



A LOOK AHEAD

Supreme Court of the United States October Term 2017

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017 PREVIEW

September 2017

A LOOK AHEAD AT OCTOBER TERM 2017

This report previews the Supreme Court’s argument docket for October Term 2017 (OT 2017). The Court has thus far accepted 32 cases for review, including two cases heard last Term and set for reargument (*Jennings v. Rodriguez* and *Sessions v. Dimaya*). Because several have been consolidated for argument, these cases will occupy 28 argument slots – barely enough to fill the first three sittings, and fewer than half the cases the Court will likely decide this Term. Section I discusses some especially noteworthy cases the Court will hear. Section II organizes the cases accepted for review into subject-matter categories and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

Trump v. International Refugee Assistance Project (16-1436)

Trump v. Hawaii (16-1540)

The Immigration and Nationality Act authorizes the President to suspend entry of any class of aliens whose admission would be detrimental to the United States. Relying on that authority, President Trump issued an Executive Order (EO), which suspends for 90 days the entry of foreign nationals of six countries that have predominantly Muslim populations. During the suspension, the Secretary of Homeland Security was to conduct a global review to determine whether foreign governments provide adequate information about nationals applying for visas, with nations identified as deficient given time to correct their practices. The EO also suspends for 120 days decisions on refugee applications and reduces the maximum number of refugees who may be admitted.

The plaintiffs challenging the suspension provision include Hawaii and close relatives of persons seeking admission from the six identified countries. They challenge the entry suspension on two grounds. First, plaintiffs claim the suspension falls outside the President’s statutory authority. The Ninth Circuit agreed, holding that the President did not make an adequate finding that entry of all nationals from the six countries would be detrimental to the U.S. It reasoned that there is no evidence that current vetting procedures are inadequate and no finding that there is a link between the nationality of 180 million people and their likelihood of committing terrorist acts.

The Ninth Circuit further held that the suspension violates Section 1152, which prohibits nationality discrimination in the issuance of immigrant visas. The court concluded that the government is directly violating that prohibition by relying on the EO’s nationality-based entry suspension to preclude the issuance of a visa. In any event, the court held, even if visas are issued, Congress did not intend to allow the President to circumvent Section 1152 by denying entry based on nationality.

The government argues that the authorization to bar entry of a “class” of persons does not require a finding that each person in the class poses a likely security risk, and the EO therefore cannot be faulted for failing to make that finding. An adequate basis for the EO, the government argues, is the finding that countries that sponsor and shelter terrorists may not provide the necessary vetting information, creating a heightened risk that terrorists will clear vetting and gain entry. While the former administration may have concluded that the vetting process is adequate, the government argues, the current President is entitled to look at the same information and reach his own conclusion about how much risk to tolerate.

The government also argues that the EO does not conflict with the bar on nationality-based visa denials. Section 1152 governs issuance of visas; it does not purport to govern the

President's authority to suspend entry. And while it is true that those denied entry are no longer eligible for visas, the government argues, that is based on a neutral policy of denying visas to those ineligible for entry. In any event, the government notes, Section 1152 applies only to immigrant visas, not non-immigrant visas.

Plaintiffs also challenge the EO as a violation of the Establishment Clause because it is a pretext for discrimination against members of the Muslim faith. The Fourth Circuit agreed, citing the President's campaign proposal to ban all Muslims from entering the U.S.; his campaign statements that "Islam hates us"; his explanation that he would effectuate his policy by targeting territories rather than Muslims directly; his signing statement that the EO's title is "Protecting the Nation from Foreign Terrorists," and "we all know what that means"; the lack of evidence of a security threat; the absence of security agencies from the initial decision-making process; the post-hoc nature of the security rationale; and the President's statement that the second EO was merely a watered-down version of the first, which he still preferred.

The government argues that the court's role is limited under *Kleindienst v. Mandel* to deciding whether the EO is facially legitimate and bona fide, a standard that precludes a court from assessing the President's motivations, and is satisfied by the President's finding that the suspension serves national security interests. The government further argues that even if some limited inquiry into motivation were permissible, a court may not consider the President's campaign statements. And finally, it argues that even if the campaign statements are considered, they do not overcome the objective evidence that the EO was based on national security concerns relating to radical Islamic terrorists, not anti-Muslim animus.

Both the statutory and constitutional claims raise a common question: to what extent must a court defer to a President's national security determination. On that issue, the Court is likely to be divided 4-4, with Justice Kennedy providing the decisive vote. There is a real possibility, however, that the Court will never reach the merits. If, as the government asserts, the entry ban became effective on June 14, it will expire on September 24, well before the Court hears argument on October 10. The suspension and cap on refugees will expire on September 30 and October 24, respectively. There are then two possibilities. First, the EO will expire, and the President will not institute a new one. Second, the President will issue a new EO based on whatever information he has acquired through the global review. In either event, the Court may find the current challenges to the EO moot.

***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (16-111)**

The owner of Masterpiece Cakeshop, Jack Phillips, is willing to make cakes for all customers, except when doing so would violate his religious beliefs. One of his religious beliefs prohibits him from making wedding cakes for same sex marriages. When a same sex couple asked him to make a cake for their wedding reception, Phillips therefore refused. Colorado prohibits persons engaged in retail sales from discriminating on the basis of sexual orientation, and the State determined that Masterpiece violated that prohibition. The question is whether Masterpiece has a First Amendment right to refrain from making wedding cakes for same sex couples.

In *Employment Div. v. Smith*, the Supreme Court held that the Free Exercise Clause does not require a State to carve out a religious exception to a law of general applicability. While Masterpiece seeks to surmount that holding by claiming discriminatory application, it relies primarily on free speech decisions holding that the government may not compel persons to express a message contrary to their beliefs. Masterpiece argues that it paints and sculpts its cakes into works of art, and is therefore entitled to the same First Amendment protection as any

artist. It further argues that wedding cakes inherently celebrate the weddings of the participants. By requiring it to create artistic cakes that celebrate same sex marriage, Masterpiece concludes, the State has compelled it to express a message that is contrary to its beliefs.

Laws requiring public accommodations to refrain from discrimination based on personal characteristics generally pose no First Amendment problem. Such laws target the conduct of discriminating in the provision of commercial services, rather than speech, and any incidental impact on speech is outweighed by the State's interest in ensuring nondiscriminatory access to commercial services. This general rule applies here, the State argues, because its law targets Masterpiece's conduct in discriminating against same sex couples who want to buy its cakes, not any views that Masterpiece has about same sex marriages. Any impact on speech rights, the State argues, is incidental and outweighed by its interest in ensuring nondiscriminatory access to commercial goods and services.

Masterpiece relies on an exception to the general rule established in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*. There, the Court ruled that the State could not, through its public accommodations law, require parade organizers to admit a group that wished to convey a message of gay pride to which the organizers objected. The Court reasoned that parade organizers have a First Amendment right to choose the message they wish to express, and may not be forced to include a competing message that would alter their chosen one. Masterpiece claims that because creating a wedding cake is a protected First Amendment activity, *Hurley* gives it the right to refuse to make one that celebrates same sex marriages.

The State relies on the Court's decision in *Rumsfeld v. FAIR*. There, the Court held that a law requiring universities to provide the same services to military recruiters as other recruiters, including hosting events and sending email notices to students, did not entail compelled speech. The Court reasoned that the military, rather than the universities, was expressing the anti-gay message to which the universities objected, and the public would not attribute that message to the universities. The State argues that *FAIR* applies here because any message of celebration is expressed by the same sex couple when they display the cake, not by Masterpiece when it makes it, and the public would not attribute any celebratory message to Masterpiece.

The backdrop for this case is the Court's recent decision in *Obergefell v. Hodges*, holding that same sex couples have a constitutional right to marry. In that decision, the Court acknowledged that people of goodwill have sincere religious and moral objections to same sex marriage. That sentiment suggests that the claim here will strike a chord with some of the Justices. Pushing in the other direction will be the Court's reluctance to invite every commercial actor who can claim some degree of artistic creativity in their work to assert an exemption from nondiscrimination laws. How the Court resolves the tension between those two concerns remains to be seen.

***Gill v. Whitford* (16-1161)**

In *Vieth v. Jubelirer*, a plurality of the Court concluded that partisan-gerrymandering cases are non-justiciable because there is no judicially administrable standard. Justice Kennedy, in concurrence, also could not identify such a standard, but left open that one might emerge. The question in the case is whether plaintiffs have come up with such a standard.

The Court's cases do not leave much room to maneuver. In racial gerrymandering cases, proof of predominant racial motive suffices. But the Court has held that proof of predominant partisan motive is not enough; a plaintiff must also demonstrate a partisan effect. The Court has rejected as a measure of partisan effect the disparity between the percentage of voters of a particular party and the percentage of officeholders they are able to elect: the Constitution does

not require proportional representation. The Court has also rejected tests that attempt to detect extreme partisanship based on the totality of circumstances for failure to supply a judicially administrable standard.

Plaintiffs propose a three part test: (i) a partisan motive (ii) resulting in a large and durable partisan effect, (iii) that is unjustified by legitimate districting factors. The key question is whether plaintiffs have come up with a viable measure of partisan effect. Plaintiffs define it as partisan asymmetry, which exists when individuals in one political party cannot translate their votes into seats on a legislative body with the same relative ease. When asymmetry is large and durable, is animated by partisan intent, and cannot be justified by traditional districting factors, plaintiffs argue, there is purposeful vote dilution in violation of the equal protection clause, and the representational interests of those affiliated with the disfavored party are deliberately burdened based on their political beliefs, in violation of the First Amendment.

Plaintiffs relied on two measures of partisan asymmetry. The first, partisan bias, exists when there is a difference between the share of seats that the major parties would win if each received 50% of the vote. The second measure, the efficiency gap, attempts to capture the extent to which district lines crack and pack voters of one party more than the other. Cracking occurs when lines are drawn to disperse voters who supported candidates of the disfavored party into numerous districts where their candidates lose by relatively small numbers, while packing concentrates such voters into districts where their candidates win by large numbers. The efficiency gap measures the difference between each party's "wasted" votes, divided by the total number of votes. Votes for the winning candidate that exceed the amount necessary to win, and all votes for the loser, count as wasted. In this case, both measures showed a large asymmetry. To establish durability -- that the partisan effects of the plan will persist throughout the decade -- plaintiffs relied on sensitivity testing, a technique that predicts future electoral outcomes while accounting for historic swings in voting patterns. That testing showed that the Republican skew would survive a substantial vote swing for Democrats. To demonstrate that partisan asymmetry is not explained by neutral factors, plaintiff produced alternative maps that complied with traditional districting criteria, but did not manifest the same large degree of partisan asymmetry.

The State attacks this entire enterprise. It argues that the asymmetry standard: (i) has no grounding in the Constitution or legislative practice; (ii) is another way of describing proportional representation; (iii) is a social science hodgepodge not administrable by legislatures or courts; (iv) is biased against Republicans because Democrats are geographically concentrated, producing asymmetry not indicative of gerrymandering; and (v) would put scores of state plans in jeopardy. Plaintiffs dispute each of those points. They say partisan asymmetry: (i) captures the concepts of vote dilution and burdening voters' representational interests based on political beliefs that are central to equal protection and First Amendment guarantees; (ii) is completely different from proportional representation; (iii) is easy for courts and legislatures to apply because of general agreement on how to calculate the statistical measures; (iv) favors neither Democrats nor Republicans since any concentration differences are small and can be factored out; and (v) puts only the most extreme gerrymanders in danger of invalidation.

