Bar Association for the United States Court of Appeals for the Eighth Circuit

NEWSLETTER

Fall 2020

Remembering Ruth Bader Ginsburg

A former clerk shares memories of Justice Ginsburg – Page 2

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Justice Ginsburg touched countless lives

Former clerk remembers kindness, attention to detail

By Matt Rubenstein

I had the great good fortune to clerk for Justice Ginsburg during the 2018-2019 Term. Justice Ginsburg was a true role model, and I will always treasure the lessons her example taught.

Prominent among these was her attention to detail, epitomized by the care with which she crafted her language. In her writing for the Court, Justice Ginsburg pored over every word, making sure her opinions said exactly what she wanted them to. Every one of her clerks could tell stories about subtle changes in phrasing or word choice the Justice made to a third, or a fifth, or a tenth draft that made a passage click—or, as the Justice would say, "sing." Justice Ginsburg's speech was no less precise. Indeed, as I was preparing for my interview to clerk for the Justice, I got the same advice from multiple sources: count to five after you think the Justice is done speaking, because she might just be considering the best way—the right way—to phrase her next thought or question.

Even after she joined the Court, Justice Ginsburg's writings were not limited to her official work—far from it. In the weeks following her death, I have been struck by the number and variety of letters from the Justice shared or re-shared by those who received them. These letters would arrive on the same letterhead, bearing the notations "Supreme Court of the United States" and "Chambers of Justice Ruth Bader Ginsburg," that the Justice would use to write to her colleagues on the Court. They ranged from messages of gratitude to her former professors to words of encouragement for children. They included ongoing correspondence on one of the Justice's favorite subjects, opera, as well as thanks for gifts such as jabots or inscribed books. One expressed appreciation to a professor who had shared a copy of his article revealing that she was the quickest of the Justices to write and release opinions—after all, the Justice prized efficiency as well as precision. With another, to the author of a *New York Times* crossword, she enclosed an autographed copy of the puzzle in which she had appeared as an answer.

These letters were just one example among many of the Justice's understanding of the impact that even a small gesture from her could have. Her well-known dedication to attending argument extended as well to the Court's sessions when no arguments were heard or opinions released—when the only business on the docket was admitting lawyers to the Court's bar. Though her decades on the Court had surely made the ceremony routine for the Justice, it was evidently anything but for many of the lawyers who had assembled for the purpose, often with proud family and friends in tow. Indeed, I have read several accounts from lawyers who found the moment especially meaningful precisely because of Justice Ginsburg's presence on the bench, sometimes paired with a nod, as the attorneys took their oaths.

In opening the current Term, the Chief Justice described "Justice Ginsburg's contributions as advocate, jurist, and citizen" as "immeasurable." In all of these roles, in matters large and small, her contributions touched countless lives. May her memory be for a blessing.

Matt Rubenstein is an associate at Jones Day in Minneapolis, Minnesota. He served as a law clerk to Justice Ginsburg in the 2018-2019 term.

Justice Ginsburg's Legacy Lives On Through People Powered Fair Maps®

By Celina Stewart

Gerrymandering—whether partisan, racial or prison based—distorts and undermines representative democracy by allowing election officials with special interests to select their voters, subverting the First and Fourteenth Amendments's purpose of "one person, one vote." For decades the League of Women Voters has played a pivotal role in advocating for transparent redistricting processes, including through an independent redistricting commission tasked with drawing maps which are substantially equal in population, geographically contiguous, provide effective representation for racial and linguistic minorities, preserve "communities of interest," and respect municipal boundaries.[1]

Following 2011's reapportionment cycle, several state Leagues engaged in statewide ballot initiative campaigns to create independent or bipartisan redistricting commissions and filed litigation to challenge unsatisfactory redistricting requirements and outcomes in light of the COVID-19 pandemic. Most notably, in 2016, the North Carolina legislature adopted a legislative map which resulted in a Republican supermajority in the state legislature even if Democratic candidates earned a majority of the statewide vote. The designers of the map were instructed by the Republican state legislature to create legislative districts "likely to elect ten Republicans and three Democrats" to the legislature and freely admitted the map "would be a political gerrymander."[2] The North Carolina League mobilized to sue Robert Rucho, the Chairman of the North Carolina State Redistricting Committee, alleging First and Fourteenth Amendment violations in *League of Women Voters of North Carolina v. Rucho* (later consolidated with *Rucho v. Common Cause*). Although two three-judge panels ruled in favor of the League at the trial and appellate level, finding blatant and unrebutted evidence of unconstitutional partisan gerrymandering, the Supreme Court ultimately held that partisan gerrymandering claims are not only precluded by the political question doctrine, but also impossible for federal courts to decide because creating a standard to evaluate unconstitutional partisan gerrymandering is "a task beyond judicial capabilities."[3]

The *Rucho* decision dealt a blow to the League, mooting partisan gerrymandering claims in federal courts in Wisconsin, North Carolina, and complicating litigation strategies for Leagues across the county.[4] Despite the *Rucho* majority's purported acquiescence to partisan gerrymandering as a "critical and traditional part of politics", the League found inspiration and a way forward through the tour de force dissent authored by Justice Kagan and joined by Justices Breyer and Sotomayor, and the late Justice Ruth Bader Ginsburg.[5] The dissent laments that:

> For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply. […] The majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. […] But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest […] voters are dependent on legislators to make electoral changes (which for the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail.

