

# The Public Lawyer



STATE BAR OF NEVADA

## Nevada Supreme Court Cases

Public Lawyers  
Section

May 2009

*All Sate Insurance Co. v. Fackett* No. 49884 (April 30, 2009)  
“Respondent Deborah Ann Fackett’s mother, Barbara Testa, suffered severe injuries when her car collided with Benjamin Bellville’s car. Bellville was an underinsured driver, and Testa was insured under her own auto insurance policy. Fackett was insured with appellant Allstate Insurance Company. A few weeks after the accident, Testa died from her injuries. Fackett sued Bellville for the wrongful death of her mother and received his \$1,000,000 policy limit. Fackett then made a demand under her Allstate insurance policy (Policy) for uninsured/underinsured motorist (UM) benefits for the death of her mother. Allstate denied coverage because Testa was not an insured person under the Policy. Allstate then filed a declaratory relief action, requesting that the court find that (1) the Policy was valid and enforceable and (2) Testa was not an insured, and therefore Fackett could not recover for Testa’s death. Both parties moved for summary judgment. The district court granted

Fackett’s motion, denied Allstate’s motion, and ruled as a matter of law that the Policy’s provision requiring that the injured be an insured violated NRS 687B.145(2) because the statute does not require that the bodily injury be sustained by an insured. Therefore, the district court found that Fackett was entitled to UM benefits for Testa’s death.

We must determine whether Allstate’s UM policy provision, which limits recovery to insureds who suffer bodily injury, is enforceable and whether the district court erred in granting summary judgment in favor of Fackett. Our analysis of the district court’s ruling has two prongs.

First, we must determine whether the Policy provision limiting recovery to insureds who suffer bodily injury is ambiguous. We conclude that the Policy is clear and unambiguous and limits recovery to insureds who suffer bodily injury.



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Second, we must determine whether the Policy limitations contravene Nevada's UM statutory scheme or public policy. We conclude that neither NRS 687B.145(2) nor public policy requires that UM coverage provide recovery for injury to uninsured third parties. Thus, Allstate's Policy provision limiting recovery to insureds who suffer bodily harm is unambiguous, does not contravene NRS 687B.145(2), and therefore is enforceable.

Accordingly, we reverse."

*Sims v. Dist. Ct.*, No. 51188 (April 30, 2009) "In this second of two related cases involving competency procedures in the Eighth Judicial District Court, the petitioners challenge the district court's refusal to allow defense counsel the opportunity to present independent competency evaluations during the competency hearing. We conclude that defense counsel may introduce these independent evaluations if they are relevant to the issue of the defendant's competency and their probative value is not substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence. Because the petitioners' independent competency evaluations are relevant to the issue of competency, and their probative value is not substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, we grant these consolidate petitions."

*Scarbo v. Dist. Ct.*, No. 51151 (April 30, 2009) "In this first of two related cases involving compe-

tency proceedings in the Eighth Judicial District Court, we must determine whether defense counsel is entitled to full and complete copies for the court-appointed examiners' competency reports prior to a competency hearing held pursuant to NRS 178.415.

We conclude that prior to a competency hearing held pursuant to NRS 178.415, full and complete copies of the competency examination reports shall be delivered to the office of the district attorney and to defense counsel, or to the defendant personally if not represented by counsel. Accordingly, we grant these petitions for extraordinary relief."



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*Elliott v. White Mountain ATC*, 07-15041 (May 14, 2009) “A tribal court’s jurisdiction over nonmembers of the tribe is limited. As a matter of comity, however, federal courts generally decline to entertain challenges to a tribal court’s jurisdiction until the tribal court has had a full opportunity to rule on its own jurisdiction. Finding that no exception to that general rule applies here, the district court held that exhaustion of tribal court remedies is required. On de novo review, *Boozer v. Wilder*, 381 F.3d 931, 934 (9th Cir. 2004), we affirm.

*Ojo v. Farmers Group*, 06-55522 (May 12, 2009) “Patrick L. Ojo (‘Ojo’), on behalf of himself and all others similarly situated, appeals the district court’s dismissal under Fed. R. Civ. P. 12(b)(1) of a class action suit brought against Farmers Group, Inc., and its affiliates, subsidiaries, and reinsurers (collectively ‘Farmers’). The Complaint alleges, *inter alia*, disparate impact race discrimination in violation of the federal Fair Housing Act (‘FHA’), 42 U.S.C. §§ 3604 et seq.

Ojo, an African-American resident of Houston, Texas, alleges that Farmers used ‘a number of undisclosed factors’ to compute credit scores and price homeowners’ insurance policies. As a result, ‘Farmers charged minorities higher premiums for homeowners’ property and casualty insurance than the premiums charged to similarly situated Caucasians.’ Farmers moved to dismiss the Complaint under 12(b)(1) for lack of subject matter jurisdiction and under 12(b)(6) for failure to state a claim.<sup>3</sup> The district court<sup>4</sup> granted Farmers’ 12(b)(1) claim on the grounds that it was reverse-preempted by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq.

In dismissing Ojo’s claim, the district court erred in two respects. First, the district court erroneously read Ojo’s claim as challenging the practice of credit scoring per se. Second, the district court erroneously interpreted Texas state insurance law as permitting disparate impact race discrimination that results from credit scoring, thereby triggering McCarran-Ferguson reverse-preemption.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse.”