This case comes down to one vote. Justice Kennedy has previously expressed skepticism about partisan asymmetry as a complete measure of unconstitutional gerrymandering, but he has also indicated receptivity to it as a relevant factor providing it can be reliably measured. Favoring the plaintiffs is that partisan gerrymandering is easier than ever to accomplish with modern mapping tools; that, in extreme form, it is antithetical to Justice Kennedy's vision of how our democratic system of government ought to function; and that this is likely Justice Kennedy's

last chance to do something about it. Favoring the State is Justice Kennedy's likely fear that that any cure for partisan gerrymandering may be worse than the disease. The last thing Justice Kennedy wants is for federal courts to routinely become redistricting bodies, or for the status of a State plan to turn on which federal judge is drawn to hear the case. The tie-breaker is whether Justice Kennedy can be persuaded, as he has not yet been, that large, durable, and unjustified partisan asymmetry is a workable and politically neutral standard that fully captures the burden on representation based on political views that he considers the vice of partisan gerrymanders.

The State offers one way out of a definitive resolution of this question--that a voter lacks standing to challenge a statewide plan. That is the rule for racial gerrymandering cases, where claims must be district-specific. It is easy enough to distinguish the racial gerrymandering cases on the ground that the relevant injury to the individual is different. But if the Court wants a way out of a definitive resolution, this would be it.

Christie v. National Collegiate Athletic Assoc. (16-476)

New Jersey Thoroughbred Horsemen's Assoc. v. National Collegiate Athletic Assoc. (16-477)

A federal statute prohibits States from authorizing or licensing sports betting. The statute exempts Las Vegas from the prohibition, and it gave New Jersey a year to authorize and regulate sports betting at its Atlantic City casinos. New Jersey missed the deadline, but subsequently adopted a law that licensed and regulated sports betting at its casinos and racetracks. The Third Circuit invalidated that law, but suggested that New Jersey would be free to repeal its prohibitions in whole or in part without violating the federal law.

New Jersey then repealed its prohibitions on sports gambling at its casinos and racetracks with the following conditions: that gambling must be conducted on site, by persons at least 21 years of age, with the owner's consent, on games played outside New Jersey by non-New Jersey teams. The Third Circuit concluded that the partial repeal ran afoul of federal law because it authorized sports betting at the specified locations. The question is whether the federal law, as so construed, violates the anti-commandeering principle.

Under the anti-commandeering principle, Congress may not require a State to enact a law. Congress therefore could not require New Jersey to enact a law that prohibits sports gambling. New Jersey argues that under the anti-commandeering principle, Congress similarly may not prohibit a state from repealing a law. There is no difference in principle, the State argues, between requiring a State to enact a law, and requiring a state to maintain a law. In either case, Congress is forcing the State to regulate private conduct it does not want to regulate. The federal statute runs afoul of the anti-commandeering principle, New Jersey argues, because, at a minimum, it requires the State to maintain its prohibition on sports gambling at casinos and racetracks. New Jersey also reads the federal law to preclude a complete repeal, effectively requiring New Jersey to maintain an across-the-board ban.

The NCAA and the U.S. as amicus rely on cases establishing that Congress may prohibit a state from enacting laws that interfere with federal policy. For example, Congress validly preempts states from enacting laws that regulate medical devices, cigarette advertising, and air carrier services. This federal law is no different, the NCAA and the U.S. argue, because it merely prohibits a State from enacting a law that authorizes sports gambling. While the NCAA and the U.S. appear to acknowledge that Congress could not prohibit a complete repeal, they argue that the federal statute does no such thing. Unlike a partial repeal that channels gambling to particular establishments, they argue, a complete repeal would not authorize sports gambling.

Each side accuses the other of trying to circumvent the Court's cases. New Jersey says that Congress may not circumvent the anti-commandeering principle by calling a partial repeal an authorization. Whatever the label, New Jersey argues, Congress is still requiring the State to prohibit gambling it does not want to prohibit. The NCAA and the U.S. say that New Jersey may not circumvent the principle that Congress may preempt state laws that interfere with federal policy by labeling an authorization to conduct sports gambling a partial repeal. Either way, the State is channeling sports gambling to specific locations.

There are factors favoring both sides. Given the Court's current composition, it is more likely to move close cases into the anti-commandeering rather than the preemption box. Moreover, there was no pressing need for Congress to regulate the States; if it cares enough about the problem of sports gambling, it can prohibit the underlying conduct itself. Pushing in the other direction is that the Court may be reluctant to provide a formula for every State in the country to jump into the sports gambling business.

One question is whether a New Jersey victory would do that. The federal statute prohibits the private operation of sports gambling establishments pursuant to state law, and that prohibition would seem to fall within Congress's power. If that prohibition survives, the State's partial repeal will do it no good. To surmount that problem, New Jersey argues that no part of the statute is severable from the rest. Unless New Jersey prevails on that argument, its victory may be a hollow one. At the same time, the possibility that it might be right about the severability question could trigger the Court's concern that it will unleash sports gambling nationwide. All of this leaves the outcome of these cases in doubt.

Carpenter v. United States (16-402)

Every time a person makes or receives a call or sends or receives a text, the cell phone has to connect to the nearest cell tower, creating a record of the phone's location. Under the Stored Communications Act, the government may obtain a court order for location records in the possession of a cell phone service provider when it establishes reasonable grounds to believe that it is relevant to a criminal investigation. Pursuant to that statute, the government collected 127 days of location records pertaining to Carpenter. The question is whether the collection of that information for that time period is a search under the Fourth Amendment, and if so, whether a warrant supported by probable cause was required.

In *Smith v. Maryland*, the Court held that the government's acquisition of several days of phone numbers from the phone company was not a search. In *United States v. Miller*, the Court held that the government's acquisition of several months of bank records from a bank was not a search. Courts of appeals have generally read those decisions as establishing that people have no reasonable expectation of privacy in information they share with a third party, and on that basis have concluded that the government's acquisition of location records from a service provider is not a search.

If recent Fourth Amendment decisions are any indication, the Court will not feel constrained by *Smith* and *Miller* if it is otherwise convinced that the government's conduct here should be subject to Fourth Amendment commands. For example, precedent seemed to say people had no reasonable expectation of privacy in their public movements. In *United States v. Jones*, however, the Court held that the use of GPS technology to track a person's movements constitutes a search. The majority distinguished prior precedent on the ground that no trespass was involved. Another five Justices concluded that long-term monitoring invades a reasonable expectation of privacy.

Carpenter seeks to take advantage of *Jones*. He argues that, for the same reason that five Justices in *Jones* concluded that long-term GPS monitoring violates a reasonable expectation of privacy, the Court should conclude that acquisition of long-term location information from a service provider is a search. In both cases, technology has enabled the government to acquire a record of a person's every movement that it previously would have been unable to acquire. *Smith* and *Miller* are distinguishable, he argues, both because they involved far less sensitive information, and because the disclosures there were meaningfully voluntary in a way that is not true here.

The government argues that nothing in this Court's recent precedents undermines the holdings of *Smith* and *Miller* that people have no reasonable expectation of privacy in information they share with a third party. *Jones* involved the government itself monitoring a person's movements through a trespass, not the government's acquisition of information from a third party. And the location information acquired from GPS monitoring, the government argues, is far more precise than cell site data. Finally, the government argues there is a fundamental distinction in third party cases between the content of a communication and the information necessary to route those communications, and location information falls on the unprotected routing side.

It is difficult to predict how the Court will respond. To some extent, it depends on how persuasive the Court finds the principle that courts of appeals have attributed to *Smith* and *Miller*--that sharing information with a third party for a limited purpose always wipes out any reasonable expectation of privacy with respect to that information. The result also depends on whether the Court believes it can define a principled line between *Smith* and *Miller*, on the one hand, and long-term location information on the other, and then apply that principle to other contexts, such as the web sites we visit, email addresses with which we correspond, the books, groceries, and medications we buy, our search queries, and the contents of our emails.

Another looming question is what happens if the Court holds that a search occurred. Does it automatically follow, as Carpenter argues, that a warrant supported by probable cause is required? Or is it enough, as the government argues, for a court to order production when there is reason to believe the evidence is relevant to a criminal investigation, a far lower standard that would provide far less protection? Because the court of appeals did not reach that question, the Court need not, and probably won't. But in deciding whether there is a search, the Court will likely want to explore this issue.

Epic Systems Corp. v. Lewis (16-285)

Ernst & Young LLP v. Morris (16-300)

National Labor Relations Board v. Murphy Oil USA (16-307)

Many employers condition employment on their employees' agreement to resolve work-related disputes through individual arbitration. The question in these cases is whether those agreements are enforceable. If so, class and collective actions to enforce work-related legal claims may be a thing of the past.

The resolution of the question involves the interaction between the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA). The FAA provides that any arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In general, that means that arbitration agreements must be enforced according to their terms, including the parties who will participate and the rules of the arbitration. At the same time, the NLRA gives employees the right to engage in "concerted activities" for the purpose of "mutual aid or protection."

The employees in these cases joined together to sue their employers for wage and overtime violations of the Fair Labor Standards Act (FLSA), which expressly authorizes an employee to bring a collective action. The employers moved to compel individual arbitration of each worker's claim, pursuant to agreements entered as a condition of employment.

The employers rely on decisions holding that a federal statute precludes enforcement of arbitration agreements only when there is a congressional command to that effect. Under those decisions, statutes that authorize collective actions to enforce substantive rights do not preclude individuals from agreeing to resolve a dispute through individual arbitration. Here, the employers argue, the NLRA's reference to the right to engage in concerted activities for mutual aid and protection does not refer to collective actions to enforce legal rights. And even if the language were broad enough to encompass a right to bring a collective action, that would not preclude an individual from agreeing to resolve a dispute through individual arbitration. Indeed, the NLRA's language is less specific than the language in the FLSA, and no one contends that the FLSA precludes an employee from waiving the right to sue collectively.

The National Labor Relations Board (NLRB) and the employees argue that the NLRA right to engage in concerted activities for mutual aid and protection clearly encompasses a right of employees to join together to enforce their rights under employment-related statutes. Just as clearly, they argue, the NLRA prohibits contractual restraints on the exercise of NLRA rights, making it unlawful for an employer to condition employment on a prospective waiver of the right to bring a collective action. An employer may no more do that, the NLRB argues, than it may secure a prospective waiver of the right to bargain collectively.

The logical implication of the NLRB's position is that the NLRA contains a congressional command that overrides the FAA. Rather than make that argument, however, the NLRB relies instead on the FAA's saving clause, which permits a refusal to enforce an arbitration agreement on a ground that exists for the revocation of any contract. Because illegality is a ground for the revocation of any contract, and a contract that prospectively waives NLRA rights is illegal, the NLRB argues, the FAA does not require its enforcement. The employers argue that the saving clause cannot be used to circumvent the cases that require FAA enforcement unless a subsequent federal statute contains an explicit contrary command. And they argue that the saving clause does not save a prohibition on collective action waivers because that would interfere with fundamental attributes of arbitration.

The Court's decision in *AT&T v. Conception* provides the basis for the latter argument. In that 5-4 decision, the Court held that a State could not treat collective action waivers in arbitration agreements as unconscionable when they result from unequal bargaining power and endanger enforcement of low-value claims, because that would do away with a fundamental attribute of arbitration, contrary to the FAA. The NLRB's burden will be to persuade a Court that is skeptical that arbitration and collective actions can coexist that Congress intended that result for employment disputes.

