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Manuel Farach

United States V. Sineneng-Smith, Case No. 19–67 (2020).
A court may not interject its own arguments into a case as doing so violates the Principle of Party Representation.

Miami-Dade County, Florida v. Publix Supermarkets, Inc., Case No. 3D19-1203 (Fla. 3d DCA 2020).
A court reviewing an agency decision on first-tier certiorari review must, pursuant to *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982), confine its evidentiary review to determine whether the agency decision (not the objector's position) is supported by competent, substantial evidence.

Fields v. Toussie Case. Nos. 4D19-1610 & 4D19-1612 (Fla. 4th DCA 2020).
A second sanctions hearing regarding non-compliance with court orders is not necessary unless the sanctions purge was to occur outside of court parameters.

Hoti v. U.S. Bank, N.A., Case No. 4D20-2089 (Fla. 4th DCA 2020).
The Fourth District adopts *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), and amends *Ricci v. Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC*, 276 So. 3d 5 (Fla. 4th DCA), review denied, No. SC19-1547, 2019 WL 7341587 (Fla. Dec. 30, 2019), to the extent *Ricci* intimated that orders entered after removal to federal court were voidable and not void.

contact

Manuel Farach
member > fort lauderdale

T (954) 356-2528
mfarach@mcglinchey.com

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES *v.* SINENENG-SMITH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19–67. Argued February 25, 2020—Decided May 7, 2020

Respondent Evelyn Sineneng-Smith operated an immigration consulting firm in San Jose, California. She assisted clients working without authorization in the United States to file applications for a labor certification program that once provided a path for aliens to adjust to lawful permanent resident status. Sineneng-Smith knew that her clients could not meet the long-passed statutory application-filing deadline, but she nonetheless charged each client over $6,000, netting more than $3.3 million.

Sineneng-Smith was indicted for multiple violations of 8 U. S. C. §1324(a)(1)(A)(iv) and (B)(i). Those provisions make it a federal felony to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law," §1324(a)(1)(A)(iv), and impose an enhanced penalty if the crime is "done for the purpose of commercial advantage or private financial gain," §1324(a)(1)(B)(i). In the District Court, she urged that the provisions did not cover her conduct, and if they did, they violated the Petition and Free Speech Clauses of the First Amendment as applied. The District Court rejected her arguments and she was convicted, as relevant here, on two counts under §1324(a)(1)(A)(iv) and (B)(i).

Sineneng-Smith essentially repeated the same arguments on appeal to the Ninth Circuit. Again she asserted a right under the First Amendment to file administrative applications on her clients' behalf, and she argued that the statute could not constitutionally be applied to her conduct. Instead of adjudicating the case presented by the parties, however, the court named three *amici* and invited them to brief and argue issues framed by the panel, including a question never raised by Sineneng-Smith: Whether the statute is overbroad under the

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First Amendment. In accord with the *amici*'s arguments, the Ninth Circuit held that §1324(a)(1)(A)(iv) is unconstitutionally overbroad.

Held: The Ninth Circuit panel's drastic departure from the principle of party presentation constituted an abuse of discretion.

The Nation's adversarial adjudication system follows the principle of party presentation. *Greenlaw* v. *United States*, 554 U. S. 237, 243. "In both civil and criminal cases, . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.,* at 243.

That principle forecloses the controlling role the Ninth Circuit took on in this case. No extraordinary circumstances justified the panel's takeover of the appeal. Sineneng-Smith, represented by competent counsel, had raised a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others. Electing not to address the party-presented controversy, the panel projected that §1324(a)(1)(A)(iv) might cover a wide swath of protected speech, including abstract advocacy and legal advice. It did so even though Sineneng-Smith's counsel had presented a contrary theory of the case in her briefs and before the District Court. A court is not hidebound by counsel's precise arguments, but the Ninth Circuit's radical transformation of this case goes well beyond the pale. On remand, the case is to be reconsidered shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties. Pp. 3–9.

910 F. 3d 461, vacated and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

No. 19–67

UNITED STATES, PETITIONER *v.* EVELYN SINENENG-SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 7, 2020]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns 8 U. S. C. §1324, which makes it a federal felony to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." §1324(a)(1)(A)(iv). The crime carries an enhanced penalty if "done for the purpose of commercial advantage or private financial gain." §1324(a)(1)(B)(i).[1]

Respondent Evelyn Sineneng-Smith operated an immigration consulting firm in San Jose, California. She was indicted for multiple violations of §1324(a)(1)(A)(iv) and (B)(i). Her clients, most of them from the Philippines, worked without authorization in the home health care industry in the United States. Between 2001 and 2008, Sineneng-Smith assisted her clients in applying for a "labor certification" that once allowed certain aliens to adjust their

[1] For violations of 8 U. S. C. §1324(a)(1)(A)(iv), the prison term is "not more than 5 years," §1324(a)(1)(B)(ii); if "the offense was done for . . . private financial gain," the prison term is "not more than 10 years," §1324(a)(1)(B)(i).

status to that of lawful permanent resident permitted to live and work in the United States. §1255(i)(1)(B)(ii).

There was a hindrance to the efficacy of Sineneng-Smith's advice and assistance. To qualify for the labor-certification dispensation she promoted to her clients, an alien had to be in the United States on December 21, 2000, and apply for certification before April 30, 2001. §1255(i)(1)(C). Sineneng-Smith knew her clients did not meet the application-filing deadline; hence, their applications could not put them on a path to lawful residence.[2] Nevertheless, she charged each client $5,900 to file an application with the Department of Labor and another $900 to file with the U. S. Citizenship and Immigration Services. For her services in this regard, she collected more than $3.3 million from her unwitting clients.

In the District Court, Sineneng-Smith urged unsuccessfully, *inter alia*, that the above-cited provisions, properly construed, did not cover her conduct, and if they did, they violated the Petition and Free Speech Clauses of the First Amendment as applied. See Motion to Dismiss in No. 10–cr–414 (ND Cal.), pp. 7–13, 20–25; Motion for Judgt. of Acquittal in No. 10–cr–414 (ND Cal.), pp. 14–19, 20–25. She was convicted on two counts under §1324(a)(1)(A)(iv) and (B)(i), and on other counts (filing false tax returns and mail fraud) she does not now contest. Throughout the District Court proceedings and on appeal, she was represented by competent counsel.

