

THE  
JOURNAL  
OF  
IN-CHAMBERS PRACTICE

INCLUDING RAPP'S REPORTS

VOLUME THREE — NUMBER ONE

2018

# THE JOURNAL OF IN-CHAMBERS PRACTICE

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## INTRODUCTION

# “THE CIRCUIT JUSTICE IS A VERY IMPORTANT PERSON”

## DID IN-CHAMBERS CONCERNS HELP DERAIL A SUPREME COURT NOMINEE’S CONFIRMATION?

*Ira Brad Matetsky*<sup>†</sup>

This *Journal of In-Chambers Practice* focuses on opinions and orders that Justices of the Supreme Court of the United States issue in their individual capacity, or “in chambers.” It has now been four years since any Justice issued an in-chambers opinion,<sup>1</sup> although the Court’s recent *per curiam* opinion in *Benisek v. Lamone*<sup>2</sup> cited not one but two of them.

The fact that a Justice can act on certain matters individually, rather than as one-ninth of the Court as a whole, ordinarily receives little attention outside the Court, some of its Bar, and readers of its *Journal*. In at least one instance, however, the significance of the Justices’ in-chambers authority was used strategically, as part of an ultimately successful effort to defeat a nomination to the Supreme Court.

In 1969, Justice Abe Fortas resigned. To succeed him, President Richard Nixon nominated Clement Haynsworth, a Judge of the U.S. Court of

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<sup>1</sup> The Justices’ four most recent in-chambers opinions, issued between 2011 and 2014, are reprinted in the *Rapp’s Reports* section of this issue.

<sup>2</sup> 138 S.Ct. 1942 (2018) (citing *Lucas v. Townsend*, 486 U.S. 1301, 3 Rapp 1284 (1988) (Kennedy, J., in chambers); *Fishman v. Schaffer*, 429 U.S. 1325, 2 Rapp 721 (1976) (Marshall, J. in chambers)). See Tony Mauro, *In-Chambers Supreme Court Opinions Get Rare Nod in Gerrymandering Ruling*, <https://www.law.com/nationallawjournal/2018/06/20/in-chambers-supreme-court-opinions-get-rare-nod-in-gerrymandering-ruling> (June 20, 2018).

Appeals for the Fourth Circuit, but the Senate rejected the nomination by a 55-45 vote.<sup>3</sup> Nixon then nominated Judge G. Harrold Carswell, of the Fifth Circuit, but the Senate rejected Carswell as well.<sup>4</sup> Nixon's third nominee, Judge Harry Blackmun of the Eighth Circuit, was confirmed and went on to serve for a quarter-century from 1970 to 1994.

The consensus today appears to be that Haynsworth was at least a respectable, if flawed, nominee for the Supreme Court but that Carswell was wholly unqualified. To the extent Carswell's nomination is remembered, it is largely for Senator Roman Hruska's inept attempt to defend Carswell against accusations that he was a "mediocre" judge. Hruska told a radio interviewer, "even if [Carswell] were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there."<sup>5</sup> At least one commentator has opined that "[m]ore than any other single thing, this statement killed Carswell's nomination."<sup>6</sup>

But while Carswell's nomination was pending in 1970, it was by no means clear that it would be rejected. Many of the Republican senators who had voted against Haynsworth were reluctant to go against the President's choice a second time, while some Southern Democrats who had opposed Haynsworth did not want to oppose a second straight Southern nominee. Ultimately, a confluence of revelations about Carswell's background and judicial performance, adroit parliamentary maneuvering by Carswell's senatorial opponents led by Birch Bayh of Indiana, and a series of missteps by Carswell's senatorial supporters led to the nomination's defeat by a 51-45 vote.

The Carswell nomination's fate was unclear just a few days before the final floor vote was to take place on April 8, 1970. A key senator who had not announced a position on the nomination was Margaret Chase Smith, Republican of Maine. Smith often kept her positions on upcoming votes to herself until the roll-call, and was known to resent overt efforts to influ-

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<sup>3</sup> See generally JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT (1991).

