SUPREME COURT OF THE UNITED STATES

No. 99–1185

MARK SELING, SUPERINTENDENT, SPECIAL COMMITMENT CENTER, PETITIONER *v.* ANDRE BRIGHAM YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 17, 2001]

JUSTICE THOMAS, concurring in the judgment.

We granted certiorari to decide whether "an *otherwise* valid civil statute can be divested of its civil nature" simply because of an administrative agency's failure to implement the statute according to its terms. Pet. for Cert. i (emphasis added). The majority declines to answer this question. Instead, it assumes that the statute at issue *is* civil– rather than "*otherwise* . . . civil," or civil "on its face." *Young* v. *Weston*, 122 F. 3d 38 (CA9 1997). And then it merely holds that a statute that is civil cannot be deemed the opposite of civil– "punitive," as the majority puts it– as applied to a single individual. *Ante*, at 15. In explaining this conclusion, the majority expressly reserves judgment on whether the manner of implementation should affect a court's assessment of a statute as civil in the "first instance." *Ante*, at 11, 15. I write separately to express my view, first, that a statute which is civil on its face cannot be divested of its civil nature simply because of the manner in which it is implemented, and second, that the distinction between a challenge in the "first instance" and a subsequent challenge is one without a difference.

Before proceeding, it is important to clarify the issue in this case. The majority adopts the Ninth Circuit's nomenclature and refers to respondent's claim as an "as applied"

challenge, see, *e.g., ante*, at 12, but that label is at best misleading. Typically an "as applied" challenge is a claim that a statute, *"by its own terms*, infringe[s] constitutional freedoms in the circumstances of [a] particular case." *United States* v. *Christian Echoes Nat. Ministry, Inc.*, 404 U. S. 561, 565 (1972) *(per curiam)* (emphasis added). In contrast, respondent's claim is not that Washington's Community Protection Act of 1990 (Washington Act), Wash. Rev. Code §71.09.010 *et seq*. (1992), "by its own terms" is unconstitutional as applied to him,[1] but rather that the statute is not being applied according to its terms at all.[2] Respondent essentially contends that the actual conditions of confinement, notwithstanding the text of the statute, are punitive and incompatible with the Act's treatment purpose. See *ante*, at 7–8.

A challenge, such as this one, to the implementation of a facially civil statute is not only "unworkable," as the majority puts it, *ante*, at 11, but also prohibited by our decision in *Hudson* v. *United States*, 522 U. S. 93 (1997). In

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[1] Respondent has made the claim that the terms of the Washington Act are criminal so that his confinement under the Act thus violates the Double Jeopardy and *Ex Post Facto* Clauses, but this claim was rejected below– first by the Washington Supreme Court, *In re Young*, 122 Wash. 2d 1, 18–23, 857 P. 2d 989, 996–999 (1993), and then by the Ninth Circuit, *Young* v. *Weston*, 192 F. 3d 870, 874 (1999)– and has not been presented to this Court.

[2] Disagreeing with this characterization, the majority contends that the statute is silent with respect to conditions of confinement. See *ante*, at 12. Even if the majority were correct– which it is not, see Wash. Rev. Code §71.09.070 (requiring annual examinations of each person's mental conditions); §71.09.080(2) (Supp. 2000) (requiring "adequate care and individualized treatment"); see also *In re Young*, 122 Wash. 2d, at 18–23, 857 P. 2d, at 996–999 (discussing similar provisions on conditions of confinement in 1990 version of Washington Act)– the question on which we granted certiorari expressly assumes that the statute "mandate[s]" the "conditions of confinement" that petitioner seeks. See Pet. for Cert. i.

