Federal Bar Association
Northern District of Ohio Chapter

INTER ALIA

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Summer/Fall 2022 Inside This Issue:

President Podium—Hon. Amanda Knapp

"I'm so glad to live in a world where there are Octobers."
-- L.M. Montgomery, *Anne of Green Gables*

October is an exciting time of year. The leaves are changing. The weather is cooling. The apples are ripe for picking. Sweaters have emerged from storage, and boots have appeared in mud rooms. Costumes have been carefully selected, and pumpkins have been carved.

Changes are underway in our chapter and district as well. The board of directors for the 2022-23 term was sworn in by Chief Judge Patricia A. Gaughan on October 3, 2022, at the annual State of the Court Luncheon, and is already hard at work developing this year's programming.

Our first program will be a brown bag luncheon with District Judge Pamela A. Barker on November 2, 2022, at the Carl B. Stokes U.S. Courthouse in Cleveland. This will be the first of many opportunities this year for members to meet and interact with our federal judiciary. With five new District Judges and five new Magistrate Judges appointed to the bench in the Northern District of Ohio since 2020, one of our chapter's greatest priorities this year will be to provide access for law students and members of the bar to meet and interact with our judges.

Another focus this year will be an "outside in" approach to member engagement. Recognizing that that the practice of law looks different today than it did in pre-pandemic times, we have convened a Taskforce on Engagement whose focus will be reaching out to members and constituency groups to learn more about how your needs and preferences have changed in the last three years. The input we receive from you will inform our future decisions on resources and programming, so I strongly encourage you to be responsive to any inquiries you receive.

Planning is also underway for a slate of interesting and informative continuing education programs, so please keep an eye on your inbox. We had a strong start to this term with our popular Trial Academy on September 30 and October 3-4. In November, will put on our New Lawyer Training and Introduction to Federal Practice for newly admitted lawyers. And in December we will offer a new take on our annual ethics and professional responsibility program, which is always free to FBA members.

The final focus I want to highlight today is the work of our civics committee. As our by-laws state, we have an obligation "to serve as the representative of the Federal legal profession" in this district. There is no way to understate the importance of civics education for students in our local elementary and secondary schools. That is why we are excited to build on our past successful civics education programs, and ensure that we are actively engaged in informing and educating younger generations regarding civility and the workings of our justice system.

I am happy to be working with and for you as your Chapter President this term. And like Humpty Dumpty, I hope you all have a great fall!

2022 State of the Court Luncheon

FBA Immediate Past President's Remarks

October 3, 2022

Good afternoon. Chief Judge Gaughan, Chief Judge Whipple, esteemed judicial officers, fellow members of the Federal Bar Association, and honored guests. On behalf of our entire chapter, I'd like to welcome you to today's program.

Our chapter has had an exciting and productive year. Our success this past year, like every year, has stemmed from three pillars of strength: our close bond with the local bench; our commitment to supporting local law schools and their students; and our dedicated board of directors and chapter officers.

Regarding the first pillar of strength, our ties to the local bench, examples from these past 12 months abound. For instance, several judicial officers are active members of our board of directors. Our incoming president, Amanda Knapp, is a sitting magistrate judge. Last December, our chapter hosted a holiday party in Cleveland for the Sixth Circuit Court of Appeals when that tribunal convened outside of Cincinnati for the first time in recent memory. Our chapter also surveyed lawyers in this district about their experiences with remote court proceedings. Their responses helped provide the Court with concrete data as it charts its course for the post-pandemic era.

Regarding our second pillar of strength, our bond with local law schools and law students, that bond is flourishing like never before. We have a dedicated committee, lead by Eleanor Hagan and Liz Collins, whose mission is to cultivate relationships with law school chapters and to help those chapters achieve their organizational goals. Not that long ago, there were no student FBA chapters at any of the local law schools. I am thrilled to report, that a result of sustained efforts by our group and by academic faculty and staff, we now have student chapters at three of our four local law schools, and we are well on the way to helping to stand up a student chapter at the fourth law school. These are wonderful accomplishments of which we should all be proud. Law students are hungry for the types of relationships, interaction, and mentoring opportunities that the Federal Bar Association is so well poised to furnish them with.

Regarding our third pillar of strength, our chapter leaders, I am here to report that your board of directors and your chapter officers have been hard at work this past year. We have been striving to deliver value to you, our members, and to achieve the societal goals that are embodied in our bylaws. The events that your board members have spent countless hours planning and executing include brown-bag lunch sessions with judicial officers, social events, high-quality CLEs, book-club discussions about diversity and inclusion, and more.

I want to highlight two events in particular: this luncheon and our trial academy. First, this magnificent luncheon is the result of the tireless work of our Social Events Committee, which is headed up by Matt Gurbach and Warren McClurg. Also vital in putting together this event has been Kayla Entsminger. You can only begin to imagine the many, many hours and many, many emails and conference calls that were needed to make this event a reality. Our attendance today is 330, and it is sold out. Please join me in a round of applause thanking Matt, Warren, and Kayla for all their hard work in planning this event.

The second event I'd like to highlight is our trial academy. This is a hands-on training program that our chapter conducts every year. It is modeled after the highly effective format that was pioneered by the National Institute of Trial Attorneys, also known as NITA. It's hard to overstate the amount of time that goes into planning an event like the trial academy. That time involves a myriad of activities, from designing the training itself, to recruiting the several dozen highly experienced coaches who are needed to do one-on-one counseling with attendees, or to coordinating with the many judges who have volunteered their time to conduct mock hearings.

The success of our trial academy is the result of the efforts of our Trial Academy Committee. Those individuals are Alexandra Dattilo, Mark Fusco, Magistrate Judge Jonathan Greenburg, Marisa Darden, Rick Hamilton, and Darin Thompson. The inspirational figure who leads that committee is Kerri Keller. Please join me in a round of applause thanking our Trial Academy Committee for its amazing efforts in making this year's program another triumph.

