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**United States Supreme Court**

**Lucia v. Securities and Exchange Commission**  
138 S. Ct. 2044 (2018)

**Synopsis:**

The Securities and Exchange Commission (SEC) charged Raymond Lucia under the Investment Advisers Act, and an Administrative Law Judge (ALJ) adjudicated the case. Lucia argued that the judge was invalid because he was not appointed by the President, a Court of Law, or a Head of Department, and it violated the Appointments Clause. Justice Kagan authored the majority opinion and agreed with Lucia that the ALJ was an “Officer of the United States” and his appointment did not comply with the Appointments Clause.

**Facts and Analysis:**

Raymond Lucia owned an investment company and “marketed a retirement savings strategy called ‘Buckets of Money’” to the SEC, which the SEC deemed “misleading.”1 “The SEC charged Lucia under the Investment Advisers Act . . . and assigned ALJ Cameron Elliot to adjudicate the case.”2

The SEC’s role is to “enforce the nation’s securities laws.”3 The SEC has five ALJs that preside over hearings when the SEC alleges a wrongdoing.4 “An ALJ assigned to hear an SEC enforcement action has extensive powers—the ‘authority to do all things necessary and appropriate to discharge his or her duties’ and ensure a ‘fair and orderly’ adversarial proceeding.”5 The ALJ has many abilities,
including the power to subpoena, administer oaths, decide motions, and at the end of a hearing, the ALJ issues an initial decision.\textsuperscript{6} The ALJ assigned to Lucia’s case, Judge Elliot, “issued an initial decision concluding that Lucia had violated the Act and imposed sanctions, including civil penalties of $300,000 and a lifetime bar from the investment industry.”\textsuperscript{7} Lucia appealed to the SEC, and argued that “the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed.”\textsuperscript{8} He argued that ALJs are “Officers of the United States” and because the ALJ was not appointed by the President, Courts of Law, or Heads of Departments, this was a violation of the Appointments Clause because “none of these actors had made Judge Elliot an ALJ.”\textsuperscript{9} If the head of the SEC appointed Judge Elliot, it would have been constitutional, but instead “the Commission had left the task of appointing ALJs, including Judge Elliot, to SEC staff members.”\textsuperscript{10} The SEC argued that the ALJs are not officers, but employees, and therefore, do not need an appointment from one of the three aforementioned groups.\textsuperscript{11} Through the appeals, the Federal government “had defended the Commission’s position that SEC ALJs are employees, not officers. But in responding to Lucia’s petition, the Government switched sides.”\textsuperscript{12} This case is defended by an \textit{amicus curiae}.\textsuperscript{13}

The Court examined the difference between employees and officers of the government on the precedent of \textit{Buckley v. Valeo}.\textsuperscript{14} \textit{Buckley} “determined that members of a federal commission were officers only after finding that they ‘exercis[ed] significant authority pursuant to the laws of the United States.’”\textsuperscript{15} However, the Court

\begin{itemize}
\item\textsuperscript{6} \textit{Id.}
\item\textsuperscript{7} \textit{Id.} at 2050.
\item\textsuperscript{8} \textit{Id.}
\item\textsuperscript{9} \textit{Id.}
\item\textsuperscript{10} \textit{Id.}
\item\textsuperscript{11} \textit{Id.}
\item\textsuperscript{12} \textit{Id.}
\item\textsuperscript{13} \textit{Id.} at 2051.
\item\textsuperscript{14} \textit{Id.; see Buckley v. Valeo, 424 U.S. 1, 126 (1976).}
\item\textsuperscript{15} \textit{Buckley, 424 U.S. at 126.}
\end{itemize}
rejected this way of determining whether or not an ALJ is an officer and instead, relied on *Freytag v. Commissioner*, where the Court “applied the unadorned ‘significant authority’ test to adjudicative officials who are near-carbon copies of the Commission’s ALJs.”

In *Freytag*, the judges were “special trial judges” (STJ) in Tax Court. The Court ruled that “the Tax Court’s STJs are officers, not mere employees.” *Freytag* discussed four factors that influenced the holding, which are applied to *Lucia*. The first factor is whether or not the ALJs take testimony. Both ALJs and STJs receive evidence and examine witnesses, which the Court in *Freytag* said goes to STJs being classified as officers. The second factor is the fact that ALJs, like STJs, “conduct trials.” The third factor is both ALJs and STJs “rule on the admissibility of evidence.” Lastly, ALJs and STJs “have the power to enforce compliance with discovery orders.”

This Court agreed with *Freytag*, stating, “[s]o point for point—straight from *Freytag*’s list—the Commission’s ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries . . . If the Tax Court’s STJs are officers, as *Freytag* held, then the Commission’s ALJs must be too.” The *amicus* brings up two distinctions between ALJs and STJs that the Court considered but ultimately rejected. One is that “the Commission’s ALJs have less capacious power to sanction misconduct” and two, in *Tax Court*, the “STJ’s findings of fact ‘shall be presumed’ correct” although “the SEC’s regulations include no

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17 *Lucia*, 138 S. Ct. at 2052.
18 *Id.*
19 *Id.*
20 *Id.* at 2053.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 2053–54.
27 *Id.* at 2054.
28 *Id.*
such deferential standard.” 29 But, the Court rejected these claims, stating, “those distinctions make no difference for officer status.” 30

Holding:

The Court in Lucia relied heavily on Freytag. Here, because of the striking similarities between STJs and ALJs, the Lucia analysis was analogous to the reasoning in Freytag. In sum, ALJs are officers of the United States, not employees. 31 Therefore, ALJs need to be appointed under the Appointments Clause. 32 The Court also addressed the remedial relief. 33 The Court held that “the ‘appropriate’ remedy for an adjudication tainted with an appointments violation is a new ‘hearing before a properly appointed’ official.” 34 The dissent argues that “Commission ALJs are not officers because they lack final decision making authority.” 35

Impact:

One of the minor impacts of Lucia is on the process in which ALJs are appointed. Instead of being appointed by staff of the SEC, ALJs must be appointed by the SEC itself. A larger impact could be challenges to different judges—such as immigration or other administrative judges who work for different agencies. If it is determined that these judges also need to be appointed under the Appointments Clause, it could be a massive overhaul of the way in which agencies appoint judges.

