

Fall, 2020: Update<sup>1</sup>

Significant Appellate Decisions  
Issued During Covid-19 Lockdown

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*Noerr-Pennington*, Implied Immunity Bar CFTC Related Antitrust Claims. *U.S. Futures Exch, LLC v. Bd. of Trade*, 953 F.3d 955 (7<sup>th</sup> Cir. 2020) (Manion, J.).

**Brief Summary:** *U.S. Futures* arose from the failure of a then-novel “electronic-based futures trading platform.” *U.S. Futures*, 953 F.3d at 958. Plaintiffs, the entities that “set out to offer” the new exchange, claimed that the Chicago Board of Trade (“CBOT”) and the Chicago Mercantile Exchange had violated, *inter alia*, the Sherman Act by “by delaying the regulatory approval process and enacting [,and convincing the Commodity Futures Trading Commission (“CFTC”) to approve,] ... an internal rule that deprived the new exchange of liquidity.” *Id* at 958-59. The Seventh Circuit affirmed the district court’s grant of summary judgment to defendants, holding that the *Noerr-Pennington* doctrine barred plaintiff’s claims based on defendants allegedly “flood[ing] the [CFTC] with frivolous objections [and requests to postpone a public hearing] ... in order to stall ... approval ... [of, and thereby harm. the new exchange],” *id.* at 959-66, and that defendants were shielded by implied immunity from plaintiffs’ claim based on defendants convincing the CFTC to enact a rule that compelled transfer of CBOT’s “open interest” to the Chicago Mercantile Exchange, thereby depriving the new exchange of liquidity. *Id* at 966-69.

**Why *U.S. Futures* Matters:** Regulatory approvals and/or actions can have enormous consequences and frequently are hotly contested. *U.S. Futures* sets forth the Seventh Circuit’s most recent analysis governing *Noerr-Pennington* and implied immunity defenses to antitrust claims arising from advocacy before an administrative agency, in this case the CFTC.

Among the notable holdings: the CFTC application review proceeding is “legislative” rather than “adjudicative” for *Noerr-Pennington* purposes based on an analysis, discussed below, that likely applies (at least in significant part) to a great many regulatory proceedings; the Seventh Circuit agreed with the First Circuit (and disagreed with four other courts of appeal) that both prongs of the “sham lawsuit” test (“objectively baseless” litigation, brought “to interfere directly with the business relationships of a competitor through the use of the governmental process ... as an anticompetitive weapon”) apply regardless of the number of allegedly “sham” proceedings at issue; and the four part test for implied antitrust immunity of *Credit Suisse Securities v. Billing*,

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551 U.S. 264 (2007) applies not just in the securities context but in all regulatory settings. *See infra*.

**Key Points:**

**1. CFTC Application Review Proceeding Is “Legislative” For *Noerr-Pennington* Purposes.**

The CFTC application review proceeding is “legislative” rather than “adjudicative” for *Noerr-Pennington* purposes – which means that the “fraudulent misrepresentation” exception to *Noerr-Pennington* does not apply thereto – based on the “general nature” of the review (including *ex parte* meetings, providing public notice and seeking public comment); the use of an “an informal fact-finding process” (including a “record” unbound “by any strict rules of relevance and admissibility” and “freedom to base ... actions on information ... from any source, including ... the public”); “the weight afforded to *ex parte* communications and public comment [which thus] subjected ... fact finding ... to political influence”; and the absence of “testimony under oath, affirmation, or penalty of perjury from the petitioning [d]efendants.” *Id.* at 960-63.

**2. Certain Adjudicatory Aspects Of Application Review Proceeding Insufficient To Render Proceedings Adjudicatory.** In light of the foregoing, none of the following altered the conclusion that the CFTC review proceedings were legislative::

- a. *denial* of an application is reviewed through an adjudicatory procedure, under different rules;
- b. false statements in the application are subject to prosecution under 18 U.S.C. § 1001 and similar statutes; and,
- c. the new exchange “had to demonstrate it met and would continue to comply with more than twenty statutory requirements” and CFTC’s “assessment ... was subject to judicial review, albeit through a distinct proceeding...”

*Id.*

**3. Two-Prong “Sham Lawsuit” Test Always Applies; Seventh Circuit Sides With First Circuit.**

Both prongs of the test for the fraud exception to *Noerr-Pennington* based on “sham” litigation apply in all cases. The Seventh Circuit rejected the argument that the first prong of the test, the requirement that a suit be “objectively baseless,” should be dispensed with – and the applicability of the exception turn solely on the subjective motivation of the litigant – where multiple lawsuits or petitions were filed, agreeing with the First Circuit<sup>2</sup> and disagreeing with the Second, Third, Fourth and Ninth Circuits.<sup>3</sup> In any event, the application review proceedings at issue comprised a single proceeding for purposes of “sham lawsuit” analysis, with “individual

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<sup>2</sup> *See Puerto Rico Telephone Co. v. San Juan Cable LLC*, 874 F.3d 767 (1<sup>st</sup> Cir. 2017).

<sup>3</sup> *See Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015); *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354 (4th Cir. 2013); *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92 (2d Cir. 2000); and *USS—POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL—CIO*, 31 F.3d 800 (9th Cir. 1994).

lobbying efforts” during the application review analogous to separate motions filed in a single lawsuit, not separate proceedings.

#### 4. Credit Suisse Implied Antitrust Immunity Test Applies Regardless Of Regulatory Context.

The four-part test for implied antitrust immunity set forth in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) applies “across regulatory boundaries.” *Id* at 968. The Seventh Circuit rejected the argument that the test articulated in *Credit Suisse* was limited to determining the existence of implied antitrust immunity in the securities context and that the Seventh Circuit’s own decision in *Am. Agric. Movement, Inc. v. Bd. of Trade of the City of Chicago*, 977 F.2d 1147 (7th Cir. 1992), issued years before *Credit Suisse*, warranted application of a different test for implied antitrust immunity in the commodities context. Instead, “implied immunity is neither a securities doctrine nor a commodities doctrine. It is an antitrust doctrine. ... The regulatory setting— securities, commodities, or something else— simply provides the backdrop against which the template is applied. ....” *Id* at 966-69.

#### **Review In Depth:**

The court “divided” plaintiff’s antitrust claims “into two theories” the “delay theory,” “whereby [d]efendants flooded the [CFTC] with frivolous objections in order to stall ... approval and harm” the new exchange and “the ‘open interest theory,’” under which “[d]efendants conspired to deprive [the new exchange] of liquidity by [proposing, and convincing the CFTC to adopt, a rule mandating] transferring [the Chicago Board of Trade’s] open interest” to the Chicago Mercantile Exchange, thereby depriving the new exchange of liquidity. The court held that *Noerr-Pennington* barred liability under the first theory (neither form of the fraud exception to *Noerr-Pennington*, fraudulent misrepresentations or sham lawsuits, applied) and that implied immunity barred liability under the second theory. *Id* at 959-69.

#### A. Noerr-Pennington

1. *Noerr-Pennington* “extends absolute immunity under the antitrust laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects” and “flows from First Amendment origins ... antitrust laws do not supersede the people’s right to petition their government in favor of a desired monopoly.” *Id* at 959-60 (citations and quotation marks omitted).

#### 1. “Fraud Exception”

2. “*Noerr-Pennington* ... [does not, however, protect] ... fraudulent misrepresentations or ... sham lawsuits.” *Id* at 960.

#### a. *Noerr- Pennington* Fraud Exception Based On Fraudulent Misrepresentation; Legislative Or Adjudicative Proceedings?

3. The *Noerr-Pennington* exception based on fraudulent misrepresentations “does not apply ... outside of adjudicative proceedings.” *Id* at 960. Thus, while “[f]raudulent misrepresentations in an

adjudicative proceeding before an administrative agency are not" immune, those "made in a legislative, political setting" before such an agency are immune. *Id.*

4. Whether a proceeding is adjudicative or legislative “for *Noerr-Pennington* purposes” is determined by considering: “(1) the general nature of the authority exercised by the agency; (2) the formality of the agency's fact-finding process; (3) the extent to which fact gathering is subject to political influence; (4) whether the agency received any testimony made under oath, affirmation, or penalty of perjury; and (5) whether the agency acted ultimately as a matter of discretionary authority or instead acted in accordance with more definite standards subject to judicial review.” *Id.* at 960 (citing *Mercatus Grp. LLC v. Lake Forest Hosp.*, 641 F.3d 834, 845 -46 (7<sup>th</sup> Cir. 2011))<sup>4</sup>

5. The CFTC’s review of the new exchange’s application was “legislative instead of adjudicative,” with the following four factors supporting this conclusion:

- a. the “general nature” of the review – “which include[d] entertaining *ex parte* meetings on proposed rules, providing notice to the public, and seeking comment before promulgating, amending, or repealing a rule” (That the CFTC employs adjudicatory procedures when reviewing the *denial* of an application did not alter this analysis);
- b. CFTC used “an informal fact-finding process” – compiling a “record” the contents of which “were not bound by any strict rules of relevance and admissibility” – and “was free to base its actions on information and arguments that came to it from any source, including information, opinion, and argument submitted by the public”;
- c. “the weight afforded to *ex parte* communications and public comment subjected the [CFTC’s] fact-finding efforts to political influence—a hallmark of the legislative process”;
- d. CFTC “received no testimony under oath, affirmation, or penalty of perjury from the petitioning [d]efendants....” (That facts set forth in the application were presented with the understanding that “intentional misrepresentations” could result in “federal prosecution” did not alter this analysis given that “the [CFTC] also devoted significant consideration to unsworn public opinions, diluting the importance of truthful and accurate information inherent in adjudicative settings”)

*Id.* at 960-63 (italics, brackets, internal quotation marks and citations omitted).

6. That the final factor (whether CFTC “ultimately acted” from discretion or “in accordance with more definite standards subject to judicial review”) arguably suggested adjudicative proceedings – the new exchange “had to demonstrate it met and would continue to comply with more than twenty statutory requirements,” CFTC had “no discretion to deny an application that meets the statutory requirements” and CFTC’s “assessment ... [of the] ... application was subject to judicial review, albeit through a distinct proceeding...” – was insufficient to render the proceedings adjudicative.