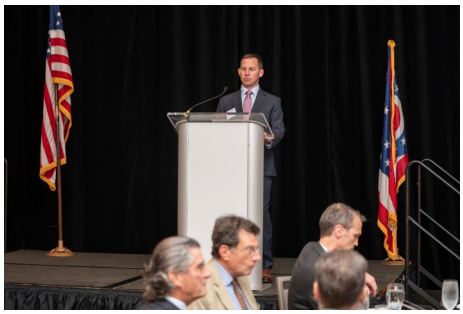
Finally, thank you to all our members. Without you, we would have no organization, no events, no luncheons like this. You are the reason we do what we do. You can rest assured that your board of directors and your chapter officers are doing our utmost to live up to the special trust and confidence that you have placed in us by putting this organization's affairs in our hands.

Thank you.

--Derek Diaz
Immediate Past President and National Delegate
Federal Bar Association Northern District of Ohio Chapter

2022 State of the Court Luncheon

Monday, October 3, 2022 State of the Court and Installment of FBA Board Officers



2022 State of the Court Luncheon

Photo Credit, Justin Gamble Photography

FBA Presents Another Successful Trial Academy

Alexandra V. Dattilo
Brouse & McDowell
Trial Academy Coordinator

The FBA presented its third Trial Academy Seminar on Depositions and Discovery Disputes on September 30 and October 3-4. It was a very successful program that could not have happened without the incredible support from the Northern District of Ohio judges, court staff, practitioners, law students, and of course the FBA. A special thank you to the Federal Litigation Section, whose generous contributions allowed the program to award several scholarships to participants who practice in the public sector and who have small or solo practices as well as to enable us to solicit the help of local area law school students who assisted with the program by volunteering their time as "deponents" for the program. We had a total of 20 participants from both the private and public sectors who had varying levels of experience. Joining the participants were 9 federal judges, 25 experienced practitioners who acted as coaches and presenters, and 21 law students.

Magistrate Judge Jonathan D. Greenberg kicked off the program with a welcome speech that was followed by presentations on taking depositions and handling discovery disputes. Magistrate Judge Thomas M. Parker spoke on the local rules and discussed standing orders related to depositions. Judge Parker was informative and practical with clear direction on how to handle depositions and discovery disputes. Next were demonstrations by experienced practitioners. The demonstrations were dissected by the instructors, the students, and other members of the Trial Academy faculty. All in attendance learned some new angle or theory they had never used before. It was clear everyone learned something, not just the participants. The first day wrapped up with a reception.

This year the Trial Academy was held in conjunction with the chapter's annual State of the Court luncheon and officer swearing-in ceremony that all the participants, coaches, presenters, and law students were invited to attend. Participants practiced taking and defending depositions before the luncheon, and after the luncheon were treated to a captivating CLE on ethics by Judge Dan Polster, Judge J. Philip Calabrese, and Magistrate Judge Amanda M. Knapp. The CLE was open to all and was well-attended.

The program culminated in the participants arguing a discovery dispute in the federal courthouse in front of Judge Polster, Judge Calabrese, Magistrate Judge Jennifer Dowdell Armstrong, Judge Charles Esque Fleming, Magistrate Judge James E. Grimes, Jr., and Magistrate Judge Darrell A. Clay, with experienced participants providing valuable feedback.

Special thanks to Judge Greenberg, Kerri Keller, Rick Hamilton, Darin Thompson, Mark Fusco, and Marisa Darden for the incredible work they did in making this event happen. And extra special thanks to Aaron Bulloff for being there at the beginning of this program and his continued help and support. Stayed tuned for more information on next year's Trial Academy Program which will be held in October of 2023, likely in conjunction with next year's State of the Court luncheon. Please consider being a part of this program. It is fulfilling for the students and for the faculty. Contact Kerri Keller (kkeller@brouse.com) or Rick Hamilton (rhamilton@ulmer.com) for more information.

The United States District Court for the Northern District of Ohio

FOR IMMEDIATE RELEASE August 25, 2022

Judge Patricia A. Gaughan, Chief Judge of the United States District Court for the Northern District of Ohio, announced that Jennifer Dowdell Armstrong, Esq. was sworn in today to serve an eight-year term as a United States Magistrate Judge in Cleveland, Ohio. She succeeds Magistrate Judge William H. Baughman, Jr., who retired effective July 1, 2022.

Magistrate Judge Armstrong recently was a partner at McDonald Hopkins LLC in Cleveland, Ohio, where she practiced law since 2009. In addition to providing services as a third-party neutral for early case evaluations, mediations, and arbitrations in court-annexed and private proceedings, her practice was devoted to defending clients in criminal and civil governmental white collar investigations and cases; representing clients in complex commercial litigation cases with an emphasis on class action litigation, primarily in federal court; and advising clients on compliance with federal and state antitrust laws. Previously, Magistrate Judge Armstrong served as law clerk to the Honorable Solomon Oliver, Jr., at the United States District Court for the Northern District of Ohio in 2007-2009. She was an associate attorney at Thompson Hine LLP in 2006-2007 and a summer associate in 2005. She is currently an Adjunct Law Professor at Cleveland-Marshall College of Law since 2022.

Magistrate Judge Armstrong earned her B.A. in English Literature/Political Science at Miami University in 1997, her master's degree in Nonprofit Organizations (M.N.O.) at Case Western Reserve University, Mandel School of Applied Social Sciences and Weatherhead School of Management in 2000, and her J.D. from Cleveland State University, Cleveland-Marshall College of Law in 2006, *summa cum laude.* She has served as a Board Member of the Federal Bar Association, Northern District of Ohio Chapter (2011-2018), served as Chair of the New Lawyer Committee (2015-2018), and served as Chair of the Law Clerk Committee (2011-2014). Magistrate Judge Armstrong is co-founder and co-chair of the Ohio Chapter of the Women's White Collar Defense Association (2016-present). She has also been a member of the American Bar Association in the White Collar, Antitrust, and ADR Sections (2006-present).

