RELIGIOUS LIBERTY — RELIGIOUS FREEDOM RESTORATION ACT — SEVENTH CIRCUIT DENIES PRELIMINARY INJUNCTION TO WHEATON COLLEGE. — *Wheaton College v. Burwell*, 791 F.3d 792 (7th Cir. 2015).

Near the end of his life, a 79-year-old Thomas Jefferson wrote to Dr. Benjamin Waterhouse about "this blessed country of free inquiry and belief, which has surrendered its creed and conscience to neither kings nor priests."[1] Had he foreseen the controversies to come nearly two hundred years later, he might have added a word about the federal judiciary. In July 2015, the Seventh Circuit in *Wheaton College v. Burwell*[2] (*Wheaton College II*) affirmed the denial of a preliminary injunction for Wheaton College, a religious institution in Illinois that has resisted the Affordable Care Act's requirement that group health insurance plans cover the provision of certain contraceptives. In so holding, the court adjudged the College "incorrect" in its belief that "as the trigger-puller or facilitator [it] share[d] responsibility for the extension of [emergency contraception] coverage to its students, faculty, and staff."[3] To the extent it relied on this conclusion to reject the substantiality of the burden upon Wheaton College's religious exercise, the Seventh Circuit's reasoning eschews the best reading of *Burwell v. Hobby Lobby Stores, Inc.*'s[4] substantiality analysis and presents a troubling submission of questions of "creed and conscience" to judicial scrutiny.

Congress passed the Patient Protection and Affordable Care Act[5] in 2010 to expand the availability of health care coverage. Implementing the Act's "minimum essential coverage" requirements,[6] the federal government in July 2013 issued final regulations requiring group health insurance plans to cover, among other things, all FDA-approved contraceptives for "women with reproductive capacity."[7] But along with that Mandate, the government offered an accommodation to religious institutions: if they filled out Employee Benefits Security Administration (EBSA) Form 700 to designate a third-party administrator, the administrator would itself provide any objected-to contraceptives.[8]

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[1] Letter from Thomas Jefferson to Dr. Benjamin Waterhouse (June 26, 1822), *in* THOMAS JEFFERSON: WRITINGS 1458–59 (Merrill D. Peterson ed., 1984).

[2] 791 F.3d 792 (7th Cir. 2015).

[3] *Id.* at 796.

[4] 134 S. Ct. 2751 (2014).

[5] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[6] *Id.* § 1501, 124 Stat. at 244 (codified as amended at 26 U.S.C. § 5000A (2012)).

[7] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013) [hereinafter "Mandate"] (to be codified at 26 C.F.R. pt. 54).

[8] *See* Brief of Appellant Wheaton College at 9–10, *Wheaton College II*, 791 F.3d 792 (No. 14-2396).

One such institution, Wheaton College, is a small, liberal arts school near Chicago that seeks to "serve[] Jesus Christ and advance[] His Kingdom through excellence in liberal arts and graduate programs that educate the whole person to build the church and benefit society worldwide."[9] In pursuing its mission, the College believes that, as "followers of Jesus Christ," its members must "uphold the God-given worth of human beings, from conception to death, as the unique image-bearers of God."[10] That belief, Wheaton maintains, "forbid[s] it from participating in, providing access to, paying for, designating others to pay for, training others to engage in, or otherwise supporting abortion."[11] Combined with its belief that life begins at conception, this leads the College to oppose any drug that might terminate a fertilized egg.[12]

Wheaton was unsatisfied with the government's proposed accommodation. The "accommodation," it objected, "still require[d] Wheaton to play a central role in the government's scheme, because [Wheaton] must designate an agent to pay for the objectionable services on Wheaton's behalf, and it has to take steps to trigger and facilitate that coverage."[13] That left the College complicit, in its view, in the sinful termination of human life.[14] In December 2013, Wheaton sued,[15] alleging that the regulations violated the First and Fifth Amendments and the Religious Freedom Restoration Act (RFRA),[16] which requires the government to justify any law that substantially burdens religious exercise as the least restrictive means to achieve a compelling governmental interest.[17] Wheaton asked the U.S. District Court for the Northern District of Illinois for a permanent injunction barring enforcement of the Mandate against the College.[18] It also

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[9] *Mission*, WHEATON COLL., http://www.wheaton.edu/About-Wheaton/Mission [http://perma.cc/YJH5-FMCE].

[10] *Community Covenant*, WHEATON COLL., http://www.wheaton.edu/about-wheaton/community-covenant [http://perma.cc/D5DF-9R3W].