29 Id.
30 Id.
31 Id.
32 Id.
33 Id. at 2055.
34 Id.
35 Id. at 2066.
McCoy v. Louisiana
138 S. Ct. 1500 (2018)

Synopsis:

Robert McCoy was convicted of first-degree murder and given three death sentences by a jury. He argued that his lawyer, Larry English, violated his constitutional rights by allowing English to concede McCoy’s guilt over McCoy’s objections. The Supreme Court, in a 6-3 decision, ruled in favor of McCoy, arguing that the guilt concession was a violation of McCoy’s Sixth Amendment right, which guarantees a defendant the right to direct his or her counsel to refrain from admitting guilt.

Facts and Analysis:

In 2008, there was a triple homicide of the mother, stepfather, and son of Robert McCoy’s ex-wife.36 McCoy was arrested in Idaho a few days later, though he argued that he was out of state and that he was framed by local police.37 Some evidence that the police had against McCoy are as follows: McCoy’s mother-in-law was heard screaming McCoy’s name, when McCoy was arrested, the gun in his possession was linked to the murders, and receipts for the ammunition were found in the getaway car.38 Despite this overwhelming evidence, McCoy insisted that he was innocent and told his attorney, Larry English, “not to make that concession [of guilt].”39 Two days before his trial, English asked to be removed as McCoy’s counsel because “absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase.”40 The trial court did not relieve English of his duties so close to the trial, and English proceeded with his strategy of

37 Id. at 1506.
38 Id. at 1513.
39 Id. at 1506.
40 Id.
conceding guilt in order to save McCoy from the death penalty.\footnote{id} McCoy protested English’s tactics and even testified to his innocence.\footnote{id} At closing, English reiterated McCoy’s guilt, but asked the jury for mercy in the penalty phase.\footnote{id} The jury returned a verdict of guilty on all counts and three death verdicts.\footnote{id} McCoy retained a new attorney and argued that his constitutional rights were violated because English conceded McCoy’s guilt even though McCoy objected repeatedly.\footnote{id} The Louisiana Supreme Court ruled that “the concession was permissible . . . because counsel reasonably believed that admitting guilt afforded McCoy the best chance to avoid a death sentence.”\footnote{id}

The issue that the Supreme Court addresses is “whether it is unconstitutional to allow defense counsel to concede guilt over the defendant’s intransigent and unambiguous objection.”\footnote{id} The Court says that under the Sixth Amendment, a criminal defendant is guaranteed “Assistance of Counsel,” which means that “a defendant need not surrender control entirely to counsel.”\footnote{id} This means that while counsel has control over which arguments to use, the objections, evidence admission, and decisions like “whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal” are reserved for the client.\footnote{id} The attorney can make choices about strategy, but when it comes to the objectives of the trial, those choices are for the client to make.\footnote{id} There are a myriad of reasons in which a client would choose to maintain innocence in the face of overwhelming guilt, and “when a client expressly asserts that the objective of ‘his defence’ is to maintain innocence of the charged

\footnote{id} Id.
\footnote{id} Id. at 1507.
\footnote{id} Id.
\footnote{id} Id.
\footnote{id} Id.
\footnote{id} Id.
\footnote{id} Id. at 1507–08.
\footnote{id} Id. at 1508.
\footnote{id} Id.
criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt."51

Another issue the Court addresses is English’s ethical obligations to McCoy.52 Here, “English’s express motivation for conceding guilt was not to avoid subornig perjury, but to try and build credibility with the jury, and thus obtain a sentence lesser than death.”53 The Court asserts that if English was not presenting McCoy’s alibi because he knew it was perjury, then he would have been complying with the ABA Model Rules of Professional Conduct.54 However, English “simply disbelieved McCoy’s account in view of the prosecution’s evidence” and because this was a trial strategy to avoid the death penalty, there is not an ABA Rule that required English to ignore McCoy’s wishes.55

**Holding:**

The holding of McCoy turns on the fact that McCoy objected to English throughout the trial. This differs from Florida v. Nixon,56 where the lawyer conceded Nixon’s guilt and Nixon “complained about the admission of his guilty only after trial.”57 Because Nixon “never asserted any objection,” his silence was interpreted as consent to his attorney’s strategy.58 On the other hand, McCoy objected throughout, and “it was not open to English to override McCoy’s objection.”59 Another consideration that determined the holding in this case was “the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.”60 While English was trying to protect McCoy from

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51 Id. at 1508–09.
52 Id. at 1510.
53 Id.
54 Id.
55 Id.
57 McCoy, 138 S. Ct. at 1509.
58 Id.
59 Id.
60 Id. at 1511.
the death penalty, his choice to override McCoy’s decision for his trial objective “was incompatible with the Sixth Amendment.”

**Impact:**

The impact of McCoy is debated amongst the justices. While this ruling prevents defense attorneys from conceding their client’s guilt, it also brings up other considerations. Can defense attorneys concede a charge, if it means getting a not-guilty on another charge? Will defense attorneys be able to concede an element? The dissent writes, “on which side of the line does conceding some but not all elements of the charged offense fall?” While currently these decisions would be considered strategic, this holding could potentially reach these issues one day. The dissent argues that this new constitutional right “is like a rare plant that blooms every decade or so.” They state that this holding is so narrow—only applicable to capital cases in which the defendant insists on guilt and the attorney and client disagree—that it is unlikely an issue like this will be seen for years to come.

