

No. 10-5180

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD MURRAY – PLAINTIFF-APPELLANT,

Vs.

JASON LENE, et al. - RESPONDENTS

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Under the present statutory authorizations from Congress, are “Senior Judges” permitted not to be counted among the Congressionally Authorized Judges for the Eastern District of Missouri and/or the 8th Circuit of the United States Court of Appeals? And if, when this instant case was heard, there were “Active Judges” whose service counted towards the number of Authorized Judges granted jurisdiction to hear matters in the designated courts, then was the use of “Senior Judges” Limbaugh (at the District Level) and Judge Arnold (at the Court of Appeals level) in want of the necessary jurisdiction ?
2. Under the present statutory authorization for “Senior Judges”, are Senior Judges stripped of their Article III protections (e.g., judicial independence, life tenure, etc.) when as senior judges they are no longer legally entitled to “judge” cases or controversies and when under the statutory authorization (28 U.S.C. 294(c)) (Appendix D) their appointment to hear cases is contingent upon the standardless and unfettered discretion of the “*chief judge or judicial council of his circuit*”? In this matter specifically, Senior Judge Arnold served on the panel with then Chief Judge Loken. The imbalance in power between judicial actors causes a reasonable person to consider whether the Chief Judge’s de facto ability to impeach and remove a Senior Judge, such as Arnold, from hearing any further cases could exert an improper influence on a “Senior Judge’s” decision making. Therefore it also undermines the

independence of all senior judges, who, as mentioned above are effectively stripped of the guarantees of independence they enjoyed as active judges. Senior Judge Arnold, by virtue of 28 U.S.C § 46(c) (Appendix G) (which strips him of his ability to vote for an en banc hearing in his senior status) was further impaired in his judicial independence. He could not therefore, advocate beyond the three judge panel, a fact that calls into question whether he still retains as a senior judge the same judicial office to which he was appointed and whose independence is constitutionally guaranteed.

3. Is the entire “Senior Judge” statutory scheme so facially unconstitutional that it must be struck down for violations of The Appointments Clause Article II § 2, in that 28 U.S.C. § 371 (e) (Appendix J) permits senior judges to maintain this status as senior judges while performing entirely non-judicial work. In addition, under this statutory scheme, senior judges are stripped of both certain powers and certain protections to which they were entitled when appointed to their position as active judges. Further specific protections of Article III are, pursuant to the present statutory scheme, stripped from “Senior Judges” which renders their independence vulnerable to influences from which “Active Judges” are protected under Article III.
4. Did the Court of Appeals err in its ruling that Mr. Murray (against whom no allegations of misconduct were made) who acted in complete compliance with a court-ordered parenting-plan (Appendix E) and who asserted his rights pursuant to that court-ordered parenting-plan, could nevertheless be

arrested, jailed for a month and his children placed into foster-care for four months? And did that court err in finding that the officer who failed to obtain a copy of the court-ordered parenting plan was entitled to qualified immunity? And did the court further err in finding that a State Bureaucrat's "Safety Plan" executed with the mother, who was under investigation, was either superior to or of equal merit as a court-ordered parenting-plan and that therefore Mr. Murray was not reasonable to have relied upon a judicial determination and order as controlling? The matters of family law are in conflict with this Court's holding in Troxel and 9th Circuit precedent. As to a "safety plan" being either equal to or of superior merit to a court-order this appears to be a case of first impression.

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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APPENDIX J..... 28 U.S.C. § 371

APPENDIX K..... Memorandum and Order signed October 31, 2007, by Senior Judge Stephen N. Limbaugh, Sr., re Murray's first amended complaint.

APPENDIX L..... Order signed November 28th, 2007, by Senior Judge Stephen N. Limbaugh, Sr., denying Murray's motion to alter or amend judgment.

