

**GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE**

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OCTOBER TERM 2011 PREVIEW

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A LOOK AHEAD AT OCTOBER TERM 2011

This report previews the Supreme Court's docket for October Term 2011. Section I discusses some especially noteworthy cases. Section II organizes next Term's cases into subject-matter categories and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

There are currently 41 cases on the Supreme Court's argument calendar for October Term 2011. Those cases will likely fill the October, November, and December sittings, and take the Court through the first week in the January sitting. To fill out the rest of the calendar, the Court will likely grant approximately 39 additional cases during the course of the Term. Should those 39 cases include the challenge to the constitutionality of the Affordable Care Act and the challenge to affirmative action in Texas's system of higher education, the Term will likely be the most significant in recent years. Without those blockbusters, the Term still promises to be an interesting one. Four granted cases are particularly noteworthy.

FCC v. Fox Television Stations

The First Amendment generally protects indecent communications, such as expletives and non-obscene nudity. In *FCC v. Pacifica Foundation*, however, the Court upheld the FCC's authority to enforce a prohibition on indecent communications against a station that broadcast George Carlin's seven dirty words monologue. Since then, the Court has invalidated indecency restrictions on cable television and the Internet. In *FCC v. Fox*, the Court will have to decide whether these more recent developments undermine indecency regulation on broadcast television and radio, or whether Congress may preserve at least one setting in which the sensibilities of children may be protected without running afoul of the First Amendment. The communications deemed indecent by the FCC include awards ceremonies in which guests used phrases such as "f***ing brilliant," "f*** em," and "f***ing easy." Also at issue is an episode of a crime drama in which the opening scene contained the kind of nudity seen every day on cable television episodes. The Government's petition focused on the lower court's ruling that the stations lacked notice that such communications would be regarded as indecent. But the Court reformulated the question to raise the broader issue whether the First Amendment precludes indecency regulation on broadcast television altogether.

Hosanna-Tabor Church v. EEOC

Congress has prohibited employment discrimination based on race, sex, national origin, age, and disability, and it has also prohibited retaliation against employees who seek to vindicate their rights under those laws. Lower courts have created an exception to those laws, known as the ministerial exception, that permits religious associations to select their religious leaders without being subject to suit under these laws. In *Hosanna-Tabor v. EEOC*, the Court has been asked to decide whether this ministerial exception applies to the selection of teachers at a religious school. Despite its acceptance in the lower courts, the Court has never endorsed the ministerial exception. It will have to decide whether such an exception is consistent with its holding in *Employment Div. v. Smith* that the Religion Clauses generally pose no bar to the enforcement of neutral laws of general applicability, and whether the more limited First Amendment right recognized in *Boy Scouts v. Dale* to be free from neutral laws that significantly

and unduly interfere with the communication of a message adequately safeguards a religious association's First Amendment rights. As all parties recognize, the First Amendment must give the Catholic Church the right to limit the priesthood to men. But does it give a religious association the right to fire any teacher at a religious school for any reason, whether religiously based or not, and regardless of the Government's interest in protecting the employee from discrimination and retaliation? That is what the Court will have to decide.

United States v. Jones

In *U.S. v. Knotts*, the Court held that the warrantless use of an electronic beeper to track a car during one trip does not violate the Fourth Amendment. In *U.S. v. Jones*, the Court will decide whether the warrantless installation of a GPS monitoring device on a person's car and the monitoring of the car's movements for four weeks violate the Fourth Amendment. The Government's argument that the Fourth Amendment places no constraints on the use of GPS technology to monitor public movements raises the specter that the Government could engage in mass surveillance of the public movements of all citizens, revealing a wealth of information that people expect to be private. That argument did not persuade the Court in *Knotts*. It remains to be seen whether the Court will see any pertinent difference between this case and *Knotts*. One potential distinction is that the Government physically attached the GPS device to the car in this case, leading to a potential coalition of Justices concerned with invasions of property rights with Justices concerned about invasions of privacy.

Zivotofsky v. Clinton

The President and Congress ordinarily speak with one voice on what nation has sovereign authority over foreign territory. But what happens when the political branches disagree? That is the question presented in *Zivotofsky v. Clinton*. The question arises in the politically charged context of the status of Jerusalem. A federal statute relating to passports directs the Secretary of State to record Israel as the birthplace of a United States citizen born in Jerusalem, if the person so requests. After Zivotofsky made that request, the Secretary refused and instead recorded Jerusalem as his birthplace, reflecting the President's position that the United States has no official position on who has sovereign authority over Jerusalem. Zivotofsky then asked a federal court to order the Secretary to comply with Congress's directive. The Court has a number of ways it could resolve this case. It could decide that a federal court should not resolve a dispute between the political branches relating to who has sovereign authority over foreign territory. It could decide on the merits whether it is the President or the Congress who has ultimate constitutional authority over that question. Or it could conclude that the federal statute is simply a passport measure within Congress's authority, with no necessary implication for who has sovereign authority over Jerusalem.

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Constitutional Law

Constitutional Tort - *Bivens*

Minneeci v. Pollard (10-1104)

Question Presented:

Whether the Court should imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the Federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government.

Summary:

In *Bivens*, the Court implied a right of action to redress constitutional violations committed by officials of the Federal Bureau of Narcotics. In *Carlson v. Greene*, the Court held that a federal inmate could bring a *Bivens* action against federal prison officials. The question in this case is whether an inmate can bring a *Bivens* action against employees of companies that contract with the federal government to provide prison services.

GEO Group operates a prison under contract with the federal Bureau of Prisons. Respondent Richard Pollard suffered dual elbow fractures while incarcerated at that prison. Before going to the physician, prison employees required respondent to don painful restraints. In addition, while the physician recommended a splint, prison employees refused to provide one, rendering Pollard unable to feed or bathe himself for several weeks. Pollard initiated a *Bivens* action against the GEO employees (petitioners), alleging Eighth Amendment violations. The district court dismissed for failure to state a claim, but the Ninth Circuit reversed.

The Ninth Circuit held that *Bivens* affords inmates a right of action to sue private prison employees for constitutional violations. The court concluded that neither the availability of a state tort remedy nor the absence of qualified immunity for private prison employees precludes recognition of a *Bivens* action.

Petitioners contend that a *Bivens* action is available only when there is no alternative remedy. Because Pollard can pursue a state tort claim against GEO employees, petitioners argue, liability under *Bivens* is precluded. Petitioners also argue that *Bivens* liability is precluded because private employees would not share the qualified immunity of their federal counterparts. Whether to impose such asymmetrical liability, petitioners argue, is a question for Congress, not the courts.

Decision Below:

629 F.3d 843 (9th Cir. 2010)

Petitioner's Counsel of Record:

Jonathan S. Franklin, Fulbright & Jaworski

Respondent's Counsel of Record:

Jack F. Preis, University of Richmond School of Law

Eleventh Amendment – Sovereign Immunity

Coleman v. Maryland Court of Appeals (10-1016)

Question Presented:

Whether Congress constitutionally abrogated states' Eleventh Amendment immunity when it passed the self-care leave provision of the Family and Medical Leave Act.

Summary:

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Supreme Court upheld the family-care provisions of the Family and Medical Leave Act (FMLA), which provide employees with 12 weeks of unpaid leave annually to care for family members, as a valid abrogation of the states' Eleventh Amendment immunity from private damage suits. At issue in this case is whether the FMLA's self-care provision, which provides the same amount of leave to an employee with a serious medical condition, also validly abrogates the states' immunity from suit.

Petitioner Daniel Coleman sued his employer, respondent Maryland Court of Appeals, claiming he was fired because he requested sick leave, in violation of the self-care provision of the FMLA. The district court dismissed the claim on the ground that it was barred by Eleventh Amendment immunity, and the court of appeals affirmed. The court determined that, unlike the family-care provisions at issue in *Hibbs*, the self-care provision was not aimed at preventing gender discrimination and therefore was not within Congress's authority under Section 5 of the Fourteenth Amendment to abrogate a state's immunity from suit. The court therefore joined every other circuit to have considered the issue and held that Congress did not validly abrogate sovereign immunity in passing the FMLA's self-care provision.

Coleman contends that "Congress enacted all of the provisions in the FMLA, including the self-care provision, together as a part of the entire prophylactic scheme" to address unconstitutional gender discrimination in states' employee leave policies. In conducting the constitutional analysis, Coleman argues, the FMLA should therefore be viewed as a whole, without requiring a legislative record that would justify independently each subpart of that comprehensive statutory scheme.

Decision Below:

626 F.3d 187 (4th Cir. 2010)

Petitioner's Counsel of Record:

Michael L. Foreman, Civil Rights Appellate Clinic, Dickinson School of Law

Respondent's Counsel of Record:

William F. Brockman, Office of the Attorney General, Maryland

First Amendment – Religion

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (10-553)

Question Presented:

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

Summary:

Through several nondiscrimination statutes, Congress has prohibited employment discrimination based on race, sex, national origin, age, and disability. Lower courts have created a constitutionally-based exception to those laws that permits religious associations to select their religious leaders without being subject to suit. The question in this case is whether this ministerial exception also applies to the selection of teachers at a religious school.

Cheryl Perich was a “commissioned minister” and a “called” teacher at a religious school operated by petitioner Hosanna-Tabor Evangelical Lutheran Church. Perich taught a complete secular curriculum, but also taught a religious class and led students in prayer. When Perich developed a narcolepsy condition, she went on disability leave. Although Perich’s doctor later cleared her to return to work without limitation, petitioner asked her to resign. When Perich threatened to file suit, petitioner fired her. The EEOC then filed suit against petitioner, alleging retaliation in violation of the Americans for Disabilities Act (ADA), and Perich intervened. The district court dismissed the suit based on the ministerial exception, but the Sixth Circuit reversed.

The Sixth Circuit held that employees who perform primarily secular duties do not fall within the ministerial exception and that Perich’s duties were overwhelmingly secular. The court rejected petitioner’s reliance on respondent’s status as a called minister on the ground that eligibility for the ministerial exception depends on an employee’s primary duties, not on an employee’s religious title. The court also deemed it significant that petitioner employed teachers who were not “called” or even Lutheran, and that those teachers performed the same duties as respondent.

Petitioner argues that the ministerial exception extends to any employee who performs important religious functions. Petitioner further argues that, when an employee falls within the ministerial exception, a court may not order reinstatement or its functional equivalent, and may not even investigate the basis for the decision. Finally, petitioner argues that because respondent performed important religious duties, the EEOC’s suit is barred by the ministerial exception.

Decision Below:

597 F.3d 769 (6th Cir. 2010)

Petitioner’s Counsel of Record:

Douglas Laycock, University of Virginia School of Law

Respondents’ Counsel of Record:

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

Walter Dellinger, O’Melveny & Myers

First Amendment – Speech***Federal Communications Commission v. Fox Television Stations, Inc.* (10-1293)****Question Presented:**

Whether the Federal Communications Commission’s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

Summary:

The First Amendment generally protects indecent speech, including communications containing expletives or non-obscene nudity. In *FCC v. Pacifica Foundation*, however,

the Court upheld the FCC's authority to enforce a prohibition on indecent communications against a station that broadcast George Carlin's seven dirty words monologue. The FCC now defines indecent communications as patently offensive descriptions or depictions of sexual or excretory activities and organs, and it weighs three factors, in context, to determine whether that standard is satisfied: the explicitness or graphic nature of the material; whether the broadcast dwells on or repeats explicit or graphic material; and whether the explicit or graphic material is used for shock value. The use of the words "f***" and "s***" are presumptively indecent, but may be used in a news context or when artistically necessary. This case raises the question whether the FCC's enforcement policy is unconstitutionally vague. It also raises the question whether *Pacifica* can be reconciled with more recent decisions holding that the regulation of indecent communications on cable television and the internet violate the First Amendment.

Respondent NBC aired a music award show in which Bono used the phrase "f***ing brilliant." Respondent Fox aired one music award show in which Cher said in reference to her critics, "f*** em," and another music award show in which Nicole Richie said, have you ever tried to get cow "s***" out of a Prada purse, it's not so "f***ing" easy. Respondent ABC aired an episode of NYPD Blue in which the opening scene showed a full rear view of a female character disrobing and entering a shower, and, when startled by a boy entering the bathroom, turning around and covering herself with her hands. The FCC found that all four programs included indecent material. The Second Circuit held that the FCC's indecency policy is unconstitutionally vague because it fails to give broadcasters fair notice of what is indecent. The court specifically identified as problematic that the policy does not inform broadcasters which expletives are potentially indecent, the FCC admits that it cannot anticipate what it will consider indecent, and with respect to the words "f***" and "s***," broadcasters can only guess when the exceptions for news and artistic necessity apply.