Chief Judge Gaughan said, "Magistrate Judge Armstrong brings with her a breadth of legal experience and strong leadership skills, which will ensure that our justice system will continue to serve the people of the Northern District of Ohio with fairness and integrity."

The United States District Court for the Northern District of Ohio has court locations in Cleveland, Akron, Toledo, and Youngstown and serves 6 million citizens in the 40 northern most counties in Ohio.

CONTACT: Sandy Opacich, Clerk of Court

(216) 357-7068

The United States District Court for the Northern District of Ohio

FOR IMMEDIATE RELEASE September 12, 2022

Judge Patricia A. Gaughan, Chief Judge of the United States District Court for the Northern District of Ohio, announced that James E. Grimes, Jr., Esq. was sworn in today to serve an eight-year term as a United States Magistrate Judge in Cleveland, Ohio. He succeeds Magistrate Judge David A. Ruiz, who was elevated to District Judge on February 10, 2022.

Magistrate Judge Grimes recently served as Chief Administrative Law Judge in the Washington, D.C., Office of the U.S. Securities and Exchange Commission, and as Administrative Law Judge since June 2014. Prior to that appointment, he served in the U.S. Department of Justice, Civil Division, in Washington, D.C., as Senior Litigation Counsel from May 2005 to June 2014, and as Trial Attorney from July 2001 to April 2005. Magistrate Judge Grimes also served as Appellate Counsel in the U.S. Navy, Judge Advocate General's Corps, from January 1996 to June 2001, and as Trial Defense Counsel from April 1996 to October 1997.

Magistrate Judge Grimes has been a member of the Federal Administrative Law Judges Conference since July 2014, served as its Treasurer from July 2017 to June 2018, served on the Award Committee from 2017 to 2018, and served on the Officer Nominating Committee in Spring 2016, Spring 2021, and Spring 2022. He has been a member of the American Bar Association Judicial Division and the National Conference of the Administrative Law Judiciary since 2016.

Magistrate Judge Grimes received his B.A. from Miami University in Oxford, Ohio, *cum laude*, Phi Beta Kappa, in 1992, and his J.D. from Ohio State University College of Law in Columbus, Ohio, with honors, in 1995.

Chief Judge Gaughan said, "Magistrate Judge Grimes's qualifications and strong work ethic make him an invaluable addition to the Bench. We are grateful that he has chosen to continue his long and distinguished career in public service in the Northern District of Ohio."

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CONTACT: Sandy Opacich, Clerk of Court

(216)357-7068

Hon. Kathleen B. Burke, A First of Many

Talia Sukol Karas*

Hon. Kathleen B. Burke's advice to the next generation of trailblazers: Pursue your own interests. When you encounter resistance, think of the best way to address it, given the context and person. Today, bias is not always as overt as it used to be, but hidden attitudes do remain. Prove yourself one person at a time, overcoming skepticism by doing well.

Judge Burke has lived this advice since she entered practice in 1973. She was raised in Park Slope, Brooklyn. A full scholarship to St. John's University made college possible and allowed her to work in journalism after graduation. After meeting several high-level reporters with law degrees, she decided to attend law school, hoping to someday cover legal news. Instead, she fell in love with the law.

For her summer associate position, Judge Burke considered only one firm outside New York: Jones Day in Cleveland. The Cleveland office had one woman partner, and, in comparison, she had encountered only one woman partner in all of the New York firms at which she had interviewed. During her first year in practice, she was dispatched to meet the chair of the Litigation Practice Group at Jones Day. The man who would ultimately become one of her biggest champions looked out over his glasses, his skeptical expression asking, "What are you [a woman] doing here?" She proved herself to the practice group chair by doing excellent work, discovering along the way that she enjoyed litigation, and being the first woman in the Cleveland office to enter this practice group and to become partner.

The litigation practice group chair encouraged Judge Burke to become active in the Ohio State Bar Association, and Judge Burke went on to become its first female president. She saw the publicity about her achievement in this regard as an opportunity to promote her platform to reduce, for example, the influence of money in state judicial campaigns. She believed this would improve the state of the courts in Ohio. When asked how she felt about being the first woman president, she replied that it was great and that she did not want to be the last. Newly elected Vice President Kamala Harris would echo in her 2020 first post-presidential election address, "While I may be the first woman in this office, I will not be the last."

When Judge Burke decided to leave private practice, she became the director of the Ohio Lottery Commission. As the first woman in this role, she enjoyed the lack of attention paid to this fact. To her, that was progress! Women in leadership positions were no longer news phenomena; they were a fact of life. Under her leadership, Ohio joined Powerball. She appeared on the lottery commission's TV show, *Cash Explosion*, and added lottery machines at certain racetracks in Ohio.

Judge Burke was appointed as a magistrate judge in the Northern District of Ohio in 2011. By this point, participants in the legal system were accustomed to seeing women on the bench. She served in this role through September 2021, turning over her chambers to the next magistrate, a woman who was leaving her role as an administrative law judge with the Social Security Administration.

Judge Burke and her husband welcomed their fifth grandchild in October 2021, just as she retired from the district court. Without a daily docket to manage, she looks forward to spending more time with her new grandchild and her entire family.

*Talia Sukol Karas is a Federal Bar Association Northern District of Ohio board member. Her article originally appeared in The Federal Lawyer and is reprinted here with their permission.

Judges Visit University Of Toledo

Assistant Dean Heather S. Karns
University of Toledo College of Law

On September 20, District Judge J. Philip Calabrese visited the University of Toledo College of Law. He was accompanied by Katlyn Patton, one of his law clerks. Judge Calabrese was very generous with his time. He talked with 1Ls-4Ls, had a very engaged group of students for a Judicial Clerkship Q & A over lunch, conducted mock interviews with students, and received a tour of the law school. Judge Calabrese was joined by District Judge James R. Knepp II and Magistrate Judge Darrell A. Clay for a reception at the end of the day.

