



# **SAMPLE CASENOTES**

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STUDENTS AT DUKE UNIVERSITY SCHOOL  
OF LAW**

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**THE TRIVIALIZATION OF OCCUPATIONAL LIBERTY:  
FORGET THE FIGHT; FIND A NEW CAREER**

I. INTRODUCTION

The court in *Engquist v. Oregon Department of Agriculture*<sup>1</sup> allows the principles of substantive due process to serve as a supposed “safeguard” for public employees who are deprived of the liberty and the freedom to pursue their choice occupation. However, defining liberty as the freedom to seek one’s preferred employment is not a new concept and has been recognized in numerous cases such as *Board of Regents of State Colleges v. Roth*<sup>2</sup>. In *Roth*, liberty is described poetically as “broad and majestic” and is defined “not merely [as] freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.”<sup>3</sup> However, this liberty is not as “broad and majestic” as the court so eloquently describes it to be; it is more of an abstract concept that the Court strictly constrains under the rather reassuring tone that the liberty is available subject only to “reasonable government regulation.”<sup>4</sup>

The Due Process Clause of the Fourteenth Amendment theoretically offers individuals hope: hope that they will be able to seek justice if they are shut out of a career by the actions of a government employer.<sup>5</sup> While the *Engquist* court recognizes this right under a theory of substantive due process,<sup>6</sup> it does little more than state that an individual is entitled to bring such a claim before a court. Relying on the tests utilized by other jurisdictions for similar claims, the

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<sup>1</sup> 478 F.3d 985 (9th Cir. 2007).

<sup>2</sup> 408 U.S. 564, 572 (1972).

<sup>3</sup> *Id.*

<sup>4</sup> See *Conn v. Gabbert*, 526 U.S. 286, 292 (1999) (Stevens, J., concurring).

<sup>5</sup> See *Engquist*, 478 F.3d at 998.

<sup>6</sup> *Id.*

Ninth Circuit adopts a test that requires a plaintiff to prove that it is “virtually impossible for the employee to find employment in his chosen field.”<sup>7</sup> By creating a standard that is practically unattainable in most circumstances, the court trivializes plaintiffs’ claims, allowing cases to be casually dismissed for lack of evidence, leaving plaintiffs with little alternative than to seek a different career.

## II. FACTS

This case originated upon Plaintiff Anup Engquist’s termination from her position with the Export Service Center (ESC) as an international food standards specialist.<sup>8</sup> Engquist qualified as a public employee of Oregon as her department was part of the Oregon Department of Agriculture.<sup>9</sup> After approximately ten years of service and an ongoing conflict with the manager of ESC, Engquist’s position was “eliminated” after ESC was reorganized.<sup>10</sup> Among other causes of action, Engquist brought a claim for a substantive due process violation.<sup>11</sup> This substantive due process claim was a plausible cause of action as the Supreme Court had previously adjudicated that “liberty” under the Fourteenth Amendment included some right to pursue a desired profession.<sup>12</sup> The court therefore denied Defendants’ motion for summary judgment as to this claim, and the case proceeded to trial by jury.<sup>13</sup> Defendants moved for judgment as a matter of law after Plaintiff presented her case and again after “the close of evidence”; both motions were denied.<sup>14</sup> On the substantive due process claim, the jury found for

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<sup>7</sup> *Id.* at 998.

<sup>8</sup> *Id.* at 990.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 991.

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

<sup>12</sup> *Id.* at 997.

<sup>13</sup> *Id.* at 991.

<sup>14</sup> *Id.*

the Plaintiff and awarded her damages.<sup>15</sup> The court subsequently denied the Defendants' motion for judgment notwithstanding the verdict.<sup>16</sup> Both parties appealed the decision for various reasons which brought the case before the United States Court of Appeals for the Ninth Circuit.<sup>17</sup>

### III. LEGAL BACKGROUND

When *Engquist* was appealed, the Ninth Circuit had yet to determine what was necessary to constitute a valid substantive due process claim regarding an individual's "right to pursue a particular profession."<sup>18</sup> Although the Supreme Court offered some guidance on the issue, the cases defining substantive due process in the employment context were distinguishable on various levels and did not fit well with the facts of *Engquist*.<sup>19</sup> Accordingly, the court, in adjudicating the claim in *Engquist*, chose to rely on a variety of Seventh Circuit cases defining the issue in greater detail.<sup>20</sup>

#### A. THE GUIDANCE OF THE SUPREME COURT

The Supreme Court has long recognized that an individual's occupation is an essential component of that person's life, liberty, and happiness.<sup>21</sup> Therefore, the Fourteenth Amendment, which states "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."<sup>22</sup> does apply to public employment decisions that deprive an individual of her right to pursue an occupation of her choice.<sup>23</sup> However, as the *Engquist* court recognized, "the Supreme Court has not specified the boundaries of the right to pursue a profession, but has

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<sup>15</sup> *Id.* at 992.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 996.