The government contends that the FCC's context-specific approach gives broadcasters sufficient notice of what is prohibited. The government further argues that any effort to make the policy more specific would permit broadcasters to circumvent the prohibition and raise other First Amendment concerns. Finally, the government argues that there is no reason to reconsider *Pacifica* because generations of parents have relied on public broadcasting to provide a safe haven for children, and the FCC's regulation of indecency imposes minimum burdens on broadcasters.

Decision Below:

613 F.3d 317 (2d Cir. 2010)

Petitioner's Counsel of Record:

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

Respondent's Counsel of Record:

Seth P. Waxman, Wilmer Cutler (for ABC, Inc.)

Carter G. Phillips, Sidley Austin (for Fox Television Stations, Inc.)

Miguel A. Estrada, Gibson Dunn (for NBC Universal Media)

***Knox v. Service Employees International Union* (10-1121)**

Questions Presented:

- 1) May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction?
- 2) May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?

Summary:

In *Teachers Local No. 1 v. Hudson*, the Court held that unions that collect fees from nonmembers must give them notice of the basis for the fee and an opportunity to object, a requirement known as a “*Hudson* notice.” In *Lehnert v. Ferris Faculty Ass’n*, the Court held that unions may collect fees from nonmembers only if the expenditures are germane to collective bargaining. The questions in this case are, first, whether an independent *Hudson* notice is required for a temporary special assessment imposed after issuance of a yearly *Hudson* notice that included no information about the temporary special assessment; and, second, whether spending to defeat anti-union ballot initiatives can be charged to nonmembers under *Lehnert*.

Respondent SEIU Local 1000, the bargaining representative for California state employees, issued a *Hudson* notice to employees. Thereafter, the Union imposed a temporary assessment, explaining that it would be used to oppose anti-union ballot initiatives and not for ordinary union expenses. The Union did not issue a new *Hudson* notice with respect to the temporary assessment that would have given objectors an opportunity to opt out. A group of nonunion employees (petitioners) filed suit against SEIU Local 1000, alleging that the Union’s special assessment violated their First and Fourteenth Amendment rights. The district court ruled in petitioners’ favor, holding that a new *Hudson* notice was required for the temporary special assessment.

The Ninth Circuit reversed. It held that *Hudson* permits unions to give a yearly notice based on its expenses from the previous year, and to incorporate any overpayments occasioned by a special assessment into the fee rate for the following year. The court also held that spending on one of the ballot initiatives was germane to collective bargaining and therefore chargeable to nonmembers because it would have allowed the Governor effectively to abrogate collective bargaining agreements in certain circumstances.

Petitioners argue that the failure to give a *Hudson* notice for the temporary assessment violated *Hudson*’s requirement that fee procedures must be carefully tailored to give non-members a fair opportunity to opt out of political expenditures. Petitioners further argue that a *Hudson* notice for the temporary special assessment was required because the assessment was specified as entirely or primarily for political purposes and because the yearly notice did not inform nonmembers that such a fee would be imposed. Finally, petitioners argue that expenditures to oppose a ballot initiative that would allow abrogation of collective bargaining agreements are not chargeable to nonmembers under *Lehnhart* because they do not relate to the ratification or implementation of a collective bargaining agreement.

Decision Below:628 F.3d 1115 (9th Cir. 2010)**Petitioner's Counsel of Record:**

William James Young, National Right to Work Legal Defense Foundation, Inc.

Respondent's Counsel of Record:

Jeffrey B. Demain, Altshuler Berzon

Fourth Amendment – Search***Florence v. Board of Chosen Freeholders of the County of Burlington* (10-945)****Question Presented:**

Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances.

Summary:

In *Bell v. Wolfish*, the Court held that prison authorities could conduct suspicionless strip searches of inmates following contact visits with outside visitors because of the risk that outside visitors would give weapons and contraband to inmates. The question in this case is whether the Fourth Amendment also permits suspicionless strip searches of persons arrested for a minor offense.

Petitioner Albert Florence was erroneously arrested for failing to pay a fine and taken to Burlington County Jail. During the intake process, a prison official conducted a strip search in which Florence was required to open his mouth, lift his tongue, turn around, and lift his genitals. Florence was subsequently transported to Essex County Correctional Facility, where he was subjected to a similar strip search. Florence filed suit against the prison facilities, alleging that the strip searches violated the Fourth Amendment. The district court agreed, holding that a suspicionless strip search of a person arrested for a minor offense violates the Fourth Amendment.

The Third Circuit reversed. Relying on *Bell v. Wolfish*, the court held that while strip searches constitute a significant intrusion on personal privacy, the government's interest in preventing the introduction of weapons and drugs into the prison environment outweighs that intrusion.

Petitioner argues that a suspicionless strip search is not reasonable because it constitutes a severe intrusion on personal privacy, and the government's interest in preventing the introduction of contraband is adequately served through pat-downs, the use of metal detectors, and searches based on reasonable suspicion. Petitioner also argues that *Bell v. Wolfish* is distinguishable because where there is genuine risk that visitors will give weapons and contraband to inmates, it is highly unlikely that persons will plan their own arrest for a minor offense in the hope of bringing weapons or contraband into the prison undetected.

Decision Below:

621 F.3d 296 (3d Cir. 2010)

Petitioner's Counsel of Record:

Thomas C. Goldstein, Goldstein & Russell

Respondent's Counsel of Record:

Carter G. Phillips, Sidley Austin

Separation of Powers

Zivotofsky v. Clinton (10-699)

Questions Presented:

- 1) Whether the “political question doctrine” deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport.
- 2) Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President’s power to recognize foreign sovereigns.

Summary:

The United States has no official view on whether Jerusalem is a part of Israel. A federal statute relating to passports, however, directs the Secretary of State to record Israel as the birthplace of a United States citizen born in Jerusalem, if the person so requests. The Secretary has refused to enforce that statute and instead records Jerusalem as the person’s birthplace. The questions in this case are whether the political question doctrine prevents a court from enforcing the federal statute and whether the statute unconstitutionally intrudes on the President’s power to recognize foreign sovereigns.

Petitioner Menachem Zivotofsky, a United States citizen, was born in Jerusalem. Petitioner’s mother applied for a passport and requested that the place of birth be recorded as Israel. The State Department denied that request and recorded “Jerusalem” as the place of birth instead. Petitioner filed suit against the Secretary, seeking an order directing the Secretary to record Israel as petitioner’s birthplace. The district court dismissed the case on the ground that it raised a political question, and the D.C. Circuit affirmed.

The D.C. Circuit held that the Constitution’s grant of authority to the President to receive Ambassadors and other Public Ministers gives the President the exclusive power to recognize foreign governments, and that exercises of that authority are unreviewable political questions. The court also held that the State Department’s refusal to record Israel as the birthplace of persons born in Jerusalem was an exercise of the President’s recognition power and therefore unreviewable.

Petitioner argues that the constitutionality of the federal statute at issue presents a straightforward question of constitutional interpretation for the courts, not a political question that is committed to the political branches. Petitioner further argues that the statute is constitutional. Specifically, petitioner argues that Congress, not the President, has ultimate authority to determine whether to recognize a foreign nation. Petitioner further argues that even assuming the President has recognition authority, Congress may determine the boundaries of a recognized sovereign. Finally, petitioner argues that the State Department’s refusal to record Israel as the birthplace of citizens born in Jerusalem is not an exercise of the President’s recognition authority since the State Department permits designations that are not recognized sovereigns, such as West Bank and Gaza Strip.

Decision Below:

571 F.3d 1227 (D.C. Cir. 2009)

Petitioner’s Counsel of Record:

Nathan Lewin, Lewin & Lewin

Respondent's Counsel of Record:

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

Supremacy Clause – Private Right of Action

Douglas v. Independent Living Center of Southern California (09-958)

Douglas v. California Pharmacists Association, (09-1158)

Douglas v. Santa Rosa Memorial Hospital (10-283)

Question Presented:

Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce [42 U.S.C.] § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates?

Summary:

The Supreme Court has long entertained claims by private parties that state laws are preempted by federal law. In some of those cases, Congress had provided a private cause of action. In others, Congress had created a “right” in favor of the private party, which could then be enforced under 42 U.S.C. § 1983. In still others, there was no apparent basis for the suit other than the Supremacy Clause itself. The Court, however, has never expressly resolved whether the Supremacy Clause itself supplies private parties with a cause of action to enjoin a state law that allegedly conflicts with federal law. This case presents that question.

In 2008 and 2009, the California Legislature reduced payments to Medicaid providers and hospitals for certain services. The Legislature also reduced the State’s contribution to the counties’ payments to In-Home Supportive Services (IHSS) providers. Medicaid providers and recipients (respondents) brought suit seeking an injunction against the reductions on the ground that they violate a provision of the Medicaid Act that requires participating States to provide a level of payment that will ensure care and services comparable to that of the general population. The Ninth Circuit enjoined each of the legislative enactments.

The Ninth Circuit recognized that Congress did not create a private cause of action to enforce the provision of the Medicaid Act relied on by respondents. And it also recognized that the provision at issue did not create a “right” enforceable under section 1983. The Ninth Circuit nonetheless held that respondents could proceed directly under the Supremacy Clause to enforce compliance with the Medicaid Act.

The State argues that the Supremacy Clause does not itself confer a cause of action, but instead supplies a rule of decision in a case that is otherwise properly before a court. The State further argues that allowing a claim under the Supremacy Clause would permit an end-run around Congress’s decision not to provide a private cause of action or create a right enforceable under section 1983. Finally, the State contends that federal funding statutes, in particular, cannot be enforced directly under the Supremacy Clause, because Congress expects noncompliance with federal funding statutes to be remedied through a fund cut-off.

Decision Below:

380 Fed. Appx. 656 (9th Cir. 2010)

Petitioner's Counsel of Record:

Karin S. Schwartz, Office of the Attorney General, California

Respondents' Counsel of Record:

Carter G. Phillips, Sidley Austin
 Stephen P. Berzon, Altshuler Berzon
 Lynn S. Carman, Medicaid Defense Fund
 Deanne Maynard, Morrison & Foerster

Water Law***PPL Montana v. Montana* (10-218)****Question Presented:**

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question “very liberally construed” in the State’s favor?

Summary:

In *United States v. Utah*, 283 U.S. 64 (1931), the Court held that titles to river beds within a state passed to the state when it was admitted to the Union if the rivers were then navigable. The Court applied that test to a section of a river that spanned approximately four miles. The questions in this case are whether the *Utah* decision requires a court to examine the navigability of rivers on a section-by-section basis, rather than as a whole, and whether evidence of present-day use is sufficient to establish navigability at the time a State was admitted into the Union.

PPL Montana (petitioner) filed a lawsuit seeking declaratory judgment that federal law prevented a claim for compensation based on its use of Montana riverbeds for hydroelectric dams. Montana filed a counterclaim contending that it was entitled to compensation for past use. The trial court granted summary judgment in favor of Montana, holding that PPL’s riverbeds rested on navigable rivers at the time of statehood and thus that Montana held title to them.

The Montana Supreme Court affirmed. It held that a court should determine navigability of a river as a whole, rather than on a section-by-section basis, at least where the sections alleged to be non-navigable are relatively short. Applying that framework, the court concluded that the interruptions relied on by PPL were relatively short and therefore insufficient to show that any portions of the river were non-navigable. The Montana Supreme Court also concluded that Montana’s evidence of present-day navigability was sufficient to establish navigability at the time of statehood, discounting PPL’s historical evidence of non-navigability as too conclusory.

Petitioner argues that *Utah* and other precedents require a court to undertake a section-by-section analysis when determining navigability and that any exception for sections that are too short could have no application to the sections at issue in this case. It further contends that the Montana Supreme Court gave undue weight to evidence of present-day usage when it effectively held that such evidence on its own was sufficient to demonstrate navigability at the time of statehood.

Decision Below:

229 P.3d 421 (Mt. 2010)

Petitioner’s Counsel of Record:

Paul D. Clement, Bancroft PLLC

Respondents’ Counsel of Record:

Stephen C. Bullock, Attorney General of Montana

Business Law**Arbitration – Credit Repair Organizations Act*****CompuCredit v. Greenwood*** (10-948)**Question Presented:**

Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1670 *et seq.*, are subject to arbitration pursuant to a valid arbitration agreement.