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61 *Id.* at 1512.
62 *Id.* at 1516.
63 *Id.* at 1514.
UNITED STATES COURT OF APPEALS

BERRY v. ESPER
322 F. Supp. 3d 88 (D.C. Cir. 2018)

Synopsis:

After the U.S. Army Decorations Board granted Joshua Berry a Purple Heart, the Deputy Assistant Secretary of the Army overrode the Board’s recommendation. Berry’s father challenged the denial under the Administrative Procedures Act, arguing that the decision was arbitrary. The Court agreed and remanded the matter to the Army.

Facts and Analysis:

Joshua Berry was an Army Staff Sergeant stationed at Fort Hood when Nidal Malik Hasan killed 13 people and injured 30 others in a mass shooting.\(^{64}\) Hasan fired 30 to 40 rounds just outside of the building that Berry was in, and when the bullets struck “the room’s exterior metal doors, [Berry] leapt over a desk to take cover and, in doing so, dislocated his shoulder.”\(^{65}\) Berry died in 2013, but his father believes that Berry should have been granted a Purple Heart for his injury at Fort Hood.\(^{66}\) A Purple Heart is different than other military decorations because it is “given to any servicemember who meets certain regulatory criteria” and does not need the recommendation of a commander.\(^{67}\) The regulatory criteria are as follows: “if [a servicemember] is wounded as the result of a terrorist attack committed by a foreign terrorist organization” then he or she is entitled to a Purple Heart.\(^{68}\) At first, the Army did not grant Purple Hearts to the Fort Hood victims because “though Hasan admitted that

\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id.
\(^{68}\) Id.
he was inspired by Al-Qaeda in the Arabian Peninsula and was in contact with one of its senior recruiters, the terrorist group was not understood to be formally behind the attack.”  

However, in 2015, Congress explained that servicemembers injured or killed in terrorist attacks “inspired by foreign terrorist organizations” could qualify for a Purple Heart.  

After this amendment, Berry’s father requested a Purple Heart for Berry.  

However, the U.S. Army Decorations Board denied the application for the reason that “the attack did not directly cause Berry’s injury” because there was an email stating that Hasan did not shoot at the building that Berry was in.  

Berry’s father appealed to the Army Board for Correction of Military Records, and filed witness statements that affirmed Hasan did shoot at Berry’s building.  

Overruling the U.S. Army Decorations Board, the Corrections Board recommended the Purple Heart to Berry.  

Berry’s injury “met the basic medical criteria” for award of the Purple Heart—i.e., that he suffered a qualifying ‘wound’ during the attack.”  

The Corrections Board cited other instances of injuries that would qualify for a Purple Heart, “including those incurred ‘while making a parachute landing from an aircraft that had been brought down by enemy fire’ or ‘as a result of a vehicle accident caused by enemy fire.’”  

While Berry’s injury was “not obviously analogous” because “Berry was injured as a result of his own decision to leap over the desk for cover” rather than having no control over his body, the Corrections Board explained that Berry would not have received that injury but for Hasan shooting at the building.  

Because of this reasoning, the Corrections Board reversed the U.S. Army Decorations Board and granted Berry a Purple Heart.

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69 "Id.
70 "Id.
71 "Id.
72 "Id. at 89–90.
73 "Id. at 90.
74 "Id.
75 "Id.
76 "Id.
77 "Id.
78 "Id.
However, the Deputy Assistant Secretary of the Army reversed the Correction Board’s decision a few months later. She was exercising her “authority to override the Correction Board’s recommendations.”\(^{79}\) Her disagreement was summarized in the following: “I have determined that the facts do not support a conclusion that his injury met the criteria for a Purple Heart.”\(^{80}\) Other than that, there was no explanation of her reversal.\(^{81}\)

Berry’s father then challenge[d] that denial under the Administrative Procedures Act (APA).\(^{82}\) He argued that “the Deputy Assistant Secretary’s decision was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ and that it was ‘unsupported by substantial evidence.’”\(^{83}\) The Court here ultimately agreed with Berry’s father, and the issue was remanded to the Army.\(^{84}\)

When there is a challenge to an agency decision under the APA, “the relevant question is not whether the record creates a material dispute of fact. Instead, the court’s job is to review the decision in light of the record before the agency and to decide whether it complied with the APA.”\(^{85}\) Here, the Deputy Assistant Secretary’s reversal of the Correction Board’s granting of the Purple Heart “provide[d] no meaningful analysis—only a boilerplate determination ‘that the facts do not support a conclusion that [Berry’s] injury met the criteria for a Purple Heart.’”\(^{86}\) Usually, courts are deferential to decisions the military makes about servicemembers’ records; however, the Deputy Assistant Secretary’s decision is “unreviewable.”\(^{87}\) Because there is no basis for the decision, “the Court cannot meaningfully evaluate the reasoning

\(^{79}\) Id.
\(^{80}\) Id.
\(^{81}\) Id.
\(^{82}\) Id.
\(^{83}\) Id.
\(^{84}\) Id.
\(^{85}\) Id.
\(^{86}\) Id. at 91.
\(^{87}\) Id.
behind it. That is enough to warrant remand."\textsuperscript{88} It is not up to the Court to decide material issues of fact.\textsuperscript{89} Rather, the Court looks at the record before the agency and determines whether or not the agency complied with the APA. The Court reasoned that even though this deference exists, it “does not totally shield [military personnel decisions] from review.”\textsuperscript{90}

\textit{Holding:}

While the Court recognized that Berry’s injury is unlike other situations in which a servicemember receives a Purple Heart, the Deputy Assistant Secretary’s denial is “at least on shaky ground.”\textsuperscript{91} The summary denial offered no reasoning for the denial, and “[a]t a minimum, Berry’s case presents a more complicated issue of causation.”\textsuperscript{92} The Court noted that there may be more discussion relating to how Berry received his injury.\textsuperscript{93} Furthermore, the Court was not required to set aside the summary denial under the APA, nor did the Court feel it necessary to order “that Berry be awarded a Purple Heart.”\textsuperscript{94} Under the APA, the Deputy Assistant Secretary’s denial was arbitrary, and the decision about Berry’s Purple Heart was remanded to the Army.