On appeal from the §1324 convictions to the Ninth Circuit, both on brief and at oral argument, Sineneng-

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[2] Sineneng-Smith argued that labor-certification applications were often approved despite expiration of the statutory dispensation, and that an approved application, when submitted as part of a petition for adjustment of status, would place her clients in line should Congress reactivate the dispensation. See Motion for Judgt. of Acquittal in No. 10–cr–414 (ND Cal.), p. 16.

Smith essentially repeated the arguments she earlier presented to the District Court. See Brief for Appellant in No. 15–10614 (CA9), pp. 11–28. The case was then moved by the appeals panel onto a different track. Instead of adjudicating the case presented by the parties, the appeals court named three *amici* and invited them to brief and argue issues framed by the panel, including a question Sineneng-Smith herself never raised earlier: "[W]hether the statute of conviction is overbroad . . . under the First Amendment." App. 122–124. In the ensuing do over of the appeal, counsel for the parties were assigned a secondary role. The Ninth Circuit ultimately concluded, in accord with the invited *amici*'s arguments, that §1324(a)(1)(A)(iv) is unconstitutionally overbroad. 910 F. 3d 461, 485 (2018). The Government petitioned for our review because the judgment of the Court of Appeals invalidated a federal statute. Pet. for Cert. 24. We granted the petition. 588 U. S. ___ (2019).

As developed more completely hereinafter, we now hold that the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion. We therefore vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel.

I

In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw* v. *United States*, 554 U. S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.*, at 243. In criminal cases, departures from the party presentation principle have usually occurred "to protect a *pro se* litigant's rights." *Id.*, at 244;

see, *e.g.*, *Castro* v. *United States*, 540 U. S. 375, 381–383 (2003) (affirming courts' authority to recast *pro se* litigants' motions to "avoid an unnecessary dismissal" or "inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis" (citation omitted)). But as a general rule, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.*, at 386 (Scalia, J., concurring in part and concurring in judgment).[3]

In short: "[C]ourts are essentially passive instruments of government." *United States* v. *Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc)). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid.*

The party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate. See, *e.g.*, *Day* v. *McDonough*, 547 U. S. 198, 202 (2006) (federal court had "authority, on its own initiative," to correct a party's "evident miscalculation of the elapsed time under a statute [of limitations]" absent "intelligent waiver").[4] But this case scarcely fits that bill. To explain why that is so, we turn

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[3] See Kaplan, Civil Procedure—Reflections on the Comparison of Systems, 9 Buffalo L. Rev. 409, 431–432 (1960) (U. S. system "exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge"; "German system puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal").

[4] In an addendum to this opinion, we list cases in which this Court has called for supplemental briefing or appointed *amicus curiae* in recent years. None of them bear any resemblance to the redirection ordered by the Ninth Circuit panel in this case.

first to the proceedings in the District Court.

In July 2010, a grand jury returned a multicount indictment against Sineneng-Smith, including three counts of violating §1324, three counts of mail fraud in violation of 18 U. S. C. §1341, and two counts of willfully subscribing to a false tax return in violation of 26 U. S. C. §7206(1). Sineneng-Smith pleaded guilty to the tax-fraud counts, App. to Pet. for Cert. 78a–79a, and did not pursue on appeal the two mail-fraud counts on which she was ultimately convicted. We therefore concentrate this description on her defenses against the §1324 charges.

Before trial, Sineneng-Smith moved to dismiss the §1324 counts. Motion to Dismiss in No. 10–cr–414 (ND Cal.). She asserted first that the conduct with which she was charged—advising and assisting aliens about labor certifications—is not proscribed by §1324(a)(1)(A)(iv) and (B)(i). Being hired to file lawful applications on behalf of aliens already residing in the United States, she maintained, did not "encourage" or "induce" them to remain in this country. *Id.*, at 7–13. Next, she urged, alternatively, that clause (iv) is unconstitutionally vague and therefore did not provide fair notice that her conduct was prohibited, *id.*, at 13–18, or should rank as a content-based restraint on her speech, *id.*, at 22–24. She further asserted that she has a right safeguarded to her by the Petition and Free Speech Clauses of the First Amendment to file applications on her clients' behalf. *Id.,* at 20–25. Nowhere did she so much as hint that the statute is infirm, not because her own conduct is protected, but because it trenches on the First Amendment sheltered expression of others.

The District Court denied the motion to dismiss, holding that Sineneng-Smith could "encourag[e]" noncitizens to remain in the country, within the meaning of §1324(a)(1)(A)(iv), "[b]y suggesting to [them] that the applications she would make on their behalf, in exchange for their payments, would allow them to eventually obtain

legal permanent residency in the United States." App. to Pet. for Cert. 73a. The court also rejected Sineneng-Smith's constitutional arguments, reasoning that she was prosecuted, not for filing clients' applications, but for falsely representing to noncitizens that her efforts, for which she collected sizable fees, would enable them to gain lawful status. *Id.*, at 75a.

After a 12-day trial, the jury found Sineneng-Smith guilty on the three §1324 counts charged in the indictment, along with the three mail-fraud counts. App. 118–121. Sineneng-Smith then moved for a judgment of acquittal. She renewed, "almost verbatim," the arguments made in her motion to dismiss, App. to Pet. for Cert. 65a, and the District Court rejected those arguments "[f]or the same reasons as the court expressed in its order denying Sineneng-Smith's motion to dismiss," *ibid.* She simultaneously urged that the evidence did not support the verdicts. Motion for Judgt. of Acquittal in No. 10–cr–414 (ND Cal.), at 1–14. The District Court found the evidence sufficient as to two of the three §1324 counts and two of the three mail-fraud counts. App. to Pet. for Cert. 67a.[5]

Sineneng-Smith's appeal to the Ninth Circuit from the District Court's §1324 convictions commenced unremarkably. On brief and at oral argument, she reasserted the self-regarding arguments twice rehearsed, initially in her motion to dismiss, and later in her motion for acquittal. Brief for Appellant in No. 15–10614 (CA9), at 9–27, 35–41; Recording of Oral Arg. (Apr. 18, 2017), at 37:00–39:40; see *supra*, at 5. With the appeal poised for decision based upon the parties' presentations, the appeals panel intervened. It ordered further briefing, App. 122–124, but not from the