Summary:

The Credit Repair Organizations Act (CROA) prohibits deceptive marketing practices by businesses that provide services intended to improve a consumer’s credit record, history, or rating. The CROA provides that consumers have a “right to sue” for violations, and further provides that “[a]ny waiver by any consumer of . . . any right of the consumer” under the CROA “shall be treated as void” and “may not be enforced by any Federal or State court or any other person.” At issue is whether the CROA’s non-waiver provision renders void and unenforceable an arbitration agreement that waives a consumer’s right to seek judicial relief for CROA violations.

Respondents Wanda Greenwood and two other consumers filed a class complaint against petitioners CompuCredit and Synovus Bank, claiming petitioners violated the CROA in marketing a subprime credit card. Petitioners’ standard form credit card agreement with each respondent required final and binding arbitration of any dispute or claim arising in connection with the credit card agreement. The arbitration clause waived the consumer’s right to litigate in court any claims against respondents.

Petitioners moved to compel arbitration of respondents’ claims pursuant to the Federal Arbitration Act (FAA). The district court denied the motion, holding the arbitration clause was an invalid waiver of a consumer’s right to sue for CROA violations. The Ninth Circuit affirmed. The court of appeals relied on the CROA’s disclosure provision, which requires a credit repair organization to inform each consumer that “You have the right to sue a credit repair organization that violates the [CROA].” The court found the plain language of the disclosure provision, coupled with the anti-waiver provision, demonstrates that Congress intended that consumers cannot waive their right to sue under the CROA.

Petitioners contend that, even assuming the right to sue creates an exclusively judicial remedy, the CROA’s non-waiver provision precludes the waiver only of a consumer’s substantive statutory rights and therefore does not prevent a consumer from waiving her procedural right to pursue redress in a judicial forum. Alternatively, petitioners argue that the right to sue is honored when a consumer is given a right to sue in an arbitral forum. For each argument, petitioners rely on the absence of any clear and unmistakable language overcoming the FAA’s presumption in favor of arbitration.

Decision Below:615 F.3d 1204 (9th Cir. 2010)

Petitioner’s Counsel of Record:

Sri Srinivasan, O’Melveny & Myers

Respondent’s Counsel of Record:

Scott Nelson, Public Citizen Litigation Group

Bankruptcy***Hall v. United States* (10-1024)****Question Presented:**

Does [Internal Revenue Code § 1399] mean that the capital gains income tax incurred due to the sale of [petitioners’ family] farm is not a Bankruptcy Code administrative expense owed by the bankruptcy estate and payable under a bankruptcy reorganization plan?

Summary:

Under Chapter 12 of the Bankruptcy Code, a tax on the sale of a farm asset is unsecured and dischargeable if the sale is made before the bankruptcy petition is filed. At issue in this case is whether the tax on a post-petition sale of a farm asset is also unsecured and dischargeable. The resolution of that question depends on whether the tax is a tax “incurred by the estate.”

Shortly after filing for Chapter 12 bankruptcy, petitioners Lynwood and Brenda Hall sold their farm for \$960,000 and proposed to pay off their outstanding debts with the sale proceeds. The IRS objected to petitioner’s reorganization plan, asserting a federal tax claim of \$29,000 on the capital gain realized from the sale. Petitioners sought to treat the tax as an unsecured claim, payable to the extent funds remained after payment of all priority claims with the balance discharged. The bankruptcy court sustained the government’s objection, but the district court reversed, finding that both post-petition and pre-petition tax claims may be treated as non-priority unsecured claims under Chapter 12.

The Ninth Circuit reversed. It held that because a Chapter 12 estate is not a taxable entity under the Internal Revenue Code (IRC), a tax incurred post-petition is not “incurred by the estate.” The court therefore held that petitioners were personally liable for the tax owed on the sale of their farm.

Petitioners contend that a tax incurred after the filing of a bankruptcy petition is necessarily a tax “incurred by the estate” and therefore unsecured and dischargeable. In using the phrase “incurred by the estate,” petitioners argue, Congress focused on whether the tax was incurred after the estate came into existence, not on whether the estate is itself a taxable entity under the IRC. Finally, petitioners argue that allowing post-petition taxes to be treated as unsecured and dischargeable furthers Congress’s intent to enable a family farmer to downsize his operation without incurring substantial tax liability.

Decision Below:617 F.3d 1161 (9th Cir. 2010)**Petitioner’s Counsel of Record:**

Susan M. Freeman, Lewis and Roca

Respondent’s Counsel of Record:

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

Copyright

Golan v. Holder (10-545)

Questions Presented:

- 1) Does the Progress Clause of the United States Constitution prohibit Congress from taking works out of the public domain?
- 2) Does Section 514 [of the Uruguay Round Agreements Act of 1994] violate the First Amendment of the United States Constitution [by restoring copyright protection to works in the Public Domain]?

Summary:

The Berne Convention requires parties to the Convention to afford copyright protection to foreign works whose terms have not expired in the country of origin. Section 514 of the Uruguay Round Agreements Act of 1994 (URAA), which implements the Berne Convention, affords copyright protection to certain foreign works in the public domain in the United States. This case presents the question whether Section 514's removal of works from the public domain exceeds Congress's authority under the Copyright Clause. It also presents the question whether Section 514 violates the First Amendment.

Petitioners are orchestra conductors, movie distributors, and others who have relied on the availability of works removed from the public domain by Section 514. They filed suit, alleging that Section 514 exceeds Congress's authority under the Copyright Clause and violates the First Amendment. In its first decision, the Tenth Circuit held that Section 514 falls within Congress's authority under the Copyright Clause. In its second decision, the Tenth Circuit held that Section 514 does not violate the First Amendment. Applying intermediate scrutiny, the court concluded that Section 514's copyright protection for foreign works is narrowly tailored to securing similar foreign protection for American works.

Petitioners contend that Section 514's removal of works from the public domain violates the requirement in the Copyright Clause that a copyright may be granted only for "limited Times." In recognition of that restriction, petitioners argue, Congress has consistently left the public domain intact. Petitioners also contend that Section 514 violates the First Amendment. In particular, petitioners argue that Congress may not trade off the speech rights of persons who have relied on the availability of works in the public domain in order to confer a windfall on American authors, and the government can comply with the Berne Convention without interfering with the speech rights of the relying parties, by invoking exceptions to the Convention's protection requirements.

Decision Below:

609 F.3d 1076 (10th Cir. 2010)

Petitioner's Counsel of Record:

Anthony T. Falzone, Stanford Law School Center for Internet and Society

Respondent's Counsel of Record:

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

Employer Liability – Outer Continental Shelf Lands Act

Pacific Operators Offshore v. Valladolid (10-507)

Questions Presented:

When an outer continental shelf worker is injured *on land*, is he (or his heir):

- 1) *always* eligible for compensation, because his employer's operations on the shelf are the but for cause of his injury (as the Third Circuit holds); or
- 2) *never* eligible for compensation, because the Act applies only to injuries occurring on the shelf (as the Fifth Circuit holds); or
- 3) *sometimes* eligible for compensation, because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the shelf (as the Ninth Circuit holds)?

Summary:

The Outer Continental Shelf Lands Act (OCLSA) extends workers' compensation coverage under the Longshore and Harbor Workers' Compensation Act to injuries "occurring as the result of operations conducted on the Outer Continental Shelf." The question in this case is whether an injury that occurred on land is compensable.

Juan Valladolid was an employee of petitioner Pacific Operators Offshore. While working at Pacific Operators' onshore oil-processing facility, Valladolid was crushed to death by a forklift. Valladolid's heir filed suit for benefits under OCLSA. The Benefits Review Board denied compensation on the ground that OCLSA does not provide compensation for an injury that occurred on land, but the Ninth Circuit reversed.

The Ninth Circuit held that the "as a result of" language of OCLSA makes clear that a claimant is eligible for compensation for any injury that is "caused" by operations conducted on the shelf regardless of where the injury occurred. The court concluded that proof of but-for causation is insufficient to satisfy that causation requirement. Instead, a claimant must prove that the "the work performed directly furthers outer continental shelf operations and is in the regular course of such operations."

Petitioners contend that OCLSA's language requires that the injury itself must occur on the shelf. In petitioners' view, the "as a result of" language simply makes clear that injuries suffered on the shelf that later manifest on land are compensable and that injuries that occur on the shelf, but are unrelated to shelf operations, are not compensable. Petitioners further contend that a requirement that the injury must occur on the shelf is commensurate with the jurisdictional problem that existed before OCLSA's enactment—that some workers who suffered injuries on the shelf had no claim while others were covered by the law of more than one state. Finally, petitioners argue that a bright-line rule that limits recovery to injuries on the shelf is easily administrable and relieves employers of the burden of purchasing insurance to cover both federal and state compensation claims

Decision Below:

604 F.3d 1126 (9th Cir. 2010)

Petitioner's Counsel of Record:

Paul D. Clement, Bancroft PLLC

Respondent's Counsel of Record:

David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel

Federal Preemption

***Kurns v. Railroad Friction Products Corp.* (10-879)**

Question Presented:

Did Congress intend the federal Railroad Safety Acts to preempt state law-based tort lawsuits?

Summary:

The federal Locomotive Inspection Act (LIA) provides that a “railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances . . . are in proper condition and safe to operate without unnecessary danger of personal injury.” At issue in this case is whether the LIA preempts state law tort claims for injuries suffered while a locomotive was not in use on a railroad line.

George Corson worked for many years repairing locomotives in railroad maintenance facilities, where he was exposed to asbestos. After he retired, Corson was diagnosed with a form of cancer caused only by asbestos exposure. Corson and his wife sued manufacturers of locomotive parts containing asbestos in state court, seeking damages for negligence and failure-to-warn under Pennsylvania tort law. After removal, a federal district court held that the LIA preempted those state law tort claims.

The court of appeals affirmed. It held that the LIA preempts all state law tort claims relating to the design, construction, and material of a locomotive, regardless of whether the plaintiff’s injury occurred while the locomotive was in use on a railroad line. While the court acknowledged that the LIA provides a remedy only for injuries incurred while a locomotive was in use, it concluded that this limitation on liability has no bearing on the scope of preemption.

Petitioners contend that because the LIA regulates locomotives only when they are in use on railroad lines, the scope of preemption is similarly limited. In support of that contention, petitioners rely on the general principle that the scope of federal preemption extends no further than the scope of federal regulation. Petitioners also argue that the court of appeals’ ruling would leave many injured railroad repair workers without any remedy, a result Congress did not intend.

Decision Below:

620 F.3d 392 (3d Cir. 2010)

Petitioner’s Counsel of Record:

David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel

Respondent’s Counsel of Record:

Jonathan D. Hacker, O’Melveny & Myers

***National Meat Association v. Harris* (10-224)**

Questions Presented:

- 1) Did the Ninth Circuit err in holding that a "presumption against preemption" requires a "narrow interpretation" of the [Federal Meat Inspection Act’s] express preemption provision, in conflict with this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977), that the provision must be given "a broad meaning"?
- 2) Where federal food safety and humane handling regulations specify that animals (here, swine) which are or become nonambulatory on federally-inspected premises are to be

separated and held for observation and further disease inspection, did the Ninth Circuit err in holding that a state criminal law which requires that such animals not be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA?

3) Did the Ninth Circuit err in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally-regulated slaughterhouses?

Summary:

To ensure the safety of meat sold for human consumption, the Federal Meat Inspection Act (FMIA) regulates slaughterhouses and requires federal inspection of animals before they are slaughtered. The FMIA provides that states may not impose "addition[al]" or "different" requirements "with respect to premises, facilities and operations" of slaughterhouses, but does not preclude states "from making requirement[s] or taking other action, consistent with this chapter." At issue in this case is whether the FMIA preempts a California law that requires downer animals that are unable to stand or walk without assistance to be immediately euthanized, and forbids their slaughter for human consumption.

Petitioner National Meat Association (NMA), a trade association of pork packers and processors, filed suit to enjoin the California law's application to federally inspected swine slaughterhouses. The district court entered a preliminary injunction, holding that the FMIA expressly preempts California's ban on the slaughter of downer animals for human consumption.

