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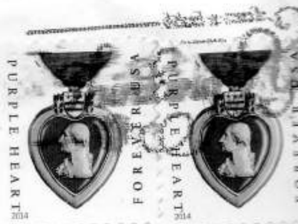

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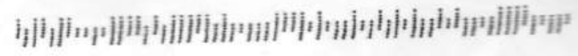

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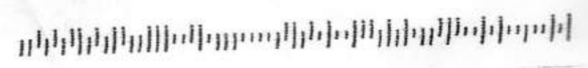

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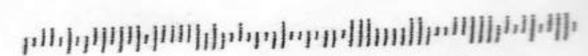

No. 17-6370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL L. KNIGHT,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Tennessee,
No. 10-cr-00120-1

BRIEF FOR APPELLANT

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October 1, 2018

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioner respectfully requests oral argument. This Court granted a certificate of appealability and appointed counsel to address whether 18 U.S.C. §924(c)(3)(B) is unconstitutionally vague under the Supreme Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). That Supreme Court decision is in conflict with one of this Court's precedents. The issue also is the subject of a growing conflict among the federal courts of appeals. Appointed counsel believes that oral argument would assist the Court in resolving this important issue.

INTRODUCTION

This is a straightforward case controlled by "a straightforward decision, with equally straightforward application here." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018). The Fifth Amendment's guarantee of due process forbids the government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). Such a statute "violates the first essential of due process." *Id.* at 2557 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). And such a statute is at issue here, as *Dimaya* makes inescapably clear.

Petitioner Michael Knight received 50 years' imprisonment under a statute that criminalizes using a firearm in furtherance of a "crime of violence" defined as a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. §924(c)(3)(B). The Supreme Court has ***twice*** held that similarly worded statutory definitions are so vague that they violate the Fifth Amendment. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 135 S. Ct. 2551 (2015). In the most recent of those decisions, *Sessions v. Dimaya*, the Supreme Court invalidated the definition of "crime of violence" incorporated into the Immigration and Nationality Act, which uses the ***exact same*** language as the

definition of that same phrase in §924(c)(3)(B). In doing so, *Dimaya* eliminated any plausible basis for distinguishing the wording of the statute invalidated in *Johnson* from the wording of the statute at issue here. Simply put, the Supreme Court's holding and reasoning in *Dimaya* compel the conclusion that §924(c)(3)(B) is unconstitutionally vague.

In light of this intervening Supreme Court precedent, it is clear that this Court's previous decision in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), which held that §924(c)(3)(B) is not unconstitutionally vague, has been abrogated. The government's arguments for distinguishing the identically worded clauses at issue here and in *Dimaya* from the residual clause of the Armed Career Criminal Act were materially indistinguishable. Thus, the Supreme Court in *Dimaya* rejected the same arguments by the same litigant that this Court accepted in *Taylor*. Numerous courts of appeals have already recognized that *Dimaya*'s reasoning applies to §924(c)(3)(B) and requires reconsidering prior circuit precedent to the contrary. Indeed, the government itself has previously recognized that the provisions at issue here and in *Dimaya* rise and fall together. The provisions fell in *Dimaya*, and *Taylor* must give way as well.

In sum, "[t]he void-for-vagueness doctrine ... guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Dimaya*, 138

**CERTIFICATE OF COMPLIANCE
WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,039 words, excluding the parts of the brief exempted by 6 Cir. R. 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

Date: October 1, 2018

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement

THE LATE CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS et al., Appts.,

vs.

UNITED STATES.

GEORGE ROMNEY et al., Appts.,

vs.

UNITED STATES.

[34 L Ed 478] (See S. C. Reporter's ed. 1-68.)

[Nos. 1031, 1054.]

Argued Jan. 16, 17, 18, 1889. Decided May 19, 1890.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Power of United States over Territory - Congress has power to revoke charter of Mormon Church of Latter-Day Saints - has power to cause its property to be seized and held - Act limiting real estate - effect of dissolution of charitable corporation on its property - polygamy may be prohibited, and property used for promoting it may be devoted to charity - property, when devoted to other charitable objects - power of Legislature over charities - law of charities - Utah law - void conveyances.

1. The United States has supreme sovereignty over a Territory, and Congress has full and complete legislative authority over its people and government.

2. Congress has power to revoke the charter of the Church of Jesus Christ of Latter-Day Saints in the Territory of Utah.<*pg. 479>

3. Congress and the courts have the power to cause the property of the said Corporation to be seized and taken possession of and held for final proper disposition.

4. The Act of July 1, 1862 (sec. 1890, U. S. Rev. Stat.), limiting the amount of real estate which could be held by a religious corporation in a Territory and forfeiting to the United States

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real estate held contrary thereto, was a valid exercise of congressional power. Its prohibition could not be evaded by putting the property of the Corporation into the hands of trustees.

5. When a public or charitable corporation is dissolved, its personal property is subject to the disposal of the sovereign authority and its real estate reverts to the grantor (in this case the United States), subject to the charitable use.

6. Government may prohibit polygamy, even if the right to indulge in it is a religious belief; and when it is forbidden by law, property used for promoting such unlawful practice, but dedicated to charitable uses and belonging to a defendant corporation, may be protected from such diversion and be taken and devoted to objects of charity.

7. Where property has been devoted to a charitable use which cannot be carried out on account of some illegality in or failure of the object, it may be applied under the direction of the courts, or of the supreme power in the state, to other charitable objects corresponding, as near as may be, to the original intention of the donor.

8. In this country, the Legislature or government of the State, as parens patrioe, has the right to enforce all charities of a public nature where no other person is intrusted with it.

9. The law of charities exists in Utah, and Congress has power to carry out that law and put it in force, in its application to the Church of Jesus Christ of Latter-Day Saints.

10. Congress had constitutional power to pass the Act of Feb. 19, 1887, annulling the charter of said Church and directing proceedings to forfeit its property.

11. The attempt made, after the passage of the Act of February 19, 1887, and whilst it was in the President's hands for his approval or rejection, to transfer the property from the trustee then holding it to other persons, and for the benefit of different associations, was an evasion of the Law and void.

Appeals from a decree of the Supreme Court of the Territory of Utah, that the Corporation of the Church of Jesus Christ of Latter-Day Saints was dissolved, and annulling certain deeds of property and (except a certain piece of land set apart for the worshipers of that sect) decreeing that the real estate belonging to said Corporation was not used for the worship of God or for burial grounds, and that its personal property has become escheated to the United States, and that the receiver appointed by this court keep possession of such real and personal property until further order.

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Held:

Affirmed. But, as the decree may perhaps require modification in some matters of detail, for that purpose only the case is reserved for further consideration.

The facts are stated in the opinion.

APPEARANCES OF COUNSEL ARGUING CASE

Messrs. *James O. Broadhead, Joseph E. McDonald,* Franklin S. Richards and John M. Butler, for appellants:

The creation of this Corporation was a contract which could not be altered or repealed by any subsequent Act of the Territorial Legislature or of the Congress of the United States.

Organic Act of Utah of 1850; Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 637, 643, 644-646 (4: 659-661); Angell and Ames, Corp. § 767; Miller v. New York, 82 U. S. 15 Wall. 488 (21: 98); Atlantic & G. R. Co. v. Georgia, 98 U. S. 365 (25: 187); Greenwood v. Union Freight R. Co. 105 U. S. 15 (26: 963); Pennsylvania College Cases, 80 U. S. 13 Wall. 212 (20: 552); St. Peter's Roman Catholic Cong. v. Germain, 104 Ill. 440; Holyoke W. P. Co. v. Lyman, 82 U. S. 15 Wall. 500 (21: 133); Terrett v. Taylor, 13 U. S. 9 Cranch, 53 (3: 654); Wilkinson v. Leland, 27 U. S. 2 Pet. 657 (7: 553); Osborn v. Nicholson, 80 U. S. 13 Wall. 662 (20: 695); Scott v. Sandford, 60 U. S. 19 How. 449 (15: 718); Calder v. Bull, 3 U. S. 3 Dall. 388 (1: 648).

The charter of the Church Corporation received the implied sanction of Congress, and thereafter Congress could not impair the contract nor dissolve the Corporation, either by disapproving the Act of incorporation, or by repealing the charter.

Clinton v. Englebrecht, 80 U. S. 13 Wall. 446 (20: 662); First Nat. Bank v. Yankton County, 101 U. S. 129 (25: 1046); People v. O'Brien, 2 L. R. A. 255, 111 N. Y. 1; Greenwood v. Union Freight R. Co. 105 U. S. 19 (26: 964).

The Act of March 3, 1887, was an act of judicial legislation, and for this reason beyond the power of the legislative department of the general government; it is therefore unconstitutional.

Hurtado v. California, 110 U. S. 535, 536 (28: 238); United States v. Klein, 80 U. S. 13 Wall. 146 (20:525); Davis v. Gray, 83 U. S. 16 Wall. 223 (21: 454); Citizens Sav. & L. Asso. v.

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Topeka, 87 U. S. 20 Wall. 662 (22: 461).

There is no such thing known to the jurisprudence of the United States as escheat. There is no rule of law by which personal property of any kind can escheat to the United States.

Coke, Litt. 13 a, 92 b; Cox v. Parker, 22 Beav. 168; Lewin, Trusts, 822; Burgess v. Wheate, 1 Eden, 177; Taylor v. Haygarth, 14 Sim. 16; Beale v. Symonds, 16 Beav. 406; Tudor, Lead. Cas. on Real Prop. 784, and notes; McDowell v. Bergin, 12 Ir. C. L. R. 391; 2 Hawkins, Pleas of the Crown, chap. 49, § 9; Wheaton v. Peters, 33 U. S. 8 Pet. 591 (8: 1055).

The personal property is not subject to escheat to the United States on account of any failure or illegality of the trusts to which it was dedicated at its acquisition and for which it has been used by the Corporation.

Com. v. Martin, 5 Munf. 117; Jackson v. Phillips, 96 Mass. 555.

Real estate in which the Church has vested rights cannot be disturbed.

Hussey v. Smith, 99 U. S. 22 (25: 314); Stringfellow v. Cain, 99 U. S. 616 (25: 423); Cofield v. McClellan, 83 U. S. 16 Wall. 332 (21: 340); Lamb v. Davenport, 85 U. S. 18 Wall. 313 (21:761); Tucker v. St. Clement's Church, 3 Sandf. 251; Bogardus v. Trinity Church, 4 Sandf. Ch. 758, 7 N. Y. Ch. L. ed. 1280; Harvard College v. Boston, 104 Mass. 488.<***pg. 480**>

Under the averments of the bill and the proofs taken there was no authority to appoint a receiver.

Fosdick v. Schall, 99 U. S. 253 (25:342); High, Receivers, chap. 1, § 7, p. 9; 2 Daniell, Ch. Pl. and Pr. chap. 28, § 1; 2 Story, Eq. Jur. chap. 21, §§ 831-835; 3 Pom. Eq. Jur. 357-365, §§ 1330-1336.

Messrs. A. H. Garland, Atty-Gen., and *G. A. Jenks*, Solicitor-Gen., for appellee:

The legislative power of Congress over the Territories is general.

First Nat. Bank v. Yankton County, 101 U. S. 133 (25: 1047); American & O. Ins. Cos. v. 356 Bales of Cotton, 26 U. S. 1 Pet. 542 (7:255); Benner v. Porter, 50 U. S. 9 How. 242 (13: 122).

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The power to repeal was reserved in the Organic Law.

Morawetz, Priv. Corp. §§ 8, 1106; 9 U. S. Stat. 454; Rev. Stat. § 1850; Miner's Bank v. United States, 1 Greene, 553; Miner's Bank v. Iowa, 53 U. S. 12 How. 1 (13:867); Holyoke W. P. Co. v. Lyman, 82 U. S. 15 Wall. 522 (21: 140); Miller v. New York, 82 U. S. 15 Wall. 478 (21: 98); Tomlinson v. Jessup, 82 U. S. 15 Wall. 455 (21:205); Chesapeake & O. R. Co. v. Miller, 114 U. S. 176 (29: 121); Shields v. Ohio, 95 U. S. 319 (24: 357); Spring Valley Water-Works v. Schottler, 110 U.S. 347 (28:173); Sinking Fund Cases, 99 U. S. 700-748 (25:496-512).

The alleged charter is void, because the power exercised in the passage of the Act of incorporation is among the powers forbidden by the Constitution.

Sedgwick, Stat. and Const. Law, 261.

If the charter was a valid one, it was a public corporation, and therefore not within the principle announced by this court in Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 668-680 (4: 667-669).

Even if the Corporation was a legal private one, its charter was rightfully dissolved, for misuse and abuse of its corporate powers.

Act of July 1, 1862; Terrett v. Taylor, 13 U. S. 9 Cranch, 43 (3: 650); Erie & N. E. R. Co. v. Casey, 26 Pa. 303; Miner's Bank v. United States, 1 Greene, 562, 563.

But whether the alleged Corporation was legal or de facto, public or private, or had or had not abused its powers, it was rightfully dissolved under the police powers of the government.

Tiedeman, Lim. of Pol. Power, 2, 576, 580; Mugler v. Kansas, 123 U. S. 623, 657-663 (31: 205, 209-211); Stone v. Mississippi, 101 U. S. 814 (25: 1079); Metropolitan Excise Board v. Barrie, 34 N. Y. 657; Boyd v. Alabama, 94 U. S. 645 (24: 302); Reynolds v. United States, 98 U. S. 145 (25: 244).

Congress had the power to declare' the dissolution of the Corporation directly, without a judicial determination of the facts.

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Miner's Bank v. United States, 1 Greene, 562.

The right is the same whether the Corporation existed as a corporation dejure or de facto.

2 Morawetz, Priv. Corp. § 745; Smith v. Sheeley, 79 U. S. 12 Wall. 361 (20: 431); Cowell v. Colorado Springs Co. 100 U. S. 61 (25: 550); Gill v. Fauntleroy, 8 B. Mon. (Ky.) 185; Miller v. Shackleford, 4 Dana (Ky.) 287, 288; Fitch v. Baldwin, 17 Johns. 161; Close v. Glenwood Cemetery, 107 U. S. 477 (27: 412).

If the Corporation was a public one, as we contend it was, on its dissolution its property became vested in the sovereign.

2 Waterman, Corp. 873; Meriwether v. Garrett, 102 U. S. 501, 511 (26: 200, 204); 2 Kent, Com. § 307; Vincennes Bank v. State, 1 Blackf. (Ind.) 282, 283; 2 Kyd, Corp. 516; Fox v. Horah, 1 Ired. Eq. 358, 361; White v. Campbell, 5 Humph. (Tenn.) 38; Mumma v. Potomac Co. 33 U. S. 8 Pet. 281 (8: 945); Curran v. Arkansas, 56 U. S. 15 How. 304 (14: 705); Bacon v. Robertson, 59 U. S. 18 How. 488 (15: 504); 2 Waterman, Corp. 934, 935.

OPINION

Mr. Justice Bradley delivered the opinion of the court:

This case originated under and in pursuance of the Act of Congress, entitled "An Act to Amend an Act Entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes, Approved March 22, 1882,'"

[136 US 7]

which Act was passed February 19, 1887, and became a law by not being returned by the President. This Act, besides making additional provision with regard to the prosecution of polygamy in the Territories, and other matters concerning the Territory of Utah, provided, in the 13th, 17th and 26th sections, as follows:

"Sec. 13. That it shall be the duty of the Attorney-General of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section three of the Act of Congress approved the first day of July,

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eighteen hundred and sixty-two, entitled 'An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah,' or in violation of section eighteen hundred and ninety of the Revised Statutes of the United States; and all such property so forfeited and escheated to the United States shall be disposed of by the Secretary of the Interior, and the proceeds thereof applied to the use and benefit of the common schools in the Territory in which such property may be: Provided, That no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial ground, shall be forfeited."

"Sec. 17. That the Acts of the Legislative Assembly of the Territory of Utah incorporating, continuing or providing for the Corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called "General Assembly of the State of Deseret" incorporating the Church of Jesus Christ of Latter-Day Saints, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said Corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved; that it shall be the duty of the Attorney-General of the United States to cause such proceedings to be taken in the Supreme Court of the Territory of Utah as shall be proper to execute the foregoing provisions of this section <***pg. 481**> and to wind up the affairs of said Corporation conformably to law; and in such proceedings

[136 US 8]

the court shall have power, and it shall be its duty, to make such decree or decrees as shall be proper to effectuate the transfer of the title to real property now held and used by said Corporation for places of worship, and parsonages connected therewith, and burial grounds, and of the description mentioned in the proviso to section thirteen of this Act and in section twenty-six of this Act, to the respective trustees mentioned in section twenty-six of this Act; and for the purposes of this section said court shall have all the powers of a court of equity."

"Sec. 26. That all religious societies, sects and congregations shall have the right to have and to hold, through trustees appointed by any court exercising probate powers in a Territory, only on the nomination of the authorities of such society, sect or congregation, so much real property for the erection or use of houses of worship, and for such parsonages and burial grounds as shall be necessary for the convenience and use of the several congregations of such religious society, sect or congregation." (24 U. S. Stat. 637, 638 and 641.)

In pursuance of the 13th section above recited, proceedings were instituted by information on behalf of the United States in the Third District Court of the Territory of Utah, for the purpose of having declared forfeited and escheated to the government the real estate of the Corporation

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called the Church of Jesus Christ of Latter-Day Saints, except a certain block in Salt Lake City used exclusively for public worship. On the 30th of September, 1887, the bill in the present case was filed in the Supreme Court of the Territory, under the 17th section of the Act, for the appointment of a receiver to collect the debts due to said Corporation and the rents, issues and profits of its real estate; and to take possession of and manage the same for the time being; and for a decree of dissolution and annulment of the charter of said Corporation, and other incidental relief. The bill is in the name of the United States, and was brought by direction of the Attorney-General, against both "the Late Corporation known and claiming to exist as the Church of Jesus Christ of Latter-Day Saints," and John Taylor, "late trustee in trust," and eleven other persons, late assistant trustees of said Corporation.

