GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2011 PREVIEW

UPDATE: JANUARY 3, 2012

This update previews 18 cases the Court has calendared for argument during the January and February sittings. The remaining five cases that will be heard during those two sittings are summarized in the October Term 2011 Preview, released in September 2011 (available at http://www.law.georgetown.edu/sci/documents/OT2011TermPreview-Final.pdf). Section I discusses some especially noteworthy cases. Section II organizes the cases into subject matter categories and provides brief summaries.

SECTION I: ADDITIONAL HIGHLIGHTS

Kiobel v. Royal Dutch Petroleum (10-1491) and ***Mohamad v. Palestinian Authority*** (11-88)

These cases raise the question whether corporations and organizations are subject to liability for violations of international human rights laws, or whether only natural persons may be sued. In *Kiobel,* the allegation is that Royal Dutch Petroleum aided the Nigerian government in committing torture, extrajudicial killings, and genocide. In *Mohamad,* the allegation is that the Palestinian Authority and the Palestine Liberation Organization tortured and killed an individual. Although the cases raise a common question of who may be liable for human rights violations, that question arises under two separate statutes, with different language and distinct histories. *Kiobel* raises that question in the context of a suit under the Alien Tort Statute, which was enacted early in this country's history and gives aliens a right to sue for torts committed in violation of international law. *Mohamad* raises the question in the context of a suit under the Torture Victim Protection Act, which was enacted relatively recently and authorizes a suit when an individual acting under color of foreign law tortures or extrajudicially kills another individual. It is possible that those differences in language and history could lead to different answers to the common question whether only natural persons can be held liable for human rights violations. The Court may, however, want to provide a uniform answer to this question. While language and history undoubtedly play their role, the larger question is how to balance this nation's commitment to the rule of international law against the potential that suits of this kind may interfere with international relations.

United States v. Alvarez (11-210)

This case involves a First Amendment challenge to the Stolen Valor Act, which makes it a crime for a person to represent falsely that he or she was awarded a military medal. The challenger is an elected official who falsely stated at a public meeting that he was a retired Marine and had been awarded the Medal of Honor. While the elected official may not be the most sympathetic First Amendment champion, important First Amendment principles are at stake. Essentially, the government argues that knowingly false speech is entitled to little constitutional protection. A significant amount of human discourse, however, consists of knowingly false speech, including false speech about such matters as height, weight, age, and financial status. And the ordinary antidote to false speech is not criminal prosecution, but counter-speech that is truthful. The government argues that there are special considerations that justify this particular ban on knowingly false speech. It remains to be seen whether the Court will agree.

Perry v. Perez (11-713), ***Perry v. Davis*** (11-714), and ***Perry v. Perez*** (11-715)

These consolidated appeals involve the extent of a federal court's authority to devise its own redistricting plan for elections to the U.S. Congress and to the state legislature when a state plan has not received preclearance under Section 5 of the Voting Rights Act. In response to the 2010 census, the Texas legislature enacted new electoral maps for seats in the U.S. Congress, the Texas House, and the Texas Senate, and sought preclearance of those plans under Section 5 of the Voting Rights Act. With no lawful plans in place, a federal court devised its own plans for upcoming elections. Those plans deviate substantially from the legislature's plans, and those deviations have significant racial and political consequences. The Supreme Court has stayed the district court's plans and has expedited briefing and argument. The State argues that a legislature's plan must be treated as the presumptive interim plan and may be altered only to the extent necessary to remedy a likely statutory or constitutional violation. The district court rejected that argument on the ground that such an approach would allow a state to implement its own plan without having received the preclearance required by Section 5. To resolve the case, the Court must balance two competing principles: On the one hand, a federal court must defer as much as possible to a state's redistricting policies. On the other hand, a State covered by Section 5 may not implement any new electoral plan until it has shown to the satisfaction of the Attorney General or the District Court for the District of Columbia that the change will not discriminate against racial minorities. The Court will have to decide which of those two competing principles should take priority.

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Civil Rights Law

Fair Housing Act

Magner v. Gallagher (10-1032)

Questions Presented:

1) Are disparate impact claims cognizable under the Fair Housing Act?
2) If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?

Summary:

The Fair Housing Act (FHA) makes it unlawful to discriminate in housing on the basis of race and certain other characteristics. In *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988), the Supreme Court left open the question whether the FHA prohibits practices that have a disparate impact on minorities, or whether it bans only practices that are motivated by a discriminatory intent. The questions presented in this case are whether disparate impact claims are cognizable under the FHA; and, if so, what test courts should use to analyze such claims.

Respondents Gallagher and other owners and former owners of rental properties sued petitioner, the City of St. Paul, Minnesota, alleging that its policy of aggressively enforcing housing codes against certain rental properties has the effect of discriminating against racial minorities, in violation of the FHA. The district court rejected respondents' claim. It ruled that respondents failed to show that the City's aggressive housing code enforcement caused a disparate effect on racial minorities. Alternatively, it ruled that respondents failed to show that any alternative policy would eliminate the disparate impact they identified and still serve the City's interest in code enforcement.