[5]The court sentenced Sineneng-Smith to 18 months on each of the remaining counts; three years of supervised release on the §1324 and mail-fraud counts; and one year of supervised release on the filing of false tax returns count, all to run concurrently. She was also ordered to pay $43,550 in restitution, a $15,000 fine, and a $600 special assessment.

parties. Instead, it named three organizations—"the Federal Defender Organizations of the Ninth Circuit (as a group)[,] the Immigrant Defense Project[,] and the National Immigration Project of the National Lawyers Guild"—and invited them to file *amicus* briefs on three issues:

> "1. Whether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?
>
> "2. Whether the statute of conviction is void for vagueness or likely void for vagueness, either under the First Amendment or the Fifth Amendment, and if so, whether any permissible limiting construction would cure the constitutional vagueness problem?
>
> "3. Whether the statute of conviction contains an implicit *mens rea* element which the Court should enunciate. If so: (a) what should that *mens rea* element be; and (b) would such a *mens rea* element cure any serious constitutional problems the Court might determine existed?" *Ibid.*

Counsel for the parties were permitted, but "not required," to file supplemental briefs "*limited to responding to any and all amicus/amici briefs*." *Id.*, at 123 (emphasis added). Invited *amici* and *amici* not specifically invited to file were free to "brief such further issues as they, respectively, believe the law, and the record calls for." *Ibid.* The panel gave invited *amici* 20 minutes for argument, and allocated only 10 minutes to Sineneng-Smith's counsel. Reargument Order in No. 15–10614 (CA9), Doc. No. 92. Of the three specified areas of inquiry, the panel reached only the first, holding that §1324(a)(1)(A)(iv) was facially overbroad under the First Amendment, 910 F. 3d, at 483–485, and was not susceptible to a permissible limiting construction, *id.,* at 472, 479.

True, in the redone appeal, Sineneng-Smith's counsel

adopted without elaboration counsel for *amici*'s overbreadth arguments. See Supplemental Brief for Appellant in No. 15–10614 (CA9), p. 1. How could she do otherwise? Understandably, she rode with an argument suggested by the panel. In the panel's adjudication, her own arguments, differently directed, fell by the wayside, for they did not mesh with the panel's overbreadth theory of the case.

II

No extraordinary circumstances justified the panel's takeover of the appeal. Sineneng-Smith herself had raised a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others. Electing not to address the party-presented controversy, the panel projected that §1324(a)(1)(A)(iv) might cover a wide swath of protected speech, including political advocacy, legal advice, even a grandmother's plea to her alien grandchild to remain in the United States. 910 F. 3d, at 483–484.[6] Nevermind that Sineneng-Smith's counsel had presented a contrary theory of the case in the District Court, and that this Court has repeatedly warned that "invalidation for [First Amendment] overbreadth is 'strong medicine' that is not to be 'casually employed.'" *United States* v. *Williams*, 553 U. S. 285, 293 (2008) (quoting *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 39 (1999)).

As earlier observed, see *supra,* at 4, a court is not hidebound by the precise arguments of counsel, but the Ninth Circuit's radical transformation of this case goes well beyond the pale.

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[6] The Solicitor General maintained that the statute does not reach protected speech. Brief for United States 32. In the Government's view, §1324(a)(1)(A)(iv) should be construed to prohibit only speech facilitating or soliciting illegal activity, thus falling within the exception to the First Amendment for speech integral to criminal conduct. *Id.*, at 22–26, 31 (citing *United States* v. *Williams*, 553 U. S. 285, 298 (2008)).

* * *

For the reasons stated, we vacate the Ninth Circuit's judgment and remand the case for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties.

It is so ordered.

Addendum of cases, 2015–2020, in which this Court called for supplemental briefing or appointed *amicus curiae*

This Court has sought supplemental briefing: to determine whether a case presented a controversy suitable for the Court's review, *Trump* v. *Mazars USA, LLP*, *post*, p. ___ (ordering briefing on application of political question doctrine and related justiciability principles); *Frank* v. *Gaos*, 586 U. S. ___ (2018) (ordering briefing on Article III standing); *Wittman* v. *Personhuballah*, 576 U. S. 1093 (2015) (same); Docket Entry in *Gloucester County School Bd.* v. *G. G.*, O. T. 2016, No. 16–273 (Feb. 23, 2017) (ordering briefing on intervening Department of Education and Department of Justice guidance document); *Kingdomware Technologies, Inc.* v. *United States*, 577 U. S. 970 (2015) (ordering briefing on mootness); to determine whether the case could be resolved on a basis narrower than the question presented, *Zubik* v. *Burwell*, 578 U. S. ___ (2016) (ordering briefing on whether the plaintiffs could obtain relief without entirely invalidating challenged federal regulations); and to clarify an issue or argument the parties raised, *Google LLC* v. *Oracle America, Inc.*, *post*, p.___ (ordering further briefing on the parties' dispute over the standard of review applicable to the question presented); *Babb* v. *Wilkie*, 589 U. S. ___ (2020) (ordering briefing on an assertion counsel made for the first time at oral argument about alternative remedies available to the plaintiff); *Sharp* v. *Murphy*, reported *sub nom. Carpenter* v. *Murphy*, 586 U. S. ___ (2018) (ordering briefing on the implications of the parties' statutory interpretations).

In rare instances, we have ordered briefing on a constitutional issue implicated, but not directly presented, by the question on which we granted certiorari. See *Jennings* v. *Rodriguez*, 580 U. S. ___ (2016) (in a case about availability of a bond hearing under a statute mandating detention of

certain noncitizens, briefing ordered on whether the Constitution requires such a hearing); *Johnson* v. *United States*, 574 U. S. 1069 (2015) (in a case involving interpretation of the Armed Career Criminal Act's residual clause, briefing ordered on whether that clause is unconstitutionally vague). But in both cases, the parties had raised the relevant constitutional challenge in lower courts; the question was not interjected into the case for the first time by an appellate forum. In *Jennings*, moreover, the parties' statutory arguments turned expressly on the constitutional issue. *Jennings* v. *Rodriguez*, 583 U. S. ___ (2018). And in *Johnson*, although this Court had interpreted the Act's residual clause four times in the preceding nine years, there still remained "pervasive disagreement" in the lower courts about its application. *Johnson* v. *United States*, 576 U. S. 591, 601 (2015).