[11] Complaint at 2, Wheaton Coll. v. Burwell, 50 F. Supp. 3d 939 (N.D. Ill. 2014) (No. 1:13-cv-08910).

[12] Wheaton does not object to all of the FDA-approved contraceptives, but only to ones it considers abortifacient: emergency contraception ("morning-after pills") and intrauterine devices (IUDs). *See Wheaton College II*, 791 F.3d at 793, 794. Although the government denies that any of its approved contraceptives are abortifacient, it defines the beginning of pregnancy as the point an embryo implants in the uterine wall, rather than the moment of conception. *Id.* at 794. Since the government did not question Wheaton's religious sincerity, the issue of whether the objected-to drugs are in fact abortifacient was not at play in this case. *See id.* at 794–95.

[13] Complaint, *supra* note 11, at 2–3.

[14] Brief of Appellant Wheaton College, *supra* note 8, at 15.

[15] It named as defendants the Secretaries and Departments of Health and Human Services (HHS), Labor, and Treasury.

[16] *See* Complaint, *supra* note 11, at 33–41.

[17] *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[18] Complaint, *supra* note 11, at 47.

sought a preliminary injunction in light of the fact that *Hobby Lobby*[19] — a similar case potentially relevant to Wheaton's claims — was pending before the Supreme Court.[20]

In June 2014, the district court denied the request for a preliminary injunction. Undertaking the four-pronged inquiry for injunctive relief,[21] it concluded there was "no question" that Wheaton had no adequate remedy at law and would suffer irreparable harm if the injunction did not issue, and that "at least in the short term[,] . . . the balance of harms strongly weigh[ed] in [Wheaton]'s favor."[22] Nevertheless, the court declined to issue a preliminary injunction, reasoning that those factors were irrelevant if Wheaton could not demonstrate a likelihood of prevailing on the merits.[23] And Wheaton was unlikely to prevail, the court reasoned, because it could not demonstrate a substantial burden warranting relief from the regulations, as required by RFRA.[24] That was because "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services."[25] On June 30, hours after the Supreme Court issued its decision in *Hobby Lobby*, the district court denied Wheaton's motion for reconsideration.[26] The Seventh Circuit affirmed in a brief, unpublished decision that same day.[27]

Wheaton filed an emergency application with the Supreme Court, and the Court granted a temporary injunction.[28] In a short order issued three days after its decision in *Hobby Lobby*, the Court exempted Wheaton from the requirements of submitting EBSA Form 700 and sending copies to health insurance issuers or third-party administra-

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[19] The Supreme Court decided *Conestoga Wood Specialties Corp. v. Burwell* jointly with *Hobby Lobby*. *See* 134 S. Ct. 2751, 2751 (2014). As relevant here, the Court held that requiring the plaintiffs to provide insurance coverage for drugs they believed to be abortifacient, with the prospect of hefty fines for noncompliance, substantially burdened their religious exercise. *See id.* at 2775–79. For a fuller discussion of *Hobby Lobby* and its background, see Paul Horwitz, *The Supreme Court, 2013 Term — The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154 (2014).

[20] *See* Wheaton Coll. v. Burwell, 50 F. Supp. 3d 939, 943 (N.D. Ill. 2014).

[21] This inquiry requires the moving party to show (1) lack of an adequate remedy at law and irreparable harm, and (2) some likelihood of success on the merits; if these are shown, the court then weighs (3) each party's competing harms and (4) the public interest. *See id.* at 946.

[22] *Id.* at 952.

[23] *See id.*

[24] *Id.* at 947.

[25] *Id.* (alteration in original) (quoting Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 554 (7th Cir. 2014)).

[26] Wheaton Coll. v. Burwell, No. 1:13-cv-08910, 2014 WL 3034010, at *1 (N.D. Ill. June 30, 2014).

[27] Wheaton Coll. v. Burwell, No. 14-2396, 2014 WL 3034614, at *1 (7th Cir. June 30, 2014).