The bill states the creation of the Corporation by an ordinance of the assembly of the socalled "State of Deseret," which was afterwards organized as the Territory of Utah. The ordinance was approved the 8th day of February, 1851, and was afterwards, in October, 1851, and January 19, 1855, re-enacted by the Legislature of the Territory of Utah. A copy of the original ordinance is appended to the bill, and is as follows:

"An Ordinance Incorporating the Church of Jesus Christ of Latter-Day Saints.

(Approved February 8, 1851.)

"Sec. 1. Be it ordained by the General Assembly of the State of Deseret: That all that portion of the inhabitants of said State which now are or hereafter may become residents therein, and which are known and distinguished as 'The Church of Jesus Christ of Latter-Day Saints,' are hereby incorporated, constituted, made and declared a body corporate, with perpetual succession, under the original name and style of 'The Church of Jesus Christ of Latter-Day Saints,' as now organized, with full power and authority to sue and be sued, defend and be defended, in all courts of law or equity in this State; to establish, order and regulate worship, and hold and occupy real and personal estate, and have and use a seal, which they may alter at pleasure.

"Sec. 2. And be it further ordained: That said body or Church, as a religious society, may, at a general or special conference, elect one 'trustee in trust,' and not to exceed twelve assistant trustees, to receive, hold, buy, sell, manage, use and control the real and personal property of said Church, which said property shall be free from taxation, which trustee and assistant trustees, when elected or appointed, shall give bonds, with approved security, in whatever sum the conference may deem sufficient, for the faithful performance of their several duties, which said bonds, when approved, shall be filed in the general church recorder's office, at the seat of general church business, when said bonds are approved by said conference, and said trustee and assistant trustees shall continue in office during the pleasure of said Church; and there shall also be made by the clerk of the conference of said Church a certificate of such election or appointment of said trustee

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and assistant trustees, which shall be recorded in the general church recorder's office, at the seat of general church business, and when said bonds are filed and said certificates recorded said trustee or assistant trustees may receive property, real or personal, by gift, donation, bequest or in any manner not incompatible with the principles

[136 US 4]

of righteousness or the rules of justice, inasmuch as the same shall be used, managed or disposed of for the benefit, improvement, erection of houses for public worship and instruction, and the well being of said Church.

"Sec. 3. And be it further ordained: That, as said Church holds the constitutional and original right, in common with all civil and religious communities, 'to worship God according to the dictates of conscience,' to reverence communion agreeably to the principles of truth and to solemnize marriage compatible with the revelations of Jesus Christ for the security and full enjoyment of all blessings and privileges embodied in the religion of Jesus Christ free to all, it is also declared that such Church does and shall possess and enjoy continually the power and authority, in and of itself, to originate, make, pass and establish rules, regulations, ordinances, laws, customs and criterions for the good order, safety, government, conveniences, comfort and control of said Church and for the punishment or forgiveness of all offenses relative to fellowship according to church covenants; that the pursuit of bliss and the enjoyment of life in every capacity of public association, domestic happiness, temporal expansion or spiritual increase upon the earth may not legally be questioned: Provided, however, That each and every act or practice so established or adopted for law or custom shall<***pg. 482**> relate to solemnities, sacraments, ceremonies, consecrations, endowments, tithing, marriages, fellowship or the religious duties of man to his Maker, inasmuch as the doctrines, principles, practices or performances support virtue and increase morality, and are not inconsistent with or repugnant to the Constitution of the United States or of this State and are founded in the revelations of the Lord.

"Sec. 4. And be it further ordained: That said Church shall keep at every full organized branch or stake a registry of marriages, births and deaths free for the inspection of all members and for their benefit.

"Sec. 5. And be it further ordained: That the presidency of said Church shall fill all vacancies of the assistant trustees necessary to be filled until superseded by the conference of said Church.

"Sec. 6. Be it further ordained: That no assistant trustee or trustees shall transact business in relation to buying, selling or otherwise disposing of church property without the consent or approval of the trustee in trust of said Church."

(Compiled Laws of Utah, 1876, p. 232.)

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The bill states, further, that John Taylor (since deceased), on and prior to the 19th of February, 1887, was trustee in trust, and the other individual defendants were the assistant trustees of the Corporation;

That the Corporation acquired and held large amounts of real and personal property in the Territory of Utah after the 1st of July, 1862,-the value of the real estate being about $2,000,000, and the value of the personal property about $1,000,000, as held and owned on the 19th of February, 1887, and which the defendants still claim to hold in violation of the laws of the United States;

That the Corporation was a corporation for religious or charitable purposes;

That by the third section of the Act of July 1st, 1862, re-enacted as section 1890 of the Revised Statutes of the United States, any corporation for religious or charitable purposes was forbidden to acquire or hold real estate in any Territory, during the existence of the territorial government, of greater value than $5,000; and that more than this value of the property of the said Corporation has been acquired since July 1st, 1862, which is not held or occupied as a building or ground appurtenant thereto for the purpose of the worship of God, or a parsonage connected therewith, or burial ground.

That therefore the real estate referred to, owned by the Corporation, is subject to escheat to the United States;

That on the 19th day of February, 1887 (by the said Act of that date), the charter and Act of incorporation of the Corporation aforesaid was disapproved, repealed and annulled by Congress, and the Corporation was dissolved, and all the real estate owned and occupied by it, in excess of $50,000, not held or occupied for the worship of God, etc., was subject to escheat to the United States;

That the said Corporation, and the successor of said John Taylor as trustee in trust (whose name is unknown, and who is asked to be made a party to the bill), and the other defendants, assistant trustees, wrongfully and in violation

[136 US 10]

of the laws of the United States still claim to hold and exercise the powers which were held and exercised by said Corporation, and are unlawfully possessing and using the said real estate, and claim the right to sell, use and dispose of the same;

That since the 19th of February, 1887, there is no person lawfully authorized to take charge of, manage, preserve or control said property, and the same is subject to irreparable and

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irremediable loss and destruction.

The bill prays that a receiver may be appointed to receive and hold all the property of the Corporation; that a decree be made declaring the dissolution and annullment of the charter of the said Corporation; that the court appoint a commissioner to select and set apart out of the real estate which was held and occupied by the Corporation such real estate as may be lawfully held for religious uses; make necessary orders and take proceedings to wind up the affairs of the said Corporation; and grant such other and further relief as the nature of the case may require.

On the 7th of November, 1887, the court appointed a receiver, and on the 8th William B. Preston, Robert T. Burton and John R. Winder, claiming to have an interest in a portion of the property, were made parties to the suit. Demurrers to the bill having been overruled, the defendants severally answered.

The Corporation of the Church of Jesus Christ of Latter-Day Saints, in its answer, after stating the granting of its charter by an ordinance of the assembly of Deseret, and its confirmation by the Legislature of the Territory of Utah, contended that this charter was a contract between the government and the persons accepting the grant, and those becoming corporators; and that the Corporation had the power to hold real and personal property, without limit as to value and amount, for the purposes of its charter; that it never acquired property in its own name, but under the powers granted by the ordinance it did acquire and hold certain real and personal property, in the name of a trustee, in trust for said Corporation; that the Act of July 1, 1862, expressly provided that existing vested rights in real estate should not

[136 US 11]

be impaired; that the defendant has ever been and still is a corporation or association for religious or charitable purposes; that so much of the Act of Congress which took effect March 3, 1887 (referring to the Act passed February 19, 1887), as attempts to dissolve the defendant Corporation, or to interfere with or limit its right to hold property, or to escheat the same, or to wind up its affairs, is unconstitutional and void; that the United States has not the power to do this by reason of said contract; that when the Act of March 3, 1887, took effect the said Corporation, through its trustees, held and owned only three parcels of real estate, namely: 1st, all of block 87, in plat A, Salt Lake City survey; 2d, part of block 88, plat A, of said survey, containing 2 157/160 acres; 3d, part of lot 6, in block 75, plat A, of same survey; that the defendant Corporation had acquired the first two of these lots before July 1, 1862; that the first piece, namely, all of block 87, in plat A, was, ever since 1850, and still is, used and occupied exclusively for purposes of the worship <***pg. 483**> of God; that the third of said tracts, which is the only tract of land owned by the Corporation on the 3d of March, 1887, which had been acquired subsequent to July 1, 1862, was always, and still is, used as a parsonage, necessary for

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the convenience and use of the Corporation; that said Corporation had owned other lands, but had sold and disposed of the same prior to March 3, 1887; that after the said Act took effect, and in pursuance of section 26 of said Act, it applied to the proper Probate Court for Salt Lake County for the appointment of three trustees to take the title to the three tracts above described; and on May 19, 1887, said court appointed William B. Preston, Robert T. Burton and John R. Winder such trustees; and afterwards said three tracts, except a part of lot 6, in block 75 (the third lot), were conveyed to said trustees; that the remaining part of said lot 6 is now held by Theodore McKean, in trust for the defendant Corporation, having been omitted from the conveyance to the said trustees by mistake; that said Corporation does not now hold any real estate whatsoever; that no successor to said John Taylor has ever been appointed trustee in trust by said Corporation.

[136 US 12]

The answer denies that the charter and Act of incorporation of the defendant was annulled by the Act of 19th February, 1887; and alleges that, even if said Act is valid and binding, it did not go into effect until March 3d, 1887.

The answer further avers that prior to February 28th, 1887, the defendant Corporation from time to time acquired and held personal property for charitable and religious purposes, and, on that day, held certain personal property donated to it by the members of the Church and friends thereof solely for use and distribution for charitable and religious purposes, such property being always held by its trustee in trust; and that on the 28th of February, 1887, John Taylor, who then held all the personal property, moneys, stocks and bonds belonging to said Corporation, as trustee in trust, with its consent and approval, donated, transferred and conveyed the same (after reserving sufficient to pay its then existing indebtedness) to certain ecclesiastical corporations created and existing under and by virtue of the laws of the Territory of Utah, to be devoted by them solely to charitable and religious uses and purposes; and delivered the same to them. Wherefore the defendant avers that when the Act of March 3d, 1887, went into effect, it did not own or hold any personal property, except mere furniture, fixtures and implements pertaining to its houses of worship and parsonage.

The defendants, Wilford, Woodruff and others, charged as assistant trustees in the bill (except Moses Thatcher), deny that they ever were such assistant trustees, though they admit that they acted as counsellors and advisors of John Taylor, the trustee in trust. Thatcher admits that he was once elected assistant trustee, but alleges that his term of office expired 9th of October, 1875, and he has never acted since. They all deny that they have ever owned or held any property belonging to the Corporation. They all, however, adopt its answer.

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Preston, Burton and Winder, who were made defendants after the suit was commenced, admit the conveyance to them of the three tracts described in the answer of the Corporation, which they declare that they hold in trust for the Church of Jesus Christ of Latter-Day

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Saints. They also adopt the answer of the Corporation.

Replications were duly filed.

One Augus M. Cannon intervened as a claimant of certain coal lands supposed to be affected by the proceedings, and was admitted as a defendant, and filed an answer explaining his claim.

Several petitions were filed in the cause, with leave of the court, for the purpose of asking that certain pieces of property therein described might be set apart for the use of the Church. They were:

1. A petition by Francis Armstrong, Jesse W. Fox, Jr., and Theodore McKean, who alleged that they held divers pieces of real estate (described in their petition) in trust for the use and benefit of the Church of Jesus Christ of Latter-Day Saints. To this petition the plaintiff filed a general replication.

2. William B. Preston, Robert T. Burton and John R. Winder filed a petition stating that they were duly appointed by the Probate Court of Salt Lake County trustees to hold title to real estate belonging to the said Church, and as such trustees hold the legal title to certain pieces of land described, to wit: 1st, a piece known as the "Guardo House" and lot, held for the use and benefit of the president of the said Church as a parsonage, where he has made his home and residence since 1878; 2dly, another piece adjoining the above known as the "Historian's Office" and grounds, the building on which contains the church library and records, and the legal title to which is in Theodore McKean. The petitioners pray that the said premises be set apart to said Church as a parsonage, and that the title be confirmed to the trustees.

To this petition the United States filed an answer, denying that said Preston, Burton and Winder hold the title to said "Guardo House" and land, or that they hold the same in trust for the said Church of Jesus Christ of Latter-Day Saints; that the pretended conveyance under which they claim to hold the same is void and of no effect, for want of power in the grantors; that said property has never been a personage; and that the property designated as the "Historian's Office" and grounds has never

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been part of any parsonage. On the contrary, the plaintiff avers that McKean holds the legal title to said property in trust for the Late Corporation of the Church of Jesus Christ of Latter-Day Saints as a part of its general property, and that the "Historian's Office" and grounds are entirely separate and apart from the "Guardo House" and lot, and in no manner connected therewith.

The said Preston, Burton and Winder filed another petition, stating their appointment as trustees as aforesaid, and that they, as such, hold another property described in the petition (being a portion of block 88, plat A, of Salt Lake City survey) for the use and benefit of the said Church, which was taken possession of by the agents of said Church when Salt Lake City was first laid out in 1848, and ever since used and occupied by said Church; and that prior to July 1, 1862, valuable buildings and improvements <*pg. 484> had been built thereon, still owned and possessed by the said Church; and they pray that said property be set apart to said Church, and the title and possession confirmed to the petitioners as trustees.

The United States filed an answer to this petition, denying the truth of the same.

A similar petition was filed by the same parties, Preston, Burton and Winder, claiming to hold the legal title to block 87, plat A, Salt Lake City survey, known as the "Temple Block," containing three large buildings constructed by said Church exclusively for religious purposes, and been in its possession since 1848. They pray that this property may be set apart to the Church, and the title and possession confirmed to the petitioners as trustees. The plaintiff, by answer, alleges that the conveyance under which the petitioners claim this property is also void for want of power in the grantors to convey.

Another petition was filed by George Romney, Henry Dinwoody, James Watson and John Clark, in behalf of themselves and of other members of the Church of Jesus Christ of Latter-Day Saints, alleging that said members are more than one hundred thousand in number, and so numerous that they cannot, without inconvenience and oppressive delays, be brought before the court; that they all have an interest

[136 US 15]

in common in the subject of the petition and the questions involved in this suit. That on the 7th of November, 1887, this court made an order appointing Frank H. Dyer receiver of the Church aforesaid; that he, as such receiver, has seized, taken possession of and now holds, subject to the order of the court, the following described real and personal property, to wit:

1. All of block 87, plat A, Salt Lake City survey, known as "Temple Block."

2. The east half of lot 6, block 75, plat A aforesaid, known as the "Guardo House" and grounds.

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3. Part of lot 6, block 75, plat A aforesaid, known as the "Historian's Office" and grounds.

4. A portion of block 88, plat A aforesaid, known as part of the "Tithing Office" property.

5. The south half of lots 6 and 7, in block 88, plat A aforesaid, known as part of the "Tithing Office" property.

6. Various tracts of land, designated, containing a large number of acres, situated in township 1 south, range 1 west, United States survey of Utah, and known as the "Church Farm;" excepting, however, a tract sold to the Denver and Rio Grande Western Railway Company by deed dated February 7, 1882.

7. The undivided half of the south half of the southeast quarter, the southeast quarter of the southwest quarter, and lot 4, section 18, and the north half of the northeast quarter of section 19, township 3 north, range 6 east, in Summit County, Utah Territory, known as coal lands.

Also a number of items of personal property, including 800 shares of stock in the Salt Lake Gas Company; 4,732 shares in the Deseret Telegraph Company; several promissory notes of different parties and amounts; 30,158 sheep; $237,666.15 of money.

That since said personal property came into possession of the receiver he has collected rents on the real estate, and dividends on the gas stock; and that all the property in the possession of the receiver is of the aggregate value of about $750,000, exclusive of Temple Block.

That all of said property, at the time so taken, and long prior thereto, was the property of the Church of Jesus Christ of Latter-Day Saints,

[136 US 16]

and that the possession of the receiver is wrongful and without authority or right.

That said Church is a voluntary religious society, organized in the Territory of Utah for religious and charitable purposes.

That said petitioners and others, for whose benefit they file the petition, are members of said Church, residing in said Territory; that the Church became possessed of all of said property in accordance with its established rules and customs, by the voluntary contributions, donations and dedications of its members, to be held, managed and applied to the use and benefit of the Church, for the maintenance of its religion and charities by trustees appointed by said members semi-annually at the general conference.

That John Taylor, the late trustee so appointed, died on the 25th day of July, 1887, and no

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trustee has been appointed since.

That the property in the hands of the trustees is claimed adversely to the Church, the petitioners, and the members thereof, and wholly without right, by the United States, and is wrongfully withheld by the receiver from the purposes to which it was dedicated and granted; that the petitioners and the members on whose behalf this petition is filed are equitably the owners of said property, and beneficially interested therein, and, to prevent a diversion thereof from the religious and charitable purposes of the said Church to which they donated and granted said property, the petitioners pray that in case said Corporation of the Church of Jesus Christ of Latter-Day Saints should, upon the final hearing, be held and decreed to be dissolved, an order may be made decreeing:

1. That the said property belongs to the individual members of said Church, and that they are authorized to appoint a trustee or trustees to hold, manage and apply such property to the purposes for which it was originally given.

2. That said receiver deliver the possession thereof to such trustee or trustees as may be named and appointed at a general conference of the members of the Church, in accordance with its rules and customs.