The Ninth Circuit vacated and remanded. The court held that California's law does not fall within the FMIA's express preemption provision because the California law regulates the kind of animal that may be slaughtered, and not the premises, facilities and operations of slaughterhouses. Under the court's interpretation of the FMIA's express preemption provision, federal law regulates the meat inspection process, but states remain free to prohibit the slaughter of certain kinds of animals altogether. The court also rejected petitioner's claim of implied preemption, because nothing in the FMIA requires the slaughter of downer animals for human consumption.

Petitioner argues that California's law fits within the plain language of the FMIA's express preemption provision, because requiring euthanasia and barring slaughter for human consumption regulates the "operations" of slaughterhouses. Petitioner further argues that the Ninth Circuit's narrow construction of the FMIA's preemption provision conflicts with the Supreme Court's holding in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), that identical language in the FMIA preempting state meat labeling or packaging requirements should be given a broad meaning. Finally, petitioner contends that the Ninth Circuit improperly neglected to conduct the inquiry required under *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), to determine if a state law falls within the scope of a federal preemption provision barring "different" or "additional" state requirements. Because the FMIA and its implementing regulations specifically govern slaughterhouse "operations" in handling downer swine, petitioner maintains, California's law imposes requirements "different than" and in addition to the federal standards and is therefore preempted.

Decision Below:

599 F.3d 1093 (9th Cir. 2010)

Petitioner’s Counsel of Record:

Steven J. Wells, Dorsey & Whitney

Respondent’s Counsel of Record:

J. Scott Ballenger, Latham & Watkins

Federal-Question Jurisdiction – Telephone Consumer Protection Act

Mims v. Arrow Financial Services (10-1195)

Question Presented:

Did Congress divest the federal district courts of their federal-question jurisdiction under 28 U.S.C. § 1331 over private actions brought under the Telephone Consumer Protection Act?

Summary:

The federal Telephone Consumer Protection Act (TCPA) prohibits certain unsolicited marketing calls and restricts the use of automatic dialers and prerecorded messages. The TCPA may be enforced by state attorneys general or private citizens. Federal courts have “exclusive jurisdiction” over suits brought by states, while private citizens “may, if otherwise permitted by [State law], bring [an action] in an appropriate court of that State.” At issue in this case is whether private suits may also be brought in federal court.

Petitioner Marcus Mims sued respondent Arrow Financial Services in federal court, claiming that Arrow harassed him with repeated automated collection calls and messages to his cellular phone, in violation of the TCPA. Mims asserted federal-question jurisdiction under 28 U.S.C. § 1331, which provides that federal “district courts shall have original jurisdiction of all civil actions arising under the ... laws ... of the United States.”

The district court dismissed Mims’s suit, holding that Congress vested jurisdiction over private TCPA suits exclusively in state court. The court of appeals affirmed, holding that the TCPA’s provision that a person “may” bring an action in state court if otherwise permitted by state law creates exclusive state-court jurisdiction over private suits.

Mims contends that 28 U.S.C. § 1331 establishes federal jurisdiction over causes of action created by federal law unless Congress has specifically divested the federal courts of that jurisdiction. Because the TCPA does not provide that private suits to enforce its provisions must be brought exclusively in state court, Mims argues, federal courts retain jurisdiction under 28 U.S.C. § 1331.

Decision Below:

2010 WL 4840430 (11th Cir. 2010)

Petitioner’s Counsel of Record:

Scott L. Nelson, Public Citizen Litigation Group

Respondent’s Counsel of Record:

Gregory G. Garre, Latham & Watkins

Patent

Caraco Pharmaceutical v. Novo Nordisk A/S (10-844)

Question Presented:

Whether [the Hatch-Waxman Act] counterclaim provision applies where (1) there is “an approved method of using the drug” that “the patent does not claim,” and (2) the brand submits “patent information” to the FDA that misstates the patent’s scope, requiring “correct[ion].”

Summary:

A manufacturer of a generic drug may not obtain FDA approval if marketing it would infringe the brand name manufacturer’s patent. There is no infringement if the generic manufacturer seeks approval for a use that is not claimed by the patent. In deciding whether it will approve the generic on that basis, the FDA relies on the use information (use code) supplied by brand-name manufacturers. When a brand-name manufacturer brings a patent infringement claim against a generic applicant, the Hatch-Waxman Act authorizes a generic applicant to bring a counterclaim “seeking an order requiring the [brand-name manufacturer] to correct or delete the patent information submitted * * * on the ground that the patent does not claim * * * an approved method of using the drug.” The question in this case is whether a generic manufacturer may bring a Hatch-Waxman claim alleging that the use code supplied by the manufacturer to the FDA is broader than the method of use claimed by its patent.

Respondent Novo Nordisk owns a patent for using repaglinide in combination with metformin to treat diabetes, and the use information (use code) it submitted to the FDA was originally limited to that combination. Petitioner Caraco sought FDA approval to market repaglinide for use by itself to treat diabetes. Respondent later amended its use code to include all combination and standalone uses of repaglinide, precluding FDA approval of the generic. After respondent filed a patent infringement claim, petitioner filed a Hatch-Waxman counterclaim. A district court found that respondent had misrepresented the scope of its patent in its amended use code, and issued an order requiring respondent to correct it.

The Federal Circuit reversed. It held that a generic manufacturer may not bring a counterclaim to correct a brand-name manufacturer’s use code that is broader than the claims in the patent. The court interpreted “an approved method” to mean “any approved method,” so that when the patent claims at least one approved method, no counterclaim may be brought, even if the use code inaccurately claims other approved methods.

Petitioner contends that under the plain language of Hatch-Waxman, respondent’s patent did not claim “an approved method,” because it did not claim the use of repaglinide by itself, and that is “an approved method.” Petitioner also argues the Federal Circuit’s interpretation would enable brand-name manufacturers to deliberately block non-infringing generic uses with overbroad use codes, defeating Congress’s goal of bringing non-infringing generics to market quickly.

Decision Below:

601 F.3d 1359 (Fed. Cir. 2010)

Petitioner’s Counsel of Record:

Steffen N. Johnson, Winston & Strawn

Respondent’s Counsel of Record:

Mark A. Perry, Gibson Dunn & Crutcher

Kappos v. Hyatt (10-1219)**Questions Presented:**

- 1) Whether the plaintiff in a Section 145 action may introduce new evidence that could have been presented to the agency in the first instance.
- 2) Whether, when new evidence is introduced under Section 145, the district court may decide de novo the factual questions to which the evidence pertains, without giving deference to the prior decision of the PTO.

Summary:

A patent applicant denied a patent by a final decision of the Patent and Trademark Office (PTO) may appeal to the Federal Circuit or file suit against the PTO in D.C. district court. The Federal Circuit reviews the PTO's decision based solely on the evidence that was before it, and gives deference to the PTO's decision. This case raises the question whether an applicant who files suit in district court may introduce new evidence that could have been presented to the PTO. It also raises the question whether the district court may decide factual questions relating to the new evidence de novo.

A PTO patent examiner denied respondent Hyatt's patent application for lack of an adequate written description, and that decision was affirmed by the PTO's Board of Patent Appeals and Interferences (Board). Hyatt petitioned for rehearing, adding for the first time claim-by-claim responses to the examiner's analysis. The Board concluded that respondent had waived those arguments by failing to present them earlier and denied reconsideration. Hyatt filed suit against the PTO in district court and submitted new evidence. The district court excluded the evidence on the ground that respondent had failed to submit the evidence to the PTO despite having had an opportunity to do so. A panel of the Federal Circuit affirmed, but the en banc court reversed.

The en banc court held that an action against the PTO in district court is an independent civil suit and that a party may therefore introduce any evidence that is admissible under the Federal Rules of Evidence. The en banc court also held that the district court should decide any factual issue related to the new evidence de novo without giving deference to the PTO.

The government argues that under standard administrative law principles for review of agency action, a district court may only consider new evidence when the patent applicant did not have a reasonable opportunity to submit the evidence to the PTO. The regime created by the Federal Circuit, the government maintains, permits an applicant to deliberately withhold evidence from the PTO at a prior hearing in order to present the evidence to a non-expert judge, thwarting Congress's decision to entrust patent decisions to an expert agency. The government also argues that under standard administrative law principles, a district court must review factual issues involving new evidence deferentially rather than de novo.

Decision Below:

625 F.3d 1320 (Fed. Cir. 2010)

Petitioner's Counsel of Record:

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

Respondent's Counsel of Record:

Aaron M. Panner, Kellogg, Huber, Hansen, Todd, Evans, & Figel

***Mayo Collaborative Services v. Prometheus Laboratories* (10-1150)**

Question Presented:

Whether 35 U.S.C. § 101 is satisfied by a patent claim that covers observed correlations between blood test results and patient health, so that the claim effectively preempts all uses of the naturally occurring correlations, simply because well-known methods used to administer prescription drugs and test blood may involve "transformations" of body chemistry.

Summary:

The Patent Statute establishes categories of patent eligibility, including for a "process." A patent is not an eligible "process" if it preempts all uses of a naturally occurring phenomenon, but a particular application of a natural phenomenon may be patent eligible. To determine whether a patent covers an eligible process, the Federal Circuit has applied a "machine-or-transformation" test under which a claimed patent process is eligible if it is tied to a particular machine or if it transforms a particular article into a different state or thing. In *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), the Supreme Court held that the "machine-or-transformation" test, while useful and important, is not the sole test to determine eligibility as a "process." The question in this case is whether a method for determining a drug's optimum dosage that relies on naturally occurring correlations is patent eligible as a "process" because the method has steps that require transformations.

Prometheus Labs (respondent) has licenses for patents that determine the optimum dosage of drugs to treat autoimmune diseases, such as Crohn's disease. The steps in the process are to administer the drug, determine the level of the drug's metabolites in the subject, and compare the level to pre-determined levels that indicate a need to increase or decrease dosage. The first two steps require transformations. The last step relies on naturally occurring correlations between metabolite levels in the body and drug efficacy and toxicity. Mayo Collaborative Services (petitioner) seeks to market a competing test based on somewhat different pre-determined optimum treatment levels. Prometheus filed suit against Mayo, alleging patent infringement. The trial court held Prometheus's patent invalid on the ground that it impermissibly preempts all uses of the naturally occurring correlation between metabolite levels and drug efficacy and toxicity.

The Federal Circuit reversed, holding that Prometheus's patent meets the "machine-or-transformation" test. The Supreme Court vacated and remanded the case for further consideration in light of *Bilski*, which was decided after the Federal Circuit decision. On remand, the Federal Circuit again reversed. It held that Prometheus's patent did not impermissibly preempt all uses of the naturally occurring correlation between metabolite levels and drug efficacy and toxicity, but instead claimed specific treatment steps. It also reaffirmed its conclusion that the patent satisfies the transformation test because the first two steps in the process require transformations. The court did not view *Bilski* as requiring a different analysis or result.

Petitioner argues Prometheus's patent impermissibly preempts the use of a natural phenomenon because it relies on naturally occurring correlations without reciting a real-world application, such as changing a patient's dosage. Petitioner further argues that the transformations required in the first two steps do not render Prometheus's claim patentable because the first two steps lead up to the natural correlations, and are not real-world applications of those correlations.

Decision Below:

628 F.3d 1347 (Fed. Cir. 2010)

Petitioner's Counsel of Record:

Stephen Shapiro, Mayer Brown

Respondent's Counsel of Record:

Richard P. Bress, Latham & Watkins

Securities***Credit Suisse Securities v. Simmonds* (10-1261)****Question Presented:**

Whether the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is subject to tolling, and, if so, whether tolling continues even after the receipt of actual notice of the facts giving rise to the claim.

Summary:

Section 16(b) of the Securities and Exchange Act prohibits corporate insiders, including security owners with more than 10% of the stock, from realizing any profit from “short swing” trades, defined as buying and selling a security within six months. Section 16(b) authorizes suit to recover the profits either by the issuer or by the owner of any security on behalf of the issuer. The Act specifies, however, that “no such suit shall be brought more than two years after the date such profit was realized.” The question in this case is whether that two-year period is subject to tolling, and if so, whether the tolling ends upon actual notice of the transaction giving rise to the claim, or instead when the trade is disclosed in a filing with the Securities and Exchange Commission (SEC).

In 2007, Vanessa Simmonds’ father bought her shares of stock in 54 companies that had Initial Public Offerings (IPOs) in 1999 and 2000. Shortly after that purchase, Simmonds filed a complaint in federal district court, alleging that the investment banks that underwrote the IPOs (petitioners) were corporate insiders owning more than 10% of the stock, and that they were required to disgorge any short swing profits. As relevant here, the district court dismissed 24 complaints as untimely.