Hudson, we held that, when determining whether a statute is civil or criminal, a court must examine the "statute on its face." *Id.*, at 101, quoting *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 169 (1963) (internal quotation marks omitted). In so holding, we expressly disavowed the approach used in *United States* v. *Halper*, 490 U. S. 435, 448 (1989), which evaluated the "actual sanctions imposed." 522 U. S., at 101, quoting *Halper*, *supra*, at 447 (internal quotation marks omitted). Respondent's claim is flatly inconsistent with the holding of *Hudson* because respondent asks us to look beyond the face of the Washington Act and to examine instead the actual sanctions imposed on him, that is, the actual conditions of confinement. Respondent argues, and the Ninth Circuit held, that *Hudson*'s reach is limited to the particular sanctions involved in that case— monetary penalties and occupational disbarment— and does not apply here, where the sanction is confinement. *Hudson*, however, contains no indication whatsoever that its holding is limited to the specific sanctions at issue. To the contrary, as we explained in *Hudson*, a court may not elevate to dispositive status any of the factors that it may consider in determining whether a sanction is criminal.[3] 522 U. S., at 101. One of these nondispositive factors is confinement. *Id.*, at

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[3] The *Hudson* Court referred to the seven factors listed in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), as "useful guideposts": "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment— retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." 522 U. S., at 99–100, quoting *Mendoza-Martinez*, *supra*, at 168–169 (internal quotation marks and alteration omitted).

99 (stating that one of the factors is "[w]hether the sanction involves an affirmative disability or restraint," quoting *Mendoza-Martinez*, *supra*, at 168 (internal quotation marks omitted)). Yet elevating confinement to dispositive status is exactly what respondent asks us to do when he advances his distinction between confinement and other sanctions. Because *Hudson* rejects such an argument, respondent's claim fails.

An implementation-based challenge to a facially civil statute would be as inappropriate in reviewing the statute in the "first instance," *ante*, at 11, 15 (majority opinion), as it is here. In the first instance, as here, there is no place for such a challenge in the governing jurisprudence. *Hudson*, which requires courts to look at the face of the statute, precludes implementation-based challenges at any time. Moreover, the implementation-based claim would be as "unworkable," *ante*, at 11 (majority opinion), in the first instance as in later challenges. Because the actual conditions of confinement may change over time and may vary from facility to facility, an implementation-based challenge, if successful, would serve to invalidate a statute that may be implemented without any constitutional infirmities at a future time or in a separate facility. To use the majority's words, the validity of a statute should not be "based merely on vagaries in the implementation of the authorizing statute." *Ibid.*

And yet the majority suggests that courts may be able to consider conditions of confinement in determining whether a statute is punitive. *Ante*, at 12, 15. To the extent that the conditions are actually provided for on the face of the statute, I of course agree. Cf. *Hudson, supra*, at 101 (directing courts to look at "'the statute on its face'"). However, to the extent that the conditions result from the fact that the statute is not being applied according to its terms,

the conditions are *not* the effect of the statute, *ante*, at 13, but rather the effect of its improper implementation.[4] A suit based on these conditions cannot prevail.

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The Washington Act does not provide on its face for punitive conditions of confinement, and the actual conditions under which the Act is implemented are of no concern to our inquiry. I therefore concur in the judgment of the Court.

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[4] The dissent argues that, "under the majority's analysis, there is no inquiry beyond that of statutory construction," *post,* at 3. Although it is unclear to me whether the dissent is correct on this score, I hope that state and federal courts so interpret the majority opinion. For even if the majority opinion does not preclude venturing beyond the face of the statute, *Hudson* certainly does. See *Hudson*, 522 U. S., at 101 (holding that courts must examine a statute "'on its face'" and may not consider the "'actual sanctions imposed'"); *supra*, at 2–3.

To dispel any suggestion to the contrary, *ante*, at 9–10, 12, 15 (majority opinion); *post*, at 2 (STEVENS, J., dissenting), I note that *Kansas* v. *Hendricks,* 521 U. S. 346 (1997) does not provide support for implementation-based challenges. In *Hendricks*, "none of the parties argue[d] that people institutionalized under the . . . civil commitment statute are subject to punitive conditions." *Id.,* at 363. The viability of an implementation-based challenge was simply not at issue. And significantly, six months after *Hendricks*, we held in *Hudson* that inquiries into whether a statute is civil are restricted to the "face" of the statute. *Hudson*, *supra*, at 101. To the extent that *Hendricks* (or any previous opinion, *ante,* at 15 (majority opinion)) left a door open by not answering the implementation question, *Hudson* closed that door.