

**GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE**

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2015 PREVIEW

September 2015

A LOOK AHEAD AT OCTOBER TERM 2015

This report previews the Supreme Court’s argument docket for October Term 2015 (OT 2015). The Court has thus far accepted 33 cases for review (some have been consolidated for briefing and argument), plus two original actions – fewer than half the cases that will likely be decided in OT 2015. Section I discusses some especially noteworthy cases on the Court’s argument docket. Section II organizes the 2015 Term cases into subject-matter categories and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

This term already has a significant number of important cases. This section highlights eight that are especially noteworthy. Three are constitutional cases, three are business cases with a class action focus, and two are criminal cases.

Constitutional Law Highlights

Evenwel v. Abbott

In *Reynolds v. Sims* the Supreme Court held that the Equal Protection Clause requires state legislative districts to be relatively equal in population. The Court has never squarely resolved, however, whether the relevant population that must be equalized is total population, voting population, or whether a state may choose between them. That issue arises in this case because Texas’s districts for its state senate are relatively equal in total population, but some districts have far fewer voters than others.

Appellants contend that a state must equalize voting population. Texas, by contrast, argues that a state may choose the relevant population base as long as it equalizes the districts on that basis. Each side can cite some language from Supreme Court decisions supporting its position. In *Reynolds*, the Court stated that “equal numbers of voters” must be able to vote for “equal numbers of representatives,” and that “the vote of any citizen” must be “approximately equal in weight to that of any other citizen of the State.” In *Burns v. Richardson*, by contrast, the Court stated that “the decision to include or exclude [aliens, transients, short-term or long term residents, or persons denied the right to vote for conviction of crime] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.” To complicate matters further, at least one court of appeals has taken the position that a state must use total population, a view that is supported by a statement in one case that the “Constitution’s plain objective was that of making equal representation for equal numbers of people the fundamental goal.” With statements from opinions pointing in different directions, it is impossible to predict how the Court will come out.

The stakes are potentially great. Almost all states currently use total population as the apportionment base. If voting population is required instead, it could dramatically change the political landscape. To the extent that non-citizens are concentrated in urban areas, or in districts that generally vote for the Democratic Party, or in districts that generally vote for Hispanic candidates, requiring the equalization of voting population could mean fewer urban districts, fewer Democratic Party representatives, fewer Hispanic representatives, or all three.

Fisher v. University of Texas at Austin

The University of Texas at Austin (UT) automatically admits in-state students who finish in the top 10% of their high school class. In filling the remaining slots, UT conducts a holistic review in which it considers a variety of factors, including race. In *Fisher I*, the Court held that UT was required to show that its consideration of race was necessary to further its compelling interest in obtaining the educational benefits of diversity, and it remanded to the Fifth Circuit to decide that issue in the first instance. On remand, the court of appeals held that UT's consideration of race in holistic review was necessary to further its compelling interest in "qualitative" or "within-group" diversity. With the future of affirmative action potentially at stake, the Court will now decide that issue.

Petitioner does not question the basic premises of prior decisions that obtaining the benefits of educational diversity is a compelling interest and that race may be used as a factor in furthering that interest when race-neutral means will not adequately accomplish that goal. Instead, petitioner contends that UT's 10% program is sufficient to further any compelling interest in diversity, and that its consideration of race is therefore unconstitutional. UT argues that a consideration of race in holistic review is necessary to obtain minority students who have talents and experiences not shared by minority students admitted through the 10% program.

The significance of this dispute depends on how the Court resolves it. Even if the Court concludes that the 10% plan is sufficient to achieve the compelling interest in diversity, it seems unlikely that the Court would impose that alternative on the rest of the country when other universities reject that approach as educationally unsound. And petitioner has offered several narrow ways to resolve the case, including that UT presumed, rather than proved, that minority students admitted through holistic review have characteristics that contribute to diversity not shared by students admitted through the 10% plan.

The decision, however, could have sweeping ramifications for the future of all affirmative action at colleges and universities. Almost every race-neutral alternative produces some amount of racial diversity, and the real question is how a court assesses a university's claim that race-neutral alternatives do not produce enough diversity. If the Court makes it extraordinarily difficult for a university to establish that race-neutral alternatives do not bring about a sufficient amount of diversity, including within-group diversity, it would be almost the same as a holding that race cannot be used at all.

In this area, Justice Kennedy holds the key, and he has voiced a strong preference for race-neutral alternatives. Just how strong is something we will find out by the end of the Term.

Friedrichs v. California Teachers Association

In *Abood v. Detroit Bd. of Ed.*, the Supreme Court held that state laws that require public employees to pay union fees for expenses related to collective bargaining do not violate the First Amendment. The Court recognized that such assessments implicate the First Amendment right of public employees to refrain from supporting speech with which they disagree. But it concluded that the interests in ensuring that a union is effective in promoting labor peace and in preventing free riders are sufficient to override that First Amendment interest. *Abood* and subsequent cases also establish that States may assess its employees for expenses unrelated to

collective bargaining as long as employees may opt out by affirmatively objecting to them. The question in this case is whether either of those *Abood* holdings should be overruled.

In recent Terms, the Court has questioned the soundness of both. In *Knox v. Serv. Emps. Int'l Union*, the Court suggested that it is difficult to justify a rule requiring public employees to opt-out of fees that cannot be imposed on them. It ultimately concluded, however, only that an opt-in system is constitutionally required for special assessments. In *Harris v. Quinn*, the Court suggested that compelled assessment of fees related to collective bargaining is difficult to reconcile with general First Amendment principles. But it held only that such fees could not be imposed on home health care workers because they are not state employees.

Tracking the dicta in *Harris*, petitioners argue that the First Amendment prohibits compelled assessments of fees related to collective bargaining. They argue that there is no First Amendment distinction between collective bargaining and legislative lobbying, that preventing free riders is not an adequate justification for overriding First Amendment interests, and that there is no evidence that compelled assessments are necessary to ensure that a union will be effective in promoting labor peace. The union and the state argue that there is a sound distinction between collective bargaining and lobbying that is grounded in the government's unique interest as employer, and that preventing free riding is uniquely important in this context because unions have a statutory duty to represent all employees.

If every member of the Court who joined *Harris* agrees with everything in it, it is difficult to see how *Abood* can survive. But Justices often join opinions without agreeing with everything in them. And considerations of stare decisis, not addressed in *Harris*, may cause one or more Justices to be reluctant to overrule *Abood*. If so, one potential compromise is to hold that unions may continue to collect fees for collective bargaining, but that they may only collect fees unrelated to collective bargaining through an opt-in system. Another possibility is that the Court will reaffirm both prongs of *Abood*. But given the direction in which the Court has been heading, this seems like the least likely possibility.

Business Highlights

Campbell-Ewald Company v. Gomez

In class action litigation, the most important issue is whether a class should be certified. If it is, it puts enormous pressure on the defendants to settle, rather than face the potentially enormous costs of liability. One tactic that some defendants have adopted to avoid class certification is to offer the named plaintiff full relief on his or her individual claim, and then, after the offer is not accepted, move to dismiss the case as moot. Through that tactic, a defendant can often avoid the risks of class liability at minimal cost. This case raises the question whether that tactic of offering full relief on the named plaintiff's individual claim moots the case. Mootness occurs when a plaintiff with a personal stake in the outcome loses that personal stake.

The decision in *Genesis Healthcare Corp. v. Symczyk*, sets the stage for the resolution of the question. In that case, the respondent had conceded below and the Court *assumed without deciding* that an unaccepted offer of full relief moots an individual's claim for relief. It then held that the mooting of an individual's claim moots a collective action under the Fair Labor

Standards Act on behalf of others who are similarly situated, if no other individual has yet opted in to join the suit. In dissent, Justice Kagan, speaking for four Justices, concluded that the Court had decided the case on the flawed premise that an unaccepted offer can moot an individual claim. An unaccepted offer, Justice Kagan argued, is a legal nullity, leaving the plaintiff with the same personal interest in the litigation she had before the offer was made. Justice Kagan went on to say that a court has inherent authority to enter judgment over a plaintiff's objection when the plaintiff obstinately refuses to accept a complete victory. But she concluded that an offer a relief that does not include relief for others who are similarly situated is not a complete victory.

Petitioner contends, contrary to Justice Kagan's position, that an offer for full individual relief moots the claim for individual relief, and that *Genesis* establishes that once the individual claim for relief is moot, the plaintiff has no personal interest in obtaining relief for an uncertified Rule 23 class. The premise for that argument—that an unaccepted offer for full individual relief moots the individual claim—seems unlikely to succeed. It is difficult to get around the logic of Justice Kagan's point that an unaccepted offer is a legal nullity that leaves the plaintiff with the same personal stake in the litigation that she had before the offer was made. The real question is whether a court may enter judgment over the plaintiff's objection on the individual claim, and then dismiss the class claim as moot.

Petitioner tries to get around this problem by arguing that the court may enter judgment for the plaintiff even after finding the individual claim moot. But if the claim is moot, the court would seem to lack jurisdiction to do anything but dismiss the case. And that argument still depends on the dubious premise that an offer for full relief moots the individual claim. One possible disposition is therefore for the Court to hold that an unaccepted offer does not moot a case, leaving for another day the important question whether a court may enter judgment on the individual claim over the plaintiff's objection, and then dismiss the class claim as moot.

If the Court finds a way to reach the latter question, however, the 5-4 decision in *Genesis* is probably the best indication of how it will come out. The same Justices who concluded that the mooting of an individual claim moots the claim on behalf of others similarly situated under the FLSA are likely to believe that it is permissible to cram down a judgment on a plaintiff who has been offered full individual relief, and that the class claim is then moot. Because one does not necessarily follow from the other, however, respondent retains some chance of prevailing. Cramming down a judgment on an objecting plaintiff is an issue the Court has not previously addressed. And it may be possible to distinguish the class action claim at issue here from the FLSA collective action claim in *Genesis*. Still, respondent's best hope is that the Court restrict itself to the question presented and leave the cram down question for another day.

Spokeo, Inc. v. Robins

A number of federal statutes give a class of persons a personal right of some kind and simultaneously give those persons a cause of action for statutory damages when their rights have been violated without requiring proof of any actual harm beyond the statutory violation. The Fair Credit Reporting Act is one such statute. It imposes an obligation on consumer reporting agencies to take reasonable measures to ensure the accuracy of information concerning the individual about whom a credit report relates. The Act gives affected consumers a right to seek statutory damages for willful violations. The question is whether Congress has the power to authorize a suit for a violation of a statutory right without proof of any actual harm.

The issue is one of Article III standing, which requires the plaintiff to prove an injury in fact. The Court has sent conflicting signals on Congress's power to create injury in fact where it would not otherwise exist. In one case, the Court appeared to adopt an expansive view that Congress has broad power to establish statutory rights, the invasion of which automatically constitutes injury in fact. In another, the Court appeared to adopt a much more narrow view that Congress could only elevate to legal status what would otherwise independently be viewed as a injury in fact. Justice Kennedy has articulated an intermediate position that would give Congress some power to define new injuries, but it is unclear just how much power he would recognize.

The parties have articulated very differing views on the scope of Congress' power to create injury in fact. Petitioner contends that a bare violation of a statutory right is never enough to confer standing; a plaintiff must always establish actual harm. Respondent argues that the violation of a statutory right is always sufficient to confer standing, provided that the right is individualized. Each of the parties cites English history, U.S. common law, and Supreme Court precedent in support of its position.

The Court is generally closely divided on standing issues, with Justice Kennedy usually determining the outcome. But it is uncertain whether that pattern will hold in this case. Respondent appears to have narrowed his focus to claims that depend on proof that his report was inaccurate, something that seems far more like a traditional injury in fact than other bare statutory violations. It is possible that the Court will hold that such a claim is sufficient to satisfy Article III without reaching the broader question whether bare statutory violations are sufficient when they depart more dramatically from traditional injuries. That path is complicated, however, by the fact that the inaccurate information alleged (married and college educated) does not seem inherently damaging. The broader issue is also so well briefed by both sides in this case that the Court may well be tempted to finally decide the important separation-of-powers question of the extent of Congress's power to establish injury in fact.