[28] The Court issued an unsigned order. Justice Scalia concurred in the result without explanation, and Justice Sotomayor filed a dissent. Wheaton Coll. v. Burwell (*Wheaton College I*), 134 S. Ct. 2806, 2807 (2014).

tors.[29] It reasoned that Wheaton had already notified the government that it met the religious exemption requirements, and "[n]othing in [its] order preclude[d] the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act."[30]

Justice Sotomayor dissented.[31] Largely echoing the district court's analysis, she argued that Wheaton could not demonstrate a substantial burden because federal law, not Wheaton's actions, was the causal mechanism behind the provision of contraceptives.[32] Although Wheaton "believe[d] that authorizing its [third-party administrator] to provide these drugs in [its] place ma[de] it complicit in grave moral evil,"[33] it was, as a matter of law, "mistaken."[34] Contraceptive coverage by a third-party administrator "would not result from any action by Wheaton; rather, in every meaningful sense, it would result from the relevant law and regulations."[35]

The challenge, however, did not end there. Still appealing from the district court's initial denial of a preliminary injunction, Wheaton maintained before the Seventh Circuit that the Court's exemption was insufficient. The exemption, Wheaton argued, left it sinfully complicit, since its actions in opting out "triggered" the provision of contraceptives no less than filling out EBSA Form 700.[36] It did not want to "notify its insurers or the government that it [was] claiming a religious exemption" or "give the government the insurers' names so that the government [could] direct the insurers to provide emergency-contraception coverage."[37] Since the government already had that information and intended to so direct the insurers, Wheaton asked the Seventh Circuit for a preliminary injunction prohibiting the government from enforcing the contraceptive coverage requirements against the College, its insurers, and its third-party administrators.[38]

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[29] *Id.*

[30] *Id.*

[31] Justice Sotomayor was joined by Justices Ginsburg and Kagan.

[32] *Compare* Wheaton Coll. v. Burwell, 50 F. Supp. 3d 939, 947 (N.D. Ill. 2014) ("[F]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers . . . to cover contraceptive services." (alteration in original) (quoting Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 554 (7th Cir. 2014))), *with Wheaton College I*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting) ("[T]he provision of contraceptive coverage is triggered not by [Wheaton's] completion of the self-certification form, but by federal law.").

[33] *Wheaton College I*, 134 S. Ct. at 2812 (Sotomayor, J., dissenting) (second and third alterations in original) (quoting Emergency Application for Injunction Pending Appellate Review at 11, *Wheaton College I*, 134 S. Ct. 2806 (No. 13A1284)).

[34] *Id.*

[35] *Id.*

[36] *See* Brief of Appellant Wheaton College, *supra* note 8, at 13–14.

[37] *Wheaton College II*, 791 F.3d at 794.

[38] Brief of Appellant Wheaton College, *supra* note 8, at 51.

The Seventh Circuit denied this request. In an opinion by Judge Posner,[39] the court concluded that "when Wheaton College tells us that it is being 'forced' to allow 'use' of its health plans to cover emergency contraceptives, it is wrong."[40] The College was compelled "only to notify its insurers . . . whether directly or by notifying the government . . . that it will *not* use its health plans to cover emergency contraception."[41] The government would then facilitate coverage through the insurers, who would notify the insured that the contraceptive coverage was not funded or administered by Wheaton. "Call this 'using' the health plans?" the court asked. "We call it refusing to use the health plans."[42]

The Seventh Circuit also disagreed with Wheaton's belief that its actions in opting out "triggered" the provision of contraceptive coverage. Though Wheaton believed that "as the trigger-puller . . . [it] share[d] responsibility for the extension of such coverage to its students, faculty, and staff," the court admonished that "[t]hat also is incorrect."[43] As the Seventh Circuit saw it, "it is the *law*, not any action on the part of the college, that obligates insurers 'to pick up the ball if [the college] decides, as is its right, to drop it.'"[44] The court thus concluded that Wheaton was, as it wished, no longer involved in the provision of emergency contraceptives.[45] Even apart from the merits, it reasoned, Wheaton had "failed to satisfy two basic requirements for the issuance of a preliminary injunction"[46]: 1) harm, since Wheaton had not produced evidence that any member of the College would be likely to violate its rules against emergency contraception even if it were covered, and 2) congruence between "the relief it [sought] [and] the illegalities it allege[d]," in light of the court's conclusion that the government was not "using" Wheaton's health plans.[47]

Though the circuits have split on this question,[48] the best reading of *Hobby Lobby*'s substantiality analysis forecloses the Seventh Cir-

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[39] Judge Posner was joined by Judges Williams and Hamilton.

[40] *Wheaton College II*, 791 F.3d at 795.

[41] *Id.*

[42] *Id.* at 796.

[43] *Id.*

[44] *Id.* (alteration in original) (quoting Univ. of Notre Dame v. Burwell, 786 F.3d 606, 614 (7th Cir. 2015)).

[45] *Id.*

[46] *Id.* at 800–01.

[47] *Id.* at 801.