Federal judges at the University of Toledo: (starting third from left) District Judge J. Philip Calabrese, District Judge James R. Knepp II, and Magistrate Judge Darrell A. Clay, along with UT law students.

My Day in Court

Sarah Cleves

On May 24, the Civics Committee of the Northern District of Ohio Chapter of the Federal Bar Association hosted its first-ever My Day in Court event. Students from Campus International High School visited the Carl B. Stokes U.S. Court House and engaged with federal practitioners in a half-day program. The students were all interested in a career in law and will be first-generation lawyers in their families.

The students first met with Judge J. Philip Calabrese for a question-and-answer session focused on life as a federal judge, the path to becoming a judge, and the federal versus state judiciary. The students also asked about the differences between private practice and serving in the judiciary. After the Q&A session, a panel of four first-generation attorneys engaged with the students about life as an attorney, law school, mentors, and different legal career paths. The panel included Immediate Past Chapter President Derek Diaz, J.J. Nelson, P.J. Sullivan, and Past Chapter President Dennis Terez. A box lunch was served after the panel. Thank you to all our volunteers!

This event was funded by a generous grant from the Federal Bar Foundation. The Civics Committee is planning to host the My Day in Court event again next year. If you are interested in being involved with this event or other Civics Committee events, please contact Warren T. McClurg (WMcClurg@beneschlaw.com) or Matthew Gurbach (MGurbach@bricker.com).

FBA Articles

The Stranger

Shay Adler
Second-Year Student, Case Western Reserve University School of Law

As an immigrant born in Israel and raised by Eastern European parents, I had difficulty as a child finding my place in my new country, the United States. Adapting to a different culture and language was neither an easy nor a quick process. I knew firsthand the problems and prejudices so many first-generation immigrants encounter simply because we are different. Because of my thick accent, as soon as I spoke, people wondered about my country of origin—something I continue to experience almost daily. I had to work harder to succeed and to "fit in" to partake in the American Dream.

As a child, I witnessed the amount of work my father invested into his job to become successful; it would take me until my summer internship after my first year of law school to fully appreciate the hurdles he had to face and the sacrifices he had to make. Growing up, I mostly remember the seemingly constant reminder that I needed to find a professional career that would lift me out of the perception of "immigrant" and into the great melting pot of America. Living in a rural area of Illinois, I knew my best odds of success would be in a larger and more diverse city, and that education would become the great equalizer. In high school, I had no clear career path, but I did have a strong interest in international business and travel, and I wanted to do something where I could make a meaningful contribution and give back to the country that welcomed me and my family.

As I started college at Saint Louis University, I chose the business school with an eye toward law school after graduation. Befitting a generation defined by developments in technology and data, I took on dual majors in International Business and Data Analytics. I obtained an SAP Certification because I knew that most companies, using either Oracle or SAP, would appreciate the ability to analyze data using one of the major existing database management tools. As I worked through my business degree, I noticed the many legal issues involved in business in general, and particularly international business. Before heading to law school, I had the opportunity to complete a one-year, accelerated M.B.A. program, and it provided me with a corporate management lens that only reinforced my belief I needed to become a lawyer to fulfill my career aspirations. I recognized in my classes that every daily and global interaction or transaction, from exchanging goods, vacationing abroad, attending graduate school, or even attempting to immigrate, took place in a backdrop of complex legal rules that I would need to master.

My first day of law school at Case Western Reserve University, I felt uneasy surrounded by people with primarily English, Political Science, and History majors; but after only one week of law school, I felt I belonged, as I had never been so enthralled by the academic experience. As my first year neared its end, I looked forward to my first "real world" legal experience, hoping to discover what area or areas of law I would eventually want to practice. Suddenly, I felt that my interest in International Law, my background, my immigration experience, and maybe even my accent had become assets—that not many of my classmates had at their disposal—going into Immigration Law. But I needed to learn how a big Immigration Law firm functions.

I secured an internship with Margaret W. Wong & Associates, a firm specializing principally in immigration law. I learned about both the legal side of Immigration Law and the business side of the practice, as I observed how the firm managed hundreds of cases, clients who spoke many languages, clients to whom I could relate and many others whose experiences showed me how fortunate I had been in my life. I learned about the nexus between Immigration Law and Criminal Defense Law, and had the opportunity to participate in filing motions and drafting complaints; obtaining evidence; completing immigration applications; driving to and obtaining criminal records from different courthouses; completing client intakes; conducting legal research and writing; manning the firm's Columbus office for a day and facilitating clients interacting remotely with firm attorneys; learning about asylum, withholding of removal, and other exceptions to deportation. I frequently shadowed litigators in federal court as well as in pro bono consultations, and I wrote an Immigration News article for the firm regarding legal relief pathways for Ukrainians attempting to enter the country.

I learned so much from Margaret Wong and the many other attorneys I met. They made me feel part of their team, and I really cared about the welfare of our clients, many of whom had frightening hardships. As I begin my second year of law school, I plan to continue my focus on International Law. While I still am unsure exactly what area I will ultimately choose as my primary focus, I know I want to work in areas that allow me to help people not native to their country, so that they can have the opportunities and the freedom I have had the good fortune to experience in the United States, a country that, in spite of the politics of immigration, still welcomes the stranger unlike any other nation on earth.

FBA Articles

Immigration Landscape—Summer 2022

Molly K. Johnson, Johnson & Johnson, Canfield, Ohio

The summer of 2022 has arguably brought more attention to the United States Supreme Court than any other period in recent history. Rulings on abortion (*Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022)), gun control (*New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022)), Environmental Protection Agency oversight (*West Virginia v. EPA*, 142 S. Ct. 2587 (2022)), and school prayer (*Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022)) dominated national headlines for months. Perhaps less discussed was the Court's recent immigration rulings.