<sup>4</sup> See RICHARD HARRIS, DECISION (1971). Harris's reporting first appeared in *The New Yorker* for December 5 and 12, 1970.

<sup>5</sup> FRANK, *supra* note 3, at 112; HARRIS, *supra* note 4, at 110.

<sup>6</sup> FRANK at 112; see also HARRIS at 110.

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ence her decisions.<sup>7</sup> Those who wished to influence her vote needed to do so more subtly.

Surprisingly, one attempt to persuade Smith to oppose Carswell cited Carswell’s potential in-chambers duties if he were confirmed:

Toward the end of the contest, [young lawyer Gary Burns] Sellers . . . happened to mention to Bayh’s staff that if Carswell was confirmed he would be the justice who oversaw the First Circuit, which took in Maine, and would have jurisdiction over stays of execution, contested federal actions in the region, and other local affairs that would be of concern to a politician with both local and national responsibilities. Sellers was asked for a memorandum on this, and when it arrived Bayh’s press officer, [Bill] Wise, telephoned the Boston office of the A.P., where the news was rejected by the acting night editor, who told him that it was “a Washington story,” and then the *Boston Globe*, where the assistant managing editor was very interested – and rather put out that his staff hadn’t thought of it. Wise dictated the information in Sellers’ memorandum, and a story on it appeared on the first page of the next day’s edition. That was said to have impressed Mrs. Smith, who had been unaware that Carswell would have such an effect on her domain if he reached the Court.<sup>8</sup>

In an oral history interview, the *Boston Globe* reporter, Thomas Oliphant, recalled this story’s being pitched to him:

[The fate of the Carswell nomination] was in doubt into the final weekend. One of the last votes to go against Carswell was Margaret Chase Smith, who was still in the Senate. . . . [T]hey were working right through the weekend, and they came to me on the Friday, OK? The story they were offering was that because of the vacancy, because of the way the Court was, the District [*sic*] Justice for the [United States Court of Appeals for the] First Circuit would be whoever filled that opening, which meant New England. So that meant that Carswell would be the Circuit Justice for the First Circuit, meaning New England [*laughs*]. And they wanted her to read that in her Sunday paper.<sup>9</sup>

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<sup>7</sup> HARRIS at 118-19, 181-82.

<sup>8</sup> *Id.* at 182.

<sup>9</sup> Thomas Oliphant oral history, Miller Center, U. of Virginia, Mar. 14, 2007, available at <https://millercenter.org/the-presidency/presidential-oral-histories/thomas-oliphant-oral-history-3142007-washington>. In the oral history, Oliphant thought it might have been one of two aides to

Oliphant's article, titled "Carswell Could Be Judge for New England Circuit," appeared on the *Boston Globe's* front page on Sunday, April 5, 1970.<sup>10</sup> Its opening paragraph declared that if confirmed, Carswell "could end up being a vital link in the appeals process for the citizens of Maine, Rhode Island, Massachusetts, New Hampshire, and Puerto Rico."<sup>11</sup> The article provided a primer on the Circuit Justice's role:

This is so because of a little-understood function of Supreme Court justices, which places them in the role of circuit justices, each getting first crack at cases coming up from lower jurisdictions in 10 sections of the country.

In effect, in his role of circuit justice, a Supreme Court justice has the power to grant or deny temporary relief to petitioners pending final resolution of a case by the whole court.<sup>12</sup>

For example, Oliphant speculated that Carswell "could be the justice making the first decision on the Vietnam War Act adopted in Massachusetts last week,"<sup>13</sup> and that if a stay were denied in such a case, the soldier-appellant "could be in Vietnam and get killed before the final phase of the appeals process was completed."<sup>14</sup> In addition, Oliphant reported that "[t]wo important civil rights cases decided in the 1960s show the important position the circuit justice occupies in the appeal process"<sup>15</sup> – a 1964 case in which Justice Hugo Black refused to stay an order enforcing the recently enacted Civil Rights Act,<sup>16</sup> and a 1970 case in which Justice Thurgood Marshall stayed an order requiring legislative redistricting in Indiana.<sup>17</sup>

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Senator Edward Kennedy who contacted him with this story lead, but Oliphant's and Harris's contemporaneous reporting does not support this.