Beyond its significance for separation-of-powers, the resolution of the question has important implications for class action litigation. Claims that do not require proof of actual harm lend themselves to class litigation because the statutory violation can often be established with proof that is common to the class. A requirement that the plaintiff establish actual harm beyond the statutory violation, however, may make certification of a class impossible, because proof of actual harm may raise individual issues that predominate over any common issues. That is why the class action defense bar has come out in droves with amicus briefs supporting petitioner, and why, there will presumably be a spate of briefs supporting respondent from the class action plaintiffs' bar.

Tyson Foods, Inc. v. Bouaphakeo

Class action claims often have some elements that are common to the class, and some that require individualized proof. A class may be certified only if the common issues predominate. This case provides an example. It involves a class claim for overtime pay based on the employer's failure to compensate donning and doffing. The question whether donning and doffing is compensable work raises a common question. But because employees spent significantly different amounts of time donning and doffing and because some employees were fully compensated for donning and doffing and others were not, there are also individualized issues relating to whether (i) employees preformed more than 40 hours of work and, if so (ii)

failed to receive overtime pay for that work. Respondent sought to turn the potentially individualized issues into a common issue through a statistical study of the time spent donning and doffing by a hypothetical average employee. Respondent then extrapolated the amount of time spent by each employee based on that average. The principal question in this case is whether that approach is permissible.

Wal-Mart Stores, Inc. v. Dukes comes close to having decided that it is not. In that case, the class proposed to determine liability through a formula under which the percentage of valid claims in a sample would be applied to the class to determine the number of valid claims. The number of valid claims would then be multiplied by the average backpay award to arrive at the class recovery. The Court disapproved of this practice.

Respondent argues that the Court's *Anderson v. Mt. Clemens Pottery Co.* decision authorized the approach followed in this case by holding that in the absence of an employer's records, employees may rely on reasonable inferences to prove their overtime claims. But it is difficult to argue that it is reasonable to infer that every employee has been undercompensated by a certain amount based on an extrapolation from a hypothetical average employee, when the employees worked significantly different amounts of time and some were fully compensated for that time and others were not. This case also potentially raises the question of how to decide whether common issues predominate over individualized ones. But the Court may see fit to simply decide the *Wal-Mart* issue, and leave that other issue for another day.

Criminal Law Highlights

Foster v. Chatman

In *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause forbids a prosecutor from striking prospective jurors on the basis of their race. The *Batson* inquiry proceeds in three steps. First, a criminal defendant must establish a prima facie case; the burden of production then shifts to the prosecutor to produce a non-racial reason for the challenged strikes; and if that burden is satisfied, the criminal defendant then has the burden to prove that the real reason for the strikes was race. Because the ultimate issue of discrimination is factual, and deference is owed to the trial judge's assessment of the credibility of the prosecutor's explanations for the challenged strikes, a *Batson* issue rarely reaches the Supreme Court.

The explanation for the grant in this case is two-fold. First, this is a death penalty case in which a black man was convicted for the murder of a white woman and sentenced to death by an all-white jury. Second, the evidence that the prosecution team exercised strikes based on the race of prospective jurors is exceptionally strong. During voir dire, the prosecution removed all four of the black prospective jurors by peremptory strike. The evidence, some of which was discovered much later, established that the prosecution team (i) marked the name of each prospective black juror in green highlighter, (ii) circled the word "black" next to the race question on the juror questionnaire, (iii) identified three black jurors as B#1, B#2, and B#3, (iv) ranked the prospective black jurors for the purposes of deciding which one should be left on the jury if one had to be picked. Perhaps the state will have some convincing explanation for all this. But unless it does, the deference that is generally owed to district court findings will not be enough to prevent a reversal.

Montgomery v. Louisiana

In *Miller v. Alabama*, the Supreme Court held that a mandatory sentence of life imprisonment without the possibility of parole for juvenile offenders violates the Eighth Amendment's ban on cruel and unusual punishment. The question in this case is whether that decision should be applied retroactively to sentences that became final before *Miller* was decided. At stake is the fate of numerous juvenile offenders who received mandatory life without parole sentences before *Miller* was decided. If *Miller* is retroactive, they would all be entitled to a hearing to decide whether a lesser sentence is warranted.

Teague v. Lane, established the standards for resolving that issue. In that case, the Court held its decisions should be applied retroactively in only two circumstances: when the decision is substantive, and when the decision establishes a watershed procedural rule. The Court has held that a rule is substantive when it narrows the scope of a criminal statute or places certain persons beyond the state's power to punish. So if the Court holds that a defendant had a First Amendment right to engage in conduct for which he was punished, the decision is retroactive. A rule is also substantive when it categorically bars a particular penalty for a class of offenders or type of crime. So the Court's decision that categorically barred capital punishment for juveniles was substantive. A rule is procedural when it alters the method for determining a sentence. The Court's decision holding that a judge rather than a jury must determine a fact that increases the amount of punishment was therefore procedural.

Miller has a procedural component. It requires a sentencer to give individualized consideration to a juvenile homicide offender to account for how children are different, and how those differences counsel against a life without parole sentence. The Court has never held that a procedural ruling is watershed, and it is doubtful that it will start now. The real question is whether *Miller* also has a substantive component. It is not substantive in either of the two ways the Court has previously identified. It does not render conduct legal that was previously illegal, and it does not categorically preclude a certain punishment. *Miller* does not change the fact that juvenile homicide is still a crime, and juveniles who commit that crime can still receive a sentence of life without the possibility of parole as long as individualized consideration is given to each offender.

There is nonetheless a strong argument that *Miller* has a substantive component because it expands the range of sentencing options available to a juvenile convicted of homicide. Before *Miller*, a juvenile convicted of homicide could receive only a sentence of life without possibility of parole in states that mandated that punishment. Now, a juvenile convicted of homicide is eligible for a lesser sentence in those states. If a ruling that constricts the permissible punishments is substantive, it is logical to say that a ruling that expands the permissible punishments is also substantive. The case for characterizing *Miller* as substantive is strengthened by the Court's expectation in *Miller* that juveniles convicted of homicide would only rarely receive such a sentence.

It is impossible to be certain that the Court will be willing to expand its definition of substantive rulings. But the Court that reached the conclusion that life without parole sentences should be rare is unlikely to think that juveniles convicted of homicide before *Miller* should languish in prison for the rest of their lives. *Miller* itself was a 5-4 decision, and while

retroactivity has no necessary correlation with a decision on the merits, it may well have such a correlation in this case.

SECTION II: CASE SUMMARIES

Page

Constitutional Law

- Fourteenth Amendment – Equal Protection
 - Evenwel v. Abbott* 13
 - Fisher v. University of Texas at Austin* 13
 - Harris v. Arizona Independent Redistricting Commission* 14

Criminal Law

- Capital Sentencing
 - Hurst v. Florida* 15
 - Kansas v. J. Carr* 16
 - Kansas v. R. Carr* 16
 - Kansas v. Gleason* 17
- Federal Statutory Offenses
 - Hobbs Act – Conspiracy
 - Ocasio v. United States* 18
 - Sentencing Enhancement
 - Lockhart v. United States* 19
- Habeas Corpus – Retroactivity
 - Montgomery v. Louisiana* 20
- Jury Selection
 - Foster v. Chatman* 21
- Law of the Case Doctrine and Statute of Limitations Defense
 - Musacchio v. United States* 22
- Pretrial Asset Forfeiture
 - Luis v. United States* 23

Federal Practice and Procedure

- Class Actions
 - Campbell-Ewald Company v. Gomez* 24
 - Spokeo v. Robins* 25
 - Tyson Foods v. Bouaphakeo* 26

- Equitable Tolling
Menominee Indian Tribe of Wisconsin v. United States 27
- Foreign Sovereign Immunities Act
OBB Personenverkehr AG v. Sachs 28
- State Sovereign Immunity
Franchise Tax Board of California v. Hyatt 29
- Three-Judge Court Act
Shapiro v. Mack 30

Labor and Employment

- Employment Discrimination
Green v. Brennan 31
- ERISA
Gobeille v. Liberty Mutual Insurance Co. 32
Montanile v. Board of Trustees 33
- Public Employee Union Dues
Friedrichs v. California Teachers Association 34

Miscellaneous Business

- *Banking*
Hawkins v. Community Bank of Raymore 35
- Federal Arbitration Act
DIRECTV v. Imburgia 36
- Government Contracting
Kingdomware Technologies v. United States 37
- Securities
Merrill Lynch, Pierce, Fenner & Smith v. Manning 37

Other Public Law

- Administrative Law
EnerNOC v. Electric Power Supply Association 38
FERC v. Electric Power Supply Association 38

- Immigration
Torres v. Lynch 39
- Indian Law
Dollar General Corp. v. Mississippi Band of Choctaw Indians 40
- Prison Litigation Reform Act
Bruce v. Samuels 41

<i>Alphabetical Case Index</i>	<i>Page</i>
<i>Bruce v. Samuels</i>	41
<i>Campbell-Ewald Company v. Gomez</i>	24
<i>DIRECTV v. Imburgia</i>	36
<i>Dollar General Corp. v. Mississippi Band of Choctaw Indians</i>	40
<i>EnerNOC v. Electric Power Supply Association</i>	38
<i>Federal Energy Regulatory Commission v. Electric Power Supply Association</i>	38
<i>Fisher v. University of Texas at Austin</i>	13
<i>Foster v. Chatman</i>	21
<i>Franchise Tax Board of California v. Hyatt</i>	29
<i>Friedrichs v. California Teachers Association</i>	34
<i>Gobeille v. Liberty Mutual Insurance Co.</i>	32
<i>Green v. Brennan</i>	31
<i>Harris v. Arizona Independent Redistricting Commission</i>	14
<i>Hawkins v. Community Bank of Raymore</i>	35
<i>Hurst v. Florida</i>	15
<i>Kansas v. J. Carr</i>	16
<i>Kansas v. R. Carr</i>	16
<i>Kansas v. Gleason</i>	17
<i>Kingdomware Technologies v. United States</i>	37
<i>Lockhart v. United States</i>	19
<i>Luis v. United States</i>	23
<i>Menominee Indian Tribe of Wisconsin v. United States</i>	27

<i>Merrill Lynch, Pierce, Fenner & Smith v. Manning</i>	37
<i>Montanile v. Board of Trustees</i>	33
<i>Montgomery v. Louisiana</i>	20
<i>Musacchio v. United States</i>	22
<i>OBB Personenverkehr AG v. Sachs</i>	28
<i>Ocasio v. United States</i>	18
<i>Shapiro v. Mack</i>	30
<i>Spokeo v. Robins</i>	25
<i>Torres v. Lynch</i>	39
<i>Tyson Foods v. Bouaphakeo</i>	26

Constitutional Law

Fourteenth Amendment – Equal Protection

Evenwel v. Abbott (14-940)

Question Presented:

Whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

Summary:

In *Reynolds v. Sims* the Supreme Court held that the Equal Protection Clause incorporates a one-person, one-vote principle under which a State's legislative districts must be relatively equal in population. The question presented in this case is whether the relevant population that must be equalized is total population, or voting population, or whether a State is free to choose between them.

In 2013, Texas adopted a redistricting plan for its State Senate that had previously been adopted by a federal court as an interim plan. The districts in the plan are relatively equal in total population, but not in voting population. Appellants Sue Evenwel and Edward Pfenninger, registered voters in Texas, filed suit in federal court, alleging that the State's redistricting plan violates the one-person, one-vote principle. In particular, they alleged that the Senate districts in which they reside deviate substantially from the ideal district in voting population, giving them less voting power than voters residing in some other districts.

A three-judge district court dismissed appellants' suit for failure to state a claim. Relying on the Supreme Court's decision in *Burns v. Richardson*, the court held that States are free to select either total population or voter population as the basis for equalizing the population in a district.