APPENDIX M..... Default Judgment signed February 21st, 2008 by Senior Judge Stephen N. Limbaugh entering a default judgment against Kayela Vittetoe for \$100.00.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at 595 F.3d 868 ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B, to the petition and is

reported at _____ ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____ ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the court appears at Appendix _____ to the petition and is

reported at _____ ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the Appeals decided my case was February 23, 2010.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 06, 2010, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix ____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“set out verbatim the constitutional provisions, treaties, statutes, ordinances and regulations involved in the case. If the provisions involved are lengthy, provide their citation and indicate where in the appendix to the petition the text of the provisions appears”

A. Federal Constitutional Provisions

Article II § 2.....III, 9

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Fourth Amendment to the Constitution.....5

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B. Federal Statutory Provisions

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C. State Statutory Provisions

STATEMENT OF THE CASE

Ronald Murray had joint legal and physical custody of his children and had them safe in his custody in Iowa when he was arrested on a Missouri warrant for parental kidnapping. The children were taken back to Missouri where they were placed in foster-care for over four months. Mr. Murray spent more than a month in an Iowa jail before the Missouri charges were dismissed, and he subsequently lost his custody rights. No allegations that the children were in danger or subject to any harm were made against Mr. Murray while the children were in his custody. In contrast, his ex-wife, Mrs. Vittetoe, was under investigation and had signed a MO. D.F.S. "Safety Plan" instructing that the children be placed with her parents during the pendency of the investigation. Mr. Murray, under the court-ordered parenting plan, opted to exercise his "right of refusal" (see opinion page 871) (Appendix A) when which, either parent would require child care for more than four hours, allowed the other parent to elect to take custody of the children as authorized by the court order. Mr. Murray informed Deputy Lene that he was exercising his rights pursuant to the Court-ordered modification & parenting-plan (Appendix E) and stated further that if that order was changed he would comply with any valid court order. Deputy Lene failed to obtain a copy of the parenting-plan and instead sought to enforce the DFS "Safety plan" while failing to disclose Mr. Murray's contention that, under the Court's order, until Mrs. Vittetoe was entitled to resume the exercise of her custody rights, his rights were superior to all others and he intended to operate under the commands of the court-order and retain custody. After the

charges were dismissed, Mr. Murray filed a lawsuit in the United States District Court, Eastern District of Missouri, alleging, *inter alia*, violation of civil rights (4th, 5th & 14th) under 42 U.S.C. § 1983, for malicious prosecution, false arrest, trespass to chattels, and intentional infliction of emotional distress under state law. *Murray v. Lene*, 595 F.3d 868 at 868 (8th Cir. 2010)

Defendants Steele and Director of the Missouri Department of Social Services filed a motion to dismiss case on August 24, 2007, and then again on September 18, 2007. On October 31, 2007, Senior Judge Stephen N. Limbaugh denied state Defendants' first motion to dismiss as moot, but he granted their second motion to dismiss with prejudice. The order further declined to exercise supplemental jurisdiction pursuant to 28 U.S.C. 1367(c)(3) as to the state law claims. Appellant's motion to alter or change that judgment was denied. On or about November 30, 2007, Appellant made his first motion for Default Judgment as to Party Defendant Vittetoe. On December 2, 2007, the clerk entered default judgment against Defendant Vittetoe and on December 7, 2007, Appellant was asked to submit documentation to set out monetary damages and a proposed judgment. On February 21, 2008, the court entered its order of default judgment against Defendant Vittetoe and awarded plaintiff the nominal amount of \$100.00. (Appendix M) .