The Eighth Circuit reversed. Citing evidence that the City's aggressive methods reduced affordable housing and that racial minorities disproportionately rely on affordable housing, it concluded that respondents had established a prima facie case of disparate impact discrimination. It also ruled that an alternative method of enforcement involving more flexibility and cooperation would significantly reduce the disparate impact on minorities yet still achieve the City's goals.

The City argues that disparate impact claims are not cognizable under the FHA. Specifically, it argues that the text of the statute requires proof of discriminatory intent, and lacks the language in Title VII and the ADEA that calls for a disparate impact analysis. The City also argues that even if disparate impact claims are generally cognizable under the FHA, housing code enforcement should not be subject to a disparate impact challenge. Rather than causing a cognizable disparate impact, the City argues, enforcing of housing codes ensures that racial minorities will not be harmed by substandard housing.

Decision Below:

619 F.3d 823 (8th Cir. 2010)

Petitioner's Counsel of Record:

Louise Toscano Seeba, City of St. Paul, Minnesota

Respondents' Counsel of Record:
Thomas C. Goldstein, Goldstein & Russell
John R. Shoemaker, Shoemaker & Shoemaker

Voting Rights Act

Perry v. Perez (11-713)
Perry v. Davis (11-714)
Perry v. Perez (11-715)

Question Presented:

Whether, while preclearance [under Section 5 of the Voting Rights Act] remains pending, [a] district court may order the use of judicially drawn "interim" electoral maps that give no deference to the State's duly-enacted maps, are not premised on any actual or likely violation of law, and are based on nothing more than the court's own notion of sound public policy and "the collective public good."

Summary:

States covered under section 5 of the federal Voting Rights Act (VRA) must obtain preclearance from a federal court or the U.S. Department of Justice before implementing any changes in electoral districting plans. In order to obtain preclearance, a State must show that its plan does not discriminate against racial minority groups in purpose or effect. The question presented in these cases is whether, pending preclearance of the State's plan, a court may order the use of a court-devised plan that deviates from the State's plan absent a finding that the State's plan violates or is likely to violate the law.

In response to the 2010 census, the Texas legislature enacted new electoral maps for seats in the U.S. Congress, the Texas House, and the Texas Senate. A number of parties (appellees) filed separate challenges to the redistricting plans in a federal district court in Texas, claiming that they impermissibly dilute the voting strength of Latino and African-American citizens, in violation of section 2 of the VRA and the Fourteenth Amendment. The suits were consolidated before a three-judge court. The State filed suit in D.C. federal district court to obtain Section 5 preclearance of the redistricting plans. The D.C. court denied the State's motion for summary judgment and scheduled trial for January 17, 2012.

Meanwhile, the Texas court conducted a trial, but did not resolve any claims. When it became clear that the State's plans would not be approved in time to use in the 2012 primaries, the Texas court ordered the State to use interim plans devised by the court. The Texas court rejected the State's proposal to use the legislature's plans on the ground that it would contravene Section 5's preclearance requirement. The Supreme Court granted a stay of the Texas court's order and noted probable jurisdiction.

The State argues that a legislature's plan must generally be treated as the presumptive interim plan and may be altered only to the extent necessary to remedy a likely statutory or constitutional violation. The State further argues that the sole exception to this rule is when officials fail to seek preclearance. Because the State is actively seeking preclearance, and the district court did not identify any likely violation of law, the State argues, the district court should have deferred to the State's plans.

Decision Below:

2011 WL 5904716 (W.D. Tex. 2011)

Appellant's Counsel of Record:
Paul D. Clement, Bancroft PLLC
Appellees' Counsel of Record:
Chad W. Dunn, Brazil & Dunn,
Anita S. Earls, Southern Coalition for Social Justice
Renea Hicks, Law Office of Renea Hicks
Jose Garza, Law Office of Jose Garza
Nina Perales, Mexican American Legal Defense and Educational Fund
Paul M. Smith, Jenner & Block

Constitutional Law

First Amendment – Free Speech

United States v. Alvarez (11-210)
Question Presented:
Whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.
Summary:
The Stolen Valor Act of 2005, 18 U.S.C. § 704(b), makes it a crime, punishable by imprisonment, to "falsely represent[] * * * verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." At issue is whether this Act violates the First Amendment.

Respondent Xavier Alvarez, an elected local official in southern California, falsely stated at a public meeting that he was a retired Marine and had been awarded the Medal of Honor. The government prosecuted Alvarez for that false claim under the Stolen Valor Act. Alvarez moved to dismiss on the ground that the Act is invalid under the First Amendment. The district court denied the motion. Alvarez entered a conditional guilty plea, reserving his right to challenge on appeal the constitutionality of the Act, and was sentenced to three years of probation and fined $5000.