The immigration detention scheme in the United States is complex, with different rules applicable at different stages of the removal process. Generally speaking, modern immigration rules can be traced back to the Immigration and Nationality Act of 1952, 8 U.S.C. § 1231. The INA is bifurcated into provisions that address the Department of Homeland Security's powers in detaining "aliens" (as defined in the statute) *during* formal removal proceedings and *after* an alien has been "ordered removed." During removal proceedings, detention is generally discretionary (unless, e.g., the alien has been convicted of certain crimes), while after an alien has been ordered removed, detention is generally mandatory.

The removal process is known to take many months, if not years. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court found that the INA (specifically, 8 U.S.C. § 1231(a)(6)) did not authorize the Attorney General to detain an "ordered removed" alien indefinitely. Instead, the Court found an implicit "reasonable time" for alien removal. The Court went on to create a presumptively reasonable time period of six months for post-removal detention. After the six months, the Court held an alien must be released absent a significant likelihood of removal in the reasonably foreseeable future.

This summer, the Court took up the issue of whether an alien "ordered removed" is entitled to a bond hearing after being detained for six months in *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827 (2022), and *Garland v. Gonzalez*, 142 S. Ct. 2057 (2022). Antonio Arteaga-Martinez is a Mexican citizen who entered the United States without authorization twice. His prior order of removal was reinstated following his unlawful reentry into the United States. He was therefore held to the "mandatory detention" provisions of I.N.A. § 241. Arteaga-Martinez then sought "withholding of removal," pleading that he feared persecution or torture in Mexico under the Convention Against Torture. Mr. Arteaga-Martinez was held without a hearing for four months, at which point he petitioned for a writ of habeas corpus. Similar to Mr. Arteaga-Martinez, *Gonzalez* involved two Mexican nationals and an El Salvadoran national who were also detained pending removal following their illegal reentries. They also sought bond hearings after six months of detention.

The government in both cases argued that I.N.A. § 241 does not require bond hearings or impose any burden upon the government to prove that continued detention is warranted. The Supreme Court agreed. Distinguishing from *Zadvydas*, the Court determined that no textual ambiguity existed regarding bond hearings and therefore the canon of constitutional avoidance was not triggered. Justice Sotomayor for the Court in *Arteaga-Martinez* opined that, "as a matter of textual command," INA § 241(a)(6) does not require bond hearings after six months of detention in which the government must prove that an alien poses a flight risk or danger to the community. The Court determined that there is "no plausible construction" of INA § 241 that requires the government to provide bond hearings or burdens of proof.

These rulings come on the heels of *Biden v. Texas*, 142 S. Ct. 2528 (2022), in which the Court upheld President Biden's ability to cease a Trump-era immigration program that forces asylum seekers at the southwestern border to remain in Mexico while their immigration cases proceed. The immigration landscape will continue to evolve into 2023 and beyond.

BLUNT FORCES:
A CASE STUDY OF ADMINISTRATIVE EXHAUSTION UNDER THE CONTROLLED SUBSTANCES ACT

Kennedy Dickson*

Marijuana Regulation in the United States

The current marijuana regulatory scheme is a catch-22. Despite sweeping changes in marijuana legality on the state level, the drug remains a Schedule I substance under the Controlled Substances Act (CSA).[1] Schedule I drugs are substances without a recognized medical use, high potential for abuse, and adequate scientific research on their effects. To reschedule marijuana out of the restrictive Schedule I category, petitioners must show that the drug has a "currently accepted medical use" by fulfilling a five-factor test promulgated by the Drug Enforcement Administration (DEA).[2] Notably, this test requires rigorous Food and Drug Administration-caliber clinical research to demonstrate the medical efficacy of a drug. But marijuana's designation as a Schedule I drug prevents the necessary research to facilitate rescheduling.[3] Thus, the five-factor test is untenable. Plaintiffs consequently seek judicial review of the DEA's refusal to reschedule marijuana. Recently, the Ninth and Second Circuits have erroneously denied review on the basis that plaintiffs must first exhaust their administrative remedies.[4]

Exhaustion Under the CSA

Exhaustion doctrine requires a party challenging an agency's decision to pursue all administrative remedies before seeking judicial review. In some instances, exhaustion is a necessary and positive tool, but in others, its application is confusing and unpredictable. The policies underlying exhaustion are protecting agency autonomy, promoting judicial efficiency, and tailoring the doctrine to the specific administrative scheme at issue. Exhaustion can be mandated by statute, regulation, or judicial discretion.

But in many enabling statutes—as under the CSA—exhaustion is not addressed. The CSA authorizes the Attorney General to make scheduling decisions through rulemaking.[5] The DEA may undertake scheduling on its own initiative, at the request of the Department of Health and Human Services (HHS), or on the petition of any interested party.[6] After receiving a petition, the Attorney General requests HHS to conduct a scientific and medical evaluation and provide recommendations on substance scheduling. The DEA then conducts its own independent review of the scientific evidence and makes a final scheduling decision which it publishes in the Federal Register.[7] For the last fifty years, the DEA has denied marijuana petitions on an almost constant basis.

Denial of a petition to initiate scheduling proceedings is subject to judicial review under section 507 of the CSA.[8] But the text of section 507 does not refer to further interagency appeals or of any duty to exhaust other administrative remedies from the DEA before seeking judicial review. And there is no DEA regulation mandating exhaustion of the agency's administrative remedies.

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* Kennedy Dickson is the executive symposium editor of the Case Western Reserve Law Review. This is an abridged version of her Note, which will be published in Volume 73 and appears here with the permission of the Case Western Reserve Law Review.

[1] 21 U.S.C. §§ 801 et seq.

[2] The five factors a petitioner must show are that (1) the drug's chemistry is known and reproducible; (2) adequate safety studies have been conducted; (3) adequate and well-controlled studies proving efficacy have been conducted; (4) the drug is accepted by qualified experts; and (5) the scientific evidence is widely available. Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10504 (Mar. 26, 1992).

[3] Any application for Schedule I drug research is subject to lengthy review by multiple executive branch agencies. Further, the DEA significantly restricts the cultivation of marijuana for research purposes. Until 2021, the DEA allowed only one institution, the University of Mississippi, to grow marijuana for research purposes.

