A LOOK AHEAD

Supreme Court of the United States October Term 2018

SUPREME COURT INSTITUTE
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This report previews the Supreme Court's argument docket for October Term 2018 (OT 2018). The Court has thus far accepted 38 cases for review, including two cases consolidated for one hour of argument (*United States v. Stitt* and *United States v. Sims*). Assuming the Court hears two hours of arguments on each scheduled argument day, these cases will fill the first three sittings (October, November, and December), and part of the January sitting, comprising roughly half the cases the Court will hear this Term. Section I discusses some especially noteworthy cases the Court will consider. Section II organizes the cases accepted for review into subject-matter categories and briefly summarizes each case.

SECTION I: TERM HIGHLIGHTS

There are a host of cases bubbling up in the lower courts raising important questions relating to President Trump and the policies of his administration. They include: (1) whether the Department of Homeland Security's revocation of the Deferred Action for Childhood Arrivals (DACA) program is valid; (2) whether President Trump's business operations violate the foreign or domestic Emoluments Clause; (3) whether Congress's repeal of the individual tax mandate renders the Affordable Care Act unenforceable; (4) whether the appointment of Robert Mueller as special counsel is constitutional; (5) whether the President's policy of withholding funds from sanctuary cities is lawful; and (6) whether adding a citizenship question to the census is valid. It is unclear, however, if any of these issues will reach the Court this term. This report therefore will not discuss them.

In addition, several pending petitions for certiorari raise significant issues that the Court will likely decide to hear. These include whether either discrimination based on sexual orientation or transgender discrimination fall within Title VII's prohibition against employment discrimination because of sex, and whether Maryland's display of a war monument in the shape of a cross violates the Establishment Clause. The Court will also likely confront questions about the constitutionality of partisan gerrymandering that remained unresolved in last term's decisions in *Gill v. Whitford* and *Benisek v. Lamone*, arising in North Carolina's appeal from an opinion invalidating the State's congressional redistricting plan. Because the Court has not yet accepted these cases for review, and may not do so, they are also outside the scope of this report.

While none of the questions the Court has already accepted for review is nearly as significant as those raised in the most important cases heard last term, a few cases stand out from the rest and deserve closer attention.

Nondelegation Doctrine

Gundy v. United States

The nondelegation doctrine is the foundation of the administrative state. Under that doctrine, Congress may not delegate legislative authority to the Executive Branch. Congress may, however, delegate broad discretion to administrative agencies to implement the law through binding rules, as long as it supplies an "intelligible principle" for the exercise of that discretion.

In practice, the intelligible principle requirement has not placed a meaningful limitation on Congress's ability to confer discretion on administrative agencies to make decisions that have

vast social and economic consequences. For example, the Court has upheld delegations to the Federal Communications Commission to regulate licensing as "public interest, convenience or necessity" requires, and to the Environmental Protection Agency to set pollution standards "to protect the public health."

In the Court's most recent nondelegation decision, Justice Thomas, in a concurring opinion, expressed doubt that the intelligible principle standard conforms to the original meaning of the Constitution, which vests all "legislative" power in Congress. There are instances, he wrote, "in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than legislative."

In the Sex Offender Registration and Notification Act (SORNA), Congress has tested the limits of the nondelegation doctrine. SORNA requires convicted sex offenders to report their interstate travel to local authorities, and makes noncompliance a crime in certain circumstances. The provision at issue here delegates to the Attorney General (AG) authority "to specify the applicability" of SORNA's reporting requirements to sex offenders convicted before SORNA was enacted. The delegation provision itself provides no standard to govern the AG's exercise of that authority. After SORNA's enactment, the AG made SORNA's reporting requirements applicable to all pre-Act sex offenders.