The Ninth Circuit reversed. The court held that the Stolen Valor Act regulates speech based on its content and is therefore subject to strict scrutiny. The court further held that the Act fails strict scrutiny because the government's interest in preserving the value of medals can be served through counter-speech that exposes as liars persons who falsely claim to have received a medal. The court rejected the government's contention that all false speech is constitutionally unprotected, holding that false speech is constitutionally unprotected only when the speech is fraudulent, dangerous, or injurious, a showing the government failed to make here. The court also noted that the government's theory that all false speech is constitutionally unprotected would lead to the untenable conclusion that Congress could subject to criminal prosecution a person who lies about his or her height, weight, age, or financial status on Match.com or a person who falsely represents to a parent that he or she does not smoke, drink alcohol, is a virgin, or has complied with the speed limits.

The government contends that Congress may restrict false speech as long as the restriction furthers an important interest and does not unduly burden fully protected speech. The government further argues that the Stolen Valor Act satisfies that standard.

In particular, the government contends that the Act furthers the government's important interest in protecting the reputation of medals, that the Act's limitation to knowing misrepresentations ensures adequate breathing space for constitutionally protected speech, and that relying on the public to discover and refute false claims would not effectively address the aggregate harm of false claims.

Decision Below:

617 F.3d 1198 (9th Cir. 2010)

Petitioner's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondent's Counsel of Record:

Jonathan D. Libby, Deputy Federal Public Defender, Los Angeles, California

Fourteenth Amendment – Equal Protection

Armour v. City of Indianapolis (11-161)

Question Presented:

Whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multi-year installment plan.

Summary:

The City of Indianapolis enacted a law that forgave tax assessments imposed on persons who paid the tax in installments, but declined to afford the same relief to persons who paid their taxes in full. The question presented is whether that law violates the Equal Protection Clause.

The City of Indianapolis levied a tax to pay for a new sewer system, and gave landowners the option to pay a lump sum or in installments. The City later forgave the outstanding debts of owners using the installment plan but refused to return equivalent funds to petitioners, who paid the lump sum. Petitioners then filed suit in state court, alleging that the City's refusal to afford them a refund violated the Equal Protection Clause. The trial court ruled in petitioners' favor, but the Indiana Supreme Court reversed.

The Indiana Supreme Court held that the City had a rational basis for treating persons who paid in full differently from persons who paid in installments. The court concluded that the City could have reasonably assumed that taxpayers who paid in full were less financially burdened by the tax than those who chose installment plans. Additionally, the court concluded that the City's interest in preserving its limited resources and in administrative convenience provided a further rational basis for the difference in treatment.

Petitioners argue that while the City's desire to alleviate financial burdens on lower-income citizens affords a rational basis for forgiving those debts, it does not justify a refusal to reimburse taxpayers who made lump sum payments. Petitioners further argue that resource preservation is not a legitimate basis for differential treatment because that rationale would effectively eliminate any equal protection review of disparate tax treatment. Finally, petitioners argue that administrative convenience is not a rational

basis for the City's action because affording a refund requires nothing more than simple arithmetic based on undisputed facts

Decision Below:

946 N.E.2d 553 (Ind. 2011)

Petitioner's Counsel of Record:

Roy T. Englert, Jr., Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP

Respondent's Counsel of Record:

Paul D. Clement, Bancroft PLLC

Criminal Law

Fifth Amendment – Double Jeopardy

Blueford v. Arkansas (10-1320)

Question Presented:

Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars reprosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.

Summary:

The Double Jeopardy Clause bars persons from being tried more than once for the same offense, but it generally permits a retrial when the first jury has hung. The question in this case is whether the Double Jeopardy Clause bars the retrial of a defendant on a greater offense after the jury announces that it has found a defendant innocent of that offense, but that it is hung on a lesser offense.

Petitioner Blueford was charged with capital murder and three lesser-included offenses: first degree murder, manslaughter, and negligent homicide. The jury was instructed to reach a verdict on each offense before considering the next lesser offense. The jury announced that it had unanimously found Blueford not guilty of the two murder charges but that it was deadlocked on manslaughter. The trial judge denied Blueford's motion for a partial verdict and declared a mistrial. Prosecutors sought to retry Blueford for all four offenses. Blueford moved to dismiss the murder charges on Double Jeopardy grounds, but the trial court denied the motion, and the Arkansas Supreme Court affirmed.

The Arkansas Supreme Court held that a jury's announcement of a not guilty vote in response to a judge's questions about the status of its deliberations is not an official declaration of acquittal. The court also held that the trial judge did not err in failing to give a partial verdict because Arkansas law forecloses partial verdicts.

Petitioner contends that the jury's announcement of not guilty on the murder charges was tantamount to an acquittal on those charges, and retrial after an acquittal is a paradigm violation of the Double Jeopardy Clause. Petitioner also argues that because the jury instructions required the jury to resolve the manslaughter charge only if it acquitted on the murder charges, the jury's deadlocking on the manslaughter charge necessarily means that it acquitted on the murder charges. Finally, petitioner argues that the present case is constitutionally indistinguishable from the Court's decision in *Green v. U.S.*, where Double Jeopardy barred retrial on a greater offense after a jury convicted on a lesser-included offense.