[4] Sisley v. DEA, 11 F.4th 1029 (9th Cir. 2021); Washington v. Barr, 925 F.3d 109 (2d Cir. 2019).

[5] 21 U.S.C. § 811(a).

[6] *Id.*

[7] *See, e.g.*, Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53767 (2016).

[8] 21 U.S.C. § 877 ("[A]ny person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision.").

Discretionary Exhaustion Requirements

Both the Second and Ninth Circuits concede that the CSA does not require exhaustion, noting specifically that exhaustion under the CSA is "prudential," "not mandated by statute," and "applied by courts in their discretion."[9] But instead of providing statutorily permissible judicial review, each court dismissed the plaintiffs' claims under a judicially created exhaustion requirement. The exhaustion requirements in both cases arise in different circumstances.

In *Sisley v. DEA*,[10] the Ninth Circuit denied an appeal of a rejected petition to reschedule marijuana under the Administrative Procedure Act (APA). The exhaustion requirement applied in *Sisley* directly conflicts with the longstanding Supreme Court precedent of *Darby v. Cisneros*.[11] In *Darby*, the Court clarified that unless a statute or agency regulation expressly requires administrative exhaustion, the lower federal courts cannot mandate it. *Sisley* meets all the prerequisites to *Darby's* application: (1) it was an APA case; (2) involved a final decision by the DEA; and (3) neither the CSA nor DEA regulations mandate exhaustion. But the Ninth Circuit never mentioned *Darby.* Instead, the court cited *McCarthy v. Madigan*,[12] a non-APA case concerning a judicially created exhaustion requirement. *Darby* definitively states that section 704 of the APA[13] renders *McCarthy* inapplicable in APA cases.[14]

The Second Circuit applied an exhaustion requirement in *Washington v. Barr*[15] to dismiss a constitutional challenge to marijuana's scheduling without a prior agency petition.[16] Unlike *Sisley*, which was brought as a challenge of a petition denial under the APA, the *Darby* reasoning will not apply to constitutional challenges like *Washington*.[17] In requiring exhaustion, the Second Circuit relied on the structure of the CSA, noting that "Congress wanted aggrieved parties to pursue reclassification through agencies, and not [through federal courts] in the first instance."[18]

The *Washington* plaintiffs argued that several common law exceptions excused the need for exhaustion. The Second Circuit's rejection of each exception is flawed. Courts commonly recognize three broad categories of exhaustion exceptions: futility, the inadequacy of the agency's remedy, and undue prejudice.

An administrative process is futile "if the agency will almost certainly deny any relief either because it has a preconceived position on, or lacks jurisdiction over, the matter."[19] The DEA has determined the issue of marijuana scheduling by denying petitions on the subject for the last 50 years. The DEA is unwilling to change its position, at least in the absence of new research that the agency itself prohibits. One of the purposes of the DEA is limiting the access to and controlling drugs. Thus, exhaustion is futile because there is no real motivation for the DEA to encourage more research on controlled substances or to lessen its regulations making drugs easier to obtain.

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[9] Washington v. Barr, 925 F.3d 109, 119 (2d Cir. 2019); Sisley v. DEA, 11 F.4th 1029, 1035 (9th Cir. 2021) (quoting *Washington*, 925 F.3d at 119).
[10] 11 F.4th 1029 (9th Cir. 2021).
[11] 509 U.S. 137 (1993).
[12] 503 U.S. 140 (1992).
[13] 5 U.S.C. § 704 ("[A]gency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.").
[14] *Darby*, 509 U.S. at 153–54 (discussing *McCarthy*).
[15] 925 F.3d 109 (2d Cir. 2019). The plaintiffs alleged that marijuana's status violated the Commerce Clause, was arbitrary and capricious, and violative of their First, Fifth, and Ninth Amendment rights.
[16] Judicial review under the CSA is available to "any person" "aggrieved" by the DEA's action. 21 U.S.C. § 877. Thus, judicial review is not limited to parties who participated in DEA proceedings by filing petitions. *See* Bonds v. Tandy, 457 F.3d 409, 414–16 (5th Cir. 2006) (citing Supreme Court cases giving similar language a broad reading).
[17] Barring the application of any exceptions, judicially created exhaustion doctrine "continues to apply as a matter of judicial discretion." *Darby*, 509 U.S. at 153.
[18] *Washington*, 925 F.3d at 116–17.
[19] Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 107 (D.C. Cir. 1986).

Exhaustion of administrative remedies may be inappropriate when the agency's remedy is inadequate "because of some doubt as to whether the agency was empowered to grant effective relief."[20] An administrative proceeding within the DEA is an inadequate forum to determine the constitutionality of the CSA. The Supreme Court has recognized that agencies are ill-suited to address structural constitutional challenges to their enabling statutes." [21]

And if a plaintiff were to challenge the five-factor medical use test, it is unlikely that the DEA will declare its own test invalid. Thus, the validity of the five-factor medical use test is purely an issue of interpretation of the statutory language "currently accepted medical use." Review and consideration of statutory interpretation is the court's role. Any interested party, like the plaintiffs in *Washington*, should be able to challenge the constitutionality of CSA scheduling and scheduling criteria without first exhausting remedies available with the DEA.

Finally, a court may excuse exhaustion "where pursuing agency review would subject plaintiffs to undue prejudice," such as an "unreasonable timeframe" for administrative action.[22] The Second Circuit in *Washington* aptly noted that the average administrative proceeding with the DEA takes about nine years to complete.[23] Courts recognize that undue prejudice is "even more problematic" in the context of healthcare.[24] Medical marijuana patients already face restricted access to certain federal and state services. Their ability to travel with medically necessary cannabis onto or across federal property is also severely inhibited by federal marijuana regulation. Therefore, medical marijuana patients should not be subject to dire uncertainty while they exhaust inadequate remedies with the DEA. Forcing those patients to wait nine years for DEA decision-making on marijuana scheduling is unduly prejudicial.

