

No. 08-11144

IN THE
Supreme Court of the United States

BURHAN UDDIN AHMED,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT*

BRIEF FOR PETITIONERS

Team Number 3173
Counsel for Petitioners

Questions Presented

1. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224(2001) (AUMF), authorizes, and if so whether the Constitution allows, the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?

2. Whether the process afforded by the district court to challenge a designation as an "enemy combatant" was sufficient under the requirements of the Fifth Amendment?

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Constitutional Provisions and Statutes

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF):

Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States:

Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title.

This joint resolution may be cited as the "Authorization for Use of Military Force".

Section 2. Authorization for Use of the United States Armed Forces.

(a) In General. That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements.

(1) Specific Statutory Authorization. Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of Other Requirements. Nothing in this resolution supersedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

Statement of the Case

Petitioner Burhan Uddin Ahmed, a citizen of Pakistan, lawfully entered the United States with his family in 2001 to pursue a doctor of veterinary medicine degree in East Dakota. Federal agents arrested Ahmed in Wilson as a material witness in the government's investigation of the 9/11 attacks. Ahmed was detained in Wilson. In November of 2002 and January of 2003, Ahmed was charged in the District of East Dakota with the possession of counterfeit Social Security cards with the intent to defraud and was further charged with making a false statement to the FBI. Ahmed pleaded not guilty to all charges.

On June 9, 2003, the court scheduled a hearing for June 15, 2003, on all pretrial motions, including a motion to suppress evidence that Ahmed asserted was obtained by torture. On June 13, 2003, the government filed an ex parte motion to dismiss the indictment based on an order signed that morning by the President of the United States.

The President's order ordered the Attorney General to surrender Ahmed to the Secretary of Defense, and directed the Secretary of Defense to "detain him as an enemy combatant." The District of East Dakota granted the government's motion to dismiss the criminal charges against Ahmed, and Ahmed was then transferred to military custody and brought to the Army Regional

Consolidated Detention Facility in Souds, East Dakota. Since that time, the military has held Ahmed as an enemy combatant indefinitely without charge or trial.

Following his transfer to the Army Regional Consolidated Detention Facility, Ahmed filed a petition for a writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241 to secure his release from military detention. The petition asserted that Ahmed's detention as an enemy combatant was unlawful and that the government must either file criminal charges against him or release him. Alternatively, the petition argued that Ahmed must be afforded a hearing to challenge the factual basis for his designation as an enemy combatant.

The government opposed his release, claiming Ahmed is an al Qaeda affiliate who "prepar[ed] for acts of international terrorism." The government asserts that the President has both statutory authority under the AUMF and inherent constitutional authority to indefinitely detain Ahmed or anyone else who associates with al Qaeda and "prepare[s]" for terrorist acts. In addition, the government asserts that Ahmed was given adequate process to challenge his detention.

The government provided the court with a hearsay document, the Declaration of John R. Murphy (Murphy Declaration), who is the Director of the Joint Task Force for Combating Terrorism,

detailing Ahmed's involvement with al Qaeda. In his declaration, Murphy reviewed the intelligence gathered by the government suggesting that Ahmed was an operative of al Qaeda acting as a sleeper agent within the United States; that he had been trained in a terrorist training camp in Afghanistan; that he had communicated with Osama Bin Laden and was aided by other known high-ranking members of al Qaeda; that he entered the United States with the intent to commit terrorist attacks within the country; and that he possesses highly valuable intelligence about al Qaeda.

The district court found that Ahmed could be detained as an enemy combatant, but found that he was entitled to challenge the factual basis of his detention at a hearing consistent with his procedural due process rights. The district court sent the case to a magistrate judge to determine the process that Ahmed must be afforded. The magistrate judge determined that Ahmed must provide Ahmed with notice of the factual basis of his detention and that if the government could produce credible evidence supporting his designation as an enemy combatant, the burden would shift to Ahmed to refute this designation with more persuasive evidence. If Ahmed could produce such evidence, the government must either release him or agree to a full adversarial hearing with more robust procedural safeguards.

