AMERICAN CONSTITUTION SOCIETY

Former Judge Beverly B. Martin

Eleventh Circuit Year in Review 2022-2023

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Hosted by

David Karp
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Featuring

Janine Lopez
ACLU of Florida

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Michael Caruso
Federal Public Defender
Southern District of Florida

Elbert P. Tuttle U.S. Courthouse
Atlanta, Georgia

7 to 5

Republican appointees	Democratic appointees
William H. Pryor Jr.	Charles R. Wilson
Kevin C. Newsom	Adalberto Jordan
Elizabeth L. Branch	Robin S. Rosenbaum
Britt C. Grant	Jill A. Pryor
Robert J. Luck	Nancy Abudu
Barbara Lagoa	
Andrew L. Brasher	

Senior Judges	Senior Judges
Gerald Bard Tjoflat	R. Lanier Anderson III
J.L. Edmondson	Frank M. Hull
Joel F. Dubina	Stanley Marcus
Susan H. Black	Julie E. Carnes
Edward Carnes	

Discussion Questions

- Trump appointed six judges — half of the 12 active judges on the Court, including replacements for three judges appointed by Democratic presidents. How did that happen?

- Has the debate on the Court shifted from one between conservatives and progressives to one between conservative incrementalists and activists?

- Who are the judges who are most independent and most defy labels?

United States v. Garcon

54 F.4th 1274
(rehearing en banc)
Decided December 6, 2022

Holding: The safety valve provision of the First Step Act was written in the conjunctive, and as a result, the defendant Julian Garcon was not disqualified from safety valve relief if he met *any* of the provision's subsection so long as he did not met all of its subsection.

The Court also held that the rule of lenity weighed against accepting the Government's interpretation of the First Step Act.

The Line Up: Chief Judge **William Pryor** wrote for the Court, joined by Judges **Wilson** and **Jill Pryor** (Democratic appointees), and Judges **Newsome**, **Luck**, and **Lagoa** (Republican appointees). Judge **Rosenbaum** concurred only in the judgment

Judge **Jordan** (a Democratic appointee), and Judges **Branch**, **Grant**, and **Brasher** (Republican appointees), dissented.

Case Summary

The *en banc* Court–in an opinion authored by Chief Judge William Pryor–considered whether, in the First Step Act, the word "and" means "and" with regard to a grant of safety-valve relief.

More specifically, the *en banc* Court considered the language of 18 U.S.C. § 3553(f)(1), which empowers a court to grant a criminal defendant relief from a mandatory minimum sentence only if "the defendant does not have" "more than 4 criminal history points," "a prior 3-point offense[,] . . . *and* . . . a prior 2-point violent offense."

The majority opinion joined in full by Judges Wilson, Jill Pryor, Newsom, Luck, and Lagoa–after considering the text of the statute and applying the ordinary meaning canon, held that because the conjunctive "and" joins together the enumerated criminal history characteristics in (A)-(C), a defendant *must have all three* before he is ineligible for safety-valve relief. In holding, the majority rejected the government's distributive reading of the word "and," declined "to adopt that novel reading when it appears to have been crafted by the government specifically for this statute to achieve its preferred outcome."

Judge Rosenbaum concurred in the judgment only, noting that she would have resolved the issue by applying the rule of lenity.

Judge Newsom, joined by Judge Lagoa, filed a separate concurrence to note that no canon of construction can make the word "and" mean "or" because the text is unambiguous. If Congress made a mistake, it should exercise its authority to amend the statute; "Article III doesn't empower [the Court] to do Congress's job for it."

Judge Jordan dissented, explaining that, depending on the context, the word "and" can be read disjunctively in legal texts. He also set out the views of the Senators who proposed the provision that became § 3553(f)(1) as further support.

Judge Branch, joined in full by Judges Grant and Brasher, and in part by Judge Jordan, dissented. She noted the circuit split on this issue before reasoning that the Majority's interpretation was contrary to the structure and context of the statute, and created two surplusage problems–first, it renders an entire subsection, (f)(1)(A), redundant; and second, it disregards Congress's plain instruction that all pertinent statutory determinations for purposes of § 3553(f)(1) are to be made "as determined under the sentencing guidelines." After consideration of context and structural cues, in her opinion, the best reading of § 3553(f)(1) is that it bars safety-valve relief for defendants who have any one of the enumerated criminal history characteristics in (A)-(C).