\textit{Impact:}

The impact of \textit{Berry} is a reiteration of what the Court examines under the APA. The Court does not decide issues of material fact, but rather looks at the agency’s actions to determine if the actions followed the APA.\textsuperscript{95} Here, the Court did not choose to rule on whether or not Berry actually deserves a Purple Heart under Army

\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 91–92.
\textsuperscript{95} Id. at 91
In fact, the Court examined whether or not the Deputy Assistant Secretary’s decision followed APA regulations. The Court held that she did not follow APA regulations and that her decision was capricious and arbitrary because she offered no support for the decision to reverse the Correction Board’s granting of a Purple Heart to Berry.

**Chippewa Cree Tribe of the Rocky Boy’s Reservation,**

**Montana v. U.S. Department of the Interior**

900 F.3d 1152 (9th Cir. 2018)

**Synopsis:**

The Department of the Interior wrote an order stating that the Chippewa Cree Tribe would have to provide back pay to a former chairman who was dismissed from his position as a chairman on the Chippewa Cree Tribe governing committee for whistleblowing. The Chippewa Cree Tribe petitioned the order, stating that it had good cause to remove the former chairman and also argued that the Department of the Interior was infringing on the Tribe’s sovereignty. The Ninth Circuit disagreed and denied the Tribe’s petition.

**Facts and Analysis:**

The Chippewa Cree Tribe (Tribe) received over $27 million in 2009 and 2010 from the federal government in stimulus funds for a water pipeline on the reservation. These stimulus funds “were awarded to the Tribe by the Department pursuant to the American Recovery and Reinvestment Act” (ARRA). In order to protect the funds, “Congress enacted robust whistleblower protections for employees of any non-federal entity receiving funds under the

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96 Id.
97 Id.
98 Id.
99 Chippewa Cree Tribe of the Rocky Boy’s Reservation, Mont. v. U.S. Dep’t of the Interior, 900 F.3d 1152, 1156 (9th Cir. 2018).
100 Id. at 1155.
Act.”101 This means that “an employer may not discharge an employee in retaliation for the disclosure of ‘information that the employee reasonably believes is evidence of’ the ‘gross mismanagement of an agency contract or grant relating to covered funds.’”102 When the Tribe received these funds, it agreed to “comply with the Act’s whistleblower protections, and specifically provided that these protections would be ‘enforceable pursuant to processes set up by ARRA.’”103

Ken St. Marks was a member of the Tribe and he “informed the Department of the Interior (“Department”) that he believed members of the Tribe’s governing body, known as the Business Committee (“Committee”), were misusing federal stimulus funds.”104 Five months after St. Marks was elected to be the Chairman of the Committee, he was removed by the other members.105 St. Marks believed that he was being targeted for whistleblowing on the Committee for misusing federal funds and filed a complaint with the Department.106 The Department agreed that he was retaliated against and “ordered the Tribe to provide relief, including back pay, to St. Marks.”107 This included $650,000 and to stop any and all reprisals against St. Marks.108 The Department did not give St. Marks any compensatory damages, and did not choose to reinstate St. Marks to the committee in fear of “implicat[ing] issues of ‘tribal sovereignty and self-determination.’”109 The Tribe “petition[ed] for review of the Department’s order” and “raise[d] five challenges.”110 First, the Tribe argued that St. Marks was not an employee and therefore could not be protected under the whistleblower statute.111 The Court disagreed and stated that, “[t]o qualify as an ‘employee,’ ARRA

101 Id.
102 Id.
103 Id. at 1556.
104 Id. at 1155.
105 Id.
106 Id.
107 Id.
108 Id. at 1157.
109 Id.
110 Id.
111 Id.
requires only that ‘an individual perform services on behalf of an employer.’"112 St. Marks was paid a salary, and though he was an elected official, "Congress did not exclude elected officials from ARRA even though it did so in other statutes [which] suggests that Congress intended to include them within ARRA’s whistleblower protections."113 The Court further elucidates, saying that the choice to not exclude elected officials from the ARRA makes sense because billions of dollars was given to “tribes, states, and local governments—most of which have elected officials... [i]t would have substantially weakened those safeguards if Congress had excepted from protection all elected officials, particularly because those officials will often be in a good position to identify and report fraud.”114

The Tribe then argued that the Department’s order infringes on the Tribe’s sovereignty.115 However, when the Tribe accepted the stimulus package from the federal government, it agreed to federal oversight, which included the whistleblower protections.116 The third argument was that the Department concluded on the whistleblowing without a hearing, which violated the Tribe’s right to due process.117 The Court concluded that the Tribe “consented to the procedures outlined in the Act, which do not include a hearing, in exchange for millions of dollars in federal funds.”118 Congress also has the ability to “condition the receipt of funds... on compliance with federal directives” through the Spending Clause, and the ARRA stays within the restrictions on Congress’s spending authority.119

The Tribe’s fourth argument was that “the Department erred in finding that the removal of St. Marks was retaliatory.”120 “The [APA] governs judicial review of an order issued under ARRA...
[and] under the APA, we will set aside the Department’s decision if it was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’"121 In order to determine this, the Court “determine[s] whether [the Department] articulated a rational connection between the facts found and the choices made.”122 The Court concluded that the Department did have a rational connection.123 When the Tribe claimed that there were other reasons that St. Marks was removed from his position, the Court concluded that those reasons were not valid; the “Tribe engaged in a prohibited reprisal” and did not “present[] a compelling argument that the Department’s decision was arbitrary or capricious.”124 Lastly, the Tribe argued that the Department miscalculated St. Marks’ damages, but since it was not raised originally, this argument cannot be raised “for the first time on appeal.”125