Jesner v. Arab Bank, PLC (No. 16-499)

The Court granted certiorari several terms ago in *Kiobel v. Royal Dutch Petroleum Co.* to decide whether the Alien Tort Statute (ATS) allows the foreign victims of human rights violations to sue corporations. Instead, the Court resolved the case on alternate grounds, holding that the ATS is limited to claims that touch or concern the territory of the United States with sufficient force to overcome a presumption against extraterritoriality. In this case, the Court will again take up the question left unanswered in *Kiobel* and decide whether corporations may be sued for human rights violations. The plaintiffs are victims of terrorist attacks by Palestinian

terrorist organizations in Israel, Gaza, and the West Bank, who allege that Arab Bank helped to finance the organizations responsible for the attacks.

The ATS provides that courts have jurisdiction over claims brought by aliens for torts committed in violation of the law of nations. Plaintiffs argue that the statute's reference to "torts" brings with it the usual common law tort liability rules and, in this country, corporations have always been liable for their torts. Plaintiffs also argue that corporate liability furthers the ATS's purpose of providing an adequate remedy against the enemies of all mankind. A corporation responsible for genocide, for example, should be liable to its alien victims, particularly when the individuals responsible may be outside the reach of U.S. jurisdiction or judgment-proof. According to plaintiffs, international law is not the right place to look to resolve the question of corporate liability: International norms, they say, do not distinguish between corporations and individuals, and international law leaves the matter of corporate liability to domestic courts. Finally, plaintiffs contend that the factors that should inform the Court's residual discretion – state common law, federal statutory causes of action, and domestic tort systems throughout the world – all favor corporate liability.

Arab Bank relies on the holding in *Kiobel* that the ATS covers only universal norms of international law. No such norm, Arab Bank argues, imposes obligations on corporations. Instead, international law generally imposes obligations only on States, and in some cases, individuals. Indeed, at Nuremberg, Arab Bank points out, the Allies declined to prosecute IG Farben, which produced the chemical for Nazi gas chambers, prosecuting instead the individuals who led the corporation. And the international criminal tribunals since Nuremberg have declined jurisdiction over corporations. Arab Bank also argues that the factors that should inform the Court's discretion disfavor corporate liability. In particular, the Torture Victim Protection Act, which creates a cause of action for torture and extrajudicial killings, excludes corporate liability. And the judicially created remedy for constitutional violations established in *Bivens v. Six Unknown Named Agents* similarly excludes corporate liability.

For the Court to rule for Arab Bank, it would have to accept that a U.S. corporation that produced a chemical agent for use in committing genocide today could not be held liable for its actions. It would also have to reject the position of the U.S. as amicus, which reaffirmed the previous administration's support for corporate liability. A majority of the Court likely wants to narrowly confine the ATS because of its potential to intrude on foreign affairs and the sovereignty of foreign nations. But the difficulty for Arab Bank is that there are a variety of doctrines it can use to accomplish that end -- including rigorous enforcement of the rule against extraterritoriality-- without establishing a per se rule against corporate liability.

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Constitutional Law

Article III – Separation of Powers

Patchak v. Zinke (16-498)

Question Presented:

Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed") – without amending underlying substantive or procedural laws – violate the Constitution's separation of powers principles?

Summary:

Following a Supreme Court decision that petitioner had standing to challenge the Department of Interior's authority to take the Bradley property into trust, Congress enacted the Gun Lake Act. The Act "reaffirmed" the Bradley property as trust land, and "ratified and confirmed" the actions of the Secretary of Interior in taking that land into trust. The Act further provided that any action, including a pending action, relating to the Bradley property, "shall be promptly dismissed." The question presented is whether the Gun Lake Act's mandate to dismiss any action related to the Bradley property violates the Constitution's separation of powers principles.

The Secretary of the Interior placed the Bradley property in Michigan in trust for the Gun Lake Tribe. Petitioner, who lived nearby, brought a suit in federal district court, claiming that the Secretary lacked authority to place the land into trust for the Tribe's benefit. The district court dismissed the action for lack of prudential standing, but the Supreme Court reversed. Before the district court ruled on the merits, Congress passed the Gun Lake Act discussed above. In accordance with the Act's terms, the district court dismissed the action.

The D.C. Circuit affirmed, holding that the Gun Lake Act's mandate to dismiss petitioner's pending action did not violate separation of powers principles. The court rejected petitioner's claim that Congress impermissibly directed the outcome of his pending suit without changing the underlying law. The court reasoned that by ratifying the Secretary of Interior's decision to take the Bradley property into trust and withdrawing jurisdiction, Congress had changed the law.

Petitioner argues that the Gun Lake Act's mandate to dismiss his pending action without any change in generally applicable law violated separation of powers principles. Petitioner contends that while Congress ratified the Secretary's action, it did not intend to change the underlying law. Even if it did intend to change the law, petitioner argues, Congress acted impermissibly in mandating dismissal of the suit, rather than permitting a court to resolve the legal issues raised by Congress's ratification.

Decision Below:

828 F.3d 995 (D.C. Cir. 2016)

Petitioner's Counsel of Record:

Scott E. Gant, Boise, Schiller, & Flexner LLP

Respondents' Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

First Amendment – Speech and Free Exercise Clauses

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission (16-111)

Question Presented:

Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

Summary:

The First Amendment Free Speech Clause generally prohibits the government from compelling individuals to promote a message with which they disagree. The Free Exercise Clause does not permit the government to gerrymander exceptions from generally applicable laws for secular conduct, while refusing to exempt religiously motivated conduct. The question in this case is whether a state statute that prohibits a business from discriminating on the basis of sexual orientation violates the Free Speech or the Free Exercise Clause to the extent it requires a business owner to create a wedding cake for a gay couple when marriage between two people of the same gender violates the owner's religious beliefs.

Petitioner Jack Phillips, a cake artist and owner of petitioner Masterpiece Cakeshop, refused to make a wedding cake for a gay couple due to his religious beliefs. The couple filed a discrimination charge with respondent Colorado Civil Rights Commission, alleging sexual orientation discrimination in violation of state law. After the agency found probable cause of discrimination, the couple filed a complaint with the state's Administrative Court. The Administrative Court found in favor of the couple and issued a cease and desist order.

The Colorado Court of Appeals affirmed. The court first held that requiring petitioner to make wedding cakes for same-sex couples did not compel speech in violation of the First Amendment. The court reasoned that designing a wedding cake and selling it to customers on a non-discriminatory basis does not convey a message supporting same-sex marriage. The court further held that the state's nondiscrimination statute does not violate the Free Exercise Clause. The court reasoned that while the law contains some exceptions, it does not exempt all secular conduct, and does not single out religiously motivated conduct for regulation.

Petitioners argue that the state's nondiscrimination statute compels him to convey a message approving same-sex weddings in violation of the First Amendment. Petitioner contends that weddings are inherently expressive celebrations, and that forcing him to design a cake for a same-sex wedding impermissibly associates him with that celebratory message. Petitioner also contends that because the statute permits some individualized exceptions to its nondiscrimination requirements, the Free Exercise Clause requires an exemption for religiously motivated objectors.

Decision Below:

370 P.3d 272 (Colo. App. 2015)

Petitioners' Counsel of Record:

Jeremy D. Tedesco, Alliance Defending Freedom

Respondents' Counsel of Record:

Fred Yarger, Colorado Judicial Center, Office of the Attorney General
Leslie Cooper, American Civil Liberties Union Foundation

First Amendment and Equal Protection Clause – Partisan Gerrymandering

Gill v. Whitford (16-1161)

Questions Presented:

(1) Did the district court violate *Vieth v. Jubelirer*, 541 U.S. 267 (2004), when it held that it had the authority to entertain a statewide challenge to Wisconsin’s redistricting plan, instead of requiring a district-by-district analysis?

(2) Did the district court violate *Vieth* when it held that Wisconsin’s redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles?

(3) Did the district court violate *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*, 478 U.S. 109 (1986)?

(4) Are Defendants entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court’s test, which the court announced only after the record had closed?

(5) Are partisan-gerrymandering claims justiciable?

Summary:

In *Vieth v. Jubelirer*, a plurality of the Court concluded that partisan-gerrymandering cases are non-justiciable because there is no judicially administrable or discernible standard. Justice Kennedy, in concurrence, also could not identify such a standard, but left open that one might emerge. The principal questions presented are: (1) whether a partisan-gerrymandering challenge may be made statewide; (2) whether compliance with traditional districting principles defeats any challenge; and (3) whether partisan-gerrymandering claims are justiciable.

Following the 2010 census, the Wisconsin legislature adopted a redistricting plan. Under the plan, Republicans obtained more than 60% of the seats in the State legislature, while receiving approximately half of the votes. Eleven individuals from different districts sued the State, alleging that the redistricting plan constituted unconstitutional partisan-gerrymandering.

The district court held that a statewide plan is invalid if it (i) was intended to place a severe impediment on voters based on their political affiliation, (ii) would have that effect throughout the life of the plan, and (iii) could not be justified by neutral districting principles. Applying its three-part test, the district court concluded that the State’s plan is unconstitutional.

The State argues that a plaintiff may not bring a statewide political-gerrymandering claim. The State further argues that its plan complies with traditional districting principles, foreclosing any partisan-gerrymandering claim. In addition, the State contends that the district court’s three-part test is not sufficiently strict, endangering numerous statewide plans. Finally, the State contends that because experience has demonstrated that there is no administrable standard for partisan-gerrymandering claims, such claims are non-justiciable.

Decision Below:

218 F.Supp.3d 837 (W.D. Wisc. 2016)

Appellants’ Counsel of Record:

Misha Tseytlin, Solicitor General of Wisconsin

Appellees’ Counsel of Record:

Paul M. Smith, Campaign Legal Center

Fourth Amendment – Search and Seizure

Carpenter v. United States (16-402)

Question Presented:

Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment.

Summary:

Under the Stored Communications Act, the government may obtain a court order for historical cell site location information (CSLI) in the possession of a cell phone service provider when it establishes reasonable grounds to believe that CSLI is relevant to a criminal investigation. At issue in this case is whether the government's acquisition of CSLI is a search within the meaning of the Fourth Amendment, and if so, whether the search is reasonable.

After obtaining information that petitioner Carpenter was involved in several armed robberies, the government applied for court orders seeking several months of petitioner's CSLI records. The magistrate judges granted the government's applications, and petitioner's wireless carrier provided the government with 127 days of CSLI records. Petitioner sought to suppress the CSLI records, asserting that the government's collection of those records constituted a warrantless search in violation of the Fourth Amendment. The district court denied the motion, and petitioner was subsequently convicted for his role in the armed robberies.

The Sixth Circuit affirmed, holding that the government's acquisition of the CSLI records was not a "search." The court reasoned that under the Supreme Court's decisions in *Smith v. Maryland* and *United States v. Miller*, a person generally lacks a reasonable expectation of privacy in information voluntarily conveyed to a third party, and that petitioner had voluntarily conveyed his CSLI to his service providers. The court also drew a distinction between a communication's content, which *is* private, and the information necessary to send the communication, which *is not* private. The court concluded that CSLI, like the phone numbers in *Smith*, facilitates communications, and is therefore unprotected.

Petitioner argues that the government's acquisition of the CSLI records constituted a search and therefore required a warrant supported by probable cause. Petitioner relies on the views expressed by five Justices in *United States v. Jones*, that the government's acquisition of long-term location information through GPS invades a reasonable expectation of privacy because it uses new technology to shrink privacy that existed before the advent of the technology. For the same reason, petitioner argues, the government's acquisition of CSLI is also a search. Petitioner further argues that *Smith* and *Miller* are distinguishable because CSLI involves far more sensitive information and is not voluntarily conveyed to a third party. Finally, petitioner argues that a warrant was required because no exception to that requirement is applicable.