*Ileto v. Glock*, 06-56872 (May 11, 2009) “By enacting the Protection of Lawful Commerce in Arms Act (‘PLCAA’ or ‘Act’), 15 U.S.C. §§ 7901-7903, Pub. L. No. 109-92, 119 Stat. 2095 (2005), Congress has protected federally licensed manufacturers and sellers of firearms from most civil liability for injuries independently and intentionally inflicted by criminals who use their non-defective products. Under the terms of the PLCAA, the claims brought here, by the victims of a criminal who shot them, against a federally licensed manufacturer and a federally licensed seller of firearms must be dismissed. But the claims brought against an unlicensed foreign manufacturer of firearms may proceed. We therefore affirm.”

*Mazda v. M/V Cougar Ace*, 07-35787 (May 8, 2009) “This in rem admiralty action requires us to decide whether the defendant ocean vessel may invoke a forum selection clause in the bills of lading governing ocean carriage on that vessel. The ocean carrier that issued the bills of lading indisputably could have invoked the forum selection clause. Further, the bills of lading include a ‘Himalaya clause,’ whereby anyone assisting in performing the carriage also benefits from any contract provision designed to benefit the carrier.<sup>1</sup> We hold that, because the vessel assisted in

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performing the carriage, it is a Himalaya beneficiary that may invoke the forum selection clause. The district court dismissed this case for improper venue; we have jurisdiction under 28 U.S.C. § 1291, and we affirm.”

*Hatfield v. Halifax PLC*, 07-55790 (May 8, 2009) “Judith Hatfield (‘Hatfield’) appeals the decision of the United States District Court for the Central District of California (‘district court’) granting a motion to dismiss in favor of Halifax PLC and HBOS PLC (the ‘Halifax Appellees’) on statute of limitations grounds. Hatfield’s allegations stem from a June 2, 1997, transaction in which Halifax Building Society (‘HBS’), of which Hatfield was a member, was converted into a publicly traded company called Halifax PLC (‘Halifax’). Hatfield claims that she, and similarly situated individuals, were deceived into believing that, upon completion of the transaction, they would be entitled to free shares in Halifax, which they never received. The district court found that Hatfield’s claims, brought eight-and-a-half years after her causes of action arose, were barred by California’s statutes of limitations, which are four years or less for each of Hatfield’s claims. On appeal, Hatfield argues that: (1) this action is governed by the English six-year statute of limitations as provided by the choice of law provision in the Transfer Agreement between HBS and Halifax; and (2) the six-year limitations period was tolled by the filing of a previous class action in New Jersey state court, making this action timely. For the reasons stated below, we vacate the district court’s decision concerning the untimeliness of Hatfield’s action, but only with respect to Hatfield individually and members of the putative class who are California residents.”

*Siskiyou Regional Education v. USFS*, 06-35332 (May 7, 2009) “Siskiyou Regional Education Project (‘SREP’) and intervenor miners Robert Barton (‘Barton’) and Gerald Hobbs (‘Hobbs’) appeal the

district court’s rulings in favor of the United States Forest Service (‘Forest Service’) on claims brought in connection with the Forest Service’s interpretation of Mineral Management Standard and Guideline MM-1 (‘MM-1’), a mining-related directive contained in the Forest Service’s Northwest Forest Plan (‘NFP’).

