



**GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE**

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2009 PREVIEW

UPDATE: FEBRUARY 22, 2010

SECTION I: OVERVIEW

Introduction

Since our last update on October 26, 2010, the Supreme Court has granted certiorari in an additional 18 cases to be argued this Term. That brings the total for the Term to 80 new cases, along with reargument of the *Citizens United* case. That number is roughly consistent with recent practice: Last Term, the Court granted plenary review in 79 cases, and in each of the last ten years the number of granted cases has ranged from 71 to 85.¹

Criminal cases continue to make up a large portion of the granted petitions, with seven of the most recent 18 grants coming in criminal cases. Among them is *Renico v. Lett* (09-338), a notable fourth case of the Term (and third from Michigan) challenging a Sixth Circuit grant of habeas relief under the Anti-Terrorism and Effective Death Penalty Act. The Court also granted certiorari in its first Fourth Amendment case of the Term, *City of Ontario v. Quon* (08-1332), in which it will consider the privacy expectations of a government employee in text messages sent on his official work pager. If the Court were to reach broad questions about Fourth Amendment expectations of privacy in text messages generally – and it is not clear whether it will do so – then this case could give rise to a foundational ruling applying the Fourth Amendment to a new and widespread communications technology.

Business cases also remain well-represented on the docket, with an additional eight cases recently granted. Among them are the Term’s first environmental law case, *Monsanto Company v. Geertson Seed Farms* (09-475), regarding the standard for issuance of an injunction under the National Environmental Policy Act, and *Rent-A-Center v. Jackson* (09-497), the third case of the Term raising questions about arbitral authority and the scope of arbitration agreements.² The Court also will decide whether the National Labor Relations Board has authority to decide cases with only two of its sitting members in *New Process Steel v. National Labor Relations Board* (08-1457), a question that may have significant practical effects if the President’s nominee for the Board remains unconfirmed by the Senate.

Additional Term Highlights

For the first time in several years, the Court will address the issue of gay rights, at least indirectly, in two First Amendment cases. *Doe v. Reed* (09-559) arises from a public referendum seeking to overturn a Washington law, known as the “everything but marriage” act, that expands domestic-partnership rights. Opponents of the referendum invoked the state’s public records law and sought access to the petitions, planning to post

¹ See <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/summary-memo-final.pdf>.

² The two other cases are *Stolt-Nielsen v. AnimalFeeds International Corp.* (08-1198) and *Granite Rock Co. v. International Brotherhood of Teamsters* (08-1214).

signatories' names on the internet. The leader of the referendum movement, a group called Protect Marriage Washington (PMW), opposed disclosure, citing a "reasonable probability" that signatories would face "threats, harassment and reprisals" from supporters of domestic partnerships and gay-marriage rights. The Ninth Circuit ruled against PMW and for disclosure, reasoning that even if petition signatures collected publicly and twenty to a page constituted protected speech, any incidental burden imposed by disclosure was justified by the state's interest in promoting transparency and accountability in its elections. The Supreme Court stayed the Ninth Circuit ruling, effectively barring disclosure until after the referendum election in November; ultimately, the voters rejected the referendum and the "everything but marriage" act survived. Now the Supreme Court will take up the First Amendment issue on the merits. For advocates on both sides of the gay rights issue, as important as the Court's ultimate conclusion may be whether the Court's opinion endorses or rejects the underlying premise of PMW's suit: that "citizens who support a traditional view of marriage" are a beleaguered group that cannot speak "freely and without fear."

Though the legal issues are different, the First Amendment claimants in *Christian Legal Society v. Martinez* (08-1371) also argue that they have been penalized for their beliefs regarding sexual orientation, religiously grounded, which do not conform to the prevailing views in their law-school community. This case raises an issue that has been percolating in the lower courts since at least the mid-1990s: Whether a school may deny official recognition (and the benefits it brings) to religious student groups thought to violate the school's non-discrimination policy by excluding students on the basis of their religion or sexual orientation. Here, Hastings College of Law denied recognition to a proposed Christian Legal Society (CLS) chapter under its non-discrimination policy because CLS excluded students who would not affirm "devotion to Jesus Christ" and refrain from sexual conduct "outside marriage between a man and a woman." According to CLS, that decision violated the group's First Amendment speech, association, and religious exercise rights: as applied here, Hastings' policy discriminates against "religious and morally traditional viewpoints" – other student groups may limit membership or leadership to people of shared views – and makes it impossible for CLS to control its own associational message and identity. Hastings, for its part, argues that its policy is in fact religion- and viewpoint-neutral, extending to all student groups without exception; that it addresses conduct, not speech; and that rather than directly mandating any change in CLS membership or leadership it simply conditions certain public benefits on compliance with a neutral non-discrimination policy. One factor that might affect the Court's decision is that this case – unlike others in which the Court has denied certiorari – arises in the law-school context, where the costs to more mature law students of exclusion from a group like CLS might be thought to be less severe.

SECTION II: CASE SUMMARIES

Constitutional Law

First Amendment

Christian Legal Society v. Martinez (08-1371)

Question Presented:

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

Summary:

Hastings College of the Law (“Hastings”), a public law school in San Francisco, denied recognition as a student group to the Christian Legal Society (“CLS”), on the ground that the group’s membership requirements discriminate based on religion and sexual orientation in violation of Hastings’ non-discrimination policy. Specifically, CLS denies voting privileges and the right to hold leadership positions to students who do not sign a “Statement of Faith” affirming “devotion to Jesus Christ” or who engage in sexual conduct “outside marriage between a man and a woman.” CLS is the only student group from which Hastings has withheld recognition, and also the only group that has refused to comply with the Hastings non-discrimination policy or sought to be exempted from it.

In response to being denied the privileges of recognized student groups (including access to certain school facilities and eligibility to apply for funding), CLS filed suit, alleging violations of its speech, associational, and religious exercise rights under the First Amendment. The Ninth Circuit rejected CLS’s claims in a two-sentence memorandum opinion, holding that Hastings’ requirement that recognized student groups be open to all students as members is viewpoint-neutral and reasonable. CLS argues that the Ninth Circuit decision conflicts with *Boy Scouts of America v. Dale*, in which the Supreme Court held that application of a non-discrimination law to compel the Boy Scouts to accept a gay man as a scoutmaster violated the Boy Scouts’ freedom of expressive association, and also with Supreme Court cases prohibiting universities from denying resources to student groups based on the groups’ religious worship or viewpoint. Hastings defends its policy on the ground that it does not single out religion or religious viewpoints, but is instead applicable to all groups, and that unlike the non-discrimination law at issue in *Dale*, it does not force CLS to change its membership but only conditions certain public benefits on compliance with neutral non-discrimination rules.