On or about September 8, 2008, Defendants Board of County Commissioners for Adair County, Missouri, Jason Lene, and Adair County Missouri Sheriff submitted their motion for summary judgment and memorandum in support. On or

about October 8, 2008, Appellant submitted his Response in Opposition to Motion for Summary Judgment and Memorandum in Opposition. On November 21, 2008, Judge E. Richard Webber Granted Defendants' Motion for Summary Judgment. (Appendix B) The appeal to the 8th Circuit United States Court of Appeals followed. They affirmed the District Court's grant of summary judgment and reversed and vacated the Default Judgment against Mrs. Vittetoe (Appendix A). Mr. Murray filed a motion for rehearing en banc (Appendix C), raising the jurisdictional objections to the use of senior judges at the district court and at the Court of Appeals and same was denied on April 06, 2010, (Appendix D) , and this Writ Application to the Supreme Court of the United States of America was timely filed thereafter

REASONS FOR GRANTING THE PETITION

The Framers recognized that an independent judiciary is the bulwark of justice – independent not in the sense that they shall not cooperate in the common good of carrying into effect the purpose of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, coercive influence. Our courts have acted with vigor and determination to sustain this fundamental structure and to strike down any action of the legislature that departs from the constitutional design. In securing the Constitution, it is independent judicial administration done for the benefit of the whole people which acts to preserve our inalienable rights.

Mr. Murray was judged by senior judges who were not authorized jurisdiction by congress, And the congressional scheme for senior judges is by design violative of the protections that preserve a judge's independence from undue pressures guaranteed to active judges.

When assuming the office of “senior judge”, judges are no longer required to judge and their ability to judge is statutorily impaired, if not, specifically limited. And Mr. Murray's fundamental right to parent his children, who were safe in his custody, was violated when his compliance with a judicial order of custody was insufficient to prevent: 1. his arrest for parental kidnapping and confinement in jail for over a month; 2. the seizure of his children and their placement in foster-care for four months; 3. And the subsequent loss of his custody rights. These lower Courts found an administrative “safety plan” executed with a Missouri Bureaucrat and Mr.

Murray's ex-wife, who was under investigation, was sufficiently controlling so as to entitle the officer initiating the arrest warrant to qualified immunity and to deprive Mr. Murray of his day in Court to establish justice for the wrongs done to him and his children.

CONGRESSIONAL AUTHORIZATION OF JUDGES

It is beyond dispute that federal courts are courts of limited-jurisdiction and that inferior federal courts are wholly creatures of Congress outside of their Article III protections. Congress enacted 28 U.S.C. §133 (Appendix H) and authorized the United States District Courts for the Eastern District of Missouri six (6) District Judges in addition to two (2) additional district judges jointly appointed to the U.S. Courts for the Eastern and Western Districts of Missouri. Senior Judge Stephen Limbaugh was assigned this case and entered disputed rulings on 31st Day of October 2007, and the 28th day of November 2007. Eight (8) active judges filled this Congressional authorization (Perry; Hamilton; Jackson; Shaw; Webber; Sippel; Autrey and Laughrey) while four (4) Senior Judges also did judicial work in the Eastern District (Limbaugh (Sr.); Flippine; Nangle and Stohr). This remained true despite there being no vacancy or supplemental congressional authorization granting jurisdiction to these "Senior Judges" to hear cases. In addition, when this matter was heard at the 8th Circuit of the United States Court of Appeals, it was authorized eleven (11) circuit judges under 28 U.S.C. § 44 (Appendix F) and that allotment was filled by judges: Loken; Benton; Riley; Wollman; Murphy; Bye; Melloy; Smith; Colloton; Gruender and Shepard – a total of eleven (11) active

judges. The panel that heard Mr. Murray's case was then Chief Judge Loken, Judge Benton and Senior Judge Morris Arnold. Senior Judge Arnold's service exceeded the number of congressionally authorized judges.

No vacancy existed on the Eighth Circuit and no supplemental or Senior Judge Authorization was approved by Congress. According to information compiled at the Federal Judiciary Center "Senior Judges" were responsible of 14.6% of the 8th Circuit's judicial productivity in 2009.

