BANKRUPTCY LAW — BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 — NINTH CIRCUIT HOLDS MOTHER'S DEBT TO COUNTY FOR SON'S JUVENILE DETENTION IS NOT DOMESTIC SUPPORT OBLIGATION AND THEREFORE IS DISCHARGEABLE IN BANKRUPTCY. — *Rivera v. Orange County Probation Department*, 832 F.3d 1103 (9th Cir. 2016).

Domestic support obligations (DSOs), or debts "in the nature of alimony, maintenance, or support . . . of [a] spouse, former spouse, or child,"[1] cannot be discharged in bankruptcy under the U.S. Bankruptcy Code.[2] One of a few, narrowly construed exceptions to the presumption that all eligible bankruptcy filers deserve a "fresh start,"[3] the DSO exception exists to protect familial dependents from financial abandonment. Prior to 2005, courts were split over whether family-support debts were still DSOs when payable to government entities rather than to the dependents themselves.[4] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[5] (BAPCPA), which clarified that a debt "owed to or recoverable by . . . a governmental unit" could indeed be a DSO,[6] ostensibly resolved this discord. But BAPCPA had repercussions for criminal justice: state and local government entities — increasingly reliant on fines and fees to fill the public coffers[7] — gained an opportunity to pursue criminal justice debt collection beyond the exhaustion of debtors' financial resources, while overwhelmed debtors found themselves denied access to the time-honored safety valve ordinarily provided by bankruptcy. Recently, in *Rivera v. Orange County Probation Department*,[8] the Ninth Circuit held that a debt owed by a mother to a county probation department for her son's detention is not a DSO, and that the debt is therefore dischargeable in bankruptcy.[9] While the panel's acerbic opinion accentuates the broader criminal justice–debt issues at play in

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[1] 11 U.S.C. § 101(14A)(B) (2012).

[2] *Id.* § 523(a)(5).

[3] Harris v. Viegelahn, 135 S. Ct. 1829, 1835 (2015) (quoting Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007)).

[4] *See* Rivera v. Orange Cty. Prob. Dep't, 832 F.3d 1103, 1106 (9th Cir. 2016) (citing cases on both sides of the split).

[5] Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

[6] *Id.* § 211(2) (codified at 11 U.S.C. § 101(14A)).

[7] *See, e.g.*, *Developments in the Law — Policing*, 128 HARV. L. REV. 1706, 1723 (2015); *see also* Emma Anderson et al., *State-by-State Court Fees*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees [http://perma.cc/ALD5-R7QF] (cataloguing the most common fees charged to offenders nationwide and showing that forty-eight states have increased fees since 2010).

[8] 832 F.3d 1103.

[9] *Id.* at 1109.

the growing number of cases like *Rivera*, the framework it created is suitable only for a comparatively circumscribed range of prospective parties.

Maria Rivera's juvenile son was incarcerated for 593 days by the Orange County Probation Department.[10] Under California statute, counties are authorized to charge the parents of a detained minor for the "reasonable costs of support of the minor" while so detained, though such charges are at the counties' discretion.[11] The statute prohibits counties from recovering from parents the costs of "incarceration, treatment, or supervision"[12] but permits charges for "food and food preparation, clothing, personal supplies, and medical expenses."[13] Pursuant to this statute, Orange County (the County) sent Rivera a bill in the amount of $16,372.[14] Rivera reportedly sold her house in an attempt to pay down the debt, eventually recompensing the County a total of $9,508.60.[15] But after she failed to appear at a hearing intended to gauge her ability to pay, the juvenile court entered a judgment against her for $9,905.40.[16]

Several months later, Rivera filed a bankruptcy petition in the U.S. Bankruptcy Court for the Central District of California and was granted a full discharge.[17] She had no assets to allocate.[18] The County, on the assumption that Rivera's debt was a DSO and thus excepted from discharge,[19] persisted in its collection attempts, prompting Rivera to file a motion to reopen her bankruptcy case.[20] The bankruptcy court granted the motion, but — after several hearings — concluded that Rivera's debt was in fact a DSO, denying her motion to hold the County in contempt of the discharge order.[21] Rivera appealed.[22] The U.S. Bankruptcy Appellate Panel for the Ninth Circuit "affirmed on

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[10] *In re* Rivera, 511 B.R. 643, 645 (B.A.P. 9th Cir. 2014).

[11] CAL. WELF. & INST. CODE § 903(a) (Deering 2016).