Decision Below: 319 Fed. App’x 645 (9th Cir. March 17, 2009)

Petitioner’s Counsel of Record:

Michael W. McConnell, Stanford Law School

Respondent’s Counsel of Record:

Gregory G. Garre, Latham & Watkins

Elizabeth A. Seaton, National Center for Lesbian Rights

***Doe v. Reed* (09-559)**

Questions Presented:

The district court granted a preliminary injunction protecting against public disclosure, as opposed to private disclosure to the government only, of those signing a petition to put a referendum on the ballot (“petition signers”). The Ninth Circuit reversed, concluding that the district court based its decision on an incorrect conclusion of law when it determined that public disclosure of petition signers is subject to, and failed, strict scrutiny. The questions presented are:

1. Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers.

2. Whether compelled public disclosure of identifying information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.

Summary:

In 2009, a group called Protect Marriage Washington (PMW) submitted a petition with over 138,500 signatures, seeking, pursuant to the Washington Constitution, a voter referendum on a recently enacted bill expanding the rights and benefits accorded to domestic partners. Washington’s Public Records Act (PRA) makes public records, including referendum petitions, available for public inspection. Two groups opposed to the referendum submitted public records requests for the referendum petition, stating that they “intend[ed] to publish the names of petition signers on the internet.”

PMW sought a preliminary injunction against public release of the petition signatories, arguing that disclosure would expose signatories to a “reasonable probability of threats, harassment, and reprisals.” The district court granted the injunction, the Ninth Circuit reversed, and ultimately the Supreme Court reinstated the preliminary injunction.

On the merits, the Ninth Circuit ruled against PMW and for disclosure. The court of appeals assumed that the act of signing a referendum petition was protected speech, but held that burdens on that speech were subject to intermediate scrutiny under *O’Brien* rather than to the strict scrutiny urged by PMW. Applying *O’Brien*, the court found that the PRA’s disclosure regime advanced important state interests in “promoting transparency and accountability” in elections. Those interests, the court concluded, were sufficiently important to justify the PRA’s incidental limitation on the speech of petition signatories – speech, the court reasoned, that was in any event not anonymous, given that signatures were collected in public on

sheets with spaces for 20 names and subject to public observation during the state's signature verification process.

Petitioners continue to argue that strict scrutiny should apply to the PRA, given the heavy burden imposed by compelled disclosure on core political belief and expression, relying in part on *NAACP v. Alabama*, which prohibited forced disclosure of NAACP's membership lists. Respondent argues that *NAACP* is inapposite, given that the record here lacks any evidence of actual threats to or fear on the part of petition signers. Commentators have noted parallels between this case and the earlier dispute in the Supreme Court over broadcasting the Proposition 8 trial, regarding a California ballot initiative banning same-sex marriage. In both, opponents of domestic rights for gay couples have argued that publicizing their identities or the proceedings in which they are involved would subject them to persecution, and both present "Internet-age clash[es] between public disclosure and privacy in the context of anti-gay rights ballot initiatives."

<http://legaltimes.typepad.com/blt/2010/01/supreme-court-takes-up-case-on-petitionsigner-privacy.html>

Decision Below: 586 F.3d 671 (9th Cir. 2009)

Petitioner's Counsel of Record:

James Bopp Jr., Bopp, Coleson & Bostrom

Respondent's Counsel of Record:

William Berggren Collins, Deputy Solicitor General for the State of Washington

Frederick J. Dullanty Jr., Counsel of Record for Washington Coalition for Open Government

Kevin J. Hamilton, Counsel of Record for Washington Families Standing Together

Business Law

Securities

Morrison v. National Australia Bank (08-1191)

Questions Presented:

1. Whether the antifraud provisions of the United States securities laws extend to transnational frauds where: (a) the foreign-based parent company conducted substantial business in the United States, its American Depository Receipts were traded on the New York Stock Exchange and its financial statements were filed with the Securities Exchange Commission ("SEC"); and (b) the claims arose from a massive accounting fraud perpetrated by American citizens at the parent company's Florida based subsidiary and were merely reported from overseas in the parent company's financial statements.
2. Whether this Court, which has never addressed the issue of whether subject matter jurisdiction may extend to claims involving transnational

securities fraud, should set forth a policy to resolve the three-way conflict among the circuits (*i.e.*, District of Columbia Circuit versus the Second, Fifth and Seventh Circuits versus the Third, Eighth and Ninth Circuits).
3. Whether the Second Circuit should have adopted the SEC's proposed standard for determining the proper exercise of subject matter jurisdiction in transnational securities fraud cases, as set forth in the SEC's amicus brief submitted at the request of the Second Circuit, and whether the Second Circuit should have adopted the SEC's finding that subject matter jurisdiction exists here due to the "material and substantial conduct in furtherance of" the securities fraud that occurred in the United States.

Summary:

Respondent HomeSide Lending, a Florida-based mortgage servicer, was at all relevant times a wholly-owned subsidiary of respondent National Australia Bank (NAB). Petitioners, who are all Australian citizens, alleged that HomeSide overvalued its assets, that it did so as a result of NAB's conduct, and that NAB disseminated materially false and misleading statements concerning HomeSide's assets. Petitioners claim they were injured by this conduct because they bought NAB shares in Australia based on the artificially inflated price of NAB's securities. At issue is whether there is a private right of action under the Securities Exchange Act of 1934 when the fraudulent activity and injury occur abroad, and how much conduct must take place in the United States in order for such a private right of action to exist. The Exchange Act itself is silent as to its application to activity outside of the United States. However, courts in every circuit have recognized that the Act extends to transnational securities fraud, or securities fraud involving activity in more than one country, to varying extents. Petitioners claim that the Exchange Act applies because HomeSide perpetrated the fraud which resulted in their injury in the United States. The district court dismissed their claim, however, concluding that it lacked subject matter jurisdiction because most of the material conduct giving rise to petitioners' injury occurred in Australia. The Second Circuit affirmed, noting that there was a lengthy chain of events between the conduct in America and the harm to the petitioners. Justice Sotomayor took no part in consideration of the petition.