In *United States of America v. American-Foreign Steamship, et al*, 363 U.S. 685 (1960) the United States Supreme Court applied 28 U.S.C. § 46 (Appendix G) and concluded that Congress's specific statutory limitation prevented a "Senior Judge" from sitting on an en banc review. The court said, "*We conclude for these reasons that under existing legislation a retired circuit judge is without power to participate in an en banc Court of Appeals determination, and accordingly that judgment must be set aside.*" *Id.* at 691.

It follows by analogy that where congress has statutorily authorized a specific number of judges, when active judges fill that allotment, and in the absence of a specific authorization for "Senior Judges" or a vacancy in the allotment of active judges, that "Senior Judges" are without jurisdiction to hear cases in that district court or court of appeals and that therefore their judgments should be vacated and the matter remanded.

Article II, Section 2: The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into

the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. --He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. --The President shall have the Power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Article III, Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

CONSTITUTIONAL ARGUMENTS SPECIFIC TO MURRAY

Much of Mr. Murray’s constitutional arguments were inspired by and/or derived from the scholarly work in *Are Senior Judges Unconstitutional?*, 92 Cornell L. Rev. 453 (2007) by Prof. David R. Stras & Ryan W. Scott and their argument, though redacted for space, is substantially cited below:

First, we consider “global” objections, by which we mean objections to the overall statutory scheme regulating senior judges, independent of the actions of any particular senior judge. Second, we consider “individualized” objections, by which we mean objections to the conduct of individual senior judges. A. Global Constitutional Objections to the Overall Statutory Scheme

The judicial retirement statute raises two general constitutional objections. The first relates to Article III. Senior judges hold judicial office, yet there is no guarantee that they will receive permission to perform judicial work. Consequently, the office violates the tenure protection of Article III, Section 1 by exposing senior judges to the risk of constructive removal by other judges. The second relates to the Appointments Clause, Article II § 2. If, as we have argued, judges actually assume a different constitutional office upon electing senior status, the statute circumvents the appointment process by depriving the President and Senate of their constitutional role.

The first global constitutional objection derives from Article III, Section 1, which grants life tenure to federal judges by providing that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.” Upon assuming senior status,

however, judges no longer have the right to perform judicial duties.

(Note: *By a “right to perform judicial duties,” we mean a right to adjudicate the kind of disputes described in Article III, Section 2: justiciable cases and controversies within the constitutional and statutory jurisdiction of the federal courts.*) Other Article III judges have discretion to decide whether to allow senior judges to sit on any court, including their “**home**” court.

The possibility that a senior judge could be barred from performing judicial duties amounts to a constructive removal from office, which violates the tenure protection of Article III § 1.

Under § 294, senior judges must obtain permission any time they wish to perform judicial duties, and there is no guarantee that they will receive it. To sit on the court to which he was originally appointed, a senior judge must be “*designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties.*” 28 U.S.C. § 294(c). To sit elsewhere, not only must a senior judge be designated and assigned by the Chief Justice of the United States to appear on the “roster of senior judges,” but also the chief judge of the requesting circuit must provide a “certificate of necessity” to the Chief Justice of the United States documenting the need for assistance. *Id.* § 294(d).

Without designation and assignment by either the chief judge of the circuit or the Chief Justice of the United States, no senior judge may perform judicial duties. § 294(b), (e) There is no comparable statute for active judges. A

“willing,” able-bodied, and able-minded judge might be refused designation under § 294.

In fact, from time to time, chief judges have been accused of refusing to designate and assign judges for purely political or personal reasons. Even if the chief judge, the judicial council, and the Chief Justice of the United States strive to make each designation and assignment decision based on objective factors such as physical and mental capacity, efficiency, and effectiveness, in “borderline” cases they may tend to err on the side of nondesignation when they disagree with a senior judge’s political or judicial philosophy.