Less than three months after *Rucho* decision, the League of Women Voters actualized the *Rucho* majority's suggestion to remedy partisan gerrymandering by launching an unprecedented national redistricting campaign, known as People Powered Fair Maps®, to create fair and transparent

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legislative maps nationwide in preparation for the 2021 redistricting efforts scheduled to take place following Census renumeration and after the subsequent reapportionment. The campaign seeks to put the power of the redistricting process in the hands of people, advocate for independent redistricting commissions through ballot initiatives or referendums where plausible, protect state constitution's free and fair election clauses, provide state and federal legislative fixes, and ground it all in civic engagement and education.

In the first year and a half of our nascent campaign, the League has litigated multiple cases in state courts around the country to ensure that the redistricting process is either in the hands of communities or in partnership between communities and elected officials. For example, the Arkansas League, as a member of the Arkansas Voters First coalition, sponsored a ballot initiative for a constitutional amendment creating an independent redistricting commission. The coalition collected over 150,000 signatures, qualifying it for the November 2020 ballot, in spite of the emergence of COVID-19 in March of this year. However, the Secretary of State disqualified the ballot initiative by exploiting a discrete and semantic technicality in the initiative's certification language. Looking to the court to remedy what Arkansas Voters First considered a blatant First and Fourteenth Amendment violation, the Arkansas Supreme Court green-lighted the Secretary of State's and State Board of Election Commissioners' decision. In the eighth most gerrymandered state in America, the dissenting Justices were correct that it is fundamentally anti-democratic to rely solely on state courts and elected state officials to fairly dispose of redistricting litigation or draw legislative maps which directly implicate the decisionmaker's ability to remain in power and the League's protracted litigation in support of their ballot initiative proves it.[6]

The League of Women Voters of Oklahoma launched a similar ballot initiative in conjunction with People Not Politicians to create an independent redistricting commission. Similar to Arkansas Voters First, the coalition faced four legal challenges to their initiative alleging that the ballot initiative language was misleading and it violated the single-subject rule, requiring ballot initiatives to address only a single issue. Fortunately, People Not Politicians overcame the legal challenges, but not the logistical challenges brought on by COVID-19 as the initiative was unable to collect the requisite number of signatures in light of social distancing guidelines. The coalition is continuing to develop alternatives to get People Powered Fair Maps.

And as a final example, the League of Women Voters of Missouri in coalition with Clean Missouri successfully fought back when the legislature moved to put a referendum on the ballot that would undo the 2018 ballot initiative where voters were able to put an independent redistricting commission in time for the 2021 redistricting cycle. The challenge caused the coalition to divert necessary time and energy that would have been directed toward implementing to shift gears to protect the commission that voters already had approved. The coalition is currently educating voters and asking them to "VOTE NO" on the referendum that would undermine the voters' choice in 2018 for the commission.

State Leagues across the country continue to engage in legislative and grassroots advocacy to disembody legislative maps from special interests, drawing on Justice Ginsburg's majority opinion in *Arizona v. Arizona Independent Redistricting Commission*, which assertively declares that partisan gerrymandering is antithetical to democratic principles, and her forceful dissent in *Rucho*.

Celina Stewart is Chief Counsel, Sr. Director of Advocacy and Litigation at the League of Women Voters of the United States where she oversees the federal litigation portfolio of 50 state affiliates and DC and is lead lobbyist for the organization. She works to live out a personal mission to liberate communities of color around the world.

[1] "Communities of Interest" refer to groups of individuals who have similar legislative concerns in addition to a demographic or linguistic connection.
[2] Complaint, Doc. 1, ¶ 1-3, *League of Women Voters of North Carolina v. Rucho*, No. 1:16-cv-1164, September 22, 2016.
[3] *Rucho v. Common Cause*, 139 S.Ct. 2484, 2509 (2019) (Kagan, J., dissenting).
[4] *See Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2019)
[5] *Rucho*, 139 S.Ct. at 2515; 2523-24.
[6] Max Brantley, "*Arkansas a top-10 state in legislative gerrymander*," ARKANSAS TIMES (September 10, 2019).

CLE Webcast: 10 Tips from the Clerk of Court

By Eder Castillo

To accompany the new edition of the Eighth Circuit Appellate Practice Manual, Minnesota CLE and the Eighth Circuit Bar Association presented five webcasts (which will be available on demand in December). The first webcast was moderated by David Herr of Maslon LLP and Thomas Boyd of Winthrop & Weinstine. Michael Gans, the Clerk of Court for the Eighth Circuit, provided the following ten tips during the webcast:

1. Cite to the record correctly.

When an attorney cites to a document in the record, that document should be included in the appendix. Therefore, citations to the record should be citations to the appendix, not the docket

2. Enter your appearance before filing.

The attorney who is filing must enter an appearance. However, an entry of appearance is not necessary for every attorney on the brief.

3. If your motion for an extension of time is pending and the deadline is approaching, call to request an expedited ruling on the motion.

The Clerk of Court routinely grants 30-day extensions of time, provided there is some reason for the extension. "A page or two [of reasoning on your first motion for an extension] is normally sufficient" advised Mr. Gans. Motions for an extension of time are typically ruled on that same day without waiting for objections from the other side. If you intend to object to an opposing party's extension of time, notify the Clerk of Court's office. Unless you have an order granting an extension of time, the original deadline stands.

4. Appendices cannot be filed electronically.

There is no way to appropriately file an appendix through CM/ECF. Only paper copies of the appendix are acceptable.