We have appointed *amicus curiae*: to present argument in support of the judgment below when a prevailing party has declined to defend the lower court's decision or an aspect of it, *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 589 U. S. ___ (2019); *Holguin-Hernandez* v. *United States*, 588 U. S. ___ (2019); *Culbertson* v. *Berryhill*, 584 U. S. ___ (2018); *Lucia* v. *SEC*, 583 U. S. ___ (2018); *Beckles* v. *United States*, 579 U. S. ___ (2016); *Welch* v. *United States*, 577 U. S. 1098 (2016); *McLane Co.* v. *EEOC*, 580 U. S. ___ (2016); *Green* v. *Brennan*, 576 U. S. 1087 (2015); *Reyes Mata* v. *Lynch*, reported *sub nom. Reyes Mata* v. *Holder*, 574 U. S. 1118 (2015); and to address the Court's jurisdiction to decide the question presented, *Montgomery* v. *Louisiana*, 575 U. S. 933 (2015).

SUPREME COURT OF THE UNITED STATES

No. 19–67

UNITED STATES, PETITIONER *v.* EVELYN SINENENG-SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 7, 2020]

JUSTICE THOMAS, concurring.

I agree with the Court that the Ninth Circuit abused its discretion in reaching out to decide whether 8 U. S. C. §1324(a)(1)(A)(iv) is unconstitutionally overbroad. In my view, however, the Court of Appeals' decision violates far more than the party presentation rule. The merits of that decision also highlight the troubling nature of this Court's overbreadth doctrine. That doctrine provides that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States* v. *Stevens*, 559 U. S. 460, 473 (2010) (quoting *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449, n. 6 (2008)). Although I have previously joined the Court in applying this doctrine, I have since developed doubts about its origins and application. It appears that the overbreadth doctrine lacks any basis in the Constitution's text, violates the usual standard for facial challenges, and contravenes traditional standing principles. I would therefore consider revisiting this doctrine in an appropriate case.

I

This Court's overbreadth jurisprudence is untethered from the text and history of the First Amendment. It first

emerged in the mid-20th century. In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), the Court determined that an antipicketing statute was "invalid on its face" due to its "sweeping proscription of freedom of discussion," *id.*, at 101–105. The Court rejected the State's argument that the statute was constitutional because it was "limited or restricted in its application" to proscribable "violence and breaches of the peace [that] are the concomitants of picketing." *Id.*, at 105. Without considering whether the defendant's actual conduct was entitled to First Amendment protection, the Court concluded that the law was unconstitutional because it "d[id] not aim specifically at evils within the allowable area of state control but, on the contrary, swe[pt] within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Id.*, at 97.

Since then, the Court has invoked this rationale to facially invalidate a wide range of laws, from statutes enacted by Congress, see, *e.g., Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234 (2002), to measures passed by city officials, see, *e.g., Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987). These laws covered a variety of subjects, from nudity in drive-in movies, *Erznoznik* v. *Jacksonville*, 422 U. S. 205 (1975), to charitable solicitations, *Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620 (1980), to depictions of animal cruelty, *Stevens*, *supra*, at 460. And all these laws were considered unconstitutional not because they necessarily violated an individual's First Amendment rights but "because of a judicial prediction or assumption that the statute's very existence *may* cause [some citizens] to refrain from constitutionally protected [activity]." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973) (emphasis added); see also *Erznoznik*, *supra*, at 216.

Notably, this Court has not attempted to ground its void-for-overbreadth rule in the text or history of the First

Amendment. It did not do so in *Thornhill*, and it has not done so since. Rather, the Court has justified this doctrine solely by reference to policy considerations and value judgments. See *New York* v. *Ferber*, 458 U. S. 747, 768–769 (1982). It has stated that facially invalidating overbroad statutes is sometimes necessary because "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society," and thus "need breathing space to survive."* *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). And, in the context of the freedom of speech, the Court has justified the overbreadth doctrine's departure from traditional principles of adjudication by noting free speech's "transcendent value to all society, and not merely to those exercising their rights." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).

In order to protect this "transcendent" right, *ibid.*, the Court will deem a statute unconstitutional when, in "the judgment of this Court[,] the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of [the] statut[e]."

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*The Court often discusses the doctrine as applying in the context of "First Amendment rights" more generally. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–613 (1973); see also *NAACP* v. *Button*, 371 U. S. 415, 433 (1963) (discussing "the First Amendment freedoms"). Such arguments are typically raised in free speech cases, but the Court has occasionally entertained overbreadth challenges invoking the freedom of the press, see, *e.g., Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and the freedom of association, see, *e.g., Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967). Curiously, however, the Court has never applied this doctrine in the context of the First Amendment's Religion Clauses. In fact, the Court currently applies a far less protective standard to free exercise claims, upholding laws that substantially burden religious exercise so long as they are neutral and generally applicable. See *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). The Court has never acknowledged, much less explained, this discrepancy.

Broadrick, *supra*, at 612. In other words, the doctrine is driven by a judicial determination of what serves the public good. But there is "no evidence [from the founding] indicat[ing] that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare." Campbell, Natural Rights and the First Amendment, 127 Yale L. J. 246, 259 (2017). This makes sense given that the Founders viewed value judgments and policy considerations to be the work of legislatures, not unelected judges. See *Obergefell* v. *Hodges*, 576 U. S. 644, 709 (2015) (ROBERTS, C. J., dissenting). Nevertheless, such judgments appear to be the very foundation upon which this Court's modern overbreadth doctrine was built.

Perhaps unsurprisingly, the overbreadth doctrine shares a close relationship with this Court's questionable vagueness doctrine. See *Johnson* v. *United States*, 576 U. S. 591, 611–623 (2015) (THOMAS, J., concurring in judgment). In fact, it appears that the Court's void-for-overbreadth rule developed as a result of the vagueness doctrine's application in the First Amendment context. For example, this Court's decision in *Thornhill*, which is recognized as "the fountainhead of the overbreadth doctrine," Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 11, cited a vagueness precedent in support of its overbreadth analysis. 310 U. S., at 96 (citing *Stromberg* v. *California*, 283 U. S. 359, 367 (1931)). And the decision expressed concerns regarding the antipicketing statute's "vague" terms with "no ascertainable meaning" and their resulting potential for "discriminatory enforcement." *Thornhill*, *supra*, at 97–98, 100–101; cf. *Chicago* v. *Morales*, 527 U. S. 41, 56 (1999) (opinion of Stevens, J.). As the overbreadth doctrine has developed, it has "almost wholly merged" with the vagueness doctrine as applied to "statutes covering [F]irst [A]mendment activities." Sargentich, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 873 (1970). Given the dubious

origins of the vagueness doctrine, I find this shared history "unsettling." *Johnson*, *supra*, at 621 (opinion of THOMAS, J.).