[48] *Compare, e.g.*, Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 222 (2d Cir. 2015) (rejecting plaintiffs' triggering argument and finding no substantial burden), *and* Little Sisters of the Poor Home for the Aged v. Burwell, No. 13-1540, 2015 WL 5166807, at *1 (10th Cir. Sept. 3, 2015) (denying rehearing en banc over dissent of five judges after panel decision rejecting triggering argument), *with* Sharpe Holdings, Inc. v. Dep't of Health & Human Servs., No. 14-1507, 2015 WL 5449491, at *8–9 (8th Cir. Sept. 17, 2015) (accepting plaintiffs' triggering argument and finding a substantial burden).

cuit's "triggering" analysis in *Wheaton College II*. The Seventh Circuit's analysis should sound familiar: it echoes Justice Sotomayor's assertion, in dissent,[49] that in believing its actions made it "complicit in grave moral evil,"[50] the College was — as a matter of law — "mistaken."[51] It is nearly identical to her argument that "[a]ny provision of contraceptive coverage by Wheaton's third-party administrator would not result from any action by Wheaton; rather, in every meaningful sense, it would result from the relevant law and regulations."[52] Most fundamentally, it harkens back to Justice Ginsburg's position in *Hobby Lobby*, again in dissent, that "the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial."[53] That argument — whatever one thinks of its merits — was rejected by the Supreme Court, and the logic of the Court's rejection should extend here.

Instead, in undertaking the substantiality analysis, the *Hobby Lobby* Court expressly declined to second-guess whether the challengers' moral culpability was "too attenuated" to constitute a substantial burden.[54] The majority noted that the challengers' claim "implicate[d] a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[55] It had stern words for the dissent's approach: "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed."[56] The Court declined to engage in that moral analysis, concluding that "it [was] not for [the Court] to say that [the challengers'] religious beliefs [were] mistaken or insubstantial."[57]

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[49] Justice Sotomayor's argument in *Wheaton College I* was not expressly rejected by the Court, insofar as the Court disclaimed any attempt to pronounce its views on the merits. *Wheaton College I*, 134 S. Ct. 2806, 2807 (2014). But the argument's failure to persuade the Court to deny the injunction, combined with its similarity to the attenuation analysis rejected in *Hobby Lobby*, should have caused the Seventh Circuit to pause before engaging in similar reasoning on remand.

[50] *Wheaton College I*, 134 S. Ct. at 2812 (Sotomayor, J., dissenting) (quoting Emergency Application for Injunction Pending Appellate Review at 11, *Wheaton College I*, 134 S. Ct. 2806 (No. 13A1284)).

[51] *Id.*

[52] *Id.*

[53] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2799 (2014) (Ginsburg, J., dissenting).

[54] *See id.* at 2777–79 (majority opinion).

[55] *Id.* at 2778.

[56] *Id.*

[57] *Id.* at 2779. True, the act alleged to create complicity in *Wheaton College* (mailing a form) is both simpler and a step removed from the one in *Hobby Lobby* (paying for and administering an employee health plan that includes emergency contraceptives). But when a party sincerely believes that an act renders it complicit in wrongdoing, ease of performing the act and proximity to the alleged evil are irrelevant. If these cases are taking place on two different factual stages, then,

Rather than assess the reasonableness of the challengers' religious convictions, the *Hobby Lobby* Court focused its substantiality analysis on what the challengers would have to do in order to simultaneously abide by those convictions and comply with the law.[58] For the *Hobby Lobby* challengers, that would entail paying enormous fines.[59] For Wheaton College, that would entail dropping student health coverage entirely.[60] It may be, after all, that there is no substantial burden imposed upon Wheaton — it may be that dropping student health care coverage does not rise to the level of substantiality. But that is not the inquiry the Seventh Circuit undertook; it conducted, instead, its own analysis of whether Wheaton's opt-out notification to HHS was sufficiently "triggering" to make Wheaton complicit in a practice it regards as murder. *Hobby Lobby*'s substantiality analysis militates against this second-guessing of Wheaton's sincerely held religious beliefs. Indeed, the very essence of religion — beliefs about the moral and supernatural, often based on faith — confounds any attempt to subject it to a "reasonableness" analysis.