Decision Below: 547 F.3d 167 (2d Cir. 2008)

Petitioners' Counsel of Record:

James W. Johnson, Labaton Sucharow LLP

Respondents' Counsel of Record:

George T. Conway III, Wachtell Lipton Rosen & Katz

Bankruptcy

Hamilton, Chapter 13 Trustee v. Lanning (08-998)

Question Presented:

Limited by the Court to the following question: Whether in calculating the debtor's 'projected disposable income' during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

Summary:

Under Chapter 13, a debtor must file a plan detailing how his or her creditors will be repaid. The court may not approve the plan over a creditor or trustee's objection unless it proposes to pay the creditors in full or to pay all of the debtor's "projected disposable income" during the lifetime of the plan. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), "disposable income" is calculated by subtracting various permissible expenses from the debtor's average monthly income for the preceding six months. The BAPCPA does not, however, define "*projected* disposable income." The question in this case is whether the BAPCPA formula for "disposable income," looking back to the prior six months, also governs the determination of "projected disposable income," or whether courts – as they often did prior to BAPCPA – also may consider foreseeable changes to the debtor's income during the plan period when they calculate projected disposable income.

In this case, respondent had \$36,793.36 in unsecured debt and filed a Chapter 13 petition. Her regular monthly income at the time of filing would give her a monthly disposable income of only \$149.03. However, because of two bonuses she received in the six months preceding her Chapter 13 filing, her "disposable income" under the BAPCPA formula was \$1,114.98. After considering respondent's actual financial circumstances, the bankruptcy court, over the trustee's objection, departed from the BAPCPA formula and approved a repayment plan of \$144 per month, over the trustee's objection.

The trustee argues that BAPCPA eliminated any judicial discretion in calculating "projected disposable income," creating a rigid formula based on the six months preceding a Chapter 13 filing. According to the trustee, "projected disposable income" is the same as "disposable income" under BAPCPA, and respondent therefore must repay her BAPCPA "disposable income" of \$1,114.98 each month. In rejecting these arguments and deciding to use its discretion, the bankruptcy court reasoned that petitioner's approach would make it impossible for debtors to file a feasible repayment plan if their income dropped from the pre-petition monthly average. The bankruptcy appellate panel and the Tenth Circuit affirmed.

Decision Below: 545 F.3d 1269 (10th Cir. 2008)

Petitioner’s Counsel of Record:

Jan Hamilton, Chapter 13 Trustee’s Office, District of Kansas, Topeka
Division

Respondent’s Counsel of Record:

Thomas C. Goldstein, Akin Gump Strauss Hauer & Feld, LLP

Labor and Employment

New Process Steel v. National Labor Relations Board (08-1457)

Question Presented:

Does the National Labor Relations Board have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board"?

Summary:

This case questions whether the National Labor Relations Board (“Board”) had authority to issue any decisions from December 31, 2007 to the present, during which it was comprised of only two members. Petitioner New Process Steel reached a collective bargaining agreement with International Association of Machinists and Aerospace Workers, AFL-CIO (“Union”), but withdrew its recognition of the Union after petitioner’s employees complained that they had actually voted against ratification of the agreement. The Union filed unfair labor practices charges against petitioner, and an ALJ for the Board ruled against petitioner. On review, the Board agreed with the ALJ, affirming that petitioner had unlawfully withdrawn recognition from the Union. Petitioner appealed to the Seventh Circuit, arguing that the Board lacked authority to issue a decision when it consisted of only two members and that the Board had incorrectly decided the substantive charges against it. The court ruled against petitioner on both issues.

Section 3(b) of the NLRA authorizes the Board “to delegate to any group of three or more members any or all of the powers which it may itself exercise.” It also provides that “three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation].” In late 2007, the Board anticipated losing two of its four members when their recess appointments expired. It therefore delegated its authority to three of the members, and believed that this would allow the Board to function with a two-member quorum. Petitioner, however, argues that the statute’s plain meaning requires the Board to have three members “at all times,” and that any other reading effectively deletes the first part of the sentence. The Board did not oppose the petition for certiorari but argues that if the Board properly delegates its authority to a group of three or more, any two of those members can

constitute quorum thereafter and can properly exercise the delegated powers.

Decision Below: 564 F.3d 840 (7th Cir. 2009)

Petitioner's Counsel of Record:

Sheldon E. Richie, Richie & Gueringer, P.C.

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

Arbitration

Rent-A-Center v. Jackson (09-497)

Question Presented:

Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act (FAA) is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?

Summary:

On his first day of work at Rent-A-Center, respondent Jackson signed an arbitration agreement that gave the arbitrator the authority to decide, among other things, all disputes relating to the enforceability of the arbitration agreement itself. When respondent subsequently sued for racial discrimination, Rent-A-Center moved to dismiss based on the arbitration agreement. Respondent claimed the arbitration agreement was unconscionable because it was a non-negotiable condition of employment and one-sided. The district court dismissed Jackson's complaint, finding that the agreement provided the arbitrator with the exclusive power to determine whether or not the agreement to arbitrate was enforceable. The Ninth Circuit disagreed, holding that courts should decide threshold questions of enforceability where, as here, a party challenges the validity of the arbitration provisions specifically and not the validity of an entire contract. The court reasoned that when an arbitration agreement is challenged as being unconscionable, it should be up to a court to decide whether the parties agreed to arbitrate in the first place. Rent-A-Center answers that even threshold questions such as the enforceability of an arbitration agreement can be decided by arbitrators when the parties clearly and unmistakably give such authority to the arbitrator. A contrary holding, in their view, will allow parties to avoid arbitration merely by claiming unconscionability.

Decision Below: 581 F.3d 912 (9th Cir. 2009)

Petitioner's Counsel of Record:

Robert F. Friedman, Littler Mendelson, P.C.

Respondent's Counsel of Record:

Ian E. Silverberg, Hardy Law Group

ERISA

Hardt v. Reliance Standard Life Insurance Co. (09-448)

Questions Presented:

Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) provides: “In any action under this subchapter ... by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party.” 29 U.S.C. § 1132(g)(1).

The Fourth Circuit in the decision below held that “only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action,” while the Second, Fifth and Eleventh Circuits have declined to read a “prevailing party” requirement into § 502(g)(1) and other circuits have issued conflicting authority. The Fourth Circuit also held that the “prevailing party” standard was not met and vacated an award of attorneys’ fees to petitioner, even where the district court found “compelling evidence that [petitioner] is totally disabled,” ruled that petitioner “did not get the kind of review to which she was entitled under applicable law” and remanded for a redetermination of benefits with an instruction that respondents “act on [petitioner's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance” or “judgment will be issued in favor of [petitioner]” and petitioner obtained the requested long-term disability benefits upon remand.

The questions presented are:

1. Whether the Fourth Circuit erred in holding that ERISA § 502(g)(1) provides a district court discretion to award reasonable attorney's fees only to a prevailing party?
2. Whether a party is entitled to attorney's fees pursuant to § 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially-ordered remand requiring a redetermination of entitlement to benefits and subsequently receives the benefits sought on remand?