To this petition the United States filed an answer, denying the claim of the petitioners;

[136 US 17]

admitting the appointment of the receiver, and his taking possession of the property referred to; denying that at the time of such taking it was the property of the said Church of Jesus Christ of Latter-Day Saints, whether the petition is intended to apply to the Late Corporation or to the voluntary religious sect which has existed under that name since the dissolution of the said Corporation. It admits that prior to the said dissolution said property belonged to the Corporation of the Church of Jesus Christ of Latter-Day Saints, but alleges that since then it has had no legal owner except the United States; denies that the said Church of Jesus Christ of Latter-Day Saints has been for years past a voluntary religious society or association, <***pg. 485**> but alleges that up to the 19th day of February, 1887, said Church existed as a corporation for religious purposes; and since that time, when it became dissolved, there has existed a voluntary and unincorporated religious society or sect, known by the name of the Church of Jesus Christ of Latter-Day Saints. It denies that the Corporation to which all of said property belonged acquired the same by voluntary contributions, donations and dedications of the members thereof, and alleges that all of said realty was acquired by said Church largely by purchase and other means as afterwards set out. It denies that the receiver is wrongfully withholding and diverting the property from the purposes to which it was donated, and denies that the petitioners or any other persons

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are equitably or otherwise the owners of said property or any portion thereof, or beneficially interested therein. The answer then sets forth the incorporation of the Church of Jesus Christ of Latter-Day Saints as a body for religious and charitable purposes, by the Act of the Territorial Assembly of Utah in 1855, and avers that it continued to be a Corporation up to the 19th of February, 1887; it then sets forth the Act of Congress of July 1, 1862, before referred to, and the Act of March 3, 1887, disapproving and annulling the Act of incorporation aforesaid, and dissolving the said Corporation, and alleges that it did become dissolved. The answer then states the previous

[136 US 18]

proceedings in the suit, and the appointment of a receiver, and alleges that the United States had filed in the District Court for the Third District of Utah a proceeding in the nature of an information against all the real property set out in the petition, for the purpose of having the same declared forfeited and escheated to the United States, which proceedings are now pending. And the answer alleges that said real property has become forfeited to the United States, as shown in said information. The answer further states that the said Corporation was a religious Corporation for the purpose of promulgating, spreading and upholding the principles, practices, teachings and tenets of said Church, and that it never had any other corporate objects, purposes or authority; never had any capital stock or stockholders, nor persons pecuniarily interested in its property, nor any natural persons authorized to take or hold any personal property or estate for said Corporation, except such trustees as were provided for by its Statute of incorporation, and the power of appointing such trustees ceased and became extinct at the date of its dissolution; that up to that date said personal property had been used for and devoted exclusively to the promulgation, spread and maintenance of the principles, practices, teachings and tenets of said Church of Jesus Christ of Latter-Day Saints, amongst which the doctrine and practice of polygamy, or plurality of wives, was a fundamental and essential doctrine, tenet and principle of said Church, and the same was opposed and contrary to good morals, public policy and the laws of the United States, and that the use made of said personal property was largely for purposes of upholding and maintaining said doctrine and practice of polygamy, and violating the laws of the United States; that since said dissolution there has existed a voluntary and unincorporated sect known as the Church of Jesus Christ of Latter-Day Saints, comprising the great body of individuals named in said intervention, who formerly formed the membership of said Corporation; and the organization and general government of said voluntary religious sect, and its principles, doctrines, teachings and tenets, include the practice of polygamy, and have been substantially the same as those of the said Corporation;

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and the said voluntary religious sect has upheld and maintained the unlawful and immoral

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practice and doctrine of polygamy as strongly as the said Corporation did; and any uses, purposes or trusts to which said personal property could be devoted in accordance with the original purposes and trusts to which it was dedicated would be opposed to good morals, public policy, and contrary to the laws of the United States. The answer further states that there are no natural persons or corporations entitled to any portion of the personal property thereof, as successors in interest to said Corporation; that all definite and legal trusts to which said property was dedicated have totally failed and become extinct; and that by operation of law the said property has become escheated to the United States; and the allegation that said property was acquired by voluntary contributions, donations and dedications of the members of the Corporation is not true, but the Late Corporation carried on business to a wide extent; and whilst a large amount of personalty in the shape of tithes was paid to the Church each year by the members thereof, yet the personalty now in the hands of the said receiver is in no part made up of voluntary contributions or tithes paid in as aforesaid, but is all of it property which was acquired by said Corporation in the course of trade, by purchase, and for a valuable consideration; and it held the same in its corporate capacity, absolutely and entirely independent of any individual members of said Corporation, and upon the trust and for the uses and purposes set out, which, as has been alleged, were in whole or in part immoral and illegal.

A replication was filed to this answer.

The last-mentioned petition of intervention and the answer thereto are in the nature of an original bill and answer, but serve to present the whole controversy in all its aspects, and for that purpose may properly be retained, as no objection is made thereto.

The Act of Congress of July 1, 1862, referred to in the pleadings, is entitled "An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States, and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah," and provides as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding <***pg. 486**> five hundred dollars, and by imprisonment for a term not exceeding five years: Provided, nevertheless, That this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been

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annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract.

"Sec. 2. And be it further enacted: That the following ordinance of the provisional government of the 'State of Deseret,' so-called, namely, 'An Ordinance Incorporating the Church of Jesus Christ of Latter-Day Saints,' passed February eight, in the year eighteen hundred and fifty-one, and adopted, reenacted and made valid by the governor and Legislative Assembly of the Territory of Utah by an Act passed January nineteen, in the year eighteen hundred and fifty-five, entitled 'An Act in Relation to the Compilation and Revision of the Laws and Resolutions in Force in Utah Territory, Their Publication and Distribution,' and all other Acts and parts of Acts heretofore passed by the said Legislative Assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be, and the same hereby are, disapproved and annulled: Provided, That this Act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship, God according to the dictates of conscience,' but only to annul all Acts and laws which establish, maintain, protect or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations or other contrivances.

"Sec. 3. And be it further enacted: That it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the territorial government, of a greater value than fifty thousand dollars; and all real estate acquired or held by any such corporation or association contrary to the provisions of this Act shall be forfeited and escheat to the United States: Provided, That existing vested rights in real estate shall not be impaired by the provisions of this section." (12 U. S. Stat. 501.)

Another Act, known as the Edmunds Act, was approved March 22, 1882, entitled "An Act to Amend Section 5352 of the Revised Statutes of the United States in Reference to Bigamy, and for Other Purposes." This Act contained stringent provisions against the crime of polygamy, and has frequently come under the consideration of this court, and need not be recited in detail.

The cause came on to be heard upon the pleadings, proofs and an agreed statement of the facts. The court made a finding of facts, upon which a final decree was rendered. The facts found are as follows:

"1st. That the Church of Jesus Christ of

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Latter-Day Saints was, from the 19th day of January, 1855, to the 3d day of March, A. D.

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1887, a corporation for religious and charitable purposes, duly organized and existing under and in pursuance of an ordinance enacted by the Legislature of the Territory of Utah, and approved by the governor thereof on the said 19th day of January, A. D. 1855, a copy of which ordinance is made a part of the complaint herein.

"2. That on the 19th day of February, A. D. 1887, the Congress of the United States passed an Act entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United States in Reference to Bigamy, and for Other Purposes,' approved March 22d, 1882, which purported to disapprove, repeal and annul the said charter and Act of incorporation of the Corporation of the Church of Jesus Christ of Latter-Day Saints aforesaid and passed as aforesaid.

"3. That immediately before the passage of said Act of Congress of February 19, 1887, the said John Taylor was, and for a long time prior thereto had been, the qualified and acting trustee in trust of said Corporation of the Church of Jesus Christ of Latter-Day Saints; that after the passage of said Act of Congress of February 19th, 1887, the said John Taylor claimed to hold and continued to exercise the powers conferred upon said Church of Jesus Christ of Latter-Day Saints by said Act of incorporation until his death, which occurred on the 25th day of July, A. D. 1887.

"4. That at the date of the passage of said Act of Congress of February 19th, A. D. 1887, and for a long time prior thereto, there were no assistant trustees of said Corporation, none having been elected, appointed or qualified since the year 1887; that said Wilford Woodruff, Lorenzo Snow, Erastus Snow, Franklin D. Richards, Brigham Young, Moses Thatcher, Francis M. Lyman, John Henry Smith, George Teasdale, Heber J. Grant and John W. Taylor were, at the commencement of this suit, counsellors and advisers of the said John Taylor, and continued to his death counselling and advising him respecting the management, use and control of the property hereinafter described.

"5. That since the passage of said Act of

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Congress of Feb. 19, 1887, the Church of Jesus Christ of Latter-Day Saints has existed as a voluntary religious sect, of which the said Wilford Woodruff is the acting president, and it has had duly designated and appointed by the Probate Court of Salt Lake County, in said Territory, in pursuance of the Act of Congress aforesaid, the following-named trustees, William B. Preston, Robert T. Burton and John R. Winder, to take the title to and hold such real estate as shall be allowed said religious sect by law for the erection and use of houses of worship, parsonages and burial grounds.

"6. That at the time of the passage of said Act of Congress of February 19, 1887, there were no outstanding debts of or claims against<***pg. 487**> said Corporation, so far as appears to the

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court from the evidence herein.

"7. That at the time of the passage of the Act of Congress of February 19, 1887, the said Corporation owned, held and possessed the following real estate in said Territory, to wit."

The items of real estate were then enumerated, being substantially the same as those specified in the petition of George Romney and others, before referred to, with the addition of the valuation of each item or piece of property,-the Temple Block being valued at $500,000; the Guardo House and grounds at $50,000; the Historian's Office and grounds at $20,000; the Tithing Office and grounds, one portion at $50,000, and the other at $25,000; the Church Farm at $110,000: and the seventh item, known as "coal lands in Summit County," valued at $30,000.

The court further found as follows:

"The legal title to the real estate, first above described, known as the Temple Block, at the time said Act of Feb. 19, 1887, went into effect, was in John Taylor, as trustee in trust for the said Corporation, which said trustee in trust subsequently and on the 30th day of June, 1887, attempted to convey the same to William B. Preston, Robert T. Burton and John R. Winder, as trustees, by a certain instrument in writing in the words and figures following, to wit:

"'This indenture, made on this thirtieth day

[136 US 22]

of June, in the year of our Lord one thousand eight hundred and eighty-seven, by and between John Taylor, trustee in trust of that certain body of religious worshipers called and known as the "Church of Jesus Christ of Latter-Day Saints," party of the first part, and William B. Preston, presiding bishop of said Church, and his two counsellors, Robert T. Burton and John R. Winder, parties of the second part.'"

The indenture then recites the appointment of the parties of the second part, by Probate Court of Salt Lake County, as trustees to hold certain real property of the said Church located in Salt Lake City, under and in pursuance of the 26th section of the Act of March 3, 1887, and purports on the part of Taylor, the party of the first part, in consideration of one dollar, to convey to the parties of the second part and their successors duly appointed, upon trust, the property referred to, being all of block 87 in plat A, Salt Lake City survey, for the use, benefit and behoof of that body of religious worshipers known and called the "Church of Jesus Christ of Latter-Day Saints," and for such use as said Church or its authorities should dictate and appoint, with provision for the devolution of the property in case of failure of the trustees.

The court further found as follows:

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"The said Temple Block was taken possession of by the agents of the said Church of Jesus Christ of Latter-Day Saints, then existing as a voluntary unincorporated religious sect, when Salt Lake City was first laid out and surveyed, in 1848, and since said date has been in possession of said Church as a voluntary religious sect until it became incorporated as aforesaid, and then as a corporation; that at the time the same was taken possession of as aforesaid it was a part of the public domain and continued to be such until said land was entered by the mayor of said city, along with other lands, on the 21st day of November, 1871, under the Town-Site Act of Congress entitled 'An Act for the Relief of Cities and Towns upon the Public Lands,' approved March 2, 1867; that on the 1st day of June, 1872, the same was conveyed by the mayor of said Salt Lake City to the trustee in trust of said Corporation, in whom the title remained until the Act of Congress of February 19, 1887, took effect.

"The facts in regard to the possession and

[136 US 23]

acquisition of the balance of said real estate above described are as follows: The second property, above described and known as the 'Guardo House' and grounds, was owned by Brigham Young individually at the time of his death, in 1877, and was thereafter transferred and conveyed by his executors to John Taylor, as trustee in trust for the Corporation of the Church of Jesus Christ of Latter-Day Saints, for a valuable consideration, pursuant to the powers in them vested by the will of the said Brigham Young; that subsequently, on the 24th day of April, 1878, the said John Taylor, as trustee in trust, transferred and conveyed the same to Theodore McKean on a secret trust for said Corporation, who held the same upon said trust until the 2d day of July, 1887, when he attempted to convey the same to William B. Preston and Robert T. Burton and John R. Winder, trustees, by a certain instrument in writing, of which the following is a copy."

The deed is then set out in the findings, and is altogether similar to that executed by John Taylor to Preston, Burton and Winder, before recited.

The court further found as follows:

"That said Guardo House and grounds were used and occupied by said John Taylor, president of said Church, from 1878 up to the time of his death, as a residence.

"The third property above described, known as the 'Historian's Office' and grounds, was taken possession of by Albert T. Rockwood in 1848, and was a part of the public domain, and continued to be such up to the 21st day of November, 1871, when the town site of Salt Lake City was entered as aforesaid; that on the 3d day of October, 1855, the Church of Jesus Christ of Latter-Day Saints, through its trustee in trust, Brigham Young, purchased the said Rockwood's

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claim to said premises and at its own cost and expense erected thereon the building which has ever since been known as the 'Historian's Office and Residence;' that said building was large enough to accommodate the historian's family and furnish an office for the church historian; that from the year 1848 until the time of his death in 1875, George A. Smith was the historian of said Church and lived in

[136 US 24]

said building with his family and had the custody of the books, papers and records of said Church relating to its history or public acts of its officers or members; that the same have always been kept in said building from the time of its construction until the present time, at the cost of said Church, and that such office is and has been necessary for the use of said historian <*pg. 488> in the discharge of his duties; that in 1872 the said George A. Smith obtained the title to said premises from the mayor of Salt Lake City under the Town-Site Act, and that after his death the same was conveyed to his wife and one of his granddaughters, who afterwards transferred and conveyed the same to Theodore McKean for a valuable consideration; that the said Theodore McKean has ever since that date held and now holds the same on a secret trust for the use and benefit of said Corporation; that said grounds are immediately west of and adjoining the Guardo House grounds.

"The fourth property above described, known as part of the 'Tithing Office' and grounds, was taken possession of by the agents of the Church of Jesus Christ of Latter-Day Saints when Salt Lake City was first laid out and surveyed, in 1848, and ever since that time has been used and occupied by said Church as a voluntary sect until it became incorporated as aforesaid, and then as a corporation, receiving and disbursing tithing and voluntary contributions of property, and that prior to July 1, 1862, buildings and other improvements of considerable value had been built thereon by said Church; that at the time said property was taken possession of as aforesaid it was a part of the public domain and continued to be such until the 21st day of November, 1871, when said land was entered as aforesaid along with other lands under said Town-Site Act by the mayor of Salt Lake City; that Brigham Young, who was then president and trustee in trust of said Corporation, claimed said land under said Town-Site Law and it was conveyed to him by Daniel H. Wells, mayor of Salt Lake City; that in November, 1873, Brigham Young transferred and conveyed said property to George A. Smith, as the trustee in trust of the Corporation of the Church of Jesus Christ of Latter-Day Saints, and his successor in office; that on

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the death of said George A. Smith the legal title in said premises vested in Brigham Young as such successor, and the executors of said Brigham Young transferred and conveyed said property to John Taylor, as the trustee in trust of said Corporation, who, in April, 1878, transferred and

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conveyed the same to Edward Hunter upon a secret trust for the use and benefit of said Corporation; that said Edward Hunter afterwards, to wit, on the 24th day of April, 1878, transferred and conveyed the same to Robert T. Burton on a secret trust for said Corporation, and on the 2d day of July, 1887, the said Robert T. Burton attempted to convey the same to William B. Preston, John R. Winder and himself, as trustees, by a certain instrument in writing in the words and figures following, to wit."

The deed here copied is similar to the previous deeds before recited.

The court further found as follows:

"The fifth piece of property above described, known as a part of the 'Tithing Office' and grounds, was possessed, acquired and owned as follows:

"In the year 1848, Newell K. Whitney, then presiding bishop of said Church of Jesus Christ of Latter-Day Saints, took possession of lot five, block eighty-eight, plat A, Salt Lake City survey, and in the same year Horace K. Whitney took possession of lot six, in said block; that some time in the year 1856 the Church of Jesus Christ of Latter-Day Saints, by its agents, took possession of the south half of said lots and placed thereon yards and corrals, and have continued to occupy the same with said yards and corrals down to this period; that in the year 1870 the mayor of Salt Lake City entered the town site of Salt Lake City, in trust for the inhabitants and occupants thereof, under the Law of 1867; that the foregoing lots are a portion of said entry.

"The said Church of Jesus Christ of Latter-Day Saints, by its trustee, Brigham Young, filed an application in the proper court for a title to the south half of said lots, and the heirs of Newell K. Whitney also filed an application in the proper court for the south half of lot five, and Horace K. Whitney filed an application in the same court for the south half of lot six.

[136 US 26]

The court awarded the title to the said premises to Brigham Young, as trustee as aforesaid.

"That afterwards, in the year 1872, Brigham Young, trustee, obtained a deed from the heirs of Newell K. Whitney to said south half of lot five, and in consideration thereof paid them seven thousand dollars, and at the same time the said Brigham Young, trustee, obtained a deed from Horace K. Whitney of lot six and paid him therefor the sum of two thousand dollars.

"At the time the Act of Congress of February 19, 1887, took effect the legal title thereto was held by Robert T. Burton on a secret trust for the use and benefit of said Corporation; that on the 2d day of July, 1887, the said Robert T. Burton attempted to convey the same to William B. Preston, John R. Winder and himself, as trustees, by that certain instrument of writing hereinbefore last set out.

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"The remainder of said real estate held, owned and possessed by said Corporation as aforesaid was acquired by it after the first day of July, 1862, by purchase, but the legal title thereof was at all times held by persons in trust for said Corporation upon secret trusts, and not by the Corporation itself.

"That at the time the said Act of Congress of February 19, 1887, took effect said Corporation owned, held and possessed the following-described personal property, to wit."

The items of personal property are then set out, being the same as in the petition of Romney and others before referred to.

The court further found as follows:

"That the said Corporation of the Church of Jesus Christ of Latter-Day Saints was in its nature and by its Statute of incorporation a religious and charitable corporation for the purpose of promulgating, spreading and upholding the principles, practices, teachings and tenets of said Church, and for the purpose of dispensing charity, subject and according to said principles, practices, teachings and tenets, and that from the time of the organization of said Corporation up to the time of the passage of said Act of February the 19th, 1887, it never had any other corporate objects, purposes and authority, never had any capital stock or stockholders,

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nor have there ever been any natural persons who were authorized under its Act and charter of incorporation to take or hold any <***pg. 489**> personal property or estate of said Corporation, except the trustees provided for by said Statute of incorporation.