Appellants argue that *Reynolds v. Sims* requires States to ensure that equal numbers of voters can vote for proportionately equal numbers of officials. For that reason, appellants contend, States may not use total population as an apportionment base for its districts when, as here, it results in substantial differences in the voting population in those districts.

Decision Below:

2014 WL 5780507 (W.D.Tex.)

Appellants' Counsel of Record:

William S. Consovoy, Consovoy McCarthy Park PLLC

Appellees' Counsel of Record:

Scott A. Keller, Solicitor General of the State of Texas

Fisher v. University of Texas at Austin (14-981)

Question Presented:

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

Summary:

In *Grutter v. Bollinger*, the Supreme Court held that the use of race as a factor in university admissions does not violate the Equal Protection Clause if it is narrowly tailored to achieve educational diversity. In *Fisher I*, the Court held that universities are not entitled to

deference on the narrowly tailored inquiry. The question presented in this case is whether the University of Texas at Austin's use of race as a factor in under-graduate admissions violates the Equal Protection Clause under *Grutter* and *Fisher I*.

The University of Texas at Austin (UT) automatically admits in-state students who finish in the top 10% of their high school class. In filling the remaining slots, UT conducts a holistic review in which it considers a variety of factors, including race. Abigail Fisher (petitioner), who is white, applied for admission to UT. Because she was not in the top 10% of her high school class, her application was given a holistic review in which race was considered as a factor. After her application was denied, petitioner filed suit in federal district court, challenging UT's use of race in admissions. The district court issued judgment for UT, and the Fifth Circuit affirmed, but the Supreme Court vacated and remanded for application of strict scrutiny without giving deference to UT on narrow tailoring.

On remand, the Fifth Circuit upheld UT's consideration of race in admissions as narrowly tailored to further the compelling interest in qualitative diversity. It concluded that UT's use of race as part of a holistic review was necessary to admit students who have talents and experiences not found in students admitted under the Top 10% program.

Petitioner argues that that UT's consideration of race in admissions fails strict scrutiny. Petitioner contends that UT's asserted interest in qualitative diversity is a post-hoc explanation for its use of race in admissions. Petitioner also contends that there is no evidence that qualitative diversity is absent from students admitted through the Top 10% program. Petitioner finally argues that qualitative diversity is not a legitimate interest because it depends on the stereotyped assumption that minorities admitted through the Top 10% program are limited in their ability to contribute to diversity.

Decision Below:

758 F.3d 633 (5th Cir. 2014)

Petitioner's Counsel of Record:

Bert W. Rein, Wiley Rein LLP

Respondents' Counsel of Record:

Gregory G. Garre, Latham & Watkins, LLP

***Harris v. Arizona Independent Redistricting Commission* (14-232)**

Questions Presented:

(1) Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle?

(2) Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby County v. Holder*, 133 S.Ct. 2612 (2013)?

Summary:

Under the one person, one vote rule, states are required to create state legislative districts that are relatively equal in population. Minor deviations that further legitimate state ends are permissible. The first question presented is whether an effort to improve the electoral prospects of one political party is a legitimate state interest that justifies minor deviations. The second question presented is whether a desire to obtain preclearance under Section 5 of the Voting Rights Act is a legitimate state interest that justifies minor deviations, and even if it is once was,

whether it no longer is in light of the Supreme Court's invalidation of Section 5's coverage formula in *Shelby County*.

Arizona's Independent Redistricting Commission (appellees) established a redistricting plan for state legislative districts in which some districts are overpopulated and others are underpopulated. Voters residing in overpopulated districts (appellants) allege that the deviations in the plan are intended to favor the Democratic Party and to increase the likelihood of preclearance under Section 5, and that neither is a legitimate justification for a deviation from population equality.

A three-judge district court upheld the plan. It concluded that the predominant purpose of the deviations was to obtain Section 5 preclearance, and that this purpose constituted a legitimate justification for deviating from the one person, one vote rule. The court held that *Shelby County* did not invalidate that purpose because it was decided after the challenged plan was created. The court further concluded that petitioners had proved only that partisanship played some role in some decisions, and that such proof was insufficient to invalidate minor deviations from the one person, one vote rule.

Appellants first argue that seeking partisan advantage is not a legitimate justification for a deviation from one-person, one-vote rule, regardless of whether it is the predominant factor or merely one motivating factor. Appellants also contend that seeking to gain Section 5 preclearance is not a legitimate justification for a deviation. Relying on the principle that a court must apply current law to pending cases, petitioners argue that under *Shelby County*, compliance with Section 5 is no longer a legitimate state interest. Petitioners further argue that Section 5 does not require deviations from population equality, and if it did, it would violate the one person, one vote rule.

Decision Below:

993 F.Supp.2d 1042 (D. Ariz. 2014)

Appellants' Counsel of Record:

Mark F. Hearne II, Arent Fox LLP

Appellees' Counsel of Record:

Paul M. Smith, Jenner & Block LLP

Criminal Law

Capital Sentencing

Hurst v. Florida (14-7505)

Question Presented:

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*.

Summary:

In *Ring v. Arizona*, the Supreme Court held that the Sixth Amendment requires that the jury find an aggravating circumstance necessary for imposition of the death penalty. Under Florida's sentencing scheme, a jury makes an advisory recommendation on whether the death penalty should be imposed. To return an advisory recommendation of death, a majority of the jury must find at least one aggravating factor. The jury need not specify which aggravating factor or factors it found, and a majority need not agree on a particular aggravating factor. The death penalty may be imposed only if a judge finds at least one aggravating factor, and

determines that aggravating factors outweigh mitigating factors. The question presented in this case is whether Florida’s capital sentencing scheme is consistent with *Ring*.

In 2000 Petitioner Timothy Lee Hurst was convicted of first-degree murder in the death of Cynthia Harrison. The jury voted 7-5 to recommend the death sentence. After finding that two aggravating circumstances outweighed the mitigating circumstances, the district court judge sentenced petitioner to death.

The Florida Supreme Court affirmed petitioner’s capital sentence, holding that Florida’s capital sentencing scheme complies with *Ring*. The court reasoned that, unlike the sentencing scheme invalidated in *Ring*, Florida’s sentencing scheme provides for jury input on whether there are aggravating factors.

Petitioner argues that Florida’s capital sentencing scheme violates *Ring* because it entrusts to the trial judge, rather than the jury, the responsibility to find an aggravating factor necessary for the imposition of the death penalty. Petitioner further argues that the jury’s recommendation of death does not imply a finding of an aggravating circumstance that would satisfy *Ring*, because the jury does not make any explicit finding on aggravating circumstances, and a majority of the jury is not required to agree on a particular aggravating circumstance. Finally, petitioner argues that Florida’s simple majority rule for finding an aggravating circumstance violates the Sixth and Eighth Amendments.

Decision Below:

147 So.3d 435 (Fla. 2014)

Petitioner’s Counsel of Record:

Seth P. Waxman, Wilmer, Cutler, Pickering, Hale and Dorr, LLP

Respondent’s Counsel of Record:

Allen C. Winsor, Solicitor General of Florida

Kansas v. Jonathan D. Carr (14-449)

Kansas v. Reginald Dexter Carr, Jr. (14-450)

Questions Presented:

(1) Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances “need not be proven beyond a reasonable doubt,” as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context make clear that each juror must individually assess and weight any mitigating circumstances?

(2) Whether the trial court’s decision not to sever the sentencing phase of the co-defendant brothers’ trial here – a decision that comports with the traditional approach preferring joinder in circumstances like this – violated an Eighth Amendment right to an “individualized sentencing” determination and was not harmless in any event?

Summary:

In *Zafiro v. United States*, the Supreme Court held that a joint trial of two defendants does not violate the Constitution merely because the defendants have antagonistic defenses. The first question in this case is whether a joint capital sentencing proceeding violates the Eighth Amendment when the defendant’s mitigation claims are antagonistic. This case also presents the question whether the Eighth Amendment requires a court to instruct a jury that mitigating circumstances need not be proven beyond a reasonable doubt. That question is also presented in *Kansas v. Gleason* (14-452), and will not be discussed further here.

Respondents Reginald and Jonathan Carr committed a series of three violent incidents

involving carjacking, robbery, and multiple murders. In the third incident, the Carrs shot five victims in the head, and killed four of them. The Carrs were jointly tried and convicted of capital murder for the four killings. The Carrs moved for separate capital sentencing proceedings, but the district court denied the motion. Following their joint sentencing proceedings, the Carrs were both sentenced to death.

The Kansas Supreme Court affirmed one of the capital murder convictions, but reversed the death sentences. The court held that the trial court's decision not to sever the penalty phase proceedings violated the brothers' Eighth Amendment right to individualized sentencing consideration. In reaching that conclusion as to Reginald Carr, the court cited evidence that could have led the jury to show mercy for Jonathan but not Reginald. The court concluded that Jonathan Carr was denied individualized sentencing consideration for similar reasons.

Kansas argues that joint sentencing proceedings do not violate the Eighth Amendment simply because the defendants have antagonistic mitigation claims. Kansas relies on the holding in *Zafiro* that antagonistic defenses do not require separate trials, and it argues that there is no reason to treat capital sentencing proceedings differently.

Decisions Below:

329 P.3d 1195 (Kan. 2014) (14-449)

331 P.3d 544 (Kan. 2014) (14-450)

Petitioner's Counsel of Record:

Stephen R. McAllister, Solicitor General of Kansas

Respondents' Counsel of Record:

Sarah E. Johnson, Kansas Appellate Defender Office (14-449)

Neal Kumar Katyal, Hogan Lovells US LLP (14-450)

***Kansas v. Gleason* (14-452)**

Question Presented:

Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances “need not be proven beyond a reasonable doubt,” as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context make clear that each juror must individually assess and weight any mitigating circumstances?

Summary:

In *Blystone v. Pennsylvania*, the Supreme Court held that the Eighth Amendment requires “that a capital sentencing jury be allowed to consider and give effect to all relevant mitigating evidence.” In *Walton v. Arizona*, the Court held that the Eighth Amendment does not preclude a state from placing the burden on the defendant to establish mitigating circumstances. The question in this case is whether the Eighth Amendment requires a capital-sentencing jury to be instructed that mitigating circumstances need not be proven beyond a reasonable doubt.

Respondent Sidney Gleason was tried and convicted of capital murder for his involvement in the killing of two men. During the sentencing phase of his trial, the court instructed the jury that in order to impose the death penalty, it was required to agree that the prosecution had proven one or more “aggravating circumstances” beyond a reasonable doubt, and that those circumstances were not “outweighed by any mitigating circumstances found to exist.” Based on those instructions, the jury unanimously voted in favor of the death penalty.

The Kansas Supreme Court reversed respondent's death sentence. It held that the failure to instruct the jury that the defendant was not required to prove the existence of mitigating circumstances beyond a reasonable doubt violated the Eighth Amendment. The court reasoned

that because the jury was repeatedly instructed that aggravating circumstances must be proven beyond a reasonable doubt, but was given no instruction on the burden of proving mitigating circumstances, the jury may have believed it could not consider mitigating circumstances unless they were proven beyond a reasonable doubt. That possibility, the court concluded, violated respondent's right to individualized consideration of mitigating circumstances.

Kansas argues that the Eighth Amendment does not require juries to be instructed that mitigating circumstances need not be proven beyond a reasonable doubt. As long as juries are allowed to consider all relevant mitigating circumstances, Kansas argues, states are free to determine the manner in which they are considered, including what instructions, if any, to give on the burden of proof. Because the instructions in this case allowed the jury to consider all relevant mitigating circumstances, Kansas contends, they complied with the Eighth Amendment.