The magistrate judge considered the Murphy Declaration and concluding that it was adequate within this framework. Ahmed was allowed 60 days to present rebuttal evidence. Ahmed responded with a general denial and asserted that he was not an enemy combatant, but refused to offer any evidence to rebut the Murphy Declaration, insisting that the procedures adopted by the magistrate judge were unconstitutional. The magistrate judge recommended that his petition for a writ of habeas corpus be dismissed. The district court agreed and dismissed the petition. Ahmed appealed and a panel at the Twelfth Circuit affirmed the district court's dismissal. Ahmed filed a motion for rehearing and the Twelfth Circuit voted to vacate the panel opinion and hear the case en banc.

Summary of the Argument

Neither the AUMF nor the inherent power of the president can justify the indefinite detention of Ahmed. To avoid a dangerously over broad grant of executive authority, the AUMF's grant of "necessary and appropriate force" must be read narrowly so as to include only fundamental incidents of waging war. Given that Ahmed was captured neither as part of a traditional war nor on a battlefield, the executive was not entitled to treat him as an enemy combatant. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2006). Moreover, construing the AUMF to bestow the executive with carte blanche to indefinitely detain any alleged

Al Qaeda operative is both constitutionally problematic and unsupported by the legislative history of the AUMF. When Congress as expressly limited executive authority as it has here, there can be no basis for independent executive authority.

Assuming there is authority to detain him, Ahmed is afforded at least the procedural framework for habeas proceedings set forth by the Supreme Court in *Hamdi* because the circumstances of Ahmed's arrest does not necessitate compromising further procedural requirements of the process afforded in *Hamdi*.

Argument

I. The detention a civilian like Ahmed neither supported by the AUMF or by the President's authority to wage war under the Constitution.

A. Ahmed's detention is not authorized by the AUMF because he is a civilian, not an enemy combatant.

This court's intentionally narrow holding in *Hamdi* does not authorize the indefinite detention of Ahmed who, unlike the combatants in *Hamdi* and *Padilla*, never directly participated in armed hostilities against the United States on a foreign battlefield. *Hamdi*, 542 U.S. at 516; *Padilla v. Hanft*, 432 F.3d 582, 589 (4th Cir. 2004). *Hamdi* only recognized the reach of the AUMF extended to enemy combatants when they fell within the "limited category" of individuals whom the government alleges were "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who engaged in an armed conflict against the United States there. 542 U.S. at 516. The Supreme Court has long held that ability to exercise military jurisdiction over individuals turns on whether, under the law of war, they are properly considered enemy combatants or if instead are civilians. See *Hamdi*, 542 U.S. at 516; *Quirin*, 317 US 1, 37-38; *Milligan*, 71 US 2, 6. Nothing in this court's

precedent establishes that Ahmed's alien status alone entitles the government to conclude he is an enemy combatant rather than a civilian. Rather, our constitution affords due process protection to legal resident aliens who have "developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); see also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that all persons within the territory of the United States are entitled to protection under the amendments).

1. The detention of civilians captured on American soil cannot be justified as a fundamental incident of waging war.

Under the conventional law of war, Ahmed is not an enemy combatant because he was neither captured on a foreign battlefield nor accused of actively taking up arms against American or coalition forces. See *Hamdi*, 542 U.S. at 516. In *Milligan*, this court rejected the argument that an unarmed civilian captured in his home in the United States could be indefinitely detained under military authority, even though he had participated in dangerous plots aimed to destroy this country. 71 US at 131. As *Hamdi* acknowledged, *Milligan* "turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there." *Hamdi*, 542 U.S. at 522. *Quirin*, on the other hand, justifies

military jurisdiction because the American citizen at issue there was the part of the military arm of an enemy government. *Id.* at 516. The detainee in *Hamdi* fell under the *Quirin* definition of enemy combatant because he was allegedly affiliated with the Taliban government of Afghanistan with which the United States is formally at war. *Id.* Ahmed's detention cannot be justified on this basis because he is a citizen of Pakistan, a government which claims to be our ally in the war on terror.

The vague grant of "necessary and appropriate force" in the AUMF is not sufficient authority to justify giving the President the incredible power to fashion new definitions of the term enemy combatant. The Geneva Convention principles that allow the detention of combatants for the duration of a particular conflict have deliberately not been extended to unconventional conflicts like our war against Al Qaeda. See Third Geneva Convention, art. 3, 6 U.S.T. at 3318; see also *al-Marri v. Pucciarelli*, 534 F.3d 213, 235 (4th Cir. 2008) (Mozt, J. Concurring) (explaining that the United States has resisted the application of prisoner of war status to terrorists to avoid giving them legitimacy and recognition). As the plurality notes in *Hamdi*, "if the practical circumstances of the given conflict are entirely unlike those of the conflicts that informed the

development of the law of war" the justifications for indefinite detention "may unravel." 542 U.S. at 521.