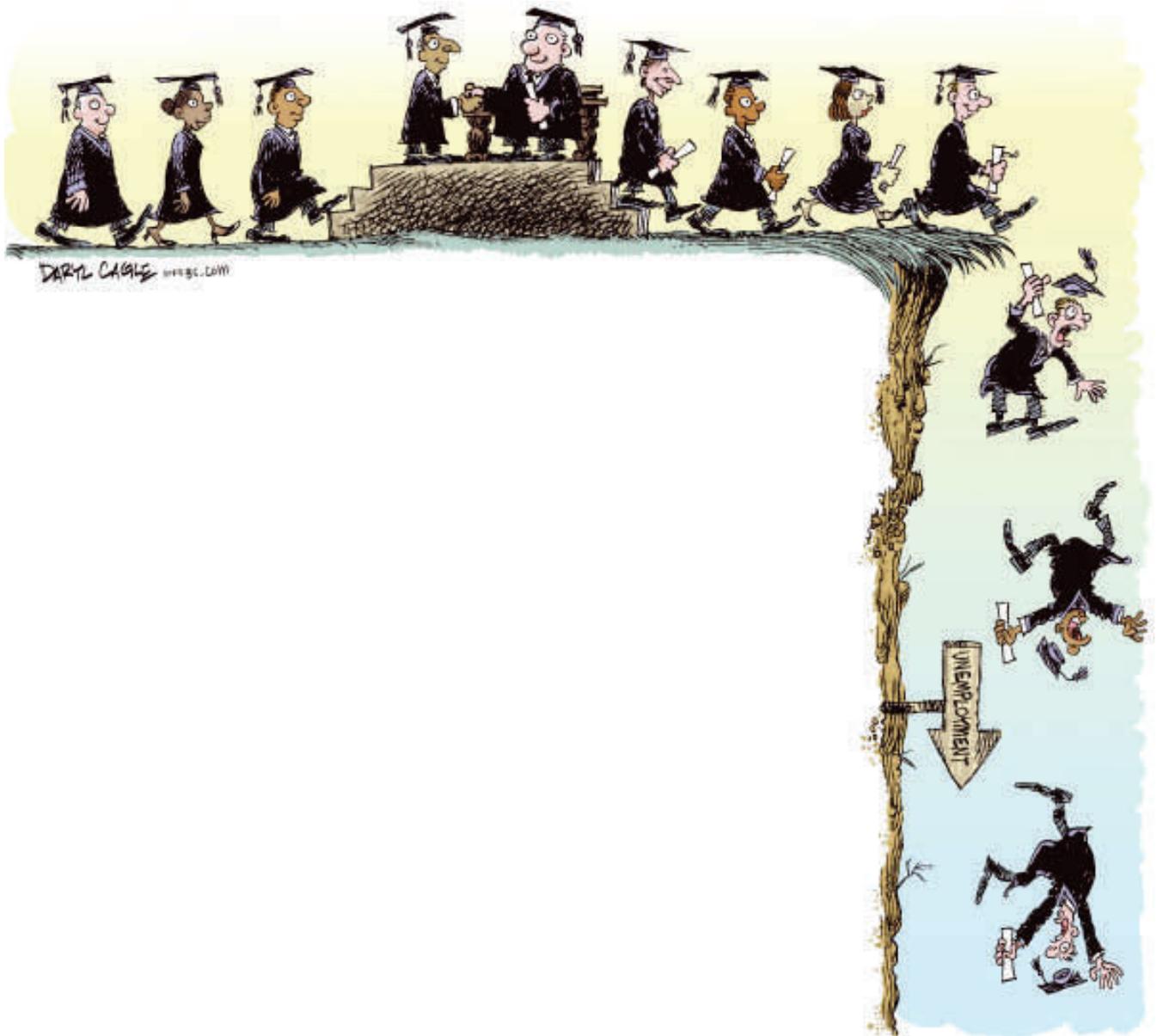
The NFP provides that Standards and Guidelines do not apply when contrary to existing law or regulation. Although 36 C.F.R. § 228.4(a) (2002), a Forest Service mining regulation, was in force when MM-1 was adopted, MM-1 and § 228.4(a) conflict in the extent of regulatory oversight of small mining operations in riparian reserves. Specifically, § 228.4(a) confers discretionary authority on district rangers to determine whether mining activity will result in significant disturbance to surface resources and therefore require a plan of operations. MM-1 appears to conflict with § 228.4(a) because it directs the district ranger to require a plan of operations for all mining activity within riparian reserves. To resolve this apparent conflict, in February 2002 the Forest Service interpreted MM-1 to impose the same threshold standard for a plan of operations as § 228.4(a). The Forest Service’s interpretation of MM-1 lies at the heart of this dispute.

The district court rejected SREP’s challenge to the Forest Service’s interpretation of MM-1, and granted summary judgment to the Forest Service. The district court also limited intervention by Barton and Hobbs to the remedial phase of the litigation, if necessary. The court dismissed as moot Barton’s separate action that had been consolidated with SREP’s suit. The court also struck Hobbs’s Answer to SREP’s First Amended Complaint on the ground that it raised claims that exceeded Hobbs’s limited role in the litigation.

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On appeal, SREP challenges the district court’s grant of summary judgment in favor of the Forest Service. SREP maintains that the Forest Service’s interpretation of MM-1 as ‘contrary to’ § 228.4(a), and thus without force insofar as it imposes additional restrictions on mining activity in riparian reserves, was arbitrary and capricious. Barton appeals the district court’s denial of his motion to intervene at the merits phase of

SREP’s suit against the Forest Service, which would have permitted him to assert that the Forest Service lacks the authority to regulate mining under the NFMA. He also challenges dismissal of his separate action as moot. Barton argues that because the National Forest Management Act of 1976 (‘NFMA’) does not grant the Forest Service authority to regulate mining, its attempt to do so in the NFP is unenforceable. Barton further ar-



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gues that even if the Forest Service is vested with this authority, its interpretation of MM-1 was reasonable and entitled to deference. Last, Hobbs argues that the counterclaims and affirmative defenses he raised in his Answer to SREP's First Amended Complaint were improperly stricken.

At the outset, we conclude that, contrary to the Forest Service's objections, we have jurisdiction over final agency action pursuant to 28 U.S.C. § 1291. We affirm both the district court's grant of summary judgment in favor of the Forest Service, and the court's rulings regarding Barton and Hobbs."

*Augusta Millender v. County of Los Angeles*, 07-55518 (May 6, 2009) "This § 1983 action arises out of a nighttime search and seizure. In a comprehensive opinion, the district court granted qualified immunity to some defendants on some issues and denied it on others. This interlocutory appeal by the City of Los Angeles and two deputy sheriffs, Detective Messerschmidt and Sergeant Lawrence, challenges only two aspects of the district court's order: the denial of qualified immunity on the scope of the search warrant to cover (1) evidence of gang affiliation and (2) all firearms and firearms-related items. We reverse the district court's denial of qualified immunity because we conclude that the officers were entitled to immunity under the second prong of the test set forth in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), as they reasonably relied on the approval of the warrant by a deputy district attorney and a judge."