Regardless of the practical likelihood that a senior judge will be barred from performing judicial duties, the statute unquestionably makes such a result possible. The language of § 294 hints at a neutral standard for senior judge designation and assignment decisions, and one that arguably limits the discretion of the relevant decision makers. Section 294I provides that a senior judge “*may be designated*” to perform “*such judicial duties within the circuit as he is willing and able to undertake*.” Similarly, § 294(d) directs the Chief Justice of the United States to maintain a roster of senior judges who are “*willing and able to undertake special judicial duties from time to time outside their own circuit*.” These provisions might constrain designation and assignment decisions by limiting such decisions to whether a “*willing*” senior judge is “*able*” to perform judicial duties, without

consideration of any other factors. The statute provides, however, that the relevant decision makers “*may*” designate and assign a “*willing and able*” senior judge, not that they shall or must do so. Section 294, therefore, leaves chief judges, judicial councils, and the Chief Justice of the United States with unchecked and unreviewable authority to refuse designation to senior judges.

Despite issuing a judge’s handbook containing many of the details about Article III service, the Judicial Conference has never issued regulations interpreting the “*willing and able*” language. With little administrative guidance, any reason seems to be enough, and in the past senior judges have been refused designation and assignment because of issues unrelated to inability. For example, Chief Justice Earl Warren refused to designate and assign Justice Charles Evans Whittaker to perform work on the lower courts, despite Justice Whittaker’s willingness to undertake those duties, because Chief Justice Warren found him too indecisive during his active service on the Supreme Court. Chief Justice Warren reportedly told a colleague, “*Tell [Justice Whittaker] that I never could get him to make up his mind, and I’ll be damned if I will let him do that to me again. So the answer is no* (FN #222)

Assuming, however, that the “*willing and able*” language in § 294 indeed controls designation and assignment decisions, the statute violates Article III, Section 1 for two reasons. First, whatever “*willing and able*” means, it does not correspond to “*good Behaviour.*” Inability to perform judicial duties is not even behavior, let alone bad behavior.

Perhaps a senior judge's willingness to perform judicial duties despite physical or mental infirmity is an ominous sign, but until a judge has misbehaved, the judge cannot be removed from office, constructively or otherwise.

See DAVID N. ATKINSON, *LEAVING THE BENCH* 4 (1999). In the case of *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003), Sixth Circuit Judge Alice Batchelder alleged that Chief Judge Boyce Martin “used his position in 2001 to delay consideration of race-conscious admissions at the University of Michigan [L]aw [S]chool until two judges opposed to the policy became ineligible to vote on it.” Charles Lane, *Judges Spar Over Affirmative Action*, WASH. POST, June 7, 2003, at A4. Court Report Faults Chief Judge in University Admissions Cases, N.Y. TIMES, June 7, 2003, at A16. Chief Judge Martin has denied any wrongdoing. See *id.* As outsiders, it is almost impossible to know which side of the story is correct. Chief judges often make their administrative decisions in secret without giving reasons and without the possibility of review. The *Grutter* example is unusual and helpful because other judges, alarmed by the behavior of their colleague, sounded a rare public alarm. This incident demonstrates that chief judges may consider ideology when making designation and assignment decisions. Judge Fletcher finds the problem of a “vindictive, venal, or politically motivated chief” unrealistic, even “imaginary,” and argues that the only

“possible abuse” by a chief judge is to underuse the designation and assignment power by failing to intervene in cases of infirmity.

Fletcher, supra note 126, at 524. We do not doubt that the vast majority of senior judges never encounter abuse by chief judges (or the Chief Justice of the United States) in making assignment and designation decisions. As these alleged instances of politically motivated decision making show, however, chief judges and Chief Justices are as **capable as any other officer of abusing their power. As a result, a statute that vests total and unreviewable power in those decision makers over their senior colleagues’ ability to perform any judicial work raises more than just theoretical concerns.**

Second, to the extent that the designation and assignment of senior judges is dictated by a statutory standard of ability, Congress itself directs the constructive removal of judges by defining the appropriate circumstances for assignment and delegation. § 294 That arrangement violates the Constitution. As an initial matter, Congress may not delegate its removal power to Article III judges because that action circumvents the impeachment process. Moreover, the standard of ability for assignment and delegation decisions codified in § 294 differs from the “*good Behaviour*” standard set forth in Article III, Section 1. Section 294, therefore, takes the removal decision out of the hands of the appropriate decision maker (Congress) and applies a standard (ability) that does not appear in the Constitution. Accordingly, the specter of constructive removal of senior judges, even if it

does not occur regularly, renders the designation and assignment statute for senior judges unconstitutional making the tenure protection inapposite.