5. When preparing paper copies, do not use the docket's PDF version of a document.

Instead, use your own copy of the document. Otherwise, the footer that CM/ECF superimposes on the docket's PDF version will obstruct the bottom of your new filing.

6. File a certificate of service with every paper document.

A certificate of service should answer three questions: (1) Who did you send the document to? (2) When did you send it? (3) How did you send it?

7. Select the right relief category when filing.

The "response" category in CM/ECF is being over-utilized. The appellee's brief should be filed under "appellee's brief," not as a "response." Likewise, a request for an extension of time should be filed under "extension," not as a "response."

8. File a certificate of compliance.

The certificate of compliance should be filed separately from the document it is certifying. The Clerk of Court will not review a filing until the certificate of compliance is filed.

9. When filing an *Anders* brief, file a motion to withdraw separately.

An *Anders* brief is filed by a criminal defense attorney when the attorney believes the appeal is frivolous. The brief must be accompanied by a motion to withdraw. Do not bury the motion to withdraw in the *Anders* brief.

10. When in doubt, call the case manager.

"Case managers are your best friend during the life of the case," said Mr. Gans. Case managers have up to 30 years of experience. They are the best resource for a highly technical question. Mr. Gans himself also takes calls from 10-15 attorneys every day. When you ask for the Clerk of Court, "you are not asked 'Why?' or 'Who are you?' If you call, you will be put through to me. And I will be happy to talk to you," assured Mr. Gans.

Lastly, two things on the horizon.

First, Mr. Gans hopes to roll out a computer program this spring that attorneys can use to identify deficiencies in briefs. Attorneys would be able to upload their brief into the program and receive a report identifying any deficiencies and the pages where the deficiencies are located. Second, Mr. Gans senses that oral arguments will be conducted over Microsoft Teams "well through the spring or maybe the entire term. It may be that the next in-person oral arguments are in September 2021."

Eder Castillo is a prosecutor at the Hennepin County Attorney's Office in Minneapolis, practicing white-collar prosecution and post-conviction litigation.

Eighth Circuit Cases at SCOTUS during 2019 Term

By Timothy J. Droske

A 2019 Supreme Court term that started seemingly normally was radically altered by the COVID-19 pandemic. Oral arguments were temporarily suspended for the first time since the Spanish flu pandemic over a century ago[1] and later resumed in a new telephonic format that was live-streamed for the first time in the Supreme Court's history.[2] The Supreme Court was forced to stretch the end of its term into July, rather than its usual end-of-June recess. And the number of merits opinions ultimately issued by the Supreme Court was significantly lower than recent past terms.[3]

The COVID-19 pandemic also frustrated the Eighth Circuit's opportunity to hear Justice Ruth Bader Ginsburg speak at the Eighth Circuit Judicial Conference that was scheduled for August 2020.[4] Instead of hearing Justice Ginsburg speak first-hand about her landmark challenges to sex discrimination and time on the Supreme Court, the country instead collectively mourned and paid tribute to Justice Ginsburg's remarkable legacy after her passing in September. Justice Ginsburg's death, and Justice Amy Coney Barrett's nomination to fill her seat, put all eyes on the eight-member Supreme Court as it started its October 2020 Term.

The impact of these events played out in different ways for the three cases arising from the Eighth Circuit that the Supreme Court was scheduled to hear and decide last term. The first case, *Thole v. U.S. Bank,* No. 17-1712, was relatively unaffected by these events. It was argued at the Supreme Court building in January 2020, and decided by the full nine-member Court in a June 1, 2020 opinion.[5] The other two cases, in contrast—*Rutledge v. Pharmaceutical Care Management Association*, No. 18-540 and *Pereida v. Barr*, No. 19-438—have been directly impacted by both COVID-19 and Justice Ginsburg's passing. Both were set for argument in Spring 2020 for a decision as part of the Supreme Court's October 2019 Term. But COVID-19 forced the cancellation of those arguments, which were instead held telephonically in October 2020 to an eight-member court.[6] As a result, those cases will be decided by the same eight justices that heard oral arguments, lacking the potentially tie-breaking vote Justice Ginsburg would have provided last term, or that Justice Barrett will provide in cases moving forward.

Statistics regarding the Eighth Circuit before the Supreme Court last term, a summary of *Thole*, and brief previews of *Rutledge* and *Pereida*, are discussed below.

Eighth Circuit Statistics

Just like much of 2020 looks like an anomaly, the same is also true with respect to the Eighth Circuit's statistics before the Supreme Court last term (see table, next page). For only the second time in the past ten years, the Supreme Court did not hear multiple cases from the Eighth Circuit. While as noted above, this was a product of oral arguments being rescheduled due to the COVID-19 pandemic in two other cases from the Eighth Circuit, the fact remains that the Supreme Court only heard one case from the Eighth Circuit last term. In what was also an anomaly, the Eighth Circuit was able to boast a 100% affirmance rate before the Supreme Court last term. This was far better than the Eighth Circuit's average affirmance rate of 28.4% over the past decade. And it also means the Eighth Circuit bucked the Supreme Court's trend of reversing more often than it affirmed—last term the Supreme Court affirmed only 32% of the cases it decided. The same 100% affirmance scorecard, however, does not extend to the individual justices, since, as discussed below, *Thole* was one of 14 cases (23%) decided by a 5-4 vote last term.[7]

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Eighth Circuit Cases at SCOTUS – 2010-2019 Terms