Judge Brasher authored a separate dissent to comment on criminal-history-based sentencing and to "give some advice to district judges about how to deal with the majority's decision."

Garcia-Bengochea v. Carnival Corporation
57 F.4th 916
(panel rehearing)
Decided January 10, 2023

Holding: Purposed owner of commercial waterfront real property in Cuba had standing to bring action under Cuban Liberty and Democratic Solidarty Act, alleging that cruise line operators had trafficked in property confiscated by the Cuban government.

The Line-Up: Per curium opinion for Judges **Jordan** and **Newsome**, and visting district judge **Liles Burke** of the Northern District of Alabama.

Case summary

In this case, the plaintiff claimed that Carnival and Royal Caribbean trafficked in a dock in Santiago, which Cuba confiscated in 1960 from a company whose shares the plaintiff inherited, by docking and disembarking passengers there beginning in 2016.

This is the court's summary of the "story":

(a) Albert, a U.S. national, owned an interest in La Marítima (commercial water-front real property in the Port of Santiago de Cuba); (b) Albert died in 1972, after the Foreign Claims Settlement Commission certified a portion of his interest in La Marítima; (c) through his will, Albert passed on his interest in La Marítima to his

brother, Desiderio Parreño; (d) Desiderio, who was a Costa Rican national, died in 2000, after passage of the Helms-Burton Act; (e) through his will, Desiderio passed on his interest in La Marítima to his cousin, Dr. Garcia-Bengochea.

Two provisions of Helms-Burton contain limitations on which U.S. nationals can bring a claim:

(B) In the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national *acquires ownership* of the claim before March 12, 1996.

(C) In the case of property confiscated on or after March 12, 1996, a United States national who, after the property is confiscated, *acquires ownership* of a claim to the property by assignment for value, may not bring an action on the claim under this section.

Before addressing the "merits" issue of whether Garcia-Bengochea timely "acquired" the claim, the court discussed whether the plaintiff had properly alleged Article III standing. Carnival argued:

1. Garcia-Bengochea suffered no concrete injury because he was not affected by the cruise lines' use of the dock as he "would be in precisely the same position he stands in now" if they had not used the dock.

2. Garcia-Bengochea's injury, if any, is not traceable to the cruise lines, but rather to the fact that the Cuban government confiscated the dock more than 60 years ago; and

3. If the injury is deemed to be intangible, there is no standing to sue because Congress cannot create a cause of action to redress an intangible injury unless the cause of action "bears a close relationship" to a claim with "common law roots."

The Court rejected each argument. It held that the injury as defined in the Act is not the Cuban government's confiscation of the property, but rather the use of that property for commercial gain without compensating or obtaining the plaintiff's permission for it. That is a concrete injury, and it is traceable to the cruise lines.

The Court further explained, an injury may have multiple causes. As alleged in the complaints, Garcia-Bengochea was injured "by both the Cuban government's initial confiscation of the property and the cruise lines' subsequent trafficking in the property." This is enough to satisfy both the injury and traceability elements of standing at this stage of the proceedings.

Even if the injury were deemed to be intangible, there would still be standing, according to the court, because the claim of trafficking as defined in the Act bears a close relationship to the common law claim of unjust enrichment.

The Court's ruling essentially ends the argument advanced by defendants in many Helms-Burton cases that a plaintiff lacks Article III standing, at least at the pleadings stage.

Even though Garcia-Bengochea has standing, on the merits the Eleventh Circuit agreed with the district court that the statutory requirement that a plaintiff must have *"acquired"* the claim before March 12, 1996, does apply to persons, like Garcia-Bengochea, who inherited their claims after that date. The Court therefore ruled that Garcia-Bengochea's claims were properly rejected by the district court.

Garcia-Bengochea contended that the word "acquires" does not encompass the passive act of inheritance and rather requires affirmative effort to gain ownership or possession. He asserted that this reading is the appropriate one given the text and purpose of the Act.

If the district court's reading is sustained, he said, no heirs could bring Title III claims where the property was confiscated before March 12, 1996, but the original owner died after that date and bequeathed his interest.

The cruise lines argued that the word "acquires" broadly to include inheritance. They argued that because confiscation took place before the passage of the Act, and because Garcia-Bengochea inherited ownership after 1996, he cannot assert a claim.