In *Reynolds v. United States*, the Supreme Court held that Congress had not made SORNA's reporting requirements applicable to pre-ACT offenders, but left that decision to the AG. The Court did not rule on the constitutionality of that delegation. In dissent, Justice Scalia, joined by Justice Ginsburg, expressed doubt that Congress could constitutionally "leave it to the AG to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals." Then-Judge Gorsuch voiced a similar concern in dissenting from en banc review of a SORNA decision in the Tenth Circuit: "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce. Yet, that's precisely the arrangement [SORNA] purports to allow in this case and a great many more like it."

This case presents the question whether SORNA's delegation to the AG violates the nondelegation doctrine. Petitioner Herman Gundy is a pre-Act sex offender convicted of failing to report interstate travel. He makes two arguments that SORNA's delegation to the AG is unconstitutional. First, he argues that it violates the original understanding of the Constitution because it transfers to the AG authority to make generally applicable rules of private conduct, backed by criminal sanctions. Second, he argues that it is unconstitutional because it transfers to the AG rulemaking authority without establishing any intelligible principle for its exercise.

The government's response is twofold: First, it argues that an intelligible principle is apparent from SORNA's expressed purpose of establishing a "comprehensive" national registration system, coupled with evidence that the delegation to the AG reflected congressional concerns that extending coverage to pre-Act offenders could pose practical problems. The government contends that the intelligible principle is therefore to achieve "coverage of pre-Act offenders to the maximum extent feasible." Second, it argues that the Constitution allows Congress to delegate authority to make binding rules backed by criminal sanctions, as long as there is a sufficiently intelligible guiding principle.

The agreement of Justices Scalia, Ginsburg, and Gorsuch that SORNA raises a serious nondelegation problem, and the Court's decision to hear this case notwithstanding the absence of a circuit conflict, make petitioner the favorite to prevail. But the government's brief does a far better job than the circuit courts' decisions in justifying the delegation. So no prediction on the outcome can be made with assurance.

Should the Court rule for petitioner, the significance of the decision will depend on the Court's rationale. If the Court agrees with petitioner that Congress left the coverage question entirely up to the AG's discretion, the decision will have limited significance. There are few, if any, other statutes that delegate authority yet specify no standard at all. But there is at least some chance that this case will prompt a rethinking of the nondelegation doctrine and lead to either a stricter intelligible principle requirement, or even a per se rule against delegation, in some circumstances. If it does, the decision could threaten a far broader swath of administrative regulations.

Competence to be Executed

Madison v. Alabama

The Supreme Court held in *Ford v. Wainwright* that it is cruel and unusual punishment, in violation of the Eighth Amendment, to execute a person who has become incompetent, even if he was fully competent and fully culpable when he committed his crime. In *Panetti v. Quarterman*, the Court clarified that the critical question is whether a person has a "rational understanding" of the State's reason for executing him, not simply whether the person is aware of the State's explanation for putting him to death. The Court therefore allowed Panetti to pursue his claim that psychotic delusions about the State's real reason for executing him rendered him incompetent.

This case raises the question whether it is cruel and unusual to impose the death penalty on a person whose dementia leaves him without any memory of his offense. Petitioner Vernon Madison shot and killed a police officer and was sentenced to death. There is no dispute that he was fully competent when he committed that murder. As a result of a series of strokes, however, Madison now suffers from severe dementia, has no memory of his offense, and does not believe he committed it. The state court determined that Madison was competent notwithstanding his dementia, based on finding that Madison understands both that he was convicted of murder and that the State will put him to death as punishment for that crime.

Madison challenged the state court's ruling in federal court via habeas corpus. A panel of the Eleventh Circuit held that Madison's inability to remember the offense rendered him incompetent, and the Supreme Court summarily reversed. The Court's review was constrained by the Antiterrorism and Effective Death Penalty Act (AEDPA), which prevents a federal habeas court from overturning a state court decision unless it violates clearly established law. The Court held that neither *Ford* nor *Panetti* clearly established that a prisoner is incompetent because he cannot remember his crime. In a concurring opinion, Justice Ginsburg, joined by Justices Breyer and Sotomayor, agreed there was no violation of clearly established law, but stated that the issue whether the State may administer the death penalty to a person whose disability leaves him without memory of his offense is a substantial question that warrants the Court's review in an appropriate case.