The Supreme Court considered a similar constructive removal claim in *Chandler v. Judicial Council of the Tenth Circuit of the United States*. Judge Stephen S. Chandler, an Oklahoma district court judge, challenged an order of the Tenth Circuit Judicial Council that responded to his severe backlog of cases by reassigning all matters pending before him and directing that “no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.” Judge Chandler argued that the Judicial Council’s action amounted to constructive impeachment, in violation of separation of powers and Article III. The Court held that jurisdictional defects barred consideration of his claims, avoiding the “ultimate question” of whether the Council’s order fell “to one side or the other of the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence.”

Several opinions, however, expressed views on the merits. The dissenters, Justices Hugo Black and William O. Douglas, would have held that the Council’s order amounted to a constructive removal from office: “[T]here is no power under our Constitution for one group of federal judges . . . to declare [any federal judge] inefficient and strip him of his power to act as a judge.” The sole constitutional

mechanism for removal of a judge, they argued, was the impeachment process reserved to Congress by the Constitution.

The five-Justice majority, led by Chief Justice Burger, did not reach the merits, but stated in dictum that it had some doubt about the constructive removal claim advanced by the dissenters. The Court suggested, without deciding, that the Council's order reflected a "reasonable standard[]" as to a "routine matter"—just one decision among "an almost infinite variety of others of an administrative nature" necessary to enable "a complex judicial system [to] function efficiently." In a solo concurrence, Justice John Marshall Harlan would have held that the Council's action was "a supportable exercise of the 238 398 U.S. 74 (1970). 239 Id. at 78 (quoting the Judicial Council's order). See id. at 82. 241 See id. at 86 (refusing to determine whether the Court had appellate jurisdiction over Judicial Council administrative orders). Id. at 84–85. Chief Justice Burger, writing for the majority, compared the Council's order to a "reasonable, proper, and necessary" directive withholding the assignment of new cases to a judge with a large "backlog." See id. at 85. That comparison is inapt, however, as a judge with a backlog continues to perform judicial duties, as is his constitutional right and obligation. Council's responsibility to oversee the administration of federal justice," posing no threat to judicial independence. Although our sympathies lie with the dissenters in *Chandler*, we do not mean to suggest that the Constitution

forbids all administrative or disciplinary actions against Article III judges by their colleagues. At the Founding and throughout the history of the federal Judiciary, judges routinely exercised administrative control over their courts. Accordingly, a statute that allows judges, acting in their administrative capacity, to withhold designation and assignment of a senior judge temporarily would not pose a problem. Such a statute would not place judges in any danger of constructive removal, and therefore would not violate Article III. The trouble is that § 294 does not limit the chief judge, the judicial council, or the Chief Justice of the United States to temporary decisions. Nothing in the statute prevents them from repeatedly refusing to designate and assign a senior judge, effectively resulting in an indefinite prohibition on the performance of judicial duties. Undoubtedly, permanently or indefinitely blocking senior judges from performing judicial duties implicates their tenure in office, even if it is accomplished using a statute with a strictly administrative purpose.