II

In addition to its questionable origins, the overbreadth doctrine violates the usual standard for facial challenges. Typically, this Court will deem a statute unconstitutional on its face only if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). But the overbreadth doctrine empowers courts to hold statutes facially unconstitutional even when they can be validly applied in numerous circumstances, including the very case before the court.

By lowering the bar for facial challenges in the First Amendment context, the overbreadth doctrine exacerbates the many pitfalls of what is already a "disfavored" method of adjudication. *Washington State Grange*, 552 U. S., at 450. "[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U. S., at 610–611. But when a court entertains—or in this case, seeks out—an overbreadth challenge, it casts aside the "judicial restraint" necessary to avoid "'premature'" and "'unnecessary pronouncement[s] on constitutional issues.'" *Washington State Grange*, *supra*, at 450 (quoting *United States* v. *Raines*, 362 U. S. 17, 22 (1960)). This principle of restraint has long served as a fundamental limit on the scope of judicial power. See *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). "[T]here is good evidence that courts [in the early Republic] understood judicial review to consist [simply] 'of a refusal to give a statute effect as operative law in resolving a case'" once that statute was determined to be unconstitutional. *Johnson*, *supra*, at 615 (opinion of THOMAS, J.) (quoting Walsh, Partial Unconstitutionality, 85 N. Y. U. L.

Rev. 738, 756 (2010)). Thus, our "modern practice of strik[ing] down" legislation as facially unconstitutional bears little resemblance to the practices of 18th and 19th century courts. *Johnson*, *supra*, at 615 (opinion of THOMAS, J.) (internal quotation marks omitted); see also Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018) ("[F]ederal courts have no authority to erase a duly enacted law from the statute books").

Moreover, by relaxing the standard for facial challenges, the overbreadth doctrine encourages "speculat[ion]" about "'imaginary' cases," *Washington State Grange*, *supra*, at 450 (quoting *Raines*, *supra*, at 22), and "summon[s] forth an endless stream of fanciful hypotheticals," *United States* v. *Williams*, 553 U. S. 285, 301 (2008). And, when a court invalidates a statute based on its theoretical, illicit applications at the expense of its real-world, lawful applications, the court "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange*, *supra*, at 451.

Collaterally, this Court has a tendency to lower the bar for facial challenges when preferred rights are at stake. See, *e.g., Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). This ad hoc approach to constitutional adjudication impermissibly expands the judicial power and "reduc[es] constitutional law to policy-driven value judgments." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ___, ___ (2016) (THOMAS, J., dissenting) (slip op., at 16). We ought to "abid[e] by one set of rules to adjudicate constitutional rights," *ibid.*, particularly when it comes to the disfavored practice of facial challenges.

III

Finally, by allowing individuals to challenge a statute based on a third party's constitutional rights, the over-

breadth doctrine is at odds with traditional standing principles. This Court has long adhered to the rule that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991); see also *Clark* v. *Kansas City*, 176 U. S. 114, 118 (1900); *Owings* v. *Norwood's Lessee*, 5 Cranch 344, 348 (1809) (Marshall, C. J.). The Court has created a "limited" exception to this rule, allowing third-party standing in certain cases in which the litigant has "a close relation to the third-party" and there is a substantial "hindrance to the third party's ability to protect his or her own interests." *Powers*, *supra*, at 410–411. Litigants raising overbreadth challenges rarely satisfy either requirement, but the Court nevertheless allows third-party standing to "avoi[d] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski*, 380 U. S., at 487. As I have previously explained, this Court "has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate." *Whole Women's Health*, *supra,* at ___ (THOMAS, J., dissenting) (slip op., at 16).

The overbreadth doctrine's disregard for the general rule against third-party standing is especially problematic in light of the rule's apparent roots in Article III's case-or-controversy requirement. Although the modern Court has characterized the rule as a prudential rather than jurisdictional matter, see *Craig* v. *Boren*, 429 U. S. 190, 193 (1976), it has never provided a substantive justification for that assertion. And the Court has admitted that this rule against third-party standing is "not always clearly distinguished from the constitutional limitation[s]" on standing, *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953); is "closely related to Art[icle] III concerns," *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975); and even is "grounded in Art[icle] III limits on the

jurisdiction of federal courts to actual cases and controversies," *Ferber*, 458 U. S., at 767, n. 20.

These statements find support in a historical understanding of Article III. To understand the scope of the Constitution's case-or-controversy requirement, "we must 'refer directly to the traditional, fundamental limitations upon the powers of common-law courts.'" *Spokeo, Inc.* v. *Robins*, 578 U. S. ___, ___ (2016) (THOMAS, J., concurring) (slip op., at 2) (quoting *Honig* v. *Doe*, 484 U. S. 305, 340 (1988) (Scalia, J., dissenting)). "Common-law courts imposed different limitations on a plaintiff's right to bring suit depending on the type of right the plaintiff sought to vindicate." *Spokeo*, 578 U. S., at ___ (THOMAS, J., concurring) (slip op., at 2). "In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury [if] his personal, legal rights [were] invaded." *Ibid.* Personal constitutional rights, such as those protected under the First Amendment, are "private rights" in that they "'belon[g] to individuals, considered as individuals.'" *Ibid.* (quoting 3 W. Blackstone, Commentaries on the Laws of England *2); see also *Ferber*, *supra,* at 767 (recognizing "the personal nature of constitutional rights" as a "cardinal princip[e] of our constitutional order"); Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 287 (2008) (listing "First Amendment rights" as examples of private rights provided by the Constitution). Thus, when a litigant challenges a statute on the grounds that it has violated his First Amendment rights, he has alleged an injury sufficient to establish standing for his claim, regardless of the attendant damages or other real-world harms he may or may not have suffered.