That moment has now arrived. Madison returned to state court, and, after losing there, obtained Supreme Court review, which will be unconstrained by AEDPA. He argues that when dementia erases any memory of the offense, that condition precludes a rational understanding of the State's reason for execution.

This is one of the first cases the Court will hear where Justice Kennedy's absence could make a difference. It is not beyond the realm of possibility that Justice Kennedy would have concluded that executing Madison is cruel and unusual. With Justice Kennedy out of the picture, petitioner's chances now seem quite remote. The Court has already held that *Panetti* and *Ford* do not clearly establish that a prisoner is incompetent to be executed because he cannot remember committing the crime. And it seems most unlikely that a majority of the current Court will be prepared to expand the Eighth Amendment's prohibition on executions beyond where *Ford* and *Panetti* have already taken it. Without Justice Kennedy, it is doubtful that the Eighth Amendment will evolve again in favor of a capital defendant any time soon.

Three Requests to Overrule Precedent

The Court has granted certiorari in three cases in which the petitioner has asked the Court to overrule one or more of its decisions. While each is significant in its own right, the three collectively are more important for what they might tell us about the extent to which stare decisis considerations will restrain the current Court from overruling decisions with which it disagrees.

Gamble v. United States

The Fifth Amendment's Double Jeopardy Clause provides that no person shall be twice put in jeopardy "for the same offence." In this case, Alabama prosecuted and convicted petitioner Terance Gamble under State law for being a felon in possession of a firearm. Based on the identical conduct, the United States prosecuted and convicted Gamble for the federal offense of being a felon in possession of a firearm. In ordinary parlance, at least, it sure seems as though Gamble was twice put in jeopardy for the same offense.

Enter something called the dual sovereignty doctrine. Under that doctrine, two prosecutions are not for the same offense when brought by different sovereigns, even when both prosecutions target the identical criminal conduct through equivalent criminal laws. As explained by the Court, "when the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses." This dual sovereignty doctrine has had its detractors. But the Court has repeatedly reaffirmed it. And while the initial articulations preceded incorporation of the Double Jeopardy Clause into the Fourteenth Amendment's Due Process Clause, the Court has reaffirmed the doctrine post-incorporation.

Then came the Court's recent decision in *Puerto Rico v. Sanchez Valle.* In a concurring opinion in that case, Justice Ginsburg, joined by Justice Thomas, stated that the dual sovereignty doctrine "bears fresh examination in an appropriate case." With that right-left pair calling for reconsideration of the dual sovereignty doctrine, it was only a matter of time until the Court decided to revisit the issue.

That time has now come. Petitioner's case for rejecting the dual sovereignty doctrine is a blend of originalism and purposivism. The text of the clause, petitioner argues, bars two

prosecutions for the same crime, regardless of the source of the prosecution. The English experience, he argues, confirms that understanding. An acquittal in Whales, for example, barred a prosecution in England. The purposes of the Clause—to prevent the ordeal of two prosecutions, and to reduce the risk of convicting the innocent—are also fully implicated when separate sovereigns prosecute someone for the same crime.

The government's response is that the Court has heard all this before and has not found it persuasive. The government also argues that the dual sovereignty doctrine flows directly from our constitutional structure, which gives each sovereign independent power to operate in its own sphere. Without the dual sovereignty doctrine, the States would have power to interfere with the legitimate interests of the federal government, and the federal government would have the power to interfere with the legitimate interests of the States.

That structural and practical point poses the biggest obstacle for petitioner. The danger that one sovereign may negate the ability of another to adequately punish a wrongdoer by bringing an insufficiently aggressive prosecution, or by imposing a minimal sentence, is not merely theoretical. Historically, for example, that has been a serious concern with State civil rights and excessive force prosecutions. Whether that is enough to preserve the dual sovereignty doctrine remains to be seen.