The Ninth Circuit reversed. It held the two-year period is tolled until a disclosure of the transactions is filed with the SEC regardless of actual notice of the transactions. Because petitioners never filed a disclosure statement with the SEC, the court held that the two-year time limit was never triggered.

Petitioners argue that the two-year period establishes an absolute bar to suit that is not subject to tolling. In support of that position, petitioners rely on the Court’s decisions in *Merck* and *Lampf*, which held that similarly worded time limits in the Act establish categorical bars to suit that are not subject to tolling. Petitioners further argue that a categorical bar makes sense because the prohibition on short swing trades imposes strict liability, without regard to whether the corporate insider based the trade on inside information. Finally, petitioners argue that if the statute permits tolling, the time period for filing should begin on the date of notice, not on the date of an SEC disclosure.

Decision Below:638 F.3d 1072 (9th Cir. 2011)

Petitioner’s Counsel of Record:

Christopher Landau, Kirkland & Ellis

Respondent’s Counsel of Record:

Jeffrey I. Tilden, Gordon Tilden Thomas & Cordell

Standing – Real Estate Settlement Procedures Act

First American Financial Corp. v. Edwards (10-708)

Question Presented:

In the absence of any claim that the alleged violation of RESPA affected the price, quality, or other characteristics of the settlement services provided, does a private purchaser of real estate settlement services have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to “Cases” and “Controversies” and which this Court has interpreted to require the plaintiff to “have suffered an ‘injury in fact,’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

Summary:

In the Real Estate Settlement Procedures Act of 1974 (RESPA), Congress sought to eliminate kickback and referral fees in connection with settlement services on mortgage loans because they tend to increase settlement costs. RESPA accordingly provides that no person shall give or receive a kickback in connection with a settlement service involving a federally related mortgage loan. RESPA further provides that a person who violates the kickback prohibition shall be liable to the person charged for the settlement service in an amount equal to three times the amount of the settlement charge. Under the terms of RESPA, a person seeking a monetary recovery need not show that the kickback arrangement affected the price, the quality, or any other characteristic of the settlement service. The question in this case is whether Article III requires the plaintiff to make such a showing.

Denise Edwards (respondent) filed a class action lawsuit against First American, seeking recovery of statutory damages for violation of RESPA. First American filed a motion to dismiss, arguing that Edwards lacks standing under Article III because she did not allege a harm resulting from the alleged violation. The trial court denied the motion, holding that RESPA conferred standing by establishing a statutory private right of action.

The Ninth Circuit affirmed. It held that an invasion of a statutory right by itself constitutes an injury, regardless of whether the plaintiff can demonstrate an additional harm resulting from the invasion of that right.

Petitioner argues that the invasion of a statutory right is not sufficient to satisfy the Article III injury-in-fact requirement. In particular, petitioner argues that while Congress may provide a cause of action for an injury that was not previously legally cognizable, it may not eliminate the injury-in-fact requirement. Petitioner further argues that respondent failed to satisfy Article III’s injury-in-fact requirement because respondent did not allege that the statutory violation increased the price or reduced the quality of the settlement service.

Decision Below:

610 F.3d 514 (9th Cir. 2010)

Petitioner's Counsel of Record:

Aaron M. Panner, Kellogg, Huber, Hansen, Todd, Evans & Figel

Respondents' Counsel of Record:

Cyril V. Smith, Zuckerman Spaeder

Criminal Law**Due Process – Suggestive Identification*****Perry v. New Hampshire* (10-8974)****Question Presented:**

Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances or only when the suggestive circumstances were orchestrated by the police?

Summary:

The Due Process Clause prohibits the admission of an eyewitness's identification when suggestive circumstances create a high likelihood that the identification is unreliable. The question in this case is whether a defendant seeking to exclude an eyewitness's identification from trial must show that the identification was caused by improper state action.

At 3 a.m., police found Barion Perry carrying amplifiers in a parking lot near a burglarized car. A uniformed officer stood near Perry while another officer questioned an eyewitness in a nearby building. After looking out the window, the witness identified Perry as the person who burglarized the car. The same witness did not identify Perry in a photo array or at trial. The district court denied Perry's motion to suppress the witness's parking lot identification, and Perry was convicted of theft.

The New Hampshire Supreme Court affirmed, rejecting Perry's due process challenge to the parking lot identification. The court held that the admission of the identification did not violate due process because there was a "complete absence of improper state action."

Petitioner contends that unreliability, rather than improper police action, is the lynchpin for determining whether the admission of eyewitness testimony violates due process. Just as improper police conduct does not result in the exclusion of a reliable identification, petitioner argues, the absence of improper police conduct cannot justify the admission of an unreliable identification. Petitioner also contends that the Fourth Amendment exclusionary rule precedent is inapplicable, because the exclusionary rule is designed to deter police misconduct, while the due process protections related to identifications are designed to ensure that a conviction is based on reliable evidence.

Decision Below:

Unreported; online at <http://www.courts.state.nh.us/supreme/orders/StatevPerry.pdf>

Petitioner's Counsel of Record:

Richard Guerriero, New Hampshire Appellate Defender Program

Respondent's Counsel of Record:

Michael Delaney, New Hampshire Attorney General

Fifth Amendment – Custodial Interrogation

Howes v. Fields (10-1024)

Question Presented:

Whether this Court's clearly established precedent under 28 U.S.C. § 2254 holds that a prisoner is always "in custody" for purposes of *Miranda* any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances.

Summary:

As relevant here, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a federal court may not issue a writ of habeas corpus unless the state court's decision was contrary to clearly established federal law as determined by the Supreme Court. This case raises an AEDPA question in connection with the *Miranda* rule, which generally bars admission of statements that are the product of custodial interrogation unless they are preceded by *Miranda* warnings. The question is whether the Supreme Court's decision in *United States v. Mathis* clearly established that prisoners who are questioned away from the general prison population about conduct that occurred outside the prison are automatically in custody and therefore entitled to *Miranda* warnings.

While respondent Randall Fields was serving a forty-five day sentence for disorderly conduct in the Lenawee County, Michigan jail, he was removed from his cell and escorted to a conference room. There, a Deputy Sheriff of Lenawee County told respondent that he could return to his prison cell at any time, but the Deputy did not give respondent *Miranda* warnings. After extensive questioning, respondent confessed to sexual contact with a thirteen-year-old child. At his trial for sexual misconduct, respondent moved to suppress that confession on the ground that he was subjected to custodial interrogation without *Miranda* warnings. The trial court found that respondent was not in custody and that the confession was therefore admissible. The Michigan Court of Appeals affirmed, holding that respondent was not in custody because the questioning was about conduct occurring outside the prison and respondent was told he was free to return to his cell. The Michigan Supreme Court denied review.

Respondent then filed a habeas corpus action in federal district court under 28 U.S.C. § 2254, claiming that the state court's custody determination was clearly contrary to *Mathis v. United States*. In that case, the Court held that an inmate was entitled to *Miranda* warnings even though he was being questioned on an offense that was unrelated to his incarceration. The district court agreed that *Miranda* warnings were required under *Mathis*, and the Sixth Circuit affirmed. The Sixth Circuit held that *Mathis* clearly established that *Miranda* warnings are required whenever an inmate is isolated from the general prison population and questioned about conduct occurring outside the prison.

The State of Michigan argues that AEDPA precludes relief because *Mathis* did not hold that inmates are always in custody when they are removed from the general prison population and questioned about conduct unrelated to the crime of incarceration. Instead, the State argues, custody was undisputed in *Mathis*, and the Court held only that the government could not engage in custodial interrogation without giving *Miranda* warnings simply because the questioning was unrelated to the crime of incarceration. The State further argues that an inmate is in custody for *Miranda* purposes only when conditions in addition to the ordinary incidents of incarceration are inherently coercive

and that isolation away from the general prison population is not inherently coercive. Finally, the State argues that, in general, an inmate is not in custody for *Miranda* purposes when he is told he is free to return to his cell.

Decision Below:

617 F.3d 813 (6th Cir. 2010)

Petitioner’s Counsel of Record:

John J. Bursch, Michigan Solicitor General

Respondent’s Counsel of Record:

Elizabeth Jacobs, Detroit, Michigan

Fourth Amendment – Search and Seizure

United States v. Jones (10-1259)

Questions Presented:

- 1) Whether the warrantless use of a tracking device on respondent’s vehicle to monitor its movements on public streets violated the Fourth Amendment.
- 2) Whether the government violated respondent’s Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.

Summary:

The Fourth Amendment protects personal privacy and property against unreasonable searches and seizures and usually requires a warrant prior to a search or seizure. In *U.S. v. Knotts*, the Court held that the warrantless use of an electronic beeper to track a car during one trip is not a search and therefore does not violate the Fourth Amendment because a person has no reasonable expectation of privacy in his public movements from one place to another. But *Knotts* reserved the question whether warrantless monitoring through a “dragnet” procedure would be constitutional. And *Knotts* did not examine whether installing a monitoring device on a car would alter the constitutional analysis. The questions in this case are whether the warrantless use of a GPS tracking device to monitor a vehicle’s movements for four weeks constitutes a search, and whether installing a GPS tracking device on a vehicle constitutes a search or a seizure.

Law enforcement officers secretly attached a GPS tracking device to respondent Jones’s car, and monitored it for four weeks, capturing Jones’s trips to a narcotics stash house. Although officers obtained a warrant to install the tracking device, they did not comply with its terms. The warrant authorized installation within ten days, in D.C., but agents installed the device on the eleventh day, in Maryland. The district court denied Jones’s motion to exclude evidence obtained from use of the GPS device, and Jones was convicted of drug trafficking and sentenced to life imprisonment.

The U.S. Court of Appeals for the D.C. Circuit reversed. The court held that the use of GPS tracking constituted a warrantless search and therefore violated the Fourth Amendment. Distinguishing *Knotts*, the court reasoned that the chance that any one person could have observed Jones’s public movements for four weeks was essentially nil, and that prolonged monitoring of public movements reveals types of information, such as patterns of behavior, that are not revealed by the monitoring of a single journey.

The government contends that monitoring a person’s public movements for a prolonged period is no more a search than monitoring that person’s movements for a single trip, because in both cases the person has knowingly exposed his movements to the

public. For purposes of the knowing exposure inquiry, the government contends, the question is not whether any one person is likely to have observed all of a driver's movements, but whether the driver's movements could have been observed. The government also argues that it is irrelevant to the Fourth Amendment inquiry whether a person exposes that he has gone from one discrete place to another or whether he exposes his pattern of movements. Any test that turns on whether monitoring is sufficiently prolonged or whether it reveals patterns of information, the government argues, would be entirely unworkable. The government also argues that the mere installation of a tracking device is not a search because it does not disclose any information, and it is not a seizure because it does not interfere with the driver's use of the car.

Decision Below:

615 F.3d 544 (D.C. Cir. 2010)

Petitioner's Counsel of Record:

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

Respondent's Counsel of Record:

Stephen C. Leckar, Shainis & Peltzman

Habeas Corpus – Antiterrorism and Effective Death Penalty Act

Gonzalez v. Thaler (10-895)

Questions Presented:

- 1) Was there jurisdiction to issue a certificate of appealability under 28 U. S. C. §2253(c) and to adjudicate petitioner's appeal?
- 2) Was the application for a writ of habeas corpus out of time under 28 U. S. C. §2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"?

Summary:

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year statute of limitations for state prisoners seeking federal habeas relief. The year runs "from the latest of: the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." This case raises the question whether the date on which the judgment becomes final is the date on which it becomes final under state law, or the date on which the time for seeking discretionary relief expires, regardless of whether that is the date on which the judgment is final under state law. It also raises the question, posed by the Court, whether the court of appeals had jurisdiction to issue a certificate of appealability (COA).

Petitioner Raphael Gonzalez was convicted of murder and an intermediate state appellate court affirmed his conviction. Gonzalez did not seek discretionary review, and his time to do so expired. The state appellate court then issued its mandate, rendering the judgment final under state law. Gonzalez filed for federal habeas relief within a year of the state appellate court's mandate, but over a year after his time to seek state discretionary review expired. The district court measured timeliness from the latter date and therefore ruled Gonzalez's petition untimely. The Fifth Circuit issued a COA limited to that timeliness question. It did not decide whether Gonzalez made a substantial showing of a denial of a constitutional right, a requirement for issuance of a COA.