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<sup>4</sup> And even if proceedings are “adjudicative,” plaintiff “still must demonstrate the alleged misrepresentation ‘(1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding.’” *Id.* at 960 n. 7 (quoting *Mercatus*, 641 F.3d at 843).

While “[t]hese details illustrate[d] several adjudicative aspects of the ... application review process ...,” “[t]he agency process in this case involves a combination of legislative and adjudicative features ... [and] ... the [CFTC’s] exercise of rulemaking-like authority, the encouragement of lobbying and *ex parte* influence, a tolerance for petitions made outside perjury’s confines, and informal fact gathering render the ... application review process a legislative one.” *Id* at 962-63.

b. *Noerr-Pennington*: Fraud Exception  
Based On “Sham” Lawsuits

7. The “sham lawsuits ... exception holds liable objectively baseless lawsuits brought in an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process* – as opposed to the *outcome* of that process — as an anti-competitive weapon.” *Id* at 963 (citations, internal quotation marks omitted; emphasis in original).

8. This exception is “extraordinarily narrow”: “(1) only if challenged litigation is objectively meritless may a court (2) examine the litigant’s subjective motivation.... [A]n antitrust plaintiff must disprove the challenged lawsuit’s legal viability before proceeding to the second, subjective step.” *Id* at 963 (citations, internal quotation marks omitted).

9. “Objectively reasonable” suits – a suit “reasonably calculated to elicit a favorable outcome” – “enjoy *Noerr-Pennington* immunity regardless of the reasons for their filing.” “[A] *successful* action self-proves its reasonableness.” *Id* at 963 (citations, internal quotation marks omitted; emphasis in original).

10. “Baseless, frivolous [suits], as distinct from colorable suits brought in bad faith, receive no protection ....” *Id* at 963 (citations, internal quotation marks omitted).

11. The Seventh Circuit rejected plaintiffs’ argument that whenever there is more than one lawsuit or petition (i.e., a “pattern” of sham filings), the Supreme Court’s decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) mandates discarding the first factor of sham test – whether the challenged litigation is “objectively meritless” – and proceeding “only with the second step’s evaluation of subjective motive.” *Id* at 965.

12. In this regard, the Seventh Circuit rejected the reasoning of four courts of appeals<sup>5</sup> and instead sided “with the First Circuit”<sup>6</sup>: “Faced with only one alleged sham lawsuit, at no point did the ... [Supreme] Court [in *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)(“*PRE*”), a more recent decision than *California Motor Transport*] link its ruling to the number of suits or suggest the outcome would be different if it encountered multiple actions. We, too, find ‘little logic’ in concluding a petitioner loses the right to file an objectively reasonable

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<sup>5</sup> See *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015); *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354 (4th Cir. 2013); *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92 (2d Cir. 2000); and *USS—POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL—CIO*, 31 F.3d 800 (9th Cir. 1994).

<sup>6</sup> See *Puerto Rico Telephone Co. v. San Juan Cable LLC*, 874 F.3d 767 (1<sup>st</sup> Cir. 2017).

petition merely because it chooses to exercise that right more than once in the course of pursuing its desired outcome .... the Ninth ... Second, Third, and Fourth Circuits all reconciled *California Motor* and *PRE* ‘by reading them as applying to different situations’ ... Nothing in either opinion indicates as much.” *Id* at 965 (citations, except *PRE*, omitted).

13. Moreover, “[t]his case is not characterized by a wide ranging ‘pattern’” but instead “involves a *single* legislative proceeding within which [d]efendants made multiple efforts to influence the [CFTC’s] decision regarding one overarching issue: whether to approve [the new exchange’s] application. Just as motions within a lawsuit support the lawsuit's objective, individual lobbying efforts play a part in obtaining the ultimate desired legislative action. But in neither scenario do multiple filings, submissions, or other efforts transform one lawsuit or proceeding into many.” *Id* at 965-66

14. The Seventh Circuit rejected plaintiffs’ argument that their “success in obtaining approval undermine[s] the reasonableness of [d]efendants' fifty-four objections submitted in response to the application ... especially ... because [d]efendants themselves knew the application would be approved in the end”: “Although a successful, winning petition proves its own reasonableness, it does not follow that a petition lacks merit simply because it did not prevail. Besides, the petitioning here was colorable .... [d]efendants' ... scheduling letters persuaded the [CFTC] to postpone the public hearing on ... [the] ... application in light of legitimate and well-documented conflicts ... [and] ... [b]efore granting ... [the] ... application, the [CFTC] held [the new exchange] to several remedial efforts ... undert[aken] in response to [d]efendants' objections ...” *Id* at 966.

15. “[W]hether [d]efendants believed or ‘knew’ ... [the] ...application would succeed does not change our analysis. Even if petitioners believe a regulator may ultimately approve an application that does not eliminate their right to encourage the governing body to consider shortcomings in the application. Proving sham petitioning in a legislative context like this one is virtually impossible, and the record does not meet that high bar.” *Id* at 966.

#### B. Implied Antitrust Immunity

16. The Seventh Circuit also affirmed the district court’s holding that implied antitrust immunity barred plaintiffs’ claim arising from defendants proposing, and convincing the CFTC to adopt, a rule that compelled CBOT to move its “open interest,” thereby depriving the new exchange of liquidity. *Id* at 966-69.

17. “Implied antitrust immunity has its roots in securities case law. In its most recent discussion of the doctrine, the Supreme Court in *Credit Suisse [Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007)] identified a four-part test for implied immunity: (1) the existence of clear and adequate regulatory authority to supervise the activity in question; (2) evidence that the responsible regulatory entities exercise that authority in an active and ongoing manner; (3) a resulting risk that the antitrust laws and those governing the challenged activity, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct; and (4) whether the questioned activity lies squarely within the heartland of the regulated area.” *Id* at 967.

18. “The facts here satisfy *Credit Suisse's* criteria easily”:<sup>7</sup>

- a. “the [CFTC] has clear and adequate regulatory authority to approve exchange rules”
- b. “the [CFTC] ... exercised this regulatory authority by approving ... [the] ... proposed rule ... [and] ... [CFTC’s] overall regulation in this area ... was both active ([CFTC] staff reviewed the proposal for over a month, soliciting and considering more than a dozen comment letters) and ongoing (the same competition concerns raised by [... [the] proposed rule ...] had been studied during the previous year through a [CFTC] roundtable and report)”
- c. “the [CFTC] approved ... [the proposed rule] ... *in spite of* potential anti-competitive effects, creating conflict with the antitrust laws. Per statute, the [CFTC] must ‘take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means’ when approving exchange rules .... Keeping with this mandate, the [CFTC] considered and acknowledged comment letters raising anticompetitive concerns but nonetheless deemed those concerns outweighed by ...innovative gains ...”

*Id* at 967 (citations omitted).

19. The court rejected plaintiffs’ argument that “the district court erred by applying the four-part test from *Credit Suisse* — a securities case — instead of [the Seventh Circuit’s reasoning in its earlier decision in] *American Agriculture*<sup>8</sup> [— a commodities case —] that immunity may be implied so long as the challenged action receives ‘active, intrusive, and appropriately deliberative’ scrutiny and approval from the relevant agency.” *Id* at 967-68. Plaintiffs “... rel[y] on the Court’s statement in *Credit Suisse* that implied immunity determinations ‘may vary from statute to statute ... but that language does not make *Credit Suisse's* factors irrelevant beyond the securities context. While the ultimate *determination* might depend on the regulations in play, the analysis does not. *Credit Suisse's* test applies across regulatory boundaries and nothing in that opinion points to the contrary. .... Implied immunity is neither a securities doctrine nor a commodities doctrine. It is an antitrust doctrine. And the question of whether it applies in a given case is answered ably by *Credit Suisse*. The regulatory setting—securities, commodities, or something else— simply provides the backdrop against which the template is applied.” *Id* at 967-68 (citations omitted; emphasis in original).

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<sup>7</sup> Plaintiffs did not challenge the district court’s findings on the fourth *Credit Suisse* factor, “whether the questioned activity lies squarely within the heartland of the regulated area.” *Id* at 967.

<sup>8</sup> *Am. Agric. Movement, Inc. v. Bd. of Trade of the City of Chicago*, 977 F.2d 1147 (7th Cir. 1992).

Meaning Of “Engaged In Business Of Banking” Under Article 4A, U.C.C.; In Case Of First Impression In Illinois Futures Commission Merchant Deemed A “Bank” Under Article 4A. *Whitaker v. Wedbush Secs, Inc.*, 2020 IL 124792 (2020) (Kilbride, J.).

**Brief Summary:** *Whitaker* arose from fraudulent wire transfer requests “sent by a third-party who had hacked [plaintiff Dr. Whitaker’s<sup>9</sup>] email account” to defendant commodities futures merchant, Wedbush Securities. *Whitaker*, 2020 IL 124792 at ¶5. “Defendant held plaintiffs’ funds in customer segregated accounts at BMO Harris Bank ... [and] ... BMO Harris provided an online portal for defendant to process wire transfers for its customers.” *Id* at ¶4. “Defendant used the online portal to transmit each of the four [fraudulent] wire transfer requests [totaling \$374,960] to BMO Harris for execution.” *Id* at ¶6<sup>10</sup>. “After defendant refused plaintiffs’ demand for return of the transferred funds, plaintiffs filed suit, asserting claims of fraudulent concealment and seeking a refund of the transferred funds under article 4A of the UCC (810 ILCS 5/4A-101 et seq...)” *Id* at ¶8.<sup>11</sup> “The claims based on article 4A proceeded to a bench trial ... [and] ... the circuit court entered judgment for defendant ... stating [that] the evidence did not establish that defendant operated as a ‘bank’ under the definition of that term in article 4A (810 ILCS 5/4A – 105(a)(2) ...).” *Id* at ¶9. The Appellate Court affirmed, holding that “plaintiffs failed to prove ... that defendant was a bank, as required to establish their claim under ... [,] article 4A.” *Id* at ¶11. “[P]rior to this case, no Illinois court ha[d] addressed what it means to be ‘engaged in the business of banking’ under article 4A, and ... [no] ... Illinois decision [had] constru[ed] the definition of the term ‘bank’ in section 4A-105(a)(2).” *Id* at ¶19. The Illinois Supreme Court reversed, holding that defendant fell within “the definition of a bank in article 4A,” *Id* at ¶¶ 35, 36, and remanded the case to the trial court to determine whether plaintiff could prove other elements necessary for recovery under article 4A. *Id* at ¶40.