Term	Number of Cases	Docket Percent	Aff'd – Rev'd – Split	Affirmed Percent
2019	1	1%	1-0	100%
2018	4	5%	1-3	25%
2017	3	4%	1-2	33%
2016	2	3%	0-2	0%
2015	6	7%	3-2-1	60%
2014	8	11%	1-7	13%
2013	2	3%	0-2	0%
2012	2	3%	0-2	0%
2011	0	-	-	-
2010	4	5%	1-3	25%
Average	3.2	4.2%		28.4%

SCOTUSblog, Stat Pack Archive, available at http://www.scotusblog.com/reference/stat-pack/

Thole v. U.S. Bank, N.A.[7] – Justiciability Under ERISA

The sole case from the Eighth Circuit that the Supreme Court decided last term was *Thole v. U.S. Bank, N.A.*, a putative ERISA class action involving the alleged mismanagement of pension funds that presented standing-related questions.[8] Justice Kavanaugh's majority opinion cast the case as requiring nothing more than a simple and straightforward Article III analysis, under which the plaintiffs clearly lacked standing:

> [T]he plaintiffs lack Article III standing for a simple, commonsense reason: They have received all of their vested pension benefits so far, and they are legally entitled to the same monthly payments for the rest of their lives. Winning or losing this suit would not change the plaintiffs' monthly pension benefits. The plaintiffs have no concrete stake in this dispute and therefore lack Article III standing.

But while the majority opinion bemoaned that "[c]ourts sometimes make standing law more complicated than it needs to be," the narrow 5-4 decision before the Supreme Court—along with the striking differences in reasoning between the District Court, Eighth Circuit, and Supreme Court—shows that the majority's view of the standing issue here as "simple and commonsense" was far from universal.

The plaintiffs in the case were James Thole and Sherry Smith, two participants in U.S. Bank's defined-benefit retirement plan. They brought a putative class action under ERISA against U.S. Bank for alleged mismanagement of the plan from 2007-2010. Claiming that the defendant had violated ERISA's fiduciary duties of loyalty and prudence in its investment decisions, the plaintiffs sought restitution to the plan of millions in losses that the plan had allegedly suffered. In addition, the plaintiffs sought injunctive relief, including replacement of the plan's fiduciaries and attorney's fees.

Critically, the plaintiffs continued to receive the same pension payment each month from 2007 through the pendency of the lawsuit irrespective of the plan's value or investment decisions, and were in fact contractually entitled to receive those same monthly payments for the rest of their lives. It was on that basis that defendants brought a motion to dismiss under

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Rule 12(b)(1), claiming that the plaintiffs had experienced no loss or risk of loss to their benefits, and thus lacked standing under Article III. The District Court, however, found standing on the basis that the plaintiffs alleged that the defendants' conduct had caused the plan to become actuarially underfunded, and remained underfunded at the time suit commenced.[9] According to the District Court, the plaintiffs had sufficiently alleged that due to the purported mismanagement, the plan lacked a surplus large enough to absorb the losses at issue, giving rise to a legally cognizable increased risk of default.

The following year, U.S. Bank renewed its Article III standing challenge, bringing forth facts showing that the plan was now actuarially overfunded, and arguing that fact rendered the suit non-justiciable. The District Court this time agreed that the case was non-justiciable under Article III, but held that mootness rather than standing was the proper analytical framework for its decision.

On appeal, the Eighth Circuit affirmed, but not on mootness or other Article III grounds.[10] Instead, the Eighth Circuit relied on its precedent in *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002), to instead decide the case on ERISA "statutory standing" grounds.[11] The court determined that under that precedent, when a plan is overfunded, as it was here, a participant in a defined benefit plan no longer falls within the class of plaintiffs authorized under §1132(a)(2) of ERISA to bring suit for alleged breaches of fiduciary duties. The panel split, however, on the same question as applied to the claims for injunctive relief under §1132(a)(3). The majority found that a showing of actual injury was required here as well—a finding again not met given that the plan was overfunded. Concurring in part and dissenting in part, Judge Kelly agreed that the panel was bound by Eighth Circuit precedent denying statutory standing to participants in overfunded plans to seek restitution, but *Harley* did not preclude the claim for injunctive relief as provided for in §1132(a)(3) of ERISA.[12] Plaintiffs' request for *en banc* review was denied, with Judge Kelly and Judge Stras dissenting.[13] The Supreme Court granted review of the Eighth Circuit's decision after first soliciting the views of the Solicitor General, who expressed a view in favor of the plaintiffs-petitioners and granting certiorari.

All of the Justices in *Thole* agreed that Article III standing was the proper analytical framework. But the Court was sharply divided along traditional conservative and liberal lines on whether such standing existed here. Justice Kavanaugh wrote for the five-member majority; Justice Sotomayor wrote the dissent.[14]

Writing for the majority, Justice Kavanaugh emphasized that "[t]here is no ERISA exception to Article III."[15] Applying traditional Article III standing principles, the majority observed that the plaintiffs had "no concrete stake in this lawsuit." As the majority explained, the plaintiffs "have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments." In other words, win or lose, the plaintiffs would still receive the same monthly benefits, "not a penny less," and "not a penny more." The Court rejected the plaintiffs' attempted analogy to trust law, their assertion they could have representative standing without a personal concrete stake in the lawsuit, and their argument that if they cannot sue, then no one will. And relying on *Spokeo*, the majority rejected the idea that the broad statutory language in ERISA permitting suit for equitable relief could negate Article III's injury-in-fact requirement or render it automatically satisfied.[1] Lastly, the majority found that the original basis for the District Court denying the motion to dismiss—that standing exists if the mismanagement substantially increased the risk the plan would fail and be unable to pay out its pension benefits—was no longer asserted by the

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plaintiffs, and in any event, was not plausibly pleaded. For these reasons, the Supreme Court "affirm[ed] the judgment of the U.S. Court of Appeals for the Eighth Circuit" on the grounds raised in the initial motion to dismiss.