"That the said personal property herein before set out had been accumulated by said Late Corporation prior to the passage of said Act of February the 19th, 1887, and that such accumulation extended over a period of twenty years or more; that prior to and at the time of the passage of said Act the said personal property had been used for and devoted to the promulgation, spread and maintenance of the doctrines, teachings, tenets and practices of the said Church of Jesus Christ of Latter-Day Saints, and the doctrine of polygamy or plurality of wives was one of the said doctrines, teachings, tenets and practices of the said Late Church Corporation, but only a portion of the members of said Corporation, not exceeding twenty per cent of the marriageable members, male and female, were engaged in the actual practice of polygamy; that since the passage of the said Act of Congress of February 19, 1887, the said voluntary religious sect known as the Church of Jesus Christ of Latter-Day Saints has comprised the great body of individuals who formerly composed the membership of said Corporation, and the organization, general government, doctrines and tenets of said voluntary religious sect have

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been and now are substantially the same as those of the Late Corporation of the Church of Jesus Christ of Latter-Day Saints.

That certain of the officers of said religious sect, regularly ordained, and certain public preachers and teachers of said religious sect, who are in good standing, and who are preachers and teachers concerning the doctrines and tenets of said sect, have, since the passage of said Act of Congress of February the 19th, 1887, promulgated, taught, spread and upheld the same doctrines, tenets and practices, including the doctrine of polygamy, as were formerly promulgated, taught and upheld by the said Late Corporation, and the said teachings of the said officers, preachers and teachers have not been repudiated or dissented from by said voluntary religious sect, nor have their teachings

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and preachings or their actions created any division or schism in said voluntary religious sect.

"That any dedication or setting aside of any of the personal property hereinbefore set out as having belonged to the Late Corporation, to the uses and purposes of or in trust for the members of the Late Corporation of the Church of Jesus Christ of Latter-Day Saints, or any of them, would practically and in effect be a dedication and setting aside of said personal property to the uses and for the purposes of and in trust for the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints.

"That at the commencement of this suit all of said personal property was in the possession of the said William B. Preston, who held it in trust and for the benefit of said Corporation.

"That all of the above-described property, real and personal, is now in the possession of Frank H. Dyer, receiver of this court.

"That of the above-described real estate the following tract, including the buildings thereon, situated in said County of Salt Lake, Territory of Utah, and being all of block eighty-seven (87), in plat A, Salt Lake City survey, at the time of the passage of the Act of Congress of February 19, 1887, was used exclusively for the worship of God according to the doctrines and tenets of the Church of Jesus Christ of Latter-Day Saints.

"That several proceedings have been instituted by and with the consent and advice of this court, by information, on behalf of the United States of America, in the Third District Court of said Territory of Utah, for the purpose of having declared and adjudged forfeited and escheated to the government of the United States all of the above-described real estate, excepting the said block eighty-seven of plat A, Salt Lake City survey, last above mentioned, by virtue of the said Act of Congress entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United

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States in Reference to Bigamy, and for Other Purposes,' which proceedings are now pending in said court and undetermined."

Upon this finding of facts the court adjudged and decreed as follows, to wit:

"That on the 3d day of March, 1887, the

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Corporation of the Church of Jesus Christ of Latter-Day Saints became and the same was dissolved, and that since said date it has had no legal corporate existence.

"2d. It is furthermore adjudged and decreed that the following alleged deeds, hereinbefore set out, were executed without authority, and that no estate in the property set out in said deeds passed by the same or any of them, to wit:

"The deed, dated June 30th, 1887, from John Taylor, trustee in trust, to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for the property described as the 'Temple Block.' The deed, dated July 2d, 1887, from Theodore McKean and his wife to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for property known as the 'Guardo House' and grounds. The deed, dated July 2d, 1887, from Robert T. Burton and wife to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for the property described as the 'Tithing House' and grounds.

"And it is therefore ordered and decreed that said alleged deeds and each of them be, and the same are hereby, annulled, canceled and set aside.

"3d. It is further adjudged and decreed that the following described real estate, to wit, all of block eighty-seven, in plat A, Salt Lake City survey, in the City and County of Salt Lake, Territory of Utah, be, and the same is hereby, set apart to the voluntary religious worshipers and unincorporated sect and body known as the Church of Jesus Christ of Latter-Day Saints, and that the said William B. Preston, Robert T. Burton and John R. Winder, trustees appointed by the Probate Court of Salt Lake County, as hereinbefore set out, do hold, manage and control said property so set aside for the benefit of said voluntary religious worshipers and unincorporated sect and body, and for the erection and use by them of houses of worship, and for their use and convenience in the lawful exercise of worship according to **<*pg. 490>** the tenets of said sect and body; and it is ordered that Frank H. Dyer, receiver of this court, heretofore appointed, do surrender and deliver possession and control of all of the

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property so set aside to the trustees, William B. Preston, Robert T. Burton and John R.

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Winder, aforesaid.

"4th. It is furthermore adjudged and decreed that, except as to the Temple Block aforesaid, the petitions of William B. Preston, Robert T. Burton and John R. Winder, trustees, filed the 6th day of October, 1888, in this court for the setting aside of certain real estate for the uses and purposes of the religious sect known as the Church of Jesus Christ of Latter-Day Saints be, and the same are hereby, denied; and it is adjudged and decreed that the balance of the real estate over and above said Temple Block, which has been hereinbefore found as belonging to said Late Corporation, has not nor has any of it ever been used as buildings or grounds appurtenant thereunto for the purposes of the worship of God or of parsonages connected therewith, or for burial grounds, by the said Late Corporation of the Church of Jesus Christ of Latter-Day Saints, nor is the said real estate, except as set aside, or any part thereof, necessary for such purposes for the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints.

"5th. It is furthermore adjudged and decreed that all of the real estate set out in the findings of fact hereinbefore was the property of and belonged to the Late Corporation of the Church of Jesus Christ of Latter-Day Saints, and the same was held in trust for said Corporation; and, furthermore, that the legal titles of and estates in said real estate and every part and parcel thereof were acquired by said Late Corporation and its trustees subsequently to July 1, 1862, and that prior to said date neither the said Corporation nor its trustees had any legal title or estate in and to said real estate or any part thereof.

"6th. And it is further adjudged and decreed that the petition of intervention by George Romney, Henry Dinwoodey, James Watson and John Clark, on behalf of themselves and other members of the Late Corporation of the Church of Jesus Christ of Latter-Day Saints, filed this day in this court, which said petition alleges the claim on behalf of the petitioners and those for whom it is filed in and to the real and personal property formerly belonging

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to said Late Corporation and now in the hands of the receiver of this court, be, and the same is hereby, denied; and it is adjudged and decreed that neither said intervenors nor those in whose behalf they filed said petition have any legal claim or title in and to said property or any part thereof.

"7th. And the court does further adjudge and decree that the Late Corporation of the Church of Jesus Christ of Latter-Day Saints having become by law dissolved as aforesaid, there did not exist at its dissolution and do not now exist any trusts or purposes within the objects and purposes for which said personal property was originally acquired, as hereinbefore set out, whether said acquisition was by purchase or donation, to or for which said personalty or any part thereof could

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be used or to which it could be dedicated, that were and are not in whole or in part opposed to public policy, good morals, and contrary to the laws of the United States; and, furthermore, that there do not exist any natural persons or any body, association or corporation who are legally entitled to any portion of said personalty as successors in interest to said Church of Jesus Christ of Latter-Day Saints, nor have there been nor are there now any trusts of a definite and legal character upon which this court, sitting as a court of chancery, can administer the personal property hereinbefore set out; and it is furthermore adjudged that all and entire the personal property set out in this decree as having belonged to said Late Corporation of the Church of Jesus Christ of Latter-Day Saints has by reason of the dissolution of said Corporation as aforesaid, on account of the failure or illegality of the trusts to which it was dedicated at its acquisition and for which it had been used by said Late Corporation and by operation of law, become escheated to and the property of the United States of America, subject to the costs and expenses of this proceeding and of the receivership by this court instituted and ordered.

"8th. It is furthermore ordered and adjudged that there is not now and has not been since the 3d day of March, 1887, any person legally authorized to take charge of, manage, preserve and control the personal and real property hereinbefore set out, except the receiver heretofore appointed by this court; and it is therefore

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ordered that the receivership hereinbefore established by this court is continued in full force and effect, and that the said receiver shall continue to exercise all and entire the powers and authority conferred upon him by the decree appointing him; and it is further ordered that he do continue in his possession and keeping all of the property, real and personal, hereinbefore set out, except such realty as has been set apart by the provision of this decree for the benefit of the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints, and that he do safely keep, manage and control the same in accordance with the provisions of the order of this court appointing him receiver, pending the determination of the proceeding upon information hereinbefore referred to and until the further order of this court; and final action upon and determination concerning the accounts, proceedings and transactions of said receiver, and all matters connected with or incidental thereto, are ordered to be reserved for the future consideration and decision of this court."

From this decree the defendants appealed, and the intervenors, Romney and others, also took a separate appeal, and the case is now here for adjudication.

The principal questions raised are, first, as to the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints; and, secondly, as to the power of Congress and the courts to seize the property of said Corporation and to hold the same for the purposes

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mentioned in the decree.

The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power <*pg. 491> given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the Territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those Territories. Having rightfully acquired said Territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had

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any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident. Chief Justice Marshall, in the case of the American & O. Ins. Cos. v. 356 Bales of Cotton, 26 U. S. 1 Pet. 511, 542 [7: 242, 255], well said: "Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." And Mr. Justice Nelson, delivering the opinion of the court in Benner v. Porter, 50 U. S. 9 How. 235, 242 [13: 119, 122], speaking of the territorial governments established by Congress, says: "They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the federal and state authorities." Chief Justice Waite, in the case of First Nat. Bank v. Yankton County, 101 U. S. 129, 133 [25: 1046, 1047], said: "In the Organic Act of Dakota there was not an express reservation of power in Congress to amend the Acts of the Territorial Legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away.

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Congress may not only abrogate laws of the Territorial Legislatures, but it may itself legislate directly for the local government. It may make a void Act of the Territorial Legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." In a still more recent case, and one relating to the legislation of Congress over the Territory of Utah itself, Murphy v. Ramsey, 114 U. S. 15, 44 [29: 47, 57], Mr. Justice Matthews said: "The counsel for the appellants in

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argument seem to question the constitutional power of Congress to pass the Act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.

The supreme power of Congress over the Territories, and over the Acts of the Territorial Legislatures established therein, is generally expressly reserved in the Organic Acts establishing governments in said Territories. This is true of the Territory of Utah. In the 6th section of the Act establishing a territorial government in Utah, approved September 9, 1850, it is declared "that the legislative powers of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act. . . . All the laws passed by the Legislative Assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect." (9 Stat. 454.)

This brings us directly to the question of the power of Congress to revoke the charter of the Church of Jesus Christ of Latter-Day Saints. That Corporation, when the Territory of Utah was organized, was a corporation de facto, existing under an ordinance of the so-called "State of Deseret," approved February 8, 1851. This

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ordinance had no validity except in the voluntary acquiescence of the people of Utah then residing there. Deseret, or Utah, had ceased to belong to the Mexican government by the Treaty of Guadalupe Hidalgo, and in 1851 it belonged to the United States, and no government without authority from the United States, express or implied, had any legal right to exist there. The assembly of Deseret had no power to make any valid law. Congress had already passed the law for organizing the Territory of Utah into a government, and no other government was lawful within the bounds of that Territory. But after the organization of <***pg. 492**> the territorial government of Utah under the Act of Congress, the Legislative Assembly of the Territory passed the following resolution: "Resolved by the Legislative Assembly of the Territory of Utah, That the laws heretofore passed by the provisional government of the State of Deseret, and which do not conflict with the Organic Act of said Territory, be and the same are hereby declared to be legal and in full force and virtue, and shall so remain until superseded by the action of the Legislative Assembly of the Territory of Utah." This resolution was approved October 4, 1851. The confirmation was repeated on the 19th of January, 1855, by the Act of the Legislative Assembly entitled "An Act in Relation to the Compilation and Revision of the Laws and Resolutions in Force in Utah Territory, Their Publication and Distribution." From the time of these confirmatory Acts, therefore, the said Corporation had a legal existence under its charter. But it is too plain for argument that this charter, or enactment, was subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose. Like any other Act of the Territorial Legislature, it was subject to this condition. Not only so, but the power of Congress could be exercised in modifying or limiting the powers and privileges granted by such charter; for if it could repeal, it could modify; the greater includes the less. Hence there can be no question that the Act of July 1, 1862, already recited, was a valid exercise of congressional power. Whatever may be the effect or true construction of this Act, we have no doubt of its validity. As

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far as it went it was effective. If it did not absolutely repeal the charter of the Corporation, it certainly took away all right or power which may have been claimed under it to establish, protect or foster the practice of polygamy, under whatever disguise it might be carried on; and it also limited the amount of property which might be acquired by the Church of Jesus Christ of Latter-Day Saints; not interfering, however, with vested rights in real estate existing at that time. If the Act of July 1, 1862, had but a partial effect, Congress had still the power to make the abrogation of its charter absolute and complete. This was done by the Act of 1887. By the 17th section of that Act it is expressly declared that "the Acts of the Legislative Assembly of the Territory of Utah, incorporating, continuing or providing for the Corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called 'General Assembly

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of the State of Deseret,' incorporating the said Church, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said Corporation, so far as it may now have or pretend to have any legal existence, is hereby dissolved." This absolute annulment of the laws which gave the said Corporation a legal existence has dissipated all doubt on the subject, and the said Corporation has ceased to have any existence as a civil body, whether for the purpose of holding property or of doing any other corporate act. It was not necessary to resort to the condition imposed by the Act of 1862, limiting the amount of real estate which any corporation or association for religious or charitable purposes was authorized to acquire or hold; although it is apparent from the findings of the court that this condition was violated by the Corporation before the passage of the Act of 1887. Congress, for good and sufficient reasons of its own, independent of that limitation, and of any violation of it, had a full and perfect right to repeal its charter and abrogate its corporate existence, which of course depended upon its charter.

The next question is, whether Congress or the court had the power to cause the property of the said Corporation to be seized and taken possession of, as was done in this case.

When a business corporation, instituted for

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the purpose of gain or private interest, is dissolved, the modern doctrine is, that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these, the ancient and established rule prevails, namely: that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority; whilst its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject, as we shall hereafter see, to the charitable use. To this rule the Corporation in question was undoubtedly subject. But the grantor of all, or the principal part, of the real estate of the Church of Jesus Christ of Latter-Day Saints was really the United States, from whom the property was derived by the Church, or its trustees, through the operation of the Town-Site Act. Besides, as we have seen, the Act of 1862 expressly declared that all real estate acquired or held by any of the corporations or associations therein mentioned (of which the Church of Jesus Christ of Latter-Day Saints was one), contrary to the provisions of that Act, should be forfeited and escheat to the United States, with a saving of existing vested rights. The Act prohibited the acquiring or holding of real estate of greater value than $50,000 in a Territory, and no legal title had vested in any of the lands in Salt Lake City at that time, as the Town Site Act was not passed until March 2, 1867. There can be no doubt, therefore, that the real estate of the Corporation in question could not, on its dissolution, revert or pass to any other person or persons than the United States.

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If it be urged that the real estate did not stand in the name of the Corporation, but in the name of a trustee or trustees, and therefore was not subject to the rules relating to corporate property, the substance of the difficulty still remains. It cannot be contended that the prohibition of the Act of 1862 could have been so easily evaded as by putting the property of the Corporation into the hands of trustees. The equitable or trust estate was vested in the Corporation. The trustee held it for no other

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purpose; and the Corporation being dissolved, that purpose was at an end. The trust estate devolved to the United States in the same manner as the legal estate would have done had it been in the hands of the Corporation. The trustee became trustee for the United States instead **<*pg. 493>** of trustee for the Corporation. We do not now speak of the religious and charitable uses for which the Corporation, through its trustee, held and managed the property. That aspect of the subject is one which places the power of the government and of the court over the property on a distinct ground.

Where a charitable corporation is dissolved, and no private donor or founder appears to be entitled to its real estate (its personal property not being subject to such reclamation), the government, or sovereign authority, as the chief and common guardian of the state, either through its judicial tribunals or otherwise, necessarily has the disposition of the funds of such corporation, to be exercised, however, with due regard to the objects and purposes of the charitable uses to which the property was originally devoted, so far as they are lawful and not repugnant to public policy. This is the general principle, which will be more fully discussed further on. In this direction, it will be pertinent, in the mean time, to examine into the character of the Corporation of the Church of Jesus Christ of Latter-Day Saints, and the objects which, by its constitution and principles, it promoted and had in view.

It is distinctly stated in the pleadings and findings of fact that the property of the said Corporation was held for the purpose of religious and charitable uses. But it is also stated in the findings of fact, and is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy-a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress-notwithstanding

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all the efforts made to suppress this barbarous practice-the sect or community composing the

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Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World. The question therefore is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore to the detriment of the true interests of civil society.

It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from the Territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their history, in Missouri and Illinois, they have no excuse for their persistent defiance of law under the government of the United States.

One pretense for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our

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own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practised. Davis v. Beason, 133 U. S. 333 [33: 637]. And since polygamy has been forbidden by the laws of the United States, under severe penalties, and since the Church of Jesus Christ of Latter-Day Saints has persistently used, and claimed the right to use, and the unincorporated community still claims the same right to use, the funds with which the Late Corporation was endowed for the purpose of promoting and propagating the unlawful

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practice as an integral part of their religious usages, the question arises, whether the government, finding these funds without legal ownership, has or has not the right, through its courts, and in due course of administration, to cause them to be seized and devoted to objects of undoubted charity and usefulness-such for example as the maintenance of schools-for the benefit of the community whose leaders are now misusing them in the unlawful manner above described; setting apart, however, for the exclusive possession and use of the Church, sufficient and suitable portions of the property for the purposes of public worship, parsonage buildings and burying grounds, as provided in the Law.