Decision Below:

329 P.3d 1102 (Kan. 2014)

Petitioner's Counsel of Record:

Stephen R. McAllister, Solicitor General of Kansas

Respondent's Counsel of Record:

Sarah E. Johnson, Kansas Appellate Defender Office

Federal Statutory Offenses

Hobbs Act – Conspiracy

Ocasio v. United States (No. 14-361)

Question Presented:

Does a conspiracy to commit extortion require that the conspirators agree to obtain property from someone outside the conspiracy?

Summary:

The Hobbs Act prescribes criminal punishment for “whoever” commits extortion, or conspires to do so, and it defines extortion as “the obtaining of property from another, with his consent . . . under color of official right.” The question in this case is whether a Hobbs Act conspiracy to commit extortion requires that the defendant agree to obtain property from someone who is not a member of the conspiracy.

Petitioner Samuel Ocasio, an officer with the Baltimore Police Department, formed an agreement with fellow officers and the owners of an auto-repair shop, whereby the officers would refer car-accident victims to the repair shop in exchange for referral fees. Petitioner was convicted of conspiring with fellow officers and the two owners of the auto repair to extort property in violation of the Hobbs Act. The district court refused the defendant's request to instruct the jury that the government had to prove that the defendant agreed to obtain property from someone outside the conspiracy.

The court of appeals affirmed. It held that a conspiracy to commit extortion can be found when the object of the conspiracy is to obtain property from a person who is a member of the conspiracy. The court reasoned that the term “another” in the Hobbs Act refers to a person other than the defendant himself, not a person outside the conspiracy.

Petitioner contends that in order to prove a Hobbs Act conspiracy, the government must show that the defendant agreed to obtain property from someone outside the conspiracy. Petitioner relies on the plain meaning of the terms in the Hobbs Act. The plain meaning of the term “another,” petitioner argues, is someone in addition to the two or more persons who have

formed the agreement to extort. Petitioner further argues that a person “obtains” property from another when the victim parts with property and the extortionist receives it, not when two people *exchange* property. Finally, petitioner argues that it makes no sense to say that two persons can conspire to obtain their own “consent.”

Decision Below:

750 F.3d 399 (4th Cir. 2014)

Petitioner’s Counsel of Record:

Ethan P. Davis, King & Spalding LLP

Respondent’s Counsel of Record:

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

Sentencing Enhancement

Lockhart v. United States (No. 14-8358)

Question Presented:

Whether [18 U.S.C.] § 2252(b)(2)'s mandatory minimum sentence is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involv[e] a minor or ward."

Summary:

Section 2252(b)(2) establishes a mandatory minimum sentence of ten years in prison for any defendant convicted of possessing child pornography who has a prior state law conviction relating to “aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.” The issue in this case is whether the ten-year mandatory minimum applies to a state law conviction for “aggravated sexual abuse” or “sexual abuse” not involving a minor or a ward.

Petitioner pleaded guilty to the federal offense of possession of child pornography. Based on petitioner’s previous state law conviction for sexually abusing his adult girlfriend, the district court sentenced petitioner to the ten-year minimum established by Section 2252(b)(2).

The Second Circuit affirmed, holding that the ten-year minimum applies to state convictions for “aggravated sexual abuse” or “sexual abuse” not involving a minor or ward. The court reasoned that the phrase “involving a minor or ward” modifies only “abusive sexual conduct” and not the other two categories of sexual abuse. That interpretation, the court concluded, best harmonizes Section 2252(b)(2) with Congress’s decision to apply the ten-year mandatory minimum to previous federal convictions for sexual abuse not involving a minor or a ward.

Petitioner argues that the phrase “involving a minor or ward” applies to all three previously identified categories of abuse. Petitioner relies on the “series qualifier” canon under which a modifying phrase following a single integrated list applies to every antecedent on the list, and not just to the last antecedent. Petitioner also contends that because numerous federal offenses trigger the mandatory minimum even when state analogues do not, Congress’s decision to apply the mandatory minimum to federal sexual abuse offenses not involving a minor or a ward is irrelevant to the interpretation of Section 2252(b)(2).

Decision Below:

749 F.3d 148 (2d Cir. 2014)

Petitioner’s Counsel of Record:

Edward S. Zas, Federal Defenders of New York, Inc.

Respondent’s Counsel of Record:

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

Habeas Corpus – Retroactivity

Montgomery v. Louisiana (14-280)

Questions Presented:

(1) Whether *Miller v. Alabama* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison?

(2) [Does the Court] have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller v. Alabama*, 567 U. S. ____ (2012)?

Summary:

In *Teague v. Lane*, the Supreme Court held that new substantive rules apply retroactively on collateral review. In subsequent decisions, the Court has held that a rule is substantive when it narrows the class of offenders subject to a particular punishment, but is procedural when it alters the method for determining a sentence. In *Miller v. Alabama*, the Supreme Court held that a mandatory sentence of life imprisonment without the possibility of parole for juvenile offenders violates the Eight Amendment’s ban on cruel and unusual punishment. The first question presented in this case is whether *Miller* adopted a new substantive rule that applies retroactively on collateral review. The Court added a second question that asks whether the Court has jurisdiction to review the Louisiana Supreme Court’s refusal to give *Miller* retroactive effect.

When petitioner Henry Montgomery was 17, he murdered a Deputy Sheriff. Petitioner was convicted of murder and sentenced to life in prison without the possibility of parole. Following the Supreme Court’s decision in *Miller*, petitioner filed a motion on state collateral review seeking a correction of his sentence in light of *Miller*. The district court denied the motion.

Relying on its decision in *State v. Tate*, the Louisiana Supreme Court denied petitioner’s writ. In *Tate*, the Louisiana Supreme Court held that *Miller* does not apply retroactively on collateral review. The court reasoned that *Miller* is not a substantive rule because it does not categorically bar a sentence of life without the possibility of parole for all juveniles, but instead alters the method for determining when a juvenile may receive such a sentence.

Petitioner contends that *Miller* is a substantive rule and therefore must be applied retroactively on collateral review. *Miller* is substantive, rather than procedural, petitioner contends, because it categorically prohibits a mandatory sentence of life imprisonment without the possibility of parole for juveniles, it adds aggravating and mitigating circumstances as additional elements that must be considered in determining the appropriate punishment, and it broadens the range of punishment for which a juvenile offender is eligible.

Because both parties agreed that the Court has jurisdiction to review the Louisiana Supreme Court’s decision, the Court appointed amicus to argue that it does not. Amicus argues that because the Louisiana Supreme Court adopted the *Teague* standard as guidance rather than under state law compulsion, its retroactivity decision raises only a state law question that the Court has no jurisdiction to review. Amicus further argues that *Teague* reflects an interpretation of the federal habeas statute and therefore does not apply by its own force on state collateral review.

Decision Below:

141 So.3d 264 (La. 2014)

Petitioner’s Counsel of Record:

Mark D. Plaisance, Office of Public Defender, East Baton Rouge Parish, Louisiana

Respondent’s Counsel of Record:

S. Kyle Duncan, Duncan PLLC, Special Assistant Attorney General

Court-Appointed Amicus Curiae:

Richard D. Bernstein, Willkie Farr & Gallagher LLP

Jury Selection

Foster v. Chatman (14-8349)

Question Presented:

Did the Georgia courts err in failing to recognize race discrimination under *Batson v. Kentucky* in the extraordinary circumstances of this death penalty case?

Summary:

In *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause forbids a prosecutor from striking prospective jurors on the basis of their race. The question in this case is whether the evidence in this case established a *Batson* violation.

Petitioner Timothy Foster, a black man charged with murdering a white woman, was sentenced to death by an all-white jury. During voir dire, the prosecution removed all four of the black prospective jurors by peremptory strike. At the sentencing phase, the prosecution argued that the jury should impose the death penalty to “deter other people out there in the projects.” Petitioner moved for a new trial, arguing that the prosecution had violated *Batson*. The trial court denied petitioner’s motion.

The Georgia Supreme Court affirmed, holding that the trial court did not err by crediting the prosecution’s race-neutral explanations for the strikes. Petitioner then filed a petition for a writ of habeas corpus in state court, and eventually gained access to the prosecution’s jury selection notes from his initial trial. The prosecution’s notes clearly marked and identified the black jurors. Following the introduction of these notes into evidence, the state habeas court denied petitioner relief. Petitioner’s request for review in the Georgia Supreme Court was denied.

Petitioner argues that the original trial court findings and the Georgia Supreme Court’s affirmance of those findings are not owed deference because the prosecution’s notes were not available to those courts. Petitioner further argues that the evidence clearly established a *Batson* violation. Petitioner specifically points to evidence from the notes that the prosecution (i) marked the name of each prospective black juror in green highlighter, (ii) circled the word “black” next to the race question on the juror questionnaire, (iii) identified three black jurors as B#1, B#2, and B#3, (iv) ranked the prospective black jurors and stated that it comes down to having to pick one, and (v) created strike lists that contradict the race-neutral explanation proffered for one of the black jurors. Petitioner also relies on evidence that the prosecution struck all four prospective black jurors and was prepared to strike the fifth until she was dismissed for cause, proffered an unusually large number of race-neutral explanations for the strikes, and stated in closing argument that petitioner should be put to death in order to deter other people in the projects from doing the same thing.

Decision Below:

14-0771 Order (Ga. 2014)

Petitioner’s Counsel of Record:

Stephen B. Bright, Southern Center for Human Rights

Respondent's Counsel of Record:

Patricia B. Burton, Deputy Attorney General of Georgia

Law of the Case Doctrine and Statute of Limitations Defense

Musacchio v. U.S. (14-1095)

Questions Presented:

(1) Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

(2) Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal?

Summary:

Under the law-of-the-case doctrine, when the government fails to object to jury instructions, the sufficiency of the evidence on appeal is generally measured against the elements described in the jury instructions, even if the instructions incorrectly add an element to the offense. The first question in this case is whether the law-of-the-case doctrine applies when the government fails to object to instructions that are patently erroneous. The statute of limitations is an affirmative defense that must be raised by the defendant at or before trial. The second question presented in this case is whether a statute-of-limitations defense not raised at or before trial is forfeited and therefore reviewable on appeal under the plain error doctrine or is waived and therefore unreviewable.

18 U.S.C. § 1030 (a)(2)(C) makes it a criminal offense to obtain information from a protected computer “without authorization” *or* by “exceed[ing] authorized access.” Petitioner Musacchio was indicted for conspiring to violate that statute by accessing his former employer’s computer “without authorization.” The district court incorrectly instructed the jury that the statute required the government to prove that petitioner conspired to obtain information by accessing a computer without authorization *and* by exceeding authorized access. The government did not object to the instructions. After the jury found petitioner guilty, he moved for acquittal on the ground that there was insufficient evidence to support the jury’s verdict that he conspired to exceed authorized access. The district court denied the motion. Petitioner had a potential statute-of-limitations defense because the superseding indictment was filed outside the limitations period and was therefore untimely unless it did not make any substantial changes in the original indictment. Petitioner did not, however, assert that defense.

The Fifth Circuit affirmed. The court held that, under the law-of-the-case doctrine, the sufficiency of the evidence is generally measured against the jury instructions when the government fails to object to them. It further held, however, that there is an exception to that doctrine when, as here, the jury instructions are patently erroneous, and the issue is not misstated in the indictment. The court refused to consider petitioner’s statute-of-limitations argument on the ground that petitioner had waived that defense by failing to raise it in the district court.

Petitioner contends that the law-of-the-case doctrine requires the sufficiency of the evidence to be measured against the elements described in the jury instructions even when the instructions are patently erroneous. Because a defendant can forfeit numerous valid claims, petitioner argues, it is only fair to hold the government to the instructions to which it failed to object. Petitioner also argues that a statute-of-limitations defense not pleaded at trial is reviewable on appeal under the plain error doctrine or otherwise. Unless review is permitted,

petitioner contends, the government will be encouraged to charge outside the limitations period in the hope that the defense will be waived.

Decision Below:

590 Fed. Appx. 359 (5th Cir. 2014)

Petitioner’s Counsel of Record:

Erik S. Jaffe, Erik S. Jaffe, P.C.