Summary:

This case arises out of the denial of long-term disability (LTD) benefits to petitioner Hardt by Hardt’s employer’s insurance company, Reliance Standard Life Insurance (Reliance). After providing Hardt with 24 months of benefits, Reliance notified Hardt that her LTD benefits would be terminated. After filing an unsuccessful administrative appeal to Reliance, petitioner filed suit in district court, claiming that Reliance violated ERISA by wrongfully denying her LTD benefits. The court remanded, finding that Hardt did not “get the kind of review she was entitled to under applicable law” and stating that there was compelling evidence that Hardt was in fact totally disabled. On remand, Reliance found Hardt eligible for LTD benefits.

Hardt then applied for attorney’s fees and costs pursuant to ERISA § 502(g)(1) claiming that she was entitled to the fees as a prevailing party. The district court granted Hardt’s request for fees, holding that Hardt met the definition of a “prevailing party” because she received benefits on remand. The Fourth Circuit reversed, holding that Hardt could not be a “prevailing party” because the district court did not order Reliance to provide her with any benefits. Hardt now argues that she should receive attorney’s fees both because § 502(g)(1), on its face, does not limit an award of fees to the prevailing party, and, alternatively, because a court-ordered remand for a redetermination of benefits should be sufficient to support an award of attorney’s fees even under the prevailing party standard.

Decision Below: No. 08-1896, 2009 WL 2038759 (4th Cir. 2009) [unreported]

Petitioner’s Counsel of Record:

John R. Ates, Ates Law Firm, P.C.

Respondent’s Counsel of Record:

Joshua Bachrach, Wilson, Elser, Moskowitz, Edelman & Dicker LLP

Environmental Law

Monsanto Company v. Geertson Seed Farms (09-475)

Questions Presented:

In this case, after finding a violation of the National Environmental Policy Act (“NEPA”), the district court imposed, and the Ninth Circuit affirmed, a permanent nationwide injunction against any further planting of a valuable genetically-engineered crop, despite overwhelming evidence that less restrictive measures proposed by an expert federal agency would eliminate any non-trivial risk of harm. The questions presented are:

1. Whether the Ninth Circuit erred in holding that NEPA plaintiffs are specially exempt from the requirement of showing a likelihood of irreparable harm to obtain an injunction.

2. Whether the Ninth Circuit erred in holding that a district court may enter an injunction sought to remedy a NEPA violation without conducting an evidentiary hearing sought by a party to resolve genuinely disputed facts directly relevant to the appropriate scope of the requested injunction.

3. Whether the Ninth Circuit erred when it affirmed a nationwide injunction entered prior to this Court's decision in *Winter v. NRDC*, 129 S. Ct. 365 (2008), which sought to remedy a NEPA violation based on only a remote possibility of reparable harm.

Summary:

Petitioners (referred to collectively as Monsanto) are farmers and manufacturers of genetically engineered (GE) alfalfa called Roundtop Ready Alfalfa (RRA), so named because it is resistant to the pesticide Roundtop. Genetically engineered crops are normally regulated by several federal agencies under the Plant Protection Act (PPA), but any person can

petition the Animal and Plant Health Inspection Service (APHIS) for a determination that a GE crop is not a “plant pest risk” and therefore should not be regulated under the PPA. Before APHIS decides to deregulate any plant or crop, the National Environmental Policy Act (NEPA) requires it to prepare an Environmental Impact Statement (EIS) detailing the impact of that deregulation. Under certain circumstances, however, NEPA allows APHIS to prepare a shorter Environmental Assessment (EA) in lieu of the full EIS. If APHIS determines that deregulation will not significantly affect the environment, it reaches a “finding of no significant impact” (FONSI). If, however, APHIS determines that deregulation *will* significantly affect the environment, then it must prepare a full EIS. APHIS examined and field tested Monsanto’s genetically engineered alfalfa, prepared the shorter EA, and issued a “finding of no significant impact.” Based on that FONSI, APHIS decided that it did not need to prepare an EIS, and unconditionally deregulated RRA.

A number of environmental groups claimed that APHIS violated NEPA by failing to conduct a full EIS. The district court agreed, finding that APHIS had not adequately considered, among other things, the potential for cross-pollination between RRA and non-GE alfalfa. The court therefore ordered APHIS to conduct a full EIS. The court also determined that an injunction would be necessary until such an EIS could be produced because there was a *possibility* of irreparable harm if RRA continued to be planted. The court then held a hearing to determine the necessary scope of the injunction. APHIS proposed that the injunction require RRA to be planted certain distances from non-GE alfalfa in order to minimize the cross-pollination concern. Monsanto claims that the risk of cross-pollination associated with APHIS’s plan would be only 0.00025%. The district court rejected the APHIS proposal and entered a nationwide injunction against any further planting of RRA until APHIS completed its EIS. Monsanto appealed to the Ninth Circuit, claiming that the district court should have held a more extensive hearing to determine the likelihood of irreparable harm before issuing such a broad injunction. The Ninth Circuit affirmed. Monsanto then petitioned that court for rehearing to consider an intervening Supreme Court decision, *Winter v. NRDC*, 129 S. Ct. 365 (2008), which held that injunctive relief for a NEPA violation required a finding that irreparable harm was *likely*, not merely possible. The Ninth Circuit again affirmed, stating that the district court had found genetic contamination to be sufficiently likely.

Monsanto now claims that the lower courts did not apply the correct standard for injunctive relief and that the district court failed to conduct an appropriate inquiry before entering the injunction. Respondents counter that the district court engaged in adequate analysis to determine that there was a sufficient likelihood of cross-pollination even under the new Supreme Court standard, and argues that Monsanto’s claim actually attempts to force district courts to resolve scientific issues regarding the degree of environmental impact of GE crops. Respondents argue that the

district court was correct in refusing to do this because examining these scientific issues is precisely APHIS's responsibility in conducting the EIS. Respondents also argue that the issue will very likely be moot before the case can be decided because APHIS has already completed a draft EIS and the injunction will be lifted when the EIS is completed.

Decision Below: 541 F.3d 938 (9th Cir. 2008), *amended by* 570 F.3d 1130 (9th Cir. 2009)

Petitioners' Counsel of Record:

Maureen E. Mahoney, Latham & Watkins LLP

Respondents' Counsel of Record:

George A. Kimbrell, Center for Food Safety

Taxation

Levin, Tax Commissioner of Ohio v. Commerce Energy, Inc. (09-223)

Questions Presented:

1. Did the Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), which addressed the scope of the Tax Injunction Act's bar against federal cases seeking to enjoin the assessment and collection of state taxes, eliminate or narrow the doctrine of comity—applied in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981)—which more broadly precludes federal jurisdiction over cases that intrude on the administration of state taxation?
2. Do either comity principles or the Tax Injunction Act bar federal jurisdiction over a case in which taxpayers allege, on equal protection and dormant Commerce Clause grounds, that their tax assessments are discriminatory relative to other taxpayers' assessments?