Knick v. Township of Scott, PA

In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Court held that a takings claim is not ripe for adjudication in federal court if the property owner has failed to exhaust compensation remedies available in State court. The full implications of that holding did not become apparent until the Court decided *San Remo Hotel v. City & County of San Francisco*. In that case, the Court held that the Full Faith and Credit Statute precludes a property owner who has exhausted his state court remedy from relitigating his takings claim in federal court.

As a result of *San Remo,* what the Court in *Williamson County* characterized as a ripeness ruling is really something different. A holding that a case is not ripe ordinarily means that litigation is premature, not that litigation is foreclosed altogether. And yet the upshot of *Williamson County* and *San Remo* is that a property owner ordinarily may not litigate a takings claim in federal court at all. Before he has exhausted, the claim is premature; after he has exhausted, the claim is barred by the Full Faith and Credit Statute. That result not only calls into question whether *Williamson County* can be defended as a case about ripeness. It also creates an apparently serious anomaly: It would mean that a party is able to bring virtually every kind of constitutional claim, other than a takings claim, in federal court. *Williamson County* therefore arguably reduces takings claims to second-class status, leading some members of the Court to call for reconsideration of that decision.

This case presents the question whether *Willamson County* should be overruled. Now that the Court has granted certiorari to resolve that issue, and now that a majority of the Court is likely to be as sympathetic to takings claims as to any other kind of constitutional claim, the result would appear to be preordained.

The issue, however, is not as easy as it first appears. While *Williamson County* uses the language of ripeness, it also rests on an interpretation of the Takings Clause and of 42 U.S.C. §

1983, the statute that furnishes a federal private cause of action for violations of constitutional rights. The Takings Clause (or Just Compensation Clause) provides that "private property [shall not] be taken for public use, without just compensation." Thus, taking property does not violate the Constitution; only the failure to pay just compensation for a taking does. And under longstanding precedent, payment need not be made contemporaneous with a taking. Instead, the government need only provide an owner with an adequate mechanism for obtaining compensation. When a compensation remedy in State court is available, there is therefore no constitutional violation.

It is of course theoretically possible that a person could sue in federal court even absent a constitutional violation. But Section 1983 does not appear to authorize it. Its text supplies a cause of action only when a person has been subjected to a "deprivation" of a constitutional "right." And in light of the Court's longstanding interpretation of the Takings Clause, it is hard to say how a person has been "deprived" of his "right" to just compensation if the State has supplied an adequate compensation mechanism. That understanding of Section 1983 also provides the answer to the complaint that *Williamson County* reduces takings claims to second-class status. Takings claims are treated like every other Section 1983 claim; a remedy is authorized only when there has been a violation.

There are two possible answers to this defense of *Williamson County*. First, it is possible to argue that the Takings Clause provides a right to immediate compensation for a taking, not simply an adequate remedial mechanism. If so, then Section 1983 would furnish a cause of action the moment property is taken without just compensation. Justice Thomas surfaced this argument in a dissent from the denial of certiorari in an earlier case. But *Williamson County* did not invent the idea that there is no immediate compensation obligation. That has been the law for nearly 130 years. The Solicitor General, who otherwise supports petitioner, has urged the Court to adhere to this aspect of *Williamson County.*

That leaves only the possibility of interpreting Section 1983 to supply a federal cause of action in the absence of a constitutional violation. It is hardly self-evident that Section 1983 is capable of such a reading. A person would seem to be deprived of a constitutional right only when his constitutional rights have been violated. At the very least, that is by far the most natural reading of Section 1983. It may well be that the considerations that led the Court to reconsider *Williamson County* in the first place will cause the Court to reinterpret either the Takings Clause or Section 1983. But the case for doing so is far from overwhelming.