Respondent’s Counsel of Record:

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

Pretrial Asset Forfeiture

Luis v. United States (14-419)

Question Presented:

Whether the pretrial restraint of a criminal defendant’s legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments.

Summary:

Federal law requires forfeiture to the United States of any property that is traceable to a criminal offense. If such property cannot be located, federal law mandates forfeiture of substitute assets. To preserve the assets that are potentially forfeitable, a court may issue a pretrial restraining order prohibiting a defendant from disposing of such assets. The question in this case is whether the pretrial restraint of a criminal defendant’s untainted assets violates the Fifth and Sixth Amendments when the assets are necessary to retain private counsel.

Petitioner was indicted on charges of health care fraud. In a related civil action, a federal district court froze \$45 million of petitioner’s assets, including untainted assets. Petitioner moved to modify the restraining order in order to obtain access to assets needed to retain private defense counsel. The district court denied the motion.

The Eleventh Circuit affirmed. The court held that the Supreme Court’s decisions in *Kaley v. United States*, *Caplin & Drysdale, Chtd. v. United States*, and *United States v. Monsanto*, preclude a constitutional challenge to the restraint of untainted assets.

Petitioner argues that the restraint of untainted assets necessary to obtain defense counsel violates the constitutional right to counsel of one’s choice. The Court’s decisions in *Kaley*, *Caplin & Drysdale*, and *Monsanto*, petitioner argues, pertain only to tainted assets, and are based on the relation-back doctrine under which assets traceable to the crime did not belong to the defendant in the first place. In contrast, petitioner contends, the relation- back doctrine does not apply to substitute assets: they are owned by the defendant, and the government has no pre-trial interest in them.

Decision Below:

564 Fed.Appx. 493 (11th Cir. 2014)

Petitioner’s Counsel of Record:

Howard M. Srebnick, Black, Srebnick, Kornspan & Stumpf, P.A.

Respondent’s Counsel of Record:

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

Federal Practice and Procedure

Class Actions

Campbell-Ewald Company v. Gomez (14-857)

Questions Presented:

(1) Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

(2) Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

(3) Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

Summary:

In *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court assumed without deciding that an unaccepted offer of full relief moots an individual's claim for relief. It then held that the mootness of an individual's claim moots a collective action under the Fair Labor Standards Act. The first two questions in this case are: (1) whether a case becomes moot when the plaintiff receives an offer of complete relief on his claim; and (2) whether the answer to that question changes when the plaintiff asserts a class action claim under Rule 23, but receives an offer of complete relief before any class is certified. In *Yearsley*, the Supreme Court established a doctrine of derivative sovereign immunity under which a government contractor is entitled to immunity from suit for work performed under the contract. The third question in this case is whether *Yearsley* immunity is restricted to claims arising out of property damage caused by public works projects.

The U.S. Navy contracted with petitioner Campbell-Ewald to develop a recruitment campaign via text message, and petitioner contracted with a third party to deliver the text. After receiving the recruitment message, respondent Gomez filed suit against petitioner in federal district court, alleging that the sending of the message without his consent violated the Telephone Consumer Protection Act (TCPA). Petitioner sought relief for himself as well as the class of all other persons sent the recruitment message without consent. Before respondent moved for class certification, petitioner offered him complete relief on his individual claim. After respondent refused the offer, petitioner sought to dismiss the case as moot, but the district court denied that motion. The district court subsequently entered judgment in favor of petitioner based on derivative sovereign immunity.

The Ninth Circuit affirmed the district court's mootness ruling and reversed its derivative sovereign immunity ruling. The court of appeals held that when a plaintiff seeks relief for himself and for a class of similarly situated persons, an offer of full relief on the individual claim does not moot either the individual claim or the class claim. The court also held that, under *Yearsley*, derivative sovereign immunity applies only to claims arising out of property damage caused by public works projects.

Petitioner contends that an offer for full relief mooted respondent's individual claim because the offer eliminated his personal stake in the outcome. Petitioner further contends that respondent's class claim did not keep the case from becoming moot because a class does not acquire a protected legal status until it is certified. Petitioner argues that, if the case is not moot,

it is entitled to derivative sovereign immunity. Petitioner contends that *Yearsley* protects any government contractor who performs duties within the scope of delegated authority.

Decision Below:

768 F.3d 871 (9th Cir. 2014)

Petitioner’s Counsel of Record:

Gregory G. Garre, Latham & Watkins, LLP

Respondent’s Counsel of Record:

Jonathan F. Mitchell, Stanford University

Spokeo, Inc. v. Robins (No. 13-1339)

Question Presented:

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

Summary:

The Fair Credit Reporting Act (FCRA) imposes obligations on “consumer reporting agencies” with respect to the consumer information they transmit. It requires such agencies to follow certain procedures to ensure the accuracy of reports, issue notices to providers and users of information, and post toll-free numbers that consumers can call to request reports. It also limits when such agencies can furnish consumer reports to employers. The Act provides that plaintiffs claiming a willful violation may seek statutory damages. The issue in this case is whether alleging a violation of a statute is sufficient to satisfy Article III’s injury-in-fact requirement when the plaintiff alleges a violation of his statutory rights, and the right is individualized, rather than collective, but there is no allegation of concrete harm.

Petitioner Spokeo, Inc. operates a “people search engine” that aggregates personal information about individuals from public sources, and presents that information in a searchable format for its users. Respondent Thomas Robins sued petitioner in federal court, claiming that petitioner willfully violated the FCRA provisions discussed above. Respondent specifically alleged that petitioner inaccurately reported that he is married, rather than single, that he has more professional and educational experience than he has, and that he is better off financially than he is. Respondent sought statutory damages. The district court dismissed respondent’s complaint for failure to satisfy Article III’s injury-in-fact requirement.

The Ninth Circuit reversed. The court held that respondent’s allegation that petitioner violated the FCRA provisions discussed above satisfied Article III’s injury-in-fact requirement. The court reasoned that Congress may confer Article III standing on a plaintiff when the plaintiff alleges a violation of his rights, and not the rights of others, and the right at issue protects individual, rather than collective interests. Those conditions were satisfied here, the court concluded, because respondent alleged that petitioner violated his statutory rights, and because respondent’s interest in the handling of his credit information is individualized rather than collective.

Petitioner argues that Congress’s creation of a statutory right cannot erase the Article III requirement that a plaintiff must demonstrate that he personally suffered concrete harm. Because respondent alleged only a violation of his statutory rights, and did not allege that the statutory violation caused concrete harm, petitioner contends, respondent failed to satisfy Article III’s injury-in-fact requirement. Petitioner further argues that in order to preserve the FCRA’s

constitutionality, the “willful violation” provision should be interpreted to allow a plaintiff to claim statutory damages only if he can demonstrate actual harm.

Decision Below:

742 F.3d 409 (9th Cir. 2014)

Petitioner’s Counsel of Record:

Andrew J. Pincus, Mayer Brown LLP

Respondent’s Counsel of Record:

William S. Consovoy, Consovoy McCarthy Park PLLC

***Tyson Foods, Inc. v. Bouaphakeo* (14-1146)**

Questions Presented:

(1) Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

(2) Whether a class action may be certified or maintained under Rule 23(b)(3), or a collection action certified or maintained under the FLSA, when the class contains hundreds of members who were not injured and have no legal right to any damages.

Summary:

Under Federal Rule 23(b), a court may certify a class action where “questions of law or fact common to class members predominate over any questions affecting only individual members.” Under the FLSA, plaintiffs may sue “for and on behalf” of themselves and other employees who have been denied overtime pay under the Act. The first question in this case is whether a class action or collective action may be certified when liability and damages are determined using statistical evidence of the amount of damages owed to the average employee in a sample. The second question in this case is whether a class action or collective action may be certified or maintained when the class contains hundreds of individuals who were not injured.

Respondents work for petitioner Tyson Foods, Inc. They filed suit alleging that petitioner failed to pay them overtime for donning and doffing protective equipment and other associated activities, in violation of state law and the FLSA. Employees at the plant spent different amounts of time donning and doffing equipment, and many did not work overtime at all. The district court nonetheless certified the state law claim as a class action, and certified the FLSA claim as a collective action, allowing respondents to prove liability and damages based on statistical evidence that calculated damages for each employee based on the amount of damages owed to the average employee in a sample.

The Eight Circuit affirmed. The court held that individual differences in the amount of time spent donning and doffing did not preclude certification of a class action or collective action because petitioner had a specific donning and doffing policy that applied to all class members, all class members worked at the same plant using similar equipment, and statistical evidence on the damages owed to the average employee in a sample raised a permissible inference on the amount owed to each employee.

Petitioner argues that a court may not certify a class action or a collective action when the common proof of liability and damages is statistical evidence of the damages owed to the average employee in a sample. Petitioner contends that when, as here, there is variation in the amount of time worked by class members, and many members of the class did not work overtime

at all, liability and damages must be determined on an individual basis. In support of that contention, petitioner relies on the holding in *Wal-Mart v. Dukes* that liability and damages cannot be determined through a formula that masks individual differences, and the holding in *Comcast v. Behrend* that courts must deny class certification when expert models are flawed.

Decision Below:

765 F.3d 791 (8th Cir. 2014)

Petitioner’s Counsel of Record:

Carter G. Phillips, Sidley Austin LLP

Respondents’ Counsel of Record:

Scott Michelman, Public Citizen Litigation Group

Equitable Tolling

Menominee Indian Tribe of Wisconsin v. United States (14-510)

Question Presented:

Whether the D.C. Circuit misapplied this Court’s *Holland* [*v. Florida*] decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for the filing of Indian Self-Determination Act claims under the Contract Disputes Act?

Summary:

Holland v. Florida established that equitable tolling of a non-jurisdictional statute of limitations is warranted when a party shows (1) reasonable diligence in pursuing its rights, and (2) that some extraordinary circumstance interfered with timely filing. At issue in this case is whether the Tribe satisfied the *Holland* requirements for equitable tolling.

In *Cherokee Nation v. Leavitt*, the Supreme Court held that the government was obligated to pay in full the support costs specified in contracts entered into under the Indian Self-Determination and Education Assistance Act. Following *Cherokee*, petitioner Menominee Tribe of Wisconsin filed claims with the Indian Health Service (IHS) for underpayments. The IHS denied the claims on the ground that they were untimely under the Contract Disputes Act’s six-year limitations period. The Tribe sought judicial review in federal district court. The district court ultimately entered judgment for the government, rejecting the Tribe’s claim for equitable tolling of the limitations period.

The D.C. Circuit affirmed, holding that the obstacles the Tribe faced were of its own making and not the result of any external extraordinary circumstance. The court explained that petitioner’s expectation that it would be a member of the *Cherokee* class was unjustified, and that the prospect that the government would deny the claims did not prevent petitioner from taking the minimal steps required to file them. The court concluded that other circumstances, such as the government’s trust relationship, were not external obstacles that prevented the Tribe from bringing its claims.

Petitioner argues that it was entitled to equitable tolling under *Holland*. It contends that under *Holland*, a court may not focus solely on one of the two *Holland* factors, but must instead analyze each factor by taking into account the other. Petitioner further argues that *Holland* requires a showing that an extraordinary circumstance interfered with timely filing, not that an external *obstacle* prevented a timely filing. Under the proper *Holland* analysis, petitioner argues, equitable tolling was warranted.

Decision Below:

764 F.3d 51 (D.C. Cir. 2014)

Petitioner’s Counsel of Record:

Geoffrey D. Strommer, Hobbs Straus Dean & Walker LLP

Respondents’ Counsel of Record:

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

Foreign Sovereign Immunities Act***OBB Personenverkehr AG v. Sachs* (13-1067)****Questions Presented:**

(1) Whether, in determining whether an entity is an “agent” of a “foreign state” under the first clause of the commercial activity exception of the Foreign Sovereign Immunities Act (FSIA), the express definition of “agency” in the FSIA, the factors established in *First National Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, or common law principles of agency, control.