Summary:

Ohio's natural gas market is partially deregulated, meaning that consumers can buy their natural gas from state-regulated public utilities or private companies called "independent marketers," or IMs. The state subjects the public utilities and IMs to different taxation regimes. For example, consumers pay sales tax on natural gas purchased from IMs, but not from public utilities. Instead, public utilities pay a gross receipts excise tax, or GRT – lower than the state sales tax – which they are allowed to pass on to the consumer. Respondent Commerce Energy, Inc., among others, brought suit in federal district court seeking a declaration that the exemptions and exclusions in Ohio's tax regime violate the Commerce and Equal Protection Clauses of the Constitution. Petitioner moved to dismiss the complaint, arguing that the Tax Injunction Act (TIA) and principles of comity precluded federal jurisdiction.

The TIA bars federal courts from interfering with a state's ability to assess, levy, or collect taxes. In the 2004 case *Hibbs v. Winn*, however, the Supreme Court held that the TIA did not prevent a federal court from hearing a case seeking to invalidate state income-tax credits on Establishment Clause grounds. Crucial to the Court's decision in *Hibbs*

was the fact that the challenge, if successful, would increase the state's tax revenue, not decrease it, and that the challenge was based on constitutional law, not state law. Comity principles were not a substantial factor in the outcome. This case questions whether, after *Hibbs*, comity principles still limit a federal court's jurisdiction over cases involving equal protection and dormant commerce clause challenges. Petitioners claim that comity should bar federal jurisdiction because respondents' challenges will require closer scrutiny of state law than was necessary in *Hibbs*, and that any remedy would substantially implicate principles of federalism. Respondents argue that there is no meaningful distinction between this case and *Hibbs* because they are contesting someone else's tax liability and the relief requested will only increase the state's tax revenue.

Decision Below: 554 F.3d 1094 (6th Cir. 2009)

Petitioner's Counsel of Record:

Benjamin C. Mizer, Solicitor General, State of Ohio

Respondents' Counsel of Record:

Stephen C. Fitch, Chester Willcox & Saxbe LLP

Federal Practice and Procedure

Krupski v. Costa Crociere (09-337)

Question Presented:

Fed. R. Civ. P. 15(c)(1)(C) Permits An Amended Complaint To "Relate Back", For Limitation Purposes, When The Amendment Corrects A, "Mistake Concerning The Proper Party's Identity". Other Circuit Courts of Appeal Construe The Rule As Applying To Substitution Of The Correct Defendant For A Related Corporation With A Similar Name. The Eleventh Circuit Has Concluded That There Can Be No Such "Mistake" Where The Plaintiff Had Imputed Knowledge Of The Identity Of The Added Defendant Prior To Filing Suit. Does The Eleventh Circuit Construction Of Rule 15(c)(1)(C) Undermine The Purpose of the Rule And Is It Inconsistent With The Decisions In Other Circuits?

Summary:

Petitioner Krupski booked a cruise through Costa Cruise Lines N.V., LLC ("Costa Cruise"). Krupski's ticket defined her "Carrier" as "Costa Crociere, various agents onboard the vessel, and the ship's manufacturer," and required that any suit arising from the cruise be filed within one year of the alleged injury. After tripping over a camera cable on the ship, Krupski filed suit against Costa Cruise. One year and four days after the injury, Costa Cruise answered, asserting that "it was merely the American sales and booking agent for the carrier/vessel operator, Costa Crociere." Krupski was allowed to amend her complaint to add Costa Crociere as a party, but the district court ultimately dismissed on the ground that the amended complaint did not "relate back" under Federal Rule of Civil Procedure 15(c)(1)(C), so that Costa Crociere had been sued only after the allowable one-year period.

Under Rule 15(c), an amended pleading “relates back” to the date of the original pleading if it asserts a claim arising out of the same occurrence that is the subject of the original pleading. Rule 15(c)(1)(C), however, provides that if an amendment “changes the party or the naming of the party against whom a claim is asserted,” that party must have received notice of the action so that it will not be prejudiced in defending, 15(c)(1)(C)(i), and “knew or should have known that the action had been brought against it, but for a mistake concerning the proper party’s identity,” 15(c)(1)(C)(ii).

The Eleventh Circuit, in an unpublished per curiam opinion, held that the amended complaint did not “relate back” under Rule 15(c)(1)(C). The court held that subsection (i) was satisfied: Costa Crociere and Costa Cruise, who shared counsel, had sufficient “identity of interest” to put Costa Crociere on notice of the suit. But the court found that the original naming of Costa Cruise was not a “mistake concerning the proper party’s identity,” as required under subsection (ii). Rather, because Krupski was given clear notice by her ticket that Costa Crociere was the “Carrier” and thus a potential defendant, the naming of only Costa Cruise resulted from a “cho[ice] to sue one potential party and not another.”

Petitioner argues that this ruling creates an “imputed knowledge” exception inconsistent with the plain language of Rule 15(c), which “does not limit the kinds of ‘mistakes’ which can result in mis-identification,” and that Rule 15 should be construed liberally so that businesses cannot avoid liability through “a corporate name game.” Respondent contends that given the information in her ticket, Krupski was properly charged with knowing that Costa Crociere was a potential defendant, and that a plaintiff’s “ignorance or misunderstanding” about just who is liable for an injury is not the kind of “mistake” as to identity covered by subsection (ii).

Decision Below: 330 Fed. App’x 892 (11th Cir. 2009) (per curiam)

Petitioner’s Counsel of Record:

Mark R. Bendure, Bendure & Thomas

Respondent’s Counsel of Record:

Robert S. Glazier

Criminal Law

Fourth Amendment

City of Ontario v. Quon (08-1332)

Questions Presented:

While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the “operational realities of the workplace.” *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality). Even if there exists a reasonable expectation of privacy, a warrantless search by a government employer - for non-investigatory

work-related purposes or for investigations of work-related misconduct - is permissible if reasonable under the circumstances. *Id.* at 725-26 (plurality). The questions presented are:

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.

2. Whether the Ninth Circuit contravened this Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager.

3. Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

Summary:

This case raises questions about application of the 4th Amendment to electronic communications by government employees. The City of Ontario, California, distributed pagers to its police department employees, including petitioner Jeff Quon, along with a policy barring personal use and stating that "[u]sers should have no expectation of privacy or confidentiality" in City internet or e-mail activity, including pager messages. At the same time, the police department is alleged to have had an informal policy providing that the City would not audit pagers so long as employees paid personally for overage charges, which Quon did. When the City did in fact audit pager transcripts to ensure that its character allotment was sufficient to meet business needs, the audit revealed that Quon's use of his pager was primarily personal and often sexually explicit.