<sup>10</sup> Thomas Oliphant, "Carswell Could Be Judge for New England Circuit," *BOSTON GLOBE*, Apr. 5, 1970, at 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* On April 1, 1970, Massachusetts had adopted legislation challenging the Nixon Administration's authority to conduct the Vietnam War without congressional approval and providing that servicemen from Massachusetts could not be involuntarily deployed in an undeclared war. See *Massachusetts v. Laird*, 400 U.S. 886 (1970) (refusing by a 6-3 vote to allow Massachusetts to file an original bill of complaint in the Supreme Court to test the validity of this law).

<sup>14</sup> Oliphant, *supra* note 10, at 21 (quoting an unnamed Bayh aide).

<sup>15</sup> *Id.*

<sup>16</sup> *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 1 Rapp 351 (1964) (Black, J., in chambers); see also *Katzenbach v. McClung*, 85 S. Ct. 6, 1 Rapp 354 (1964) (Black, J., in chambers).

<sup>17</sup> See *Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (granting stay application presented to Marshall, J., and referred to the full Court); Robert P. Mooney, *Court Delays Use of Remap*, *INDIANAPOLIS STAR*,

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While Oliphant’s article initially reported only that Carswell “could” be allotted to the First Circuit if confirmed, it cited aides to Bayh as asserting that “Judge Carswell would almost certainly be assigned to the First Circuit . . . because no Supreme Court Justice is assigned to it now.”<sup>18</sup> This was not actually true: Justice William Brennan had been assigned to the First Circuit, in addition to his home Third Circuit, following Fortas’s resignation in 1969. However, Fortas had previously served the First Circuit and Brennan’s may have been perceived as a temporary, fill-in assignment until the Court was back at full strength.<sup>19</sup>

While the Oliphant article reportedly “impressed” Senator Smith,<sup>20</sup> no one knows how much it may have contributed to her vote on Carswell’s nomination three days later. There were plenty of other concerns about Carswell; for example, around the same time, Smith also expressed concerns about a report that Carswell had given misleading testimony about his role in incorporating a segregated golf club.<sup>21</sup> When the time came, Smith voted against Carswell’s confirmation. During the roll-call, her vote “brought a roar of approval from the galleries and more applause, for her vote made twelve Republicans opposed – the number necessary to defeat the nomination.”<sup>22</sup> Smith never gave specific reasons for her vote against Carswell, either before or after she cast it.

Whether Carswell would in fact have been assigned as Circuit Justice for the First Circuit if he had been confirmed to the Court is another unknowable. When Blackmun was confirmed two months later to what would have been Carswell’s seat, he was allotted not to the First Circuit but to the Eighth Circuit, where he had sat on the Court of Appeals before his elevation. Brennan, who had been allotted to the First Circuit upon Fortas’s resignation, retained that assignment after Blackmun joined the Court. Indeed, Brennan remained the Circuit Justice for both the First and Third Circuits until he retired from the Court in 1990. Blackmun took his assignment to the Eighth Circuit over from Justice Byron White, who had

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Feb. 7, 1970 (reporting that Marshall had granted a stay in this case).

<sup>18</sup> Oliphant, *supra* note 10, at 1, 21.

<sup>19</sup> For listings of Circuit Justice assignments, see LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, table 5-4 (6th ed. 2015), or the Federal Judicial Center website at <https://www.fjc.gov/history/courts/supreme-court-united-states-circuit-allotments>

<sup>20</sup> HARRIS, *supra* note 4, at 182.