2. Ahmed's alleged connections to Al Qaeda are not sufficient to determine that he is an enemy combatant.

The allegation that Ahmed attended Al Qaeda training camps and contacted Osama Bin Laden does not lead to the conclusion that he should be considered an enemy combatant for the purposes of the AUMF. Although the AUMF was undoubtedly a response to the Al Qaeda's 9/11 attacks, it was not intended to grant the president broad authority to conduct a war on terror on the home front. See *al-Marri*, 534 F.3d at 239 (explaining that senate rejected the Bush Administration proposal to add the words "in the United States and" after appropriate force in the text of the AUMF). Congress addressed domestic terrorism when it passed the Patriot Act, which specifically prohibits the indefinite detention of suspected terrorist aliens in the United States. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (The Patriot Act); see also *al-Marri*, 534 F.3d at 240 (explaining that the legislative history of the Patriot Act reveals that Congress rejected proposals from the Bush Administration to allow for the indefinite detention of terrorist aliens). Moreover, this

criminal statute suggests that our detention of suspected terrorists is motivated by punishment rather than simply preventing combatants from returning to the battlefield. Coupled with our government's continuing Article III trials of both terrorist aliens and citizens in United States, the PATRIOT Act demonstrates that the military detention of Ahmed is not justified by the AUMF. We cannot allow the executive branch to use indefinite detention as an alternative to criminal process when the government lacks the evidence to prove its case before a jury.

Finding that AUMF expands the definition of enemy combatant to apply to alleged Al Qaeda operatives who have never directly taken up arms against the United States in foreign combat zone risks granting the executive broad, unchecked and unpredictable authority. It is undisputed our war against Al Qaeda has no determinate end in sight and could very well span lifetimes. Our troops have been fighting in Iraq and Afghanistan for longer than U.S. involvement in World War II. They will probably be there longer than our troops were in Vietnam. Under these conditions granting our commander in chief the ability to detain alleged terrorists for the "duration of the conflict" is also to give him the unprecedented power to imprison civilians for life without charge or trial. This power scarcely follows naturally

from the vague grant to use "necessary and appropriate" force and lacks the clear statement required to allow the significant infringement on due process rights permitted by the military detention of civilians. See, eg. *Greene v. McElroy*, 360 U.S. 474, 508 (1959); *Ex Parte Endo*, 323 U.S. 283, 300 (1944) (rejecting the argument that a wartime executive order and statute permitted Japanese internment when neither used the language of detention). Moreover, indefinite detention is hardly the President's only tool for dealing with domestic terrorism. He can deport aliens and deny them reentry into the United States. He can follow the guidelines of Patriot Act and utilize limited detention. Internationally, he is still privileged to detain individuals who qualify as enemy combatants at our military facilities abroad.

B. The President does not have the inherent power under Article II to indefinitely detain Ahmed.

When exercising his independent power to wage war under Article II, the President may not "disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006). The "equilibrium established by our constitutional" system requires that "[p]residential powers are not fixed but fluctuate, depending on their disjunction or conjunction with

those of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Thus, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum" but when "the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.*

1. The President's power is at its lowest ebb because the indefinite detention of Ahmed is contrary to the express wishes of congress.

The Patriot Act expressly forbids the indefinite detention of alleged terrorist aliens. Contrary to the argument of the 4th Circuit plurality, there is no basis in either reason or the precedent of this court to assert the president can escape the express limitations of Congress by claiming he is exercising a different type of executive power. As *Hamdan* suggests when it holds that the Youngstown framework applies in times of war and peace, and to both property and persons, congressional limitations properly circumscribe any of the President's asserted independent authority. 548 U.S. at 592.