Quon sued the City under the Fourth Amendment, which is violated when a government search both invades a "reasonable expectation of privacy" and is "unreasonable" under the circumstances. In *O'Connor v. Ortega*, a plurality of the Court held that while the Fourth Amendment does apply to searches conducted by the government in its employer capacity, the "operational realities of the workplace" require that government employees be afforded a reduced "expectation of privacy" while on the job. Applying the *Ortega* framework, the Ninth Circuit held that the police department's informal policy protecting pagers against audits nevertheless created a "reasonable expectation of privacy" in pager messages, and that the City's search of pager transcripts was constitutionally "unreasonable" because it was excessively intrusive in light of the purposes served.

It is unclear how broad a decision the Supreme Court will issue in this case. The Court could simply apply the *Ortega* plurality opinion and issue a narrow ruling limited to the context of government employment and focused on the particular facts of this case. It also could use the occasion

to revisit the splintered decision in *Ortega* and more conclusively decide the question of government employee privacy rights. Finally, this case offers the Court one of its first opportunities to speak more generally to the question of privacy expectations in the internet age, with ramifications for searches of all forms of electronic communication both inside and outside the government-employment context.

Decision Below: 529 F.3d 892 (9th Cir. 2008)

Petitioner’s Counsel of Record:

Kent L. Richland, Greines Martin Stein & Richland LLP

Respondent’s Counsel of Record:

Michael A. McGill, Lackie Dammeier & McGill APC

Fifth Amendment

Renico v. Lett (09-338) (see **Criminal Law: Habeas and AEDPA Review**)

Habeas and AEDPA Review

Renico v. Lett (09-338)

Question Presented:

Whether the United States Court of Appeals for the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the State trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

Summary:

Respondent Lett claims that the state violated the Fifth Amendment Double Jeopardy Clause when it retried him for murder after a mistrial based on a deadlocked jury. Under the Court’s precedent, a defendant may be retried after a mistrial only if there was a “manifest necessity” for declaring the mistrial; a trial judge is accorded deference in determining that a jury is so genuinely deadlocked that a mistrial is necessary, but must exercise “sound discretion.” The Michigan Supreme Court denied respondent’s Double Jeopardy claim, holding that the record contained “sufficient justification” for the trial judge’s determination that there was “manifest necessity” for the original mistrial. But the Sixth Circuit affirmed a grant of habeas relief under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), ruling that the Michigan Supreme Court unreasonably applied governing law when it found that the trial judge exercised “sound discretion” in declaring a mistrial, given the judge’s “haste and lack of consideration”—exhibited by the judge’s brief colloquy with the jury foreperson, following relatively short jury deliberations, and the trial judge’s “inexplicably abrupt” declaration of the mistrial.

Under the AEDPA, federal habeas relief is limited to cases in which a state court decision is “contrary to, or involved an unreasonable

application of, clearly established Federal law,” or is “based on an unreasonable determination of the facts.” Petitioner, the State of Michigan, argues that the Sixth Circuit overstepped its authority under AEDPA in this case. Because there is disagreement among the circuits about the requirements for determining “manifest necessity,” the State claims, the Michigan Supreme Court decision could not have contravened any “clearly established Federal law.” Moreover, the State argues, the Sixth Circuit should have deferred to rather than “second-guessed” the state trial court, because of that court’s greater proximity to and expertise on the jury and trial. Respondent asserts that AEDPA deference does not require a “rubber stamp approach” to state court decisions, and that the Sixth Circuit’s correctly interpreted and applied the Supreme Court’s “sound discretion” standard.

This case is now one of a remarkable four cases this Term in which the Court will review the Sixth Circuit’s application of AEDPA. It is also the third Sixth Circuit AEDPA case from Michigan. In its petitions in those cases, the State of Michigan has argued that the cases “evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply the AEDPA.”

Decision Below: 316 Fed. App’x 373 (6th Cir. March 10, 2009)

Petitioner’s Counsel of Record:

B. Eric Restuccia, Solicitor General, Michigan Attorney General’s Office

Respondent’s Counsel of Record:

Marla R. McCowan, Assistant Defender, State Appellate Defender Office of Michigan

Magwood v. Culliver (09-158)

Question Presented:

Limited by the Court to the first question: When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a “second or successive” claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?

Summary:

Petitioner Magwood was sentenced to death for a murder committed in 1979. At the time of the offense, Alabama law provided for the imposition of the death penalty only after a finding by the trial judge of one or more statutory aggravating circumstances that outweighed any mitigating circumstances. In 1981, the trial judge sentenced petitioner to death despite the absence of any aggravating circumstances, relying on an intervening Alabama Supreme Court decision, *Ex parte Kyzer*, issued in 1981 just months before the sentencing and holding that Alabama law no longer required a finding of aggravating circumstances.

Petitioner sought habeas relief, and the district court granted his petition on the ground that the sentencing court had failed to consider

mitigating circumstances related to petitioner's mental illness. In 1986, Magwood was resentenced to death; this time, the trial court did consider mitigating circumstances, but again relied on *Kyzer* to impose the death penalty without a finding of any aggravating circumstances. Petitioner filed a habeas petition challenging his 1986 sentence, arguing that the retroactive application of the new rule announced in *Kyzer* to his sentencing violated the Due Process Clause. The district court granted relief, but the Eleventh Circuit reversed, holding that petitioner's due process claim was barred as successive because he could have but did not raise it in his challenge to his 1981 sentence.

The Antiterrorism and Effective Death Penalty Act (AEDPA) generally prohibits the grant of habeas relief on a "second or successive" habeas petition; the question in this case is whether petitioner's first challenge to his 1986 sentence qualifies as "second or successive" because, as the Eleventh Circuit reasoned, it is directed at an unchanged "component" of the original sentence. Petitioner argues that under the plain meaning of the terms, a petition cannot be "second or successive" if it is "the first one to challenge a new judgment," and that the Eleventh Circuit's alternative definition of "second or successive" is contrary to the text and purpose of AEDPA and Supreme Court precedent. Respondent contends the Eleventh Circuit's holding, which applies only when a claim could have been but was not raised in an earlier petition, advances AEDPA's general purpose of streamlining habeas litigation and bringing efficiency and finality to the system.