Decision Below:
2011 Ark. 8
Petitioner's Counsel of Record:
Clifford M. Sloan, Skadden, Arps, Slate, Meagher & Flom
Respondent's Counsel of Record:
David R. Raupp, Senior Assistant Attorney General, Arkansas

Habeas Corpus – Anti-Terrorism and Effective Death Penalty Act

Wood v. Milyard (10-9995)
Questions Presented:
1) Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense?
2) Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had?
Summary:
Under the Antiterrorism and Effective Death Penalty Act (AEDPA), effective in 1996, state prisoners must file a federal habeas petition within a year of their conviction, but this limitations period does not run while the prisoner's applications for state collateral review are pending. The questions in this case are whether an appellate court can raise the issue of timeliness, *sua sponte*, and whether a State waives that defense by stating in the district court that it will not challenge timeliness.

In 1986, petitioner Wood was convicted of murder for shooting a pizza shop employee in the head and was sentenced to life imprisonment. In 1995, he filed for post-conviction relief in state court, but no court ever ruled on the motion. In 2004, Wood filed a renewed motion for relief in state court, and the state court denied the petition in 2008. Petitioner filed for federal habeas relief in 2008. The district court denied his petition as time-barred. On reconsideration, however, the State mentioned Wood's 1995 filing and stated it was "not challenging, but [does] not concede, the timeliness of the petition." The district court then denied relief on the merits.

The Tenth Circuit raised the issue of timeliness *sua sponte* and affirmed the district court's judgment on the ground that Wood's petition was untimely. The court reasoned that Wood had abandoned his 1995 claim through inaction, rendering his 2008 habeas petition untimely. While the court acknowledged that the Supreme Court's decision in *Day v. McDonough* prevents courts from overriding a State's deliberate waiver of a statute of limitations defense, it concluded that the State had not deliberately waived the defense.

Petitioner argues that *Day* only permits district courts, not appellate courts, to raise a statute of limitations defense *sua sponte*. Petitioner also contends that even if an appellate court would have discretion to raise the issue *sua sponte* absent waiver, here the State waived any statute of limitations defense by deliberately choosing not to assert it in the district court.
Decision Below:
403 Fed. Appx. 335 (10th Cir. 2010)

Petitioner's Counsel of Record:
Kathleen A. Lord, Assistant Federal Public Defender, Denver, Colorado
Respondent's Counsel of Record:
Daniel D. Domenico, Solicitor General, State of Colorado

Federal Practice and Procedure

Civil Service Reform Act

Elgin v. Department of the Treasury (11-45)

Question Presented:

Do federal district courts have jurisdiction over constitutional claims for equitable relief brought by federal employees, as the Third and D.C. Circuits have held, or does the Civil Service Reform Act impliedly preclude that jurisdiction, as the First, Second, and Tenth Circuits have held?

Summary:

Under the Civil Service Reform Act (CSRA), federal employees in the civil service may challenge adverse employment actions by filing an appeal with the Merit Systems Protection Board (MSPB), and may appeal adverse decisions of the MSPB to the Federal Circuit. At issue in this case is whether federal employees who claim their dismissals were unconstitutional may sue for equitable relief in federal district court, or whether appeal to the MSPB followed by appeal to the Federal Circuit is the exclusive route to raise a constitutional challenge to their removal from federal civil service.

Federal law disqualifies from federal employment those who knowingly and willfully failed to register for the draft with the Selective Service System although required to do so. Petitioners Michael Elgin, Aaron Lawson, Henry Tucker, and Christon Colby lost their jobs when their federal employers discovered that they had not registered as required by law. Petitioners sued their agency employers in district court, claiming that the statutory disqualification is an unconstitutional bill of attainder, and violates the Equal Protection Clause. Petitioners sought equitable relief, including reinstatement to their jobs. The district court rejected petitioners' constitutional claims on the merits.

The First Circuit vacated the judgment and remanded for entry of a new judgment denying relief for lack of subject matter jurisdiction. The court held that the CSRA provides a route to review of petitioners' constitutional claims by an Article III court, and Congress intended that route to be exclusive of ordinary district court actions to challenge removals. The court acknowledged that the MSPB, as an executive agency, may lack authority to strike down a federal statute as facially unconstitutional. The court determined, however, that the Federal Circuit has such authority.

Petitioners contend that the CSRA does not displace the established tradition of federal courts awarding equitable relief to redress constitutional injuries. Petitioners further assert that the MSPB has consistently held, at the government's urging, that it lacks jurisdiction to review dismissals of employees who are statutorily disqualified because they failed to register for the draft, and the Federal Circuit considers the scope of its jurisdiction on appeal from the MSPB to be coextensive with the MSPB's and refuses to address issues beyond the limit of what the MSPB could review. Given these established rulings and practices of the MSPB and Federal Circuit, petitioners contend

that the First Circuit's holding that the district court lacked jurisdiction left them with no judicial forum to adjudicate their constitutional claims, and without any remedy if their rights were violated.