The Fifth Circuit then affirmed the district court's timeliness ruling. It held that when an inmate fails to seek discretionary review, the judgment becomes final on the date on which the time to seek such review expires, not the date on which state law makes the judgment final. The court concluded that AEDPA adopts a uniform federal rule on when a judgment becomes final, not a rule that varies depending on when state law makes a judgment final.

Petitioner contends that the appellate court had jurisdiction to issue a COA because he raised a substantial constitutional speedy-trial claim, and because the requirement of a substantial constitutional claim is not jurisdictional in any event. On the timeliness issue, petitioner contends that the state court judgment was final when the appellate court issued its mandate because that is the date on which direct review actually concluded. Petitioner also argues that the principles of federalism underlying AEDPA require deference to state procedural rules. Finally, petitioner argues that the Fifth Circuit's interpretation denies prisoners a full year to present their habeas petitions, because the limitation period starts running while state law procedurally forbids the filing of such petitions.

Decision Below:

623 F.3d 222 (5th Cir. 2010)

Petitioner's Counsel of Record:

Patricia A. Millett, Akin, Gump, Strauss, Hauer & Feld

Respondent's Counsel of Record:

Jonathan F. Mitchell, Solicitor General of Texas

Greene v. Fisher (10-637)

Question Presented:

For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is the temporal cutoff for whether a decision from this Court qualifies as "clearly established Federal law" under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?

Summary:

The Antiterrorism and Effective Death Penalty Act (AEDPA) permits federal courts to grant habeas relief if a state court decision on the merits of the claim is contrary to "clearly established Federal law." The question in this case is whether "clearly established law" is determined at the time a state-court conviction becomes final, or at the time of the state-court decision itself.

Petitioner Eric Greene was convicted at a joint trial based in part on out-of-court statements of non-testifying codefendants. Prosecutors redacted petitioner's name from the statements, but inserted substitutes that made it obvious that a name had been deleted. A Pennsylvania appellate court affirmed Green's conviction. While Green's petition for review to the Pennsylvania Supreme Court was pending, the United States Supreme Court held in *Gray v. Maryland* that such redactions fail to satisfy the Confrontation Clause. The Pennsylvania Supreme Court nonetheless denied review, and Green's conviction became final. Greene then sought habeas relief in federal district court, claiming that the state court adjudication of his Confrontation Clause claim was "contrary to" *Gray* and that he was entitled to the benefit of *Gray* because it was decided before his

conviction became final. The district court denied habeas relief, and the Third Circuit affirmed.

The Third Circuit held that under the language of AEDPA, a defendant can benefit from a Supreme Court decision only if it existed at the time of the state court's adjudication of his claim on the merits. The court reasoned that a state court cannot unreasonably apply a Supreme Court decision that did not exist at the time of its decision.

Petitioner contends that under the Court's pre-AEDPA decision in *Teague*, a defendant is entitled to the benefit of any case that was decided before his conviction became final, and that AEDPA altered only the standard of review for habeas petitions, not the temporal cutoff for benefitting from a decision. Petitioner also argues that a "court decision" cutoff poses practical and constitutional problems. In particular, petitioner argues that when the relevant Supreme Court case is decided after an intermediate appellate court decision, relief would depend on whether the state's highest court chooses to grant discretionary review, creating the danger of dissimilar treatment of similarly situated defendants.

Decision Below:

606 F.3d 85 (3d Cir. 2010)

Petitioner's Counsel of Record:

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

Respondent's Counsel of Record:

Ronald Eisenberg, District Attorney's Office, Philadelphia County

***Maples v. Thomas* (10-63)**

Question Presented:

Whether the Eleventh Circuit properly held - in conflict with the decisions of this Court and other courts - that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.

Summary:

Federal Courts reviewing habeas petitions have the power to excuse a state procedural default for cause when the default results from "some objective factor external to the defense." Under *Coleman v. Thompson*, attorney negligence in a post-conviction proceeding does not constitute such an external factor. This case presents the question whether the cause standard is satisfied by a showing that a clerk of court failed to contact counsel after notice to counsel of a filing deadline was returned unopened. It also raises the question whether cause was established by petitioner's showing that his attorneys left their law firm and assumed positions that precluded them from representing him.

Cory Maples was found guilty of capital murder and sentenced to death, and his conviction and sentence were affirmed on direct appeal. Two New York attorneys representing Maples filed a petition for post-conviction relief in state court raising an ineffective assistance of counsel claim. The trial court denied the petition, and the clerk of court sent notices to the two attorneys. By the time the notice was sent, the two attorneys had left their firm, and the letters were returned to the court clerk unopened. The clerk took no further action to contact the two attorneys. The clerk also had notified Maples' local attorney, but his only involvement in the case had been to facilitate

representation by the New York attorneys, and he therefore did nothing. After learning about the default, different lawyers from the firm in New York sought leave to appeal notwithstanding the missed deadline. The trial court denied leave to appeal, and the Alabama Supreme Court affirmed.

Maples filed a federal habeas corpus petition alleging ineffective assistance at his original trial and sentencing. The district court held that Maples had defaulted that claim by missing the appeal deadline, and the Eleventh Circuit affirmed. It held that the actions of Maples' attorneys were the cause of the default, and that, under *Coleman*, attorney performance in a post-conviction proceeding can never constitute cause to excuse a default.

Petitioner contends that the clerk's failure to contact the two New York attorneys after the notice was returned unopened violated due process and therefore constituted cause for the default. Petitioner further argues that his counsels' actions independently constituted cause because an attorney's actions are not binding on the client when the attorney is not acting as the client's agent, and his attorneys ceased acting as his agents when they left the firm and assumed positions that precluded them from representing him.

Decision Below:

583 F.3d 879 (11th Cir. 2009)

Petitioner's Counsel of Record:

Gregory G. Garre, Latham & Watkins

Respondent's Counsel of Record:

John C. Neiman Jr., Alabama Solicitor General

***Martel v. Clair* (10-1265)**

Question Presented:

Whether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence.

Summary:

Federal law provides a right to counsel to a prisoner seeking habeas corpus relief in a capital case. It also provides that counsel may be changed upon the prisoner's motion. 18 U.S.C. § 3599(a)(2) and (e). At issue in this case is the showing required to demonstrate that the denial of a request to replace appointed habeas counsel in a capital case is reversible error.

Respondent Kenneth Clair was convicted of murder and sentenced to death. While awaiting a decision on his initial federal habeas petition, Clair requested appointment of new counsel to pursue evidence that his appointed defender had allegedly failed to investigate, including physical evidence from the crime scene that could be DNA-tested. The district court denied Clair's request, finding that "counsel is doing a proper job" and Clair had shown no "conflict of interest or inadequacy of counsel." The court also denied Clair's habeas petition.

The court of appeals vacated both the denial of substitute counsel and the denial of habeas. The court held that a district court should grant a motion for replacement counsel when such a change would be in the "interests of justice." Satisfying that

standard, the court held, does not require a showing that current counsel is constitutionally ineffective. Because the district court did not inquire into whether the interests of justice required replacement counsel, the court of appeals vacated and remanded for further proceedings.

Petitioner, the state of California, argues that there is no federal statutory right to replacement counsel in capital habeas proceedings absent a showing that current counsel has been constitutionally ineffective. The “interests of justice” standard adopted by the court, petitioner contends, violates principles of finality and constitutes an end-run around Congress’s limitations on successive federal habeas corpus petitions.

Decision Below:

403 Fed.Appx. 276 (9th Cir. 2010)

Petitioner’s Counsel of Record:

Ward Allen Campbell, Office of the Attorney General, California

Respondent’s Counsel of Record:

Seth P. Waxman, Wilmer Hale

Prosecutorial Misconduct

Smith v. Cain (10-948)

Questions Presented:

- 1) Is there a reasonable probability that, given the cumulative effect of the *Brady* and *Napue/Giglio* violations in Smith’s case, the outcome of the trial would have been different?
- 2) Did the Louisiana state courts ignore fundamental principles of due process in rejecting Smith’s *Brady* and *Napue/Giglio* claims?

Summary:

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecutor must disclose exculpatory evidence when there is a reasonable probability that it would affect the outcome of the proceeding. The question in this case is whether the prosecutor violated *Brady* when he failed to disclose evidence that cumulatively tended to undercut the testimony of the only witness who identified petitioner as the perpetrator of five murders.

Petitioner Juan Smith was charged with five counts of first-degree murder. During the trial, Larry Boatner, a survivor of the shooting, identified Smith as the perpetrator. Smith was convicted and sentenced to life imprisonment without parole.

In post-conviction proceedings, petitioner alleged that the prosecutor withheld evidence in violation of *Brady* and related decisions. In support of that allegation, petitioner introduced evidence that the prosecution withheld, *inter alia*, a statement from Boatner that he could not identify the perpetrators, a statement from one of the participants in the murders named Young that Smith was not involved, and a statement from a prison inmate that a person named Trackling confessed to participating in the murders and named two other accomplices, neither of whom was Smith. Petitioner also presented evidence that a detective gave knowingly false testimony that Young was in a vegetative state when he tried to interview him. The state trial court denied post-conviction relief without opinion, and the Louisiana Court of Appeal and Supreme Court denied discretionary review.

Petitioner argues that, when viewed collectively, the prosecution's withholding of evidence and presentation of false testimony violated *Brady* and related decisions and deprived him of a fair trial.

Decision Below:

45 So.3d 1065 (La. 2010)

Petitioner's Counsel of Record:

Kannon Shanmugam, Williams & Connolly

Respondent's Counsel of Record:

Donna Rau Andrieu, Orleans Parish District Attorney's Office

Sentencing

Setser v. United States (10-948)

Questions Presented:

- 1) Does a district court have authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence?
- 2) Is it reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences?

Summary:

Under 18 U.S.C. § 3584(a), a federal court has authority to order prison terms to run either consecutively or concurrently. The question in this case is whether the court has authority under section 3584(a) to run a federal sentence consecutive to a state sentence that has not yet been imposed. This case also presents the question whether such a sentence is unreasonable.

Respondent Setser was arrested after drugs were found in his car during a traffic stop. The state not only charged Setser with possession with intent to deliver (the 2007 case); it also sought to revoke his probation on a previous offense (the 2006 case). A federal indictment was subsequently issued relating to the same conduct, and Setser pleaded guilty to one count of that indictment. With both state charges still pending, the district court sentenced Setser to 151 months of imprisonment, with the sentence to run consecutive to the yet-to-be imposed sentence on the 2006 case and concurrent to the yet-to-be imposed sentence on the 2007 case. The state court subsequently sentenced Setser to five years on the 2006 case and ten years on the 2007 case, with both sentences to run concurrently.

The Fifth Circuit affirmed the sentence imposed by the federal district court. It held that a federal court has authority under section 3584(a) to impose a sentence that is consecutive to a state sentence that has not yet been imposed.

Petitioner argues that the terms of section 3584(a) limit the court's authority to issue a consecutive sentence to circumstances in which the court is imposing multiple terms of imprisonment at the same time or a sentence on a different offense has already been imposed. Petitioner further argues that a court cannot reasonably decide whether to make a sentence concurrent or consecutive until it first knows what that state court sentence is.

Decision Below:

607 F.3d 128 (5th Cir. 2010)

Petitioner’s Counsel of Record:

Jason D. Hawkins, Federal Public Defender’s Office

Respondent’s Counsel of Record:

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

Court-Appointed Amicus Curiae in Support of the Judgment Below:

Evan A. Young, Baker Botts

Sex Offender Registration and Notification Act – Retroactivity***Reynolds v. United States*** (10-6549)**Question Presented:**

Does Mr. Reynolds have standing under the plain reading of the SORNA statute to raise claims concerning the Attorney General’s Interim Rule and is review by this Court needed to resolve the circuit conflict?

Summary:

The Sex Offender Registration and Notification Act (SORNA) requires convicted sex offenders to register and keep registration current in each jurisdiction where they live. It further provides that “the Attorney General shall have authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment” of SORNA in 2006. In an Interim Rule issued in 2007, the Attorney General declared that SORNA applies to offenders convicted before SORNA’s enactment. The question in this case is whether sex offenders convicted before SORNA’s enactment have standing to challenge the Attorney General’s Interim Rule or whether they lack standing because they were already subject to SORNA’s reporting requirements by virtue of SORNA itself.