Decision Below: 555 F.3d 968 (11th Cir. 2009)

Petitioner's Counsel of Record:

Jeffrey L. Fisher, Stanford Law School, Supreme Court Litigation Clinic

Respondent's Counsel of Record:

Corey L. Maze, Solicitor General, Office of the Attorney General of Alabama

Sentencing

Dillon v. United States (09-6338)

Questions Presented:

1. Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.
2. Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

Summary:

In 2005, the Supreme Court held in *United States v. Booker* that because "the Sixth Amendment requires a jury," rather than a judge, "to find the facts that establish a mandatory floor for a defendant's sentence," the United States Sentencing Guidelines ("Guidelines") must be treated as

only advisory rather than mandatory. In *Kimbrough v. United States* (2007), the Court held that the same principle applies to the Guidelines for crack-cocaine offenses, which, “like all other Guidelines, are advisory only.” At issue is whether the *Booker* line of cases extends beyond “full” sentencing proceedings to sentence-modification proceedings under 18 U.S.C. § 3582(c), or whether the Guidelines remain mandatory in such modification hearings.

Petitioner Dillon was convicted of drug-related offenses involving crack cocaine. The district court sentenced him to 322 months (almost 27 years), the very bottom of the Guideline range; because Dillon was sentenced pre-*Booker*, in 1993, the district court felt compelled to impose what it believed to be an “unreasonable sentence.” In 2007, the United States Sentencing Commission (USSC) amended the Guidelines to retroactively reduce the base offense level for most crack cocaine offenses. Dillon then filed a *pro se* motion for a sentence reduction under 8 U.S.C. § 3582(c)(2), which provides that a court may reduce the sentence of a defendant when the USSC subsequently lowers the relevant sentencing range, “if such reduction is consistent with applicable policy statements issued by the Sentencing Commission.” The policy statement here prohibits a sentencing judge from imposing a modified sentence below the new minimum set by the amended Guideline range.

The district court reduced Dillon’s sentence consistent with the USSC amendment, but held that because *Booker* does not apply to sentencing modifications, it lacked the authority to further reduce the sentence. The Third Circuit agreed, holding that *Booker* applies to an initial sentencing and to resentencing after an original sentence is vacated, but not to sentence-modification proceedings under § 3582(c)(2).

Petitioner argues there is no relevant distinction between a “new sentence” and a “sentence modification.” In either case, the sentencing court must act in accordance with the law that exists at the time – including *Booker*, which at the time of petitioner’s sentencing reduction made the Guidelines advisory rather than mandatory. The Court’s resolution of this issue will have significant practical effect: The USSC has made 27 retroactive amendments to the Guidelines, and approximately 19,500 defendants became eligible for sentence modifications based on the crack-cocaine amendment alone.

Decision Below: 572 F.3d 146 (3d Cir. 2009)

Petitioner’s Counsel of Record:

Renee Domenique Pietropaolo

Respondent’s Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

***Barber v. Thomas* (09-5201)**

Questions Presented:

The federal good time credit (GTC) statute provides for credits “up to 54 days at the end of each year of the prisoner’s term of imprisonment.” Throughout

federal sentencing statutes, and elsewhere in the same sentence, “term of imprisonment” means the sentence imposed. However, the Bureau of Prisons (BOP) interprets “term of imprisonment” as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credits. The first question presented is:

Does “term of imprisonment” in Section 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits on the basis of the sentence imposed?

The Circuits, using a variety of rationales, have rejected the BOP’s claim that the statute was unambiguous, but deferred to the BOP interpretation under *Chevron* based on “term of imprisonment” being ambiguous. In this litigation, the BOP has conceded that the regulation implementing the GTC statute, and previously accorded deference, was promulgated in violation of the Administrative Procedure Act. Nevertheless, the Ninth Circuit affirmed the BOP rule under *Skidmore*. The second question presented is:

If “term of imprisonment” in the federal good time credit statute is ambiguous, does the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

Summary:

The federal good time credit (GTC) statute, 18 U.S.C. § 3624(b)(1), awards prisoners credits against their sentences for “exemplary behavior.” Specifically, a prisoner may receive GTC “toward the service of the prisoner’s sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner’s *term of imprisonment*, beginning at the end of the first year of the term.” *Id.* (emphasis added). The BOP interprets “term of imprisonment” as *time served*, rather than sentence imposed. The mathematical result is that qualifying prisoners receive roughly seven fewer days of credit for each year of their sentence than they would if GTC were awarded on the basis of the sentence imposed.

The BOP concedes that the regulation codifying its interpretation of the GTC statute does not comply with the APA and thus is not entitled to *Chevron* deference. Nevertheless, the Ninth Circuit held that the BOP interpretation deserves deference under *Skidmore*, deeming the BOP’s consistently-held position reasonable and persuasive in light of the statutory language and legislative history.

Petitioners, current and former federal prison inmates, argue first that the statute unambiguously requires that credit be awarded on the basis of the sentence imposed rather than years served. According to petitioners, the ordinary meaning of “term of imprisonment” is the sentence imposed, and that reading is necessary to make the GTC statute consistent internally and with other sentencing statutes that use the phrase “term of imprisonment.” Petitioners also argue that their reading promotes the statutory purpose of simplifying the calculation of GTC to a 15% reduction in sentence (54 days equals 15% of a 365-day year); in contrast, the BOP calculation, using time

served, requires 200 pages of “cumbersome and confusing formulas.” In the alternative, petitioners argue that if the statute is ambiguous, the court should adopt their reading both under the rule of lenity and in deference to the United States Sentencing Commission, which has adopted the same interpretation of the statute.

Decision Below: 533 F.3d 800 (9th Cir. 2008)

Petitioner’s Counsel of Record:

Stephen R. Sady, Chief Deputy Federal Public Defender

Respondent’s Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

Dolan v. United States (09-367)

Question Presented:

Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5).

Summary:

The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3664, provides that “notwithstanding any other provision of law, when sentencing a defendant convicted of [a covered offense], the court shall order restitution.” To set the amount of restitution, the “court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing.” This case involves the consequences of a court’s failure to schedule the restitution hearing within the 90 days provided by statute.

Petitioner Dolan was convicted of assaulting a hitchhiker, sentenced to 21 months in prison, and ordered to pay \$250 a month in restitution for the victim’s medical expenses. Petitioner’s sentencing occurred on July 30, 2007, at which time the district court lacked information as to the victim’s expenses and thus “left that [restitution] matter open, pending receipt of additional information.” The court ultimately set restitution at a hearing on February 4, 2008, 190 days after the original sentencing. The Tenth Circuit affirmed, reasoning that the reference to “mandatory” in the Act’s title, combined with the “notwithstanding any other provision of law” language in the opening, indicated that restitution must always be ordered for certain crimes. The 90-day limit, the court held, is not a jurisdictional bar, but only a “subsidiary command” to the MVRA’s “primary and overriding” directive that restitution be ordered.