2. The indefinite detention of civilians is at odds with the constitutional principles surrounding separation of powers.

Although the military is a necessity, the founders realized that it threatened fundamental liberties if not confined "within its proper sphere, subordinate to civil authority." *Reid v. Covert*, 345 U.S. 1, 23-26 (1957). Dramatic expansions of military jurisdiction, like the executive's unilateral reformation of the term enemy combatant, risk becoming arbitrary impositions of martial law which blatantly contradict the founder's intent to limit the power of the federal government. See, e.g., Brief for General Merrill A. McPeak, et al. as Amici Curiae Supporting Petitioners-Appellants, *al-Marri v. Wright*, 534 F.3d 213, 487 F.3d 160 (2006) (No. 06-7427) (arguing that the constitution reflects a strong and traditional resistance to military intrusion into civilian affairs). Absent a suspension of the writ of habeas corpus, the Constitution does not allow the President acting alone to significantly expand the scope of detention without trial.

The Due Process Clause means that there are only limited exceptions to the rule that "the government may not detain a person prior to a judgment of guilt in criminal trial." *United States v. Salerno*, 481 U.S. 739, 749 (1987). Ordinarily, substituting civil commitment for criminal process requires not only "proof of dangerousness" but the clear fulfillment of a statutory definition. *Kansas v. Hendricks*, 521 U.S. 346, 358. In *Hamdi*, the court held that the same principles applied to

military detention of enemy combatants because the government had to provide credible evidence that the individual qualified for exceptional treatment. 542 U.S. at 516, 534. Finding that Ahmed qualifies from treatment as an enemy combatant would shoot a hole through the heart of due process, by allowing the executive branch to substitute statutory authorization for detention with its own judgment, effectively allowing the executive to police itself.

II. The Process afforded to Ahmed is not sufficient under due process.

The Due Process Clause protection is strong. The Constitution guarantees that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V; see also *id.* amend. XIV, § 1. The text of the Fifth Amendment affords this guarantee to "person[s]," not merely citizens, and so the constitutional right to freedom from deprivation of liberty without due process of law extends to all lawfully admitted aliens living within the United States. See *Wong Wing*, 163 U.S. at 238.

Under the due process clause, the government may not detain a person prior to a judgment of guilt in a criminal trial." *Salerno*, 481 U.S. at 749. Tension "often exists between the autonomy that the Government asserts is necessary in order to

pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. *Hamdi*, 542 U.S. at 528. In limited cases, the full process of a criminal trial is not granted to individuals in special circumstances, such as persons who qualify as enemy combatants. See *al-Marri*, 543 F.3d at 223. Furthermore, even in those narrow recognized exceptions, our Constitution generally permit only limited periods of detention. See *al-Marri*, 543 F.3d at 223. The reason due process protection is limited in the categorical exception for enemy combatants is the lack of practical procedures for detaining and having a criminal trial when someone has been detained in the battlefield.

A. Ahmed's resident alien status does not afford him less due process protection than a citizen.

The Government argues that because Ahmed is not a citizen, he is not afforded the Due Process protection, or at least he is afforded less than the Due Process protection provided to Hamdi, who is a citizen. However, it is established that persons who are legally residing as an alien and have established substantial connections with the United States are protected under the Due Process Clause. *Verdugo-Urquidez*, 494 U.S. at 271, see also *Boumediene v. Bush*, 128 S.Ct. 2229, 2246 (2008). Because Ahmed lawfully resided in the United States and

established substantial connections by pursuing a degree at a university, he should be afforded the protection of the Due Process Clause.

B. The location and manner of Ahmed's capture grant him more due process protection than was afforded to Hamdi.

Unlike *Hamdi*, Ahmed was not captured on the battlefield overseas, but rather, was captured in the United States. *Hamdi*, 542 U.S. at 510. The Government contends that the location of capture is not relevant to the procedures due to a detainee. However, the location of capture is relevant because the risk of erroneously arresting someone in the United States is much higher than it is on the battlefield. Most people in the United States are civilians and not enemy combatants, whereas in the battlefield, most people are enemy combatants and not civilians. Simply, the circumstances of Ahmed's capture in the U.S. by FBI agents rather than soldiers in a foreign battlefield mean that it is more likely that better evidence is available. Thus, in Ahmed's case it is not necessary to compromise some of the procedural requirements attendant to normal habeas proceedings.

C. Ahmed's status as a civilian who is not participating in armed combat demands more due process protection than *Padilla*.