The Court sided with the cruise lines. "The plain meaning of' 'acquires' is 'to gain possession or control of; to get or obtain.' … That includes inheritance. If Congress meant for 'acquires' to require some form of active conduct, like a purchase, it knew how to communicate that meaning. In fact, it did so in the very same section of the Act: 'In the case of property confiscated on or after March 12, 1996, a United States national who, after the property is confiscated, *acquires ownership of a claim to the property by assignment for value*, may not bring an action on the claim under this section. There would have been no reason for Congress to add the words 'by assignment for value' if 'acquires ownership' was already limited to assignment for value."

In a concurrence, Judge Jordan analyzed the meaning of "acquired" more thoroughly and concluded that it could be – and, given the Act's purpose of deterring trafficking in confiscated property and granting U.S. persons a right of action, very arguably should be – construed more narrowly to exclude passive acquisitions such as by inheritance.

Judge Jordan nevertheless concurred based on statutory construction principles. The subdivision of the Act setting the March 12, 1996, as the cut-off date for acquiring claims applicable to confiscations before that date is immediately followed by another subdivision applicable to confiscations after March 12, 1996. This latter subdivision applies expressly to a narrower class of acquisitions – "by assignment for value" – which language excludes, for example, inheritances. Judge Jordan concluded, applying statutory construction principles, that the "combined language" of these two subdivisions "cannot bear the weight" of Garcia-Bengochea's argument that "acquires" has the same narrow meaning in both subdivisions.

League of Women Voters of Fla. v. Fla. Secretary of State

66 F.4th 905
Decided April 27, 2023
Petition for rehearing en banc denied
Petition denied September 21, 2023

Holding: Florida's election law regulating drop-boxes, solicitation of voters at polls, and registration delivery did not violate the Equal Protection Clause, Due Process Clause, 15th Amendment, or Voting Rights Act.

The Line-Up: Chief Judge **William Pryor,** joined by Judge **Grant**, wrote for the Court. Judge **Jill Pryor** wrote a one-paragraph dissent.

En Banc Poll: Yesterday, the Eleventh Circuit denied rehearing en banc with Chief Judge **William Pryor** writing a statement supporting the decision, joined by Judges **Grant** and **Brasher**. Judge **Wilson** writing a blistering dissent joined by Judge **Jill Pryor** and joined in part by Judge **Jordan**.

Case Summary

In this case, the Eleventh Circuit upheld several Republican-backed voting restrictions in Florida, overturning a lower court ruling that found the measures were deliberately enacted to suppress Black voters.

The plaintiffs argued that voters of color were being intentionally discriminated against by new registration requirements for voter-registration drives, limits on delivering the absentee ballot of another person (known as ballot harvesting), drop-boxes, and providing food and water to folks standing in line to vote (known as line warming).

At trial, the defendants argued that the law made only minor prophylactic changes to the election code. Plaintiffs, on the other hand, asserted that the law runs "roughshod over the right to vote, unnecessarily making voting harder for all eligible Floridians, unduly burdening disabled voters, and intentionally targeting minority voters—all to improve the electoral prospects of the party in power."

The district court concluded that "Once is an accident, twice is a coincidence, and three times is a pattern. At some point, when the Florida Legislature passes law after law disproportionately burdening Black voters, this Court can no longer accept that the effect is incidental." The district court also found that Florida's "long history of racial discrimination against Black ... Floridians" "informs its present."

The district court also discussed "socioeconomic disparities ... between racial groups." It framed such disparities as "the stark results of a political system that, for well over a century, has overrepresented White Floridians and underrepresented Black ... Floridians." The organizations contend that such statistics serve as "evidence of 'the lingering effects of past discrimination.'"

The district court wrote in its final paragraph:

"In Florida, White Floridians outpace Black Floridians in almost every socioeconomic metric. In Florida, since the end of the Civil War, politicians have attacked the political rights of Black citizens. In Florida, though we have come far, 'the realistic fact is that we still have a long, long way to go.' For the past 20 years, the majority in the Florida Legislature has attacked the voting rights of its Black constituents. They have done so not as, in the words of Dr. King, 'vicious racists, with [the] governor having his lips dripping with the words of interposition and nullification,' but as part of a cynical effort to suppress turnout among their opponents' supporters. That, the law does not permit."