Petitioner argues that the plain language of the MVRA deprives the court of power to order restitution outside the specified 90-day limit. Reading the initial “notwithstanding any other provision of law” clause to override deadlines within the same statute would lead to absurd results, as none of the MVRA’s other statutory provisions would have effect. If the Court lacks sufficient information to set restitution, it can postpone sentencing until it has the necessary information or, if delay results from the defendant’s actions or bad faith, equitably toll the 90-day period. Respondent, the United States, relies on a harmless error analysis under Rule 52(a) of the Federal Rules of Criminal Procedure, arguing that the

defendant should not benefit from a delay in setting restitution “at least where the defendant was not prejudiced by that error.”

Decision Below: 571 F.3d 1022 (10th Cir. 2009)

Petitioner’s Counsel of Record:

Pamela S. Karlan, Stanford Law School, Supreme Court Litigation Clinic

Respondent’s Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice

Contempt

Robertson v. U.S. ex rel. Watson (08-6261)

Question Presented:

Limited by the court to the following question: Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

Summary:

The United States Attorney’s Office (USAO) for the District of Columbia entered into a plea agreement with petitioner Robertson: Robertson pled guilty to felony assault arising from an attack on his former girlfriend, Wykenna Watson, in March of 1999, and the USAO promised not to pursue any criminal charges with respect to a subsequent June 1999 incident between Robertson and Watson. Watson, however, filed a criminal contempt action based on the June 1999 incident, alleging that Robertson’s conduct had violated a Civil Protection Order (CPO) issued to Watson in April. District of Columbia law allows private parties protected by CPOs, as well as the government, to bring such criminal charges. Robertson was convicted of three counts of criminal contempt based on the June 1999 incident and sentenced to jail followed by probation.

The question in this case is whether the prosecution of Robertson violated his plea agreement with the USAO, or whether, as the District of Columbia Court of Appeals held, because Watson’s contempt action was “not [a] public action brought in the name and interest of the United States or any other governmental entity,” it did not implicate Robertson’s separate agreement with the government. Petitioner does not contest the authority, under District law, of private CPO holders to act as prosecutors in criminal contempt actions, nor argue that the Constitution prohibits this practice. Rather, petitioner argues that when a private party prosecutes a contempt action in the District of Columbia courts, he or she must be understood as acting in the interest and name of the United States – and therefore may not bring an action inconsistent with a United States plea agreement. Petitioner claims that the Supreme Court resolved this matter in *United States v. Dixon*, in which it held that an action under the D.C. contempt statute is an “exercise of the United States’ sovereign power” for Double Jeopardy Clause purposes. Respondent Watkins, represented by the District of Columbia Attorney

General, argues that *Dixon* did not directly address the identity of the parties-in-interest in a contempt proceeding, and that the D.C. contempt statute vests the holder of a CPO with a “private right to pursue criminal contempt.” The United States has not yet weighed in on the merits of this question; asked for its views at the certiorari stage, it advised denial of the petition, primarily on the ground that petitioner’s narrow challenge would not give the Court the opportunity to address all constitutional issues raised by private prosecutions of contempt actions.

Decision Below: 940 A.2d 1050 (D.C. 2008)

Petitioner’s Counsel of Record:

James W. Klein, Public Defender Service

Respondent’s Counsel of Record:

Todd S. Kim, Solicitor General, Office of the Attorney General for D.C.

Elena Kagan, Solicitor General, United States Department of Justice

Other Public Law Cases

Immigration

Carachuri-Rosendo v. Holder (09-60)

Question Presented:

Under the Immigration and Nationality Act, a lawful permanent resident who has been “convicted” of an “aggravated felony” is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 4-2 on the following question presented by this case:

Whether a person convicted under state law for simple drug possession (a federal law misdemeanor) has been “convicted” of an “aggravated felony” on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

Summary:

Petitioner Carachuri-Rosendo, a lawful permanent resident, twice pled to state-law drug-possession misdemeanors: In 2004, he pled guilty in state court to misdemeanor possession of marijuana, and in 2005 he pled *nolo contendere* to misdemeanor possession of one tablet of Xanax. Though the state of Texas could have prosecuted petitioner as a recidivist in 2005, it elected not to do so. In 2006, Carachuri was notified that he was removable based on his 2005 Xanax conviction, and when he applied for cancellation of removal, the immigration judge ruled him ineligible on the ground that he had been “convicted” of an “aggravated felony” under 8 U.S.C. § 1229b(a)(3). According to the immigration judge, because Carachuri-Rosendo’s second misdemeanor possession offense could have been punished as a felony under the recidivism provision of the federal Controlled Substances Act (CSA), that offense qualified as a felony making him ineligible for cancellation of removal.

In an *en banc* opinion, the Board of Immigration Appeals (BIA)

endorsed a different “preferred interpretation” of § 1229b(a)(3), requiring that the status of an offense be determined based on the actual prosecution in question, not “what hypothetically might have been prosecuted” – so that Carchuri-Rosendo’s second misdemeanor offense, never actually prosecuted as a recidivist offense in state, would not qualify as an “aggravated felony” based on recidivism. Nevertheless, the BIA declined to follow its preferred approach and instead upheld the immigration judge’s decision on the ground that it was supported by Fifth Circuit precedent. On appeal, the Fifth Circuit reaffirmed its precedent adopting a “hypothetical approach” to defining “aggravated felony,” under which a second possession offense that could have been punished as a recidivist felony under the CSA qualifies, even if no recidivism charge is actually brought.

Petitioner argues that Fifth Circuit’s “hypothetical approach” is inconsistent with the statutory text, which focuses on what a person “has been convicted of” and not what he could have been prosecuted for, and notes that both the BIA and Department of Homeland Security agree with his reading. Respondent United States, like the Fifth Circuit, relies heavily on *Lopez v. Gonzales*, 549 U.S. 47 (2006), in which the Supreme Court held that whether a state-law possession felony constitutes an “aggravated felony” for removal purposes turns on whether the conduct in question is “punishable as a felony” under the federal CSA. Petitioner counters that *Lopez* actually supports his claim, as his second state-law misdemeanor was *not* “punishable as a [recidivist] felony” under the CSA because the state never charged him as a recidivist.

Decision Below: 570 F.3d 263 (5th Cir. 2009)

Petitioner’s Counsel of Record:

Sri Srinivasan, O’Melveny & Myers LLP

Respondent’s Counsel of Record:

Elena Kagan, Solicitor General, United States Department of Justice