[12] *Id.* § 903(b).

[13] *Id.* § 903(c).

[14] *Rivera*, 832 F.3d at 1105.

[15] *Id.*; *Rivera*, 511 B.R. at 646. The Bankruptcy Appellate Panel noted that Rivera's declaration that she voluntarily paid the sum to the County was inconsistent with the declaration of the County's collection manager that the sum was paid by an escrow company to satisfy a security interest in Rivera's home. *Rivera*, 511 B.R. at 646 n.5.

[16] *Rivera*, 511 B.R. at 646. This time it was the Ninth Circuit's turn to point out an inconsistency: the judgment against Rivera was substantially in excess of the remaining balance of the County's original bill. *See Rivera*, 832 F.3d at 1105 n.1. The County was unable to account for this disparity. *Id.*

[17] *See Rivera*, 511 B.R. at 646.

[18] *Id.*

[19] *See* 11 U.S.C. § 523(a)(5) (2012) ("A discharge . . . does not discharge an individual debtor from any debt . . . for a domestic support obligation.").

[20] *Rivera*, 511 B.R. at 646.

[21] *Id.* at 646–48.

[22] *Id.* at 648.

largely the same ground,"[23] concluding that "the debt [Rivera] owes to Orange County is excepted from discharge as a [DSO]."[24]

The Ninth Circuit reversed.[25] Writing for the panel, Judge Reinhardt[26] began by identifying the competing policy concerns at issue. Bankruptcy, explained the panel, is meant to "give[] people from all walks of life a 'fresh start'" by allowing them to discharge insurmountable debt.[27] Yet bankruptcy protections are subject to an even greater interest: the "overriding public policy favoring the enforcement of familial obligations," enshrined in the DSO exception.[28] The panel next discussed the changes to the DSO exception under BAPCPA, pointing out that BAPCPA merely clarified that DSOs could be owed to "a governmental unit," leaving untouched the qualifying range of underlying debts.[29] Crucially, the panel found that this language referred only to entities within the "government's family support infrastructure,"[30] such as foster care systems or family courts. The issue, then, was whether a debt to a government entity outside the family-support infrastructure (here, a county probation department) could also be "in the nature of . . . support" under the DSO exception.[31]

The panel's answer: no.[32] To reach this conclusion, the panel distinguished *Rivera* from pre-BAPCPA Ninth Circuit cases in which debts to government entities had been found to qualify as DSOs.[33] In those cases, wrote the panel, the government creditor had been primarily concerned with establishing or guaranteeing the juvenile's welfare.[34] Not so in *Rivera*. Under the panel's framework, it is not enough that costs merely "fall under the general rubric of support"; to qualify under the pre- or post-BAPCPA DSO exception, the "principal purpose" of the government entity must be juvenile welfare.[35] The Bankruptcy Appellate Panel's conclusion was therefore inapposite, since the County's foremost goal had not been to ensure the integrity of Rivera's son's domestic situation, but rather to maintain public safe-

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[23] *Rivera*, 832 F.3d at 1105.

[24] *Rivera*, 511 B.R. at 656.

[25] *Rivera*, 832 F.3d at 1113.

[26] Judge Reinhardt was joined by Judge Wardlaw and District Judge Bennett, sitting by designation from the Northern District of Iowa.

[27] *Rivera*, 832 F.3d at 1105 (quoting Harris v. Viegelahn, 135 S. Ct. 1829, 1835 (2015)).

[28] *Id.* at 1106.

[29] *Id.* (quoting 11 U.S.C. § 101(14A)(A)(ii) (2012)); *see also id.* at 1106–07.

[30] *Id.* at 1107.

[31] *Id.*

[32] *Id.* at 1108–09.

[33] Namely, *In re Chang*, 163 F.3d 1138 (9th Cir. 1998), and *In re Leibowitz*, 217 F.3d 799 (9th Cir. 2000). *See Rivera*, 832 F.3d at 1108.

[34] *Rivera*, 832 F.3d at 1108.