The property in question has been dedicated to public and charitable uses. It matters not whether it is the product of private contributions, made during the course of half a century, or of taxes imposed upon the people, or of gains arising from fortunate operations in business, or appreciation in values, the charitable uses for which it is held are stamped upon it by charter, by ordinance, by regulation and by usage, in such an indelible manner that there can be no mistake as to their character, purpose or object.

The law respecting property held for charitable uses of course depends upon the legislation

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and jurisprudence of the country in which the property is situated and the uses are carried <***pg. 494**> out; and when the positive law affords no specific provision for actual cases that arise, the subject must necessarily be governed by those principles of reason and public policy which prevail in all civilized and enlightened communities.

The principles of the law of charities are not confined to a particular people or nation, but prevail in all civilized countries pervaded by the spirit of Christianity. They are found embedded in the civil law of Rome, in the laws of European nations, and especially in the laws of that nation from which our institutions are derived. A leading and prominent principle prevailing in them all is, that property devoted to a charitable and worthy object, promotive of the public good, shall be applied to the purposes of its dedication, and protected from spoliation and from diversion to other objects. Though devoted to a particular use, it is considered as given to the public, and is therefore taken under the guardianship of the laws. If it cannot be applied to the particular use for which it was intended, either because the objects to be subserved have failed, or because they have become unlawful and repugnant to the public policy of the State, it will be applied to some object of kindred character so as to fulfill in substance, if not in manner and form, the purpose of its consecration.

The manner in which the due administration and application of charitable estates is secured, depends upon the judicial institutions and machinery of the particular government to which they

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are subject. In England, the court of chancery is the ordinary tribunal to which this class of cases is delegated, and there are comparatively few which it is not competent to administer. Where there is a failure of trustees, it can appoint new ones; and where a modification of uses is necessary in order to avoid a violation of the laws, it has power to make the change. There are some cases, however, which are beyond its jurisdiction; as where, by statute, a gift to certain uses is declared void and the property goes to the King; and in some other cases of failure of the charity. In such cases the King, as parens patrioe, under

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his sign manual, disposes of the fund to such uses, analogous to those intended, as seems to him expedient and wise.

These general principles are laid down in all the principal treatises on the subject, and are the result of numerous cases and authorities. See Duke on Char. Uses, chap. X., secs. 4, 5, 6; Boyle on Charities, chap. III., IV.; 2 Story's Eq. Jur. §§ 1167 et seq.; Atty-Gen. v. Guise, 2 Vern. 266; Moggridge v. Thackwell, 7 Ves. Jr. 36, 77; De Themmines v. De Bonneval, 5 Russ. 289; Pawlet v. Clark, 13 U. S. 9 Cranch, 292, 335, 336 [3: 735, 750, 751]; Beatty v. Kurtz, 27 U. S. 2 Pet. 566 [7: 521]; Vidal v. Girard, 43 U. S. 2 How. 127 [11: 205]; Jackson v. Phillips, 14 Allen, 539; Ould v. Washington Hospital, 95 U. S. 303 [24: 450]; Jones v. Habersham, 107 U. S. 174 [27: 301].

The individual cases cited are but indicia of the general principle underlying them. As such they are authoritative, though often in themselves of minor importance. Bearing this in mind, it is interesting to see how far back the principle is recognized. In the Pandects of Justinian we find cases to the same effect as those referred to, antedating the adoption of Christianity as the religion of the Empire. Amongst others, in the Digest, lib. 33, tit. 2, law 16, a case is reported which occurred in the early part of the third century, in which a legacy was left to a city in order that from the yearly revenues games might be celebrated for the purpose of preserving the memory of the deceased. It was not lawful at that time to celebrate these games. The question was, what was to be done with this legacy. Modestinus, a celebrated jurist of authority, replied: "Since the testator wished games to be celebrated which were not permitted, it would be unjust that the amount which he had destined to that end should go back to the heirs. Therefore let the heirs and magnates of the city be cited, and let an examination be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner." Here is the doctrine of charitable uses in a nutshell.

Domat, the French jurist, writing on the civil law, after explaining the nature of pious and charitable uses, and the favor with which they are treated in the law, says: "If a pious

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legacy were destined to some use which could not have its effect, as if a testator had left a legacy for building a church for a parish, or an apartment in an hospital, and it happened, either that before his death the said church or the said apartment had been built out of some other fund, or that it was noways necessary or useful, the legacy would not for all that remain without any use; but it would be laid out on other works of piety for that parish, or for that hospital, according to the directions that should be given in this matter by the persons to whom this function should belong." And for this principle he cites a passage from the Pandects. Domat's Civil Law, book 4, title 2, section 6, par. 6.

By the Spanish law, whatever was given to the service of God became incapable of private ownership, being held by the clergy as guardians or trustees; and any part not required for their own support, and the repairs, books and furniture of the church, was devoted to works of piety, such as feeding and clothing the poor, supporting orphans, marrying poor virgins, redeeming captives and the like. Partida III. tit. 28, ll. 12-15. When property was given for a particular object, as a church, a hospital, a convent or a community, etc., and the object failed, the property did not revert to the donor or his heirs, but devolved to the crown, the church or other convent or community, unless the donation contained an express condition in writing to the contrary. Tapia, Febrero Novisimo, lib. 2, tit. 4, chap. 22, §§ 24-26.

A case came before Lord Bacon in 1619 (Bloomfield v. Stowe Market, Duke, Char. Uses, 624), in which lands had been given before the Reformation to be sold, and the proceeds applied, one half to the making of a highway from the town in which the lands were, one

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fourth to the repair of a church in that town, and the other fourth to the priest of the church to say prayers for the souls of the donor and others. The lord keeper decreed the establishment of the uses for making the highway and repairing the church, and directed the remaining **<*pg. 495>** fourth (which could not, by reason of the change in religion, be applied as directed by the donor) to be divided between the poor of the same town and the poor of the town where the donor inhabited.

In the case of Baliol College, which came before the court of chancery from time to time for over a century and a half, the same principle was asserted, of directing a charity fund to a different, though analogous, use, where the use originally declared had become contrary to the policy of the law. There, a testator in 1679, when episcopacy was established by law in Scotland, gave lands in trust to apply the income to the education of Scotchmen at Oxford, with a view to their taking Episcopal orders and settling in Scotland. Presbyterianism being re-established in

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Scotland after the Revolution of 1688, the object of the bequest could not be carried into effect; and the court of chancery, by successive decrees of Lord Somers and Lord Hardwicke, directed the income of the estate to be applied to the education of a certain number of Scotch students at Baliol College, without the condition of taking orders; and, in consideration of this privilege, directed the surplus of the income to be applied to the college library. See the cases of Atty-Gen. v. Guise, 2 Vern. 166; Atty-Gen. v. Baliol College, 9 Mod. 407; Atty-Gen. v. Glasgow College, 2 Coll. Ch. 665, 1 H. L. Cas. 800. And see abridgment of the above cases in 14 Allen, 581, 582.

Lord Chief Justice Wilmot, in his opinion in Atty-Gen. v. Lady Downing, Wilmot, Notes, 1, 32, looking at the case on the supposition that the trusts of the will (which were for instituting a college) were illegal and void, or of such a nature as not fit to be carried into execution, said: "This court has long made a distinction between superstitious uses and mistaken charitable uses. By mistaken, I

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mean such as are repugnant to that sound constitutional policy, which controls the interests, wills and wishes of individuals, when they clash with the interest and safety of the whole community. Property destined to superstitious uses is given by law of Parliament to the King, to dispose of as he pleases; and it falls properly under the cognizance of a court of revenue. But where property is given to mistaken charitable uses, this court distinguishes between the charity and the use; and seeing the charitable bequest in the intention of the testator, they execute the intention, varying the use, as the King, who is the curator of all charities, and the constitutional trustee for the performance of them, pleases to direct and appoint." "This doctrine is now so fully settled that it cannot be departed from." Ibid.

In Moggridge v. Thackwell, 7 Ves. Jr. 36, 69, Lord Eldon said: "I have no doubt that cases much older than I shall cite may be found; all of which appear to prove that if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity, but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." In Hill on Trustees, page 450, after citing this observation of Lord Eldon, it is added: "In accordance with these principles, it has frequently been decided that where a testator has sufficiently expressed his intention to dispose of his estate in trust for charitable purposes generally, the general purpose will be enforced by the court to the exclusion of any claim of the next of kin to take under a resulting trust, although the particular purpose or mode of application is not declared at all by the testator. And the same rule prevails although the testator refers to some past or intended declaration of the particular charity, which declaration is not made or cannot be discovered; and although the selection of the objects of the charity and the mode of application are left to the discretion of the trustees. And it is

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immaterial that the trustees refuse the gift, or die, or that their appointment is revoked in the lifetime of the

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testator, causing a lapse of the bequest at law. The same construction will also be adopted where a particular charitable purpose is declared by the testator which does not exhaust the whole value of the estate; or where the particular trust cannot be carried into effect, either for its uncertainty or its illegality, or for want of proper objects. And in all these cases the general intention of the testator in favor of charity will be effectuated by the court through a cy-prhs application of the fund." The same propositions are laid down by Mr. Justice Story in his Equity Jurisprudence, sections 1167 et seq. But it is unnecessary to make further quotations.

These authorities are cited (and many more might be adduced) for the purpose of showing that where property has been devoted to a public or charitable use which cannot be carried out on account of some illegality in, or failure of, the object, it does not, according to the general law of charities, revert to the donor or his heirs, or other representatives, but is applied under the direction of the courts, or of the supreme power in the state, to other charitable objects, lawful in their character, but corresponding, as near as may be, to the original intention of the donor.

They also show that the authority thus exercised arises, in part, from the ordinary power of the court of chancery over trusts, and, in part, from the right of the government, or sovereign, as parens patrioe, to supervise the acts of public and charitable institutions in the interest of those to be benefited by their establishment; and, if their funds become bona vacantia, or left without lawful charge, or appropriated to illegal purposes, to cause them to be applied in such lawful manner as justice and equity may require.

If it should be conceded that a case like the present transcends the ordinary jurisdiction of the court of chancery, and requires for its determination the interposition of the parens patrioe of the state, it may then be contended that, in this country, there is no royal person to act as parens patrioe, and to give direction for the application of charities which cannot be administered by the court. It is true we have no such chief magistrate. But here the Legislature is the parens patrioe, and, unless

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restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England. Chief Justice <*pg. 496> Marshall, in the Dartmouth College Case, said: "By the Revolution, the duties, as well as the powers, of government devolved on the people. . . . It is admitted that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department." (17 U. S. 4 Wheat. 651 [4: 662].) And

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Mr. Justice Baldwin, in Magill v. Brown, Bright. 347, 373, a case arising on Sarah Zane's will, referring to this declaration of Chief Justice Marshall, said: "The Revolution devolved on the State all the transcendent power of Parliament, and the prerogative of the crown, and gave their Acts the same force and effect."

Chancellor Kent says: "In this country, the Legislature or government of the State, as parens patrioe, has the right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is intrusted with it." 4 Kent, Com. 508, note.

In Fontain v. Ravenel, 58 U. S. 17 How. 369, 384 [15: 80, 86], Mr. Justice McLean, delivering the opinion of this court in a charity case, said: "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the parens patrioe."

This prerogative of parens patrioe is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the Legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves. Lord Chancellor Somers, in Cary v. Bertie, 2 Vern. 333, 342, said: "It is true infants are always favored. In this court there

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are several things which belong to the King as pater patrioe, and fall under the care and direction of this court, as charities, infants, idiots, lunatics, etc."

The Supreme Judicial Court of Massachusetts well said, in Sohier v. Massachusetts Gen. Hospital, 3 Cush. 483, 497: "It is deemed indispensable that there should be a power in the Legislature to authorize a sale of the estates of infants, idiots, insane persons and persons not known, or not in being, who cannot act for themselves. The best interest of these persons, and justice to other persons, often require that such sales should be made. It would be attended with incalculable mischiefs, injuries and losses, if estates, in which persons are interested who have not capacity to act for themselves, or who cannot be certainly ascertained, or are not in being, could, under no circumstances, be sold, and perfect titles effected. But, in such cases, the Legislature, as parens patrioe, can disentangle and unfetter the estates, by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured."

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These remarks in reference to infants, insane persons and persons not known, or not in being, apply to the beneficiaries of charities, who are often incapable of vindicating their rights, and justly look for protection to the sovereign authority, acting as parens patrioe. They show that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic; but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right, and is as clearly capable of being exercised in cases of charities as in any other cases whatever.

It is true that in some of the States of the Union in which charities are not favored, gifts to unlawful or impracticable objects, and even gifts affected by merely technical difficulties, are held to be void, and the property is allowed to revert to the donor or his heirs or other representatives. But this is in cases where such heirs or representatives are at hand to claim the property and are ascertainable. It is difficult to see how this could be done in a case where it would be impossible for any such claim to be made,-as where the property has been the resulting accumulation of ten thousand petty contributions, extending through a

[136 US 59]

long period of time, as is the case with all ecclesiastical and community funds. In such a case the only course that could be satisfactorily pursued would be that pointed out by the general law of charities, namely, for the government, or the court of chancery, to assume the control of the fund, and devote it to lawful objects of charity most nearly corresponding to those to which it was originally destined. It could not be returned to the donors, nor distributed among the beneficiaries.

The impracticability of pursuing a different course, however, is not the true ground of this rule of charity law. The true ground is that the property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it is devoted, but within those limits consecrated to the public use, and become part of the public resources for promoting the happiness and well-being of the people of the State. Hence, when such property ceases to have any other owner, by the failure of the trustees, by forfeiture for illegal application or for any other cause, the ownership naturally and necessarily falls upon the sovereign power of the State; and thereupon the court of chancery, in the exercise of its ordinary jurisdiction, will appoint a new trustee to take the place of the trustees that have failed or that have been set aside, and will give directions for the further management and administration of the property; or if the case is beyond the ordinary jurisdiction of the court, the Legislature may interpose and make such disposition of the matter as will accord with the purposes of justice and right. The funds are not lost to the public as charity funds; they are not lost to the general objects or class of objects which they were intended to subserve or effect. The State, by its Legislature,

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or its judiciary, interposes to preserve them from dissipation and destruction, and to set them up on a new basis of usefulness, directed to lawful ends, coincident, as far as may be, with the objects originally proposed.<***pg. 497**>

The interposition of the Legislature in such cases is exemplified by the case of Pawlet v. Clark, 13 U. S. 9 Cranch, 292 [3: 735], which arose in Vermont. In the town charter,

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granted in the name of the King in 1761, one entire share of the town lands was granted "as a glebe for the Church of England as by law established." There was no Episcopal church in the town until 1802. In that year one was organized, and its parson laid claim to the glebe lands, and leased them to Clark and others. Of course, this church had never been connected with the "Church of England as by law established;" and the institution of such a church in 1802 was impossible, and would have been contrary to the public policy of the State. Meantime, in 1794, the Legislature had granted the glebe lands to the several towns to be rented by the selectmen for the sole use and support of public worship, without restriction as to sect or denomination. This law was subsequently repealed, and in 1805 the Legislature passed another Act, granting the glebe lands to the respective towns, to apply the rents to the use of schools therein. This was held to be a valid disposition. Mr. Justice Story, in the course of an elaborate opinion, amongst other things showed that a mere voluntary society of Episcopalians within a town could no more entitle themselves, on account of their religious tenets, to the glebe than any other society worshiping therein. "The glebe," he said, "remained as an hoereditas jacens, and the State, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it, or might erect an Episcopal church therein," etc. "By the Revolution the State of Vermont succeeded to all the rights of the crown as to the unappropriated as well as the appropriated glebes." pp. 334, 335. Again: "Without the authority of the State, however, they [the towns] could not apply the lands to other uses than public worship; and in this respect the Statute of 1805 conferred a new right which the towns might or might not exercise at their own pleasure."* p. 336.

Coming to the case before us, we have no

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doubt that the general law of charities which we have described is applicable thereto. It is

[136 US 62]

true, no formal declaration has been made by Congress or the Territorial Legislature as to what system of laws shall prevail there. But it is apparent from the language of the Organic Act, which was passed September 9, 1850 (9 Stat. 453), that it was the intention of Congress that the

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system of common law and equity which generally prevails in this country should be operative in the Territory of Utah, except as it might be altered by legislation. In the 9th section of the Act it is declared that the Supreme and District Courts of the Territory "shall possess chancery as well as common-law jurisdiction;" and the whole phraseology of the Act implies the same thing. The Territorial Legislature, in like manner, in the first section of the Act regulating procedure, approved December 30, 1852, declared that all the courts of the Territory should have "law and equity jurisdiction in civil cases." In view of these significant provisions, we infer that the general system of common law and equity, as it prevails in this country, is the basis of the laws of the Territory of Utah. We may therefore assume that the doctrine of charities is applicable to the Territory, and that Congress, in the exercise of its plenary legislative power over it, was entitled to carry out that law and put it in force, in its application to the Church of Jesus Christ of Latter-Day Saints.

Indeed, it is impliedly admitted by the Corporation itself, in its answer to the bill in this case, that the law of charities exists in Utah, for it expressly says: "That it was, at the time of its creation, ever since has been and still is a corporation or association for religious or charitable uses." And again it says:

"That prior to February 28, 1887, it had, as <***pg. 498**> such corporation, as it lawfully might by the powers granted to it by its Act of incorporation, acquired and held from time to time certain personal property, goods and chattels, all of which it had acquired, held and used solely and only for charitable and religious purposes; that on the 28th day of February, A. D. 1887, it still held and owned certain personal property, goods and chattels donated to it by the members of said Church and friends thereof solely

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and only for use and distribution for charitable and religious purposes;" and "that on February 28, 1887, John Taylor, who then held all the personal property, moneys, stocks and bonds belonging to said defendant Corporation as trustee in trust for said defendant, by and with the consent and approval of defendant, donated, transferred and conveyed all of said personal property, moneys, stocks and bonds held by him belonging to said defendant Corporation, after setting apart and reserving certain moneys and stocks then held by him, sufficient in amount and necessary for the payment of the then existing indebtedness of said defendant Corporation, to certain ecclesiastical corporations created and existing under and by virtue of the laws of the Territory of Utah, to be devoted by said ecclesiastical corporations solely and only to charitable and religious uses and purposes."