Overbreadth doctrine turns this traditional common-law rule on its head: It allows a litigant without a legal injury to assert the First Amendment rights of hypothetical third parties, so long as he has personally suffered a real-world injury. See *Broadrick*, 413 U. S., at 612. In other words,

the litigant has no private right of his own that is genuinely at stake. See Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 722–723 (2004); see also Hessick, 93 Cornell L. Rev., at 280–281. At common law, this sort of "factual harm without a legal injury was *damnum absque injuria* and provided no basis for relief." *Ibid.* Courts adhered to the "obvious" and "ancient maxim" that one's real-world damages alone cannot "lay the foundation of an action . . . if the act complained of does not violate any of his legal rights." *Parker* v. *Griswold*, 17 Conn. *288, *302–*303 (1846).

Here, the overbreadth challenge embraced by respondent on appeal relied entirely on the free speech rights of others—immigration lawyers, activists, clergy, and even grandmothers. This is not terribly surprising given that the overbreadth arguments were developed by *amici* organizations that represent some of these third parties, not by respondent herself. See *ante,* at 7–8. Although it appears respondent lacked standing on appeal to assert the rights of individuals not before the court, she did have standing to seek relief for alleged violations of her own constitutional rights, which she raised before the Ninth Circuit commandeered her appeal. On remand, the Court of Appeals will be well within the bounds of its Article III jurisdiction in considering these narrower arguments.

* * *

The overbreadth doctrine appears to be the handiwork of judges, based on the misguided "notion that some constitutional rights demand preferential treatment." *Whole Woman's Health*, 579 U. S., at ___ (THOMAS, J., dissenting) (slip op., at 14). It seemingly lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges, and violates Article III principles regarding judicial power and standing. In an appropriate case, we should consider revisiting this doctrine.

Third District Court of Appeal

State of Florida

Opinion filed May 6, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1203
Lower Tribunal No. 17-82

Miami-Dade County, Florida,
Petitioner,

vs.

Publix Supermarkets, Inc.,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Appellate Division, Barbara Areces, Celeste Hardee Muir and William Thomas, Judges.

Abigail Price-Williams, Miami-Dade County Attorney, and Dennis Kerbel and Kevin Marker, Assistant County Attorneys, for petitioner.

Greenspoon Marder LLP, and Louis J. Terminello, for respondent.

Before HENDON, MILLER and LOBREE, JJ.

LOBREE, J.

Miami-Dade County (the "County") petitions for second-tier certiorari review of the circuit court's appellate division's order quashing its Community Zoning Appeals Board (the "CZAB") denial of a zoning special exception and nonuse variance sought by Publix Supermarkets, Inc. ("Publix"). Because we agree that the circuit court failed to observe the essential requirements of law in conducting its first-tier certiorari review, we grant the petition.

Factual and Procedural Background

Publix sought to open a liquor store close to one of its grocery stores. Zoning regulations generally prohibit alcoholic beverage retailers in commercial-zoned areas from being within 1,500 feet of each another. Because there existed at least one such retailer ("the objector") within 1,500 feet of the proposed location, Publix sought an exception, as well as a nonuse variance for year-round alcohol sales on Sundays.

At the hearing, the CZAB staff preliminarily recommended approval, noting the venture's minimal impact on the surrounding area and its compatibility with other zoning regulations, as well as recommending conditions for the use. Publix's counsel emphasized that, but for the County's "anomal[ous]" distance requirement, Publix would be entitled as of right to open its liquor store, as it has allegedly done in other Florida counties. To buttress its claim, Publix introduced a liquor survey at the hearing showing that the objector itself was within 1,500 feet of eight other

similar retailers. The objector took part in the proceedings and opposed Publix, arguing that denial was required in light of the County's policy of reducing the harm of inappropriate drinking, the current saturation of the area with such establishments, a petition signed by some neighbors in opposition, and the likelihood that Publix's venture would put the objector out of business.

Publix argued that the only opposition to its applications was based on the speculative economic interest of the objector, whereas special exceptions and nonuse variances could only be denied if the express, relevant criteria of the code were not met by the applicant, which, in this case, were met. The CZAB denied the special exception because it "would not be compatible with the area and its development" and "would have an adverse impact upon the public interest," and denied the variance on the grounds that it "would not be in harmony with the general purpose and intent of the regulations." Successfully seeking first-tier certiorari in the circuit court, Publix obtained a decision quashing the CZAB's denial. The majority of the circuit panel held that the CZAB made insufficient findings, relevantly noting:

> [The objector] did not meet its burden to demonstrate that Publix's requests fail to meet the standards and are adverse to public interest. See Jesus Fellowship, Inc. [v. Miami-Dade County], 752 So. 2d [708 (Fla. 3d DCA 2000)]. The zoning appeals board afforded Publix procedural due process and complied with the essential requirements of the law. However, the zoning appeals board decision was not supported by competent substantial evidence.

In her dissent, however, Judge Muir argued that the correct standard was whether competent, substantial evidence in the record supported the CZAB's denial, not whether such evidence supported the objector's opposition. Charging error to the circuit court's decision on that same basis and arguing that it applied the incorrect law in reviewing the CZAB's denial, the County now seeks second-tier certiorari.

Certiorari Jurisdiction

On first-tier certiorari, a circuit court may make a full review of a zoning appeals board's decision by focusing on whether: (a) procedural due process was afforded by the agency; (b) the essential requirements of law were observed; and (c) its findings and decisions were supported by competent, substantial evidence. See Fla. Power & Light v. City of Dania, 761 So. 2d 1089, 1092 (Fla. 2000). On second-tier certiorari, this court may only consider "whether the circuit court applied the correct law, or . . . departed from the essential requirements of law." Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1092 (Fla. 2010). "A departure from the essential requirements of law is more than 'simple legal error'" but rather it is when "the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice." Fla. Wellness & Rehab. Ctr., Inc. v. Mark J. Feldman, P.A., 276 So. 3d 884, 888 (Fla. 3d DCA 2019) (quoting Custer, 62 So. 3d at 1092).

A circuit court's application of incorrect evidentiary standards in conducting first-tier certiorari can amount to a departure from the essential requirements of law.