**Why *Whitaker* Matters:** It is important for any financial institution that offers wire transfer services, whether or not it also offers checking services or other traditional banking services or otherwise is traditionally considered a “bank,” to understand *Whitaker*. *Whitaker* sets forth the analysis for determining whether such an entity is a “bank” within the meaning of article 4A, which in turn may dictate such entity’s rights in the event of a dispute regarding funds transfers.<sup>12</sup>

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<sup>9</sup> There were two plaintiffs in *Whitaker*: Dr. James Q. Whitaker, who was replaced by the executor of his estate after he died during the litigation, and Pathology Institute of Middle Georgia, P.C., which was “owned and controlled” by Dr. Whitaker. *Id* at ¶3 and n.1.

<sup>10</sup> The fraudulent requests directed the “wire transfer of funds to an account purportedly held by plaintiff the Pathology Institute of Middle Georgia at a bank in Poland.” *Id* at ¶6.

<sup>11</sup> The first “a” in “article 4A” is typically lower case in the Court’s opinion and therefore that is the convention used here unless grammar rules or the text of a different authority, such as the Comments to the Illinois U.C.C., provide otherwise.

<sup>12</sup> The funds transfers that fall within the scope of article 4A are enumerated in 810 ILCS §§ 5/4A-102, 4A-104, 4A-108. The discussion in this *Update* is concerned with *Whitaker*’s holding regarding the definition of “bank” under article 4A and not with other aspects of article 4A.

## Key Points:

1. “The drafters of [article 4A] sought to create a legal framework to balance the rights and obligations between a bank and its institutional customers when completing funds transfers.” *Id* at ¶18.

2. Relevant [here] ... article 4A balances the risk involved if a third party steals a customer's identity and issues a fraudulent payment order to a bank.... A bank is generally required to refund amounts lost through unauthorized payment orders. See 810 ILCS 5/4A – 204(a) (West 2014) .... [But] [w]hile the bank generally bears the risk in this situation, article 4A provides a means for the bank to protect itself from liability and shift the risk of loss to the customer...” if certain requirements are satisfied. *Id* at ¶18 (citations omitted except to sections of 810 ILCS 5/4A).

3. 810 ILCS § 5/4A-105(a)(2) provides that for purposes of article 4A “bank” means “a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this Article.” 810 ILCS 5/4A-105(a)(2). Comment 1 states in relevant part: “The definition of ‘bank’ in subsection (a)(2) includes some institutions that are not commercial banks. The definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers.” 810 ILCS 5/4A-105, Comment 1; *see also*, *Whitaker*, 2020 IL 124792 at ¶¶ 19, 32.

4. “[A]rticle 4A does not apply to every party making a funds transfer”; it is “confined to *financial institutions* that meet the definition of a bank in section 4A-105.” *Id* at ¶ 32 (emphasis in original)

5. Whether or not a “financial institution” offers checking services is not dispositive of whether that institution is a “bank” under article 4A; the court rejected defendant’s argument that it could not be considered a bank because it did not offer checking services. *Id* at ¶¶ 25-30.

6. Further, “the definition of a bank in article 4A is certainly not precise and it must be applied based on the specific facts of a given case.”:

- a. “article 4A does *not* apply to every person or entity that processes a funds transfer”
- b. “the definition ordinarily would not include law firms, title companies, or similar entities unless the organization may fairly be considered a financial institution providing wholesale wire transfers.”
- c. But “courts have consistently held mutual fund companies, brokerage firms, and insurance companies may fall within the definition of a bank under articles 3, 4, and 4A.”

*Id* at ¶ 34, 35 (emphasis in original).

7. Another boundary of article 4A is that it is “limit[ed] ... to payment made through the banking system,” which in turn “typically involve[s] very large amounts of money,” while “[a] transfer of funds made by an entity outside the banking system is excluded.” 810 ILCS 5/4A-104, UCC

Comment 2; *see also*, *Whitaker*, 2020 IL 124792 at ¶ 33 (“Article 4A was intended to govern ‘[w]holesale wire transfers’ typically involving ‘very large amounts of money,’ not [‘... transfer[s] of funds through an entity other than a bank that are usually ...’] consumer-based transactions involving ‘relatively small amounts of money and a single contract.’ 810 ILCS 5/4A-104, UCC Comment 2, at 537 (Smith-Hurd 2014).”).

8. Here, “the undisputed evidence shows defendant meets the definition of a bank in article 4A”:

- a. “defendant is a financial institution”: “defendant ... is a registered futures commission merchant,” is also a “registered as a broker-dealer” and the predecessor entity that held plaintiffs’ accounts “sent a letter ... stating defendant was a ‘leading financial services company’ that offered a variety of services, including brokerage and trading services”;
- b. “defendant processed four unauthorized wire transfers out of plaintiffs' trading accounts over the course of less than two weeks totaling \$374,960 ...”
- c. “defendant [also] regularly assisted its customers in processing funds transfers... [a] current and a former employee both testified they processed 15 to 20 wire transfer requests per day on average... [and] [a]nother former employee was asked if she recalled working on any wire transfer requests to Poland ... and ... replied that ... ‘[b]ecause of volume, I don't remember locations.’”

*Id* at ¶¶ 35, 36; *see generally*, ¶¶ 19-37.

### **Review In Depth:**

1. “Article 4A of the UCC was drafted in 1989 to address a dramatic increase in wholesale wire transfers between financial institutions and other commercial entities.... The drafters sought to create a legal framework to balance the rights and obligations between a bank and its institutional customers when completing funds transfers.” *Id* at ¶17(citations omitted).

2. Among other things, “article 4A balances the risk involved if a third party steals a customer's identity and issues a fraudulent payment order to a bank.... A bank is generally required to refund amounts lost through unauthorized payment orders. See 810 ILCS 5/4A – 204(a) (West 2014) (requiring bank to refund payment plus interest when it accepts an unauthorized payment order). While the bank generally bears the risk in this situation, article 4A provides a means for the bank to protect itself from liability and shift the risk of loss to the customer. Specifically, under section 4A-202, the customer bears the risk of loss from an unauthorized payment order if (1) the bank and its customer have agreed to implement a commercially reasonable security procedure to protect against unauthorized payment orders and (2) the bank accepts the payment order in good faith and in compliance with the parties' security procedure and any written instructions from the customer restricting acceptance of payment orders. 810 ILCS 5/4A – 202(b)....” *Id* at ¶18 (citations omitted except to sections of 810 ILCS 5/4A).

3. § 5/4A-105(a)(2) provides that for purposes of article 4A “bank” means “a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union,

and trust company. A branch or separate office of a bank is a separate bank for purposes of this Article.” 810 ILCS 5/4A-105(a)(2). Comment 1 states in relevant part: “The definition of ‘bank’ in subsection (a)(2) includes some institutions that are not commercial banks. The definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers.” 810 ILCS 5/4A – 105, Comment 1; *see also Whitaker*, 2020 IL 124792 at ¶¶19, 32.

4. Article 4A is “limit[ed] ... to payment made through the banking system,” which in turn “typically involve[s] very large amounts of money,” while “[a] transfer of funds made by an entity outside the banking system is excluded.” 810 ILCS 5/4A-104, UCC Comment 2; *see also, Whitaker*, 2020 IL 124792 at ¶ 33. (“Article 4A was intended to govern ‘[w]holesale wire transfers’ typically involving ‘very large amounts of money,’ not [... transfer[s] of funds through an entity other than a bank that are usually ...]’ consumer-based transactions involving ‘relatively small amounts of money and a single contract.’ 810 ILCS 5/4A-104, UCC Comment 2, at 537 (Smith-Hurd 2014).”).

5. Relying upon *Gold v. Merrill Lynch & Co.*, 2009 U.S. Dist. LEXIS 61719 (D. Ariz. July 14, 2009) and *Covina 2000 Ventures Corp. v. Merrill Lynch*, 2008 U.S. Dist. LEXIS 32799 (S.D.N.Y. Apr. 21, 2008), *affirmed*, *Ma v. Merrill, Lynch*, 597 F.3d 84 (2<sup>nd</sup> Cir. 2010) – in both of which Merrill, Lynch was held to be a bank within the meaning of article 4A – and the text of article 4A and the commentary thereto, the Court held that “[b]ased on the evidence ... defendant is a financial institution acting on behalf of its customers in funds transfers ... [and] ... [g]iven the specific circumstances of this case, defendant meets the definition of a bank under article 4A,” *id* at ¶¶ 35, 37 and generally ¶¶ 19-37:

- a. “...courts have construed the term ‘bank’ in article 4A liberally to promote the purposes and policies of the UCC,” *id* at ¶37 (citations omitted)
- b. “...the analysis in *Gold*, *Covina*, and *Ma* [, *supra*,] is persuasive when considering whether defendant is a bank within the meaning of article 4A. As in *Gold*, plaintiffs here rely on the official comment to section 4A-105 ... [which] ... states, in pertinent part, that the term ‘bank’ ‘includes some institutions that are not commercial banks’ and that ‘[t]he definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers.’ 810 ILCS Ann. 5/4A-105, UCC Comment 1, at 541 (Smith-Hurd 2014).” *Id* at ¶33.
- c. Courts have consistently held mutual fund companies, brokerage firms, and insurance companies may fall within the definition of a bank under the UCC, *Id* at ¶32;
- d. “Defendant state[d] [that] it is a registered futures commission merchant. Prior to trial, defendant's attorney stipulated that defendant is also registered as a broker-dealer,” *Id* at ¶35;
- e. “When KCG Futures sold plaintiffs' accounts to defendant, KCG Futures sent a letter to plaintiff account holder stating defendant was a ‘leading financial services company’ that

offered a variety of services, including brokerage and trading services. It is clear that defendant is a financial institution.” *Id.*

- f. “Additionally, the undisputed evidence shows defendant processed four unauthorized wire transfers out of plaintiffs' trading accounts over the course of less than two weeks totaling \$374,960” and that “defendant regularly assisted its customers in processing funds transfers .... [a] current and a former employee both testified they processed 15 to 20 wire transfer requests per day on average ... [and] .... [a]nother former employee ... [could not recall if she] work[ed] on any wire transfer requests to Poland[,] [stating that] ... ‘[b]ecause of volume, I don't remember locations’.” *Id.* at ¶ 36.