At the heart of this case, as in *Hobby Lobby*, lies a dispute over the correct theory as to what causes the ultimate provision of contracep-

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we're still watching the same play: one where a federal court second-guesses a religious adherent's belief that his actions create complicity. Just as Justice Ginsburg would have held that the causal chain between the *Hobby Lobby* plaintiffs' religious objections and the ultimate contraceptive coverage was "too attenuated," *id.* at 2799 (Ginsburg, J., dissenting), Justice Sotomayor and the Seventh Circuit would inform Wheaton College that its beliefs about complicity are legally "mistaken" or, more bluntly, "incorrect," *Wheaton College I*, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, J., dissenting); *Wheaton College II*, 791 F.3d at 796. But the *Hobby Lobby* majority was not concerned with the *degree* of attenuation; it was concerned, rather, that the dissent felt qualified to venture a judgment about attenuation *at all*. *See Hobby Lobby*, 134 S. Ct. at 2777–78 ("HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do . . . and the end that they find to be morally wrong . . . is simply too attenuated. . . . This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)."). We have been here before, and the final act turns on the plaintiffs' sincerely held religious beliefs, not the courts' moral philosophy of complicity, however couched in legal language it might be. It is for Wheaton, not the Seventh Circuit, to decide which actions "trigger" the provision of contraceptive coverage. And reasonably or not, Wheaton sincerely believes that it would commit "grave moral evil" if it participated in a health insurance scheme that ultimately leads to the provision of abortifacient drugs. That belief should signal the close of the curtain for any "attenuation" or "triggering" analysis.

[58] *See Hobby Lobby*, 134 S. Ct. at 2778 (describing the question presented by RFRA as "whether the [Mandate] imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*").

[59] *See id.* at 2775–76.

[60] Indeed, that is what Wheaton has now done. *See* Manya Brachear Pashman, *Wheaton College Ends Coverage Amid Fight Against Birth Control Mandate*, CHI. TRIB. (July 29, 2015, 1:05 PM), http://www.chicagotribune.com/news/local/breaking/ct-wheaton-college-ends-student-insurance-met-20150728-story.html [https://perma.cc/XGM5-8VLZ].

tives. The circuits' division reflects a profound disagreement over who gets to answer that question — courts, as a matter of law, or religious adherents, as a matter of sincerely held belief. The best reading of *Hobby Lobby*'s substantiality analysis would answer that question in favor of religious adherents. To be sure, such an answer is not without consequences: a decision in favor of Wheaton College will limit the availability of contraceptive coverage for those insured by objecting religious institutions.[61] But the alternative carries consequences of its own, engaging courts in what amounts to a fundamentally moral analysis of which actions are sufficiently "triggering" to constitute complicity. Conducting that analysis here, the Seventh Circuit found complicity lacking and announced that "[n]o one is asking Wheaton to violate its religious beliefs."[62] In a country that has left creed and conscience to its citizenry rather than its government, such a pronouncement should have no home in the Federal Reporter.

Questions about the limits of complicity are better left to philosophers and theologians than to federal judges. By cloaking an essentially moral question in legal garb, the Seventh Circuit presented Wheaton College with the very choice RFRA was designed to shield it from.[63] Perhaps, after all, Wheaton will be forced to choose between its God and its government — perhaps the provision of contraceptives is a compelling interest and the notification requirement a least restrictive means, or perhaps Congress will decide that it wishes to bypass RFRA altogether and amend the Affordable Care Act to exempt its provisions from RFRA's strictures. But if and when that day comes,[64] it should not be because a federal court has substituted its complicity analysis for that of the College. Someone *is* asking Wheaton College to violate its religious beliefs — just ask Wheaton.

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[61] *Cf.* Univ. of Notre Dame v. Burwell, 786 F.3d 606, 623 (7th Cir. 2015) (Hamilton, J., concurring) (noting that accepting Notre Dame's belief would "nullify the law's benefits for others"). By contrast, the *Hobby Lobby* Court noted that its ruling would have "precisely zero" effect on the women employed by Hobby Lobby. *Hobby Lobby*, 134 S. Ct. at 2760.

[62] *Wheaton College II*, 791 F.3d at 799.

[63] *See* 42 U.S.C. § 2000bb (2012) (noting, among the congressional findings and purposes behind RFRA, that governments should avoid substantial burdens absent a compelling justification, and that persons whose religious exercise is so burdened should have a defense). True, the Act does not obviate that choice in *all* circumstances: no law pursues its ends at all costs, and where the government is able to demonstrate that its policy is the least restrictive means of furthering a compelling governmental interest, substantial burdens upon religious exercise are permitted. *Id.* § 2000bb-1(b). But the Seventh Circuit never performed that analysis, instead truncating its inquiry upon deciding that the burden imposed on Wheaton College was not a substantial one.

[64] As this issue goes to print, the Supreme Court has granted certiorari in *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), and consolidated cases to examine the issue of whether the new accommodation process satisfies RFRA. *See* Little Sisters of the Poor Home for the Aged v. Burwell, No. 15-105, 2015 WL 6759642, at *1 (U.S. Nov. 6, 2015) (mem.).