See, e.g., Dep't of Highway Safety v. Baird, 175 So. 3d 363, 366 (Fla. 3d DCA 2015); Jesus Fellowship, 752 So. 2d at 711 (quashing circuit court's order for failure to apply correct law governing both review of special exceptions and what constitutes as competent, substantial evidence in such cases); City of Dania, 761 So. 2d at 1994 (quashing circuit court's order and remanding for it to apply standard in City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982), and to "review the record to determine simply whether the Commission's decision is *supported* by competent substantial evidence") (emphasis in original). Unless not supported by any competent, substantial evidence in the record as a whole, circuit courts must defer to an agency's findings. See Dep't of Highway Safety & Motor Vehicles v. Hirtzel, 163 So. 3d 527, 529 (Fla. 1st DCA 2015).

This case is controlled by City of Dania, 761 So. 2d at 1089. There, a zoning body denied an applicant's request for a special exception. Id. at 1090. On first-tier certiorari, reviewing only for competent, substantial evidence, the circuit court quashed the denial because, although applicants had met their burden of proof at the hearing, it concluded that the opponents had not, and their failure to show competent, substantial evidence invalidated the agency's decision. Id. On second-tier certiorari, the Fourth District Court of Appeal quashed the lower court's order, finding that it improperly "re-assess[ed] the record for competent substantial evidence," instead of determining whether "[t]he record as a whole contain[ed] substantial competent

evidence to support a denial." Id. at 1091. The Florida Supreme Court subsequently agreed, holding that the circuit court applied the incorrect law when it resorted to determining whether the agency correctly applied the burden-shifting rule from Irvine v. Duval Cty. Planning Comm'n, 495 So. 2d 167 (Fla. 1986). City of Dania, 761 So. 2d at 1092.

City of Dania explains that the Irvine rule is a standard of proof that local government bodies alone must follow, requiring quasi-judicial officers to grant an exception if, after an applicant has met the initial burden of showing that the statutory criteria are met, the opponent fails to produce competent, substantial evidence that granting it would be adverse to the public interest. Id. The Vaillant standard, on the other hand, requires solely a circuit court's review of an agency's decision for due process, essential requirements of law, and competent, substantial evidence. Vaillant, 419 So. 2d at 625.

Here, as in City of Dania, the circuit court's sole rationale for quashing the CZAB's decision was that its findings were not supported by competent, substantial evidence, because its review of the proceedings purportedly revealed that the objector had failed to meet its burden of proof under Irvine. As noted by Judge Muir's dissent, the majority failed to review the entire record for any competent, substantial evidence supporting the CZAB's determination and findings, instead assessing the objector's showing and evidence. Publix's attempts to distinguish City

of Dania and rely instead on Jesus Fellowship, 752 So. 2d at 708, are unavailing.[1] Circuit courts must be vigilant to apply the standard of review outlined in Vaillant and not the standard of proof set forth in Irvine. See Town of Manalapan v. Gyongyosi, 828 So. 2d 1029, 1033-34 (Fla. 4th DCA 2002) ("The court appears to have applied the 'competent substantial evidence' standard of proof, as set forth in Irvine. . . , rather than the standard of review. It found the existence of competent, substantial evidence to support respondents' assertion, which is not part of the review process outlined by Vaillant."); City of Jacksonville Beach v. Car Spa, Inc., 772 So. 2d 630, 632 (Fla. 1st DCA 2000) ("We conclude that the circuit court applied the wrong law to the extent that it failed to review the entire record to determine whether the Planning Commission's decision was supported by competent substantial evidence and, instead, reweighed the evidence, substituting its judgment regarding relative weight for that of the Planning Commission.").

This result does not mean that the circuit court could not have properly quashed the CZAB's resolution upon a proper application of the Vaillant standard,

[1] In Jesus Fellowship, 752 So. 2d at 711, which predates City of Dania, this court's analysis of the sufficiency of the evidence was ancillary to the primary task on second-tier certiorari of determining whether the circuit court applied the correct legal standard of "competent, substantial evidence" in reviewing the agency's decision. Here, unlike Jesus Fellowship, the dispute is not whether the circuit court applied Vaillant incorrectly, but whether it applied it at all. It did not, and this was error.

or additionally considered an appropriate challenge under Irvine. However, having ascertained from the face of the lower court's order that it applied the incorrect law by failing to apply Vaillant, this court's task on second-tier certiorari comes to an end, as further comment on the competency of the record would be a departure from settled law no less an exercise in "judicial tyranny" than the circuit court's error we now seek to correct. Compare City of Dania, 761 So. 2d at 1093 (disapproving of appellate court's comments on record below as themselves departure from law), with Vill. of Palmetto Bay v. Palmer Trinity Private Sch., Inc., 128 So. 3d 19, 21 (Fla. 3d DCA 2012) (deeming such departures from law acts of judicial tyranny). For these reasons, we conclude that the circuit court applied incorrect law to the facts below, departing from the essential requirements of law. We return this case to the circuit court to apply the three-prong standard of review, and when applying the third prong, the court should review the record to determine simply whether the CZAB's decision is supported by competent substantial evidence. City of Dania, 761 So. 2d at 1094.

Petition for writ of certiorari is granted and the opinion below is quashed with directions for further proceedings consistent herewith.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

RICHARD FIELDS and **D. BOSWORTH, LLC,**
Appellants,

v.

ROBERT TOUSSIE, MICHAEL TOUSSIE and **COASTAL DEVELOPMENT, LLC,**
Appellees.

Nos. 4D19-1610 & 4D19-1612

[May 6, 2020]

Consolidated appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John B. Bowman, Judge; L.T. Case No. 18-002364.

Michael W. Moskowitz and Scott M. Zaslav of Moskowitz, Mandell, Salim & Simonwitz, P.A., Fort Lauderdale, for appellants.

Alex P. Rosenthal and Amanda Jassem Jones of Rosenthal Law Group, Weston, for Appellee Robert Toussie.

PER CURIAM.

Appellants Coastal Development, LLC ("Coastal") and Richard Fields ("Fields") appeal the trial court's orders issuing a writ of bodily attachment against Fields and finding Fields, Coastal, and D. Bosworth, LLC in contempt of court for failure to provide discovery. We affirm on all issues.