The dissent disagreed with the majority, finding that Article III's requirement of a "concrete" injury was satisfied here for three independent reasons: 1) by analogy to the interest private trust beneficiaries have in protecting their trust; 2) because a breach of fiduciary duty is itself a cognizable injury irrespective of any corresponding financial harm; and 3) on the basis that the plaintiffs have standing to sue on the retirement plan's behalf.[1] The dissent also cited to *Spokeo* throughout its opinion, and—juxtaposing itself against the majority—closed by stating, "[t]he Constitution, the common law, and the Court's cases confirm what common sense tells us: People may protect their pensions."[16]

The Supreme Court's ruling in *Thole* shows that nearly 30 years after the seminal standing decision in *Lujan*[17] (another case arising out of the Eighth Circuit and the primary precedent cited by the *Thole* majority), the question of standing remains a critical, yet divisive issue. This is particularly the case in the *Spokeo*-related context of whether a sufficiently concrete injury has been alleged notwithstanding a statute's grant of a private right of action. The *Thole* case teaches that while standing is a threshold issue, it is one that is subject to a meaningful plausibility standard at the pleading stage, and on top of that can be disputed with a strong factual record under Rule 12(b)(1). Also, a "case or controversy" must exist throughout the case, which was critical to the District Court's decision to revisit standing and dismiss the case after the plan became overfunded. Counsel should be mindful, as this complex area of the law continues to develop, to be attentive to the various ways in which a case may or may not be determined to be justiciable. Strikingly, while the District Court, Eighth Circuit, and Supreme Court all agreed that the case was non-justiciable, each came to that conclusion on different grounds. And with the Supreme Court dividing 5-4, it seems certain standing will remain a fertile ground in future class action litigation, despite Justice Kavanaugh's entreaty that standing not be made more complicated than it needs to be.

Rutledge v. Pharmaceutical Care Management Association – ERISA Preemption

ERISA is also front and center in one of the two Eighth Circuit cases that was moved to the Supreme Court's current term due to the COVID-19 pandemic. In *Rutledge v. Pharmaceutical Care Management Association*, the dispute involves ERISA's preemptive scope. Arkansas, like the majority of states, has a law regulating drug reimbursement rates for pharmacy benefit managers ("PBMs") who operate as claims-processing middlemen. The Eighth Circuit found that the statute was preempted by ERISA, 29 U.S.C. §1144(a), which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plans . . . ."[18] It is now up to the eight-members of the Court who heard oral arguments to determine whether ERISA preemption applies here. A 4-4 split would have no precedential weight; it would simply result in a summary affirmance of the Eighth Circuit's decision by reason of an equally divided Supreme Court.[19]

Pereida v. Barr – Immigration

The other Eighth Circuit case rescheduled to the current term, *Pereida v. Barr*, involves a circuit split in how courts are to analyze whether a noncitizen has been convicted of a disqualifying offense listed in the Immigration and Nationality Act ("INA") as a crime involving moral turpitude ("CIMT") precluding that individual from applying for relief from deportation through asylum or cancellation of removal.[20] The circuits have split in what to do when the underlying statute of conviction is

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ambiguous as to whether it corresponds to a disqualifying CIMT listed in the INA. The Eighth Circuit took the position that because it is the noncitizen's burden to establish that his underlying conviction is *not* a disqualifying CIMT, any ambiguity as to whether the underlying conviction was for a CIMT cuts against the noncitizen, who is thus unable to prove his eligibility for discretionary relief such as asylum or cancellation of removal.[21] In contrast, other circuits have held that such ambiguity in the underlying conviction does not bar relief from removal, since in that event, the conviction does not "necessarily" establish the elements of a CIMT listed in the INA.[22] This case was argued in October 2020, and like *Rutledge*, will be decided by the eight-members of the Court who sat for argument.

Timothy J. Droske is Co-Chair of the Appellate Practice Group at Dorsey & Whitney LLP, teaches Appellate Advocacy at the University of Minnesota Law School as an adjunct professor, and serves on the Eighth Circuit Bar Association's Board of Directors.

[1] Supreme Court, Press Release Regarding Postponement of March Oral Arguments (March 16, 2020), *available at* https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20

[2] Supreme Court, Media Advisory Regarding May Teleconference Argument Audio (April 30, 2020), *available at* https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20

[3] SCOTUSblog, Final Stat Pack for October Term 2019 at 33, *available at* https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf

[4] *See* Scott Stewart, *Ruth Bader Ginsburg to Visit Omaha Next Year To Celebrate 19th Amendment*, The Daily Record (Aug. 27, 2019), *available at* https://omahadailyrecord.com/content/ruth-bader-ginsburg-visit-omaha-next-year-celebrate-19th-amendment

[5] *Thole v. U.S. Bank N.A.*, Supreme Court Docket, *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1712.html

[6] *Rutledge v. Pharmaceutical Care Management Association*, Supreme Court Docket, *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-540.html; *Pereida v. Barr*, Supreme Court Docket, *available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-438.html*

[7] Dorsey & Whitney LLP—the law firm for which the author is an attorney—represented U.S. Bank, N.A. as counsel of record in the District Court and Eighth Circuit, and as co-counsel in the Supreme Court.