Decision Below:

819 F.3d 880 (6th Cir. 2016)

Petitioner's Counsel of Record:

Nathan F. Wessler, ACLU Foundation

Respondent's Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

District of Columbia v. Wesby (15-1485)**Questions Presented:**

(1) Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

(2) Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

Summary:

Under the Fourth Amendment, an officer making an arrest must have probable cause that a suspect has committed an offense. The first question in this case is whether officers had probable cause to believe that the suspects they arrested knew or should have known they were trespassing, given that the suspects claimed an innocent state of mind. The second question presented is whether, at a minimum, the officers were entitled to qualified immunity.

Officers of the D.C. Police Department responded to a complaint of a loud party at a vacant house. The partygoers told the responding officers they had been invited to the party by someone who purported to have authority to do so. After the homeowner told officers he had not given permission for a party, the officers arrested the partygoers for trespassing. Respondents – 16 of the 21 partygoers arrested – sued D.C. and the arresting officers (petitioners), claiming their arrests lacked probable cause and therefore violated the Fourth Amendment. The district court ruled for respondents.

The D.C. Circuit affirmed. It held that the officers lacked probable cause because respondents reasonably believed they had permission to enter based on an invitation from an apparently lawful source. The court also concluded that the officers were not entitled to qualified immunity because it was clearly established that probable cause requires some evidence on each element of an offense, and no evidence of the suspects' illicit mental state was present.

Petitioners contend that the officers had probable cause that the partygoers knew or should have known they had no right to be in the home. While the partygoers asserted an innocent mental state, petitioners argue, officers could reasonably discredit their assertions based on objective circumstances, including the vacant appearance of the house, the scattering of the guests upon police entry, the partygoers' conflicting accounts about why they were there, and their purported reliance on an invitation from someone who was not present. Petitioners argue that, at the very least, the officers were entitled to qualified immunity because there was no clearly established law that an arrest under those facts lacked probable cause.

Decision Below:

765 F.3d 13 (D.C. Cir. 2014)

Petitioners' Counsel of Record:

Todd S. Kim, Solicitor General for the District of Columbia

Respondents' Counsel of Record:

Nathaniel P. Garrett, Jones Day

Tenth Amendment

Christie v. National Collegiate Athletic Association (16-476)

New Jersey Thoroughbred Horsemen’s Assoc. v. National Collegiate Athletic Assoc. (16-477)

Question Presented:

Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992)?

Summary:

In *New York v. United States*, the Supreme Court held that Congress cannot compel States to regulate third parties. In contrast, the Court has held that Congress has authority to preempt state laws that interfere with congressional policy. The Professional and Amateur Sports Protection Act (PASPA) preempts any state law that “authorizes” sports wagering. The question presented is whether PASPA violates the *New York* anti-commandeering principle to the extent that it prevents a State from partially repealing its prohibitions on sports wagering.

The New Jersey Legislature repealed portions of its prohibitions on sports wagering as they pertained to licensed racetracks and casinos. Respondent National Collegiate Athletic Association (NCAA) filed suit in federal court, alleging that the amended law “authorized” sports wagering at those venues in violation of PASPA. The district court ruled for the NCAA.

The Third Circuit, sitting en banc, affirmed. The court held that while framed as a partial repeal, New Jersey had “authorized” sports wagering at licensed racetracks and casinos because its partial repeal channeled sports betting to those locations. The court further held that PASPA’s prohibition did not violate the *New York* anti-commandeering principle because it did not command any affirmative actions. The court also concluded that PASPA does not limit States to a binary choice between a complete prohibition on sports gambling and a complete repeal, but instead gives States leeway to choose among different potential policies.

Petitioners argue that PASPA violates the anti-commandeering principle. Petitioners contend that PASPA’s prohibition of partial repeals leaves them no meaningful discretion to establish State policy on gambling, because it forces the State to choose between a complete prohibition and black market gambling throughout the State. Even assuming that the State retains some discretion, petitioners contend, *New York* precludes the federal government from directing a State to maintain any portion of a State law prohibition it wishes to repeal. Finally, petitioners argue that the absence of any requirement in PASPA to enact positive law is irrelevant because there is no difference between requiring a State to enact a law and preventing a State from repealing one.

Decision Below:

832 F.3d 389 (3d Cir. 2016) (en banc)

Petitioners’ Counsel of Record:

Theodore B. Olson, Gibson, Dunn & Crutcher LLP (No. 16-476)

Ronald J. Riccio, McElroy, Deutsch, Mulvaney & Carpenter, LLP (No. 16-477)

Respondents’ Counsel of Record:

Paul D. Clement, Kirkland & Ellis LLP

Criminal Law

Criminal Obstruction

Marinello v. United States (16-1144)

Question Presented:

Whether § 7212(a)'s residual clause, [which makes it a crime to corruptly endeavor to obstruct or impede the due administration of the Internal Revenue Code], requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct.

Summary:

Section 7212(a) of the Internal Revenue Code makes it a felony to endeavor to intimidate or impede any tax official in his official capacity. It also contains a residual clause, which penalizes anyone who corruptly endeavors to obstruct or impede the due administration of the Code. In *United States v. Aguilar*, the Supreme Court held that knowledge of a pending judicial or grand jury proceeding is required to prove that a person engaged in corrupt efforts to interfere with the due administration of justice in violation of the general obstruction of justice statute. The question in this case is whether conviction under Section 7212(a)'s residual clause requires proof of a pending IRS action, such as an audit, of which the defendant was aware.

Petitioner Marinello, owner and operator of a freight service, did not keep corporate records or file personal or corporate tax returns for almost twenty years. He was found guilty of nine counts of tax-related offenses, including one count for violating the residual clause. The district court rejected petitioner's claim that conviction under the residual clause required proof that petitioner knew about a pending IRS investigation.

The Second Circuit affirmed, holding that knowledge of a pending IRS investigation is not an element of a residual clause offense. The court explained that the IRS can administer the tax laws by ascertaining income and collecting taxes before initiating any particular proceeding against a taxpayer, and a person who endeavors to impede those functions literally violates the residual clause. The court distinguished *Aguilar* based on textual differences between Section 7212(a) and the general obstruction statute. In particular, the court reasoned that while the general obstruction statute prohibits interference with due administration of *justice*, a term associated with judicial and grand jury proceedings, Section 7212(a) prohibits obstruction of the due administration of *this title*, a phrase that is not limited to IRS proceedings or investigations.

Petitioner argues that the residual clause requires proof that the defendant was aware of a pending IRS investigation or proceedings, such as an audit. Petitioner contends that the textual differences between the general obstruction statute and Section 7212(a) are not significant, and that *Aguilar*'s broader lesson is that criminal obstruction statutes should be interpreted narrowly to avoid penalizing innocent conduct.

Decision Below:

839 F.3d 209 (2d Cir. 2016)

Petitioner's Counsel of Record:

Matthew S. Hellman, Jenner & Block LLP

Respondent's Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

Guilty Plea

Class v. United States (16-424)

Question Presented:

Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.

Summary:

In *Tollett v. Henderson*, the Supreme Court held that when a defendant pleads guilty, he generally may not thereafter raise independent constitutional claims that occurred prior to entry of the plea. Subsequently, in *Blackledge v. Perry* and *Menna v. New York*, the Supreme Court held that a defendant who pleads guilty can raise double jeopardy and vindictive prosecution claims that challenge the prosecution's authority to hale the defendant into court and are not inconsistent with his factual admission of guilt. The question in this case is whether a defendant who enters an unconditional guilty plea may challenge the constitutionality of the statute under which he was convicted.

Petitioner Rodney Class was charged with possession of a firearm on Capitol grounds in violation of 40 U.S.C. § 5104(e). He moved to dismiss the charges, on the ground that the statute was unconstitutional under the Second Amendment. The district court denied the motion, and petitioner entered an unconditional guilty plea.

The D.C. Circuit affirmed, holding that petitioner's unconditional guilty plea waived any challenge to the constitutionality of his statute of conviction. The court reasoned that under Fed. R. Crim. P. 11(a)(2), a defendant who pleads guilty generally waives all constitutional claims on appeal unless he specifically reserved them in a conditional plea. The sole exceptions, the court concluded, are claims not to be haled into court at all and claims of lack subject matter jurisdiction. The court concluded that neither exception was applicable here.

Petitioner argues that a defendant who pleads guilty does not inherently waive his right to challenge the constitutionality of his statute of conviction. He contends that, under the Supreme Court's cases, an unconditional guilty plea waives trial rights and procedural and evidentiary claims, but does not waive a defendant's right to raise claims on appeal that go to the State's power to prosecute the defendant for the crime charged. A challenge to the statute of conviction, petitioner contends, falls into the latter category. Petitioner further contends that Rule 11(a)(2) preserves the line drawn by the Court's cases.

Decision Below:

No. 1:13-cr-00253-1 (D.C. Cir. July 5, 2016)

Petitioner's Counsel of Record:

Jessica Ring Amunson, Jenner & Block LLP

Respondent's Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

Habeas Corpus

Ayestas v. Davis (16-6795)

Question Presented:

Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an IAC [ineffective-assistance-of-counsel] claim

that state habeas counsel forfeited, where the claimant’s existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made.

Summary:

Upon finding that investigative services are “reasonably necessary” for the representation of a defendant on post-conviction review in a capital case, a federal court may authorize such services at public expense. The question presented in this case is whether services are “reasonably necessary” only if the defendant can demonstrate a “substantial need,” which entails a showing of a “meritorious” claim.

Petitioner Carlos Manuel Ayestas was convicted of killing a 67-year-old woman during a robbery and sentenced to death. After the denial of his state habeas application, petitioner filed a federal habeas petition alleging trial counsel was ineffective in pursuing mitigating evidence. He also alleged that state habeas counsel was ineffective in failing to assert that claim, establishing cause for the procedural default. Petitioner also moved for investigative assistance to pursue his ineffectiveness claim. The district court denied relief.

The Fifth Circuit affirmed. The court held that investigative assistance is available only if a habeas petitioner can demonstrate a “substantial need” for the assistance. The court further held that a habeas petitioner cannot establish a substantial need when his underlying claim is without merit. Because it concluded that trial counsel was not constitutionally ineffective in pursuing mitigating evidence, the court also concluded that petitioner was not entitled to investigative assistance.

Petitioner contends that investigative services are “reasonably necessary” when a reasonable private attorney whose client’s resources are limited would seek the service. Petitioner argues that the substantial-need test conflicts with the text of the statute because “substantial” need is much higher than a “reasonable” need. Petitioner further contends that, by requiring a showing of a meritorious claim as a condition for obtaining assistance, the substantial need test defeats the statute’s purpose of providing assistance that will facilitate the development of meritorious claims.

Decision Below:

817 F.3d 888 (5th Cir. 2016)

Petitioner’s Counsel of Record:

Lee B. Kovarsky, University of Maryland School of Law

Respondent’s Counsel of Record:

Scott A. Keller, Solicitor General of Texas

Wilson v. Sellers (16-6855)

Question Presented:

Did this Court’s decision in *Harrington v. Richter*, 562 U.S. 86 (2011), silently abrogate the presumption set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) – that a federal court sitting in habeas proceedings should “look through” a summary state court ruling to review the last reasoned decision – as a slim majority of the *en banc* Eleventh Circuit held in this case, despite the agreement of both parties that the *Ylst* presumption should continue to apply?