Another policy reason for suspending habeas corpus acknowledged in *Hamdi* is to ensure that "those who have in fact

fought with the enemy during a war do not return to battle against the United States.” 542 U.S. at 531. Unlike *Padilla*, Ahmed was not “armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States,” and Ahmed is unlikely to return immediately to battle against the United States. *Padilla*, 423 F.3d 386, 390. The fact that Ahmed was not actively participating in combat distinguishes him from *Padilla* because he was not an immediate threat to the national security of the United States. The alleged terrorist activity of social security card theft is unlikely to cause immediate threat to public safety. Without such an immediate threat to public safety, Ahmed’s indefinite detention without a normal habeas corpus proceeding is not necessary and appropriate.

The government contends that we are fighting a new kind of war where enemy combatants may not be actively participating in combat. However, the interest of the detainee to be free from detention is so great that when the practicalities of a full criminal trial are not so burdensome, the detainee should be granted due process. For the reasons above, Ahmed should be afforded at least the habeas corpus procedures afforded to *Hamdi*. Furthermore, because of the circumstances of his arrest, he should be afforded a procedure that is closer to a full criminal trial.

D. The Habeas Corpus proceedings afforded to Ahmed must be crafted based on a weighing of Ahmed's and the government's interests.

To reconcile those interests, 28 USC § 2241 outlines the procedures to be afforded to a petitioner in federal habeas review. Specifically, the Congress intends that "habeas corpus petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process." *Hamdi*, 542 U.S. 507 at 526. The Supreme Court plurality opinion in *Hamdi* reminds us that the "an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of [immediate] threat [to the national security of the United States]." *Hamdi*, 542 U.S. at 530.

1. The *Hamdi* framework adopts the balancing test in *Mathews v. Eldridge*.

To craft appropriate constitutional habeas corpus procedures for challenging enemy combatant status, the court in *Hamdi*, adopted a balancing test from *Mathews v. Eldridge*. *Hamdi*, 542 U.S. at 529. This test balances the interests of the detainee and the Government by weighing the private interest of the detainee and the burdens the Government would face in providing greater process. *Hamdi*, 542 U.S. at 529. In

particular, the balancing test examines “‘the risk of an erroneous deprivation’ of the private interest if the process were reduced and ‘the probable value, if any, of additional or substitute procedural safeguards.’” *Hamdi*, 542 U.S. at 529 quoting *Mathews v. Eldridge*, 424 U.S. at 335.

While the Government may assert that the risk of erroneous deprivation is low, the burdens of the Government in Ahmed’s case to provide the most reliable evidence is small compared to the circumstances of detaining someone in the midst of a battlefield. More specifically, the Government’s proposed “some evidence standard” is inadequate for Ahmed’s case. See *Hamdi*, 542 U.S. at 537. Furthermore, the probable value of offering better evidence than the hearsay evidence would not only reduce the risk of erroneously detaining Ahmed, it would provide substantial probative value by ensuring that the Government evidence is well supported. See *Hamdi*, 542 U.S. at 534, 536-37.

Furthermore, the district court erred in applying the *Hamdi* framework because the district court did not apply the balancing test discussed in *Mathews*. In dicta, the Supreme Court in *Hamdi* suggests that “[h]earsay, for example, may need to be accepted as the most reliable available evidence from the Government” (emphasis added). *Hamdi*, 542 U.S. at 536-37. However, in light of the facts, the Supreme Court held that the evidence provided by the Government does not provide sufficient proof and must not

be “wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise.” See *Hamdi*, 542 U.S. at 537.

2. The District Court Erred in Accepting the Murphy Declaration as Sufficient to Shift the Burden to Ahmed to Rebut the Evidence.

Applying this balancing test, the district court failed to consider the interests of Ahmed in light of the burden on the Government. Specifically, because Ahmed was arrested by FBI agents, there must have been more evidence that is readily available to the Government than the evidence submitted in the Murphy Declaration. Even if the opportunity to rebut the evidence is provided to Ahmed, the process still does not provide Ahmed adequate due process because the Murphy Declaration did not suffice in light of the balancing test. See *Hamdi*, 542 U.S. at 537; *al-Marri*, 534 F.3d at 265 (finding the district court erred in accepting the Rapp Declaration as sufficient to shift the burden of persuasion to al-Marri without considering the specific circumstances before it) (Traxler J., concurring). Furthermore, the hearsay evidence should be rejected because it is unlikely that a request to provide better evidence “would unduly burden the government.” See *Al-Marri*, 534 F.3d at 268.