<sup>21</sup> *Id.* at 183.

<sup>22</sup> *Id.* at 201.

been Circuit Justice for that circuit since his appointment in 1962.

What is clear is that Carswell would not have been assigned in 1970 to the Fifth Circuit, which since 1937 had been the domain of Justice Hugo Black. Quite possibly Carswell would have been assigned to the Eighth Circuit, even though he was geographically unconnected with that circuit. This would have relieved White from his doubled-up responsibility for both the Eighth Circuit and his home Tenth Circuit. White's double load in serving both the Eighth and Tenth Circuits was more burdensome than Brennan's in serving both the First and Third Circuits, because the First Circuit was the smallest in the country. Despite all this, it is possible that Carswell would have been slotted in to fill the First Circuit seat in 1970 – but even then, it would probably have been a short-lived assignment, as Carswell could have been reallocated to his home Fifth Circuit when Black left the Court the following year.

But in any event, at one critical moment in 1970s, the breadth of the Circuit Justice's responsibilities made front-page news in a major city. As Oliphant's article concluded: "In short, the circuit justice is a very important person."<sup>23</sup>

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<sup>23</sup> Oliphant, *supra* note 10, at 21 (quoting an unnamed Bayh aide).

# RAPP'S REPORTS

## VOLUME 5

IN THE JOURNAL OF IN-CHAMBERS PRACTICE

5 Rapp no. 13 (2011)

## GRAY V. KELLY, WARDEN

### HEADNOTE

by Ira Brad Matetsky

Source: *United States Reports*, via U.S. Supreme Court website

Opinion by: John G. Roberts, Jr. (noted in source).

Opinion date: August 25, 2011 (noted in source).

Citation: Gray v. Kelly, 564 U.S. 1301, 5 Rapp no. 13 (2011) (Roberts, C.J., in chambers), 2 J. In-Chambers Practice 16 (2018).

Additional information: The headnote to this case in the *United States Reports* states:

Gray's application to stay a Federal District Court order setting a federal habeas briefing schedule pending this Court's disposition of his petition for a writ of certiorari to the Virginia Supreme Court is denied. The familiar standard for securing a stay of a judgment subject to this Court's review is inapplicable here because Gray is not seeking to stay the Virginia Supreme Court's judgment. Nor does this Court's "supervisory authority" over the District Court, which implicates an even more daunting standard, entitle Gray to relief. See *Ehrlichman v. Sirica*, 419 U. S. 1310, 1311–1312 (Burger, C. J., in chambers).

### OPINION

GRAY v. KELLY, WARDEN

ON APPLICATION FOR STAY

No. 11A210 (11-5545). Decided August 24, 2011.

CHIEF JUSTICE ROBERTS, Circuit Justice.

Ricky Gray was convicted of five counts of capital murder in Virginia. He was sentenced to death on two of the counts and life imprisonment on the remaining three. After his convictions and sentences were affirmed on direct appeal, Gray filed a petition for state postconviction relief. The Virginia Supreme Court granted the petition in part, ordering vacatur of one

of the convictions for which Gray was sentenced to life imprisonment. *Gray v. Warden of Sussex I State Prison*, 281 Va. 303, 304, 707 S. E. 2d 275, 280–281 (2011). But the court denied relief in all other respects, *ibid.*, and the Commonwealth of Virginia set a date of execution of June 16, 2011. Meanwhile, Gray applied for appointment of counsel in the United States District Court for the Eastern District of Virginia, where he planned to file a petition for a writ of habeas corpus under 28 U. S. C. § 2254. On June 14, 2011, the District Court appointed counsel for Gray and stayed the execution of his death sentence for 90 days pursuant to § 2251(a)(3). In a separate order issued the same day, the District Court set a briefing schedule requiring Gray to file his federal habeas petition within 45 days, no later than July 29. In a subsequent order on June 29, the District Court extended Gray’s deadline for filing a habeas petition to August 29.