*Labor/Community v. Los Angeles County MTA*, 06-56866 (May 5, 2009) "This appeal arises after fourteen years of litigation concerning public transit in Los Angeles County. In 1994, the La-

bor/Community Strategy Center and other Los Angeles County community organizations and local residents, known collectively as the 'Bus Riders Union' or 'BRU,' brought a civil rights class action against the County's Metropolitan Transit Authority, charging the MTA with unlawfully discriminating against 'inner-city and transit dependent bus riders' in its allocation of public transportation resources. The case did not go to trial; rather, in 1996, the parties agreed to, and the district court approved, a consent decree that committed MTA to implementing 'a detailed plan to improve bus service.' See *Labor/Community Strategy Ctr. v. L.A. County Metro. Trans. Auth.*, 263 F.3d 1041, 1043 (9th Cir. 2001) ('*Labor/Community*'). The district court's jurisdiction over the decree was explicitly set to expire in ten years.

Shortly before the tenth anniversary of the decree, BRU moved to extend the duration of the decree on the grounds that MTA had allegedly failed to comply with the decree's overcrowding provisions. BRU also sought civil contempt sanctions against MTA for MTA's alleged failure to comply with a 2004 remedial order. Ruling that MTA had substantially complied with the decree, the district court denied BRU's motion seeking these remedies and allowed the decree to expire.

We hold today that the district court did not abuse its discretion in denying BRU's motion to extend the decree and for contempt sanctions. We therefore affirm the district court's decision in all respects."

*United States v. Martin A. Kapp* 07-56408, (May 1, 2009) "Martin A. Kapp appeals the district court's entry of a permanent injunction preventing him from preparing or assisting in preparing

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federal tax returns that assert the position that mariners are entitled to an unreimbursed deduction for meal expenses while working on board a ship, when no meal expenses are actually incurred (the ‘mariner’s tax deduction’). He also appeals the grant of summary judgment for the government and the denial of his cross motion for summary judgment. We have jurisdiction of this timely appeal under 28 U.S.C. § 1291, and affirm the judgment of the district court.”

*Dyer v. Cenex Harvest States*, 07-73549 (May 1, 2009) “Rex Dyer prevailed in a workers’ compensation claim under the Longshore and Harbor Workers’ Compensation Act (‘LHWCA’). Dyer then sought attorney’s fees pursuant to Section 28(a) of the LHWCA, 33 U.S.C. § 928(a). The Benefits Review Board (‘BRB’) held that Dyer was entitled to recover only those attorney’s fees incurred after his employer, Cenex Harvest States Cooperative (‘Cenex’), refused to pay his claim. The BRB held that Dyer was not entitled to recover attorney’s fees for the period between his injury and Cenex’s refusal. In the jargon of this area of the law, the BRB allowed attorney’s fees for the ‘post-controversion’ period but denied fees for the ‘pre-controversion’ period. In addition, the BRB affirmed the District Director’s reduction of Dyer’s lawyer’s requested hourly rate from \$350 to \$235. Dyer petitions for review in this court.

We hold that Dyer is entitled to both pre- and postcontroversion attorney’s fees. We do not decide the proper hourly rate for Dyer’s attorney. We vacate and remand to the BRB so that it may decide that question under the principles we recently articulated in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049

(9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009).”

*White Tanks v. Strock*, 07-15659 (April 29, 2009) “This environmental dispute is between developers who dream of building thousands of homes in the now relatively undisturbed desert near the White Tank Mountains west of Phoenix, Arizona, and a non-profit organization formed essentially to oppose such developments. The focus of this dispute is the adequacy of the study that went into the decision by the Army Corps of Engineers (‘Corps’) to grant a permit under the Clean Water Act (‘CWA’) so that the developers could fill several ephemeral washes that run through the project area. The scope of the Corps’ jurisdiction under the Clean Water Act is not entirely clear after the Supreme Court’s four-four-one decision in *Rapanos v. United States*, 547 U.S. 715 (2006), but there has never been any direct challenge to the exercise of jurisdiction before the Corps in this case, and the existence of the Corps’ jurisdiction is not disputed before this court.

Rather, the dispute before us is over which of our own prior decisions should control. The case boils down to a question of whether it is factually more similar to our court’s decision in *Save Our Sonoran v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) (‘SOS’), or to our decision in *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000) (‘Wetlands’). In SOS, we held that before the Corps could grant a permit to fill washes similar in nature to those at issue in this appeal, the Corps must consider the entire scope of that development, because the pattern of washes in the area made any development avoiding the washes impossible. SOS, 408 F.3d at 1122. In *Wetlands*, we considered a project that required filling natural saltwater wetlands, but in mitigation created a larger freshwater wetland. *Wetlands*, 222 F.3d at 1110-11. We held that the Corps properly confined its envi-

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ronmental review to the wetlands and was not required to study the environmental effects on the upland area, principally because the development of the upland area could proceed independent of the wetlands project. *Id.* at 1116-17.

The district court in this case, in a thoughtful opinion, concluded it should follow *Wetlands* because it agreed with the analysis of the Corps in the district court that the bulk of this project could be developed independently, without affecting the area traversed by the washes. Upon a close review of the district court and administrative records, including the permit application itself and concerns that the Environmental Protection Agency ('EPA') and the Fish and Wildlife Service ('FWS') raised before the Corps, we conclude that the washes here were, in most material respects, more like the washes in *SOS* than those in *Wetlands*. These washes were dispersed throughout the project area in such a way that, as a practical matter, no large-scale development could take place without filling the washes. We therefore hold that the Corps' Finding of No Significant Impact ('FONSI') was made on the basis of too narrow a scope of analysis, and we reverse the district court."