*Id.* at ¶¶ 19-37.

6. The court rejected defendant’s argument that “it cannot be a bank within the meaning of article 4A because there was no admissible evidence before the trial court showing it provided its customers with checking services,”:

- a. The Court distinguished decisions under articles 3 and 4 of the UCC that held various entities to be banks because they provided checking services. Such cases, the Court stated, “generally address[ed] disputes involving checking services” and it therefore was “not surprising that they focused on that activity in determining whether a defendant was a bank within the context of articles 3 and 4....” The court did “not believe those cases intended to limit the definition of a bank under the UCC strictly to institutions offering checking services.” *Id.* at ¶¶ 25-29.
- b. “More importantly, the language of article 4A does not support an interpretation that offering checking services is necessary to meet the definition of a bank. If the legislature had intended to limit the definition of a bank to financial institutions providing checking services, it could have easily done so. The legislature did not enact the statute with a provision requiring checking services to meet the definition of a bank, however, and we cannot add provisions or limitations not expressed by the legislature.” *Id.* at ¶ 30

7. The court also rejected defendant’s argument “that plaintiffs seek to rewrite the definition of a bank to apply to anyone who processes a funds transfer”: “We find the official comments to section 4A-105 clarify that the definition of a bank operates to narrow the application of article 4A to financial institutions. See 810 ILCS Ann. 5/4A-105, UCC Comment 1, at 541 (Smith-Hurd 2014) (stating ‘[t]he definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks’). Thus, article 4A does not apply to every party making a funds transfer. Rather, it is confined to *financial institutions* that meet the definition of a bank in section 4A-105. The definition of a bank is not superfluous under a construction of the statute including financial institutions within its scope.... Significantly, in the cases cited by defendants and the appellate court, different types of financial institutions, including mutual fund companies, brokerage firms, and insurance companies, were considered banks within the meaning of the UCC.” *Id.* at ¶¶ 31, 32 (citations omitted except to 810 ILCS Ann. 5/4A – 105).

8. The court “recognize[d] that the definition of a bank in article 4A is certainly not precise and it must be applied based on the specific facts of a given case” and “emphasize[d] ... that article 4A does *not* apply to every person or entity that processes a funds transfer.... the definition ordinarily would not include law firms, title companies, or similar entities unless the organization may fairly be considered a financial institution providing wholesale wire transfers.” *Id* at ¶ 34 (emphasis in original).

### Civil Rights

**Monell “Single Incident” Liability Significantly Expanded:** *J.K.J. v. Polk Cty.*, 960 F.3d 367 (7<sup>th</sup> Cir. 2020) (Scudder, J.) (*en banc*).

**Brief Summary:** Plaintiffs – two female inmates of the Polk County, Wisconsin jail who had been raped repeatedly by a male guard – obtained a jury verdict of \$2 million each in compensatory damages against both the guard and the County for violations of their Eighth and Fourteenth Amendment rights and an award of \$3.75 million each in punitive damages against the guard. A Seventh Circuit panel ruled 2-1 that the County could not be held liable under *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) and its progeny. *J.K.J. v. Polk Cty.*, 928 F.3d 576, 587-99 (7<sup>th</sup> Cir. 2019). Despite no prior pattern of similar incidents or indeed any prior rape, an overall “good” institutional “record” with respect to sexual misconduct toward inmates, multiple clear and well understood policy and criminal law prohibitions of the guard’s knowing and intentional criminal conduct and the guard’s concealment thereof, the full Seventh Circuit in a 7-4 *en banc* decision reversed the panel and upheld the jury verdict against the County. *J.K.J. v. Polk Cty.*, 960 F.3d 367, 377-86 (7<sup>th</sup> Cir. 2020).

The majority upheld the jury’s verdict under the “single incident” theory articulated in *City of Canton v. Harris*, 489 U.S. 378, 390 n. 10 (1989), holding that plaintiffs had adduced sufficient evidence to establish liability under the “... path to *Monell* liability” based on a single incident described in *City of Canton*, under which liability can attach where the ““risk of constitutional violations ... [is] ... so high and the need for training so obvious that the ... [municipality entity’s] ... failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation.”” *Id* at 380 (*quoting City of Canton*, 489 U.S. at 390). Under such circumstances, ““the failure to provide proper training may fairly be said to represent a policy for which the ... [municipal entity] ... is responsible, and for which the ... [municipal entity]... may be held liable if it actually causes injury.”” *Id.* (*quoting City of Canton*, 489 U.S. at 390; bracketed language inserted). Here, the majority held that there was sufficient evidence for a reasonable jury to find “conscious, deliberate municipal inaction” on the part of the County “in the face of an obvious *and* known risk that its male guards would sexually assault female inmates” and that such inaction was the “moving force” behind plaintiffs’ injuries. *Id* at 379, 381, 384 (emphasis in original).

**Why *Polk Cty.* Matters:** As the dissenting opinions in *Polk Cty.* argue with great force,<sup>13</sup> the majority’s decision amounts to *respondeat superior* liability thinly disguised as *City of Canton*

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<sup>13</sup> See *id* at 389 (Easterbrook, J., dissenting) (“If *Monell* is to be overruled, and vicarious liability established, that should be done forthrightly (and by the Supreme Court) rather than via the roundabout route the majority has devised.”) and *id* at 401 (Brennan, J., dissenting) (“... the majority opinion departs

“single incident” liability or at least very nearly amounts to this. As such, *Polk Cty.* is a significant precedent. At a minimum, even if not quite imposing *respondeat superior* liability, *Polk Cty.* sets forth an expansive interpretation of “single incident” liability, beyond any prior decision of the Supreme Court or the Seventh Circuit, and thus has far-reaching implications – unless confined by subsequent decisions to the context of sexual assault in a correctional facility.<sup>14</sup>

*Polk Cty.* imposes *Monell* liability despite i) multiple clear, easily understood, easily applied policies (and criminal law provisions) of which all employees were aware that prohibited any sexual contact with, and/or harassment of, inmates and required guards to, and directed inmates to, report any such misconduct; ii) the guard’s knowledge that he was violating policy and committing crimes and concealment of his acts; iii) the fact that the prohibitions on sexual contact with, and/or harassment of, inmates were enforced by the jail – once the guard’s crimes were uncovered he was fired and prosecuted and a different guard who previously engaged in less serious misconduct was investigated and reprimanded and later resigned; and iv) plaintiff’s own expert conceded that the jail had a “good” institutional “record” overall with respect to sexual misconduct toward inmates, even taking into account the aforementioned less serious prior misconduct by a guard who did not commit the rapes. *Polk Cty.*, 960 F.3d at 373-74, 377-86, 388, 390-91, 394.

Further, and perhaps even more significantly, while the majority acknowledged that the evidence did not show a prior “pattern of similar violations” to provide notice to the County of a “known” or “obvious” risk that a male guard would sexually assault a female inmate – a finding of the district court that plaintiffs did not challenge on appeal – the majority nevertheless held that a reasonable jury could find, on this same evidence, notice of “a known *and* obvious” risk of rape for purposes of *City of Canton* “single incident” liability. *Id* at 380-81 (emphasis in original). As Judge Brennan wrote in dissent: “The majority opinion turns the single incident theory on its head, using the same facts to produce the opposite conclusion. On this same record the need for more training and better policies is simultaneously ‘not at all obvious’ and ‘so obvious’.... Pattern and single incident theories of liability differ in their requirements, but they share the identical objective of notice. Under either theory, a municipality must have notice of omissions before being deemed deliberately indifferent.... Evidence that falls short under one theory falls short under the other as well.” *Id* at 405–406.

Absent a prior “pattern of similar violations,” the majority stretched to find notice under *City of Canton* from the County’s general obligation under *DeShaney*<sup>15</sup> to protect inmates, the prior

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from the Supreme Court’s requirements in [*City of*] *Canton*, [*Bd. Of Cmm’rs of*] *Bryan County* [*v. Brown*, 520 U.S. 397 (1997)] and *Connick* [*v. Thompson*, 563 U.S. 51 (2011)] and oversteps the culpability and causation rules governing § 1983 claims, resulting in *respondeat superior* liability, an outcome forbidden since *Monell*.”).

<sup>14</sup> It does not appear that the County filed a petition for a writ of *certiorari*. If this is in fact the case, *Polk Cty.* of course will not be reversed by the Supreme Court. Additionally, the appeal by the guard who committed the rapes is not noteworthy. The majority and dissenting opinions agreed that his appeal was without merit. *Id* at 376-77, 386, 420. The significant question before the Seventh Circuit was whether the County should be liable under *Monell* for the guard’s crimes.

<sup>15</sup> *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

misconduct by a different guard (Allen Jorgenson<sup>16</sup>) that “fell short of rape” (and which was investigated and for which Jorgenson was reprimanded), an inherently imbalanced “power dynamic” between male guards and female inmates and a “broken culture” that “denigrat[ed]” women (i.e., inappropriate comments by guards, including by an official in charge of the jail, a “dismissive” attitude toward the federal Prison Rape Elimination Act (“PREA”), “barely existent” sexual abuse training and a failure to sufficiently punish Jorgenson). *Id* at 381-84.

The majority stated that “[w]e recognize that policies can always be more robust, and training can always be more thorough,” that “PREA is not a constitutional standard, and jails are not required to adopt it” and that “[o]ur federal structure leaves the choices to state and local authorities.” *Id* at 384. But these words ring hollow and are hard to credit in light of the majority’s decision and reasoning.