Is it a violation of Article III, if one is quietly prevented from judging? Professor Gerhardt acknowledges as much, noting that “[g]ranting sitting judges the power to evaluate the suitability of allowing other judges to retain their offices injects an **element of intimidation** that, no doubt, would threaten not only collegiality among judges but also independent judicial decision making itself.” It does not matter that a judge might retain the salary and title of the office, even as the judge is prohibited from performing judicial

duties. The salary and title are significant benefits of the office, to be sure, but Article III directs that judges shall hold the “office,” which includes its powers and duties, “during good Behaviour.” As Judge Richard Posner has observed, the bottom line is that senior judges effectively relinquish life tenure, serving at the pleasure of their colleagues in the judicial branch.

Moreover, as a functional matter, the constitutional objection arises the moment Congress passes a statute that threatens judges with removal from office. Judicial independence requires the absence of any danger of involuntary removal, not just the absence of some specific recent instance of removal. See *THE FEDERALIST NO. 78*, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (defending the tenure protection of Article III as a measure not only to prevent the judiciary from being “overpowered,” but also from being “awed” or “influenced”); *id.* *NO. 79*, at 472–73 (Alexander Hamilton) (defending the salary protection of Article III on the ground that it prevents judges from being “deterred from [their] duty by the apprehension of being placed in a less eligible situation” (emphasis added)).

RETAINS THE OFFICE

28 U.S.C. § 371 (d) directs the President to appoint, by and with the advice and consent of the Senate, a successor for each judge that elects “Senior” status. At the same time the statute purports to permit the “Senior judge” to “retain the office”. Does Associate Justice Sandra Day O’Connor retain her office and may she sit with an active nine on the court or

substitute for temporary vacancy? As an active judge she had a right to hear matters before the Court. Should a Chief Justice of the United States Supreme Court elect senior status may the “Senior” Chief Justice perform some of the singular duties to which the Active Chief Justice is uniquely tasked. If the office is retained as the statute purports then the rights and responsibilities attendant to that office are undiminished even in “Senior” status. If not, “Senior” judges do not retain the same office to which they were appointed in their active capacity.

The Supreme Court held in *Booth v. United States*, 291 U.S. 339 (1934) under the then existing act that Senior Judges are constitutionally permissible. More recently the Supreme Court in *Northern Pipeline Company v. Marathon Pipe Line Company & the United States*, 458 U.S. 50, 102 s.Ct. 2858, 73 L.Ed. 598, (1982) held that the federal statute which reorganized Bankruptcy Courts was struck down because the act unconstitutionally conferred Article III judicial power upon judges who lacked life tenure and protection against salary diminution. These attributes were incorporated into the Constitution to ensure the independence of the Judiciary. “The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison). To ensure against such tyranny the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. “The Framers regarded the checks and balances that they had built into the tripartite Federal

Government as a self-executing safeguard against encroachment or aggrandizement of one branch at the expense of the other.” *Id.* at 57

In its senior judge statutory scheme Congress has stripped “Senior” judges of their Article III protections and left the execution of these encroachments in judicial hands so as to leave the guardian unconcerned by the violations.

WITHIN THE 8TH CIRCUIT CHILDREN ARE GOVERNMENT CHATTEL

This Court reiterated in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000) that the parents’ have a fundamental right to make decisions concerning the care, custody and control of their children. This fundamental liberty interest is further enhanced by the Fourteenth Amendment’s due process clause protection against government interference with certain fundamental rights and liberty interests. In *Troxel*, this Court affirmed the Washington Supreme Court holding that The Federal Constitution permits a State to interfere with the fundamental right of parent to rear their child only to prevent harm or potential harm to the child. *Id.* at 63

In the Murray case no allegations that Mr. Murray had in anyway harmed, endangered or could potentially harm his children were made, except for the allegation of parental kidnapping by asserting his rights to maintain custody of the children under the authority of court ordered parenting-plan.