*Mohamed v. Jeppesen Data Plan, Inc.*, 08-15693 (April 28, 2009) "Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi ('plaintiffs'), appeal the dismissal of this action, brought under the Alien Tort Statute, 28 U.S.C. § 1350, against Jeppesen Dataplan, Inc. ('Jeppesen'), a wholly owned subsidiary of the Boeing Company. Before Jeppesen filed an answer to the complaint, the United States intervened, asserting that the state secrets privilege required dismissal of the entire action on the pleadings. The district court agreed and dismissed the complaint. On appeal, plaintiffs ar-

gue the district court misapplied the state secrets doctrine and erred in dismissing the complaint.

Concluding that the subject matter of this lawsuit is not a state secret because it is not predicated on the existence of a secret agreement between plaintiffs and the Executive, and recognizing that our limited inquiry under Federal Rule of Civil Procedure 12(b)(6) precludes prospective consideration of hypothetical evidence, we reverse and remand."

"Plaintiffs brought suit under the Alien Tort Statute, 28 U.S.C. § 1350, claiming that Jeppesen is directly liable in damages for (1) actively participating in their forcible and arbitrary abduction, and (2) conspiring in their torture and other cruel, inhuman, or degrading treatment, in violation of customary international law cognizable under the Alien Tort Statute.

In the alternative, plaintiffs assert that Jeppesen is liable for aiding and abetting agents of the United States, Morocco, Egypt, and Jordan in subjecting them to torture and other cruel, inhuman, or degrading treatment because Jeppesen knew or should have known that the passengers of each flight for which it provided logistical support services were being subjected to such treatment by agents of those countries. They further allege in the alternative that Jeppesen demonstrated reckless disregard as to whether the passengers of each flight for which it provided logistical support services were being subjected to torture and other cruel, inhuman, or degrading treatment.

Before Jeppesen answered the complaint, the United States government intervened, asserting the state secrets privilege and, on that basis, moved for dismissal. Then-director of the CIA, General Michael Hayden, filed two declarations in support of

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the motion to dismiss, one classified, the other redacted and unclassified. The public declaration asserts that ‘[d]isclosure of the information covered by this privilege assertion reasonably could be expected to cause serious—and in some instances, exceptionally grave—damage to the national security of the United States and, therefore, the information should be excluded from any use in this case.’”

“Two parallel strands of the state secrets doctrine have emerged from its relatively thin history. *Totten v. United States*, 92 U.S. 105 (1875), perhaps the earliest case to turn on state secrets in any form, stands for the proposition that a suit predicated on the existence and content of a secret agreement between a plaintiff and the government must be dismissed on the pleadings because the ‘very subject matter’ of the suit is secret. In that case, William Lloyd’s estate brought suit against the government to recover compensation for services that Lloyd had allegedly rendered as a spy during the Civil War. *Id.* at 105. Lloyd claimed to have performed on the contract, but not to have received full payment for his services according to the terms of the agreement. *Id.* at 106. Dismissing the case on the pleadings, the Supreme Court observed that the secrecy of the parties’ relationship was a ‘condition of the engagement’ and ‘[b]oth employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter.’ *Id.* This condition of secrecy, the Court reasoned, is ‘implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations.’ *Id.* ‘The publicity produced by an action’ to enforce the conditions of any such agreement, moreover, ‘would itself be a breach of a contract of that kind, and thus defeat a recovery.’ *Id.* Because ‘the existence of a con-

tract of that kind is itself a fact not to be disclosed,’ *id.* at 107, ‘the very subject matter of the action . . . [is] a matter of state secret,’ and the action must therefore be ‘dismissed on the pleadings without ever reaching the question of evidence,’ *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953) (citing *Totten*).



“Two parallel strands of the state secrets doctrine have emerged from its relatively thin history.”



In contrast with the *Totten* bar, the *Reynolds* evidentiary privilege prevents only discovery of secret evidence when disclosure would threaten national security. See *Reynolds*, 345 U.S. 1.3 Application of the *Reynolds* privilege involves a ‘formula of compromise’ in which the court must weigh ‘the circumstances of the case’ and the interests of the plaintiff against the ‘danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.’ *Id.* at 9-10. While the court should ‘defer to the Executive on matters of foreign policy and national security’ in making this determination, *Al-Haramain*, 507F.3d at 1203, ‘[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,’ *Reynolds*, 345 U.S. at 9-10. The court must therefore undertake an independent evaluation of the claim of privilege to ensure the

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privilege properly applies. Once the court determines a claim of privilege is legitimate, however, ‘even the most compelling [personal] necessity cannot overcome’ it. *Reynolds*, 345 U.S. at 11.”

Successful invocation of the *Reynolds* privilege does not necessarily require dismissal of the entire suit. Instead, invocation of the privilege requires ‘simply that the evidence is unavailable, as though a witness had died [or a document had been destroyed], and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.’ *Al-Haramain*, 507 F.3d at 1204 (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983)). Within the *Reynolds* framework, the ‘litigation can proceed,’ therefore, so long as (1) ‘the plaintiffs can prove ‘the essential facts’ of their claims ‘without resort to [privileged evidence],’ ‘ *id.* (quoting *Reynolds*, 345 U.S. at 11), and (2) invocation of the privilege does not deprive ‘the defendant of information that would otherwise give the defendant a valid defense,’ *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).”