Franchise Tax Board of California v. Hyatt

The Supreme Court has held that States are generally immune from suits by private parties in federal court and in their own courts. There is no provision of the Constitution that expresses that immunity directly. The Eleventh Amendment directly addresses the immunity of States, but only from suits in federal court brought by citizens of a different State. The Court has found more expansive immunity implicit in the structure of the Constitution: Immunity from suit is an inherent aspect of sovereignty that States possessed before the Constitution was adopted, and nothing in the Constitution displaced that inherent aspect of sovereignty.

In *Nevada v. Hall*, however, the Supreme Court held that a State does not have immunity from suit in the courts of another State. The decision rests on the idea that State-to-State

sovereign immunity was a matter of comity before the Constitution was adopted, and nothing in the Constitution transformed that comity-based protection into a constitutionally-based one. This case presents the question whether *Nevada v. Hall* should be overruled. That question was presented to the Court a couple of terms ago, in this very case. Justice Scalia passed after the case was argued, and the Court divided 4-4 on the question, presumably with the right side of the Court voting one way and the left side voting the other.

Assuming there is a full bench when the Court reconsiders the issue, chances are high that *Nevada v. Hall* will not survive. Even when it was decided, *Nevada v. Hall* seemed out of step with the Court's general sovereign immunity jurisprudence. Since then, there has been a steady progression of 5-4 decisions favoring State sovereign immunity in almost every context in which it has arisen. Unless the new Justice has a decidedly different take on sovereign immunity from every other Justice on the right side of the Court, *Nevada v. Hall* will be treated as an anomaly that should be overruled.

Incorporation Doctrine

Timbs v. Indiana

The Eighth Amendment prohibits the imposition of "excessive fines." While the first eight Amendments to the Constitution originally applied only to the federal government, the Supreme Court has held that the Fourteenth Amendment incorporates most rights protected by those Amendments, making them applicable to the States. The incorporation test is whether the right at issue is essential to our scheme of ordered liberty, or deeply rooted in our history and tradition.

The Excessive Fines Clause almost surely meets that test. In fact, the Court has said several times in dicta that the prohibition against excessive fines is incorporated and applicable to the States. Yet because there is no square holding to that effect, the Indiana Supreme Court decided that it would not apply the Excessive Fines Clause in Indiana. Only a mandate from the U.S. Supreme Court, it said, would make it do so.

Without much question, the Supreme Court will unanimously impose that mandate. What makes this case potentially interesting is how it will do so. Until now, the Court has relied on the Fourteenth Amendment's Due Process Clause as the mechanism of incorporation. For constitutional originalists, however, lodging incorporation there is impossible. For them, the notion that due process could protect anything other than "process" is a linguistic non-starter. Equally significant, once loosed from its procedural moorings, the Due Process Clause, in their view, has become the repository of substantive rights that the Constitution could not possibly have meant to protect, including the right to reproductive choice recognized in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

In the last incorporation case, involving the Second Amendment right to bear arms, all but Justice Thomas signed on to the Due Process Clause as the source for incorporation. Justice Thomas would have repudiated substantive due process, at least for unresolved questions of incorporation, and instead grounded incorporation in the Privileges and Immunities Clause.

Since that decision, Justice Scalia's seat is now occupied by Justice Gorsuch, a more thoroughgoing originalist than his predecessor. And by the time the Court decides this case, another originalist or quasi-originalist presumably will have replaced Justice Kennedy, who was the opposite of an originalist. That new mix of Justices could provoke a more vigorous debate about the source of incorporation. Or the case could turn into a stare decisis nothingburger on the issue of incorporation.

A holding that the Excessive Fines Clause is incorporated, however, will have significant practical impact in either event. State and local governments lacking the tax dollars to support government operations have increasingly resorted to property forfeiture to expand public coffers. A decision incorporating the Excessive Fines Clause can be expected to trigger a new wave of challenges to that practice under the Eighth Amendment.