Decision Below:

641 F.3d 6 (1st Cir. 2011)

Petitioner's Counsel of Record:

Harvey A. Schwartz, Rodgers, Powers & Schwartz

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Litigation Costs

Taniguchi v. Kan Pacific Saipan (10-1472)

Question Presented:

Whether costs incurred in translating written documents are "compensation for interpreters" for purposes of section 1920(6).

Summary:

A federal court may award to a prevailing party the costs of compensating "interpreters." 28 U.S.C. § 1920(6). At issue in this case is whether an interpreter includes someone who translates written documents or is instead limited to persons who translate orally.

Petitioner Kouichi Taniguchi, a Japanese professional basketball player, fell through a wooden deck on respondent Kan Pacific's premises. Taniguchi brought a negligence suit, seeking to recover medical expenses and lost income. The district court granted summary judgment for Kan Pacific, and awarded costs, including the expense of translating documents from Japanese to English. The Ninth Circuit affirmed. The court held that the term "interpreters" in Section 1920(6) encompasses a translator of written documents, and that Section 1929(6) therefore authorizes an award for the costs of translating documents that are needed for litigation.

Taniguchi contends that the ordinary meaning of interpreter is someone who translates orally for parties conversing in different languages, not someone who engages in written translation. He notes that the cost provision is a component of legislation that focuses on in-court interpretive services, further showing that Congress did not intend to allow costs for written translations. Taniguchi further contends that Congress has generally drawn a distinction between interpreters and translators, and has used both terms together when it intends to encompass both oral and written translators. Finally, petitioner contends that expanding the term interpreters to encompass written translators would violate the rule that waivers of sovereign immunity must be construed narrowly, would be contrary to the common law rule that each side in litigation pays its own costs, and would raise issues of international comity in transnational litigation.

Decision Below:

633 F.3d 1218 (9th Cir. 2011)

Petitioner's Counsel of Record:

Donald B. Ayer, Jones Day

Respondent's Counsel of Record:

Dan Himmelfarb, Mayer Brown

Immigration Law

Imputation of Parental Residency

Holder v. Gutierrez (10-1542)
Holder v. Sawyers (10-1543)

Questions Presented:

1) Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

2) Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

Summary:

Title 8 U.S.C. § 1229b(a) allows the Attorney General to cancel removal of a lawful permanent resident alien if certain statutory factors are met, including that the alien has been a lawful permanent resident for at least five years and that the alien has continuously resided in the United States for at least seven years after obtaining lawful permanent resident status. The question in this case is whether the statute allows imputation of a parent's satisfaction of these criteria to a child who does not independently satisfy them.

Respondents Gutierrez and Sawyers sought cancellation of their removal status. The Board of Immigration Appeals denied those requests on the ground that neither personally satisfied the requirement of having resided in the United States continuously for seven years after having been admitted into any status. The Board also held that Gutierrez personally failed to satisfy the requirement of having been lawfully admitted for permanent residence for at least five years. In reaching those conclusions, the Board rejected the argument of Gutierrez and Sawyers that a parent's satisfaction of the statutory criteria should be imputed to a minor child.

The Ninth Circuit remanded both cases to the Board for reconsideration in light of an intervening Ninth Circuit decision. That decision held that §1229b(a) requires the Board to impute to a minor child a parent's satisfaction of the five-year lawful permanent resident requirement and the seven-year residence requirement.

The Government argues that § 1229b(a)'s plain language makes the alien's *own* lawful permanent resident status and residence the relevant factors to consider. In the alternative, the Government argues that even if §1229b(a) is ambiguous, the Board's interpretation is reasonable and is therefore entitled to deference.

Decisions Below:

Gutierrez v. Holder, 411 Fed. Appx. 121 (9th Cir. 2011)
Sawyers v. Holder, 399 Fed. Appx. 313 (9th Cir. 2010)

Petitioner's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondents' Counsel of Record:

Stephen B. Kinnaird, Paul Hastings, for respondent Gutierrez
Charles A. Rothfeld, Mayer Brown, for respondent Sawyers

Retroactivity

Vartelas v. Holder (10-1211)

Question Presented:

Should 8 U.S.C. § 1101(a)(13)(C)(v), which removes a [lawful permanent resident] of his right, under *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), to make "innocent, casual, and brief" trips abroad without fear that he will be denied reentry, be applied retroactively to a guilty plea taken prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009 (1996)?

Summary:

Prior to 1997, lawful permanent residents [LPRs] who returned to the United States after short trips abroad were not considered to be "seeking admission," rendering inapplicable laws forbidding admission of LPRs who had committed certain crimes. In 1997, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added a new provision specifying that LPRs who committed crimes involving moral turpitude should be regarded as seeking admission after brief trips abroad. The question in this case is whether that provision applies to a person who pleaded guilty to a crime involving moral turpitude before enactment of the new admissibility provision.