Future Marijuana Regulation Uncertainty

The convoluted state of marijuana laws in the United States is partly due to a lack of judicial review of DEA action following improper application of an exhaustion requirement. Just over a quarter of a century ago, marijuana was illegal throughout the United States. But today—in all 50 states—marijuana is available in some form. The DEA acts as both a textual and physical gatekeeper restricting the science needed to facilitate rescheduling. The DEA acts as the textual gatekeeper by maintaining an untenable five-factor test for determining whether a substance has a currently accepted medical use. Marijuana will always fall short of fulfilling the five factors because the DEA's role as the physical gatekeeper will not allow for more comprehensive research on the drug. Judicial review of marijuana scheduling and DEA action on the merits could potentially demonstrate both APA and constitutional violations.

While administrative progress with the DEA remains stagnant, the federal prohibition of marijuana will continue. Federal marijuana illegality jeopardizes the health and well-being of its users. The quickly changing state legal landscape for marijuana will direct more pressure on not only the DEA, but the courts. The Supreme Court has held that when lower courts impose exhaustion requirements not required by statute, they "exceed[] the proper limits of the judicial role."[25] As long as plaintiffs are met by the blunt forces of the DEA's interpretive roadblocks and improper exhaustion requirements in the courts, marijuana policy in the United States will remain dangerously impracticable.

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[20] McCarthy v. Madigan, 503 U.S. 140, 146–47 (1992) (finding that exhaustion was not required because the available administrative remedy would be inadequate).

[21] Carr v. Saul, 141 S. Ct. 1352, 1360 (2021) (citing other instances the Court has excused exhaustion in the context of constitutional challenges).

[22] *McCarthy*, 503 U.S. at 146–47.

[23] Washington v. Barr, 925 F.3d 109, 120 (2d Cir. 2019).

[24] *See, e.g.*, Abbey v. Sullivan, 978 F.2d, 37, 46 (2d Cir. 1992) ("[I]f the delay attending exhaustion would subject claimants to deteriorating health … then waiver [of exhaustion] may be appropriate.").

[25] Jones v. Bock, 549 U.S. 199, 199 (2007).

The Shaky Constitutional-Law Claim Trying to Link *Roe*, *Dred Scott*, and *Plessy*

Jonathan L. Entin*

Abortion opponents long have likened *Roe v. Wade* to the awful rulings in *Dred Scott v. Sandford* and *Plessy v. Ferguson*, 19th-century cases that upheld slavery and segregation. Now they are saying that the problem with all those decisions is that they relied on the legal theory known as substantive due process.

There was plenty wrong with *Dred Scott* and *Plessy*, but it is a stretch to call them substantive due process decisions. That theory was unknown before the 20th century, and it became synonymous with rulings that used unenumerated rights such as freedom of contract to strike down worker protections like minimum wages and maximum hours.

Dred Scott was not about unenumerated rights.

The word "slave" appears nowhere in the Constitution, but the framers knew about slavery and clearly referred to it in three places:

- the infamous "three fifths of all other Persons" provision that enhanced the political power of slave states;
- the clause that prevented Congress from banning for at least twenty years "the Migration or Importation of such Persons as any of the States now existing shall see fit to admit" that protected the slave trade;
- and the fugitive slave clause that required the return of any "Person held to Service or Labour in one State, under the laws thereof" who escaped into another.

So, slavery was baked into the Constitution's text.

In *Plessy* nobody asserted an unenumerated right, and the Court did not rely on anything remotely like substantive due process. The Supreme Court decided that "separate but equal" railroad cars treated Blacks and whites the same, so segregation was permissible. This was an equal protection ruling that had nothing to do with substantive due process.

Dred Scott and *Plessy* were wrong because they rested on the racist view that Blacks were subhuman.

The *Dred Scott* Court said that the Constitution assumed that Blacks "had no rights which the white man was bound to respect." The segregation law in *Plessy* was meant to keep Blacks away from white passengers; as Justice Harlan's great dissent condemning segregation explained, "No one would be so wanting in candor as to assert the contrary."

Even if you think that *Roe* was as bad as *Dred Scott* and *Plessy*, the similarities are not about substantive due process.

And even if you disagree with me about that, think twice before rejecting substantive due process out of hand. The Constitution doesn't say anything about parental rights, the right of opposite-sex couples to marry, or the right to pursue the common occupations of life.

Those rights are protected under substantive due process, too. Should we abandon them?

*Jonathan L. Entin is David L. Brennan Professor Emeritus of Law and Adjunct Professor of Political Science at Case Western Reserve University. This is a very slightly revised version of an op-ed column that appeared in The Plain Dealer and on Cleveland.com on August 14 and is reprinted here with their permission.

Federal Bar Association
Northern District of Ohio Chapter

Introduction to Federal Practice Seminar

Monday, November 21, 2022
Time: 9:00 a.m. - 12:30 p.m.
Carl B. Stokes U.S. Court House - Courtroom 19B
Registration starts at 8:30 a.m.
This seminar satisfies Local Rule 83.5 Admission of Attorneys to Practice in the Northern District of Ohio.

Join us for this informative seminar covering federal practice in the Northern District of Ohio. Topics discussed include: the role of the magistrate judge; court programs, accessing court information and electronic filing; local rules and practice; and electronic courtrooms.

Participants who have completed the course and otherwise met the requirements of Local Rule 83.5 will be sworn in to practice in the Northern District of Ohio immediately following the seminar. A tour of the courthouse will also follow the program.
Total of 2.25 hours of credit.

Please click **here** for the agenda.

New Lawyer Training Seminar

Monday, November 21, 2022
Time: 1:25 p.m. - 5:00 p.m.
Carl B. Stokes U.S. Court House - Courtroom 19B
Registration starts at 1:00 p.m.

Please click here for the agenda.