Although Fields alleges the trial court abused its discretion by imposing incarceration as a civil contempt sanction and issuing a writ of bodily attachment against him without a second hearing, a second pre-incarceration hearing is generally not required when a trial court orders incarceration for past noncompliance. *See Hipschman v. Cochran*, 683 So. 2d 209, 212 (Fla. 4th DCA 1996). It may be necessary, however, "where the contempt order specifies compliance extra-judicially, i.e., by performance outside the auspices of the court or its adjuncts." *Id.* at 212-13. In this case, while the court did allow the appellee to file an ex parte affidavit of noncompliance to obtain the issuance of the writ, Fields' past noncompliance was not in dispute, admitting as much in his brief.

Therefore, a second hearing was unnecessary.

Affirmed.

WARNER, KLINGENSMITH and KUNTZ JJ. concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SKENDER HOTI and **BEBA HOTI,**
Appellants,

v.

U.S. BANK, N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS LEGAL TITLE TRUSTEE FOR BCAT 2016-18TT**,**
Appellee.

No. 4D20-289

[May 6, 2020]

Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; John S. Kastrenakes, Judge; L.T. Case No. 502015CA013534XXXXMB.

Arthur J. Morburger, Miami, for appellants.

Adam G. Schwartz of Fox McCluskey Bush Robison, PLLC, Stuart, for appellee.

ON MOTION TO RELINQUISH JURISDICTION

KUNTZ, J.

The borrowers, Skender and Beba Hoti, appeal the circuit court's order denying their second amended motion for relief from the final judgment of foreclosure under Florida Rule of Civil Procedure 1.540(b)(4). Among other grounds, the borrowers argued the judgment should be vacated for lack of jurisdiction because the circuit court entered the judgment after the case had been removed to federal court. The circuit court denied the motion, and the borrowers appealed. During this appeal, the lender moved to relinquish jurisdiction, similarly arguing the foreclosure judgment is void because it was entered when the circuit court lacked jurisdiction.

This opinion solely addresses the argument that the circuit court lacked jurisdiction to enter the final judgment of foreclosure. When the circuit court denied the motion for relief from judgment, it was bound to follow this Court's recent holding in *Ricci v. Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC*, 276 So. 3d 5 (Fla. 4th DCA), *review denied*, No.

SC19-1547, 2019 WL 7341587 (Fla. Dec. 30, 2019). *Ricci* analyzed the effect of the filing of a notice of removal on pending state court proceedings. *Id.* at 6. We held that the court should take no further action until remand:

> [T]he proper course of action regarding an order entered after notice of removal has been filed in the state court proceeding and before entry of a remand order is that: (1) the trial court and the parties take no action on the improperly issued state court order until a remand order is entered; (2) the trial court promptly vacate the order *sua sponte* or on motion of a party after the remand order is entered; and (3) the trial court immediately re-enter the vacated order with notice to the parties after the remand order is entered.

Id. at 10. We also discussed the effect of the state court's act of entering an order after removal and whether that order is void or voidable. *Id.* at 7-9. We stated that "[i]f Congress truly intended that any action taken by the state court during the removal period is void, it would have used words to that effect," *id.* at 8 (discussing 28 U.S.C. § 1446(d)), and that "a lack of subject matter jurisdiction makes an order void, whereas a lack of case jurisdiction generally renders an order voidable," *id.* at 8-9 (citation omitted).

After we issued *Ricci*, the United States Supreme Court issued an opinion addressing this issue. *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020). In that case, the Supreme Court held that, under 28 U.S.C. § 1446(d), when the notice of removal is filed, "[t]he state court 'los[es] all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment [are] not . . . simply erroneous, but absolutely void.'" *Id.* at 700 (alterations and omission in original) (quoting *Kern v. Huidekoper*, 103 U.S. 485, 493 (1881)).

The lender asks that we relinquish jurisdiction to account for a change in the law as a result of *Acevedo Feliciano*. The lender argues our opinion in *Ricci* required the circuit court to treat the order entered on remand as voidable while the more recent opinion from the United States Supreme Court requires that it be found void.

It is true that the Supreme Court's opinion requires us to find any order entered by the state court after removal to be void. *Acevedo Feliciano*, 140 S. Ct. at 700. But *Ricci* did not expressly conclude that an order entered during remand was voidable and not void—though it did strongly imply that conclusion. *See* 276 So. 3d at 8-9 ("[A] lack of subject matter jurisdiction makes an order void, whereas a lack of case jurisdiction

generally renders an order voidable." (citing *14302 Marina San Pablo Place SPE, LLC v. VCP-San Pablo, Ltd.*, 92 So. 3d 320, 321 (Fla. 1st DCA 2012) (Ray, J., concurring)).

Instead, in *Ricci*, we held that "we do not need to resolve" the apparent conflict in the law on whether the order was void or voidable. *Id.* at 9. And we held that if a state court enters an order after removal, the court should promptly vacate the order after the federal court remands the case. *Id.* at 10. That is not inconsistent with the Supreme Court's opinion in *Acevedo Feliciano*.

So that there is no confusion, an order entered by a state court after the filing of a notice of removal is void. *Acevedo Feliciano*, 140 S. Ct. at 700. Both *Ricci* and *Acevedo Feliciano* require a court to vacate any such order.

Here, the borrowers filed their notice of removal on September 22, 2017, and the federal court remanded the case one month later. But the circuit court entered the judgment of foreclosure during the short period between removal to the federal court and remand to the state court. As a result, the court's judgment is void. *See Acevedo Feliciano*, 140 S. Ct. at 700.

So we grant the lender's motion to relinquish jurisdiction in part. We grant the motion to the extent it asks that we relinquish jurisdiction to the circuit court to vacate the final judgment of foreclosure. But we deny the motion to the extent it asks that we direct the circuit court to reenter the final judgment on remand. After we dismiss this appeal for being moot, the circuit court may consider whether to reenter the final judgment in the first instance. *See Ricci*, 276 So. 3d at 6 ("[O]ur reversal is without prejudice for the trial court, *sua sponte* or upon motion, to immediately re-enter the order after vacating it, *with notice to the parties*." (second emphasis added)).

We relinquish jurisdiction for ninety days for the circuit court to vacate the final judgment of foreclosure. Within seven days of the court's order vacating the final judgment, the borrowers must file the order in this Court, and this appeal will be dismissed.

Motion to relinquish jurisdiction granted in part, denied in part.

WARNER and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.