On July 25, Gray filed with this Court a petition for a writ of certiorari, seeking review of the decision of the Virginia Supreme Court. He claimed that the procedures followed by that court in adjudicating his postconviction claims violated his federal constitutional rights to due process and equal protection of the laws. Gray then asked the District Court to stay its June 29 scheduling order pending this Court’s disposition of his petition for certiorari to the Virginia Supreme Court. After the District Court denied the request, Gray did not seek a stay from the Court of Appeals for the Fourth Circuit, but rather filed an application for a stay with me as Circuit Justice.

Gray’s application accompanies his petition for certiorari to the Virginia Supreme Court, but does not seek a stay of that court’s judgment. Nor does his application seek a stay of his date of execution, which has not been reset. His application instead requests only a stay of the District Court’s order requiring him to file a federal habeas petition by August 29.\*

Although Gray’s application invokes the familiar standard for securing a stay of a judgment subject to this Court’s review, see Application for Stay 4 (citing *Barefoot v. Estelle*, 463 U. S. 880, 895 (1983)), that standard is inap-

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\* Gray’s application specifically requests a stay of the District Court’s June 29 scheduling order. Application for Stay 14. That order *extended* the deadline for filing a federal habeas petition to August 29. A stay of that order would therefore serve only to restore the original deadline of July 29. The substance of Gray’s application makes clear, however, that the relief he actually seeks is a stay of the District Court’s briefing schedule in its entirety until this Court acts on his petition for a writ of certiorari to the Virginia Supreme Court.

plicable here because Gray does not seek a stay of such a judgment. Gray's request that this Court exercise its "supervisory authority" over the District Court, Reply to Opposition to Application for Stay 2, implicates a standard even more daunting than that applicable to a stay of a judgment subject to this Court's review. See *Ehrlichman v. Sirica*, 419 U. S. 1310, 1311–1312 (1974) (Burger, C. J., in chambers). Gray clearly has not established his entitlement to relief from the District Court's scheduling order. The application for a stay is denied.

*It is so ordered.*

5 Rapp no. 14 (2012)

# MARYLAND V. KING

## HEADNOTE

by Ira Brad Matetsky

Source: *United States Reports*, via U.S. Supreme Court website

Opinion by: John G. Roberts, Jr. (noted in source).

Opinion date: July 30, 2012 (noted in source).

Citation: *Maryland v. King*, 567 U.S. 1301, 5 Rapp no. 14 (2012) (Roberts, C.J., in chambers), 2 J. In-Chambers Practice 19 (2018).

Additional information: The headnote to this case in the *United States Reports* states:

The State of Maryland’s application to stay the judgment of the Maryland Court of Appeals — overturning the first-degree rape conviction of Alonzo Jay King, Jr., on the ground that the collection of his DNA pursuant to the State’s DNA Collection Act violated the Fourth Amendment — is granted. Because that judgment conflicts with the decisions of other courts upholding similar statutes and implicates an important law enforcement practice in approximately half the States and the Federal Government, there is “a reasonable probability” that this Court will grant certiorari. *Conkright v. Frommert*, 556 U. S. 1401, 1402. Given the considered analysis of courts on the other side of the split, there is also “a fair prospect” that this Court will reverse that decision. *Ibid.* Finally, there is a “likelihood” that Maryland will suffer “irreparable harm,” *ibid.*, if it is unable to give effect to a statute “enacted by representatives of its people,” *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U. S. 1345, 1351. There is also ongoing and concrete harm to Maryland’s law enforcement and public safety interests resulting from the State’s not being allowed to employ a duly enacted statute for investigating unsolved crimes

OPINION

MARYLAND *v.* KING

ON APPLICATION FOR STAY

No. 12A48. Decided July 30, 2012.

CHIEF JUSTICE ROBERTS, Circuit Justice.