Summary:

Under AEDPA, a federal habeas court may not overturn a state court’s final decision on the merits unless it is based on an unreasonable application of law or an unreasonable determination of the facts. Pre-AEDPA, the Supreme Court held in *Ylst* that when the last reasoned state court decision denies relief based on procedural default, a federal court should presume that a later unexplained decision relied on procedural default. Conversely, when the last

reasoned decision rejected a claim on the merits, a federal court should presume that later unexplained decisions also rejected the claim on the merits. Post-AEDPA, the Supreme Court held in *Richter* that when a state court’s final decision on the merits is unexplained, a federal court should deny relief unless there is no reasonable basis for doing so. The question in this case is whether when a state court’s final decision on the merits is unexplained, *Ylst* requires the federal court to examine whether the last reasoned decision on the merits is reasonable, or *Richter* requires the federal court to deny relief if there is any reasonable basis for doing so.

Petitioner Marion Wilson was convicted of murder and sentenced to death. Petitioner filed a state habeas petition alleging ineffective assistance of counsel. The state superior court denied his petition in a written opinion, and the Supreme Court of Georgia summarily denied his application to appeal. A federal district court then denied Wilson’s ineffective assistance claim, and a panel of the Eleventh Circuit affirmed.

On rehearing en banc, the court of appeals affirmed, holding that there was a reasonable basis supporting the Georgia Supreme Court’s merits decision. The court rejected petitioner’s argument that *Ylst* required it to examine the reasoning of the superior court as the last reasoned decision. The court held that *Ylst* required a “look through” only to determine whether the Georgia Supreme Court’s decision was based on the merits or procedural default. After determining through the “look through” that it was on the merits, the court held that *Richter* required it to defer to the Georgia Supreme Court’s decision as long as there was any reasonable basis to support it. It would not presume that the state’s highest court adopted the superior court’s reasoning.

Petitioner argues that *Ylst* requires a federal court to look through an unexplained merits decision to the last reasoned decision to determine the reasoning for the later decision. Petitioner further contends that *Richter*’s any reasonable basis standard applies only when there is no earlier reasoned state court decision, as was the case in *Richter*.

Decision Below:

834 F.3d 1227 (11th Cir. 2016)

Petitioner’s Counsel of Record:

Brian S. Kammer, Georgia Resource Center

Respondent’s Counsel of Record:

Sarah H. Warren, Solicitor General of Georgia

Federal Practice and Procedure

Appellate Procedure

***Hamer v. Neighborhood Housing Services of Chicago* (16-658)**

Question Presented:

Whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, as the Second, Fourth, Seventh and Tenth Circuits have concluded, or whether Federal Rule of Appellate Procedure 4(a)(5)(C) is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, as the Ninth and D.C. Circuits have concluded, and therefore subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine.

Summary:

The statute governing the timeliness of civil appeals, 28 U.S.C. § 2107, generally sets forth a 30-day limit for filing a notice of appeal, but authorizes a district court to extend the time

upon motion filed within thirty days of the regular expiration time. The statute does not address the maximum length of any such extension. Federal Rule of Appellate Procedure 4(a)(5)(C) provides that no extension may exceed 30 days after the normal expiration date or 14 days after the date the motion to extend is granted. The question in this case is whether a notice of appeal that is filed within the time limit set by a district court extension order, but outside the limits set by Rule 4(a)(5)(C), must be dismissed for lack of jurisdiction.

Petitioner Hamer filed an age discrimination suit in federal district court, but the court entered summary judgment in favor of respondent Neighborhood Housing Services of Chicago. Petitioner moved for a sixty-day extension of time to file a notice of appeal. The district court granted that motion. Petitioner then filed her notice of appeal within the sixty-day extension, but outside the time period for an extension authorized by Rule 4(a)(5)(C).

The Seventh Circuit dismissed the appeal, holding that the time limit for an extension established by Rule 4(a)(5)(C) is jurisdictional. The court relied on the Supreme Court's decision in *Bowles v. Russell*, which held that statutory deadlines for appeal are jurisdictional, and that Rule 4(a)(6)'s time limit for extending the deadline is similarly jurisdictional because it carries the statutory deadline into effect. The court of appeals reasoned that Rule 4(a)(5)(C) similarly implements the statutory deadline for appeals and is therefore jurisdictional.

Petitioner argues that the time limit in Rule 4(a)(5)(C) is not jurisdictional because it is not found in the statute governing time limits for appeal. Instead, petitioner contends, Rule 4(a)(5)(C) is a mandatory claim processing rule, which respondent can and did waive, allowing petitioner's appeal to proceed. Petitioner contends that *Bowles* is distinguishable because the time limit for the Rule at issue in that case was also set forth in the statute governing the timeliness of appeals.

Decision Below:

835 F.3d 761 (7th Cir. 2016)

Petitioner's Counsel of Record:

Jonathan A. Herstoff, Haug Partners LLP

Respondents' Counsel of Record:

Linda T. Coberly, Winston & Strawn LLP

***Artis v. District of Columbia* (16-460)**

Question Presented:

Whether the tolling provision in §1367(d) suspends the limitations period for the state-law claim while the claim is pending and for thirty days after the claim is dismissed, or whether the tolling provision does not suspend the limitations period but merely provides 30 days beyond the dismissal for the plaintiff to refile.

Summary:

Federal courts may exercise supplemental jurisdiction over a state law claim that is related to federal claim. When a district court declines to exercise supplemental jurisdiction, the state law claim may be refiled in state court if the limitations period has not run. Section 1367(d) provides that the limitations period for such a claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period." The question presented in this case is whether 1367(d) "suspends" the limitations period while the state law claim is pending in federal court and for 30 days thereafter, or whether it provides only a 30-day "grace period" for refileing the state-law claim after its dismissal.

In 2011, petitioner Stephanie Artis sued the District of Columbia in federal court, alleging that she was terminated from her employment in violation of Title VII. She also

asserted related claims under D.C. law. The district court dismissed the federal claim, and declined to exercise supplemental jurisdiction over the D.C. claims. Petitioner then refiled her D.C. claims in D.C. Superior Court. That filing was timely if Section 1367 suspended the running of the limitations period while her federal suit was pending, but untimely if Section 1367 provided only a 30-day grace period from the date of dismissal. The district court adopted the grace-period interpretation and dismissed the suit.

The D.C. Court of Appeals affirmed, holding that the limitations period continues to run while a claim is pending in federal court, and that 1367(d) provides plaintiff with a 30-day “grace period” to refile in the event that the statute of limitations expires during the pendency of the state-law claim. The court reasoned that Congress intended to adopt the American Law Institute (ALI) grace period proposal, and that such an approach better accommodates federalism concerns.

Petitioner argues that Section 1367 suspends the running of a limitations period while the state claim is pending in federal court. Petitioner argues that the plain meaning of the term “tolls” is suspends. Petitioner further contends that the language “shall be tolled *while* the claim is pending *and* for a period of 30 days” calls for two distinct periods of tolling: the period while the claim “is pending” and the period of “30 days after” the claim is dismissed. Petitioner also argues that the text of Section 1367 demonstrates that Congress did not adopt the ALI’s grace period proposal. Finally, petitioner contends that the Supreme Court in *Jinks v. Richland County* rejected the notion that federalism considerations should inform the meaning of Section 1367.

Decision Below:

135 A.3d 334 (D.C. 2016)

Petitioner’s Counsel of Record:

Adam G. Unikowsky, Jenner & Block LLP

Respondent’s Counsel of Record:

Todd S. Kim, Solicitor General for the District of Columbia

Foreign Sovereign Immunities Act – Attachment Immunity

***Rubin v. Islamic Republic of Iran* (16-534)**

Question Presented:

Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether assets are otherwise subject to execution under Section 1610.

Summary:

Under the Foreign Sovereign Immunities Act (FSIA), the property of a foreign state is immune from attachment and execution, except as provided in 28 U.S.C. 1610. Section 1610 permits attachment and execution when a foreign state’s property is used for commercial purposes, provided certain other criteria are satisfied. As originally enacted, the terrorism exception to attachment immunity allowed a party who prevailed in a terrorism case to attach property used for commercial purposes. Congress amended the terrorism exception to provide in Section 1610(g), that property of a foreign state, and the property of an agency or instrumentality of a foreign state, are subject to attachment “as provided in this section,” regardless of five factors that courts had previously used to decide when a party could satisfy a judgment against a foreign state by attaching the property of an agency or instrumentality. The question in this case is whether Section 1610(g) establishes a freestanding exception to attachment immunity.

Petitioners filed suit against Iran for sponsoring a suicide attack in Jerusalem. Petitioners prevailed, but Iran refused to pay. Petitioners then sought to satisfy the judgment by attaching Iranian antiquities in several U.S. museums. The district court entered judgment for Iran.

The Seventh Circuit affirmed. It held that Section 1610(g) does not provide an independent basis for attachment in terrorism cases. The court reasoned that the phrase “as provided in this section” means that an individual must first establish that an immunity exception elsewhere in Section 1610 applies. Once such an exception applicable to a foreign state is established, the court concluded, Section 1610(g) then allows execution on property of a state instrumentality or agency, without regard to the five-factor test.

Petitioners contend that Section 1610 (g) creates a freestanding basis for attachment in terrorism cases. Petitioners argue that the phrase “as provided in this section,” refers to procedures contained in the Section, not to a need to establish an independent basis for attachment. Petitioner further contends that interpreting Section 1610(g) to do no more than eliminate the five-factor test would make it meaningless in cases involving executing on the property of a foreign state.

Decision Below:

830 F.3d 470 (7th Cir. 2016)

Petitioners’ Counsel of Record:

Asher Perlin, Solo Practitioner

Respondents’ Counsel of Record:

Jeffrey A. Lamken, MoloLamken LLP

Miscellaneous Business

Bankruptcy

Merit Management Group, LP v. FTI Consulting, Inc. (16-784)

Question Presented:

Whether the safe harbor of 11 U.S.C. § 546(e) prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred.

Summary:

Section 546 of the Bankruptcy Code prohibits a trustee from avoiding transfers that are margin payments or settlement payments “made by or to (or for the benefit of)” certain protected entities, including financial institutions. The issue in this case is whether that safe harbor provision protects a transfer of settlement payments from one party to another when a financial institution is the conduit for the transfer.

Valley View Downs, LP (Valley View), the owner of a racetrack, acquired all of the shares of a competitor, Bedford Downs, in exchange for \$55 million. Valley View transferred the money to Citizens Bank of Pennsylvania as escrow agent. Citizens Bank, in turn, transferred \$16.5 million of that amount to petitioner, which held an ownership interest in Bedford Downs. After Valley View filed for bankruptcy, respondent, acting as trustee, filed suit to recover the \$16.5 million from petitioner on the ground that it was a fraudulent transfer. The district court entered judgment for petitioner, holding that the transfer was protected by the safe harbor provision.

The Seventh Circuit reversed, holding that the safe harbor provision does not protect transfers when a financial institution acts solely as a conduit. The court reasoned that it is

ambiguous whether a payment made through a conduit is made “by or to” or “for the benefit of” the conduit. Based on the statute’s context and purpose, the court concluded that the safe harbor provision protects transactions involving financial institutions only when the financial institution is the first or final party to the transaction, not when it acts solely as a conduit.

Petitioner contends that the safe harbor provision applies to transactions in which a financial institution acts solely as a conduit. At the very least, petitioner argues, a transfer of funds through a financial institution as escrow agent, which holds the funds before distributing them, is unambiguously a transfer made “to” the financial institution.

Decision Below:

830 F.3d 690 (7th Cir. 2016)

Petitioner’s Counsel of Record:

Brian C. Walsh, Bryan Cave, LLP

Respondent’s Counsel of Record:

Paul D. Clement, Kirkland & Ellis LLP

***U.S. Bank National Association v. Village at Lakeridge* (15-1509)**

Question Presented:

Whether the appropriate standard of review for determining non-statutory insider status [under the Bankruptcy Code] is the *de novo* standard of review or the clearly erroneous standard of review.