**Holding:**

The Tribe’s petition was denied in full.126 This holding reflects the APA governing any petitions against a government agency, and how the government agency’s decision must be capricious in order to be overturned.127 Here, the Tribe attempted to argue that the Department of the Interior lacked facts for their order.128 However, the Ninth Circuit disagreed and held that the Tribe was bound by the whistleblowing statute, the federal government can place requirements on a receipt of federal funds, and these requirements were not a violation of the Tribe’s sovereignty.129 Furthermore, the

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121 Id. at 1161–62.
122 Id. at 1162.
123 Id.
124 Id. at 1163.
125 Id.
126 Id.
127 Id. at 1162.
128 Id.
129 Id. at 1157.
Court rejected the Tribe’s alternate explanations for why St. Marks was removed from his position on the Committee.\textsuperscript{130}

\textbf{Impact:}

The holding of \textit{Chippewa Cree Tribe} will likely have a lasting impact on tribes who receive federal funding. The Ninth Circuit identifies that tribes can be bound by qualifications to receive federal funding and stimulus packages. Furthermore, these qualifications are not violations of a tribe’s sovereignty because under the Spending Clause, Congress is permitted to place restrictions on its funding. This holding also reiterates the use of the APA in determining whether a government agency acted properly in a decision.

\textbf{City and County of San Francisco v. Trump}

\textit{897 F.3d 1225 (9th Cir. 2018)}

\textbf{Synopsis:}

President Trump issued an Executive Order which withheld federal funds from sanctuary jurisdictions. The San Francisco City and County challenged the Executive Order’s constitutionality. The Ninth Circuit agreed with San Francisco and held that the Executive Order violated the separation of powers and, in light of Congress’ spending powers, was unconstitutional. However, the Court did not support the implementation of a permanent, nationwide injunction.

\textbf{Facts and Analysis:}

Executive Order 13,768, “Enhancing Public Safety in the Interior of the United States,” signed by President Trump five days after his inauguration, outlines the recourses that the government can take against a sanctuary jurisdiction.\textsuperscript{131} To further this policy, “the Attorney General and the Secretary of the Department of Homeland

\textsuperscript{130} \textit{Id.} at 1163.

\textsuperscript{131} \textit{City & Cty. of San Francisco v. Trump}, 897 F.3d 1225, 1232 (9th Cir. 2018).
Security, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with sanctuary jurisdictions are not eligible to receive Federal grants, except as deemed necessary for law enforcement.” 132 Overall, “the Executive Order directs the agencies of the Executive Branch to withhold funds appropriated by Congress in order to further the Administration’s policy objective of punishing cities and counties that adopt so-called ‘sanctuary’ policies.” 133 The question is “whether, in the absence of congressional authorization, the Executive Branch may withhold all federal grants from so-called ‘sanctuary’ cities and counties.” 134 The Ninth Circuit addressed the different arguments and concluded that this was an unconstitutional executive order. 135 Congress has exclusive control of the Spending Power, and “may attach conditions on the receipt of federal funds.” 136 The Executive Branch may not overrule Congress’s power of the purse, and because Congress has not acted here, the Executive Branch cannot attach its own conditions on the City and County of San Francisco and the County of Santa Clara. 137 The Court stated that “the President is without authority to thwart congressional will by canceling appropriations passed by Congress” and “may not decline to follow a statutory mandate or prohibition simply because of policy objections.” 138 If the Executive Branch attempts to attach conditions to federal funds, it is in violation of the separation of powers doctrine, because, as aforementioned, Congress has the exclusive power of the purse. 139 “Because Congress did not authorize withholding of funds, the Executive Order violates the constitutional principle of the Separation of Powers.” 140

132 Id. at 1232–33.
133 Id. at 1233.
134 Id. at 1231.
135 Id.
136 Id. at 1231–32.
137 Id. at 1231.
138 Id. at 1232.
139 Id.
140 Id. at 1235.
The Administration made the argument that the Counties of San Francisco and Santa Clara lacked standing.\textsuperscript{141} However, this Court responded to that argument by holding that “a ‘loss of funds promised under federal law satisfies Article III’s standing requirement.’”\textsuperscript{142} The Court outlined the federal funds that San Francisco and Santa Clara receive through the State of California.\textsuperscript{143} “Approximately $1.2 billion of San Francisco’s yearly budget of $9.6 billion comprises federal funds. Santa Clara received approximately $1.7 billion in federal and federally dependent funds in the 2015–2016 fiscal year, totaling about 35% of the County’s total revenue.”\textsuperscript{144} This is a significant loss of funds, and this is enough to show that both San Francisco and Santa Clara have standing.\textsuperscript{145} Another argument that the Administration made was that there was no imminent injury.\textsuperscript{146} But, the Court held that “the Counties have demonstrated that, if their interpretation of the Executive Order is correct, they will be forced to either change their policies or suffer serious consequences.”\textsuperscript{147} Finally, the Administration claimed that this case was not ripe.\textsuperscript{148} There are three factors in determining ripeness and are as follows: “(1) ‘whether the plaintiffs have articulated a ‘concrete plan’ to violate the law in question’; (2) ‘whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings’; and (3) ‘the history of past prosecution or enforcement under the challenged statute.’”\textsuperscript{149} Here, the San Francisco and Santa Clara are in conflict with the Executive Order, so the first factor is satisfied.\textsuperscript{150} Secondly, the Administration has communicated a specific warning.\textsuperscript{151} “The Administration quickly and repeatedly announced that the Executive Order would

\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 1236.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 1237.
\textsuperscript{151} Id.
eradicate sanctuary policies by authorizing the wholesale defunding of cities that do not assist the Administration in enforcing its hardline immigration policy.” The President and others speaking on his behalf have made it clear that sanctuary cities would be defunded. The third factor was also satisfied because of other historical grants that were conditioned on compliance. “Given the severe potential for harm and the likelihood of prosecution, the controversy is ripe for adjudication.”