“The government finally urges us to affirm according to *Reynolds* because, in its view, there is ‘no possibility’ that plaintiffs can establish a prima facie case, or that Jeppesen can defend itself, ‘without using privileged evidence.’ We are unpersuaded because acceding to the government’s request would require us to ignore well-established principles of civil procedure. At this stage in the litigation, we simply cannot prospectively evaluate hypothetical claims of privilege that the government has not yet raised and the district court has not yet considered.

This case is before us on appeal from a Rule 12(b)(6) motion to dismiss. Jeppesen has not

filed an answer to the complaint, and discovery has not yet begun. It is well settled that when a federal court reviews the grant of a Rule 12 motion to dismiss, ‘its task is necessarily a limited one.’ *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). That limited task ‘is not [to determine] whether a plaintiff will ultimately prevail,’ *id.*, but instead only whether the complaint ‘state[s] a claim upon which relief can be granted,’ Fed. R. Civ. Pro. 12(b)(6). Plaintiffs here have stated a claim on which relief can be granted and therefore should have an opportunity to present evidence in support of their allegations, without regard for the likelihood of ultimate success. *See Scheuer*, 416 U.S. at 236 (a district court acts ‘prematurely’ and ‘erroneously’ when it dismisses a well-pleaded complaint, thereby ‘preclud[ing] any opportunity for the plaintiffs’ to establish their case ‘by subsequent proof’); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, — (2007) (‘[A] well-pleaded complaint may proceed even if it appears ‘that a recovery is very remote and unlikely.’ ‘ (quoting *Scheuer*, 416 U.S. at 236)). This limited inquiry—a long-standing feature of the Federal Rules of Civil Procedure—serves a sensible judicial purpose. We simply cannot resolve whether the *Reynolds* evidentiary privilege applies without (1) an actual request for discovery of specific evidence, (2) an explanation from plaintiffs of their need for the evidence, and (3) a formal invocation of the privilege by the government with respect to that evidence, explaining why it must remain confidential. *See Reynolds*, 345 U.S. at 8-9 (‘the principles which control the application of the privilege’ require a ‘formal claim of privilege’ by the government with respect to the challenged evidence); *id.* at 10-11 (the court must consider the litigants’ ‘showing of necessity’ for the evidence in determining whether ‘the occasion for invoking the privilege is appropriate’). Nor can

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we determine whether the parties will be able to establish their cases without use of privileged evidence without also knowing what non-privileged evidence they will marshal. *See Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1267-68 (Fed. Cir. 2005) (‘deciding the impact of the government’s assertion of the state secrets privilege’ before the record is ‘adequately developed’ puts ‘the cart before the horse’). Thus neither the Federal Rules nor Reynolds would permit us to dismiss this case at the pleadings stage on the basis of an evidentiary privilege that must be invoked during discovery or at trial. Our decision to remand also has the additional benefit of conforming with ‘the general rule . . . that a federal appellate court does not consider an issue not passed on below,’ and will allow the district court to apply Reynolds in the first instance. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); see also *Johnson v. California*, 543 U.S. 499, 515 (2005) (citing *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557-58 (1994) (reversing and remanding for the lower court to apply the correct legal standard in the first instance)).

On remand, the government must assert the privilege with respect to secret evidence (not classified information), and the district court must determine what evidence is privileged and whether any such evidence is indispensable either to plaintiffs’ prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint. REVERSED and REMANDED.”

*Wilson v. Kayo Oil Co.*, 08-55444 (April 24, 2009) “Plaintiff Ronald Wilson appeals the district court’s: (1) dismissal of his suit against Defendant Kayo Oil Company for lack of standing; and (2) entry of monetary sanctions against Wil-

son and his counsel. We have jurisdiction under 28 U.S.C. § 1291, and we reverse for the following reasons.

‘Standing is a question of law that we review de novo.’ *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1224 (9th Cir. 2008). ‘Allegations that a plaintiff has visited a public accommodation on a prior occasion and is currently deterred from visiting that accommodation by accessibility barriers establish that a plaintiff’s injury is actual or imminent.’ *Doran v. 7-Eleven*, 524 F.3d 1034, 1041 (9th Cir. 2008). Here, Wilson makes these minimal allegations, and therefore survives a facial attack on standing. *See id.* at 1041 (‘Notwithstanding the [500-mile] distance between Doran’s home and the 7-Eleven, there is an actual and imminent threat that, during his planned future visits to Anaheim, Doran will suffer harm as a result of the alleged barriers.’). Because the district court ‘relie[d] solely on undisputed facts or on facts as they are represented by’ Wilson, we express no opinion on whether Wilson’s allegations would survive a factual attack.

We ‘review the district court’s entry of sanctions for abuse of discretion.’ *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1130 (9th Cir. 2008). ‘A district court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence.’ *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007) (internal quotation marks omitted).

Here, the district court concluded that Wilson and his counsel committed nine sanctionable acts. With respect to seven of these acts,2 Wil-

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son was not given ‘sufficient, [particularized,] advance notice of exactly which conduct was alleged to be sanctionable.’ See *In re DeVille*, 361 F.3d 539, 549 (9th Cir. 2004). However, the district court’s order to show cause did indeed notify Wilson and his counsel that they needed to demonstrate that they did not file this ADA case in bad faith or for oppressive reasons. Both of these allegedly sanctionable acts rely on the same lynchpin: that Wilson filed his suit knowing that he did not have standing. As discussed above, the district court’s standing decision is contrary to our decision in *Doran*, 524 F.3d at 1041.