<sup>19</sup> See *Conn*, 526 U.S. at 287; *Roth*, 408 U.S. at 573-74.

<sup>20</sup> *Engquist*, 478 F.3d at 998.

<sup>21</sup> *Roth*, 408 U.S. at 572.

<sup>22</sup> U.S. Const. amend. XIV § 1.

<sup>23</sup> *Id.*

identified it generally.”<sup>24</sup> One rationale for this limited guidance is that the Court is hesitant to strictly scrutinize the decisions of the government as an employer because of the potential flood of litigation that this could produce.<sup>25</sup> “The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.”<sup>26</sup> The Court, however, in a most evasive manner, provides little guidance for when a due process claim is actually implicated, stating that a discharged employee has no redress “[i]n the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee’s constitutionally protected rights . . . .”<sup>27</sup>

One of the leading Supreme Court cases on what liberty interest a public employee has under a theory of substantive due process is *Board of Regents of State Colleges v. Roth*.<sup>28</sup> In *Roth*, where the plaintiff was an assistant professor hired for a one-year term of service and was not subsequently rehired, the Court held that he had not been “deprived of liberty . . . protected by the Fourteenth Amendment.”<sup>29</sup> The plaintiff’s cause of action was based on his belief that he had been deprived of occupational liberty because it would be more difficult to get a job after the University’s decided not to rehire him.<sup>30</sup> However, the Court held that since the University did not implicate his good name in the process nor “impose[] on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities,” the plaintiff was not deprived of any protected liberty interest.<sup>31</sup> In essence, although it was obvious that the University’s decision not to rehire him did not reflect well on him as a candidate for other

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<sup>24</sup> *Engquist*, 478 F.3d at 997.

<sup>25</sup> See *Bishop v. Wood*, 426 U.S. 341, 349 (1976).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 350.

<sup>28</sup> 408 U.S. at 572.

<sup>29</sup> *Id.* at 566, 578.

<sup>30</sup> *Id.* at 570.

<sup>31</sup> *Id.* at 573.

academic positions, this was hardly enough for the plaintiff to be able to claim that he had significantly been deprived of the liberty to seek employment in academia.<sup>32</sup>

The Supreme Court further specified the lengths to which a public employer may go before depriving an individual of their liberty when they decided *Conn v. Gabbert*.<sup>33</sup> There, the plaintiff was an attorney who was physically searched while his client was testifying in court.<sup>34</sup> The Ninth Circuit Court of Appeals held for the plaintiff, believing this behavior to be “unreasonable government interference” in the attorney’s practice of law.<sup>35</sup> However, the Supreme Court held that there was no cognizable right interfered with, classifying the search as a mere “brief interruption” in plaintiff’s profession. Justice Stevens, in his concurring opinion, agreed that while the search was certainly of “shabby character”, no liberty interest was implicated where there was “no evidence that respondent’s income, reputation, clientele, or professional qualifications were adversely affected by the search.”<sup>36</sup>

## B. THE “STIGMA PLUS” TEST

Following the somewhat meager guidance set forth in the aforementioned Supreme Court decisions, the various circuits had to decide what actually constituted a viable substantive due process claim for the deprivation of liberty. The Seventh Circuit, in *Colaizzi v. Walker*,<sup>37</sup> relied on the Supreme Court’s precedent in *Paul v. Davis*<sup>38</sup> that “infliction by the state of a stigma on one’s reputation, without more, does not infringe upon a liberty interest protected by Fourteenth

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<sup>32</sup> *See Id.* at 574.

<sup>33</sup> 526 U.S. at 291.

<sup>34</sup> *Id.* at 287.

<sup>35</sup> *Id.* at 290.

<sup>36</sup> *Id.* at 293.

<sup>37</sup> 542 F.2d 969, 973 (7th Cir. 1976).

<sup>38</sup> 424 U.S. 693 (1976).