In 1994 petitioner Panagis Vartelas, an LPR, pleaded guilty to conspiring to make counterfeit checks, a crime involving moral turpitude. In 2003, Vartelas took a brief trip to Greece. Upon his return, immigration officials considered him inadmissible due to his guilty plea. The Board of Immigration Appeals rejected petitioner's contention that the new admissibility provision should not be applied to guilty pleas prior to its enactment, and the Second Circuit affirmed.

Applying the two-step analysis established in *Landgraf v. USI Film Products*, for determining the temporal reach of a statute, the court first concluded that Congress had not expressly prescribed the admissibility provision's temporal reach. The Second Circuit then concluded that application of the new admissibility provision to persons who pleaded guilty to a crime of moral turpitude before its enactment would not have a genuinely retroactive effect. The court reasoned that because the new provision turns on commission of an offense, rather than conviction of an offense, petitioner could not have reasonably relied on the short trip doctrine when he pleaded guilty. The court also concluded that an LPR cannot reasonably rely on provisions in the immigration laws in committing an offense.

Petitioner contends that applying the new admissibility provision to conduct occurring before its enactment would be impermissibly retroactive. In particular, petitioner argues that such an application would add a new penalty to pre-IIRIRA conduct and disrupt LPRs' settled expectations that their reentry after a brief trip abroad would not trigger inadmissibility.

Decision Below:

620 F.3d 108 (2nd Cir. 2010)

Petitioner's Counsel of Record:
Stephanos Bibas, University of Pennsylvania Law School, Supreme Court Clinic
Respondent's Counsel of Record:
Donald B. Verrilli Jr., Solicitor General of the United States

International Law

Alien Tort Statute

Kiobel v. Royal Dutch Petroleum (10-1491)
Questions Presented:
1) Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.
2) Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.
Summary:
The Alien Tort Statute (ATS) provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court held that ATS liability does not extend to violations of international norms "with less definite content and acceptance among civilized nations than the [historical] paradigms familiar when [ATS] was enacted." The Court also noted that a "related consideration is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual." (emphasis added). The questions presented in this case are whether the liability of a corporation is a question of subject matter jurisdiction, and whether corporations are subject to liability under the ATS for human rights violations.

Petitioner Esther Kiobel sued respondents Royal Dutch Petroleum and other foreign corporations under the ATS for respondents' alleged support of the Nigerian government's violent suppression of protesters. Kiobel specifically alleged that respondents aided the Nigerian government in committing the international law violations of torture, extrajudicial killings, and genocide. The district court dismissed some claims and refused to dismiss other claims, and certified its order for interlocutory appeal.

The Second Circuit ordered the dismissal of all claims. It held that whether ATS liability extends to a corporation is a question of subject matter jurisdiction that must be resolved before analyzing the merits of the claim. The court then held that the ATS does not extend liability to corporations because international law has rejected corporate liability for international human rights crimes.

Kiobel argues that the scope of liability is a merits question, not a question of subject matter jurisdiction. In making this argument, Kiobel relies on Supreme Court

decisions holding that questions regarding the scope of a cause of action are not jurisdictional. Second, Kiobel argues that corporations are subject to ATS liability because the text of the ATS does not exclude corporate actors, federal common law has always provided for corporate tort liability, and corporate liability is a general principle of law that is accepted by all nations.

Decision Below:

621 F.3d 111 (2d Cir. 2010)

Petitioners' Counsel of Record:

Paul L. Hoffman, Schonbrun DeSimone Seplow Harris & Hoffman

Respondent's Counsel of Record:

Kathleen Sullivan, Quinn Emanuel Urquhart & Sullivan

Torture Victim Protection Act

Mohamad v. Rajoub (11-88)

Question Presented:

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons.

Summary:

The Torture Victim Protection Act (TVPA) affords a cause of action against "an individual" who, under color of foreign law, tortures or extrajudicially kills another "individual." The question in this case is whether an "individual" perpetrator of torture or an extrajudicial killing includes a political organization or is instead limited to natural persons.

While visiting the West Bank, Azzam Rahim was allegedly picked up by security officers of the Palestinian Authority and taken to a prison in Jericho, where he was tortured and killed. Rahim's widow and family (petitioners) brought suit against the Palestinian Authority and the Palestine Liberation Organization under the TVPA. The district court dismissed the action, holding that the TVPA does not apply to institutional defendants. The D.C. Circuit affirmed.

The D.C. Circuit held that the ordinary meaning of "individual" is "natural person." The court also concluded that the structure of the Act confirms that only natural persons can violate the TVPA. The court explained that Congress used the term "individual" to refer to both the perpetrators and the victims of torture and extrajudicial killings, and only natural persons can be victims. The court also noted that the TVPA uses "person" to refer to possible claimants, which could include non-natural persons such as the estate of a deceased torture victim.