Thus, while it was undisputed that the jail’s policies (and Wisconsin law) clearly prohibited sexual contact with inmates and were easily understood, easily applied and known by all employees, that jail policy required guards to report actual or reasonably suspected sexual misconduct and directed inmates to do so, that there had been no prior “pattern of similar ... violations” (or indeed any prior rape at all) and that the jail had a “good” institutional “record” overall with respect to sexual misconduct toward inmates (even taking Jorgenson’s lesser misconduct into account), the majority nonetheless faulted the County for inadequate sexual abuse training and a policy that “fell short on prevention and detection” of sexual abuse. *Id* at 373-74, 379, 390-91, 393. Similarly, while the majority acknowledged that “PREA is not a constitutional standard, and jails are not required to adopt it,” the majority repeatedly invoked the County’s “dismissive” attitude toward PREA and the testimony of plaintiff’s expert, which was “grounded ... on PREA’s recommendations...,” as evidence supporting the verdict. *Id* at 373-74, 379, 381-84, 390-91, 394. And although the majority stated that “[o]ur federal structure leaves the choices to state and local authorities,” the majority held that the decision of officials to reprimand, rather than more severely punish, Jorgenson for his alleged less serious misconduct and to tell Jorgenson that the reprimand was not “a ‘major deal’ and he could move on from it,” supported the jury’s verdict. *Id* at 372, 383. The officials to whom “our federal structure” left the “choice” of how to address Jorgenson’s misconduct thought Jorgenson “was a good employee ... a go-to employee ... [whom they] ... wanted to salvage” and therefore “felt that it was important ... [to] ... recognize and support ... [Jorgenson’s] ... prior work history.” *Id.* at 372. But according to the *Polk Cty.* majority: “The jury could have viewed this slap on the wrist as confirming the jail’s broken culture ...” *Id.* at 383.

It is very difficult, if not impossible, to reconcile *Polk Cty.* with the Supreme Court’s decision in *Connick*, the most recent Supreme Court case addressing “single incident” liability as “hypothesized” in *City of Canton*. In *Connick*, plaintiff had spent years on death row due to a *Brady* violation and “alleged that [the *Brady*] violation was caused by the district attorney’s deliberate indifference to an obvious need to train prosecutors to avoid violations of *Brady*,” pointing to “at least four prior *Brady* violations in the district attorney’s office.” *Id* at 399. On these facts, the Supreme Court held that “single incident” liability did not apply. *Connick*, 563 U.S. at 63-71. As Judge Easterbrook wrote in dissent in *Polk Cty.*: “Consider *Connick* ...: The Justices recognized that the prosecutor’s office ... had violated the *Brady* doctrine repeatedly but held that

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<sup>16</sup> Plaintiffs were raped by guard Darryl Christensen. The prior alleged misconduct with a different female inmate that “fell short of rape” involved guard Allen Jorgenson. *Id* at 370, 372-73.

this did not show a toleration of wrongdoing. If that was not enough in *Connick*, the Jail's failure to control lewd talk or do more in response to one guard's sexual harassment is categorically insufficient to make the County liable for a different guard's rapes." *Polk Cty.*, 960 F.3d at 389. Equally, if the recurrent question whether evidence implicates *Brady*, which at times can present a difficult decision even for an attorney, does not present an obvious need for training, it is difficult to see how a simple, flat prohibition on jail guards having sexual contact with inmates – and a corresponding requirement that guards report such crimes – does present an obvious need training.

The *Polk Cty.* majority made no attempt to reconcile its decision with *Connick*, mentioning *Connick* only a few times in passing. *Id* at 370-86. But the majority did contend that precedent supported its decision, citing, *inter alia*, the Seventh Circuit's prior decisions in *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917 (7th Cir. 2004) and *Glisson v. Indiana Dep't of Corr.*, 849 F.3d 372 (7th Cir. 2017) (*en banc*), each of which "present[ed] a viable *Monell* claim based on a municipality's failure to act in the absence of a [prior] pattern." *Polk Cty.*, 960 F.3d at 380-81. But both *Woodward* and *Glisson* are distinguishable. In *Woodward*, a health care provider to a jail repeatedly, systemically and with the knowledge and acquiescence of its management violated and/or ignored its own suicide prevention protocols despite the fact that jail inmates present a highly elevated risk of suicide. *Woodward*, 368 F.3d at 920-26. This in turn led directly to a failure to take suicide prevention steps with respect to the decedent in *Woodward*, who clearly was at great risk of committing suicide and managed to do so because suicide prevention steps were not taken. *Id* at 925-26, 929. By contrast, there was no failure (systemic or otherwise) to follow policy in *Polk Cty.* – except on the part of the guard who committed the rapes. *Polk Cty.*, 960 F.3d at 370-86. *Glisson* is more similar to *Polk Cty.* in that it is a 6-4 *en banc* decision in which the court held that a policy "gap" – the failure of a healthcare provider to a prison system "to enact centralized treatment protocols for chronically ill inmates" where the need for such coordinated care was obvious – gave rise to a triable *Monell* claim. *Glisson*, 849 F.3d at 382, 387. But *Glisson* too is distinguishable because it involved a claim that defendant had "a deliberate policy *not* to require any kind of formal coordination of medical care," *id* at 379 (emphasis added), in contrast to *Polk Cty.*, where "the jail had express zero-tolerance sexual assault policies and trained its guards about those policies." *Polk Cty.*, 960 F.3d at 420. Moreover, neither *Woodward* nor *Glisson* involved a "failure to train" claim. *Id* at 419-420.

It is not difficult to imagine scenarios outside the sexual abuse/corrections context to which *Polk Cty.* might be applied. *Polk Cty.* conceivably could be applied in any number of contexts – including use of force,<sup>17</sup> the execution of search warrants, equal protection, etc. – where a municipal entity has a clear, easily understood policy but the argument can be made (as it always at least in a facile sense can be made) that the municipal entity failed to train on the policy with sufficient rigor and/or failed to institute and/or train on needed supplemental procedures to prevent and detect violations of the policy. A future such claim based on *Polk Cty.* would be even stronger if there is an ostensibly "optional" federal or professional standard that the municipal entity chose not to follow, at least in its entirety, like PREA in *Polk Cty* or the Indiana Department of Corrections healthcare directive at issue in *Glisson*, 849 F.3d at 380, and an institutional culture that can be characterized as "dismissive" toward the concerns underlying the standard declined by the municipal entity. *Polk Cty.*. 960 F3d at 367. Under such circumstances, the failure to adopt the

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<sup>17</sup> Indeed, the backdrop against which *City of Canton* "hypothesized" single incident liability was a failure to train officers regarding constitutional limitations on the use of deadly force. *Connick*, 563 U.S. at 63.

standard and/or reform the institutional culture can serve as a fulcrum for a claim that the municipal entity acted with deliberate indifference to a known and obvious risk of the harm that the standard was meant to prevent. *Polk Cty.*, 960 F.3d at 378-79, 381-82; *Glisson*, 849 F.3d at 379-82. And, as in *Polk Cty.*, notice of an obvious risk can at least in part be found based on such “generalized risks” as a “broken culture” or an “imbalanced” “power dynamic.” *Polk Cty.*, 960 F.3d at 382, 407.

Whether *Polk Cty.* portends that expanded, nearly *respondeat superior* liability in “single-incident” cases will become a “new normal” under *Monell*, at least within the Seventh Circuit, or whether *Polk Cty.* will be limited to its facts and singular context – i.e. sexual assault in a correctional facility – remains, of course, to be seen. But what can be said now is that *Polk Cty.* employed a significantly expanded version of *City of Canton* “single incident” liability, beyond what either the Supreme Court or the Seventh Circuit previously have allowed.

Set forth below as key points are some of the ways in which *Polk Cty.* expands “single incident” liability.

### **Key Points:**

**1. Failure To Conduct “Robust” Training On An Already Clear, Well Understood Policy Can Support “Single Incident” Liability:** The hypothetical “single incident” scenario described in *City of Canton* involved a failure to train officers – who have been equipped with firearms and who “policymakers know to a moral certainty ... will be required to arrest fleeing felons” – regarding the circumstances under which they could employ deadly force. *Id* at 380 (quoting *City of Canton*, 489 U. S. at 390 n. 10). *Connick* deemed *City of Canton*’s single incident hypothetical a “narrow range” of potential liability arising from “an obvious need for some form of training” because “[t]here is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force” and “in the absence of training, there is no way for novice officers to obtain the legal knowledge they require.” *Connick*, 563 U.S. at 64. *Connick* distinguished *City of Canton*’s “narrow” hypothetical based on police officers and the use of deadly force from the case at bar arising from prosecutors’ *Brady* decisions: “[t]he *Canton* hypothetical assumes that the armed police officers have *no knowledge at all* of the constitutional limits on the use of deadly force” whereas the plaintiff in *Connick* “cannot rely on the *utter lack of an ability cope with constitutional situations* that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about *particular Brady* evidence or the *specific scenario related to the violation in this case.*” *Id* at 67 (emphasis added). This critical distinction rendered *City of Canton* inapplicable: “That sort of nuance simply cannot support an inference of deliberate indifference here. As the Court said in *Canton*, ‘[i]n virtually every instance where a person has had his rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city ‘could have done to prevent the unfortunate incident.’” *Id* (citing *City of Canton*, 489 U.S. at 392).

Taken together, *City of Canton* and *Connick* make clear that a single incident, failure to train claim requires both “an obvious need for some form of training” arising from a complicated or difficult task or situation that the employees of a municipal entity will face – such as the “split-second decisions with life-or-death consequences” that “[a]rmed police must sometimes make,” *Connick*,

563 U.S. at 64 – and reason to believe that such employees are not equipped with the knowledge necessary to address such task or situation and have no way to acquire such knowledge absent training.

*Polk Cty.* clearly does not fall within this “narrow range.” As the *Polk Cty.* majority admitted, the County made all personnel aware that sexual contact with inmates violated policy and was a crime and there was no evidence that any employee failed to understand this simple, clear prohibition. See, e.g., *id* at 373-75 and *passim*. And both the majority and Judge Brennan’s dissent agree that jail policy required guards to report even suspected sexual misconduct and also directed inmates to report such misconduct. *Id* at 373-74, 390-91.<sup>18</sup> Nowhere in *Polk Cty.* is there any suggestion that anyone, guard or inmate, failed to understand the obligation to report sexual misconduct, with the only possible exception being the majority’s observation that it is possible some inmates might not realize that conduct is improper because of the difficult circumstances from which they came, which concern was at least partially addressed by the inmate handbook, which stated that “[e]very inmate has the right to be safe from sexual abuse and harassment,” that “[n]o one has the right to pressure you to engage in sexual acts” and that “[i]f you are being pressured[,] threatened, or extorted for sex, you should report this to staff immediately...” *Id* at 373-75 and *passim*.