[8] *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020)

[9] *Adedipe v. U.S. Bank, N.A.*, 62 F. Supp. 3d 879, 887, 891 (D. Minn. 2014).

[10] *See Adedipe v. U.S. Bank, N.A.*, No. 13-2687, 2015 U.S. Dist. LEXIS 178380, at *9 (D. Minn. Dec. 29, 2015)

[11] *Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2017).

[12] *Id.* at 632 (Kelly, J., concurring in part and dissenting in part).

[13] *Thole v. U.S. Bank, N.A.*, No. 16-1928, 2018 U.S. App. LEXIS 4339 (8th Cir. Feb. 22, 2018) (*en banc*).

[14] *See Thole*, 140 S. Ct. at 1617 (Kavanaugh delivered the Court's opinion, joined by Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch; Justice Thomas also filed a separate concurrence, joined by Justice Gorsuch; Justice Sotomayor filed a dissent, joined by Justices Ginsburg, Breyer, and Kagan.).

[15] *Id.* at 1620-21 (citing *Spokeo, Inc. v. Robins*, 578 U.S. __, 136 S. Ct. 1540 (2016)). The Supreme Court in *Spokeo* held that even when a plaintiff alleges a particularized violation of his or her statutory rights, Article III's "injury-in-fact requirement requires a plaintiff to allege an injury that is both concrete *and* particularized." *Spokeo*, 136 S. Ct. at 1544-45.

[16] *Id.* at 1625-34 (Sotomayor, J., *dissenting*).

[17] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *reversing* 911 F.2d 117 (8th Cir. 1990).

[18] 891 F.3d 1109, 1111-13 (8th Cir. 2018).

[19] *See, e.g.*, *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016) (*per curiam* opinion that "[t]he judgment is affirmed by an equally divided Court," in case on review from the Eighth Circuit).

[20] *See Pereida v. Barr*, No. 17-3377, Question Presented, *available at* https://www.supremecourt.gov/docket/docketfiles/html/qp/19-00438qp.pdf

[21] 916 F.3d 1128, 1132-33 (8th Cir. 2019).

[22] Question Presented, *see supra* n.40.

Partial Voting Rights and the Need for the Nineteenth Amendment:

A Short Survey of the U.S. Woman Suffrage Movement in the Eighth Circuit States

By Molly P. Rozum

Nebraska suffragists planned to go all in to win the vote in 1916. The *Omaha News* reported on a plan to "call in suffragists" from around the region, "from Dakota and Minnesota on the north and northeast, from Iowa and Missouri on the east and southeast": all could "help carry Nebraska for woman suffrage." The states of the United States Court of Appeals for the Eighth Circuit, including Arkansas, frequently offered support across state lines to win the vote. Suffrage advocates in the region worked for over fifty years and held a dozen popular votes on woman suffrage. Yet suffragists found full success only in South Dakota and only late in the game, in 1918, with the Nineteenth Amendment to the U.S. Constitution in clear sight. Along with the rest of the region's women, South Dakota women voters participated in their first national election in 1920. However, the region's women succeeded everywhere in winning varieties of partial suffrage.

The Eighth Circuit woman suffrage story has its origins in the post-Civil War years, when during Reconstruction the U.S. Congress passed the Fourteenth Amendment defining citizenship (which inserted the word "male" into the U.S. Constitution for the first time) and the Fifteenth Amendment, which bared discrimination on account race (but not sex). Few regional territorial or state legislative sessions during the last decades of the nineteenth century occurred without significant lobbying for women's voting rights. Politicians friendly to suffragists presented petitions to Minnesota's legislature in 1866, 1867, and 1868. (Even earlier, in 1856, Nebraska had the chance to become the first territory to pass woman suffrage.) Advocates also raised the issue of female suffrage rights at the 1868 Arkansas Constitutional convention. An 1868 bill passed the Dakota Territorial House but failed in the Council. In 1870, Minnesota's legislature passed an expansive voting rights bill that would have allowed women and with some conditions, non-citizen immigrants, mixed-race individuals, and Indigenous peoples to vote. Thinking the measure unconstitutional because it allowed women, as well as men, to vote on the referendum, the governor vetoed it. Iowa's legislature also passed a suffrage amendment in 1870, but it failed in 1872; Iowa's constitution required amendments to pass two successive legislatures before going out to the people for a vote.

In this era, one of the most famous turning points in the national suffrage story occurred in Missouri. Virginia Minor, and many suffragists of her generation, held the conviction women should vote as a reward for their Civil War contributions. In 1872 Minor attempted to register to vote in Saint Louis. Refused, she took her case to court under the theory that as citizens under the Fourteenth Amendment, women already had the right to vote. In 1874, however, the U.S. Supreme Court ruled unanimously that the U.S. Constitution did not guarantee the right of citizens to vote. Reconstruction had been a time of reimagining citizenship, but women (and freed-people) found themselves still constrained in the law.