Course Description:
This seminar will provide new attorneys with training on law office management, professional conduct and relationships, and client fund management. It fulfills the three hours of NLT classroom instruction on professionalism, law office management, and client fund management required by the Ohio Supreme Court of all newly admitted Ohio attorneys.
Total of 3.00 credit hours

Both Introduction to Federal Practice and the New Lawyer Training seminars are pending approval by the Supreme Court of Ohio.

Registration Fees are as follows:

Introduction to Federal Practice Seminar (only)
(Registration includes continental breakfast with seminar.)
$100 FBA Member
$115 Non-Member

New Lawyer Training Seminar (only)
$100 FBA Member
$115 Non-Member

* ***New Lawyer Training & Introduction to Federal Practice Seminars***
(Registration includes continental breakfast with seminar.)
$165 FBA Member
$190 Non-Member
Choice to order a box lunch during registration for an additional $12

Online registration only via credit card only.
Registration deadline is November 15, 2022
Please review cancellation policy on our website..
WWW.FBA-NDOHIO.ORG

Click here to register.

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1) Log in to www.fedbar.org with your email and password.
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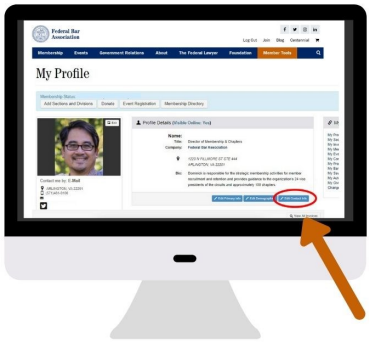
3) Click **PAY NOW** next to your national membership invoice (located mid-page in My Profile). During checkout, please consider a donation to the FBA Foundation.



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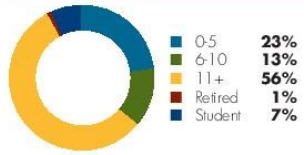
Federal Bar Association

Benefits of Membership

Joining the FBA entitles you to membership within the national organization as well as within your local FBA chapter. Members receive a host of special benefits designed to uphold the mission of the FBA and support each member's career within the federal legal system. Association activities and member benefits are organized into five primary categories.

You're in Good Company

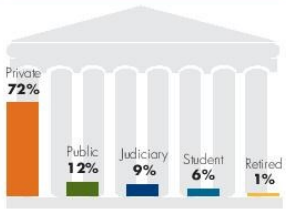
Years in Practice



Note: Chart only includes practicing attorney members of the Association.

Gender

Types of Practice



Advocacy

The organization's headquarters are located outside of Washington, D.C., in Arlington, Va., giving it the proximity necessary to remain engaged on behalf of its members.

- government relations efforts as defined by the FBA Issues Agenda
- annual Capitol Hill Day
- monthly updates on recent government relations developments

Networking and Leadership

The FBA is large enough to have an impact on the federal legal profession, but small enough to provide opportunities for networking and leadership. The FBA is governed by a 15-member, elected, Board of Directors and numerous volunteer members.

- more than 95 chapters across all federal circuits
- 22 practice area sections
- five career divisions
- volunteer leadership opportunities within each chapter, section, and division

Education

The FBA offers more than 700 credit hours of continuing legal education (CLE) at both the national and local level throughout the year.

- national CLE conferences
- bimonthly CLE webinars
- local chapter-sponsored CLE events

Publications and Communication

As part of your membership, you will receive and have access to:

- FBA website (www.fedbar.org)
- The Federal Lawyer magazine (10x per year)
- bimonthly eNewsletter
- section, division, and chapter newsletters (printed)
- Judicial Profile Index (archived)

Legal Career Center

The Legal Career Center is an online resource for both employers looking to hire and job seekers looking for a position within the federal legal community. Employers have the option of posting jobs available to the FBA Legal Career Center only, or to the Legal Job Exchange Network that reaches thousands of potential candidates through the network of partner job boards. Job seekers have free access and can use the Legal Career Center to post resumes, search for jobs, and prepare for interviews, as they launch their careers.

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Support

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Contact the FBA at (571) 481-9100 or membership@fedbar.org for more information.

Federal Bar Association

FBA-NDOH Calendar of Events:

November 2, 2022 ***Brown Bag Luncheon with Judge Pamela A. Barker***

November 16, 2022 ***FBA-NDOH Board Meeting***

November 21, 2022 ***Introduction to Federal Practice and Newer Lawyer Training Seminars***

December 21, 2022 ***FBA-NDOH Board Meeting***

January 18, 2023 ***FBA-NDOH Board Meeting***

We add events to our calendar often so please check our website for upcoming events that may not be listed here.

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Northern District of Ohio Chapter

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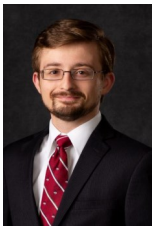

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Federal Bar Association

STATEMENT OF THE FEDERAL BAR ASSOCIATION BOARD OF DIRECTORS ON JUDICIAL INDEPENDENCE

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.

The Federal Bar Association is comprised of over 19,000 public and private sector lawyers practicing in our federal courts, hailing from all fifty states and the U.S. Territories. The Federal Bar Association is a non-partisan professional organization created to promote the sound administration of justice and integrity, quality and independence of the judiciary.

SOLACE
Support of Lawyers/Legal Personnel – All Concern Encouraged

Our Chapter supports the FBA's SOLACE program, which provides a way for the FBA legal community to reach out in small, but meaningful and compassionate ways, to FBA members and those related to them in the legal community who experience a death, or some catastrophic event, illness, sickness, injury, or other personal crisis. For more information, please follow this link: http://www.fedbar.org/Outreach/SOLACE.aspx

INTER ALIA is the official publication of the Northern District, Ohio Chapter of the Federal Bar Association.

If you are a FBA member and are interested in submitting content for our next publication please contact Stephen H. Jett, Prof. Jonathan Entin, James Walsh Jr. or Benjamin Reese no later then December 1, 2022

Next publication is scheduled for December 2022.

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