In light of this, it is clear that the *Polk Cty.* majority did not really fault the County for failing to provide essential training, instilling knowledge that employees need to handle difficult tasks or situations and would not otherwise obtain. Instead, in reality, the majority faulted the County for failing to conduct sufficiently robust training with respect to clear policies that already were well understood:

.... Training is important because it can educate and sensitize guards as well as shape and reinforce institutional values, bringing to life words that otherwise exist only on paper. The trial evidence showed that the County’s training on preventing and detecting the sexual harassment and abuse of inmates was all but nonexistent. The training consisted almost exclusively of informing guards of the easy and evident—that the jail’s policies prohibited sexual contact with inmates. The only training even addressing the sexual assault of inmates by guards came in a single session on the Prison Rape Elimination Act in 2014, well after much of Darryl Christensen’s abuse of J.K.J. and M.J.J. had occurred, and which he did not even attend. And even then the jury — ever mindful of Captain Nargis’s dismissive ‘tizzy email’ [stating that personnel were ‘in a tizzy to train their staff on PREA’] — could have found that the County itself hardly took the PREA training

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<sup>18</sup> The language in jail policy that “instructed that any staff member or inmate ‘who knows or reasonably suspects’ sexual misconduct was to inform the ‘Jail Administrator’ or, if the complainant was an inmate, ... could inform a staff member” was taken from PREA and added in July, 2012, *id* at 373-74, toward the beginning of the time period during which Christensen committed his crimes. *Id* at 371. Neither the majority nor the dissents attach any significance to the fact that this language was added in July, 2012, *id*, *passim*, and this *Update* therefore does not either. Moreover, since sexual contact between a guard and an inmate is a crime under Wisconsin law, it is difficult to believe that guards were not in any event always obligated by Wisconsin law generally to report any such misconduct. As a practical matter, then, throughout the time period at issue, jail policy required the reporting of even suspected sexual misconduct.

seriously. What was missing stands out. The jury heard no evidence of the County informing guards of the inherent vulnerability the confinement setting presents to female inmates, educating jailers on the symptoms of an inmate suffering from the trauma of abuse, requiring officers to report each other's misconduct, or taking any time to otherwise instruct guards on matters of prevention and detection, whatever form that might have taken.

*Id* at 379; *see also id* at 374 (“Aside from ... written policies, Polk County Jail staff received no training (in any sense of the word) focused on the sexual harassment or assault of female inmates.”). Other than, perhaps, education concerning “the symptoms of an inmate suffering from the trauma of abuse,” there is nothing in the foregoing passage that was not already addressed by jail policy, as described by the majority itself, or that any guard or inmate would not have known already simply from common sense.<sup>19</sup> And as the majority itself admits, guards were trained on jail policy, even if relatively briefly, including a requirement that guards read one policy each day, and inmates were provided with, and told to read, the inmate handbook. *Id* at 373-75.<sup>20</sup>

Thus, in stark contrast to *City of Canton* and *Connick, Polk Cty.* expands the breadth of single incident liability by allowing liability for failure train with sufficient rigor on clear, already well understood policy. As Judge Easterbrook wrote in dissent,<sup>21</sup> “the [Supreme] Court sees *knowledge* as the proper goal of training.” *Id* at 387 (Easterbrook, J., dissenting) (emphasis added). The point of *City of Canton*'s hypothetical was that “a policy such as ‘comply with the Fourth Amendment’ is useless to non-lawyers without information about what compliance entails. Is it lawful to shoot a fleeing felon? If the answer depends on ongoing danger, how much danger justifies deadly force? A city that stops with ‘obey the Constitution’ lacks a genuine policy.” *Id*. “Contrast that,” Judge Easterbrook wrote, “with Polk County .... Anyone can understand the rule against intimate physical relations between guards and inmates. The Jail made sure that every guard knew about this rule. What training is required to get guards to grasp it? The problem is not a want of *comprehension* (as in *Canton*'s hypothetical) but a want of *compliance*. Yet subordinate

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<sup>19</sup> As the majority itself states elsewhere in its opinion: “It is difficult to conceive of any setting where the power dynamic could be more imbalanced than that between a male guard and a female inmate. *The jury knew that from common sense — the reality was as obvious as obvious could be...*” *Id* at 382 (emphasis added).

<sup>20</sup> It is worth noting that, among the jail's written policies were prohibitions of “verbal, physical, emotional, psychological, or sexual harassment” of inmates and “intimate social or physical relationship[s] with” inmates, a statement that “sexual contact with any inmate is a criminal offense under Wisconsin law and any officer that suspects such conduct has a duty to report it” and the following statement in a handbook provided to inmates “upon arrival at the jail”: “Every inmate has the right to be safe from sexual abuse and harassment. No one has the right to pressure you to engage in sexual acts. If you are being pressured threatened, or extorted for sex, you should report this to staff immediately.” *Id* at 390 (Brennan, J. dissenting).

<sup>21</sup> This *Update* does not necessarily “side” with the dissenting opinions but rather quotes such opinions frequently because they assist greatly in understanding the actual import of the majority opinion.

employees' failure to comply with a valid policy is not a ground of liability against a municipality." *Id.*<sup>22</sup>

**2. A Failure To Adopt “Best Practices” In Place Of An Existing Policy May Be Deemed A “Policy Gap” Supporting “Single Incident” Liability:** The majority also concluded that the County was liable because there were “gaps” in the County’s policy with respect to the prevention and detection of sexual abuse. As Judge Hamilton explained in a concurring opinion: “... [I]t is worth emphasizing that the *Monell* claims against the county are based on much more than whether guards knew right from wrong or knew that it was a crime to have sex with inmates. The *Monell* claims are also based on the county’s failure to monitor its guards and its failure to provide effective channels for complaints so as to discourage abuse.” *Id.* at 386. Judge Hamilton cited as an analogy the need to audit bank tellers: “The risk of embezzlement, even by tellers who know the law and the rules, is obvious. So is the need for audits. The risk and need are so obvious that the bank’s stockholders could easily find that its managers (i.e., its policymakers) were not merely negligent but deliberately indifferent (i.e., reckless) toward this obvious and known risk, even if only one teller gave in to the temptation.” *Id.* The majority referred to this alleged “failure to monitor ... guards and ... provide effective channels for complaints” as policy “gaps” regarding prevention and detection of sexual assault and held that such “gaps” supported the jury’s verdict. *Id.* at 378-79.

But the County clearly had a policy regarding prevention and detection: guards and inmates were informed of the prohibition on sexual contact or harrasment; guards were informed that violations would be punished (as Christensen and Jorgenson both were); and guards were required, and inmates directed, to report such misconduct. *Id.* at 371-74, 390-91.<sup>23</sup> *Polk Cty.* thus presents a different sort of “gap” in policy, if gap it really was, than was present in *Glisson*, which involved

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<sup>22</sup> Judge Easterbrook’s more fundamental contention was that “[t]he Constitution does not require training”; instead, “[t]he duty is to avoid unconstitutional policies.” *Id.* at 386-87. In Judge Easterbrook’s view, liability would attach in *City of Canton*’s hypothetical because a municipal entity that does not inform officers in some detail when deadly force can be used violates the Constitution by in effect having no policy at all. *Id.* at 387 (“A city that stops with ‘obey the Constitution’ lacks a genuine policy.”). That is, there are some circumstances where a municipal entity effectively has no policy unless it provides training because the subject matter cannot be comprehended without training. In Judge Easterbrook’s view, *City of Canton*’s hypothetical is such a situation and this – and not any constitutional requirement that municipal entities must always offer training – is why the Court in *City of Canton* spoke of an obvious need for training and *Monell* liability absent such training. As set forth above, under Judge Easterbrook’s analysis, *Polk Cty.* emphatically did not present a situation in which training was necessary in order to have a policy: “Anyone can understand the rule against intimate physical relations between guards and inmates. The Jail made sure that every guard knew about this rule. What training is required to get guards to grasp it?” *Id.* at 387.

<sup>23</sup> As Judge Easterbrook noted in dissent, “the [C]ounty ... elect[ed] deterrence and incapacitation as the means of enforcing its policies”: “Threats of criminal prosecution or losing one’s livelihood offer better prospects of deterring malicious conduct [than training]. Polk County threatened guards with both kinds of punishment, and it carried through against Christensen. Those steps show vividly that the Jail does not tolerate sexual abuse of prisoners—that the policy is not just a cynical attempt to deflect liability.” *Id.* at 388. “[N]othing in the Constitution ... prevents a [C]ounty from electing deterrence and incapacitation as the means of enforcing its policies.” *Id.*

an alleged “deliberate policy *not* to require any kind of formal coordination of medical care.” *Glisson*, 849 F.3d at 379, 382, 387 (emphasis added). Given this, the majority’s real objection appears to be not that there was a “gap” in jail policy in the sense that the policy simply failed to address prevention and detection of sexual misconduct but rather that the policy did not reflect “best practices” with respect to prevention and detection of sexual misconduct – at least as such “best practices” are specified by PREA.

Although a review of Seventh Circuit cases regarding “policy gaps” is beyond the scope of this *Update* and no authority categorically forbids basing liability on a failure to adopt “best practices” in place of an existing policy, the alleged “policy gaps” in *Polk Cty.* plainly are a tenuous basis, at best, for liability in a single-incident case and an incremental expansion, at least, of single incident liability. This is especially so because there was no prior incident of rape or indeed any misconduct with an inmate except for Jorgenson’s alleged lesser misconduct,<sup>24</sup> plaintiff’s expert admitted “that there is no empirical data that compliance with PREA yields better results” and there is no legal obligation to adopt PREA. *Id* at 384, 388, 394. In substance, the majority deemed “the County[‘s] ... elect[ion] [of] deterrence and incapacitation as the means of enforcing its policies” over PREA’s “best practices” a policy “gap” supporting liability even though there is substantial support (cited by Judge Easterbrook) for the view that deterrence and incapacitation are more effective than training and no evidence (as admitted by plaintiff’s expert) that PREA’s “best practices” yield better results. *Id* at 388, 394. The majority’s policy “gap” holding appears to be exactly the sort of “micromanage[nt] of local government...” that *Connick* forbids. *Connick*, 563 U.S. at 68. Moreover, as Judge Brennan pointed out, the Supreme Court, in contrast to the Seventh Circuit in *Polk Cty.* and *Glisson*, “has never extended single-incident liability outside failure to train ...” *Polk Cty.*, 960 F.3d at 407.