The Court’s below in Murray failed to bestow his status as father with joint legal and physical custody (Appendix D) and with the children safely in his custody

in Iowa any deference or consideration at all. The Eighth Circuit in its opinion in *Murray v. Lene*, 595 F.3d 868 (8th Cir. 2010) did recite, “*Mr. Murray argues that there was no probable cause that he committed this offense because a provision in the joint parenting plan provided that “[i]f child care is needed for more than four hours a day, the other parent can have the right of refusal and instead opt to take custody of the child at that time.”* In Mr. Murray’s view, when Ms. Vittetoe agreed to abide by the safety plan and not to have contact with the children, she essentially agreed to have the children’s grandparents provide child care for more that four hours a day. ... Mr. Murray’s proposed construction of the agreement is not altogether farfetched, but it is not the most reasonable one. In any event, the agreement does not obviously give the right of custody to Mr. Murray under these circumstances, and a **prudent person could conclude that the safety plan made Ms. Vittetoe’s parent’s the legal custodians of the children**, and therefore Mr. Murray committed the offense of child abduction by refusing to return the children to their grandparents” Id., at 871-872. (emphasis added) Mr. Murray will let the Eighth Circuit’s above argument stand on its own strength with no further comment.

In the Ninth Circuit of the United States Court of Appeals a contradictory approach to fundamental parental rights are taken. This approach is consistent with Troxel and this Court’s related precedent. In a recent case, the Ninth Circuit in *James v. Rowlands*, 08-166642 (9th Cir. On May 26, 2010) restated that the Fourteenth Amendment protects parents’ fundamental right to participate in the care, custody, and management of their children. “*The Fourteenth Amendment’s*

Due Process Clause protects parents' well-established liberty interest in the "companionship, care, custody, and management of [their] children." Lassiter, 452 U.S. at 27 (noting that the importance of this right is "plain beyond the need for multiple citation") (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)); accord Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing this liberty interest as "perhaps the oldest of the fundamental liberty interests recognized by this Court"). This right is not reserved for parents with full legal and physical custody. To the contrary, we have recognized that parents with even fewer custody rights than James—parents with no legal or physical custody, but merely visitation rights—have "a liberty interest in the companionship, care, custody, and management of their children," even though such a parent's right is "unambiguously lesser in magnitude than that of a parent with full legal custody." Brittain, 451 F.3d at 992. James therefore has a protected liberty interest in participating in C.J.'s "care, custody, and management." Id., at 9 "...We have recognized that the Fourteenth Amendment's protection of parental rights prohibits the state from separating parents from their children "without due process of law except in an emergency." Wallis, 202 F.3d at 1136. We have accordingly held that:

Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. Recently, in Burke v. County of Alameda, we extended

this rule to protect not only parents with full custody, but also parents like James who have only joint legal custody and no physical custody. 586 F.3d 725, 733 (9th Cir. 2009). In Burke, officials took a child into protective custody and did not inform the father, who had only joint legal custody, for two days. Id. We held that the officials had reasonable cause to believe that the child was in imminent danger, but that the officials may have violated the father's rights because the "scope of the intrusion" may have been greater than necessary to avert the danger to the child. Id. at 732-33." Id. 12-13 (emphasis added)

It is clear that a fundamental conflict exists between the Eighth and Ninth Circuits as to whether parents enjoy fundamental rights with regard to their children and when and how the state can intervene.

CONCLUSION

So, Mr. Murray is submitting the Ninth's Circuit's approach is correct and in keeping with this Court's precedent and that within the Eighth Circuit the precedent this case provides denies citizens fundamental rights they previously had no need to question and the Eighth Circuit's opinion should be corrected and remanded for further proceedings, before it used to grant qualified immunity to another set of state actors who recklessly interfere in the fundamental rights of parents to rear their children. The jurisdictional argument that Congress did not authorize the "Senior" judges who heard this matter at the District and Court of Appeals levels is based upon the plain reading of the relevant statutes cited above.

The additional argument is that the “senior” judge statutory scheme enacted by congress strips “senior” judges of their Article III protections and is therefore unconstitutional on those grounds. The Court should grant this application for Writ of Certiorari, or in the alternative remand with instructions.

Respectfully submitted,

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