The Administration then asked the Court to give weight to a DOJ Memorandum that further elucidates the Executive Order. While the Court can “give significant weight to an agency interpretation of an executive order. . . the DOJ memorandum is not consistent with the terms of the Executive Order.” The Court denied consideration based on the DOJ Memorandum.

Lastly, the district court granted relief in the form of “a permanent nationwide injunction barring Administration officials ‘from enforcing Section 9(a) of the Executive Order against jurisdictions they deem as sanctuary jurisdictions.’” The Court held that while the Counties are entitled to injunctive relief, “the present record is not sufficient to support a nationwide injunction.” The Counties of San Francisco and Santa Clara have shown the effect of the Executive Order on their counties, but the nationwide impact of it is unknown.

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152 Id.
153 Id.
154 Id. at 1238.
155 Id.
156 Id. at 1241.
157 Id. at 1241–42.
158 Id. at 1243.
159 Id.
160 Id. at 1243–44.
161 Id. at 1244.
Holding:

The holding of this case relies on multiple constitutional issues. The Administration used several tactics to argue that this case was moot. Here, the Ninth Circuit found that the City and Counties of San Francisco and Santa Clara did indeed have standing, there was injury, and this issue was ripe.\textsuperscript{162} Furthermore, the Court examined the separation of powers and spending power responsibilities and determined that the Executive Order putting requirements on federal funds was a violation of both.\textsuperscript{163}

Impact:

The impact of \textit{City of San Francisco} is yet to fully be known, but for now, it has prevented the current Administration from refusing to grant federal funding to the sanctuary cities in the Counties of San Francisco and Santa Clara. While the Ninth Circuit did not grant a nationwide injunction, it is likely that this opinion will inform other circuits with cases where this Executive Order is an issue.

\textbf{CONSUMER FINANCIAL PROTECTION BUREAU v. SOURCE FOR PUBLIC DATA}

\textbf{903 F.3d 456 (5th Cir. 2018)}

Synopsis:

The Consumer Financial Protection Bureau (CFPB), an administrative agency created by Congress, issued a civil investigative demand (CID) to the Source for Public Data, Inc. (Public Data), a company that provides public records through an internet search engine. When a CID is issued, the administrative agency must provide a notification of purpose, which states the nature of the alleged violation. Public Data argued that the CFPB’s notification of purpose was lacking, and the Court held that the CFPB did not comply with the statutory requirements of the CID and did not identify what conduct constituted the alleged violation.

\textsuperscript{162} Id. at 1235.
\textsuperscript{163} Id. at 1231–32.
Facts and Analysis:

The Consumer Financial Protection Bureau was created to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.” One of the CFPB’s functions is to “address violations of Federal consumer financial laws.” In order to do this, the CFPB can issue a civil investigative demand to any person that the CFPB has information about a violation. However, there are requirements to issuing a CID. A CID must “state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation,” which is known as a notification of purpose. “If a recipient does not comply with the CID, the CFPB may file a petition in federal court to enforce it.” The CFPB sent Public Data a CID, and Public Data responded with a petition to set aside the CID because the notification of purpose was inadequate, and the CFPB did not have jurisdiction. In response, the CFPB filed a petition in federal court. The district court held that the CFPB did have jurisdiction and ordered Public Data to respond to the CID, pending resolution of the appeal.

Holding:

The Fifth Circuit held that the CFPB did not comply with the two requirements for notification of purpose. Instead of stating the conduct constituting the alleged violation, the CFPB was essentially

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165 Id.
166 Id.
167 Id.
168 Id.
169 Id.
170 Id. at 458.
171 Id.
172 Id.
173 Id.
on a fishing expedition. Public Data provides and uses public records.\textsuperscript{174} These activities are “not violations of federal law, and the CFPB fails to explain how these activities violate federal consumer law.”\textsuperscript{175} Furthermore, the CID does not identify a relevant provision of law.\textsuperscript{176} Instead, it merely references the Fair Credit Reporting Act,\textsuperscript{177} which governs “all activities relating to the reporting of consumers’ credit information.”\textsuperscript{178} The Court states that this “does nothing to clarify what conduct is under investigation.”\textsuperscript{179} In this decision, the Court aligns itself with a D.C. Circuit decision that rejected a similar CID.\textsuperscript{180} The D.C. Circuit case rejected a CFPB CID that “failed to explain what the broad and non-specific term ‘unlawful acts and practices’ meant in this investigation.”\textsuperscript{181} The Court goes on further to say that “courts will enforce an administrative subpoena if: ‘(1) the subpoena is within the statutory authority of the agency; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome.’”\textsuperscript{182} The Court cannot review the CID because the CID fails to identify the conduct under investigation.\textsuperscript{183} Because the CFPB’s CID did not fulfill the statutory requirements, Public Data is not held to answer.\textsuperscript{184}

\textit{Impact:}

The impact of \textit{CFPB v. Public Data} is a reiteration of the scope of the CFPB’s power to issue CIDs. In order to issue CIDs, each one must have a proper notification of purpose, which specifically mentions the nature of the conduct constituting the violation as well

\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id. at 459.}
\textsuperscript{177} \textit{Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq. (1970).}
\textsuperscript{178} \textit{Source for Pub. Data, 903 F.3d at 459.}
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id. at 460.}
as the provision of law applicable.\textsuperscript{185} Without these two elements in a CID, the CPFB is not allowed to issue ambiguous CIDs that could be considered fishing expeditions. This holding curbs the ability of the CPFB to issue arbitrary CIDs.

**McAdoo v. Martin**  
899 F.3d 521 (8th Cir. 2018)

*Synopsis:*

In *McAdoo v. Martin*, Daaron McAdoo was in custody at a jail in Hot Springs, Arkansas. While in custody, he sustained a shoulder injury from a guard and was denied the proper medication and surgery needed. McAdoo sued under 42 U.S.C. § 1983. The district court found that the Prison Litigation Reform Act (PLRA) precludes McAdoo from recovering damages. The Eighth Circuit found that McAdoo did indeed meet the PLRA’s physical injury requirement, and the case was remanded for McAdoo to receive compensatory damages but not punitive damages.