Summary:

Bankruptcy courts may confirm a Chapter 11 reorganization plan over a secured creditor’s objection only if at least one impaired class of creditors votes to accept the plan, excluding the votes of statutory and non-statutory insiders. A non-statutory insider is a person not listed in the Code who has a sufficiently close relationship with the debtor. The question presented is whether non-statutory insider status is a question of fact subject to clear error review or mixed question of law and fact subject to *de novo* review.

Respondent, a limited liability corporation with MBP Equity Partners as its only member, filed a petition for bankruptcy under Chapter 11. It filed a claim for reorganization that would impair the claims of its two creditors, one of whom was MBP and one of whom was petitioner U.S. National Bank Association. Because petitioner did not consent, and MBP was a statutory insider, the plan could not be approved. Respondent Bartlett, a board member of MBP, then sold MBP’s claim to Dr. Robert Rabkin. Petitioner moved to disallow Rabkin’s claim for plan voting purposes, asserting that Rabkin was a non-statutory insider. The bankruptcy court determined that Rabkin was not a non-statutory insider. The United States Bankruptcy Appellate Panel for the Ninth Circuit affirmed that determination.

The Ninth Circuit also affirmed the bankruptcy court’s determination. It held that the question whether a person meets the definition of a non-statutory insider is a pure question of fact subject to clear error review. Applying that standard, the court of appeals concluded that the bankruptcy court’s finding on Rabkin’s status was not clearly erroneous.

Petitioner argues that the question whether a person is a non-statutory insider is a mixed question of law and fact, not a pure question of fact. As such, petitioner argues, the bankruptcy court’s determination on that issue should be subject to *de novo* review.

Decision Below:

814 F.3d 993 (9th Cir. 2016)

Petitioners' Counsel of Record:

Gregory A. Cross, Venable LLP

Respondents' Counsel of Record:

Daniel L. Geysler, Stris & Maher LLP

Labor***Epic Systems Corp. v. Lewis* (16-285)****Question Presented:**

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waives class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

Summary:

The National Labor Relations Act (NLRA) gives employees the right to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The Federal Arbitration Act (FAA) provides that any arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The question presented is whether an employment agreement that requires disputes to be resolved through individual arbitration and waives collective proceedings is enforceable under the FAA, notwithstanding the concerted action guarantee of the NLRA. The same question is at issue in *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil USA*, consolidated for oral argument.

The employment contract between petitioner Epic Systems and its employees requires disputes over wages and hours to be submitted to arbitration and precludes an employee from bringing a collective action in any forum. Respondent Jacob Lewis and several other employees nonetheless collectively sued Epic in federal court for overtime pay under the Fair Labor Standards Act. Epic moved to compel individual arbitration under the arbitration agreement. The district court denied Epic’s motion.

The Seventh Circuit affirmed. It held that the right under the NLRA to engage in “concerted activities” includes the right to bring collective actions in administrative and judicial forums. By prohibiting collective proceedings, the court concluded, Epic’s agreement impinges on that right and is therefore unenforceable. The court further held that the FAA does not make the agreement enforceable. The court reasoned that the FAA saving clause preserves illegality as a ground for non-enforcement, and that the NLRA renders Epic’s agreement illegal.

Petitioner argues that, by declaring arbitration agreements “enforceable,” the FAA mandates the enforcement of arbitration agreements that include collective action waivers. Petitioner further argues that the FAA’s saving clause is inapplicable because (i) it does not encompass federal statutes, (ii) the NLRA is not a ground for the unenforceability of “any” contract, (iii) the saving clause does not preserve any ground that interferes with a fundamental attribute of arbitration, such as collective action waivers, and (iv) the saving clause only preserves defenses that relate to the making of contracts. Finally, petitioner argues that there is no conflict between the FAA and the NLRA because the right to engage in concerted activity does not include a right to participate in collective legal proceedings, and even if it did, nothing in the NLRA precludes an employee from voluntarily waiving that procedural right.

Decision Below:

823 F.3d 1147 (7th Cir. 2016)

Petitioner’s Counsel of Record:

Neal K. Katyal, Hogan Lovells US LLP

Respondent’s Counsel of Record:

David C. Zoeller, Hawks Quindel, S.C.

Ernst & Young LLP v. Morris (16-300)**Question Presented:**

Whether the collective-bargaining provisions of the National Labor Relations Act (NLRA) prohibit the enforcement under the Federal Arbitration Act (FAA) of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

Summary:

The FAA provides that any arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The NLRA gives employees the right to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The question presented is whether an employment agreement that requires disputes to be resolved through individual arbitration, rather than through collective action, is “enforceable” under the FAA, notwithstanding the NLRA’s “concerted” action provision. The same issue is presented in *Epic Systems Corp. v. Lewis* and *NLRB v. Murphy Oil USA*, consolidated for oral argument.

The employment contract between petitioner Ernst & Young and its employees requires disputes to be submitted to arbitration in individual proceedings. Respondents Stephen Morris and Kelly McDaniel, Ernst & Young employees, nonetheless brought a class action in federal court, alleging they were denied overtime wages in violation of federal and state law. The district court ordered individual arbitration and dismissed the case.

The Ninth Circuit vacated and remanded. The court held that the right under the NLRA to engage in concerted activities includes a substantive right to bring collective actions, and that Ernst & Young’s agreement interfered with that right and was therefore unenforceable. The court further held that the FAA does not make the agreement enforceable. The court reasoned that the agreement’s class action waiver is distinct from its requirement to resolve claims through arbitration, the FAA’s saving clause preserves illegality as a ground for non-enforcement, and the NLRA’s concerted action guarantee renders the contractual waiver of class actions illegal.

Petitioner argues that the FAA makes the agreement’s requirement of individual arbitration “enforceable,” and the NLRA does not contain an express contrary command. Petitioner further argues that the FAA’s saving clause is inapplicable because it does not encompass federal statutes that discriminate against arbitration, and the illegality defense it preserves has its source in state law. Finally, petitioner argues that the NLRA right to engage in concerted activity does not encompass a right to particular procedures for adjudicating a non-NLRA claim, and that even if it did, that procedural right would be waivable.

Decision Below:

834 F.3d 975 (9th Cir. 2016)

Petitioners’ Counsel of Record:

Kannon K. Shanmugam, Williams & Connolly LLP

Respondents’ Counsel of Record:

Max Folkenflik, Folkenflik & McGerity, LLP

***National Labor Relations Board v. Murphy Oil USA* (16-307)**

Question Presented:

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees’ right under the National Labor Relations Act to engage in “concerted activities” in pursuit of their “mutual aid or protection,” 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

Summary:

The Federal Arbitration Act (FAA) provides that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The National Labor Relations Act (NLRA) gives employees the right to engage in “concerted activities” for the purpose of “mutual aid or protection.” The question presented is whether an employment agreement that requires disputes to be resolved through individual arbitration is enforceable under the FAA, notwithstanding the concerted action guarantee of the NLRA. The same question is presented in *Epic Systems Corp. v. Lewis* and *Ernst & Young LLP v. Morris*, consolidated for oral argument.

As a condition of her employment with respondent Murphy Oil, Sheila Hobson agreed to resolve any employment-related claims by arbitration and waived any right to pursue claims collectively. Hobson and three other employees nonetheless filed a collective action against Murphy Oil alleging violations of the Fair Labor Standards Act. After Murphy Oil moved to compel individual arbitration, Hobson filed an unfair labor charge with the National Labor Relations Board (NLRB). The NLRB ruled that by requiring employees to sign arbitration agreements waiving their right to pursue collective claims, respondent violated the NLRA.

Relying on its decision in *D.R. Horton, Inc. v. NLRB*, the Fifth Circuit reversed. In *D.R. Horton*, the Fifth Circuit held that an agreement requiring employment disputes to be resolved in individual arbitration is enforceable under the FAA. The court reasoned that (1) the NLRA does not contain a congressional command overriding the FAA, and (2) the use of collective action procedures is not a substantive right under the NLRA.

Petitioner argues that an agreement requiring individual arbitration of workplace disputes violates the NLRA because it deprives employees of their substantive right to engage in “concerted activities” in pursuit of their “mutual aid or protection.” Petitioner further argues that such agreements are not “enforceable” under the FAA, because the FAA’s saving clause preserves defenses based on illegality, and agreements that violate the NLRA fall within the saving clause.

Decision Below:

808 F.3d 1013 (5th Cir. 2015)

Petitioner’s Counsel of Record:

Richard F. Griffin, National Labor Relations Board

Respondents’ Counsel of Record:

Neal K. Katyal, Hogan Lovells US LLP

Patent

***Oil States Energy Services v. Greene's Energy Group* (16-712)**

Question Presented:

Whether *inter partes* review – an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents – violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

Summary:

A patent holder may sue in federal court for infringement, and the defendant may assert invalidity as a defense to that claim. In that proceeding, there is a right to a jury trial to determine both infringement and validity. The America Invents Act authorizes the PTO, through a process known as *inter partes* review, to reexamine the validity of a patent it has issued and to invalidate it based on lack of novelty or obviousness. The review is conducted by the PTO Patent Trial and Appeal Board (Board). Any person other than the patent owner may initiate the process, and both the party initiating the process and the patent holder may participate in it. The issue in this case is whether *inter partes* review violates the Seventh Amendment's right to a jury and Article III of the Constitution.

Petitioner Oil States Energy Services owns a patent that relates to an apparatus and methods for protecting wellheads during fracking. Petitioner filed an action against respondent Green's Energy Group in federal district court, alleging infringement of that patent. Respondent filed a petition to the Board seeking *inter partes* review of two claims in the patent. The Board invalidated the two claim as anticipated by prior art, and denied petitioner's motion to amend the two claims.

In a per curiam order, the Federal Circuit affirmed without addressing petitioner's Seventh Amendment and Article III claims. A prior circuit decision, however, held that *inter partes* review is consistent with Article III and the Seventh Amendment. The prior decision reasoned that Congress may assign adjudication of a federal law claim that is connected to a public right to an administrative agency, and that *inter partes* review falls within that authority.

Petitioner contends that *inter partes* review violates the Seventh Amendment and Article III. Petitioner argues that the Seventh Amendment applies to common law causes of action decided by English law courts, rather than courts of equity, and that an action for patent infringement, including any invalidity defense, would have been heard by an English common law court. Petitioner further argues that the rule that public rights may be assigned to an administrative agency is inapplicable, because once a patent is issued, it becomes a private right. For similar reasons, petitioner argues that invalidity must be determined in an Article III court.

Decision Below:

639 Fed. Appx. 639 (Fed. Cir. 2016)

Petitioner's Counsel of Record:

Alyson N. Ho, Morgan, Lewis & Bockius LLP

Respondents' Counsel of Record:

George E. Quillin, Foley & Lardner LLP

***SAS Institute Inc. v. Matal* (16-969)**

Question Presented:

Does 35 U.S.C. § 318(a), which provides that the Patent Trial and Appeal Board in an inter partes review "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner," require that Board to issue a final written decision as to every claim challenged by the petitioner, or does it allow that Board to issue a final written decision with respect to the patentability of only some of the patent claims challenged by the petitioner, as the Federal Circuit held?

Summary:

The America Invents Act (AIA) authorizes the U.S. Patent and Trademark Office (PTO), to reexamine the validity of a patent through a process called "inter partes review." A party may file a petition asking the PTO to cancel as unpatentable "1 or more claims" in a patent. Review may be instituted if "there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." Upon conclusion of review, the Patent Trial and Appeal Board (Board) "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner." The question presented is whether the Act requires the Board to issue a decision as to every claim challenged by the petitioner, or whether the Board may issue a decision addressing only the claims as to which there was a finding of a reasonable likelihood of invalidity.