(2) Whether, under the first clause of the commercial activities exception of the FSIA, a tort claim for personal injuries suffered in connection with travel outside of the United States is “based upon” the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

Summary:

The FSIA grants immunity to foreign states, and defines a foreign state to include its agencies and instrumentalities. Under the FSIA, a foreign state is not immune from claims “based upon” commercial activity it conducts in the United States. The first question in this case is whether, in determining when the commercial activity of another entity is attributable to a foreign state, courts should apply the FSIA’s definition of agency, the *Bancec* day-to-day control test, or common law agency principles. The second question is whether a tort claim for personal injuries sustained in connection with travel in Austria is “based upon” the ticket sale in the United States or the allegedly tortuous act in Austria.

Respondent Sachs, a California resident, purchased a Eurail pass over the internet from Rail Pass Experts (RPE), a Massachusetts travel agent. When respondent sought to use her ticket to board a train operated by petitioner OBB in Austria, she suffered injuries that required amputation of both of her legs. Respondent filed suit against OBB in federal district court, asserting tort claims under California law. As an agent or instrumentality of Austria, OBB asserted immunity under the FSIA. The district court dismissed the suit, rejecting respondent’s claim that her suit fell within the commercial activity exception.

A Ninth Circuit panel affirmed, but the en banc court reversed. First, the court held that in determining whether the acts of a separate entity are attributable to a foreign state under the commercial activity exception, the FSIA requires application of common law agency principles. The court concluded that because RPE acted as OBB’s common law agent, its activity in selling respondent a ticket in the United States is imputable to OBB. The court next held that a claim is “based upon” commercial activity in the United States when proof of such commercial activity is essential to proving one element of a claim. Because proof that respondent bought a ticket is necessary to establish an element of her tort claims against OBB, the court concluded, her claims are all “based upon” commercial activity in the United States.

Petitioner first argues that in determining when the acts of a separate entity are attributable to a foreign state, the FSIA definition of “agency” is controlling. Under that definition, a separate entity is an agency of a foreign state only when it is an organ of the foreign state or majority-owned. Alternatively, petitioner argues that the day-to-day control test derived

from the Court's decision in *Bancec* is controlling. Under either approach, petitioner argues, RPE's actions may not be imputed to petitioner. Finally, petitioner argues that a claim is "based upon" an activity in the United States when the alleged tortious acts occurred in the United States. Because the alleged tortious acts in this case all occurred in Austria, petitioner argues, respondent's suit is not "based upon" commercial activity in the United States.

Decision Below:

737 F.3d 584 (9th Cir. 2013) (*en banc*)

Petitioner's Counsel of Record:

Juan C. Basombrio, Dorsey & Whitney LLP

Respondent's Counsel of Record:

Geoffrey Daniel Becker, Becker & Becker

State Sovereign Immunity

Franchise Tax Board of California v. Hyatt (14-1175)

Questions Presented:

1) Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts.

2) Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.

Summary:

In *Hyatt I*, the Supreme Court held that the Constitution's Full Faith and Credit Clause does not require a state court to apply a sister state's law on sovereign immunity. The first question presented in this case is whether Nevada is required by the Full Faith and Credit Clause and sovereign immunity principles to extend to sister states the same immunity Nevada enjoys in its own courts. In *Nevada v. Hall*, the Supreme Court held that the Constitution does not afford a state immunity from suit in the courts of another state. The second question presented in this case is whether *Hall* should be overruled.

In 1992, the Franchise Tax Board of California (petitioner) determined that Gilbert Hyatt (respondent) owed California for unpaid taxes. Respondent filed suit in Nevada state court asserting that petitioner had committed various torts while conducting its audits of him. A jury awarded respondent compensatory damages that exceeded the statutory cap on compensatory damages that would have applied to a Nevada state agency.

The Nevada Supreme Court affirmed, holding that petitioner was not entitled to the statutory cap on compensatory damages applicable to Nevada government agencies. The court concluded that Nevada's policy interest in providing adequate redress to Nevada citizens outweighed its interest in affording comity to another state's agencies.

Petitioner argues that Nevada is required to extend to sister states the same immunities Nevada enjoys in its own courts. If the Court is not prepared to overrule *Hall*, petitioner contends, it is imperative that a foreign state receive at least equal treatment. Petitioner also argues that the better course would be to overrule *Hall* and hold that a state is constitutionally immune from suit in the courts of another state. Petitioner contends that *Hall* is inconsistent with subsequent decisions that recognize that a state's immunity from suit in any court was a basic assumption of the Constitution.

Decision Below:

335 P.3d 125 (Nev. 2014)

Petitioner’s Counsel of Record:

Paul D. Clement, Bancroft PLLC

Respondent’s Counsel of Record:

H. Bartow Farr, Law Office of H. Bartow Farr

Three-Judge Court Act*Shapiro v. Mack* (14-990)**Question Presented:**

May a single-judge district court determine that a complaint covered by 28 U.S.C. § 2284 is insubstantial, and that three judges therefore are not required, not because it concludes that the complaint is frivolous, but because it concludes that the complaint fails to state a claim under Rule 12(b)(6)?

Summary:

28 U.S.C. § 2284 provides that a district court of three judges shall hear any case challenging the constitutionality of the apportionment of congressional districts unless the single judge to whom the case is initially referred determines that three judges are not required. In *Goosby v. Osser*, the Supreme Court held that Section 2284 does not require the convening of a three-judge court when the constitutional attack upon the state statute is “insubstantial.” The Court equated “insubstantial” to “obviously frivolous” and contrasted it with “doubtful or dubious merit.” The question presented in this case is whether a single-judge district court may determine that a complaint covered by 28 U.S.C. § 2284 is insubstantial, and that three judges therefore are not required, because it concludes that the complaint fails to state a claim.

Following the results of a 2010 census, the Maryland General Assembly enacted a congressional redistricting plan. Petitioners, a bipartisan group from Maryland, filed a complaint in federal court, alleging that the plan infringed on First Amendment rights of political association. The district court refused to convene a three-judge court and dismissed the case for failure to state a claim. It concluded that redistricting plans do not infringe on First Amendment rights, because they do not affect anyone’s ability to engage in public debate, or join political parties, or influence the opinions of their representatives. In holding that a single judge may dismiss a case for failure to state a claim, the district court relied on the Fourth Circuit’s decision in *Duckworth v. State Bd. of Elections*. In *Duckworth*, the Fourth Circuit held that when a plaintiff’s pleadings fail to state a claim, then by definition, they are insubstantial, and do not require the convening of a three-judge court.

In a brief per curiam opinion, the Fourth Circuit affirmed for the reasons stated by the district court.

Petitioners argue that a single judge may not refuse to convene a three-judge court simply because the judge unilaterally concludes that the plaintiff has failed to state a claim. Under *Goosby*, petitioners argue, a three-judge court must be convened unless the claim is obviously frivolous, a standard that sets a far higher bar for dismissal than the standard for failure to state a claim. Petitioners also contend that their First Amendment claim is not obviously frivolous because no precedent forecloses it, and Justice Kennedy’s controlling opinion in *Vieth v. Jubiliert* provides support for it.

Decision Below:

584 Fed.Appx. 140 (4th Cir. 2014)

Petitioners' Counsel of Record:

Michael B. Kimberly, Mayer Brown LLP

Respondents' Counsel of Record:

Steven M. Sullivan, Assistant Attorney General of Maryland

Labor and Employment**Employment Discrimination**

Green v. Brennan (14-613)

Question Presented:

Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held?

Summary:

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against an employee because of his race. Under Title VII's constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is treated as an unlawful termination. To bring a Title VII claim, an employee must first file an administrative complaint within a specified time period. The question in this case is whether the filing period for a constructive discharge claim begins when an employee resigns, or at the time of the employer's last allegedly discriminatory act giving rise to the resignation.

Petitioner worked as a postmaster for Englewood, CO. When petitioner was denied a promotion, he filed an administrative complaint of discrimination with a Postal Service EEO counselor. After the complaint was filed, petitioner's superiors alleged that petitioner had engaged in serious criminal conduct, and placed him on unpaid suspension. Petitioner subsequently signed an agreement under which he could either choose to retire or accept a position that paid much less and was much further away. Petitioner ultimately chose to resign. Petitioner contacted an EEO counselor, alleging constructive discharge in retaliation for his protected Title VII conduct. The administrative charge was timely if the filing period began with petitioner's resignation, but untimely if it began when petitioner signed the agreement. Petitioner subsequently filed suit in federal court against respondent, the Postmaster General, alleging constructive discharge. The district court dismissed petitioner's complaint of constructive discharge on the ground that his administrative complaint was untimely.

The Tenth Circuit affirmed, holding that the filing period for a constructive discharge claim begins to run from the time of the employer's alleged "last discriminatory act" that is said to have given rise to the resignation, not from the resignation itself. The court rejected the date-of-resignation rule on the ground that it would allow employees to indefinitely delay the date of accrual.

Petitioner argues that the filing period for a constructive discharge claim begins on the date of resignation. Petitioner relies on the background rule that a limitation period begins only when the plaintiff has a complete and present cause of action. Because resignation is a necessary element of a constructive discharge claim, petitioner argues, the filing period for such a claim does not begin to run until the employee resigns. Petitioner also contends that the date-of-resignation rule is superior to the last-discriminatory-act rule because it is far easier to

administer, and more appropriate for a scheme initiated by laypersons. Finally, petitioner argues that the date-of-resignation rule does not give employees an incentive to delay the date of accrual because any appreciable delay will weaken the merits of a constructive discharge claim.

Decision Below:

760 F.3d 1135 (10th Cir. 2014)

Petitioner’s Counsel of Record:

Brian Wolfman, Stanford Law School Supreme Court Litigation Clinic

Respondent’s Counsel of Record:

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

Court-Appointed Amicus Curiae:

Catherine M.A. Carroll, Wilmer Cutler Pickering Hale and Dorr LLP

ERISA

Gobeille v. Liberty Mutual Insurance Company (14-181)

Question Presented:

Did the Second Circuit – in a 2-1 panel decision that disregarded the considered opinion advanced by the United States as amicus – err in holding that [the Employee Retirement Income Security Act (ERISA)] preempts Vermont’s health care database law as applied to the third-party administrator for a self-funded ERISA plan?

Summary:

ERISA governs most health care benefit plans and imposes various reporting requirements on plans. ERISA also preempts state laws that “relate to” any employee benefit plan covered by the statute. The Supreme Court has held that a state law relates to an ERISA plan if it has a connection with or reference to such a plan. A Vermont healthcare database statute requires health insurers, including any third party administrator, to file health care claims, enrollment information, and other related health care information. The question presented is whether the Vermont statute is preempted by ERISA as applied to the third-party administrators for self-funded ERISA plans.

Respondent Liberty Mutual Insurance is the administrator of an ERISA self-insured health plan covering Vermont residents, and has contracted with Blue Cross to serve as the plan’s third-party administrator. Pursuant to the Vermont database statute, a Vermont state official subpoenaed Blue Cross, seeking claims data and other required information for Vermont’s database. At respondent’s direction, Blue Cross refused to comply with the subpoena. Respondent then filed suit in federal court, claiming that ERISA preempts the Vermont statute as applied to third-party administrators of self-funded ERISA plans. The district court ruled in favor of Vermont.

The Second Circuit reversed, holding that ERISA preempts Vermont’s database statute. The court reasoned that the Vermont statute has a connection with an ERISA plan because, given ERISA’s own reporting requirements, Vermont’s statute intrudes into an area of core ERISA concern. While not every state reporting requirement is preempted, the court concluded, Vermont’s reporting requirements cross the line because they are burdensome, time-consuming, and risky.

Vermont contends that its healthcare data base statute is not preempted by ERISA. It argues that its statute does not intrude into an area of core ERISA concern because it requires the collection of data in order to improve the quality of health care, not to monitor plan administrators’ responsibilities to fiduciaries. It further argues that state laws that impose

administrative burdens are preempted only when the burden is so acute that it forces an ERISA plan to adopt a certain scheme of coverage or effectively restricts its choice of insurers. In this case, Vermont argues, respondent failed to show that the Vermont statute has anything more than a minor effect on costs, much less that it will cause a change in the plan.