[35] *Id.* at 1110.

ty.[36] Any "support" provided by the County was merely incidental to its law enforcement objectives, making it "both inaccurate and inconsistent with precedent" to classify Rivera's debt as a DSO.[37]

This conclusion, offered the panel, is consistent with the purposes of the Bankruptcy Code generally and of the DSO exception specifically, and is supported by compelling public policy concerns. Holding for Rivera provides her with the "fresh start" that is at the core of bankruptcy law and also bolsters her chances of fulfilling future support obligations to her son.[38] Holding for the County, on the other hand, would disadvantage both Rivera and her son by further undermining the family's precarious financial situation, while supporting only the County coffers.[39] Further, the County's burdensome billing practices do not even promote its presumptive goal: to "transform [Rivera's son] into a productive member of society."[40] Finally, the panel called attention to the broader phenomenon of governmental units "imposing fiscal burdens on those who can least afford them" in order to raise revenue.[41] Citing a wide range of literature discussing the negative effects of such practices, the panel concluded with a biting reprimand to the County and a charge to begin "exercis[ing] its discretion in a way that protects the best interests of minors and the society they will join as adults, instead of following a directly opposite and harmful course."[42]

These scathing closing thoughts capture the heart of the panel's opinion: a purposeful effort to mitigate some of the inequities produced by mushrooming criminal justice debt and the tenacious collection efforts that are now standard procedure in counties and municipalities across the country. To achieve this aim, the panel crafted a DSO exception framework that bids courts to examine governmental motives in determining whether an expense is in the nature of support. But although this approach enabled the panel to highlight the serious policy concerns that this system of criminal justice debt raises for a whole class of debtors, the resultant framework is appropriate for a decidedly more limited range of factual scenarios.

The panel is not alone in noting the deeply troubling nature of a criminal justice system converted into a fundraising mechanism. Unhappily, revenue-conscious statutes and practices are now commonplace nationwide, in all manner and at all stages of criminal justice–related matters, as has been documented with concern by a great range

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[36] *Id.* at 1107.
[37] *Id.* at 1108 (citing 11 U.S.C. § 101(14A) (2012)).
[38] *Id.* at 1109–10.
[39] *Id.* at 1110.
[40] *Id.* at 1112.
[41] *Id.*
[42] *Id.*

of commentators.[43] The primary debtors under this regime are among the nation's poorest and are more likely to be disadvantaged because of race, education level, mental illness, or substance abuse, among other factors.[44] Furthermore, overburdened lower criminal courts — often subject to perverse incentive structures and coincident internal pressure to raise funds[45] — sometimes fail to conscientiously assess defendants' realistic ability to pay, even when constitutionally required to do so.[46] Inability to pay these legal financial obligations (LFOs) typically burdens offenders with accumulating interest, late fees, and collection fees, pulling them into a vicious cycle of penalties.[47] In short, while reliance on courts as "revenue generators, for themselves as well as for general state coffers"[48] may indeed allow governments to successfully finance some public institutions,[49] this reliance creates what is

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[43] *See, e.g.*, ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [http://perma.cc/JU95-2ZZ3]; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [http://perma.cc/6AFV-8KGX]; COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2–6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [https://perma.cc/AP6Z-JJCD]; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1098–102 (2015); Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2016).

[44] *See* BANNON ET AL., *supra* note 43, at 4; COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 4, 8 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf [https://perma.cc/3NPV-P2R6].

[45] *See, e.g.*, ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 25–28 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [http://perma.cc/LF7S-6EFE] (describing the perverse incentive structure of New Orleans criminal court funding).

[46] *See* Bearden v. Georgia, 461 U.S. 660, 667–68 (1983) (holding pursuant to the Fourteenth Amendment that states may not "imprison a person solely because he lack[s] the resources to pay" a fine unless the nonpayment was willful); *see also* HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 38 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [http://perma.cc/9XNY-J3PS] ("Whether by negligence or by design, some courts and probation companies . . . simply treat[] all offenders as though their failure to pay is willful.").

[47] *See* COUNCIL OF ECON. ADVISERS, *supra* note 44, at 61 ("[T]he burden of these payments can increase for individuals that cannot pay them on time, with late fees, processing fees, interest, and even incarceration for failure to pay these debts."); Dear Colleague Letter, Vanita Gupta & Lisa Foster, Civil Rights Div., U.S. Dep't Just., Fines and Fees in State and Local Courts 2 (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download [http://perma.cc/LR2Z-JKAQ].

[48] Natapoff, *supra* note 43, at 1102.