*Facts and Analysis:*

Daaron McAdoo was in custody at the Hot Spring Detention Center in Hot Springs, Arkansas.\textsuperscript{186} During his time in custody, McAdoo got into a fight with a fellow inmate.\textsuperscript{187} In order to stop the fight, Officer Cash, after telling McAdoo to stop several times, “grabbed him by the waist, took him to the floor, and placed his knee on his back.”\textsuperscript{188} After this altercation, McAdoo complained that his shoulder hurt, and he was transported to the hospital.\textsuperscript{189} He was diagnosed with a dislocated shoulder and prescribed hydrocodone tablets.\textsuperscript{190} Because of a jail policy against narcotics, McAdoo was

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\textsuperscript{185} *Id.* at 457.  
\textsuperscript{186} *McAdoo v. Martin*, 899 F.3d 521, 523 (2018).  
\textsuperscript{187} *Id.*  
\textsuperscript{188} *Id.* (internal quotations omitted).  
\textsuperscript{189} *Id.*  
\textsuperscript{190} *Id.*
only allowed non-prescription pain relievers.\textsuperscript{191} After going back to the hospital for a follow-up appointment, McAdoo was also told he would need immediate surgery.\textsuperscript{192} Even though the jail was responsible for inmate medical expenses, McAdoo was told he would have to sign documents stating that he was liable for all medical treatments.\textsuperscript{193} McAdoo refused to sign the documents and was then denied the proper medication and surgery while he was housed at the jail.\textsuperscript{194} It was not until he was transferred to the prison the following month that he received the surgery and nine months of physical therapy.\textsuperscript{195} McAdoo sued under 42 U.S.C. § 1983,\textsuperscript{196} and while the district court agreed with him, it ruled that he was barred from recovering under the Prison Litigation Reform Act.\textsuperscript{197}

The PLRA requires a physical injury in order for an inmate to recover under 42 U.S.C. § 1983, and the district court found that McAdoo’s severe pain did not meet the PLRA’s standard.\textsuperscript{198} The district court did not grant any punitive damages because “defendants’ conduct, while perhaps ill advised, did not exhibit an evil motive or intent or reckless or callous indifference as is required to award punitive damages.”\textsuperscript{199} As a result, “[t]he district court . . . awarded McAdoo $1 in nominal damages, plus the cost of the filing fee.”\textsuperscript{200}

The Eighth Circuit affirms in part and reverses in part. The Court agrees with McAdoo that his sustained severe pain stemming from a physical injury satisfies the PLRA’s physical injury requirement.\textsuperscript{201} The Court determines that McAdoo’s injury is beyond de minimus because during the altercation in which Officer Cash had to take down McAdoo, McAdoo sustained a shoulder injury which required

\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 524.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{198} McAdoo, 899 F.3d at 524.
\textsuperscript{199} Id. at 524–25 (internal quotations omitted).
\textsuperscript{200} Id. at 525.
\textsuperscript{201} Id.
surgery. The conduct that causes the injury does not have to be unconstitutional.

**Holding:**

This decision uses the Tenth Circuit’s reasoning in *Sealock v. Colorado.* In *Sealock,* an inmate complained of a heart attack, and the officers waited until morning to take the inmate to the hospital. Here, the inmate was allowed to sue even though the act that caused the physical injury, the heart attack, was not sustained under unconstitutional conditions. “[I]n the Eighth Amendment context, in order to recover compensatory damages, the PLRA requires a showing of harm caused by some unconstitutional conduct that amounted to deliberate indifference and an accompanying showing of physical injury. The PLRA does not say whether the unconstitutional conduct must cause the physical injury.” Accordingly, this case was remanded for the district court to calculate compensatory damages “that result from the pain differential, if any, that McAdoo experienced from having to take non-prescription pain relievers instead of the ten prescribed hydrocodone tablets.” However, the Court determined that McAdoo should not be awarded any punitive damages because in order to receive punitive damages, the officers would have to inflict “unnecessary and wanton pain.” Because the officers were following jail protocol when they refused to give McAdoo the hydrocodone, the Court held that the officers were simply following orders and not intentionally inflicting unnecessary and wanton pain.

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202 *Id.*
203 *Id.* at 526.
204 *Id.; Sealock v. Colorado,* 218 F.3d 1205 (10th Cir. 2000).
205 *McAdoo,* 899 F.3d at 526.
206 *Id.*
207 *Id.*
208 *Id.* at 526–27.
209 *Id.* at 527.
210 *Id.*
Impact:

The impact of McAdoo will be seen when inmates sue and whether the PLRA prohibits their suits. This case expands inmates’ rights by giving them the ability to sue for severe pain, as long as it stems from a physical injury. This holding also elucidates the unconstitutionality factor in the physical injury. There does not have to be unconstitutional conduct that creates the physical injury in order for an inmate to recover, but there must be a showing that there was an unconstitutional behavior that accompanied the physical injury. For example, in McAdoo, the unconstitutional conduct was the deliberate indifference, which accompanied the shoulder injury sustained during a constitutional breakup of the fight. Because this holding aligned with the Tenth Circuit’s holding in a similar case, there is no circuit split that would necessitate a Supreme Court review of the holdings.

Nguyen v. Sessions  
901 F.3d 1093 (9th Cir. 2018)

Synopsis:

Vu Minh Nguyen was a lawful permanent resident of the United States. He was placed in removal proceedings because of three misdemeanor convictions, one of which was the use of cocaine. Nguyen petitioned for a review of the Board of Immigration Appeals’ decision to deny his application for cancellation of removal. The issue in this case is whether or not Nguyen was eligible to seek cancellation of his removal proceedings. The Ninth Circuit determined that he was eligible to seek cancellation because the cocaine conviction did not trigger the stop-time rule.