The district court's ruling blocked provisions including stringent restrictions on third-party voter registration drives, limits on ballot drop boxes, and a criminal law barring anyone from helping voters who are waiting in line. The district court also required pre-clearance on these issues for ten years.

Chief Judge William Pryor wrote that the lower court's "reasoning—implicitly requiring evidence of voter fraud in Florida to justify prophylactic measures—does not follow our precedents."

He added that the "bill's sponsors, legislative leaders, and the Governor all presented a consistent message about the need for election security."

The Court held that the drop-box, solicitation, and registration-delivery provisions did not violate the Fourteenth or Fifteenth Amendment.

First, the plaintiffs must prove both that the law will have a discriminatory impact and that it was adopted with discriminatory intent. Second, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this racial discrimination factor."

In determining whether a "law has both a discriminatory intent and effect," the court relied on *Village of Arlington Heights* which requires consideration of several factors about the law and its adoption:

(**1**) the impact of the challenged law; (**2**) the historical background; (**3**) the specific sequence of events leading up to its passage; (**4**) procedural and substantive departures; ... (**5**) the contemporary statements and actions of key legislators[;] ... (**6**) the foreseeability of the disparate impact; (**7**) knowledge of that impact[;] and (**8**) the availability of less discriminatory alternatives.

The Court held that the district court relied on fatally flawed statistical analyses, out-of-context statements by individual legislators, and legal premises that do not follow our precedents. The organizations contend that "divorc[ing] individual threads of evidence from the larger 'calculus-of-voting' framework" unfairly deconstructs their argument. On the contrary, examining the record reveals that the finding of intentional discrimination rests on hardly any evidence. Because the record does not contain evidence sufficient to sustain a finding of either disparate impact or discriminatory intent for the solicitation provision and drop-box provision, neither provision violates the Constitution."

The Court viewed the registration-delivery provision as a closer question. Sufficient evidence exists in the record to uphold the finding, on clear-error review, that the provision will have a disparate impact on black voters. But a finding of disparate impact alone cannot support a finding that the registration-delivery provision violates the Constitution. Other evidence, at most, establishes that some legislators knew that black voters are more likely than white voters to register to vote using third-party voter-registration organizations. That evidence does not establish that the Legislature acted with discriminatory intent.

The Court also held that the district court correctly concluded that the solicitation provision is unconstitutionally vague.

The law expanded the scope of the prohibition against soliciting voters who are waiting in line to cast their votes. At issue is the constitutionality of the final clause, which prohibits "engaging in any activity with the intent to influence or effect of influencing a voter."

The second half of the challenged clause—which prohibits "engaging in any activity *with the ... effect* of influencing a voter—presented a problem. "How is an

individual seeking to comply with the law to anticipate whether his or her actions will have the subjective effect of influencing a voter? Knowing what it means to influence a voter does not bestow the ability to predict which actions will influence a voter. As a result, this phrase in the solicitation provision both fails to put Floridians of ordinary intelligence on notice of what acts it criminalizes and encourages arbitrary and discriminatory enforcement, making this provision vague to the point of unconstitutionality."

Judge Jill Pryor dissented based on the district court's order in a one-paragraph order.

Thompson v. Alabama

65 F.4th 1288
Decided April 26, 2023

Holding: A 1996 amendment to the Alabama Constitution removed any taint from the racially discriminatory motives behind the 1901 Alabama Constitution, did not impose punishment under the *Ex Post Facto* clause, and Alabama's mail voting form complied with the National Voting Registration Act of 1993.

The Line-Up: Senior Judgment **Gerald Tjoflat** wrote an opinion joined by visiting district court **James Moody** of the Middle District of Florida. Judge Robin Rosenbaum dissented and concurred in part.

Case Summary

The Alabama Constitution of 1901 was enacted with the specific purpose of establishing white supremacy. To accomplish this goal, the 1901 constitution contained a provision disenfranchising anyone convicted of a crime of moral turpitude. After the Supreme Court held that provision unconstitutional in 1985, the state enacted a new constitutional amendment that disenfranchised only those who committed *felonies* involving moral turpitude.

Greater Birmingham Ministries, which aids low-income individuals and persons convicted of felony offenses, challenged the felon disenfranchisement clause in court, focusing on its discriminatory history.