Accordingly, we reverse the district court’s sanctions order. Finally, we decline Wilson’s

request to reassign his case to a different judge on remand. See *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1133 (9th Cir. 2008). REVERSED and REMANDED.”

*Rodriguez v. West Publishing Corp.*, 07-56643 (April 23, 2009) “West Publishing Corp. and Kaplan, Inc. entered a settlement agreement in an antitrust class action brought by those who purchased a BAR/BRI course between August 1, 1997 and July 31, 2006. (BAR/BRI is a subsidiary of West that provides preparation courses for state bar exams.) The district court approved the settlement, and several class members who object (Objectors) appeal. Their principal objection relates to incentive agreements that were entered into at the onset of litigation between class coun-



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sel and five named plaintiffs who became class representatives. They also contend that the district court improperly failed to compare the amount of the settlement to the likely recovery of treble, as well as single, damages.

We agree that the ex ante incentive agreements created conflicts among the five contracting class representatives, their counsel, and the rest of the class. We disapprove of them. Nevertheless, there were two other class representatives who had no incentive agreements and whose separate counsel were not conflicted. They provided adequate representation and the court was not required to reject the settlement on this account.

We conclude that the district court did not clearly abuse its discretion in finding that the \$49 million settlement was fair, adequate, and reasonable even though it evaluated the monetary portion of the settlement based only on an estimate of single damages. Courts are not precluded from comparing the monetary component of a settlement to the estimated treble damages if, in their informed judgment, the strength of the particular case warrants it; but they are not obliged to do so in every antitrust class action. In this case, the settlement is substantial and meets the standard for approval by any measure.

Finally, we believe that the incentive agreements may have an effect on attorney's fees that the district court did not acknowledge. It gave no weight to the Objectors' role in securing denial of incentive awards, nor did the court take into account ethics concerns arising out of the incentive agreements when it awarded attorney's fees to class counsel. Both issues need to be revisited.

The Objectors' remaining arguments lack force. Accordingly, we affirm approval of the settlement. We reverse the orders denying any fee award to Objectors and granting the fee award to class counsel, and remand."

*Tur v. YouTube, Inc.*, 07-56683 (April 21, 2009) "Robert Tur, an award-winning helicopter journalist, sued YouTube, a highly popular online video sharing service, for copyright infringement in the Central District of California. YouTube moved for summary judgment based upon the safeharbor provision of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c), which the district court denied. Shortly thereafter, Tur, hoping to join a putative New York class action against YouTube that raises similar issues, moved to dismiss his current case. The district court granted Tur's motion to dismiss without prejudice. YouTube timely appeals from both the grant of the motion to dismiss and the denial of summary judgment. In a memorandum disposition filed concurrently with this opinion, we affirm the dismissal order."

*Nordyke v. King* 07-15763 (April 20, 2009) "We must decide whether the Second Amendment prohibits a local government from regulating gun possession on its property."

"There are three doctrinal ways the Second Amendment might apply to the states: (1) direct application, (2) incorporation by the Privileges or Immunities Clause of the Fourteenth Amendment, or (3) incorporation by the Due Process Clause of the same Amendment.

Supreme Court precedent forecloses the first option. The Bill of Rights directly applies only to the federal government. *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247-51 (1833). 'Although

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“We must decide whether the Second Amendment prohibits a local government from regulating gun possession on its property.”

the Supreme Court has incorporated many clauses of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, the Supreme Court has never explicitly overruled *Barron*.’ *Nordyke III*, 319 F.3d at 1193 n.3 (Gould, J., specially concurring). Therefore, the Second Amendment does not directly apply to the states. See *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (citing *Barron* as a basis for the conclusion that ‘[t]he second amendment . . . means no more than that [the right to keep and bear arms] shall not be infringed by Congress’); see also *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (concluding that the Second Amendment ‘is a limitation only upon the power of Congress and the National government, and not upon that of the State’).

We are similarly barred from considering incorporation through the Privileges or Immunities Clause. The Clause provides that ‘[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.’ U.S. Const. amend. XIV, § 1. Under the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), this language protects only those rights that derive from United States

citizenship, but not those general civil rights independent of the Republic’s existence, see *id.* at 74-75. The former include only rights the Federal Constitution grants or the national government enables, but not those preexisting rights the Bill of Rights merely protects from federal invasion. *Id.* at 76-80. The Second Amendment protects a right that predates the Constitution; therefore, the Constitution did not grant it. See, e.g., *Heller*, 128 S. Ct. at 2797 (‘[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.’). It necessarily follows that the Privileges or Immunities Clause did not protect the right to keep and bear arms because it was not a right of citizens of the United States. See *Cruikshank*, 92 U.S. at 553; cf. *Presser*, 116 U.S. at 266-67 (holding that the ‘right to associate with others as a military company’ is not a privilege of citizens of the United States). The final avenue for incorporation is that by which other provisions of the Bill of Rights have come to bind the states: selective incorporation through the Due Process Clause of the Fourteenth Amendment. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to criminal jury); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compelled selfincrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of evidence obtained by unreasonable search and seizure); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Establishment Clause).”