All this said, however, the take-away from *Polk Cty.* in this regard is that a failure to adopt “best practices” in place of an existing policy can be construed as a “policy gap” that in turn supports single incident liability – at least if such “best practices” are delineated by a federal statute,

**3. “Optional” Federal Standards May Practically Be Mandatory; Compliance With Governing State Law May Not Forestall Liability.** While acknowledging that “PREA is not a constitutional standard, and jails are not required to adopt it,” the majority nonetheless expressly relied on the County’s allegedly “dismissive” attitude toward PREA and, more significantly, the testimony of plaintiff’s expert – who, as Judge Brennan pointed out, “grounded his testimony on PREA’s recommendations” – in affirming the verdict against the County. *Id* at 376, 379, 384, 394.<sup>25</sup> It is thus difficult to credit the majority’s statement that “PREA is not a constitutional standard, and jails are not required to adopt it” given that a failure to do so in *Polk Cty.* was, as a practical matter, deemed significant evidence in support of the jury’s verdict. As Judge Brennan wrote: “Strikingly an opinion witness who advanced a standard [PREA] the majority opinion says

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<sup>24</sup> “It ... [was] ... undisputed that in the nine years preceding trial, 14,100 inmates came though the jail, and the Jorgenson circumstance was the only known allegation of an improper relationship between a guard and an inmate.” *Id* at 393. And as plaintiff’s expert conceded, even taking Jorgenson’s alleged misconduct into account, the jail had a “good” overall record regarding sexual misconduct. *See supra*.

<sup>25</sup> “PREA played a large role in plaintiffs’ case.” *Id* at 394 (Brennan, J., dissenting)

is not required sets the fault standard in this circuit, even though that witness agreed the County had a good record on sexual assaults.” *Id* at 412.

Conversely, and equally significant, compliance with governing state law was not sufficient in *Polk Cty.* to forestall liability under *Monell*: “Plaintiffs agreed that state law, not PREA, governs county jails in Wisconsin, but they offered no evidence that the jail’s sexual assault policies or training fell below state legal or administrative standards. As for compliance with state law, the County presented evidence that the Wisconsin Department of Corrections annually reviews the jail’s policies, including its policy prohibiting fraternization with inmates. In each year of plaintiffs’ incarcerations, that Department found the jail to be in full compliance with all applicable Wisconsin statutes and regulations.” *Id* at 394.

**4. Judicial Scrutiny May Extend Deep Into The Particulars Of Training.** *Polk Cty.* is authority for the proposition that courts may scrutinize not only the substance of training provided by a municipal entity but also may second guess the particulars of how such training was provided. As Judge Brennan observed, training guards on the clear, simple prohibition of sexual contact with inmates does not present any pedagogical difficulty: “[t]he County’s policies and training—that guards are not to sexually assault inmates—admits of no nuance, separating it from the deadly force training of *Canton* and the *Brady* prosecutorial obligations of *Connick*. The training here is imperative and declarative: a jailer may not have sexual contact with an inmate, and if the jailer does, the jailer will be fired and prosecuted for a felony under Wisconsin law. That is not a gray area, confounding correctional officials ....” *Id* at 418-19 (Brennan, J., dissenting). But notwithstanding the straightforward nature of the policy, “the majority opinion is replete with conclusions on the nature, quantity, and timing of the training: what language was and was not included in Polk County’s written policies; what topics were and were not discussed in training sessions; when the training did and did not occur; and how the training should have been done, in contrast to how it was done.” *Id* at 418 (Brennan, J., dissenting); *see also id* at 378-79 (description of jail policies and training in majority opinion).

Thus, notwithstanding that “... failure-to-train liability is concerned with the substance of training, not the particular instructional format” and that § 1983 “does not provide plaintiffs or courts *carte blanche* to micromanage local government...,” *Connick*, 563 U.S. at 431, the “particular instructional format” of training – and not just the “substance” of training – is now, in the wake of *Polk Cty.*, fair game for plaintiffs and courts, no matter how straightforward the policy or subject matter at issue.

**5. The Constitution May Not Really “Leave ... Choices Up To” Local Officials.** As noted above, local officials may not really have as much discretion in making “choices” as the majority opinion proclaims. *Id* at 384. Here, it was undisputed that the County investigated each time allegations by an inmate against guard Allen Jorgenson came to light and that Jorgenson was reprimanded for his misconduct and later resigned after female co-workers complained about him. *Id* at 372-73. Officials explained the reprimand and their statement to Jorgenson that the reprimand “was not a ‘major deal’ and he could move from it” as their effort to “salvage” Jorgenson because he had been a “good,” “go-to” employee. *Id* at 372. The majority deemed this exercise of discretion a “slap on the wrist” that constituted evidence supporting the jury’s verdict. *Id* at 383.

Thus, the County was as a practical matter penalized for the “choice” officials made to try to “salvage” Jorgenson in light of his overall work history.

**6. Causation May Be Found Even Where An Employee Willfully Does Precisely What Clear Policy Forbade – At Least If There Also Was A Failure Found In Prevention And Detection Procedures And/Or Training.** The majority found the County’s lapses caused plaintiff’s injuries within the meaning of *Monell* even though it was guard Darryl Christensen who raped plaintiffs and concealed the rapes and Christensen “admitted ... [that] ... he knew he was putting the plaintiffs at risk” and “that his conduct not only violated prison policy but was criminal” and that he did not need more training to know this. *Id* at 371, 376, 391 “Having established that the jury could conclude that the risk of constitutional injury – here, the sexual assaults – was obvious, it took but a small inferential step for the jury to find causation.” *Id* at 384. The contention that Christensen, not the County, was the “moving force” behind plaintiff’s injuries failed because “the evidence allowed the jury to conclude that the County’s acting to institute more robust policies – foremost addressing prevention and detection – and then training on those policies would have resulted in another correctional officer, an inmate, or even ... [plaintiffs] ... taking some step to stop ... [the guard’s] ... sexual assaults.” *Id* at 385. Also, the jury was not “compelled to conclude that the sexual abuse suffered by ... [plaintiffs] ... had one and only one cause.” *Id* at 385-86.

*Polk Cty.* thus stands for the proposition that, at least if there was a failure with respect to prevention and detection procedures and/or training, a municipal entity can be held in a “single incident” *Monell* case to have been a “moving force” behind injuries caused by an employee’s willful, criminal conduct in violation of policy, law and his or her training. Under such circumstances, the conclusion always can be reached, as it was in *Polk Cty.*, that with better prevention and detection procedures and/or training, someone would have reported or stopped the offending employee and thus the municipal entity’s failings were a “moving force” behind the injuries too.

**7. A Less Serious, Dissimilar Prior Incident Can Constitute Evidence Of A “Known” Or “Obvious” Risk Of A Much More Serious Incident Of The Same General Type.** There was no rape (much less multiple rapes) of an inmate by a guard at the jail prior to Christensen’s rapes of plaintiffs – hence plaintiffs’ reliance on, and the majority’s affirmance under, the “single incident” theory set forth in *City of Canton*. That said, the majority treated Jorgenson’s less serious prior misconduct as tantamount to a prior incident of rape for purposes of finding that the County had notice of an obvious risk that a guard would rape an inmate. While “the accusations of Jorgenson’s reprehensible conduct fell short of rape,” the majority stated, “it would be naive in the extreme to dismiss the misconduct as no more than boorish behavior or, more to it, providing no incremental notice of an obvious risk.” *Id* at 382. “That Jorgenson’s grooming of N.S. did not end with rape is no liability shield; it was good fortune.” *Id* at 383. Thus, the majority held, although Jorgenson’s misconduct “fell short of rape,” it nonetheless was “a plain example of predatory sexual behavior staring [the County] in the face” and a “flashing” red light...” *Id* at 383. “Jorgenson’s misconduct reinforced for Polk County that the risks were real and acute in the jail” and “[f]aced with that notice, the County had a legal obligation to act—to take reasonable steps to reduce the obvious and known risks of assaults on inmates.” *Id* at 384.

At root, the majority deemed sexual harassment (Jorgenson) as equivalent to rape (Christensen) for purposes of finding notice of a “known and obvious risk” of rape under *City of Canton*’s “single incident” hypothetical.<sup>26</sup> The majority equated Jorgenson’s lesser misconduct with Christensen’s rapes – thereby greatly increasing the ostensible notice to the County – in part by describing what Jorgenson did as “predatory sexual behavior,” a term broad enough to cover both Jorgenson’s and Christensen’s conduct despite significant differences between what each guard did. *See* n. 26, *supra*. This is at least arguably at odds with *Connick*, where the Supreme Court held that four prior *Brady* violations by the defendant district attorney’s office “could not have put [the District Attorney] on notice that the office’s *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here” because “those [prior] incidents are not similar to the violation at issue here.” *Connick*, 563 at U.S. at 428. In *Connick*, in other words, even though the four prior incidents of failing to turn over favorable information and the failure to turn over favorable information at issue were all similar in the sense that all were *Brady* violations, such general similarity was insufficient to provide notice; greater similarity was required – and lacking. By contrast, the *Polk Cty.* majority appears to have held, or at least arguably has held, that a general similarity is enough for a less serious, dissimilar prior incident to provide notice of a known and obvious risk of a much more serious incident.

At bottom, then, under *Polk Cty.* an incident that is less serious and dissimilar – but of the same general type or category as potentially much more serious conduct – can be deemed sufficient to give notice of a known and obvious risk of such more serious conduct.

### Employment Litigation

Title VII Protects Gay, Transgender; Significant Discussion Of Statutory Interpretation; Textualism Redefined?: *Bostock v. Clayton County*, 2020 U.S.LEXIS 3253 (June 15, 2020) (Gorsuch, J.)

**Brief Summary:** *Bostock* involved three cases, in two of which (*Bostock*, *Zarda*) gay persons sued under Title VII, alleging unlawful discrimination based on sexual orientation, and in one of which (*Stephens*) a transgender person sued under Title VII, alleging unlawful discrimination based on transgender status. *Bostock*, 2020 U.S.LEXIS 3253 at \*10 - \*12 The Court held, 6-3, that discrimination on the basis of sexual orientation or transgender status is discrimination on the basis of sex and therefore is prohibited by Title VII: “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” *Id* at 3253 at \*9.