[49] *But see* COUNCIL OF ECON. ADVISERS, *supra* note 43, at 4 ("[G]rowing evaluation evidence suggests that a policy that funds government through criminal justice fees and fines is often ineffective.").

functionally a system of regressive taxation, with formidable consequences for society's most vulnerable members.[50]

This context informed the panel's consideration of the California statute authorizing counties to bill parents for the "reasonable costs of support" of incarcerated juveniles.[51] While the statute purports to constrain counties from levying "excessive charges" by limiting costs to parents' ability to pay, its primary method of doing so is the nebulous directive that counties "take into consideration" families' financial circumstances when assessing costs.[52] Vague exhortations like this are nearly impossible to enforce and are regularly ignored in adult and juvenile contexts alike.[53] Provisions permitting parental charges for juvenile corrections are common throughout the states,[54] and — unsurprisingly — they produce the same harmful effects typical to the wider class of LFOs.[55] However, while LFOs generally are excepted from discharge in bankruptcy,[56] courts have declined to extend this exception to debts accrued for the wrongful actions of another,[57] such as parental debt for juvenile corrections. The only potential barrier to dischargeability for debts like Rivera's, then, is the post-BAPCPA DSO exception for debts in the nature of support.[58]

The panel's options for disposing of this obstacle were limited. Because the California statute explicitly limited the County to billing for "the reasonable costs of support of the minor,"[59] comprising charges for the sorts of basic necessities the Bankruptcy Appellate Panel had reasonably termed "quintessential[] support expenses,"[60] the panel was forced to pivot away from the nature of the expenses themselves to the

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[50] *See id.*; HUMAN RIGHTS WATCH, *supra* note 46, at 22–37; Natapoff, *supra* note 43, at 1098–102.

[51] CAL. WELF. & INST. CODE § 903 (Deering 2016); *see also Rivera*, 832 F.3d at 1112.

[52] WELF. & INST. § 903(c).

[53] *See* JESSICA FEIERMAN ET AL., JUVENILE LAW CTR., DEBTORS' PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 6 (2016), http://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf [http://perma.cc/A3YV-R99X]; *see also* sources cited *supra* note 46 and accompanying text.

[54] *See* FEIERMAN ET AL., *supra* note 53, at 4, 11–22; *see also, e.g.*, IDAHO CODE § 20-524 (2016); MISS. CODE ANN. § 43-21-615(2) (2015); NEB. REV. STAT. § 43-290 (2014).

[55] *See* FEIERMAN ET AL., *supra* note 53, at 6–8, 23; ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 47–48 (2016).

[56] *See* 11 U.S.C. § 523(a)(7), (a)(13) (2012); *see also* HARRIS, *supra* note 55, at 3; Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. OF SOC. 1753, 1763, 1788 (2010).

[57] *See, e.g.*, *In re* Hickman, 260 F.3d 400, 404 (5th Cir. 2001) ("Congress intended to limit the [exception]'s application to forfeitures imposed upon a wrongdoing debtor.").

[58] 11 U.S.C. § 101(14A); *see also Rivera*, 832 F.3d at 1105.

[59] *See supra* notes 11–13 and accompanying text.

[60] *In re* Rivera, 511 B.R. 643, 654 (B.A.P. 9th Cir. 2014); *cf., e.g.*, *In re* Gianakas, 917 F.2d 759, 763 (3d Cir. 1990) ("An obligation that serves to maintain daily necessities such as food, housing and transportation is indicative of a debt intended to be in the nature of support.").

character of the creditor. Under the framework conceived by Judge Reinhardt, it is not enough merely that "the underlying expenses . . . can be described ordinarily as support expenses"; rather, judges should assess whether the creditor's "principal purpose" was the promotion of the juvenile's domestic welfare.[61] While the panel presented this framework as a direct extension of pre-BAPCPA Ninth Circuit reasoning[62] in cases like *In re Chang*[63] and *In re Leibowitz*,[64] it appears original to *Rivera*. It is true that the winning public creditors in *Chang* and *Leibowitz* were well within what the *Rivera* panel subsequently termed "the government's family support infrastructure."[65] But the fact that these dispositions would survive the *Rivera* framework is more likely the result of serendipity than parallel reasoning, as neither *Chang* nor *Leibowitz* inquired into the creditor's purposes. In fact, they appear to caution against such inquiries, preferring instead to consider the nature of the specific expenses at issue: *Chang* explicitly noted that "the identity of the payee is less important than the nature of the debt,"[66] and *Leibowitz* established that debts qualify as DSOs when the underlying expenses "benefitted" the juvenile when spent.[67] Under the *Rivera* framework, however, the identity and "larger governmental purpose" of the creditor predominate over the function or effects of the costs giving rise to the debt.[68]

Although this new framework produced a satisfactory result in *Rivera*, it may prove less suitable to govern amorphous or opportunistic parties, even within the relatively narrow confines of juvenile-justice debt. The Orange County Probation Department is unlikely to be confused with a family-support entity under any set of facts,[69] but other potential creditors are not so easily categorized. In some jurisdictions, for instance, juvenile-corrections programs are housed in the same department as foster care services,[70] producing a discordant conception of departmental "purpose." Juvenile group homes, typically "considered less restrictive than juvenile detention centers but more re-

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61 *Rivera*, 832 F.3d at 1110.