Maryland's DNA Collection Act, Md. Pub. Saf. Code Ann. § 2–501 *et seq.* (Lexis 2011), authorizes law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes, mainly violent crimes and first-degree burglary. In 2009, police arrested Alonzo Jay King, Jr., for first-degree assault. When personnel at the booking facility collected his DNA, they found it matched DNA evidence from a rape committed in 2003. Relying on the match, the State charged and successfully convicted King of, among other things, first-degree rape. A divided Maryland Court of Appeals overturned King's conviction, holding the collection of his DNA violated the Fourth Amendment because his expectation of privacy outweighed the State's interests. 425 Md. 550, 42 A. 3d 549 (2012). Maryland now applies for a stay of that judgment pending this Court's disposition of its petition for a writ of certiorari.

To warrant that relief, Maryland must demonstrate (1) "a reasonable probability" that this Court will grant certiorari, (2) "a fair prospect" that the Court will then reverse the decision below, and (3) "a likelihood that irreparable harm [will] result from the denial of a stay." *Conkright v. Frommert*, 556 U. S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (internal quotation marks omitted).

To begin, there is a reasonable probability this Court will grant certiorari. Maryland's decision conflicts with decisions of the U. S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court, which have upheld statutes similar to Maryland's DNA Collection Act. See *United States v. Mitchell*, 652 F. 3d 387 (CA3 2011), cert. denied, 565 U. S. 1275 (2012); *Haskell v. Harris*, 669 F. 3d 1049 (CA9 2012), reh'g en banc granted, 686 F. 3d 1121 (2012); *Anderson v. Commonwealth*, 274 Va. 469, 650 S. E. 2d 702 (2007), cert. denied, 553 U. S. 1054 (2008); see also *Mario W. v. Kaipio*, 230 Ariz. 122, 281 P. 3d 476 (2012)

(holding that seizure of a juvenile’s buccal cells does not violate the Fourth Amendment but that extracting a DNA profile before the juvenile is convicted does).

The split implicates an important feature of day-to-day law enforcement practice in approximately half the States and the Federal Government. Reply to Memorandum in Opposition 3; see 114 Stat. 2728, as amended, 42 U. S. C. § 14135a(a) (1)(A) (authorizing the Attorney General to “collect DNA samples from individuals who are arrested, facing charges, or convicted”). Indeed, the decision below has direct effects beyond Maryland: Because the DNA samples Maryland collects may otherwise be eligible for the Federal Bureau of Investigation’s national DNA database, the decision renders the database less effective for other States and the Federal Government. These factors make it reasonably probable that the Court will grant certiorari to resolve the split on the question presented. In addition, given the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below.

Finally, the decision below subjects Maryland to ongoing irreparable harm. “[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U. S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Here there is, in addition, an ongoing and concrete harm to Maryland’s law enforcement and public safety interests. According to Maryland, from 2009 — the year Maryland began collecting samples from arrestees — to 2011, “matches from arrestee swabs [from Maryland] have resulted in 58 criminal prosecutions.” Application 16. Collecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries. That Maryland may not employ a duly enacted statute to help prevent these injuries constitutes irreparable harm.

King responds that Maryland’s eight-week delay in applying for a stay undermines its allegation of irreparable harm. In addition, he points out that of the 10,666 samples Maryland seized last year, only 4,327 of them were eligible for entry into the federal database and only 19 led to an arrest (of which fewer than half led to a conviction). Memorandum in Oppo-

sition 11. These are sound points. Nonetheless, in the absence of a stay, Maryland would be disabled from employing a valuable law enforcement tool for several months — a tool used widely throughout the country and one that has been upheld by two Courts of Appeals and another state high court.

Accordingly, the judgment and mandate below are hereby stayed pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

*It is so ordered.*

5 Rapp no. 15 (2012)

HOBBY LOBBY STORES, INC. v. KATHLEEN  
SEBELIUS, SECRETARY OF HEALTH AND  
HUMAN SERVICES ET AL.