In 2001, petitioner Billy Joe Reynolds was convicted of statutory sodomy. In 2005, after his release from prison, petitioner registered as a sex offender in Missouri pursuant to Missouri law. In 2007, petitioner moved to Pennsylvania and failed to register as a sex offender there. In that same year, petitioner was indicted for failure to register and update his registration as a sex offender. In a motion to dismiss, petitioner challenged the validity of the Interim Rule. After the district court denied the motion, petitioner entered a conditional guilty plea, reserving his right to appeal his motion to dismiss.

The Third Circuit affirmed. It held that petitioner lacked standing to challenge the validity of the Interim Rule because his duty to update his registration arose from SORNA itself, not from the Interim Rule. The court reasoned that the Interim Rule applies only to sex offenders who were unable to register prior to SORNA’s enactment, not to persons like petitioner who were required to register under state law before SORNA’s enactment.

Petitioner argues that he has standing to challenge the Interim Rule because sex offenders convicted before SORNA’s enactment only became subject to SORNA’s reporting requirements by virtue of that Interim Rule. In making that contention, petitioner relies on the provision stating “[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this subchapter.” Petitioner contends that this provision unambiguously makes clear that SORNA did not initially apply to sex

offenders convicted before its enactment, but instead delegated to the Attorney General the authority to determine whether to expand SORNA's reporting requirements to such offenders. Petitioner further argues that the plain language of this provision covers all sex offenders convicted before SORNA's enactment, not just offenders who could not register under state law prior to SORNA's enactment.

Decision Below:

380 Fed. Appx. 125 (3rd Cir. 2010)

Petitioner's Counsel of Record:

Candace Cain, Assistant Federal Public Defender

Respondent's Counsel of Record:

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

Sixth Amendment – Confrontation Clause

Williams v. Illinois (10-8505)

Question Presented:

Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.

Summary:

In *Melendez-Diaz v. Massachusetts*, the Court held that the Confrontation Clause barred introduction of an affidavit reporting the results of a laboratory analysis of a drug when no live witness attested to the truthfulness of the report. In *Bullcoming v. New Mexico*, the Court held that the Confrontation Clause also barred introduction of a certified blood-alcohol report when the live witness who testified about the report did not sign the report or observe the test. In a controlling concurring opinion, however, Justice Sotomayor stated that the Court's opinion did not address whether expert testimony about laboratory reports that are not admitted into evidence would violate the Confrontation Clause. This case raises that question.

Petitioner Williams was charged with sexual assault. At trial, a forensic scientist gave expert testimony that the DNA profile derived from semen taken from the victim matched the DNA profile derived from blood drawn from Williams. In giving that expert opinion, the scientist relied on a lab report analyzing the semen taken from the victim that she did not prepare or observe, but that report was not introduced into evidence. The trial court rejected Williams' objection to admission of the scientist's testimony based on the Confrontation Clause, and Williams was convicted and sentenced to life imprisonment.

The Illinois Supreme Court affirmed. It held the Confrontation Clause does not bar introduction of statements admitted for purposes other than proving the truth of the matter asserted. The court further held that the expert's statements about the lab report analyzing the semen taken from the victim were admitted for the purpose of explaining the basis of the expert's opinion, not for the purpose of proving the truth of the conclusions reached in the report.

Petitioner contends that the Confrontation Clause does not permit an expert witness to testify about the results of a forensic analysis performed by someone else who does not give live testimony. Petitioner contends that such testimony is necessarily admitted for the truth of the matter asserted because the validity of the expert's opinion

turns on the truth of the underlying report. Finally, petitioner argues that permitting such expert testimony would negate a defendant's right under the Confrontation Clause to test through cross-examination the honesty, proficiency, and veracity of the person who prepared the report.

Decision Below:

238 Ill.2d 125 (2010)

Petitioner's Counsel of Record:

Brian W. Carroll, Office of the State Appellate Defender

Respondent's Counsel of Record:

Anita Alvarez, State's Attorney's Office, Cook County, Illinois

Sixth Amendment – Ineffective Assistance of Counsel

Lafler v. Cooper (10-209)

Questions Presented:

- 1) Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?
- 2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

Summary:

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's deficient advice caused prejudice. This case raises the question whether a defendant who has received a fair trial can establish prejudice by showing that he would have accepted a plea bargain for a lower sentence but for counsel's deficient advice. It also raises the question whether any remedy for ineffective assistance during plea negotiations is appropriate when the defendant subsequently received a fair trial. Similar questions are raised in *Missouri v. Frye*, No. 10-444.

Respondent Cooper was charged with assault with intent to commit murder for shooting a woman below the waist. Prosecutors offered respondent a 51-to-85 month sentence in exchange for a guilty plea. Although respondent was inclined to plead guilty, he rejected the offer because his counsel erroneously informed him that shots below the waist were legally insufficient to convict him of intent to murder. After a trial, respondent was found guilty and sentenced to 185-360 months of imprisonment. Respondent then sought post-conviction relief based on ineffective assistance of counsel. The state courts rejected that claim, but a federal district court granted habeas relief, and the Sixth Circuit affirmed.

The Sixth Circuit held that counsel's deficient advice resulted in prejudice to respondent notwithstanding that respondent had received a fair trial. The court concluded that prejudice was established by respondent's showing that he would have pleaded guilty and received a lower sentence but for his attorney's deficient advice. As a remedy, the court ordered the State to reoffer the initial plea bargain or release Cooper.

Petitioner contends that an ineffective assistance claim requires proof that counsel's deficient performance resulted in an unfair trial, a showing respondent concededly failed to make. Petitioner further argues that a lost opportunity to accept a

plea for a lower sentence does not constitute prejudice because a defendant has no right to a plea offer, and courts have no duty to accept plea agreements. Finally, petitioner argues that a remedy that requires the State to reoffer the same plea deal confers an impermissible windfall on the defendant because it transforms a contingent opportunity for a lower sentence into a legal entitlement and because the State already had to undergo the burdens of a trial.

Decision Below:

2010 WL 1851348 (6th Cir. 2010)

Petitioner’s Counsel of Record:

John J. Bursch, Michigan Solicitor General

Respondent’s Counsel of Record:

Valerie R. Newman, Assistant Defender, Detroit, Michigan

***Martinez v. Ryan* (10-1001)**

Question Presented:

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

Summary:

Under the Supreme Court’s decisions in *Douglas* and *Halbert*, criminal defendants have a right to counsel for their first appeal. In contrast, under *Coleman*, defendants generally do not have a right to counsel in post-conviction proceedings. The question in this case is whether a defendant has a right to counsel in a post-conviction proceeding when that proceeding is the first opportunity the defendant has to allege ineffective assistance of trial counsel.

Petitioner Luis Martinez was convicted of sexual contact with a person under the age of fifteen, and his conviction was affirmed. A court-appointed appellate counsel filed a notice of post-conviction relief, but after he informed the court that there was no colorable claim, the court denied relief. Another attorney then sought post-conviction relief, alleging ineffective assistance of trial counsel. In Arizona, the post-conviction proceeding is the first opportunity that a defendant has to raise an ineffective assistance of trial counsel claim. The trial court nonetheless ruled that Martinez’s claim to that effect was precluded because it was not raised during the first, failed attempt at post-conviction relief. That ruling was affirmed on appeal. Martinez then sought federal habeas relief, alleging ineffective assistance of counsel in the first collateral proceeding. The district court and Ninth Circuit both denied his petition.

The Ninth Circuit held that a defendant has no right to counsel in post-conviction proceedings and therefore no right to effective assistance of counsel in those proceedings. The court reasoned that Supreme Court precedent guarantees a right to counsel only on direct appeal.

Petitioner contends that a defendant has a right to counsel in post-conviction proceedings to assert ineffective assistance of trial counsel. Because a post-conviction proceeding is the first opportunity to challenge the competence of trial counsel, petitioner argues, it is equivalent to a first appeal as of right with respect to that claim.

Decision Below:

623 F.3d 731 (9th Cir. 2010)

Petitioner's Counsel of Record:

Robert Bartels, Sandra Day O'Connor College of Law, Arizona State University

Respondent's Counsel of Record:

Kent Cattani, Attorney General, Arizona

Missouri v. Frye (10-444)**Questions Presented:**

- 1) Can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging [] that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms?
- 2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

Summary:

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's deficient advice caused prejudice. In *Hill v. Lockhart*, the Court held that a defendant who pleads guilty establishes prejudice by showing that counsel's deficient advice caused him to plead guilty, rather than go to trial. This case raises the question whether prejudice can also be established by showing that counsel's deficient advice caused a defendant who pleaded guilty to forgo a more favorable plea bargain. It also raises the question whether any remedy for ineffective assistance during plea negotiations is appropriate when the defendant subsequently pleaded guilty pursuant to constitutionally adequate procedures. Similar questions are raised in *Lafler v. Cooper*, No. 10-209.

After respondent Frye was charged with a felony for driving without a license, prosecutors mailed his counsel a plea offer that included the option of pleading guilty to a misdemeanor and serving 90 days in county jail. Respondent's counsel failed to inform respondent of this offer, and it expired. Respondent then pleaded guilty to a felony and was sentenced to three years of imprisonment. Respondent sought post-conviction relief based on ineffective assistance of counsel, and the Missouri Court of Appeals granted relief.

The Missouri Court of Appeals held that a defendant can satisfy the prejudice prong of an ineffective assistance of counsel claim by showing that counsel's deficient performance in failing to communicate a plea caused the defendant to forgo a better plea offer. Concluding that it had no authority to order the State to reoffer the original plea of a misdemeanor, it ordered that respondent could proceed to trial or plead guilty to the felony charge.

The State contends that when a defendant has pleaded guilty, the prejudice prong of an ineffective assistance claim can be satisfied only by a showing that but for counsel's deficiency, the defendant would not have pleaded guilty. The State further contends that a showing that counsel's deficiency caused the defendant to forgo a more favorable plea does not establish prejudice because plea negotiations and unaccepted pleas are not critical confrontations that demand constitutional protection. Finally, the State argues that even assuming that a lost opportunity for a lower sentence constitutes

prejudice, no remedy is appropriate when, as here, the defendant knowingly and intelligently pleaded guilty.

Decision Below:

311 S.W.3d 350 (Mo. 2010)

Petitioner's Counsel of Record:

Shaun J. Mackelprang, Assistant Attorney General, Missouri

Respondent's Counsel of Record:

Emmett D. Queener, Missouri Public Defender

Other Public Law

Administrative Law

Sackett v. Environmental Protection Agency (10-1062)

Questions Presented:

- 1) May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704?
- 2) If not, does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the due process clause?

Summary:

When the EPA finds that there has been a violation of the Clean Water Act's prohibition against discharging pollutants into regulated waters, it may issue a compliance order, assess penalties, or bring a civil action. The EPA may enforce a compliance order only by filing a civil enforcement action. If the EPA prevails in that action, a court may impose civil penalties. The questions in this case are whether compliance orders are subject to pre-enforcement judicial review, and if not, whether the failure to provide pre-enforcement review violates due process.

Petitioners filled their property, intending to build a house. The EPA found that petitioners had polluted a protected wetland in violation of the CWA and issued a compliance order requiring them to remove the fill and restore the parcel to its original condition. The order threatened civil or administrative penalties up to a maximum of \$25,000 per day for noncompliance. Petitioners filed suit in district court, seeking pre-enforcement review of the compliance order. The district court dismissed petitioner's complaint for lack of subject matter jurisdiction.

The Ninth Circuit affirmed, holding that the CWA precludes pre-enforcement judicial review of compliance orders. Such review, the court reasoned, would eliminate the option Congress gave to the EPA to either issue a compliance order or file a civil action. The court also contrasted Congress's express provision of judicial review for penalty assessments with the absence of such a judicial review provision for compliance orders. The court further held that the failure to provide pre-enforcement review of compliance orders does not violate due process. The court reasoned that the CWA gives landowners a reasonable opportunity to contest the validity of the EPA's finding of non-compliance both at the civil enforcement proceeding and through judicial review of a permit denial.

Petitioners contend that the failure to afford pre-enforcement review of a compliance order violates due process because it effectively prevents a landowner from

challenging the validity of such an order. Ignoring the order and awaiting an enforcement action is not a viable option, petitioners argue, because that would expose a landowner to massive penalties. Applying for a permit is not an adequate remedy, petitioner maintains, because the EPA may refuse to entertain a permit application and the permit process is too time-consuming and costly in any event.

Decision Below:

622 F.3d 1139 (9th Cir. 2010)

Petitioner’s Counsel of Record:

Damien M. Schiff, Pacific Legal Foundation

Respondent’s Counsel of Record:

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

Government Immunity – Section 1983

Messerschmidt v. Millender (10-704)

Questions Presented:

- 1) Are officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search?
- 2) Should the *Malley/Leon* standards be reconsidered or clarified in light of lower courts’ inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good faith conduct and improper exclusion of evidence in criminal cases?