Amendment due process safeguards.”<sup>39</sup> Therefore, the Seventh Circuit set forth a principle that if the State did defame an individual *in combination with* a discharge or a decision not to rehire then an individual could present a viable deprivation of liberty cause of action.<sup>40</sup>

In *Perry v. Federal Bureau of Investigation*,<sup>41</sup> the Seventh Circuit further elaborated on the test proposed in *Colaizzi*, which became known as the “stigma plus” test.<sup>42</sup> When a government employee is either terminated from his position or is not rehired, the individual can bring a claim that his liberty was infringed upon if “(1) the individual’s good name, reputation, honor or integrity are at stake by such charges as immorality, dishonesty, alcoholism, disloyalty, Communism or subversive acts or (2) the state imposes a stigma or other disability on the individual which forecloses other opportunities . . . .”<sup>43</sup> Applying the elements of the test to the *Perry* case, the court determined that the plaintiff did not suffer injury to reputation nor were his opportunities to pursue a law enforcement career categorically foreclosed when the FBI circulated information regarding plaintiff and the questionable nature of his candidacy for federal jobs.<sup>44</sup> The dissenting opinion, written by Chief Judge Cummings, took no issue with the proposed test, but concluded that reputation damages and lost opportunities should not be decided through summary judgment but should be left for decision on remand.<sup>45</sup> Judge Cummings’ issue in the dissent is foreboding of future courts’ willingness to casually dismiss plaintiffs’ allegations that they have been deprived of an essential liberty – the freedom to pursue their chosen occupation.

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<sup>39</sup> *Colaizzi*, 542 F.2d at 972.

<sup>40</sup> *Id.* at 973.

<sup>41</sup> 781 F.2d 1294, 1300 (7th Cir. 1986) (Cummings, C.J., dissenting).

<sup>42</sup> *Id.* at 1303.

<sup>43</sup> *Id.* at 1300.

<sup>44</sup> *Id.* at 1296, 1300-02.

<sup>45</sup> *Id.* at 1306.

Other circuits also sought to further clarify the grounds upon which a deprivation of liberty claim could be brought – also defining the extent of such liberty with far greater detail than the Supreme Court ever sought to. In *Chilingirian v. Boris*,<sup>46</sup> the Sixth Circuit limited when a plaintiff could claim a deprivation of a liberty interest: “A charge that merely makes a plaintiff less attractive to other employers but leaves open a definite range of opportunity does not constitute a liberty deprivation.”<sup>47</sup> By limiting viable claims to individuals who had truly been divested of an opportunity to pursue their chosen profession, the Sixth Circuit sought to offer the judicial system as an avenue of relief for those individuals who most needed it – and not those people seeking retribution for having been discharged for reasons such as “inadequate performance.”<sup>48</sup>

### C. THE “VIRTUALLY IMPOSSIBLE” TEST

The Seventh Circuit, in *Bordelon v. Chicago School Reform Board of Appeals*,<sup>49</sup> appears to accept the test adopted and utilized in previous cases within that circuit’s jurisprudence. In finding for the defendant on a motion for summary judgment, the court evaluated whether the plaintiff had been sufficiently stigmatized so as to “destroy” any opportunities for him to pursue a career in education.<sup>50</sup> While this appears to be the test previously proposed by the Seventh Circuit, the court here adopts additional language, which significantly bolsters the amount of evidence that must be produced by a plaintiff in order to succeed in a claim for deprivation of liberty.<sup>51</sup> In establishing what is required of a plaintiff in such a situation, the court states that “the employee must show that the stigmatizing actions make it *virtually impossible* for the

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<sup>46</sup> 882 F.2d 200, 206 (6th Cir. 1989).

<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> 233 F.3d 524, 531 (7th Cir. 2000).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

employee to find new employment in his chosen field.”<sup>52</sup> By adopting what is almost unattainable standard for any plaintiff to meet, the *Bordelon* court is defeating the inherent purpose and safeguards of the substantive due process clause: the plaintiff’s claims can be categorically dismissed with a lack of any real adjudication on the issue.<sup>53</sup>

#### IV. HOLDING

The Court of Appeals for the Ninth Circuit held that “Engquist has stated a valid claim . . . under substantive due process by alleging that Defendants’ actions prevented her from pursuing her profession.”<sup>54</sup> In coming to this conclusion, the court relied on Supreme Court decisions such as *Conn v. Gabbert*, as noted above, that recognized a “generalized” right to pursue the employment of one’s choice.<sup>55</sup> However, the court, in an effort not to extend too much protection to the public employees, severely limited viable claims to only those which the individuals had essentially been “blacklisted” from their profession.<sup>56</sup> Although this limitation may be severe and too far-reaching to protect occupational liberty to any discernable extent, the court purposely chose to impose this limiting principle to restrict the number of claims that could be brought and sustained.<sup>57</sup>

Although the court gallantly recognized that Engquist did have a deprivation of liberty claim, which, consequently, the jury found in her favor for, the court subsequently denied her claim on the basis of insufficiency of evidence.<sup>58</sup> As previously mentioned, the court here adopted an incredibly high standard – the *Bordelon* standard – which Engquist was required to

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<sup>52</sup> *Id.* (emphasis added) (internal citations omitted).