Petitioner SAS Institute petitioned for inter partes review, challenging the patentability of all sixteen claims in a patent SAS was accused of infringing. The Board instituted inter partes review on only some of the claims and issued a final written decision addressing only those claims it reviewed. Petitioner's request for rehearing to address all of its claims was denied.

Relying on its earlier decision in *Synopsis, Inc. v. Mentor Graphics Corp.*, the Federal Circuit affirmed. In *Synopsis*, the Federal Circuit held that the AIA does not require the Board to address every claim raised in the petition. The court concluded that the difference in language between "claims challenged in the petition" and "any claim challenged by the petitioner" demonstrates that the first refers to all claims raised in the petition, while the latter refers to the claims as to which the Board has instituted review. The court also reasoned that the Act contemplates that review may be instituted on fewer than all claims, and that it would make little sense to issue a decision on claims as to which review is not instituted.

Petitioner argues that the Act's requirement for a final decision with respect to "any patent claim challenged by the petitioner" forecloses the Board from issuing a decision only with respect to some of those claims. The provision prohibiting the initiation of review absent a likelihood of success on "1 or more claims," petitioner argues, does not authorize review of fewer than all claims. Petitioner further contends that there is no meaningful distinction between "claims challenged in the petition" and "any claim challenged by the petitioner." Instead, both contemplate review on all claims. Finally, petitioner argues that because the statute unambiguously requires a decision on all claims, PTO's contrary view is not entitled to *Chevron* deference.

Decision Below:

825 F.3d 1341 (Fed. Cir. 2016)

Petitioner's Counsel of Record:

Gregory A. Castanias, Jones Day

Respondents' Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

Securities

Cyan, Inc. v. Beaver County Employees Retirement Fund (15-1439)

Question Presented:

Whether state courts lack subject matter jurisdiction over covered class actions that allege only [Securities Act of 1933] claims.

Summary:

The Securities Act of 1933 gave federal and state courts concurrent jurisdiction over claims arising under the Act. The Securities Litigation Uniform Standards Act of 1998 (SLUSA), amended that provision to add the following language: “except as provided in section 77p of this title with respect to covered class actions.” Section 77p defines a “covered class action” to include certain suits seeking damages on behalf of 50 or more people. It also provides that certain covered class actions based on state law may not be maintained in state or federal court. The question presented in this case is whether the “except” clause divests state courts of jurisdiction of covered class actions arising under the 1933 Act.

Beaver County Employees Retirement Fund (respondents) brought suit against Cyan, Inc. (petitioner) in state court, alleging various violations of the Securities Act of 1933. Petitioner moved for judgment on the pleadings, arguing that the state court lacked jurisdiction to hear respondents’ claims. The California Superior Court denied the motion based on a decision of the California Court of Appeal in *Luther v. Countrywide Financial Corp.*

In *Luther*, the California Court of Appeal held that the “except” clause did not divest state courts of concurrent jurisdiction over class action claims arising under the 1933 Act. The court in *Luther* reasoned that while Section 77p contains a definition of covered class actions, it does not provide anything that is relevant to a covered class action alleging only federal law claims. Both the California Court of Appeal and the California Supreme Court denied review of the superior court’s decision in this case.

Petitioner contends that the “except” clause points to the definition of covered class actions in Section 77p, and therefore divests state courts of jurisdiction of any suit under the 1933 Act that seeks damages on behalf of 50 or more people. Petitioner further contends that interpreting the “except” clause to divest state courts of jurisdiction of certain covered class actions based on state law would make no sense since the concurrent jurisdictional provision in the 1933 Act applies only to federal law claims. Finally, petitioner argues that interpreting the “except” clause to encompass only certain state law claims would lead to the anomalous result of precluding state courts from hearing certain state law claims, but allowing them to hear federal law claims.

Decision Below:

Unreported

Petitioners’ Counsel of Record:

Boris Feldman, Wilson Sonsini Goodrich & Rosati PC

Respondents’ Counsel of Record:

Andrew S. Love, Rudman & Dowd LLP

Leidos v. Indiana Public Retirement System (16-581)**Question Presented:**

Whether the Second Circuit erred in holding—in direct conflict with the decisions of the Third and Ninth Circuits—that Item 303 of SEC Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

Summary:

Section 10(b) makes it unlawful to omit a material fact necessary to make the statements made in connection with the sale of any security not misleading. The Supreme Court has held that there is a private cause of action to enforce Section 10(b) in certain circumstances. Item 303 of Regulation S-K requires disclosure of information where a “trend,” “event,” or “uncertainty” is “known to management and reasonably likely to have material effects on the registrant’s financial condition.” At issue in this case is whether there is a private cause of action under Section 10(b) to enforce the Item 303 disclosure obligation.

Petitioner Leidos, Inc. (formerly known as SAIC) contracted with New York City to develop and implement a workforce management system. Two Leidos employees and others formulated a kickback scheme that entailed overbilling the project’s costs. Federal and state authorities eventually uncovered the scheme, as did petitioner’s internal audit. Petitioner filed a Form 10-K that failed to disclose the investigations or the scheme. Ultimately, petitioner reached an agreement with state and federal authorities to reimburse New York City more than \$500 million and to forfeit \$40 million in unpaid receivables. Respondent investors sued petitioner, claiming that petitioner’s failure to disclose the investigations and the scheme in its Form 10-K violated its disclosure obligations under Item 303, and was actionable as a misleading omission under Section 10(b). The district court dismissed the claim.

The Second Circuit reversed. Relying on its prior decision in *Stratte-McClure v. Morgan Stanley*, the court held that a failure to make a disclosure required by Item 303 can be actionable as a misleading omission under Section 10(b). The court reasoned that because Item 303 disclosures are mandatory, a reasonable investor would regard the absence of an Item 303 disclosure to imply the absence of known trends, events, or uncertainties the registrant reasonably expects to have a material adverse impact on its financial condition.

Petitioner argues that the failure to make a disclosure required by Item 303 is not actionable as a misleading omission under Section 10(b). Petitioner contends that there are only two circumstances in which an omission is actionable under Section 10(b): when it renders an affirmative statement misleading, and when there is a fiduciary duty to make the disclosure. Neither of those circumstances is present here, petitioner argues, because no affirmative statement in its Form 10-K was alleged to have been misleading by virtue of any omission, and petitioner did not owe a fiduciary duty to disclose Item 303 information.

Decision Below:

818 F.3d 85 (2d. Cir. 2016)

Petitioner’s Counsel of Record:

Andrew S. Tulumello, Gibson, Dunn & Crutcher LLP

Respondents’ Counsel of Record:

David C. Frederick, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.

Digital Realty Trust v. Somers (16-1276)**Question Presented:**

Whether the anti-retaliation provision for “whistleblowers” in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the Act’s definition of a “whistleblower.”

Summary:

The Dodd-Frank Act (DFA) protects whistleblowers against retaliation by their employers for engaging in the following conduct: (i) providing information to the Securities and Exchange Commission (SEC); (ii) testifying or assisting in an SEC investigation or action; and (iii) making disclosures that are required or protected under the Sarbanes-Oxley Act. The DFA defines a whistleblower as any individual who provides information to the SEC. The Sarbanes-Oxley Act affords whistleblower protection to employees who provide information regarding misconduct to a supervisor. The question presented is whether clause (iii) protects employees who provide information internally, but not to the SEC.

Respondent Somers, an employee of petitioner Digital Realty Trust, provided information to Digital management on possible securities law violations. He did not provide that information to the SEC. After he was fired, respondent sued petitioner, alleging retaliation in violation of the DFA. Petitioner moved to dismiss on the ground that respondent was not a “whistleblower” as defined by the DFA. The district court denied the motion.

The Ninth Circuit affirmed, holding that the DFA’s clause (iii) protects a person who reports information internally, but not to the SEC. The court concluded that the DFA’s definition of “whistleblower” was inapplicable to clause (iii) because it contradicted that clause’s reference to reports protected under Sarbanes-Oxley, which includes internal reports. The court also explained that applying the DFA definition would drain clause (iii) of practical meaning because Sarbanes-Oxley requires internal reporting before external reporting, and any retaliation is likely to occur at the earlier rather than the later point.

While petitioner has not yet filed a brief setting forth its position on the merits, it has invoked the Fifth Circuit’s decision in its petition. The Fifth Circuit held that the statutory definition unambiguously limits “whistleblowers” to persons who provide information to the SEC. It also concluded that clause (iii) was not superfluous under that interpretation because it would protect an individual who reported alleged misconduct internally and to the SEC, but was fired because of the internal report.

Decision Below:

850 F.3d 1045 (9th Cir. 2017)

Petitioner’s Counsel of Record:

Kannon K. Shanmugam, Williams & Connolly LLP

Respondent’s Counsel of Record:

Daniel L. Geyser, Stris & Maher LLP *Digital Realty Trust v. Somers*

Other Public Law

Alien Tort Statute

Jesner v. Arab Bank, PLC (No. 16-499)

Question Presented:

Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.

Summary:

The Alien Tort Statute (ATS) provides that “[t]he district court shall have jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations.” In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court granted certiorari to decide whether a corporation is subject to liability under the ATS, but ultimately resolved the case on the ground that the ATS does not apply extraterritorially unless the claim touches and concerns the territory of the United States with sufficient force to overcome the presumption against extraterritoriality. The question presented in this case is whether the ATS forecloses corporate liability.

Petitioners include aliens who were allegedly injured, captured, or killed by Palestinian terrorist organizations overseas. Petitioners sued respondent Arab Bank, a corporation that has a branch office in New York, for allegedly financing and facilitating the activities of organizations that committed the terrorist attacks. The district court dismissed on the ground that the ATS forecloses corporate liability.

The Second Circuit affirmed. Relying on its own decision in *Kiobel*, the court held that the ATS does not impose liability on a corporation. In *Kiobel*, the Second Circuit reasoned that the question whether the ATS imposes liability on corporations is a question of international law, and that international law does not impose liability on corporations for human rights violations. Although the court of appeals viewed the Supreme Court’s decision in *Kiobel* as casting doubt on its holding that corporations are not subject to liability under the ATS, it declined to revisit that precedent.

Petitioners argue that the ATS permits corporate liability. Petitioners contend that the text of the ATS does not draw any distinction between classes of defendants and that the word “tort” is a term of art that brings with it the general rule that corporations may be held liable for acts of their agents. Petitioners further argue that corporate liability advances the purposes of the ATS by ensuring a federal remedy for aliens who are injured in ways that could affect foreign relations. Petitioners also argue that corporate liability is a remedial question that international law leaves to domestic law once conduct violating international law has been established. Finally, petitioners contend that while courts have common law authority to shape the ATS cause of action, all relevant sources of common law favor corporate liability.

Decision Below:

808 F.3d 144 (2d Cir. 2015)

Petitioners’ Counsel of Record:

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

Respondent’s Counsel of Record:

Paul D. Clement, Kirkland & Ellis LLP

Clean Water Act

National Association of Manufacturers v. Department of Defense (16-299)

Question Presented:

Whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not “issu[e] or den[y] any permit” but instead defines the waters that fall within Clean Water Act jurisdiction.

Summary:

The Clean Water Act gives courts of appeals original jurisdiction to hear challenges to an agency action “issuing or denying” a permit. 33 U.S.C. § 1369(b)(1)(F). Courts of appeals also have original jurisdiction under Section 1369(b)(1)(E) to hear challenges to an action “approving or promulgating” any effluent limitation or “other limitations.” Final agency action that does not fall within these jurisdictional grants is subject to review in federal district court. The question in this case is whether the court of appeals had jurisdiction under Section 1369(b) to review a rule defining “waters of the United States” under the Clean Water Act.