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<sup>26</sup> This is not to disagree with the majority’s assessment that what Jorgenson did and/or allegedly did (*see id* at 372-73) was reprehensible. It is rather to say that Judge Easterbrook is correct when he described Jorgenson’s alleged conduct – which led ultimately to his resignation but for which it is clear he was not prosecuted and the County was not held civilly liable (*id.*, *passim*) – as “sexual harassment.” *Id* at 389. Christensen’s rapes, by contrast, were a far more serious matter, leading to his incarceration for thirty years and the County’s being held civilly liable for \$4 million in damages.

The majority acknowledged that its construction of Title VII “might not have [been] anticipated” by the Congress that passed the law in 1964 but held that the “express terms of Title VII controlled the outcome: “Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. *When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.*” *Id* at \*9-\*10 (emphasis added).

**Why *Bostock* Matters:** Foremost, *Bostock* settles that Title VII prohibits discrimination against gay and transgender persons. Even the dissenting Justices agreed that this should be the law. They dissented because in their view it was not the Court’s prerogative, but rather that of Congress, to make this change. *See, e.g., id* at \*125-\*126 (Alito, J. dissenting) (“The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration and fairness that everyone deserves. But the authority of this Court is limited to saying what the law is.”); *id* at 184-185 (Kavanaugh, J. dissenting) (“Notwithstanding my concern about the Court’s transgression of the Constitution’s separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans.”).

But perhaps just as important over the long run as the *Bostock* majority’s construction of Title VII is the majority’s process of statutory construction.

Both the majority and the dissenting Justices agreed that a statute, such as Title VII, should be “interpret[ed] ... in accord with the ordinary public meaning of its terms at the time of its enactment.” *Id* at \*12 (majority opinion) (emphasis added); *see also id* at \*91 (Alito, J., dissenting) *id* at \*159-\*161 (Kavanaugh, J., dissenting). As the majority explained, “[i]f judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.” *Id* at \*12-\*13 (citation omitted).

The dissenting opinions amassed a formidable case that such an analysis results clearly in the conclusion that in 1964, when the Civil Rights Act was passed, the ordinary public meaning of “discriminate because of sex” “did not encompass discrimination because of sexual orientation” and/or transgender status and therefore Title VII does not prohibit discrimination on the basis of sexual orientation or transgender status, however desirable such a prohibition may be. *Id* at \*167; *see generally* \*59-\*185.

What is noteworthy is that the *Bostock* majority’s decision to nonetheless construe Title VII to prohibit discrimination on the basis of sexual orientation or transgender status, while claiming to be following a textualist approach, opens the door for a litigant to contend in a future case that

textualism supports a given construction of federal law even in the face of substantial evidence that such construction in fact contravenes the ordinary public meaning of the statutory text at the time of adoption. At a minimum, under *Bostock*, if it is applied straightforwardly in the future, evidence of ordinary public meaning at the time of a law’s passage will not be accorded as much weight as it once was.

In particular, a fair reading of *Bostock* suggests that *Bostock* is authority for at least the following forms of argument in future litigation involving statutory construction.

First, a statute may be interpreted by focusing on the meaning of specific words or small phrases rather than the meaning of the text at issue as a whole and by employing the literal meaning of specific words or small phrases rather than the ordinary public meaning. The majority defined its task as “determin[ing] the ordinary public meaning of Title VII’s command that it is ‘unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin,’” for which task the majority “orient[ed] ourselves to the time of the statute’s adoption, here 1964...” *Id* at \*13. But the majority examined the meaning of particular discrete terms (“sex,” “because of,” “discriminate” and “individual”) rather than meaning of the statutory text at issue as a whole and employed the literal definition of these terms. *Id* at \*13-\*19; *see also id.* at \*178-\*179 (Kavanaugh, J., dissenting). By this process, the majority concluded that “[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex” (*id* at \*20), that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex” (*id* at \*20-\*21) and, therefore, “[a]n employer who fires an individual merely for being gay or transgender defies the law,” i.e. Title VII. *Id* at \*58. The majority reached this result even though the dissents set forth compelling evidence and argument that “Congress” “indisputably did not” “in 1964” “outlaw...” “discrimination because of sexual orientation or gender identity.” *Id* at 62.<sup>27</sup>

Second, the majority’s response to the substantial evidence cited by the dissents that the ordinary public meaning of Title VII when adopted did not prohibit discrimination based on sexual orientation or gender identity likewise offers new arguments for use in future statutory construction cases. For example, the *Bostock* majority contended that within a few years after Title VII’s passage “at least some people foresaw” that Title VII might prohibit discrimination based on sexual orientation or transgender status because “not long after the law’s passage, gay and transgender employees began filing Title VII complaints” and “during debates over the Equal

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<sup>27</sup> As Justice Kavanaugh pointed out: “[C]ourts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.” *Id* at 159. “In light of the bedrock principle that we must adhere to the ordinary meaning of a phrase,” Justice Kavanaugh wrote, “the question in this case boils down to the ordinary meaning of the phrase ‘discriminate because of sex.’ Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no. On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination – back in 1964 and still today.” *Id* at 167-68; *see also, e.g., id* at \*84 - \*115 (Alito, J., dissenting); *id* at \*168-\*178 (Kavanaugh, J. dissenting)

Rights Amendment, ... [some] ... counseled that its language – which was strikingly similar to Title VII’s – might also protect homosexuals from discrimination.” *Id* at \*47-\*48. “Why isn’t that enough,” the majority asked, “to demonstrate that today’s result isn’t totally unexpected?” *Id* at \*48. This can support an argument that evidence of even a small group of persons offering an alternative construction of a law not long after its passage calls into question substantial evidence that the ordinary public meaning of the law at that time in fact was otherwise. More fundamentally, *Bostock* is clearly authority for the general proposition that a statute can be construed in a manner that contradicts a great deal of evidence that the ordinary public meaning of the statute when passed was otherwise. *Id, passim*.

None of the foregoing is to disagree with *Bostock*’s result. It is rather to point out that, in order to obtain that result, the majority, notwithstanding its’ claims to be following a textualist approach, in fact employed a different form of textualism than that advanced by Justice Scalia and like- minded jurists and that this form of textualism now may be employed by advocates in future cases. *See, e.g., id* at \*61. (Alito, J., dissenting) (“The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled.”). Whether the Supreme Court and other courts will accept such arguments, or limit *Bostock* to its compelling facts, remains to be seen.

#### Federal Criminal Defense

Principles Governing Whether Trial Record Should Be Considered In Appellate Review Of A Ruling On A Pre-Trial Motion To Suppress. *United States v. Howell*, 958 F.3d 590 (7<sup>th</sup> Cir. 2020) (Scudder, J.).

**Brief Summary/Why *Howell* Matters:** This case arose from a stop and frisk in which police officers recovered a handgun from defendant, who subsequently was indicted for unlawfully possessing a firearm after having been convicted of a felony, based on both the handgun recovered during the stop and frisk and other firearms subsequently found in defendant’s home. *Howell*, 958 F.3d at 592. After having been convicted on all counts, defendant appealed, challenging, *inter alia*, the district court’s denial before trial of defendant’s motion to suppress the handgun recovered from him during the stop and frisk. *Id*. “In evaluating [defendant’s] position, [the Seventh Circuit] ... confront[ed] a question about the proper scope of the record on review ... [of a ruling pretrial suppression motion:] ... whether we limit our review to the pretrial record or expand our look to consider the arresting officer’s trial testimony as well... [which] ... matters [here] because the facts in the pretrial record differed in a material way from those that emerged at trial, where the arresting officer testified that he decided to proceed with the pat down only after [defendant] ignored a directive to remove his hands from his pockets.” *Id*.

After requesting and considering supplemental briefs, *id* at 595, the Seventh Circuit described as follows the principles governing whether to consider trial evidence when reviewing a ruling on a pretrial suppression motion:

Considered collectively our prior cases show that the question presented—when we may consider trial evidence in reviewing a pretrial motion to suppress—does not lend itself to bright-line answers. Rather, we approach the inquiry on a case-

by-case basis, taking account of all available information regarding the proceedings below. We read our case law (and the principles underpinning it) to at least establish that we retain the discretion to consider trial evidence bearing on a district court's ruling on a motion to suppress where that evidence came into play in the district court's consideration of the motion—where the defendant renewed the motion and thereby invited the district court to reevaluate its prior ruling in light of trial evidence or where the district court undertook such a reevaluation of its own accord.... The prior cases likewise counsel that one factor properly informing our exercise of discretion is whether considering the trial evidence would cause unfair prejudice to the defendant.

*Id* at 596 (citations omitted). The court further stated that “[t]he law does not compel us to consider trial evidence in reviewing a suppression ruling; it merely affords us discretion to do so.” *Id* at 597.

With respect to the case at bar, the Seventh Circuit “concluded that these principles tilt against consideration of the trial record...” *Id* at 596. “Foremost, the district court itself never considered [the] [o]fficer[’s] trial testimony – neither in denying ... [the] ... pretrial motion, nor in denying the later renewals of the same motion.” *Id* at 596-97. “So, too, is it clear that it would prejudice [defendant] to consider [the] [o]fficer[’s] trial testimony, as it contained a new, material representation – that [defendant] disregarded a clear direction from [the] [o]fficer ... to remove his hands from his pockets. At trial [defendant] had no reason to believe the district court would consider that testimony as part of revisiting its pretrial ruling ... [and] ... [e]ven more, defendant may have had sound strategic reasons, when cross-examining and attempting to impeach [the] [o]fficer..., not to draw attention to the new fact offered for the first time at trial” and “little incentive at trial to focus on factual details pertinent to a pretrial motion that the district court resolved before trial even began.” *Id* at 597. The court “found it equally noteworthy that neither party’s briefing on appeal even identified the difference between the pretrial and trial records.” *Id*.

Reviewing the district court’s ruling on the suppression motion without considering the officer’s trial testimony, the court held that the officer’s stop of defendant was proper but the frisk was not and therefore reversed the district court’s denial of the motion to suppress. *Id* at 598-602.