And the intervenors, Romney and others, who claim to represent the hundred thousand and more individuals of the Mormon Church, in their petition say:

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"That the said Church of Jesus Christ of Latter-Day Saints is and for many years last past has been a voluntary religious society or association, organized and existing in the Territory of Utah for religious and charitable purposes.

"That said petitioners, and others for whose benefit they file this petition, are members of said Church, residing in said Territory; that said Church became possessed of all the above-described property, in accordance with its established rules and customs, by the voluntary contributions, donations and dedications of its said members, to be held, managed and applied to the use and benefit of said Church and for the maintenance of its religion and charities by trustees appointed by said members semi-annually at the general conference or meeting of said members."

The foregoing considerations place it beyond doubt that the general law of charities, as understood and administered in our Anglo-American system of laws, was and is applicable to the case now under consideration.

Then looking at the case as the finding of facts presents it, we have before us-Congress

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had before it-a contumacious organization, wielding by its resources an immense power in the Territory of Utah, and employing those resources and that power in constantly attempting to oppose, thwart and subvert the legislation of Congress and the will of the government of the United States. Under these circumstances we have no doubt of the power of Congress to do as it did.

It is not our province to pass judgment upon the necessity or expediency of the Act of February 19, 1887, under which this proceeding was taken. The only question we have to consider in this regard is as to the constitutional power of Congress to pass it. Nor are we now called upon to declare what disposition ought to be made of the property of the Church of Jesus Christ of Latter-Day Saints. This suit is, in some respects, an ancillary one, instituted for the purpose of taking possession of and holding for final disposition the property of the defunct Corporation in the hands of a receiver, and winding up its affairs. To that extent, and to that only, the decree of the circuit court has gone. In the proceedings which have been instituted in the district court of the Territory, it will be determined whether the real estate of the Corporation which has been seized (excepting the portions exempted by the Act) has, or has not, escheated or become forfeited to the United States. If it should be decided in the affirmative, then, pursuant to the terms of the Act, the property so forfeited and escheated will be disposed of by the Secretary of the Interior, and the proceeds applied to the use and benefit of common schools in the Territory.

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It is obvious that any property of the Corporation which may be adjudged to be forfeited and escheated will be subject to a more absolute control and disposition by the government than that which is not so forfeited. The non-forfeited property will be subject to such disposition only as may be required by the law of charitable uses; whilst the forfeited and escheated property, being subject to a more absolute control of the government, will admit of a greater latitude of discretion in regard to its disposition. As we have seen, however, Congress has signified its will in this regard, having declared that the proceeds shall be applied to the use and benefit of common schools in

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the Territory. Whether that will be a proper destination for the non-forfeited property will be a matter for future consideration in view of all the circumstances of the case.

As to the constitutional question, we see nothing in the Act which, in our judgment, transcends the power of Congress over the subject. We have already considered the question of its power to repeal the charter of the Corporation. It certainly also had power to direct proceedings to be instituted for the forfeiture and escheat of the real estate of the Corporation; and, if a judgment should be rendered in favor of the government in these proceedings, the power to dispose of the proceeds of the lands thus forfeited and escheated, for the use and benefit of common schools in the Territory, is beyond dispute. It would probably have power to make such a disposition of the proceeds if the question were merely one of charitable uses, and not of forfeiture. Schools and education were regarded by the Congress of the Confederation as the most natural and obvious appliances for the promotion of religion and morality. In the ordinance of 1787, passed for the government of the territory northwest of the Ohio, it is declared (art. 3): "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Mr. Dane, who is reputed to have drafted the said ordinance, speaking of some of the statutory **<*pg. 499>** provisions of the English law regarding charities as inapplicable to America, says: "But in construing these laws, rules have been laid down which are valuable in every State; as that the erection of schools and the relief of the poor are always right, and the law will deny the application of private property only as to uses the nation deems superstitious." 4 Dane's Abridg. 239.

The only remaining constitutional question arises upon that part of the 17th section of the Act, under which the present proceedings were instituted. We do not well see how the constitutionality of this provision can be seriously

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disputed, if it be conceded or established that the Corporation ceased to exist, and that its property thereupon ceased to have a lawful owner, and reverted to the care and protection of the government as parens patrioe. This point has already been fully discussed. We have no doubt that the state of things referred to existed, and that the right of the government to take possession of the property followed thereupon.

The application of Romney and others, representing the unincorporated members of the Church of Jesus Christ of Latter-Day Saints, is fully disposed of by the considerations already adduced. The principal question discussed has been, whether the property of the Church was in such a condition as to authorize the government and the court to take possession of it and hold it until it shall be seen what final disposition of it should be made; and we think it was in such a condition, and that it is properly held in the custody of the receiver. The rights of the church members will necessarily be taken into consideration in the final disposition of the case. There is no ground for granting their present application. The property is in the custody of the law, awaiting the judgment of the court as to its final disposition in view of the illegal uses to which it is subject in the hands of the Church of Latter-Day Saints, whether incorporated or unincorporated. The conditions for claiming possession of it by the members of the sect or community under the Act do not at present exist.

The attempt made, after the passage of the Act of February 19, 1887, and whilst it was in the President's hands for his approval or rejection, to transfer the property from the trustee then holding it to other persons, and for the benefit of different associations, was so evidently intended as an evasion of the Law that the court below justly regarded it as void and without force or effect.

We have carefully examined the decree, and do not find anything in it that calls for a reversal. It may perhaps require modification in some matters of detail, and for that purpose only the case is reserved for further consideration.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Field and Mr. Justice Lamar, dissenting:

I am constrained to dissent from the opinion

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and judgment just announced. Congress possesses such authority over the Territories as the Constitution expressly or by clear implication delegates. Doubtless territory may be acquired by the direct action of Congress, as in the annexation of Texas; by treaty, as in the case of Louisiana;

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or, as in the case of California, by conquest and afterwards by treaty; but the power of Congress to legislate over the Territories is granted in so many words by the Constitution. Art. 4, sec. 3, clause 2.

And it is further therein provided that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

In my opinion, Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, express or implied, in that instrument. And no such power as that involved in the Act of Congress under consideration is conferred by the Constitution, nor is any clause pointed out as its legitimate source. I regard it of vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments. The legislative power of Congress is delegated and not inherent, and is therefore limited. I agree that the power to make needful rules and regulations for the Territories necessarily comprehends the power to suppress crime; and it is immaterial even though that crime assumes the form of a religious belief or creed. Congress has the power to extirpate polygamy in any of the Territories, by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals or corporations, without office found, because they may have been guilty of criminal practices.

The doctrine of cy prhs is one of construction, and not of administration. By it a fund devoted to a particular charity is applied to a cognate purpose, and if the purpose for which this property was accumulated was such as has been depicted, it cannot be brought within the

[136 US 68]

rule of application to a purpose as nearly as possible resembling that denounced. Nor is there here any counterpart in congressional power to the exercise of the royal prerogative in the disposition of a charity. If this property was accumulated for purposes declared illegal, that does not justify its arbitrary disposition by judicial legislation. In my judgment, its diversion under this Act of Congress is in contravention of specific limitations in the Constitution; unauthorized, expressly or by implication, by any of its provisions; and in disregard of the fundamental principle that the legislative power of the United States, as exercised by the agents of the people of this Republic, is delegated and not inherent.

FOOTNOTES

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* The frequency with which this power of the Legislature is exerted is shown by a recurrence to the private laws of any of the States. Taking New Jersey for example; the Index of Private Laws, under the head of Academies alone, refers to the following Acts:

1. By an ancient charter the trustees of the Township of Bergen held certain lands for the common benefit of the freeholders, a portion of which was set apart for the free school of the township. An academy being organized and incorporated in the town, its trustees claimed this portion and sold certain parcels of it. The Legislature, on the representation of the trustees of the township, confirmed the sales that had been made, but directed that the proceeds and the land unsold should be vested in the trustees of the township, for the use and benefit of the free school alone. This, of course, the court of chancery could not have done. Laws of 1814, p. 202.

2. By an Act of March 2, 1848, it was enacted that the title of a lot in the Village of Hackensack, formerly vested in the trustees of the Washington Academy, should be vested in the Washington Institute of Hackensack, to be held by them for the purposes and trusts, and subject to the conditions, of the articles of their association. Laws of 1848, p. 118. It is probable that the first institution had ceased to exist.

3. A certain school-house and lot in the City of Newark was held by trustees for the benefit of "The Female Union School Society," for the education of indigent female children. Not being longer needed for that purpose, in consequence of the establishment of public free schools in the city, the Legislature authorized the trustees, with the assent of the association, to sell the property and pay over the proceeds to a new corporation created for the support and education of destitute orphan children of the city, called "The Protestant Foster Home Society." Laws of 1849, p. 143.

4. In 1854 an Act was passed, authorizing the trustees of the Camden Academy to convey their property to the Board of Education of the City of Camden. The reason appears from the following recital of the Act: "Whereas a certain lot of land [describing it] has heretofore been given or bequeathed for the purpose of erecting a schoolhouse thereon; and whereas the building known as the Camden Academy has been erected thereon by voluntary subscription; and whereas the donors of said land and the subscribers to the funds for the erection of said building have, with few exceptions, departed this life, and the objects which they had in view have in a great degree been frustrated; and whereas it is considered that the same may be best promoted by securing said lot of land, and the building thereon, for the occupancy of public schools of the City of Camden: Be it enacted," etc. Laws of 1854, p. 353.

5. By an Act passed in 1871, the trustees of Chatham Academy, in the County of Morris, were authorized to convey any part of the real estate held by them, or to sell the same and pay over the proceeds, to the trustees of Chatham School District No. 1, to be used by them for educational purposes only. Laws of 1871, p. 670. Here was evidently another case of an academy having run down, and its operations discontinued.

Instances of this kind of legislation, in which the Legislature clearly acts as parens patrioe, may be found almost without number.

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ADDENDUM

Petitioner-Appellant's Designation of
Relevant District Court Documents

Petitioner-Appellant Michael L. Knight hereby designates the following relevant documents in the electronic record:

Record Entry	Description of Document	Page ID #
1	Complaint (July 14, 2010)	1-6
17	Superseding Indictment (Nov. 2, 2010)	51-56
38	Minute Entry for proceedings held before District Judge Harry S Mattice, Jr: Change of Plea Hearing as to Michael L Knight (April 5, 2011)	144
44	Judgment (July 14, 2011)	154-160
46	Notice of Appeal (July 19, 2011)	162
47	Amended Judgment (July 29, 2011)	163-169
48	Second Amended Judgment (Sept. 20, 2011)	170-176
55	Sixth Circuit Order Affirming Judgment (Dec. 5, 2012)	453-455
59	Letter from Clerk Regarding Supreme Court's Denial of Petition for Writ of Certiorari (Apr. 15, 2013)	462
63	Defendant's Motion to Vacate Sentence (April 21, 2014)	500-512
72	Motion to Appoint Counsel (Apr. 27, 2016)	539-540
74	Defendant's Notice (June 2, 2016)	543-549
82	Defendant's Motion for Leave to Amend Motion to Vacate Sentence (Feb. 17, 2017)	594-597
85	Memorandum Opinion (Sept. 12, 2017)	617-628
86	Judgment Order Denying Motion to Vacate (Sept. 12, 2017)	629
87	Notice of Appeal (Nov. 16, 2017)	630

18 U.S.C. § 16

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)

(c)

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

...

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years;

...

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(e)

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

…

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another ….

18 U.S.C. § 1201(a)

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or

(5) the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties,

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

18 U.S.C. § 2114(a)

(a) Assault. —A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned not more than twenty-five years.

S. Ct. at 1212. Like the similar statute in *Johnson* and the identical statute at issue in *Dimaya*, §924(c)(3)(B) fails to provide these essential standards. The Court, therefore, should hold that §924(c)(3)(B) is void for vagueness and should vacate Knight's sentence to the extent is was based on that unconstitutional law.

JURISDICTIONAL STATEMENT

Petitioner filed a motion to vacate, set aside, or correct his sentence, and the district court for the Eastern District of Tennessee had jurisdiction over that motion pursuant to 28 U.S.C. §§2241 and 2255. The district court entered an order and final judgment denying petitioner's motion on September 12, 2017, and denied a certificate of appealability pursuant to 28 U.S.C. §2253(c)(2) and Federal Rule of Appellate Procedure 22(b). *See* Judgment Order, RE 86, Page ID # 629.[1] Petitioner timely filed a notice of appeal seeking a certificate of appealability. *See* Notice of Appeal, RE 87, Page ID # 630.[2] This Court issued a certificate of appealability on

[1] "RE" refers to documents entered on the district court's docket, and "Doc." refers to documents entered on this Court's docket.

[2] In his notice of appeal, Knight certified that he placed the notice in the mailbox of his correctional facility on November 9, 2017, which was within 60 days from the district court's order denying his motion on September 12, 2018. *See* Copy of Notice of Appeal, Doc. 3 at 1. Although the Clerk's office did not stamp the notice as filed until November 16, 2017, this Circuit observes the mailbox rule for federal inmates, which provides that a notice of appeal is deemed filed on the date it is deposited in the mailbox of the inmate's correctional facility. *See United States v. Smotherman*, 838 F.3d 736, 737-38 (6th Cir. 2016). Knight's notice therefore was timely.

the issue presented in this appeal, *see* Order, Doc. 7-1 at 3-5, and has jurisdiction under 28 U.S.C. §§1291 and 2253.

STATEMENT OF THE ISSUE

The Supreme Court in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), held that the definition of "crime of violence" incorporated into the INA—which covers "a felony … that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. §16(b)—is unconstitutionally vague. In doing so, *Dimaya* rejected every plausible distinction between the language of §16(b) and the language of the residual clause invalidated in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See Dimaya*, 138 S. Ct. at 1218-21. Petitioner was convicted under 18 U.S.C. §924(c)(3)(B), which defines "crime of violence" using the exact same language as §16(b). In *United States v. Taylor*, 814 F.3d 340, 376-78 (6th Cir. 2016), this Court distinguished *Johnson* employing the very reasoning and accepting the very government arguments that the Supreme Court rejected in *Dimaya*. Does *Dimaya* abrogate this Court's decision in *Taylor* and make clear that §924(c)(3)(B) is unconstitutionally vague, entitling petitioner to relief under 28 U.S.C. §2255?

STATEMENT OF THE CASE

A. Factual Background, Trial, and Sentencing

This case arises out of petitioner Michael Knight's 2010 robbery of a post office and kidnapping of the postmaster as part of a scheme to defraud Bank of

America.[3] According to the evidence presented at trial, Knight robbed a post office, stole property, and carjacked and kidnapped the postmaster, all while using a firearm. Specifically, Knight entered the post office wearing a ski mask and gloves, brandished a handgun, and asked the postmaster to give him cash, a money order machine, and blank money orders. *See* Presentence Investigation Report, Doc. 8 at 5. He also demanded the keys of the postmaster's personal truck. *Id.* He then forced the postmaster into the passenger seat of the truck, drove about a mile to a nearby creek bed, and ordered the postmaster to stay in place at an overhead bridge on the threat that his associate was watching her from out of view and would shoot her if she moved. *Id.* Knight fled on foot, keeping the keys to the truck. *Id.*

Following these events, the post office was missing $2,458 in cash and stamps, along with a money order machine and 190 blank money orders. *Id.* Five of the stolen money orders were deposited in three transactions into a Bank of America account in petitioner's name. *Id.* at 6. The deposits were made via a walk-up ATM, and the camera at the drive-through window showed petitioner's face and vehicle at the location. *Id.* Later, an additional money order was cashed at a BB&T bank, and Knight was again identified on video footage and by one of the bank

[3] The facts are described here in the light most favorable to the verdict, and Knight does not dispute them for purposes of this appeal.

tellers. *Id.* The police later located and arrested Knight based on these developments.

Knight pleaded guilty to one count of bank fraud, 18 U.S.C. §1344, admitting to acquiring stolen money orders from a robbery of a post office and presenting those money orders to Bank of America for deposit with the intent of withdrawing them later. Minute Entry, RE 38, Page ID # 144. He proceeded to trial on other charges related to the same scheme.

A federal jury convicted Knight on nine counts arising out of these events. The jury convicted him of robbery, 18 U.S.C. §2114(a); possession of stolen property, §2114(b); kidnapping, §1201; carjacking, §2119; possessing a firearm as a convicted felon, §922(g)(1); and a second count of bank fraud, §1344.

Under §924(c), the jury also convicted Knight of three counts of using a firearm "during and in relation to" three "crime[s] of violence,"—the robbery, kidnapping, and carjacking counts. To qualify as a "crime of violence," the crime must be a felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," §924(c)(3)(A), or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." §924(c)(3)(B). Because both robbery and kidnapping can be committed without "the use, attempted use, or threatened use of physical force against the person or property

of another," §924(c)(3)(A), the §924(c) counts related to those crimes necessarily relied on §924(c)(3)(B)'s definition of crime of violence.

The presentence report identified for the court the applicable sentencing guidelines range for these convictions. Because Knight's convictions for bank fraud, robbery, possession of stolen property, kidnapping, carjacking, and felon in possession of a firearm all involved the same victim and were part of a common scheme, the report grouped the crimes together for purposes of sentencing. Presentence Investigation Report, Doc. 8 at 7. Accordingly, the presentence report used the highest offense level calculated for a single count as the Adjusted Offense Level. *Id.* That offense was kidnapping, which under the 2010 U.S. Sentencing Guidelines carried an adjusted offense level of 35. *Id.* at 8-9. The presentence report then grouped the three convictions for use of a firearm in furtherance of a crime of violence. *Id.* at 10. Under the relevant statute and sentencing guidelines, the first conviction for that offense carries a mandatory minimum sentence of 5 years to a maximum of life imprisonment, and each subsequent conviction carries a mandatory minimum of 25 years to a maximum of life imprisonment. *Id.*; *see also* 18 U.S.C. §924(c)(1)(A)(i); U.S.S.G. §2K2.4. Those sentences must run consecutive to any other sentence imposed, resulting in a mandatory minimum sentence of 55 years for Knight on top of the sentence imposed for his other convictions. Presentence Investigation Report, Doc. 8 at 9. The presentence report also calculated a criminal

history score of 11, which established a criminal history category of V under the sentencing guidelines. *Id.* at 15.