Summary:

Under *Malley v. Briggs*, an officer who executes a search warrant is not entitled to qualified immunity from suit under 42 U.S.C. § 1983 when the warrant is “so lacking in indicia of probable cause as to render official belief in its existence unreasonable.” The questions in this case are whether petitioners were entitled to qualified immunity under that standard, and whether that standard should be reconsidered or clarified.

A woman reported to police that her boyfriend Bowen fired a sawed-off shotgun at her and that he resided at the home of his foster mother, respondent Millender. Based on this information, and the fact that Bowen was a known gang member with prior convictions, petitioners Messerschmidt and Lawrence prepared an affidavit and obtained a warrant to search Millender’s home. The warrant authorized seizure of any firearms and any firearm-related evidence. A SWAT team, with petitioners present, executed the warrant and seized a firearm belonging to Millender. Millender filed suit against petitioners alleging Fourth Amendment violations, and petitioners claimed qualified immunity. The district court denied qualified immunity, and an en banc panel of the Ninth Circuit affirmed.

The Ninth Circuit held that the warrant violated the Fourth Amendment’s specificity requirement because its scope was not limited by the probable cause on which it was based. In particular, the court held that because the police had no evidence that any weapon other than the sawed-off shotgun was involved in Bowen’s offense, the

supporting affidavit did not supply probable cause to search for any firearm other than the sawed-off shotgun. The court further held petitioners were not entitled to qualified immunity because the warrant was so lacking in the indicia of probable cause as to render an officer's belief in its existence unreasonable.

Petitioners contend that they are entitled to qualified immunity because a reasonable officer could have concluded that there was probable cause to search for any firearm in Bowen's residence. In particular, they argue that a reasonable officer could conclude that a person who has fired a sawed-off shotgun at someone may also possess other weapons and intend to use them on that person. Petitioners further argue that the "so lacking in indicia" test is too vague. That standard, petitioners argue, should either be applied only when there is a robust consensus of cases establishing that the officers violated the Fourth Amendment, or it should be eliminated altogether.

Decision Below:

620 F.3d 1016 (9th Cir. 2010)

Petitioner's Counsel of Record:

Timothy T. Coates, Greines, Martin, Stein & Richland

Respondent's Counsel of Record:

Robert Mann, Robert Mann & Donald W. Cook

***Rehberg v. Paulk* (10-788)**

Question Presented:

Whether a government official who acts as a "complaining witness" by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages.

Summary:

Section 1983 of Title 42 authorizes a private action against a state actor who subjects any person to a deprivation of his constitutional rights. In certain limited circumstances, however, defendants are entitled to absolute immunity from suit. Under the Court's decisions, a government official is absolutely immune from a suit alleging that he testified falsely at trial, but is not absolutely immune from a suit alleging that he submitted a false affidavit to secure an arrest warrant. The question in this case is whether an investigating officer is entitled to absolute immunity from a suit alleging that his false testimony at a grand jury proceeding led to the prosecution of an innocent person.

Petitioner Charles Rehberg accused a hospital of unethical billing practices. In retaliation, Respondent James Paulk, Chief Investigator for the District Attorney, falsely testified to three grand juries that Rehberg assaulted a doctor and harassed hospital employees. That testimony led to Rehberg's indictment and arrest. All charges against Rehberg were ultimately dismissed. After Rehberg filed an action under Section 1983 for violation of his constitutional rights, Paulk claimed absolute immunity as a testifying witness. The district court denied absolute immunity but the Eleventh Circuit reversed.

The Eleventh Circuit held that grand jury witnesses, like trial witnesses, have absolute immunity from suit. The court declined to create an exception that would permit a suit against a "complaining witness," *i.e.*, a grand jury witness who provides the facts that cause a prosecution to be commenced. The court reasoned that such an exception would undermine the confidential nature of grand jury proceedings.

Petitioner contends that Section 1983 incorporates only those immunities that existed at common law, and that complaining witnesses did not enjoy absolute immunity at common law. Petitioner also argues that absolute immunity for a complaining witness cannot be justified by analogy to the absolute immunity accorded to a trial witness, because a trial witness's testimony can be challenged through cross-examination and does not cause a prosecution to be initiated. Finally, petitioner contends that it would be arbitrary to distinguish between a complaining witness at a grand jury proceeding and a complaining witness who secures an arrest warrant through a false affidavit, because both cause the same harm – the initiation of a prosecution.

Decision Below:

611 F.3d 828 (11th Cir. 2010)

Petitioner's Counsel of Record:

Andrew J. Pincus, Mayer Brown

Respondent's Counsel of Record:

John C. Jones, Marietta, Georgia

Privacy Act

***Federal Aviation Administration v. Cooper* (10-1024)**

Question Presented:

Whether a plaintiff who alleges only mental and emotional injuries can establish "actual damages" within the meaning of the civil remedies provision of the Privacy Act, 5 U.S.C. 552a(g)(4)(A).

Summary:

The Privacy Act prohibits federal agencies from disclosing records pertaining to an individual without that person's consent, and authorizes a private suit against an agency to recover "actual damages" sustained as a result of a willful or intentional violation. At issue in this case is whether "actual damages" include damages for emotional distress or are instead limited to damages for pecuniary harm.

The Federal Aviation Administration (FAA) and the Social Security Administration (SSA) conducted a joint investigation aimed at identifying pilots who had misrepresented their health status to obtain FAA certifications to fly. The FAA and SAA compared medical records respondent Cooper submitted to each agency and learned that Cooper had disclosed his HIV status to the SSA in applying for disability benefits, but had repeatedly withheld that information from the FAA when renewing his private pilot certificate. After the FAA revoked Cooper's license and Cooper pleaded guilty to a criminal offense, Cooper sued the FAA and the SAA, alleging that their sharing of information violated the Privacy Act. Cooper sought damages for emotional distress. The district court granted summary judgment against Cooper, holding that emotional injuries do not constitute "actual damages" under the Act. It reasoned that the term "actual damages" is facially ambiguous and that principles underlying sovereign immunity require such ambiguities to be construed in favor of the government.

The court of appeals reversed. The court concluded that the term "actual damages" is ambiguous "standing alone," but held that the Privacy Act's context and purpose supplied the requisite unequivocal expression of congressional intent to waive the government's immunity from non-pecuniary damages. The court relied on the

statutory preamble's reference to civil suits for "any" damages, the statutory goal of preventing embarrassment, the statutory provision allowing anyone who suffers an "adverse effect" to file suit, and the Privacy Act's similarity to the Federal Credit Reporting Act, which has been construed to allow recovery for emotional injury.

The government contends that the court of appeals failed to adhere to the sovereign immunity canon that a waiver of immunity must be unequivocally expressed in the statutory text, with any ambiguity in the scope of the waiver construed narrowly in the government's favor. None of the sources identified by the court, the government argues, unequivocally authorizes recovery for emotional injury.

Decision Below:

622 F.3d 1016 (9th Cir. 2010)

Petitioner's Counsel of Record:

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

Respondent's Counsel of Record:

Raymond A. Cardozo, Reed Smith

Immigration

Judulang v. Holder (10-694)

Question Presented:

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did not depart and reenter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

Summary:

Former Section 212(c) of the Immigration and Nationality Act grants the Attorney General discretion to admit to the U.S. lawful permanent residents (LPRs) convicted of certain crimes. The Board of Immigration Appeals (BIA) has long applied Section 212(c) to deportation proceedings, but only if an LPR is deportable on a ground that has a statutory counterpart in the grounds for inadmissibility. In 2005, the BIA held that whether a ground for deportation has a counterpart turns on whether Congress employed similar language to describe substantially equivalent categories of offenses for deportation and inadmissibility, not on whether an LPR's offense of conviction makes him both deportable and inadmissible, albeit under different categories.

Under that approach, the BIA held that a crime of violence (a ground for deportation) is not a counterpart offense to a crime involving moral turpitude (a ground for inadmissibility) because they do not use the same language to describe the same offense. Thus, an LPR convicted of a crime of violence is not eligible to seek discretionary relief even when that offense is also a crime involving moral turpitude. This case raises the question whether the BIA's 2005 categorical approach constitutes a fundamental change from its prior approach and is therefore impermissibly retroactive as applied to guilty pleas before that date. It also raises the question whether the BIA's 2005 approach violates equal protection.

Petitioner Judulang, an LPR, pleaded guilty to voluntary manslaughter. In a deportation proceeding years later, the BIA held that Judulang was categorically barred from seeking discretionary relief under Section 212(c) because voluntary manslaughter

constitutes a crime of violence and the crime of violence category has no counterpart in any inadmissibility category.

The Ninth Circuit denied Judulang’s petition for review, holding that the BIA’s 2005 categorical approach is not impermissibly retroactive because it reflects the BIA’s consistent position in published decisions. Subsequently, the Ninth Circuit decided en banc in a different case that Section 212(c) simply does not apply to deportation, and that the distinction between inadmissibility and deportation does not violate equal protection.

Petitioner contends that the BIA arbitrarily and capriciously changed its approach for determining eligibility for discretionary relief from deportation from one that focused on whether the crime of conviction would have made an LPR both deportable and inadmissible to one that focuses on whether the two grounds for exclusion have the same language. Focusing on semantic differences between the grounds for exclusion, petitioner argues, bears no relationship to Congress’s intent regarding eligibility for discretionary relief. Finally, petitioner contends that the BIA’s approach violates equal protection because it draws an irrational distinction between LPRs. A deportable LPR who remains in the U.S. may not seek discretionary relief under Section 212 (c), whereas a deportable LPR who leaves the U.S. and returns is considered under the admissibility grounds, and is therefore able to seek such relief.

Decision Below:

249 Fed. Appx. 499 (9th Cir. 2007)

Petitioner’s Counsel of Record:

Mark C. Fleming, Wilmer Cutler

Respondent’s Counsel of Record:

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

Kawashima v. Holder (10-1024)

Question Presented:

Whether, in direct conflict with the Third Circuit, the Ninth Circuit erred in holding that Petitioners’ convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under 8 U.S.C. § 1101(a)(43)(M)(i), and Petitioners were therefore removable.

Summary:

An alien who is admitted to the United States and subsequently convicted of an aggravated felony is subject to removal. The term “aggravated felony” is defined to include “an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or (ii) is described in section 7201 of Title 46 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000.” At issue in this case is whether a tax offense other than tax evasion as described in subsection (ii) is an “aggravated felony” under subsection (i).

Petitioners Akio and Fusako Kawashima are Japanese citizens admitted to the United States as lawful permanent residents. Petitioners pled guilty, respectively, to willfully making and subscribing to a false statement on a tax return, and aiding and abetting in the preparation of a false tax return, in violation of 26 U.S.C. §§ 7206(1) and (2). Petitioners stipulated that the total actual tax loss was \$245,126.

The government sought to deport petitioners on the ground that their tax convictions were “aggravated felonies” involving “fraud or deceit in which the loss to the

victim . . . exceeds \$10,000.” 8 U.S.C. § 1101(a)(43)(M)(i). An Immigration Judge decided that petitioners’ convictions were aggravated felonies and ordered their removal, and the Board of Immigration Appeals affirmed.

The Ninth Circuit affirmed. The court held that petitioners’ convictions were aggravated felonies under the plain language of subsection (i) because the tax offenses to which they pled guilty necessarily involved fraud or deceit, and the stipulated revenue loss exceeded \$10,000.

Petitioners contend that the tax offenses that are aggravated felonies are limited to those in subsection (ii). Because all tax offenses encompassed within subsection (ii) involve fraud or deceit, petitioners contend, treating tax offenses as fraud and deceit offenses under subsection (i) would render subsection (ii) superfluous. Petitioners also argue that because Congress used the general phrase “loss to the victim” in subsection (i), while using the more specific phrase “revenue loss” in subsection (ii), the principle that the specific controls the general means that the general term “loss to the victim” in subsection (i) does not encompass “revenue loss.” Finally, petitioners argue their crimes did not require fraud or deceit and are therefore not aggravated felonies under subsection (i).

Decision Below:

615 F.3d 1043 (9th Cir. 2010)

Petitioner’s Counsel of Record:

Thomas J. Whalen, Eckert, Seamans, Cherin & Mellott

Respondent’s Counsel of Record:

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