HEADNOTE

by Ira Brad Matetsky

Source: U.S. Supreme Court website

Opinion by: Sonia Sotomayor. (noted in source).

Opinion date: December 26, 2012 (noted in source).

Citation: Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401, 5 Rapp no. 15 (2012) (Sotomayor, in chambers), 2 J. In-Chambers Practice 23 (2018).

Additional information: The headnote to this case in the *United States Reports* states:

Applicant corporations' request for an injunction pending appeal barring the enforcement of Health Resources Services Administration guidelines issued pursuant to § 1001(5) of the Patient Protection and Affordable Care Act is denied. They contend that requiring group health plans such as theirs to cover "approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," 77 Fed. Reg. 8725, is contrary to their religious beliefs and thus violates both the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act of 1993. Because an injunction pending appeal "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts," *Respect Maine PAC v. McKee*, 562 U. S. 996, it may be issued by a Circuit Justice only when it is "[n]ecessary or appropriate in aid of [this Court's] jurisdiction" and "the legal rights at issue are indisputably clear," *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 542 U. S. 1305, 1306. Applicants have failed to satisfy that demanding standard here.

OPINION

HOBBY LOBBY STORES, INC., ET AL. v. KATHLEEN  
SEBELIUS, SECRETARY OF HEALTH AND HUMAN  
SERVICES, ET AL.

ON APPLICATION FOR INJUNCTION

No. 12A644. Decided December 26, 2012.

JUSTICE SOTOMAYOR, Circuit Justice.

This is an application for an injunction pending appellate review filed with me as Circuit Justice for the Tenth Circuit. The applicants are two closely held for-profit corporations, Hobby Lobby Stores, Inc. (Hobby Lobby) and Mardel, Inc. (Mardel), and five family members who indirectly own and control those corporations. Hobby Lobby is an arts and crafts retail chain store, with more than 13,000 employees in over 500 stores nationwide. Mardel is a chain of Christian-themed bookstores, with 372 full-time employees in 35 stores. Employees of the two corporations and their families receive health insurance from the corporations' self-insured group health plans.

Under §1001(5) of the Patient Protection and Affordable Care Act, 124 Stat. 131, 42 U. S. C. §300gg–13(a), nongrandfathered group health plans must cover certain preventive health services without cost-sharing, including various preventive services for women as provided in guidelines issued by the Health Resources Services Administration (HRSA), a component of the Department of Health and Human Services. As relevant here, HRSA's guidelines for women's preventive services require coverage for "all Food and Drug Administration . . . approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012) (internal quotation marks omitted).

The applicants filed an action in Federal District Court for declaratory and injunctive relief under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb *et seq.* They allege that under the HRSA guidelines, Hobby Lobby and Mardel will be required, contrary to the applicants' religious beliefs, to provide insurance coverage for certain drugs and devices that

the applicants believe can cause abortions. The applicants simultaneously filed a motion for a preliminary injunction to prevent enforcement of the contraception-coverage requirement, which is scheduled to take effect with respect to the employee insurance plans of Hobby Lobby and Mardel on January 1, 2013. The District Court for the Western District of Oklahoma denied the motion for a preliminary injunction, and the Court of Appeals for the Tenth Circuit denied the applicants' motion for an injunction pending resolution of the appeal.

The only source of authority for this Court to issue an injunction is the All Writs Act, 28 U. S. C. §1651(a). "We have consistently stated, and our own Rules so require, that such power is to be used sparingly." *Turner Broadcasting System, Inc. v. FCC*, 507 U. S. 1301, 1303 (1993) (Rehnquist, C. J., in chambers); see this Court's Rule 20.1("Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. §1651(a) is not a matter of right, but of discretion sparingly exercised"). Unlike a stay of an appeals court decision pursuant to 28 U. S. C. §2101(f), a request for an injunction pending appeal "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U. S. 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers)). Accordingly, a Circuit Justice may issue an injunction only when it is "[n]ecessary or appropriate in aid of our jurisdiction" and "the legal rights at issue are indisputably clear." *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 542 U. S. 1305, 1306 (2004) (Rehnquist, C. J., in chambers) (internal quotation marks omitted).