“To summarize, our task is to determine whether the right to keep and bear arms ranks as fundamental, meaning ‘necessary to an Anglo-American regime of ordered liberty.’ *Duncan*, 391 U.S. at 149 n.14 (*emphasis added*). If it does, then the Fourteenth Amendment incorporates it. This culturally specific inquiry compels

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us to determine whether the right is ‘deeply rooted in this Nation’s history and tradition.’ *Glucksberg*, 521 U.S. at 721 (internal quotation marks and citation omitted). Guided by both *Duncan* and *Glucksberg*, we must canvass the attitudes and historical practices of the Founding era and the post-Civil War period, for those times produced the constitutional provisions before us.”

We therefore conclude that the right to keep and bear arms is ‘deeply rooted in this Nation’s history and tradition.’ Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the ‘true palladium of liberty.’ Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

“Heller tells us that the Second Amendment’s guarantee revolves around armed self-defense. If laws make such self-defense impossible in the most crucial place—the home—by rendering firearms useless, then they violate the Constitution.

But the Ordinance before us is not of that ilk. It does not directly impede the efficacy of self-

defense or limit self-defense in the home. Rather, it regulates gun possession in public places that are County property.

The Nordykes counter that the Ordinance indirectly burdens effective, armed self-defense because it makes it more difficult to purchase guns. They point to case law on the right to sexual privacy as an analog. In *Carey v. Population Services International*, 431 U.S. 678 (1977), for instance, the Supreme Court measured state regulations limiting access to contraceptives by the same yardstick as they would a total ban on contraceptives. See *id.* at 688. Just as the Court held that ‘[l]imiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives,’ *id.* at 689, so the Nordykes argue that limiting the availability of firearms burdens their right to keep and bear arms for the purpose of self-defense. But ‘not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right.’ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.). Indeed, ‘[n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care . . . for abortion,’ for instance. *Id.* at 874. Even though the Supreme Court has recognized a right to an abortion, it has approved some of those regulations. The Court has also held that the government need not fund abortions, even though women have a substantive due process right to obtain them. See *Harris v. McRae*, 448 U.S. 297, 315-16 (1980). In *Harris*, the Court drew a crucial distinction between government interference with activity the Constitution protects and the government’s decision not to encourage, to facilitate, or to partake in such activity. ‘Although the liberty protected by the Due Proc-

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ess Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions,' Harris declared, 'it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.' *Id.* at 317-18.<sup>21</sup> If we apply these principles here, we conclude that although the Second Amendment, applied through the Due Process Clause, protects a right to keep and bear arms for individual self-defense, it does not contain an entitlement to bring guns onto government property.

The County also points to the famous passage in *Heller* in which the Court assured that nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or *laws forbidding the carrying of firearms in sensitive places* such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Heller*, 128 S. Ct. at 2816-17 (emphasis added). The County argues that its Ordinance merely forbids the carrying of firearms in sensitive places, which includes the Alameda County fairgrounds and other County property.

"The Nordykes argue that the Ordinance is overbroad because it covers more than such sensitive places. They list the areas covered: 'open space venues, such as County-owned parks, recreational areas, historic sites, parking lots of public buildings . . . and the County fairgrounds.' The only one of these that seems odd as a 'sensitive place' is parking lots. The rest are gathering places where high numbers of people might congregate. That is presumably why they are called 'open space venues.' Indeed, the fairgrounds itself hosts numerous public and private events throughout the year, which a large number of

people presumably attend; again, the Nordykes' gun shows routinely attracted about 4,000 people. Although *Heller* does not provide much guidance, the open, public spaces the County's Ordinance covers fit comfortably within the same category as schools and government buildings.

To summarize: the Ordinance does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it. The Ordinance falls on the lawful side of the division, familiar from other areas of substantive due process doctrine, between unconstitutional interference with individual rights and permissible government nonfacilitation of their exercise. Finally, prohibiting firearm possession on municipal property fits within the exception from the Second Amendment for 'sensitive places' that *Heller* recognized. These considerations compel us to conclude that the Second Amendment does not invalidate the specific Ordinance before us. Therefore, the district court did not abuse its discretion in denying the Nordykes leave to amend their complaint to add a Second Amendment claim that would have been futile."

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment to the County on the Nordykes' First Amendment and equal protection claims and, although we conclude that the Second Amendment is indeed incorporated against the states, we AFFIRM the district court's refusal to grant the Nordykes leave to amend their complaint to add a Second Amendment claim in this case. AFFIRMED."

*Solis v. Matherson*, 07-35633 (April 20, 2009)

"In this opinion we resolve whether the overtime provisions of the Fair Labor Standards Act

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(‘FLSA’) apply to a retail business located on an Indian reservation and owned by Indian tribal members. We also resolve whether Appellee the Secretary of Labor for the United States Department of Labor (the ‘Secretary’) has the authority to enter the Indian reservation to inspect the books of that business. Finally, we resolve whether it was an abuse of discretion for the district court to appoint a receiver for the retail business in the event the overtime payments were not made.”

We conclude that the overtime requirements of the FLSA apply to the retail business at issue in this case. Because the FLSA applies to the retail business, we conclude that the Secretary had the authority to enter the Indian reservation to audit

the books of the business, as she would regularly do with respect to any private business. We therefore affirm the decision of the district court on these two issues.

We conclude that the district court’s decision with respect to the automatic appointment of a receiver over the retail business in the event the overtime payments were not made was premature. We therefore vacate that portion of the judgment.”