Facts and Analysis:

Vo Minh Nguyen was a lawful permanent resident of the United States. He immigrated to the United States when he was eighteen years old in 2000, but in 2015, he was placed in removal proceedings

\footnote{Nguyen v. Sessions, 901 F.3d 1093, 1095 (2018).}
because of three misdemeanor convictions.\textsuperscript{212} Nguyen sought cancellation of his removal, but the government argued that he was not eligible to seek cancellation because he did not live in the United States for seven continuous years without commission of an offense.\textsuperscript{213} He admitted to using cocaine in 2005.\textsuperscript{214} The immigration judge and the Board of Immigration Appeals agreed that Nguyen was not eligible to seek cancellation of removal.\textsuperscript{215} The Ninth Circuit granted certiorari and has jurisdiction under 8 U.S.C. § 1252.\textsuperscript{216}

The statutory section at issue is the “stop-time rule” which states that “any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title . . . .”\textsuperscript{217} The government contended that because Nguyen used cocaine in 2005, he only had five years of continuous presence in the United States, which rendered him inadmissible to seek cancellation of his removal.\textsuperscript{218}

The opinion then discusses the difference between removability and inadmissibility, both of which are governed by federal law.\textsuperscript{219} “An inadmissible alien is one who was not admitted legally to the United States and is removable under § 1182, whereas a deportable alien is in the United States lawfully and is removable under § 1227.”\textsuperscript{220} If a noncitizen is in inadmissibility proceedings, he or she has the burden of proving that he or she is not inadmissible.\textsuperscript{221} On the other hand, if a noncitizen is in removal proceedings, the government bears the burden.\textsuperscript{222} Because of this distinction, a lawful permanent resident is “subject to the grounds of removability, not

\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{217} Nguyen, 901 F.3d at 1096.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id. (internal quotations omitted).
\textsuperscript{221} Id.
\textsuperscript{222} Id.
inadmissibility.”\textsuperscript{223} Therefore, because Nguyen was a lawful permanent resident, he could not have been charged with inadmissibility. “A noncitizen ‘lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws.”\textsuperscript{224} The Court acknowledges that there are six narrow exceptions to this rule, none of which apply to Nguyen’s case. The Court also goes on to say that inadmissibility for the purposes of the Immigration and Nationality Act should be construed in the same way for the stop-time rule.\textsuperscript{225} Therefore, Nguyen is eligible to apply for cancellation of removal.\textsuperscript{226}

The Court then addresses several of the government’s arguments. One argument that the Court does not find persuasive is the argument that “Nguyen was rendered inadmissible because he would be inadmissible if he ever sought admission to the United States.”\textsuperscript{227} The Court explained that when construing a statute, every word needs to be given effect, and this interpretation leaves out the second part of the stop-time rule.\textsuperscript{228} The government argues that Congress uses the word “inadmissibility” to mean different things in varying contexts, and if the statutory language is ambiguous, then it deserves \textit{Chevron} deference.\textsuperscript{229} The Court also rejects this argument because “the statute is not ambiguous.”\textsuperscript{230} \textit{Chevron} deference should only be applied “to agency interpretations of statutes that, apply the normal tools of statutory construction, are ambiguous.”\textsuperscript{231}

\begin{quote}
\textit{Holding:}
\end{quote}

\textsuperscript{223} \textit{Id.} at 1097.
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.} at 1098.
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.} (internal quotations omitted).
The holding of Nguyen turns on the differences in the statutory language of removability and inadmissibility proceedings.\textsuperscript{232} Because Nguyen was a lawful permanent resident, he could not have been deemed inadmissible due to his misdemeanor cocaine possession conviction in 2005 because he was “not subject to the grounds of inadmissibility.”\textsuperscript{233} If Nguyen was seeking admission to the United States, the holding would likely change. However, nothing in the Immigration and Nationality Act suggests that inadmissibility proceedings are ever detached from the act of actually seeking admission.\textsuperscript{234} Because Nguyen was “not rendered inadmissible by his admitted use of cocaine in 2005, he did not trigger the stop-time rule and is eligible to apply for cancellation of removal.”\textsuperscript{235}

\textit{Impact:}

The full impact of \textit{Nguyen} is yet to be determined. This opinion splits with a similar case in the Fifth Circuit,\textsuperscript{236} and it is likely that the Supreme Court will have to decide the matter of law in the future. In the case of \textit{Calix v. Lynch},\textsuperscript{237} the Fifth Circuit “found the stop-time rule’s phrase ‘renders the alien inadmissible’ ambiguous as to its effect on lawful permanent residents not subject to the grounds of inadmissibility.”\textsuperscript{238} The Fifth Circuit also did not apply a \textit{Chevron} analysis, and instead “impos[ed] its own construction on the stop-time rule.”\textsuperscript{239} For now, \textit{Nguyen} parses out the distinguishing language with regard to inadmissibility and removal proceedings.\textsuperscript{240} This opinion will ensure that lawful permanent residents cannot be rendered inadmissible unless they are seeking admission.\textsuperscript{241}

\begin{footnotesize}
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\item \textsuperscript{232} \textit{Id.} at 1097.
\item \textsuperscript{233} \textit{Id.}
\item \textsuperscript{234} \textit{Id.}
\item \textsuperscript{235} \textit{Id.}
\item \textsuperscript{236} \textit{Id.} at 1099.
\item \textsuperscript{237} \textit{Calix v. Lynch}, 784 F.3d 1000 (5th Cir. 2015).
\item \textsuperscript{238} \textit{Nguyen}, 901 F.3d at 1099.
\item \textsuperscript{239} \textit{Id.} (citing \textit{Calix}, 784 F.3d at 1006–07).
\item \textsuperscript{240} \textit{Id.} at 1096.
\item \textsuperscript{241} \textit{Id.} at 1100.
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