62 *Id.* at 1107 n.2.

63 163 F.3d 1138 (9th Cir. 1998).

64 217 F.3d 799 (9th Cir. 2000).

65 *Rivera*, 832 F.3d at 1107.

66 *Chang*, 163 F.3d at 1141.

67 *Leibowitz*, 217 F.3d at 803 (writing that a debt is in the nature of support when its "basis . . . benefitted the child[]").

68 *Rivera*, 832 F.3d at 1107; *see also id.* at 1110–11.

69 *Id.* at 1107 ("The Department's mission statement describes it as a 'public safety agency' that makes use of 'efficient and research supported corrections practices to [r]educe [c]rime . . . .'").

70 *See, e.g.*, *Juvenile Corrections*, S.D. DEP'T OF CORRECTIONS, https://doc.sd.gov/juvenile [http://perma.cc/RAW4-KLDB] (last visited Jan. 27, 2017).

strictive than family foster care placements,"[71] pose another puzzle. These programs can house juvenile public-welfare recipients as well as juvenile offenders, offering a combination of supportive and public-safety services.[72] Nonprofits that partner with both juvenile-welfare and juvenile-corrections agencies further confound the "family support infrastructure" rubric, especially in the provision of noncoercive services like in-home treatments for troubled minors.[73] Finally, the *Rivera* framework — turning as it does upon which government subdivision spent the cash — may be vulnerable to manipulation by clever administrative partitioning on the part of creditors.

It is fitting that courts should countenance the serious consequences of criminal justice debt within the context of bankruptcy. Long a bastion of grace for the financially distressed, bankruptcy is a matter of "public as well as private interest" in its provision of "a new opportunity in life" to the overwhelmed debtor.[74] As a general matter, bankruptcy protections grant successful filers increased future earnings, extended life expectancy, and a substantially reduced likelihood of home foreclosure[75] — meaningful metrics to any debtor, but especially relevant to the average bankruptcy filer, who earns less than the average employed high school dropout.[76] Yet, if bankruptcy is to provide relief to the wider class of juvenile criminal justice debtors, it is unlikely to do so through so narrow an opinion as *Rivera*. The panel's condemnation of unscrupulous LFO exaction is striking in its force, but its framework is ultimately too limited to guarantee safety valves to all who are "unfairly conscript[ed]"[77] to subsidize public goods under the DSO exception.

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[71] DEV. SERVS. GRP., INC., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, GROUP HOMES 1 (2008), http://www.ojjdp.gov/mpg/litreviews/Group_Homes.pdf [http://perma.cc/4WFX-RMD7].

[72] *See id.*

[73] *See, e.g.*, *Direct Services*, CTR. ON JUV. & CRIM. JUST., http://www.cjcj.org/Direct-services.html [http://perma.cc/24V9-YGEY]; *Solutions for States*, YOUTH VILLAGES, http://www.youthvillages.org/how-we-succeed/solutions-for-states.aspx [http://perma.cc/8PH8-TXRU].

[74] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[75] Will Dobbie & Jae Song, *Debt Relief and Debtor Outcomes: Measuring the Effects of Consumer Bankruptcy Protection*, 105 AM. ECON. REV. 1272, 1291–300 (2015).

[76] *See id.* at 1280; U.S. CENSUS BUREAU, SELECTED CHARACTERISTICS OF PEOPLE 15 YEARS OLD AND OVER BY TOTAL MONEY INCOME IN 2015, WORK EXPERIENCE IN 2015, RACE, HISPANIC ORIGIN, AND SEX, http://www2.census.gov/programs-surveys/cps/tables/pinc-01/2016/pinc01_3_1_1.xls [http://perma.cc/SXQ6-AFD8].

[77] *Rivera*, 832 F.3d at 1112.