Suffragists in the region continued to advocate in the 1880s and 1890s. The Nebraska Woman Suffrage Association, founded in early 1881, worked unsuccessfully to convince the state's electorate to approve a woman suffrage referendum. In 1885, the governor of Dakota Territory vetoed a bill upon speculation the right might cause the U.S. Congress to reject statehood. The South Dakota Equal Suffrage Association formed ahead of an 1890 popular referendum that proposed to strike the word "male" from the state's new constitution. The measure failed. One of the most notorious failed woman suffrage efforts took

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place in 1893. Both chambers of North Dakota's legislature passed a woman suffrage bill a Populist governor waited to sign. The local political machine placed men outside the governor's door to prevent action. Then, the bill went missing until a janitor found it under a floor mat. In the end, the legislature closed without the governor's signature. Moreover, the legislature expunged the record. We know about the suffrage bill only because suffragists recorded the event. Two more woman suffrage amendments failed in referenda voted on in 1898 in Iowa and South Dakota.

Suffragists across the nation lost momentum until 1910, when women in the three Pacific Coast states began winning voting rights. Nearly every state in the Eight Circuit held popular votes (or came as close as they ever would) on woman suffrage over the years from 1913 to 1916. Nebraska and Missouri suffragists used the Initiative process to place woman suffrage on the ballot in 1914. Both failed. A referendum also failed in South Dakota and North Dakota that year. Doomed from the start in North Dakota, a provision in the state's 1889 Constitution required a majority of all people voting *at an election* to pass any voter qualification measure, not simply a majority of those voting *on the measure*. Officials counted a ballot left *unmarked* on suffrage as a *no* vote. A woman suffrage amendment made it out of the Arkansas legislature in 1915 to be voted on popularly. Woman suffrage failed to reach the public, however, as the state allowed only three referenda to appear on the ballot at any one election. An amendment in Iowa finally passed two successive legislatures in 1913 and 1915. Confident of popular approval, Iowa's legislators sent the measure to the electorate at the June primary rather than the November general election (women hoped they would be able to vote that November). The Iowa measure failed. A referendum in South Dakota failed again in 1916.

Anti-suffragists organized, even as the woman suffrage movement gained momentum

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from increasingly diverse organizations such as the Scandinavian Woman Suffrage Association formed in 1907 in Minnesota, the Everywoman Suffrage Club founded by a black woman in St. Paul in 1914, and the support of the Federated Colored Women's Club in Missouri the same year. Minnesota women recognized brewers and ethnic voters as opposition leaders back in the 1870s. South Dakota suffragists had blamed beer-drinking, socially-conservative immigrants, especially Germans and German-Russians, since 1890. In 1911, Arkansas legislators warned of black women's voting power and one labeled woman suffrage as socialist. Nebraska suffragists blamed the state's foreign-born population, especially Germans, and "Antis" who in 1914 used women's potential jury duty as a scare tactic. When Iowa Suffragists lost in 1916, they in part blamed Germans, and especially German Catholics. Suffrage supporters in St. Louis, Missouri worried over the opposition of the city's ten breweries and the powerful German-American Alliance, active throughout the nation. In 1917, Nebraska suffrage politicians were betrayed when, in return for promised support from Antis in the legislature, they agreed to oppose the repeal of a law that allowed German to be taught in the schools.

During the First World War, South Dakota's legislature combined women's voting rights with the elimination of "alien suffrage." Since statehood, South Dakota had allowed a non-

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A Float in the July 4, 1918 suffrage parade in Sioux Falls, SD.
Credit: Bryn Mawr College Special Collections, Carrie Chapman Catt Papers, BMC-M15, Box 1, Album 1, Parades and Pageants.

citizen male who declared an official intention to become a U.S. citizen, but who had not yet completed the naturalization process, to vote. South Dakota suffragists resented what they believed to be immigrants' antagonistic votes. The 1918 "Citizenship Amendment" made it impossible to vote against woman suffrage without voting for alien suffrage. Wartime 100% Americanism and hysteria toward immigrants, especially Germans, helped reduce opposition to woman suffrage in South Dakota, which passed finally on the sixth popular vote.

From the 1860s through 1919, all of the Eighth Circuit states took some pride in winning partial suffrage rights, which importantly, did not require popular votes. Nebraska allowed women school suffrage starting in 1867. Minnesota women won the right to vote in school elections in 1875. In 1879, Dakota Territory allowed women to vote if present at local public school meetings and the legislature granted more formal school suffrage rights in 1883, which women carried into statehood. Iowa women earned the right to vote on school issues in 1894. In 1898, the Minnesota legislature extended women's political rights to include voting on library bonds and serving on library boards. In 1917, women in Arkansas won the right to vote in primary elections. Arkansas women felt they now could pressure the men representing them in the U.S. Congress to vote for the Nineteenth Amendment. North Dakota women won municipal and presidential suffrage under a farmers' Nonpartisan League government in 1917. Minnesota suffragists won presidential suffrage on the third try in 1919, *after* the state had already ratified the Nineteenth Amendment. Additionally, Missouri and Iowa both passed presidential suffrage in 1919.

Through the long woman suffrage movement women in the Eighth Circuit states offered

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mutual support. Marietta Bones of Dakota Territory spoke in Omaha ahead of Nebraska's 1882 popular vote as did Missourian Virginia Minor. Missouri transplants to Arkansas built suffrage organizations there in the 1880s. Minnesotan Julia B. Nelson toured both North Dakota and South Dakota, while Dakotan Emma Smith DeVoe lectured in Minnesota. Citing their 1914 failure to pass suffrage, Nebraska's Woman Suffrage Association begged Iowa's Equal Suffrage Association to pay particular attention to rural women in 1916. Two Arkansas organizers toured South Dakota to build popular support ahead of the 1918 woman suffrage referendum.