Applicants do not satisfy the demanding standard for the extraordinary relief they seek. First, whatever the ultimate merits of the applicants' claims, their entitlement to relief is not "indisputably clear." *Lux v. Rodrigues*, 561 U. S. 1036, 1037 (2010) (ROBERTS, C. J., in chambers) (internal quotation marks omitted). This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion. Cf. *United States v. Lee*, 455 U. S. 252 (1982) (rejecting free exercise claim brought by individual Amish employer who argued that paying Social Security taxes for his employees interfered with his exercise

of religion). Moreover, the applicants correctly recognize that lower courts have diverged on whether to grant temporary injunctive relief to similarly situated plaintiffs raising similar claims, Application for Injunction Pending Appellate Review 25–26, and no court has issued a final decision granting permanent relief with respect to such claims. Second, while the applicants allege they will face irreparable harm if they are forced to choose between complying with the contraception-coverage requirement and paying significant fines, they cannot show that an injunction is necessary or appropriate to aid our jurisdiction. Even without an injunction pending appeal, the applicants may continue their challenge to the regulations in the lower courts. Following a final judgment, they may, if necessary, file a petition for a writ of certiorari in this Court.

For the foregoing reasons, the application for an injunction pending appellate review is denied.

*It is so ordered*

5 Rapp no. 16 (2014)

TEVA PHARMACEUTICALS USA, INC. ET  
AL. V. SANDOZ, INC. ET AL.

HEADNOTE

by Ira Brad Matetsky

Source: U.S. Supreme Court website

Opinion by: John G. Roberts, Jr. (noted in source).

Opinion date: April 18, 2014 (noted in source).

Citation: *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 572 U.S. \_\_\_\_,  
134 S. Ct. 1621, 5 Rapp no. 16 (2014) (Roberts, C.J., in chambers), 2  
J. In-Chambers Practice 27 (2018).

Additional information: Teva Pharmaceuticals petitioned for certiorari to review a Federal Circuit decision in a patent case. After the Supreme Court granted the petition, Teva moved for a stay of the Federal Circuit's decision. Despite the grant of certiorari, Chief Justice Roberts denied the motion. Although Teva had "of course" established that certiorari was likely to be granted and had also shown a fair prospect of success on the merits, it had not demonstrated a likelihood of irreparable harm from the denial of a stay, because it could recover damages if it ultimately prevailed on the merits.

OPINION

No. 13A1003 (13–854)

TEVA PHARMACEUTICALS USA, INC., ET AL.  
v. SANDOZ, INC., ET AL.

ON APPLICATION TO RECALL AND STAY MANDATE

[April 18, 2014]

CHIEF JUSTICE ROBERTS, Circuit Justice.

The application to recall and stay the mandate of the United States Court of Appeals for the Federal Circuit, see 723 F. 3d 1363 (2013), is denied. To obtain such relief, applicant Teva Pharmaceuticals USA, Inc., must demonstrate (1) a “reasonable probability” that this Court will grant certiorari, (2) a “fair prospect” that the Court will reverse the decision below, and (3) a “likelihood that irreparable harm [will] result from the denial of a stay.” *Maryland v. King*, 567 U. S. 1301, 1302 (2012) (ROBERTS, C. J., in chambers) (internal quotation marks omitted). Teva has of course satisfied the first requirement, and has also shown a fair prospect of success on the merits. I am not convinced, however, that it has shown a likelihood of irreparable harm from denial of a stay. Respondents acknowledge that, should Teva prevail in this Court and its patent be held valid, Teva will be able to recover damages from respondents for past patent infringement. See Brief in Opposition 25–28. Given the availability of that remedy, the extraordinary relief that Teva seeks is unwarranted.

*It is so ordered.*