The presentence report's determinations yielded a guidelines range of 262 to 327 months to life imprisonment, plus the mandatory and consecutive sentences for using a firearm in furtherance of a crime of violence, for a total range of 922 to 987 months. *Id.* at 19. The presentence report did not recommend any adjustments based on mitigating or aggravating factors. *Id.* at 21.

Consistent with the presentence report's recommendation, and within the guidelines range, the district court sentenced Knight to 955 months in prison (roughly 79.5 years). Without the two convictions under §924(c)(3)(B) for using a firearm while committing a crime of violence, which carried consecutive mandatory minimum sentences of 25 years per count, Knight's sentencing guidelines range would have been 50 years shorter than the sentence he received.

Knight appealed his convictions and sentence, and this Court affirmed. *See* Notice of Appeal, RE 46, Page ID # 162; Order, RE 55, Page ID ## 453-455. The Supreme Court denied Knight's petition for certiorari review. Letter from Clerk, RE 59, Page ID # 462.

B. §2255 Motion

Following his unsuccessful efforts to seek review of his convictions and sentence on direct appeal, Knight filed a *pro se* motion to vacate, set aside, or correct

his sentence under 28 U.S.C. §2255, raising multiple grounds for relief. *See* RE 63, Page ID ## 500-512. On April 23, 2016, Johnson sought to amend his 2255 motion to add a claim based on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and he requested the district court appoint him counsel. *See* Motion to Appoint Counsel, RE 72, Page ID #539. The court appointed him counsel, but his counsel filed a notice in the district court asserting that no good-faith basis existed for collateral relief under *Johnson*. Notice, RE 74, Page ID ## 543-548. That notice, however, never addressed *Johnson*'s potential impact on Knight's convictions under §924(c)(3)(B). *See id.*

While Knight's motion was still pending, the Supreme Court granted certiorari in *Sessions v. Dimaya*, and Knight sought leave to amend his motion to add a claim that he was entitled to relief from his sentence in light of *Johnson*, *Welch v. United States*, 136 S. Ct. 1257 (2016), and the fact that "the residual clause in §924(c)(3)(B)," is "identical" to the definition of "crime of violence" in §16(b) of the INA. Mot. for Leave To Amend, RE 82, Page ID ## 595-596.

The district court denied Knight's §2255 motion in its entirety, denied leave to amend, and denied a certificate of appealability. *See* Mem. Op., RE 85, Page ID ## 617-628. Knight then filed a notice of appeal, which this Court construed as a request for a certificate of appealability under Federal Rule of Appellate Procedure 22(b).

This Court granted Knight a certificate of appealability on the question whether, under the Supreme Court's decision in *Dimaya*, §924(c)(3)(B) is unconstitutionally vague. This Court also directed the Clerk, pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(a)(2)(B), to appoint counsel for Knight. Order, Doc. 11.

STANDARD OF REVIEW

A federal prisoner may make a motion to vacate, set aside, or correct his judgment of conviction and sentence if his sentence was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. §2255. This Court reviews de novo the district court's denial of a motion under §2255 and reviews for clear error the district court's factual findings. *Mallett v. United States*, 334 F.3d 491, 497 (6th Cir. 2003).

SUMMARY OF ARGUMENT

Michael Knight was sentenced to 50 years in prison based on two counts of using a firearm in furtherance of a "crime of violence," which Congress has defined as a felony that, *inter alia*, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. §924(c)(3)(B). Last Term, the Supreme Court in *Sessions v. Dimaya* held that the ***identical*** definition of "crime of violence" that appears in 18 U.S.C. §16(b) and is incorporated into the Immigration and Nationality

Act ("INA") was unconstitutionally vague. 138 S. Ct. 1204. The Court dismissed minor differences in wording between the definition in §16(b) and the similar definition invalidated in *Johnson* and explained that "two features" of both definitions rendered them inconsistent with due process: They required a court to "'imagine' an 'idealized ordinary case of the crime'" rather than focus on the actual facts of the crime or the statutory elements, and at the same time "left unclear what threshold level of risk made any given crime a 'violent felony.'" *Id.* at 1213-14 (quoting *Johnson*, 135 S. Ct. at 2557-58). These factors were present "in just the same way" in §16(b) as they were present in the residual clause of the Armed Career Criminal Act ("ACCA") which the Court had invalidated as unconstitutionally vague in *Johnson*.

The exact same language that the Court invalidated in §16(b) and the exact same features that the Court deemed constitutionally problematic in §16(b) and the ACCA's residual clause are present in §924(c)(3)(B). Just as the Supreme Court deemed §16(b) unconstitutionally vague under a "straightforward application" of *Johnson*, an even more straightforward application of *Dimaya* compels the conclusion that §924(c)(3)(B) is unconstitutionally vague too. While the government could point to minor differences in wording between the INA and ACCA, there is simply no daylight between the INA and §924(c)(3)(B) and no

escaping the conclusion that this Court's earlier effort to distinguish *Johnson* does not survive *Dimaya*.

While this Court's earlier decision in *Taylor* accepted the government's argument that §924(c)(3) is textually distinguishable from the residual clause of the ACCA invalidated in *Johnson*, the *Dimaya* Court rejected those same government arguments, rendering that portion of *Taylor* no longer good law. Numerous other courts of appeals have already concluded that *Dimaya* renders §924(c)(3)(B) unconstitutional and abrogates earlier precedents to the contrary. And this Court has previously recognized that *Dimaya* might compel it to reconsider *Taylor*. Even the United States has recognized in prior briefing that the clauses in §16(b) and §924(c)(3)(B) are materially indistinguishable such that their constitutionality rises and falls together.

Given that *Dimaya* compels the conclusion that §924(c)(3)(B) is unconstitutionally vague, the 50 years of Knight's sentence attributable to convictions under that clause were imposed in violation of the Constitution, entitling him to relief under §2255. This Court should vacate the portion of his sentence that was imposed in violation of the Constitution.

ARGUMENT

I. Knight Is Entitled To §2255 Relief Because 18 U.S.C. §924(c)(3)(B) Is Unconstitutionally Vague.

"The prohibition of vagueness in criminal statutes … is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'" *Dimaya*, 138 S. Ct. at 1212 (quoting *Johnson*, 135 S. Ct. at 2557). Under this principle, courts will invalidate a criminal law if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. This protection is vital, for "[v]ague laws invite arbitrary power" by "leav[ing] judges to their intuitions and the people to their fate." *Dimaya*, 138 S. Ct. at 1223-24 (Gorsuch, J., concurring).

The government used a vague law here to sentence Michael Knight to 50 years in prison. Knight was convicted of three counts under §924(c)(1)(A), for using a firearm "during and in relation to" "crime[s] of violence" related to kidnapping, robbery, and carjacking. Section 924(c)(3) provides two definitions for "crime of violence," both of which focus on the crime in generic or categorical terms, not as committed by the defendant. The first is the "elements clause," which covers any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." §924(c)(3)(A). The second definition sweeps in any felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course

of committing the offense." §924(c)(3)(B). Because neither robbery nor kidnapping are "crimes of violence" under the elements clause, *see infra* Part I.B, the §924(c) counts tied to these charges—and the 50 years' imprisonment that went with them—depend on §924(c)(3)(B).

But that provision is unconstitutionally vague. Indeed, it employs ***verbatim*** the *exact same* definition of crime of violence that the Supreme Court invalidated as unconstitutionally vague last Term in *Dimaya*. Numerous courts of appeals have declared §924(c)(3)(B) to be void for vagueness in the wake of *Dimaya*, and even the government has recognized that §924(c)(3)(B) and *Dimaya* stand or fall together. Moreover, *Johnson* and *Dimaya* are "substantive decision[s] and so ha[ve] retroactive effect under *Teague* in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). The Court, therefore, should vacate the portion of Knight's sentence based on §924(c)(3)(B) because it was imposed in violation of the Constitution. *See* 28 U.S.C. §2255.

A. *Dimaya* Compels the Conclusion That §924(c)(3)(B) Is Unconstitutionally Vague.

1. A "straightforward application" of the Supreme Court's recent decision in *Dimaya* requires this Court to invalidate the definition of crime of violence in §924(c)(3)(B) as unconstitutionally vague. 138 S. Ct. at 1213. *Dimaya* followed the Court's decision in *Johnson* holding that part of the Armed Career Criminal Act's definition of "violent felony" was impermissibly vague. The ACCA provided that a

violent felony is one that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another" or "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*" §924(e)(2)(B) (emphasis added). The last clause of that definition became known as the "residual clause" of the statute, and the Court declared it void for vagueness.

Three Terms later, in *Dimaya*, the Supreme Court held that the "similarly worded clause" in the "definition of 'crime of violence'" as incorporated into the INA "suffers from the same constitutional defect" that rendered the residual clause of the ACCA unconstitutionally vague. 138 S. Ct. at 1210. The INA incorporates the definition of "crime of violence" from the federal criminal code, which provides that a crime of violence is "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "(b) any other offense that is a felony and that, *by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*" 18 U.S.C. §16 (emphasis added).

The Court rejected the government's efforts to emphasize minor differences in wording between the ACCA and §16(b) and explained that two features that the provisions had in common rendered §16(b) unconstitutionally vague. First, it "requires a court to picture the kind of conduct that the crime involves in 'the

ordinary case,'" *Dimaya*, 138 S. Ct. at 1216, rather than asking the court to focus on "the real-world facts" or the "statutory elements of an offense." *Id.* at 1213-14 (internal quotation marks omitted). In other words, "[the] court was supposed to imagine an idealized ordinary case of the crime" to "identify the kind of conduct the ordinary case of a crime involves." *Id.* at 1214. But §16(b) provided "no guidance" as to how the court should "figure that out," and thus "offered no reliable way to discern what the ordinary version of any offense looked like." *Id.* (internal quotation marks omitted). Without that guidance, the Court explained, "no one could tell how much risk the offense generally posed" and the court's account of the "ordinary" case would be "wholly speculative." *Id.*

Second, "[c]ompounding that first uncertainty," §16(b) "left unclear what threshold level of risk" satisfied the risk needed to render the crime at issue a "crime of violence." *Id.* It thus required a court to determine whether the ordinary case presented "some not-well-specified-yet-sufficiently-large degree of risk." *Id.* at 1216. "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony," §16(b) "violates the guarantee of due process." *Id.* at 1214.

In litigating *Dimaya*, the government struggled mightily to distinguish the definition of "violent felony" in §924(e)(2)(B) (at issue in *Johnson*) from §16(b) by pointing to minor differences in wording, but the *Dimaya* Court would have none of

violent felony is one that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another" or "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*" §924(e)(2)(B) (emphasis added). The last clause of that definition became known as the "residual clause" of the statute, and the Court declared it void for vagueness.

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ordinary case,'" *Dimaya*, 138 S. Ct. at 1216, rather than asking the court to focus on "the real-world facts" or the "statutory elements of an offense." *Id.* at 1213-14 (internal quotation marks omitted). In other words, "[the] court was supposed to imagine an idealized ordinary case of the crime" to "identify the kind of conduct the ordinary case of a crime involves." *Id.* at 1214. But §16(b) provided "no guidance" as to how the court should "figure that out," and thus "offered no reliable way to discern what the ordinary version of any offense looked like." *Id.* (internal quotation marks omitted). Without that guidance, the Court explained, "no one could tell how much risk the offense generally posed" and the court's account of the "ordinary" case would be "wholly speculative." *Id.*

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it, concluding that none of the textual differences could "cure the statutory indeterminacy" found in §16(b). 138 S. Ct. at 1220. For example, the government argued in *Dimaya* that §16(b) provided sufficient standards because it requires that the risk of physical force occur "*in the course of* committing the offense" (emphasis added), which the ACCA's residual clause did not require. *Id.* at 1218-19. The Court rejected that purported distinction and explained that a court's ability "to consider everything that is likely to take place for as long as a crime is being committed" hardly "narrow[s] or focus[es] the statutory inquiry." *Id.* at 1219. The "in the course of" phrase excludes only a court's ability to consider risks "that … will be used after the crime has entirely concluded," but that additional consideration "cannot realistically affect a court's view of the *ordinary case* of a crime." *Id.* Thus, "the phrase 'in the course of' makes no difference as to either outcome or clarity" under the ACCA's residual clause or §16(b). *Id.* at 1220.

Likewise, the Court rejected the government's contention that the ACCA's reference to risk of "physical force" was somehow meaningfully distinguishable from §16(b)'s reference to risk of "physical injury." *Id.* The Court "struggle[d] to see how that statutory distinction would matter," as a crime that is likely to lead to the use of physical force is also likely to lead to physical injury. *Id.* Because "the force/injury distinction is unlikely to affect a court's analysis of whether a crime

qualifies as violent," the "variance in wording" between the two statutes "cannot make ACCA's residual clause vague and §16(b) not." *Id.* at 1221.

The government also pointed out that §16(b), unlike the ACCA's residual clause, "is not preceded by a confusing list of exemplar crimes." *Id.* at 1221 (internal quotation marks omitted). Although the Court acknowledged that the list of examples "failed to bring any certainty" to the "application" of the ACCA's residual clause, it did not follow, the Court explained, that the list of examples *caused* the vagueness problem. *Id.* Instead, with or without a confusing list of examples, the "dual flaws" of requiring an ordinary-case analysis and indeterminacy about the level of risk required to render a crime sufficiently violent "remain." *Id.*

Finally, the Court rejected the government's contention that the Court's longstanding difficulties interpreting the residual clause of the ACCA rendered that clause uniquely problematic under the Constitution. *Id.* at 1221-23. The Court observed that the application of §16(b), like the application of the ACCA's residual clause, had divided federal courts of appeals on a "host of issues." *Id.* at 1222. And the Court emphasized that "after issuing the relevant ACCA decisions, [it] vacated the judgments in [] §16(b) cases and remanded them for further consideration." *Id.* at 1223. Because §16(b) shares "all the same hallmarks" that rendered the residual clause of the ACCA unconstitutionally vague, the Court held that §16(b) should suffer the same fate.

2. Everything the Court said about §16(b) is equally true with respect to §924(c)(3)(B), compelling the conclusion that it too is unconstitutionally vague. First and foremost, §924(c)(3)(B) is ***identically worded*** to §16(b). Both statutes provide that "a crime of violence" is a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. §16(b); *id.* §924(c)(3)(B). Thus, whatever textual distinctions the government could point to between the ACCA's residual clause and §16(b)—distinctions that the Supreme Court found unavailing—cannot be made between §16(b) and §924(c)(3)(B). The two clauses are word-for-word the same.

Given that textual identity, §924(c)(3)(B) necessarily shares the "two features" that "conspire[d]" to make both the residual clause of the ACCA and §16(b) unconstitutionally vague. *Dimaya*, 138 S. Ct. at 1213-14. Section 924(c)(3)(B), like its identical twin in §16(b), requires a court to address a crime "by its nature" and "to picture the kind of conduct that the crime involves in 'the ordinary case,'" rather than asking the court to focus on "the real-world facts" or the "statutory elements of an offense." *Id.* at 1213-14, 1216 (internal quotation marks omitted); *see also id.* at 1216-18 (§16(b) "demands a categorical approach" and "has no 'plausible' fact-based reading") (quoting *Johnson*, 135 S. Ct. at 2562). Indeed, this Court has already recognized that §924(c)(3)(B) "requires the application of the

categorical approach, which requires courts to look at the ordinary case of the predicate crime." *United States v. Taylor*, 814 F.3d 340, 378 (6th Cir. 2016). Moreover, given that §924(c)(3)(B) includes the same "substantial risk" language, it, like §16(b), leaves "unclear what threshold level of risk" is sufficient to satisfy the definition of crime of violence. *Dimaya*, 138 S. Ct. at 1214. Because §924(c)(3)(B) "has the same two features" as the ACCAs' residual clause and §16(b), it likewise "violates the guarantee of due process." *Id.* at 1213-14.

Recognizing that the relevant provisions in §16(b) and §924(c)(3)(B) are indistinguishable, several federal courts of appeals have already held that *Dimaya* compels the conclusion that §924(c)(3)(B) is unconstitutionally vague and compels the recognition that *Dimaya* abrogated earlier circuit precedent reaching a contrary conclusion. The D.C. Circuit, for example, observing that the "two statutes are materially identical," held that it could "discern no basis for a different result" for §924(c)(3)(B) "from the one in *Dimaya*." *United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) (per curiam). It accordingly "abjur[ed] [its] earlier analysis to the contrary" and "vacat[ed] [petitioners'] section 924(c) convictions in light of *Dimaya*." *Id.* at 37-38. The Fifth, Seventh, and Tenth Circuits have recently reached similar conclusions. *See United States v. Davis*, __ F.3d __, 2018 WL 4268432, at *3 (5th Cir. Sept. 7, 2018) (holding "§924(c)'s residual clause … unconstitutionally vague" because "the language of the residual clause here [in §924(c)(3)(B)] and that

in §16(b) are identical"); *United States v. Salas*, 889 F.3d 681, 684-86 (10th Cir. 2018) (invalidating §924(c)(3)(B) and explaining why its textual similarity with §16(b) is dispositive); *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016) (same). Indeed, even before *Dimaya*, several courts of appeals noted the similarity between the two provisions and reasoned that "cases interpreting" §16(b) "inform [the court's] analysis" of §924(c)(3)(B). *United States v. Serafin*, 562 F.3d 1105, 1108 & n.4 (10th Cir. 2009); *see also In re Hubbard*, 825 F.3d 225, 230 n.3 (4th Cir. 2016) ("[T]he language of §16(b) is identical to that in §924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other.").