Appellants claimed that Amendment 579's (1996) felon disenfranchisement provision violated the Equal Protection Clause because the re-enactment process did not adequately dissipate the taint of the discriminatory intent behind the 1901 Constitution.

The Court recognized that the Equal Protection Clause does prevent states from disenfranchising voters based on race, and a "facially-neutral law violates the Equal Protection Clause if adopted with the intent to discriminate against a racial group." Determining whether a facially neutral law violates the Equal Protection Clause involves a two-step analysis. First, the court "examines whether racial discrimination was a substantial or motivating factor in the state's decision to deny the right to vote to felons." If the plaintiffs succeed in making this showing, the court then asks, "whether the state can show that the provision would have been enacted in the absence of any racially discriminatory motive."

In this case, the Appellants did not contend that Amendment 579 was enacted with discriminatory intent in 1996. Instead, Appellants argued that Amendment 579 failed to eliminate the discriminatory intent behind the 1901 Constitution by re-

enacting the "moral turpitude" language of the 1901 Constitution. To determine "whether a subsequent legislative re-enactment can eliminate the taint from a law that was originally enacted with discriminatory intent," the Court considered whether the law was re-enacted "through a deliberative process" while paying special attention to whether the re-enactment resulted in any substantive changes.

The Court held that Amendment 579 was also passed through a deliberative process. Alabama considered reforms to § 182 as part of three different constitutional reform efforts in 1973, 1979, and 1983 before Amendment 579 finally passed the Alabama legislature unanimously in 1995 and was ratified by 76 percent of the Alabama population in 1996. Further, Amendment 579 also resulted in substantive changes to Alabama law; while § 182 disenfranchised all felons, Amendment 579 expanded the franchise by only disenfranchising persons convicted of felonies involving moral turpitude.

Additionally, the Court held the amendment does not constitute retroactive punishment, is part of a civil statute, does not include the scienter requirement's intentional or reckless disregard for the law, and does not promote the traditional aims of punishment, like retribution and deterrence.

The Appellants also argued that the voting registration form violates the National Voter Registration Act because it does not specifically list all of the felonies that involve moral turpitude and prevent someone from voting. But the Court said that the form is sufficiently specific because it directs registrants to a website that lists all the applicable felonies, which includes most felonies.

Judge Robin S. Rosenbaum wrote a dissenting opinion that found the test for deciding whether the disenfranchisement provision purged the taint of its predecessor was "meaningless" but concurred in the majority's equal protection conclusion. Rosenbaum also dissented from the ex post facto and voting act holdings, saying that the provision is punitive, and that the voting registration form is not sufficiently specific.

United States v. Dupree

57 F.4th 1269
(en banc)
Decided January 18, 2023

Holding: The en banc Court held that the definition of "controlled substance offense" in U.S.S.G. 4B1.2(b) does not include inchoate offenses like conspiracy.

The Line-Up: Judge **Jill Pryor** wrote the Court's opinion, joined joined by Chief Judge **William Pryor** and Judges **Wilson**, **Jordan**, **Rosenbaum**, **Newsom**, **Lagoa**, and **Brasher**.

Judges **Luck** and **Branch** dissented.

Case Summary

In an opinion by Judge Jill Pryor, and joined by Chief Judge William Pryor and Judges Wilson, Jordan, Rosenbaum, Newsom, Lagoa, and Brasher, the Court held that the definition in the text of 4B1.2(b) unambiguously excludes inchoate offenses. Because there was no ambiguity, the Court was precluded from deferring to the commentary's broader definition (expressly including inchoate offenses) under the Supreme Court's recent decision in *Kisor* clarifying its earlier decision *Stinson*.

Chief Judge Pryor concurred in order to correct the common misconception. The Guidelines' commentary typically goes through the same notice-and-comment and congressional review process as amendments to the text of the Guidelines themselves. He encouraged the Commission to move what normally goes in the commentary into the text of the Guidelines.

Judge Grant concurred in the judgment, agreeing with the result but criticizing the majority for effectively overruling Stinson, which she viewed as distinct from the administration law cases upon which it relied. She feared that the majority's opinion may "unsettled much of our case law" because courts must now examine whether the text of the Guidelines is ambiguous before consulting the commentary.

Judge Luck, joined by Judge Branch, dissented. He opined that the majority's application of *Kisor* to *Stinson* effectively overruled *Stinson*, and *Kisor* did not apply to *Stinson* at all.