Petitioners contend that the term "individual" can encompass non-natural persons. Petitioners further argue that aliens can sue organizations for human rights violations under the Alien Tort Statute (ATS), and that the TVPA should be interpreted to extend to U.S. citizens the relief that is available to aliens under the ATS.

Decision Below:

634 F.3d 604 (D.C. Cir. 2011)

Petitioner's Counsel of Record:

Robert J. Tolchin, The Berkman Law Office

Respondent's Counsel of Record:
Laura G. Ferguson, Miller & Chevalier Chartered

Other Public Law

Government Immunity – Section 1983

Filarsky v. Delia (10-1018)

Question Presented:

Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee.

Summary:

Qualified immunity shields government officials from liability for civil damages for conduct that does not violate clearly established constitutional rights. At issue in this case is whether a private attorney retained to assist city officials conducting a personnel investigation may assert qualified immunity from a suit to recover damages for an alleged constitutional violation committed during the investigation.

Respondent Nicholas Delia, a firefighter employed by the City of Rialto Fire Department, presented a series of letters from his doctor excusing him from work. Suspicious of Delia, the City hired a private investigator, who filmed Delia buying several rolls of insulation at a home improvement store. The City retained petitioner Steve Filarsky, a private attorney, to assist in investigating whether Delia was off work on false pretenses. During the investigation, Filarsky sought Delia's consent to a warrantless search of his home. When Delia refused, Filarsky obtained a written order, signed by the fire chief, requiring Delia to produce the rolls of insulation from his house, and Delia complied.

Delia sued various officials and Filarsky under 42 U.S.C. § 1983, seeking damages for alleged violations of his constitutional rights. The district court granted summary judgment against Delia, holding that all the individual defendants were entitled to qualified immunity. The Ninth Circuit affirmed in part and reversed in part. It held that while the order to produce the insulation violated the Fourth Amendment, it did not violate clearly established law. The court therefore affirmed the grant of qualified immunity to all the city officials. As to Filarsky, however, the court reversed. The court held that a private attorney who is not a government employee is not entitled to qualified immunity.

Filarsky contends that a private attorney retained by the government is entitled to qualified immunity when the attorney is the functional equivalent of a government employee. That test is satisfied, Filarsky contends, when, as here, a private attorney works with and under the supervision of government employees in performing a government function. Filarsky further argues that failing to accord qualified immunity to private attorneys in these circumstances would drive them away from accepting public employment and deprive state and local governments of critically needed legal advice.

Decision Below:

621 F.3d 1069 (9th Cir. 2010)

Petitioner's Counsel of Record:
Patricia A. Millett, Akin Gump Strauss Hauer & Feld
Respondent's Counsel of Record:
Michael McGill, Lackie, Dammeier & McGill

Real Estate Settlement Procedures Act

Freeman v. Quicken Loans, Inc. (10-1042)

Question Presented:

Whether Section 8(b) of the Real Estate Settlement Procedures Act prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

Summary:

Section 8(b) of the Real Estate Settlement Procedures Act of 1974 (RESPA) states that "no person shall give and no person shall accept any portion, split, or percentage of any charge . . . other than for services actually performed." HUD, the agency responsible for enforcing RESPA, has interpreted the Act to apply to both kickback schemes involving a division of fees between two or more parties and undivided unearned fees involving a single service provider. The question in this case is whether fee division between two or more parties is necessary to make an unearned fee claim actionable under § 8(b).

Petitioner Freeman sued respondent Quicken Loans alleging that respondent charged a loan discount fee but did not provide any corresponding reduction in interest rate, in violation of RESPA. The district court granted Quicken Loans' motion for summary judgment, holding that the plain language of § 8(b) limits its application to fees divided between two or more parties. Because Quicken Loans was the sole recipient of the fees, the district court held that the claim was not actionable.

The Fifth Circuit affirmed. It held that the phrase "no person shall give and no person shall receive" necessarily refers to two culpable actors. It further held that the terms "portion," "split," and "percentage" all unambiguously refer to less than the whole of something. Having determined that the statute unambiguously covers only fee splitting between two culpable parties, the court refused to defer to HUD's contrary interpretation.

Petitioner argues that the most natural reading of the phrase "no person shall give, and no person shall receive" is that it requires only one culpable party. Petitioner further argues that, in common usage, the terms "any portion" and "any percentage" both encompass the entirety or 100%. Finally, petitioner argues that, to the extent the statute is ambiguous, deference to HUD's interpretation is required.

Decision Below:

626 F.3d 799 (5th Cir. 2010)

Petitioner's Counsel of Record:

Kevin K. Russell, Goldstein & Russell

Respondent's Counsel of Record:

Thomas M. Hefferon, Goodwin Proctor

Tax

United States v. Home Concrete & Supply, LLC (11-139)

Questions Presented:

(1) Whether an understatement of gross income attributable to an overstatement of basis in sold property is an "omi[ssion] from gross income" that can trigger the extended six-year assessment period.