Decision Below:

746 F.3d 497 (2d Cir. 2014)

Petitioner’s Counsel of Record:

Bridget C. Asay, Office of the Attorney General of Vermont

Respondent’s Counsel of Record:

Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Montanile v. Bd. of Trustees of the Nat’l Elevator Indus. Health Benefit Plan (14-723)

Question Presented:

Does a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seek “equitable relief” within the meaning of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant’s possession and control at the time the fiduciary asserts its claim?

Summary:

ERISA authorizes the fiduciary of an ERISA plan to seek appropriate equitable relief from a plan participant to enforce the terms of the plan. The Supreme Court has held that a fiduciary seeking reimbursement from a plan participant may obtain an equitable lien on a particular fund that is in the participant’s possession, but may not obtain recovery from the participant’s general assets. The question presented in this case is whether a fiduciary may obtain an equitable lien when the particular fund identified by the fiduciary has been dissipated by the time suit is filed.

Petitioner Robert Montanile was seriously injured in a car accident with a drunk driver. Petitioner recovered medical expenses of \$121,044.02 from National Elevator Industry Health Benefit Plan. After petitioner settled his claims against the drunk driver for \$500,000, the Board of Trustees of the Plan (respondent) sought reimbursement under a provision of the plan entitling it to “first reimbursement” of any “award, judgment, [or] settlement.” By then, petitioner had spent most of the \$500,000 he received and retained significantly less than \$121,044.02. The district court granted summary judgment in respondent’s favor.

The Eleventh Circuit affirmed. The court held that an equitable lien immediately attached to the proceeds from petitioner’s settlement and that petitioner’s dissipation of the funds could not destroy that lien.

Petitioner argues that, under Supreme Court precedent and general equitable principles, a plan fiduciary seeking reimbursement from a participant must identify a particular fund that is in the participant’s possession at the time of suit. When the fund identified has been dissipated, petitioner contends, the claim is necessarily one for legal relief.

Decision Below:

593 Fed.App’x 903 (11th Cir. 2014)

Petitioner’s Counsel of Record:

Rachana A. Pathak, Stris & Maher LLP

Respondent’s Counsel of Record:

Neal Kumar Katyal, Hogan Lovells US LLP

Public Employee Union Dues

Friedrichs v. California Teachers Association (14-915)

Questions Presented:

(1) Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1997), should be overruled and public-sector “agency shop” arrangements invalidated under the First Amendment.

(2) Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

Summary:

In *Abood*, the Supreme Court held that state laws that require public employees to pay union fees for expenses related to collective bargaining (agency shop arrangements) do not violate the First Amendment. *Abood* further held that States may require public employees to pay union fees for expenses unrelated to collective bargaining (nonchargeable fees) as long as employees may opt out by affirmatively objecting to them. The first question in this case is whether *Abood* should be overruled, and agency shop arrangements invalidated under the First Amendment. The second question in this case is whether opt-out requirements for nonchargeable speech violate the First Amendment.

California law authorizes school districts to require public school teachers to either join a union or pay a fee that may not exceed the fee for becoming a union member. The fee includes amounts both related and unrelated to collective bargaining. The union is required to calculate the amount for each, and give notice to employees that they may opt out of the nonchargeable fees by affirmatively objecting. Petitioners, public school teachers and the Christian Educators Association, filed suit in federal court against respondent Unions, challenging the agency shop and opt-out requirements as a violation of the First Amendment. California Attorney General Kamala Harris intervened. Relying on *Abood*, the district court entered judgment for respondents, and the Ninth Circuit summarily affirmed.

Petitioners contend that agency shop arrangements violate the First Amendment and that *Abood* should be overruled. Petitioners specifically argue that agency shop arrangements violate the principle that the government may not compel a person to subsidize speech by a third party absent a sufficiently weighty justification. For purposes of that principle, petitioner contends, there is no difference between speech related to collective bargaining and speech that is unrelated to collective bargaining because both involve political speech designed to influence government decision-making. The government’s interests in labor peace and preventing free riders, petitioners argue, are insufficient to justify compelled subsidization of political speech. Petitioners further contend that because *Abood* cannot be reconciled with numerous other First Amendment precedents, stare decisis considerations do not preclude its overruling. Finally, petitioners argue that, at the very least, opt-out requirements for nonchargeable fees violate the First Amendment by placing an unconstitutional burden on public employees.

Decision Below:

No. 13-57095 (9th Cir. Oct. 14, 2014) (Order)

Petitioners’ Counsel of Record:

Michael A. Carvin, Jones Day

Respondents’ Counsel of Record:

Jeremiah A. Collins, Bredhoff & Kaiser, PLLC

Miscellaneous Business

Banking

Hawkins v. Community Bank of Raymore (No. 14-520)

Questions Presented:

(1) Are “primarily and unconditionally liable” spousal guarantors unambiguously excluded from being [Equal Credit Opportunity Act (ECOA)] “applicants” because they are not integrally part of “any aspect of a credit transaction”?

(2) Did the Federal Reserve Board have authority under the ECOA to include by regulation spousal guarantors as “applicants” to further the purposes of eliminating discrimination against married women?

Summary:

The ECOA makes it unlawful for a creditor to discriminate against an “applicant” for credit on the basis of marital status. It further provides that an “aggrieved applicant” may bring suit for violations of the ECOA. Pursuant to statutory authority to issue regulations, the Federal Reserve Bank (FRB) issued a regulation that generally prohibits a lender from requiring the spouse of a borrower, or the spouse of an owner of the borrower, to guarantee a loan. The FRB regulation also defines “applicant” to encompass spousal guarantors for purposes of that rule. The question presented is whether the FRB’s interpretation of “applicant” as including spousal guarantors is reasonable and therefore controlling under *Chevron*.

Respondent Community Bank of Raymore loaned money to PHC Development, LLC (PHC), a company owned by Gary Hawkins and Chris Patterson. As part of the loan agreement, respondent not only required Hawkins and Patterson to guarantee the loans, but also required their wives (petitioners) to do so. When PHC defaulted on the loan, respondent demanded payment from petitioners. Petitioners sued respondent in federal court, alleging that respondent violated the ECOA by requiring them to sign the guaranties. Respondent counterclaimed, seeking enforcement of the guaranties, and petitioners asserted the alleged ECOA violation as an affirmative defense. The district court dismissed petitioners’ claim and struck their affirmative defense.

The Eighth Circuit affirmed. The court held that a guarantor clearly does not qualify as an “applicant” solely by virtue of executing a guarantee. The court reasoned that the Act defines “applicant” as a person who “applies for credit,” and that a guarantor does not apply for credit absent participation in the loan application process. Because the court concluded that the term “applicant” unambiguously excludes guarantors who do not participate in the loan application process, it refused to defer to the FRB’s contrary interpretation.

Petitioners contend that the FRB reasonably interpreted the term “applicant” to include spousal guarantors and that its interpretation is therefore controlling under *Chevron*. Petitioners argue that guarantors can readily be viewed as applying for credit because they request (at least implicitly) that credit be extended to the borrower. Petitioners also contend that the FRB’s interpretation furthers the ECOA’s goal of eliminating lending practices that discriminate based on marital status because it protects spouses from being required to assume an unwanted liability and protects their ability to maintain an independent credit history.

Decision Below:

761 F.3d 937 (8th Cir. 2014)

Petitioners' Counsel of Record:

John M. Duggan, Duggan Shadwick Doerr & Kurlbaum LLC

Respondent's Counsel of Record:

Greer S. Lang, Lathrop & Gage, LLP

Federal Arbitration Act

DIRECTV, Inc. v. Imburgia (14-462)

Question Presented:

Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act (FAA) requires the application of state law preempted by the FAA.

Summary:

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA preempts state laws that condition the enforceability of an arbitration agreement on the availability of class-wide arbitration. The question in this case is whether an arbitration agreement that incorporates state law on the enforceability of class action waivers encompasses state law preempted under *Concepcion*.

DIRECTV's Customer Agreement provides for binding arbitration of disputed claims and prohibits class action arbitration. The Agreement further provides that if "the law of your state" would find the agreement to dispense with class arbitration unenforceable, the entire arbitration agreement is unenforceable. Finally, the Agreement specifies that it is governed by the FAA. Customers of DIRECTV (respondents) filed class actions against petitioner DIRECTV in California Superior Court, alleging that petitioner improperly charged early termination fees. Because California law made class action waivers unenforceable, petitioner did not seek to compel arbitration. Following *Concepcion*'s invalidation of that state law, however, petitioner moved to compel arbitration. The California Superior Court denied the motion.

The Court of Appeal affirmed. It held that the Agreement's reference to the "law of your state" is most naturally read to incorporate state law even if that law is preempted by the FAA. It further held that this specific reference to state law constitutes an exception to the Agreement's more general reference to the FAA as the governing law. The court therefore concluded that the Agreement incorporates California's prohibition on class action waivers, even though that law is preempted under *Concepcion*.

Petitioner contends that, in context, the Agreement's incorporation of state law necessarily refers to state law that is in force, not to some hypothetical state law that has been preempted. That is particularly true, petitioner argues, because the Agreement expressly makes the FAA the governing law. Because the FAA preempts California's prohibition on class action waivers, petitioner argues, that prohibition cannot stand as a barrier to the enforcement of the parties' agreement to arbitrate.

Decision Below:

170 Cal.Rptr.3rd 190 (Ct. App. 2014)

Petitioner's Counsel of Record:

Christopher Landau, Kirkland & Ellis LLP

Respondents' Counsel of Record:

Thomas C. Goldstein, Goldstein & Russell, P.C.

Government Contracting

Kingdomware Technologies, Inc. v. United States (14-916)

Question Presented:

Whether the Federal Circuit erred in construing 38 U.S.C. § 8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

Summary:

Federal law requires the Secretary of the Department of Veterans Affairs (VA) to set goals for the percentage of VA contracts that are awarded to veteran-owned small businesses. It further specifies that “for the purposes of meeting the goals,” the VA “shall award” contracts to veteran-owned small businesses whenever there is a “reasonable expectation” that two or more veteran-owned small businesses will bid for the contract at a fair and reasonable price, a procedure known as “the rule of two.” The question presented in this case is whether the VA is required to follow the rule of two for every contract, or whether it need not follow that rule as long as the goals it has established are met.

The VA awarded a contract for certain services for medical centers to a non-veteran-owned small business without first researching whether two veteran-owned small businesses could offer a fair and reasonable price. Petitioner, a veteran-owned small business, filed a bid protest with the Government Accountability Office (GAO). The GAO upheld the protest, but the VA declined to follow the GAO's nonbinding ruling. Petitioner then filed a complaint with the United States Court of Federal Claims, challenging the VA's failure to follow the rule of two. The court ruled in favor of the government.

The Court of Appeals for the Federal Circuit affirmed. The Federal Circuit held that the statute unambiguously links the rule of two to the statutory requirement to meet the goals established by the VA. As long as the goals are met, the court concluded, the VA is not required to follow that rule.

Petitioner argues that the statute requires the VA to follow the rule of two for every contract. Petitioner contends that the term “shall” makes the rule of two mandatory, and that the phrase “for purposes of meeting the goals” is a prefatory clause that does not limit that mandatory duty. Petitioner further argues that unless the rule of two is mandatory for every contract, there is no practical way to determine when it is mandatory and when it is not.

Decision Below:

754 F.3d 923 (Fed. Cir. 2014)

Petitioner's Counsel of Record:

Thomas G. Saunders, Wilmer Cutler Pickering Hale and Dorr, LLP

Respondent's Counsel of Record:

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

Securities

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning (No. 14-1132)

Question Presented:

Whether § 27 of the Securities Exchange Act of 1934 provides federal jurisdiction over state-law claims seeking to establish liability based on violations of the Act or its regulations or seeking to enforce duties created by the Act or its regulations.