In June 2015, the EPA and the Army Corps of Engineers promulgated a final Water Rule clarifying the definition of “waters of the United States” as used in the Clean Water Act. That ruling has significant consequences because a person may not discharge pollutants into “waters of the United States” without a permit. Multiple petitions for review of the Water Rule were filed and consolidated in the Sixth Circuit. Petitioner intervened in the consolidated cases and filed a motion to dismiss, claiming that the court of appeals lacked jurisdiction under the terms of Section 1369(b) to consider the validity of the Water Rule.

The Sixth Circuit denied the motion to dismiss, holding that the Water Rule constituted an action “issuing or denying a permit.” Relying on the Supreme Court’s decision in *Crown Simpson Pulp Co. v. Costle*, the court of appeals interpreted Section 1369(b) to encompass agency actions that go beyond literal denials or grants of a permit to actions that are “functionally similar.” The Water Rule satisfies that functional similarity test, the court concluded, because it governs the issuance of permits. Judge McKeague, writing only for himself, concluded that the Water Rule was also reviewable as an “other limitation” because it has an impact on point source operators and permit issuing authorities.

Petitioner argues that because the Water Rule itself does not “issue or deny any permit,” it falls outside the scope of Section 1369(b)(1)(F). *Crown Simpson*, petitioner argues, did not expand jurisdiction under Section 1369(b)(1)(F) beyond its text to any action that governs a permitting decision, but instead merely treated an EPA veto of a state permit as a “denial of a permit.” Petitioner also argues that the Water Rule is not an “other limitation” because it does not itself establish any limitation, but instead merely defines the geographical scope for effluent and other limitations.

Decision Below:

817 F.3d 261 (6th Cir. 2016)

Petitioner’s Counsel of Record:

Timothy S. Bishop, Mayer Brown LLP

Respondents’ Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

Immigration and Nationality Act

Jennings v. Rodriguez (15-1204)

Questions Presented:

(1) Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

(2) Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

(3) Whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226 (c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months.

Summary:

Under the Immigration and Nationality Act (INA), inadmissible aliens who arrive at our Nation's borders "shall be detained" pending removal proceedings. Certain criminal and terrorist aliens must also be detained during removal proceedings. Other aliens may be released on bond during their removal proceedings if the alien demonstrates that he is not a flight risk or danger to the community. The questions presented are (i) whether detained inadmissible aliens are statutorily or constitutionally entitled to a bond hearing after six months, (ii) whether detained criminal or terrorist aliens are statutorily or constitutionally entitled to a bond hearing after six months, and (iii) whether detained aliens are statutorily or constitutionally entitled to release after six months unless the government shows by clear and convincing evidence that an alien is a flight risk or danger to the community, whether the length of detention weighs in favor of release, and whether a new bond hearing is required every six months.

Respondents brought a habeas corpus class action on behalf of themselves and other aliens who were detained for longer than six months, alleging that detention without a bond hearing violates the INA and the Constitution. The district court ruled for respondents in part.

The Ninth Circuit affirmed in part and reversed in part. The court held that each of the statutes at issue required a bond hearing after six months. The court did not rely on the text of any of the provisions at issue. Instead, it concluded that prolonged detention under those statutes would raise a serious constitutional question, and that the statutes therefore implicitly limit detention to six months without a hearing. The court further concluded that an alien is entitled to be released unless the government demonstrates by "clear and convincing" evidence that the alien is a flight risk or a danger to the community. And it also held that immigration judges must consider the length of detention as a factor in bond decisions, and that the government must provide periodic bond hearings every six months. After oral argument on the statutory questions last term, the Supreme Court directed the parties to file supplemental briefs on the constitutional questions, and set the case for reargument.

The government argues that there is no statutory or constitutional basis for requiring bond hearings after six months. The government argues that the text forecloses any statutory requirement. As for the Constitution, the government argues that an alien seeking admission has no constitutional right to enter prior to a determination of admissibility, and automatic detention of criminal and terrorist aliens is generally supported by Congress's reasonable judgment that

individualized screening is ineffective in preventing flight and danger to the community. Extraordinary cases, the government argues, may be addressed in as-applied challenges. Because there is no requirement for a bond hearing in the first place, the government argues, it follows that it does not have to provide one every sixth months. The government also argues that the Constitution provides no basis for a clear and convincing evidence rule. Finally, the government argues that flight risk and danger to the community, not length of detention, are the factors relevant to a bond decision.

Decision Below:

804 F.3d 1060 (9th Cir. 2015)

Petitioners’ Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

Respondents’ Counsel of Record:

Ahilan T. Arulanantham, ACLU Foundation of Southern California

Sessions v. Dimaya (15-1498)

Question Presented:

Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

Summary:

Under the Immigration and Nationality Act (INA), a lawful permanent resident is subject to removal if convicted of a crime of violence. A crime of violence includes a felony that involves a “substantial risk” of physical force against person or property during the commission of that offense. 18 U.S.C. 16(b). In *Johnson v. United States*, the Supreme Court held that a similarly worded criminal statute was unconstitutionally vague. The issue in this case is whether the INA’s incorporation of Section 16(b) as a ground for removal is unconstitutionally vague in light of *Johnson*.

Respondent Dimaya, a non-citizen, was twice convicted of first degree residential burglary. The Department of Homeland Security initiated removal proceedings against respondent, finding that his two burglaries created a substantial risk of physical force and were therefore crimes of violence under Section 16(b). The Immigration Judge agreed and ordered respondent’s removal. The Board of Immigrations Appeals (BIA) dismissed the appeal.

The Ninth Circuit reversed. Relying on *Johnson*, the court held that Section 16(b)’s substantial risk standard is unconstitutionally vague. The court reasoned that it creates the same uncertainty about how to gauge the risk posed by an offense and how much risk is necessary that led the Court in *Johnson* to hold the similarly worded criminal statute unconstitutionally vague.

The government argues that a civil statute is unconstitutionally vague only if it supplies no standard at all, a vice not suffered by Section 16(b). The government also argues that textual differences between Section 16(b) and the criminal statute invalidated in *Johnson* make it more precise. In particular, Section 16(b) focuses on the risk of force during the course of an offense, and it does not contain a confusing list of exemplar offenses with different risk levels.

Decision Below:

803 F.3d 1110 (9th Cir. 2015)

Petitioner’s Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

Respondent’s Counsel of Record:

E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP

Trump v. International Refugee Assistance Project (16-1436)***Trump v. Hawaii*** (16-1540)**Questions Presented:**

(1) Whether respondents' challenges to Section 2(c)'s temporary entry suspension, Section 6(a)'s temporary refugee suspension, and Section 6(b)'s refugee cap [in Executive Order No. 13,780] are justiciable.

(2) Whether the challenges to [Section] 2(c) became moot on June 14, 2017.

(3) Whether Sections 2(c), 6(a), and 6(b) exceed the President's authority under the [Immigration and Nationality Act].

(4) Whether Section 2(c), 6(a), and 6(b) violate the Establishment Clause.

(5) Whether the global injunctions are impermissibly overbroad.

Summary:

The Immigration and Nationality Act (INA) gives the President authority to suspend entry of any class of aliens when the President finds their admission would be detrimental to United States interests. Relying on that authority, President Trump issued an Executive Order (EO) that suspends for 90 days the entry of foreign nationals of six countries that have predominantly Muslim populations. The EO also suspends refugee admission worldwide and establishes a cap on refugee admissions. The principal questions presented for review are whether challenges to the EO are justiciable, whether the EO exceeds the President's authority under the INA, and whether the EO violates the Establishment Clause.

Following the President's issuance of the EO, several U.S. citizens and lawful permanent residents (the IRAP respondents) filed suit, alleging that the EO illegally prevented or delayed entry of family members. Another suit challenging the EO was filed by Hawaii, which alleged that the EO illegally affected its students and faculty, its tourism, and its efforts to assist in resettling refugees, and by Dr. Elshik, who alleged that the EO illegally delayed entry of a family member. The district courts in both cases entered preliminary injunctions against the EO.

The Fourth Circuit and the Ninth Circuit affirmed. The Fourth Circuit held that the EO violated the Establishment Clause because its primary purpose was to discriminate against members of the Muslim faith and to effectuate the President's campaign promise to enact a Muslim ban. The Ninth Circuit held that the EO exceeded the President's power under the INA because the President failed to identify a link between a person's nationality and their propensity to commit terrorist acts.

The government contends that the challenges to the EO are non-justiciable because Congress precluded any statutory challenge, and neither Hawaii nor any of the individual respondents has asserted a violation of their own Establishment Clause rights. The government further argues that the EO falls within the President's authority under the INA based on the President's determination that the current screening in six countries may be insufficient to prevent entry of aliens who pose a risk to national security. The government contends that the EO does not violate the Establishment Clause because it is facially neutral and rationally related to legitimate national security concerns. Even if an inquiry into official motive were permissible, the government argues, a review of the President's official acts demonstrate a national security motive, and no inquiry into campaign statements is permissible.

Decision Below:

857 F.3d 554 (4th Cir. 2017) (No. 16-1436)

859 F.3d 741 (9th Cir. 2017) (No. 16-1540)

Petitioners' Counsel of Record:

Jeffrey B. Wall, Acting Solicitor General of the United States

Respondents' Counsel of Record:

Omar C. Jadwat, American Civil Liberties Union Foundation (No. 16-1436)

Neal K. Katyal, Hogan Lovells US LLP (No. 16-1540)

National Voter Registration Act and Help America Vote Act

Husted v. A. Philip Randolph Institute (16-980)

Question Presented:

Does 52 U.S.C. § 20507 permit Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the [National Voter Registration Act of 1993] and [Help America Vote Act of 2002]?

Summary:

The National Voter Registration Act (NVRA) prohibits States from implementing any program that would “result” in removal of a person from the voter roll “by reason of a person’s failure to vote.” The Help America Vote Act (HAVA) requires States to remove voters who do not respond to a confirmation notice and do not vote in the next two general federal elections, but prohibits States from removing voters “solely by reason of a failure to vote.” The question presented is whether Ohio’s practice of sending confirmation notices to registered voters who did not engage in voting activity over a two-year period violates the NVRA or the HAVA.

Ohio sends notices to persons on their rolls who have not voted for two years, asking them to confirm their eligibility to vote. If the person fails to respond to the notice over the next four years, that person’s registration is cancelled. Petitioner A. Philip Randolph Institute filed suit against respondent Ohio Secretary of State Husted, alleging that the State’s practice violates the NVRA. The district court ruled for the State.

The Sixth Circuit reversed, holding that Ohio’s practice violates the NVRA. Because the State uses a person’s failure to vote as a trigger for sending a notice, the court reasoned, a person’s ultimate removal from the rolls “results” from a person’s failure to vote. The court further concluded that the HAVA does not authorize the State’s practice, because the trigger for the confirmation notice is based “solely” on a person’s failure to vote.

Petitioner contends that, in order for a practice to violate the NVRA, failure to vote must be both a but-for and proximate cause of removal. While failure to vote is a but-for cause of removal under its program, petitioner contends, the proximate cause is a person’s failure to respond to the confirmation notice. Petitioner further argues that since it removes voters both because a person has failed to respond to a notice and because the person has failed to vote, no person is removed “solely” by reason of a failure to vote in violation of the HAVA.

Decision Below:

838 F.3d 699 (6th Cir. 2016)

Petitioner’s Counsel of Record:

Eric E. Murphy, Office of the Ohio Attorney General

Respondents’ Counsel of Record:

Brenda Wright, DEMOS