<sup>53</sup> *See Id.*

<sup>54</sup> *Engquist*, 478 F.3d at 996.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 997.

<sup>57</sup> *See Id.* at 998 (holding that this limitation would preclude an unruly number of public employees litigating their discharge under substantive due process claims).

<sup>58</sup> *Id.* at 996.

meet in order to succeed in showing that she had been deprived of an essential liberty.<sup>59</sup> Citing directly to *Bordelon*, the court imposed the Seventh Circuit’s requirement that the actions of the government employer must “make it virtually impossible for the employee to find new employment in his chosen field.”<sup>60</sup> Consequently, the court was able to dismiss all of the evidence presented by Engquist throughout her trial and overturn the judgment found by the jury in her favor on this claim, concluding that she could not succeed on her substantive due process claim.<sup>61</sup>

## V. ANALYSIS

The *Engquist* Court, in supporting what could aptly be coined as the “virtually impossible” test, in actuality divests potential plaintiffs of any real opportunity to succeed in a deprivation of occupational liberty claim. Although, as discussed by the court in *Engquist* and by other circuits, the Court has good reason to want to limit the number of claims that could be brought under this theory of law, adopting such a high standard serves as a great deterrent to plaintiffs thinking of bringing such claims, as most of the cases are dismissed by the court in summary judgment.<sup>62</sup>

Even if one would accept the rationale behind the “virtually impossible” test set forth in recent cases, the *Engquist* court erred in reversing the jury verdict in favor of the plaintiff. The Ninth Circuit had explicitly laid out the standard of review in evaluating a jury’s verdict.<sup>63</sup> In *Gilbrook*, the court stated, “the verdict . . . must be affirmed if there is substantial evidence to

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<sup>59</sup> *Id.* at 998.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 999.

<sup>62</sup> *See Id.* at 998 (holding that allowing only the most extreme cases to succeed would prevent “federal courts [from having to] review[] every public employee discharge).

<sup>63</sup> *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999).

support the verdict.”<sup>64</sup> In *Engquist*, however, the court seems to conveniently forget the standard of review laid out for jury verdicts. Engquist produced a massive amount of evidence suggesting that she had been deprived of virtually every opportunity for a position in her field in the state of Oregon.<sup>65</sup> Engquist demonstrated this, for example, by introducing evidence “that Defendants made defamatory statements to two or three other people in the industry.”<sup>66</sup> Moreover, she testified that she had “applied for approximately 200 jobs” and while she had established her own company when it became obvious that her hopes for employment were almost nonexistent, her business remained unprofitable.<sup>67</sup> After hearing this evidence, the jury concluded that Engquist could succeed on her substantive due process claim.<sup>68</sup> However, somewhat inexplicably, the Appellate Court concluded that this evidence was not sufficient to prove that it was “‘virtually impossible’ for Engquist to find new employment.”<sup>69</sup>

In previous decisions, this court has defined the “substantial evidence” standard of review as being met if evidence is produced that “reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.”<sup>70</sup> Given this readily understandable definition, it is difficult to see how this standard of evidence had not been met in Engquist’s situation. Both the court and the Defendants acknowledged that Engquist’s line of work was “highly specialized” and “there simply are not many jobs available in that field in Oregon.”<sup>71</sup> Therefore, given that the Defendants defamed Engquist to people in

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<sup>64</sup> *Id.*

<sup>65</sup> *Engquist*, 478 F.3d at 998-99.

<sup>66</sup> *Id.* at 999.

<sup>67</sup> *Id.* at 991.

<sup>68</sup> *Id.* at 992.

<sup>69</sup> *Id.* at 999.

<sup>70</sup> *Gilbrook*, 177 F.3d at 856 (citing to *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370-71 (9th Cir. 1987)).

<sup>71</sup> *Engquist*, 478 F.3d at 999.

that particular industry – the “highly specialized” industry in which few jobs were available – this would appear to indicate that not only did the court err in reversing the jury verdict under a substantial evidence standard of review, it seems almost as apparent that Engquist’s evidence satisfied the “virtually impossible” test required by the court. This decision is not only unfortunate because of the personal and financial ramifications that Engquist must suffer as a consequence of this adjudication, but it also establishes evidentiary standards that are contrary to this country’s jurisprudence.