(2) Whether a final regulation promulgated by the Department of the Treasury, which reflects the IRS's view that an understatement of gross income attributable to an overstatement of basis can trigger the extended six-year assessment period, is entitled to judicial deference.

Summary:

While the statute of limitations for additional tax assessments in cases of understated tax returns is generally three years, the Internal Revenue Code establishes a six-year statute of limitations in cases where the taxpayer "omits from gross income an amount properly includible therein." In *The Colony, Inc. v. CIR*, 357 U.S. 28 (1958), the Supreme Court held that, under a previous version of the statute, an overstated basis did not constitute an omission from gross income. The question in this case is whether an overstated basis constitutes an omission from gross income under the current version of the statute given that (i) the current version contains an amendment specifying that an overstatement of basis by a trade or business does not trigger the six-year assessment period, and (ii) a Treasury Department regulation treats an overstated basis as an omission from gross income.

Respondent Home Concrete & Supply filed tax returns in 2000 that allegedly overstated its basis in assets. Six years later, the IRS required respondent to pay an assessment based on the correct basis. Respondent then sued to recover the amount of the assessment, arguing that the IRS acted beyond the three-year assessment period. The trial court granted partial summary judgment in favor of the IRS, holding that an overstatement in basis triggers the six-year assessment period.

The Fourth Circuit reversed. It concluded that *Colony*'s holding that the six-year assessment period is inapplicable to an overstatement in basis applies to the current version of the statute because the "omits from gross income" language interpreted in *Colony* remains in the current version. The court rejected the Government's reliance on the Treasury Department's regulation on the grounds that the tax returns at issue preceded the regulation's applicability date and because the Supreme Court in *Colony* viewed the "omits from gross income" language as "unambiguous."

The Government argues that an overstatement in basis constitutes an omission from gross income and that *Colony* does not stand in the way of that interpretation for two reasons. First, it argues that an amendment specifying that an overstatement in basis by a trade or business does not trigger the six-year assessment period implies that a different rule applies to other taxpayers. Second, it argues that the Treasury Department regulation is entitled to deference because it was intended to apply to pending cases, including those in which the tax returns at issue preceded the applicability date, and because the Court in *Colony* recognized that the phrase "omits from gross income" is ambiguous.

Decision Below:
634 F.3d 249 (4th Cir. 2011)
Petitioner's Counsel of Record:
Donald B. Verrilli, Jr., Solicitor General of the United States
Respondent's Counsel of Record:
Richard T. Rice, Womble Carlyle Sandridge & Rice

Workers' Compensation – Longshore Act

Roberts v. Sea-Land Services (10-1399)

Question Presented:

Whether the phrase "those *newly* awarded compensation during such period" in Longshore Act § 6(c), applicable to all classes of disability except permanent total, can be read to mean "those first *entitled* to compensation during such period," regardless of when it is *awarded*.

Summary:

Compensation under The Longshore and Harbor Workers' Compensation Act is calculated as a percentage of the worker's average weekly wage at the time of the injury. The Act caps the rate of compensation, however, at 200% of the "applicable national average weekly wage," an amount determined by the Secretary of Labor each fiscal year. Cap determinations apply to persons "newly awarded compensation." At issue is whether the applicable maximum compensation is the rate in effect when a worker became disabled, or the rate in effect when the worker's employer is ordered to pay compensation.

Petitioner Dana Roberts injured his neck and shoulder on the job as a gatehouse dispatcher for respondent Sea-Land Services. Roberts stopped working and sought workers' compensation under the Longshore Act. In awarding compensation based on the cap, the ALJ applied the cap in effect for 2002, when Roberts became disabled, not the cap in effect for 2007, when Roberts was awarded compensation.

The Benefits Review Board upheld the award, and the Ninth Circuit affirmed. The court held that an employee is "newly awarded" compensation when he first becomes disabled, not when the award is actually made. The court noted that while the Act sometimes uses the term "award" to mean a formal compensation order, it elsewhere uses the term to refer to an employee's entitlement to compensation. Relying on the structure of the Act, the court determined award means entitlement to compensation in the provision at issue. In particular, the court concluded that because the Act uses the worker's weekly wage at the time of his injury as the starting point to determine compensation, it makes sense to use that same time to determine a worker's maximum compensation.

Petitioner contends that the Act's compensation cap is the one in effect at the time a worker is awarded compensation, because the term "newly awarded compensation" plainly refers to the time a worker is awarded compensation, not to the time a worker is entitled to benefits. Petitioner further argues that the Act's goal of encouraging employers to pay compensation contemporaneous with the onset of disability is furthered by imposing a cost on an employer that delays the payment of compensation by litigation.

Decision Below:
625 F.3d 1204 (9th Cir. 2011)
Petitioner's Counsel of Record:
Joshua T. Gillelan II, Longshore Claimants' National Law Center
Respondents' Counsel of Record:
Carter Phillips, Sidley Austin
Donald B. Verrilli Jr., Solicitor General of the United States