Eighth Circuit states all ratified the Nineteenth Amendment in 1919, with Iowa the tenth state and the first in the region. Missouri ratified as the eleventh state. While a few Arkansas politicians believed the state's voters should pass woman suffrage on the state level before ratification of the national amendment, enough voted in favor to make Arkansas the twelfth ratification state. Nebraska became the fourteenth and Minnesota the fifteenth to approve the national amendment. North Dakota and South Dakota voted favorably as the twentieth and twenty-first states, respectively, out of the thirty-six states required, to ratify the Nineteenth Amendment for inclusion in the U.S. Constitution.

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Editor's Note: This article was adapted from a presentation Professor Rozum prepared for the Eighth Circuit Judicial Conference, which was cancelled because of the COVID-19 pandemic.

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Judge Laurie Smith Camp Passes Away

Senior District Judge Laurie Smith Camp passed away unexpectedly and peacefully at her home on September 23, 2020. Judge Smith Camp was appointed to the District Court by President George W. Bush in 2001, and was confirmed to that position by the Senate by a unanimous vote of all 100 senators. She was the first woman appointed as a U.S. district judge in Nebraska. She assumed senior judge status in 2018, but continued to carry an active caseload.

Chief Judge John M. Gerrard said of Judge Smith Camp: "Judge Smith Camp was more than an outstanding judge and leader on this Court. To many of us, she was a mentor, true friend and confidante. Our prayers go out to Judge Smith Camp's family and to everyone who has been personally touched by the wisdom and grace of this fabulous woman."

Judge Smith Camp was born in Omaha on November 28, 1953. She graduated with distinction from Stanford University in 1974, and earned her law degree from the University of Nebraska College of Law in 1977, where she served as editor-in-chief of the Nebraska Law Review. Before being appointed to the bench, she was in private practice in Nebraska and Kansas between 1977 and 1980, served as Genera l Counsel to Nebraska's Department of Corrections from 1980 to 1991, headed the Nebraska Attorney General's Civil Rights Section from 1991 to 1995, and was Chief Deputy Attorney General for Criminal Matters from 1995 to 2001. In 2019, Judge Smith Camp was elected to serve as the 2020-2021 president of the Omaha Bar Association. And in addition to her accomplished legal career, she, along with her three business partners, initiated and sustained the development of Lincoln's historic Haymarket district from 1982 to 2001.

The Hon. Laurie Smith Camp

Judge Smith Camp is survived by her two children, Jonathan and Abby.

Association seeks candidates for board of directors

One or more seats on the Board of Directors of the Eighth Circuit Bar Association will be open for a three-year term beginning on January 1, 2021. Members who are interested in serving on the Board are encouraged to contact any of the Association's current officers, which are: Katherine Walsh, Jeff Justman, Jason Grams, and Landon Magnuson (insert contact information). The Board is seeking candidates reflecting diversity in gender, race, ethnic background, and professional experience.

In addition, the Board is always seeking members who are interested in participating in one or more of its committees. The committees and their functions are listed in the description of the Bylaw amendments on the next page. Please contact Jeff Justman,at Jeff.Justman@FaegreDrinker.com if you are interested in participating on any committee of the Board. Service on a committee is a great way to get more involved in the Association and can be an entrée to service on the Board itself.

Bylaw amendments formalize committees

On August 18, 2020, the Board of Directors of the Eighth Circuit Bar Association updated its bylaws to make several corporate governance changes. A full, updated set of the Bylaws is available eighthcircuitbar.com. Three categories of changes will be of interest to members:

1. The Board formalized the existence of several committees that had been operating informally. Those committees are: (1) a Communications Committee, charged with overseeing the Association's communications with members and the public, including through the website, newsletter, monthly update, and other communications; (2) a Membership Committee, whose focus is on recruiting, cultivating, and maintaining members of the Association; (3) a Nominating and Governance Committee, which reviews and updates the Bylaws and other policies and procedures of the Board, as well as proposes nominations for pending or future vacancies on the Board of Directors, with a focus on ensuring that nominations reflect candidates from diverse backgrounds and perspectives; (4) a CLE committee, which organizes and presents CLE seminars and programs; and (5) a Judicial Conference Committee, which assists the Court in preparing and putting on the annual Eighth Circuit Judicial Conference. Each committee must have at least two directors, and is also open to participation from members of the Association.

2. The Board revised the terms for the Secretary and Treasurer position to be two-year terms, up from one-year terms, and staggered the Secretary and Treasurer's terms so they change in alternating years. The Board made this change to increase institutional memory among the officers of the Association.

3. The Board revised the Bylaws to clarify that Board and membership meetings can take place electronically, whether by video or telephone conference.

Members with comments or suggestions for how to further improve the Association's Bylaws are encouraged to contact Jeff Justman, Chair of the Nominating and Governance Committee, at Jeff.Justman@FaegreDrinker.com

Eighth Circuit Bar Association CLE

The Supreme Court Term in Preview

November 10, 2020 – 12 p.m. to 1 p.m. CST

Cost: Free to members, $40 for nonmembers, $25 for public sector nonmembers or students

Registration: Visit https://8thcircuitbar.wildapricot.org/event-4007183 or contact Jeff Justman at Jeff.Justman@FaegreDrinker.com or 612-766-7133