Summary:

Section 27 of the Securities Exchange Act of 1934 provides federal courts with exclusive jurisdiction over any suit brought to enforce any liability or duty created by the Act or its implementing regulations. The issue in this case is whether Section 27 extends federal jurisdiction to a suit that alleges a violation of an SEC regulation in support of a state law claim when proof of the federal violation is not a necessary element of the state law claim.

Shareholders of Escala Group (respondents) sued various financial institutions (petitioners) in New Jersey state court, alleging a variety of state law claims. In support of those claims, respondents alleged that petitioners had engaged in “naked” short sales of Escala’s stock in violation of an SEC regulation known as Regulation SHO. Petitioners removed the case to federal district court, claiming “arising under” jurisdiction under 28 U.S.C. § 1331 and exclusive jurisdiction under Section 27. The district court held that it had jurisdiction under both provisions and denied respondents’ motion to remand.

The Third Circuit reversed, holding that the district court lacked jurisdiction over respondents’ claims. The court first held that respondents’ claims did not arise under federal law for purposes of Section 1331 because proof of a violation of Regulation SHO was not a necessary element of any of respondents’ state law claims. The court then held there was no jurisdiction under Section 27 either. The court reasoned that Section 27 is coextensive with Section 1331 for purposes of establishing jurisdiction, and that its sole effect is to make jurisdiction exclusive for those claims within its reach.

Petitioners argue that Section 27 extends jurisdiction to any suit in which a plaintiff chooses to rely on federal securities law in support of a state law claim, even if that reliance is not necessary to establish the state law claim. Petitioners contend that Section 27 is more expansive than Section 1331 in that respect, because it broadly applies to “any” suit “to enforce a liability or duty created” by the federal securities laws and lacks Section 1331’s narrower “arising under” language.

Decision Below:

772 F.3d 158 (3d Cir. 2014)

Petitioners’ Counsel of Record:

Jonathan D. Hacker, O’Melveny & Myers LLP

Respondents’ Counsel of Record:

Brendan S. Maher, Stris & Maher LLP

Other Public Law

Administrative Law

Federal Energy Regulatory Commission v. Electric Power Supply Association (14-840)

EnerNOC, Inc. v. Electric Power Supply Association (14-841)

Questions Presented:

(1) Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U.S.C. 791a *et seq.*, to regulate the rules used by operators of wholesale electricity markets to pay for reduction in electricity consumption and to recoup those payments through adjustments to wholesale rates.

(2) Whether the Court of Appeals erred in holding that the rule issued by the Federal Energy Regulatory Commission is arbitrary and capricious.

Summary:

Wholesale market operators pay electricity users to reduce their consumption, an activity referred to as “demand response.” Those payments are then recouped in the wholesale rate. The Federal Energy Regulatory Commission (FERC) promulgated a rule establishing a methodology that wholesale-market operators must use to compute the compensation for demand response commitments. In promulgating the rule, FERC invoked its authority under the Federal Power Act to regulate any practice that affects wholesale rates. The questions presented are whether FERC has statutory authority to promulgate a demand response rule, and whether the particular methodology FERC established is arbitrary and capricious.

Organizations representing electricity generators and others (respondents) sought judicial review of FERC’s rule in the D.C. Circuit. Certain companies involved in the demand response market (petitioning companies) intervened in support of the rule. The D.C. Circuit vacated the rule, holding that FERC lacks statutory authority to regulate demand response payments. The court reasoned that States retain exclusive authority to regulate the retail market, and that demand response is part of the retail market. The court added that FERC’s interpretation has no limiting principle and would authorize FERC to regulate other markets that affect wholesale rates, such as the steel, fuel, and labor markets. The court also concluded that, even assuming FERC has statutory authority to regulate demand response payments, FERC’s methodology for doing so is arbitrary and capricious.

FERC and the petitioning companies argue that the rule falls within FERC’s authority to regulate practices that affect wholesale rates. Unlike the markets identified by the court of appeals, petitioners contend, demand response payments directly affect wholesale rates because they are recouped in the wholesale rate paid by wholesale purchasers in the wholesale market. The Supreme Court added the second question on whether FERC’s methodology is arbitrary and capricious. It apparently did so to eliminate any prudential or jurisdictional barrier to reviewing the court of appeals’ decision.

Decision Below:

753 F.3d 216 (D.C. Cir. 2014)

Petitioners’ Counsel of Record:

Donald B. Verrilli, Jr., Solicitor General of the United States (14-840)

Carter G. Phillips, Sidley Austin LLP (14-841)

Respondents’ Counsel of Record:

Paul D. Clement, Bancroft PLLC

Immigration

Torres v. Lynch (No. 14-1096)

Question Presented:

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is “described in” a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

Summary:

Under the Immigration and Naturalization Act (INA), an alien is deportable and ineligible for various forms of discretionary relief if the alien has committed an “aggravated felony.” An aggravated felony is defined to include three kinds of offenses: (1) certain generic offenses, like murder and rape, (2) certain offenses “defined in” particular provisions of federal

law, and (3) certain offenses “described in” particular provisions of federal law. Offenses in these three categories are aggravated felonies “whether in violation of state or federal law.” The issue in this case is whether a state offense falls into the “described in” category if it parallels a described federal offense except that it does not include the interstate-commerce element.

Upon his return from abroad, petitioner George Luna Torres, a resident alien, was charged with inadmissibility. When he sought cancellation of his removal, an Immigration Judge found him ineligible on the ground that his state conviction for attempted arson was an “aggravated felony” under the INA. That state offense parallels the federal arson offense “described in” a provision of federal law, except that it does not include the interstate commerce element. The Board of Immigration Appeals (BIA) dismissed petitioner’s appeal, relying on BIA precedent interpreting “described in” offenses to include state offenses that parallel a federal offense but do not contain the federal offense’s jurisdictional element.

The Second Circuit denied petitioner’s petition for review. The court held that the BIA’s interpretation of “described in” offenses was reasonable and therefore entitled to deference under *Chevron*. The court reasoned that the term “described in” is broader than the term “defined in,” supporting the conclusion that the “described in” category includes state offenses that parallel the federal offense but do not include the jurisdictional element.

Petitioner argues that the plain meaning of the term “described in” requires an exact match between the elements of the state and federal offenses. Petitioner further contends that if Congress had intended to permit state offenses to qualify as aggravated felonies even though they lack the applicable jurisdictional element, it would have either described the offenses generically (*e.g.*, arson), or used language such as “substantially similar.” Because the text of the statute unambiguously excludes state offenses missing the jurisdictional element, petitioner argues, the BIA’s interpretation is not entitled to deference under *Chevron*.

Decision Below:

764 F.3d 152 (2d Cir. 2014)

Petitioner’s Counsel of Record:

Matthew L. Guadagno, Law Office of Matthew L. Guadagno

Respondent’s Counsel of Record:

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

Indian Law

Dollar General Corp. v. Mississippi Band of Choctaw Indians (No. 13-1496)

Question Presented:

Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members?

Summary:

Under the so-called *Montana* exceptions, Tribes may regulate the activities of nonmembers who enter consensual relationships with the Tribe or its members through taxation, licensing, or other means (consensual relationship exception), and may exercise civil authority over the conduct of nonmembers on reservation fee lands when that conduct threatens the Tribe’s political integrity, economic security, or health or welfare (tribal self-government exception). The issue in this case is whether the consensual relationship exception permits a tribal court to

exercise jurisdiction over civil tort claims against nonmembers who have entered consensual relationships with the Tribe or its members.

Petitioner Dollar General Corporation operates a retail store on the reservation of respondent Mississippi Band of Choctaw Indians, and participates in a program that provides short-term internships to young members of the Tribe. John Doe, a tribal member, participated in the internship program at petitioner's store. After the store's manager allegedly molested Doe, his parents filed suit in tribal court, seeking to hold petitioner liable for the manager's alleged conduct. The Does sought more than \$4.5 million in damages. The tribal trial court denied petitioner's motion to dismiss for lack of jurisdiction, and the Tribe's appellate court affirmed. Petitioner sued in federal district court to enjoin the litigation in tribal court. The district court denied relief.

The Fifth Circuit affirmed. The court held that the tribal court had the power to adjudicate the tort claim under the consensual relationship exception. By agreeing to take on Doe under the Tribe's internship program, the court concluded, petitioner had engaged in a consensual relationship with the Tribe and one of its members. The court further concluded that there was "logical nexus" between that consensual relationship and the activity giving rise to Doe's tort claim because the Tribe was regulating the safety of Doe's workplace by adjudicating that claim.

Petitioner contends that Tribes lack jurisdiction to adjudicate tort claims against nonmembers absent congressional authorization. Petitioner notes that the Court has held that Tribes have no criminal jurisdiction over nonmembers because the Bill of Rights does not apply, there is no effective review in state or federal courts, and tribal courts often lack independence from the political governing body. Those same considerations, petitioner argues, apply equally to tort claims. Petitioner also argues that the consensual relationship exception is limited to regulations created *ex ante*, and tort claims are different because tribal tort law is unwritten, vague, and based on tribal custom unfamiliar to nonmembers. Entry into a consensual relationship, petitioner contends, cannot be taken as consent to be bound to the application of rules that are so difficult to discern.

Decision Below:

746 F.3d 167 (5th Cir. 2014)

Petitioners' Counsel of Record:

Thomas C. Goldstein, Goldstein & Russell, P.C.

Respondents' Counsel of Record:

C. Bryant Rogers, VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP

Prison Litigation Reform Act

Bruce v. Samuels (14-844)

Question Presented:

When a prisoner files more than one case or appeal in the federal courts *in forma pauperis*, does § 1915(b)(2) cap the monthly exaction of filing fees at 20% of the prisoner's monthly income regardless of the number of cases or appeals for which he owes filing fees?

Summary:

Under the Prison Litigation Reform Act (PLRA), an *in forma pauperis* prisoner who files a civil lawsuit or an appeal in federal court and cannot pay the full filing fee must make an initial partial payment of 20% of any court fees from his prison account, and then must pay the rest by

making monthly payments of 20% of the preceding month's income credited to his account, as long as his account contains more than ten dollars. At issue in this case is whether, when an *in forma pauperis* prisoner has filed more than one lawsuit or appeal, his monthly payment is 20% of his monthly income regardless of how many cases he has filed (per-inmate approach) or instead 20% of his monthly income for each case (per-case approach).

Pinson, a federal inmate, filed suit in federal court challenging the conditions of his confinement. After the district court dismissed his claim for improper venue, Pinson filed a mandamus petition in the D.C. Circuit seeking to compel the district court to accept certain filings. Petitioner Bruce, another federal inmate, joined the mandamus petition. Petitioner obtained *in forma pauperis* status and moved to stay the collection of the filing fee until he had completed paying the fee he owed in another case.

The D.C. Circuit Court denied petitioner's motion to stay collection, holding that an inmate filing *in forma pauperis* must pay 20% of his monthly income for each case. In adopting the per-case approach, the court relied on the connection between the initial payment provision and the monthly installment provision. The court reasoned that because the initial payment provision applies to each case, and that provision serves as a triggering condition for the monthly installment obligation, the monthly installment obligation also applies to each case. The court also concluded that the per-case approach better furthers the PLRA's purpose of deterring the filing of frivolous lawsuits.

Petitioner contends that the PLRA caps the monthly payment at 20% of an inmate's account regardless of how many cases an inmate has filed. As petitioner explains, the courts adopting that per-inmate approach have relied on the initial payment provision's use of the term "any" fees as an indication that the PLRA caps the monthly installment at 20% for all fees in all cases. Those courts have also concluded that the per-case approach would raise serious constitutional questions because it could impede an inmate's right of access to the courts.

Decision Below:

761 F.3d 1 (D.C. Cir. 2014)

Petitioner's Counsel of Record:

Anthony F. Shelley, Miller & Chevalier Chartered

Respondents' Counsel of Record:

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