The cases and judicial commentary preceding *Engquist* would suggest that the evidence presented in this case would be more than sufficient to render a judgment for Engquist’s deprivation of liberty claim. *Bordelon*, upon which the court relies so heavily in finding for the Defendants in *Engquist*, is quite distinguishable from the facts in *Engquist*.<sup>72</sup> The plaintiff in *Bordelon* did not face nearly the difficulty that Engquist confronted in her search for employment: Bordelon actually had his contract as principal renewed whereas Engquist’s position was eliminated and her reputation in Oregon was permanently tarnished.<sup>73</sup> It seems highly inconsistent for the Ninth Circuit to apply the harsh test presented by *Bordelon* to the facts of *Engquist* while ignoring the glaring differences in the two cases.

Under the “stigma plus” test historically utilized in the Seventh Circuit (which lacked the additional phrase of “virtually impossible” that appeared in the *Bordelon* opinion), Engquist likely could have succeeded in her deprivation of liberty claim. For instance, in *Perry*, a liberty interest is implicated upon an individual’s termination if the person’s “good name, reputation, honor, or integrity are at stake...” or if “the state imposes a stigma . . . upon the individual which

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<sup>72</sup> See *Bordelon*, 233 F.3d at 531.

<sup>73</sup> See *Id.*

forecloses other opportunities . . . .”<sup>74</sup> Although the plaintiff in *Perry* was not found to have a successful claim for liberty deprivation<sup>75</sup>, Engquist likely would have been successful since the state agents, fully aware that the industry in Oregon was limited, made comments implying that Engquist had “run the ESC ‘into the ground’”.<sup>76</sup> In Engquist’s case, even a few negative comments could essentially foreclose all opportunities in Oregon, given the extenuating circumstances.

The few Supreme Court cases that speak to this issue of deprivation of liberty do not indicate that such a harsh test should be applied to the facts of a case; rather, the Justices of the Court may have intentionally left the right undefined and “generalized” so that various courts would be able to apply justice in the situation and not according to some pre-set standard.<sup>77</sup> Moreover, Justice Stevens’ concurring opinion in *Conn* suggests that a situation comparable to Engquist’s is exactly one that would implicate such a liberty interest.<sup>78</sup> Justice Stevens suggests that there was no deprivation of liberty interest in *Conn* because the plaintiff produced “no evidence that [his] income, reputation, clientele, or professional qualifications were adversely affected . . . .”<sup>79</sup> By enumerating such factors, he implies that these would be important considerations in establishing whether a deprivation of liberty had occurred.<sup>80</sup> For Engquist, she certainly had suffered from some combination of these negative effects (which would suggest

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<sup>74</sup> *Perry*, 781 F.2d at 1300 (citing to *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985)).

<sup>75</sup> *See Id.* at 1300-1302 (holding that criticism of plaintiff was “strictly limited to a few specified law enforcement agencies . . . .”).

<sup>76</sup> *Engquist*, 478 F.3d at 991.

<sup>77</sup> *See Conn*, 526 U.S. at 292 (holding that a mere brief interruption to a person’s occupation did not constitute a deprivation of liberty).

<sup>78</sup> 526 U.S. at 293.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

she had sufficiently been deprived of her liberty): she had definitely lost income and her reputation within the industry had been tainted.<sup>81</sup>

The policy ramification of applying such a strict standard regarding the deprivation of liberty interests such as those in *Engquist* and *Bordelon* is essentially to prevent plaintiffs from succeeding in all but the rarest cases. For *Engquist*, her reputation has been essentially destroyed in a tiny industry. Her only hope of employment, beyond continuing in the financial wreck of self-employment, is to move and seek employment elsewhere. In a nation that prides itself on individual choice and liberty, it seems imprudent for a court to deny a plaintiff relief in such circumstances. It appears to be highly unfair to allow public employers to defame an individual in a limited industry and then force the plaintiff to prove that this defamation and discharge “reduced her employment options” to a point of nonexistence.<sup>82</sup>

The result in *Engquist* is troubling in that the court, on the basis of a mere phrase in a Seventh Circuit opinion, is establishing a trend that will make it incredibly difficult for public employees to have any sort of real redress against unfair government employers. The policy ramifications set by this case are incredibly harsh on public employees – few plaintiffs will have the opportunity to survive summary judgment, jury decisions can be causally dismissed, and the courts acquire the remarkable power to decide whether an individual retains even the slightest possibility of finding employment in her field, a decision that seems beyond their authority to summarily adjudicate upon.

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<sup>81</sup> *Engquist*, 478 F.3d at 991, 999.

<sup>82</sup> *See Engquist*, 478 F.3d at 999.