Even the United States has previously acknowledged that §16(b) and §924(c)(3)(B) are "materially identical," resisting the invalidation of the one provision because the other provision would inevitably fall with it. *See, e.g.*, Gov't Br. 12, *Sessions v. Dimaya*, No. 15-1498 (U.S. Nov. 14, 2016); *see also Dimaya*, 138 S. Ct. at 1241 (Roberts, C.J., dissenting) ("§16(b) is replicated in … §924(c)"). It thus comes as no surprise that the Supreme Court granted, vacated, and remanded several cases involving sentences under §924(c)(3)(B) in light of its decision in *Dimaya*, many of which arose from an appeal of the denial of a §2255 motion. *See, e.g.*, *Winters v. United States*, 138 S. Ct. 1982 (2018); *Eizember v. United States*, 138 S. Ct. 1983 (2018); *Carreon v. United States*, 138 S. Ct. 1985 (2018); *Taylor v.*

United States, 138 S. Ct. 1979 (2018).[4] The Court in *Dimaya* recognized that its decision to GVR several §16(b) cases in light of *Johnson* supported its conclusion that §16(b) suffered from the same constitutional flaws as the ACCA's residual clause, *Dimaya*, 138 S. Ct. at 1223, and its decision to GVR several §924(c)(3)(B) after *Dimaya* supports the same inference here.

3. Although this Court has previously held in *Taylor* that §924(c)(3)(B) is not unconstitutionally vague under *Johnson*, the Supreme Court's decision in *Dimaya* is inconsistent with that holding and requires this Court to recognize that *Taylor* cannot survive *Dimaya*. Consistent with the government's recognition that the language of §924(c)(3)(B) and §16(b) are identical, the government's efforts to distinguish *Johnson* were essentially identical in *Taylor* and *Dimaya*, which is to say the government arguments that the Supreme Court rejected in *Dimaya* were the same arguments a divided panel of this Court accepted in *Taylor*.

While *Taylor* accepted the government's argument that §924(c)(3)(B) was not unconstitutionally vague because it was "considerably narrower than the statute invalidated by the Court in *Johnson*," 814 F.3d at 375-76, *Dimaya* dismissed those minor differences as immaterial, 138 S. Ct. at 1218-21. While *Taylor* emphasized

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4 *See also Davis v. United States*, 138 S. Ct. 1979 (2018) (direct appeal); *United States v. Jenkins*, 138 S. Ct. 1980 (2018) (same); *Glover v. United States*, 138 S. Ct. 1979 (2018) (same); *United States v. Jackson*, 138 S. Ct. 1983 (2018) (same).

that §924(c)(3)(B) lacks the "confusing set of examples" that preceded the residual clause in the ACCA, 814 F.3d at 376, *Dimaya* concluded that the examples were not the source of the ACCA's vagueness, 138 S. Ct. at 1221. While *Taylor* stressed that the ACCA referenced the risk of physical "injury" rather than the risk of "force," 814 F.3d at 376-77, *Dimaya* concluded that those terms were equivalent and equally unhelpful in providing meaningful clarity, 138 S. Ct. at 1220. While *Taylor* noted that the ACCA did not limit the risk of injury to events arising "in the course of" committing the offense, as §924(c)(3)(B) requires, 814 F.3d at 377, *Dimaya* emphasized that §16(b)'s "phrase 'in the course of' makes no difference as to either outcome or clarity." 138 S. Ct. at 1220. And while *Taylor* suggested that the Supreme Court's "repeated attempts and repeated failures" at interpreting the ACCA's residual clause without analog in the §924(c)(3)(B) context was an important difference, 814 F.3d at 377-78, *Dimaya* concluded that the earlier failures just underscored the inherent difficulty of interpreting the materially similar language. 138 S. Ct at 1223.

Finally, *Taylor* fully acknowledged the two overriding similarities between the language of the ACCA residual clause and the text of §924(c)(3)(B)—*viz.*, "it is true" that both statutes require the court to engage in an ordinary-case analysis and speculate about the level of risk required to satisfy the definition of crime of violence—but deemed those two factors insufficient to condemn §924(c)(3)(B). 814

F.3d at 378. In contrast, *Dimaya* makes crystal clear that the ACCA's residual clause and §16(b) both failed because "[t]wo features ... conspire[d] to make [them] unconstitutionally vague ... 'by combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony.'" *Dimaya*, 138 S. Ct at 1213-14 (quoting *Johnson*, 135 S. Ct. at 2557-58). As *Taylor* itself acknowledges, those same two features are present in §924(c)(3)(B), and they thus produce the same "hopeless indeterminacy" that doomed the provisions at issue in *Johnson* and *Dimaya*. *Id.* at 1213 (quoting *Johnson*, 135 S. Ct. at 2558). Thus, in both the specific responses to the government's arguments and in the general reasoning as to what factors were dispositive to a finding of vagueness, *Taylor* and *Dimaya* are fundamentally inconsistent and the former cannot survive the latter.

Although this Court's prior published decisions are controlling authority, a panel may recognize the abrogation of a "decision of another panel" when "an inconsistent decision of the United States Supreme Court requires modification of th[at] decision." *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). Indeed, "the intervening Supreme Court authority need not be precisely on point, if the legal reasoning is directly applicable." *Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 720-21 (6th Cir. 2016).

Here, this Court's *Taylor* holding simply cannot be squared with *Dimaya*, which not only invalidated §924(c)(3)(B)'s identical twin, but expressly rejected the same arguments by the same litigant and knocked out each ground upon which *Taylor* built its holding. Indeed, this Court previously recognized the potential for *Dimaya* to abrogate *Taylor*. After the Supreme Court granted certiorari in *Dimaya*, this Court noted that *Taylor*'s days might be numbered. In *United States v. Pembrook*, the Court cited *Taylor* to reject vagueness arguments against §924(c)(3)(B), but recognized that the arguments could be poised for "possible reconsideration pending the forthcoming decision in *Dimaya*." 876 F.3d 812, 831 (6th Cir. 2017). The Supreme Court has now spoken in *Dimaya*, and this Court should reconsider *Taylor* on the ground that it is inconsistent with intervening Supreme Court precedent. In doing so, this Court should follow *Dimaya* and hold that §924(c)(3)(B) is unconstitutionally vague.

4. Only one court of appeals post-*Dimaya* has concluded otherwise, but its reasoning conflicts with clear precedent of both this Court and the Supreme Court. The Second Circuit recently ruled that §924(c)(3)(B) is not unconstitutionally vague notwithstanding *Dimaya* because the ordinary-case analysis for §924(c)(3)(B) "is not concerned with prior convictions," like the ACCA and §16, but "pertains only to §924(c)(1) crimes of *pending* prosecution." *United States v. Barrett*, No. 14-2641, 2018 WL 4288566, at *12 (2d Cir. Sept. 10, 2018). The court thus concluded that it

could abandon the categorical ordinary-case approach and "constru[e]" §924(c)(3)(B) "to present a question of fact to be found by the trial jury according to the defendant's 'real-world conduct.'" *Id.* at 10. By "[s]ubmitting §924(c)(3)(B) determinations to trial juries for conduct-specific determinations," the court reasoned, it could "avoid[] not only the constitutional vagueness concerns that *Dimaya* and *Johnson* located in the categorical ordinary-case standard, but also the Sixth Amendment right-to-trial concern that originally prompted the Supreme Court to mandate a categorical approach" in the first place. *Id.*

The Second Circuit's approach might make a *different* statute constitutional, but it works violence to the actual statutory text of §924(c)(3)(B) and conflicts with clear precedent from the Supreme Court and this Circuit. Section 924(c)(3)(B) asks whether a felony "*by its nature*" poses a substantial risk of the use of physical force. §924(c)(3)(B) (emphasis added). As the *Dimaya* plurality explained, that language "tells courts to figure out what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 138 S. Ct. at 1217-18. Also relevant is the "language that is *missing* from" §924(c)(3)(B), as "the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit." *Id.* at 1218 (citing *Descamps v. United States*, 570 U.S. 254, 267 (2013)). After all, "[i]f Congress had wanted judges to look into a felon's actual conduct, 'it presumably would have said

so; other statutes, in other contexts, speak in just that way.'" *Id.* (quoting *Descamps*, 570 U.S. at 267-68). In sum, "all this textual evidence" shows that §924(c)(3)(B)—like §16(b) and the ACCA's residual clause—"has no 'plausible' fact-based reading." *Id.* (quoting *Johnson*, 135 S. Ct. at 2562). Indeed, given the identity of the statutory language between §924(c)(3)(B) and §16(b), the language of the two provisions cannot have substantially different meanings just to avoid a constitutional problem. *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one."). The language of both statutes plainly calls for a categorical approach and given the language Congress employed in both §924(c)(3)(B) and §16(b) that categorical approach creates insuperable vagueness problems.[5]

This Court too has repeatedly recognized that the "by its nature" language in "§924(c)(3)(B) … requires the application of a categorical approach, which requires courts to look at the ordinary case of the predicate crime." *Taylor*, 814 F.3d at 378; *see also Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011) (when interpreting

[5] The absurdity of interpreting §924(c)(3)(B) to adopt anything other than a categorical approach is underscored by the fact this subsection, like the "residual clauses" struck down in *Johnson* and *Dimaya* follow an elements clause that is undeniably "categorical." The notion that Congress would switch from a categorical approach to defining crimes of violence in the elements clause to a case-specific approach in the "residual clause" and do so only for §924(c)(3)(B) and not in the context of other statutes with the same structure and materially identical language is simply too extravagant to be maintained.

§924(c)(3), "we adopt a categorical approach, looking to the language of the statute [of conviction], rather than the particular facts of Evans's crimes"). While *Taylor*'s conclusion that §924(c)(3)(B)'s categorical definition is not vague does not survive *Dimaya*, there is no intervening Supreme Court case that would justify revisiting the determination in *Taylor* and *Evans* that §924(c)(3)(B) requires a categorical approach. To the contrary, it is wholly consistent with the Supreme Court's teachings in *Dimaya* and numerous other decisions applying the ordinary-case approach to comparable clauses. *See, e.g.*, *Johnson*, 135 S. Ct. at 2562; *Sykes v. United States*, 564 U.S. 1, 8 (2011); *Chambers v. United States*, 555 U.S. 122, 125 (2009); *Begay v. United States*, 553 U.S. 137, 141 (2008); *James v. United States*, 550 U.S. 192, 202 (2007); *Taylor v. United States*, 495 U.S. 575, 599-602 (1990). This Court thus should adhere to that aspect of its *Taylor* decision and refrain from fundamentally rewriting §924(c)(3)(B) to get around the unmistakable holding of *Dimaya*. *Accord United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) ("Whatever the clean-slate merits of the [real-world facts] construction, we as a panel are not liberty to adopt it: circuit precedent demands a categorical approach to section 924(c)(3)(B)….").

To be sure, before *Dimaya*, this Court's decision in *Shuti v. Lynch*, 828 F.3d 440 (2016), included dicta suggesting an approach similar to the one adopted by the Second Circuit. But the *Shuti* Court's suggestion is neither binding on this Court

nor persuasive. *Shuti* correctly anticipated the result in *Dimaya* and held that, notwithstanding *Taylor*, §16(b) was unconstitutionally vague under *Johnson*. *See Shuti*, 828 F.3d at 449. To distinguish §16(b) from §924(c)(3)(B) (and thus to distinguish *Taylor*'s holding that §924(c)(3)(B) was not vague), the Court opined that "[u]nlike the ACCA and INA, which require a categorical approach to stale predicate convictions, 18 U.S.C. §924(c) is a criminal offense that requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding." *Shuti*, 828 F.3d at 449. *Shuti* thus read *Taylor* as applying a "real-world conduct exception to uphold the constitutionality of 18 U.S.C. §924(c)(3)(B)." *Shuti*, 828 F.3d at 450.

But *Taylor* did not place any weight at all on the distinction between current and prior offenses and never suggested it was applying a "real-world conduct" approach. Instead, *Taylor* squarely held that §924(c)(3)(B)'s use of the phrase "by its nature" compels a categorical approach, and that is the approach *Taylor* applied. *Taylor*, 814 F.3d at 377. The dicta from *Shuti* thus does not displace the clear holding of *Taylor*. Indeed, after this Court decided *Shuti*, the Court reaffirmed that "[i]t use[s] a 'categorical approach' to determine whether an offense constitutes a 'crime of violence' for purposes of § 924(c)(3)." *United States v. Rafidi*, 829 F.3d 437, 444 (6th Cir. 2016) (citing *Evans*, 644 F.3d at 453). Thus, *Evans*, *Taylor*, and *Rafidi* foreclose the Second Circuit's approach. Just as the *Shuti* Court recognized that

"[a]ny dictum in [*Taylor*], purporting to address the constitutionality of the INA's residual clause, is simply that"—dicta—the *Shuti* Court's cursory analysis of §924(c)(3)(B), which was not at issue in that case, is likewise dicta that this Court should disregard as inconsistent with the aspects of *Taylor* that remain binding precedent. *Shuti*, 828 F.3d at 450; *see, e.g.*, *Williams v. Anderson*, 460 F.3d 789, 818 (6th Cir. 2006) (statements that are "not necessary to the resolution of the case" are "dicta").

In all events, *Shuti*'s gloss on *Taylor* must be set aside post-*Dimaya*. Just as the panel in "*Taylor* did not have the benefit of the [Supreme] Court's guidance in" *Welch*, the *Shuti* panel did not have the benefit of *Dimaya*. *Shuti*, 828 F.3d at 450. *Dimaya* made clear that when a statute requires courts to consider a crime "by its nature," the provision "refer[s] to 'the statute of conviction, not the facts of each defendant's conduct.'" 138 S. Ct at 1217 (plurality) (quoting *Taylor*, 495 U.S. at 601). Because "[a]n offense's 'nature' means its 'normal and characteristic quality,'" *id.* (quoting *Webster's Third New International Dictionary* 1507 (2002)), there is "no 'plausible' fact-based reading" of either §16(b) or §924(c)(3)(B)—and certainly not after *Dimaya*. *Id.* at 1217-18.

Accordingly, under both the Supreme Court's and this Court's precedent, §924(c)(3)(B) requires the categorical approach. And that approach, combined with

the "substantial risk" language of that clause, renders §924(c)(3)(B) unconstitutionally vague.

B. The Court Should Vacate the Part of Knight's Sentence Imposed Under §924(c)(3)(B).

In light of the foregoing, the Court should vacate the parts of Knight's sentence imposed under §924(c) that relate to kidnapping and robbery. A defendant may satisfy the definition of "crime of violence" under §924(c)(3) if his crime falls within the "elements clause" in §924(c)(3)(A), which covers felonies that have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." Knight's convictions for kidnapping and robbery do not fall within the elements clause. Thus, those convictions necessarily depend on the unconstitutionally vague definition in §924(c)(3)(B) and must be vacated.

The elements clause in §924(c)(3)(A), like definition in §924(c)(3)(B), requires courts to employ a categorical approach. *See Rafidi*, 829 F.3d at 444. Under the categorical approach, the court focuses "on the statutory definition of the offense, rather than the manner in which an offender may have violated the statute in a particular circumstance." *Id.* (internal quotation marks and citations omitted). In conducting that inquiry, courts "must consider the *least objectionable* conduct that would violate the statute" to determine whether a crime is categorically a crime of violence. *Raybon v. United States*, 867 F.3d 625, 632 (6th Cir. 2017). In other words, the court must ask whether the statute requires *in every instance* proof of the use,

attempted use, or threatened use of physical force against the person or property of another. The Supreme Court has explained that the phrase "physical force" in this context means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

For both robbery and kidnapping, the "least objectionable" conduct that satisfies the statutory definitions for those crimes does not categorically involve the use, attempted use, or threatened use of force. *Raybon*, 867 F.3d at 632. And this Court has never held that either of those crimes fall within the elements clause of §924(c)(3)(A). The §924(c) convictions tied to those crimes thus cannot be sustained under that provision's elements clause.

The statutory text makes clear that these crimes do not categorically require the use or threatened use of violence. The federal kidnapping statute punishes anyone who "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise" another person (with certain exceptions and territorial restrictions not relevant here). 18 U.S.C. §1201. Many of those actions can be accomplished without resort to the use or threat of violence. Indeed the entire point of "decoy[ing]" someone is to lure them "without force." *Black's Law Dictionary* (10th ed. 2014) (defining "Decoy" as "To entice (a person) without force; to inveigle"). Recognizing that reality, numerous courts of appeals have recognized that federal kidnapping and similar state offenses do not

satisfy the elements clause of §924(c)(3). *See United States v. Jenkins*, 849 F.3d 390, 393-94 (7th Cir. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 1980 (2018) ("[K]idnapping is not a crime of violence under the Force Clause"); *United States v. Zamora*, 222 F.3d 756, 764-65 (10th Cir. 2000); *United States v. Williams*, 110 F.3d 50, 52-53 (9th Cir. 1997); *see also Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring) ("Does a conviction for kidnapping ordinarily involve throwing someone into a car trunk or a noncustodial parent picking up a child from daycare?").

Nor does the federal robbery statute categorically require the use or threatened use of violence. That statute proscribes not only "assault[]" of a person "with intent to rob, steal or purloin" property of the United States (which would require the use of force), but also simply "rob[bing] or attempt[ing] to rob" someone of federal property. 18 U.S.C. §2114(a). Because someone could "rob[] or attempt[] to rob[]" a person without using force—for example, stealing property from an unlocked office while no one is there—the statute does not categorically require the use of force to satisfy the elements of the offense. A conviction for federal robbery thus does not fall within the meaning of the elements clause.

In sum, the §924(c) convictions tied to kidnapping and robbery may be sustained only under §924(c)(3)(B). Because that clause is unconstitutionally vague, the Court should vacate those convictions and the 50 years' imprisonment attributable to that unconstitutionally vague law.

CONCLUSION

For the reasons set forth above, this Court should vacate petitioner's sentence under §924(c)(3)(B), remand for resentencing, and grant any other appropriate relief.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,039 words, excluding the parts of the brief exempted by 6 Cir. R. 32(b).

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Date: October 1, 2018

s/Paul D. Clement
Paul D. Clement

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I hereby certify that on October 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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