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Constitutional Law

Article I – Nondelegation Doctrine

Gundy v. United States (17-6086)

Question Presented:

Whether [the Sex Offender Registration and Notification Act's] delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine.

Summary:

The Sex Offender Registration and Notification Act (SORNA) requires a convicted sex offender to register and keep his registration current in each jurisdiction in which he resides. SORNA imposes criminal liability on a person who is required to register, travels in interstate commerce, and fails to update his registration. SORNA delegated to the Attorney General (AG) authority to specify the applicability of its registration requirements to sex offenders convicted before SORNA's enactment. Pursuant to that authority, the AG specified that the registration requirements shall apply to all such sex offenders. Under the nondelegation doctrine, Congress may not delegate legislative power to the executive branch unless, at a minimum, it supplies an "intelligible principle" to guide the executive's action. The question in this case is whether SORNA's delegation to the AG violates the nondelegation doctrine.

Petitioner Herman Gundy was convicted of a sex offense before SORNA's enactment. After the AG made SORNA's requirements applicable to persons convicted before enactment, petitioner traveled from Pennsylvania to New York without updating his registration as required by SORNA, and was subsequently convicted of that offense. The district court rejected petitioner's claim that SORNA's delegation of authority to the AG violated the nondelegation doctrine.

The Second Circuit affirmed, holding, in reliance on its prior precedent, that SORNA's delegation of authority to the AG did not violate the nondelegation doctrine. In that prior decision, the Second Circuit reasoned that Congress sufficiently constrained the AG's exercise of authority by determining the crimes requiring registration, the information needed to register, and the penalties for nonregistration, leaving to the AG only the applicability of SORNA to a limited group of individuals.

Petitioner contends that SORNA's delegation of authority to the AG violates the original understanding of the nondelegation doctrine because it transfers to the executive branch the power to make generally applicable rules of private conduct, backed by criminal sanctions. In the alternative, petitioner contends that the delegation violates the modern understanding of the nondelegation doctrine because it fails to set forth any intelligible principle to guide the AG's exercise of authority. In particular, petitioner argues that SORNA includes no directive to the AG on whether he should make any pre-act offenders register, which offenders should be required to register, or even what factors should be considered in deciding those questions.

Decision Below:

695 Fed.Appx. 639 (2d Cir. 2017)

Petitioner's Counsel of Record:

Sarah Baumgartel, Federal Defenders of New York, Inc.

Respondent's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

Article VI – Supremacy Clause: Preemption

Merck Sharp & Dohme Corp. v. Albrecht (17-290)

Question Presented:

Is a state-law failure-to-warn claim preempted when the [Food and Drug Administration (FDA)] rejected the drug manufacturer's proposal to warn about the risk after being provided with the relevant scientific data; or must such a case go to a jury for conjecture as to why the FDA rejected the proposed warning?

Summary:

In *Wyeth v. Levine*, the Supreme Court held that the Food and Drug Administration's (FDA's) approval of a drug label does not preempt a state failure-to-warn claim unless there is clear evidence that the FDA would not have approved the label allegedly required by state law. The question presented is whether a claim based on a failure to warn for a particular risk is preempted when a manufacturer brings that risk to the FDA's attention and the FDA rejects the manufacturer's proposed warning to address that risk.

Petitioner Merck manufactures Fosamax, a drug that treats osteoporosis in women. In response to developing data on an association between Fosamax and atypical femoral fractures, Merck proposed a label change to warn of the occurrence of low energy femoral fractures, some of which were "stress fractures." The FDA rejected the proposed change, stating that stress fractures may not be clearly related to the atypical fractures reported in the literature. In response to a later task force report, the FDA subsequently required Merck to warn of a risk of atypical femoral fractures. Doris Albrecht and others who had taken Fosamax (respondents) brought state tort failure-to-warn claims against Merck, alleging that Merck should have warned of the risk of atypical femoral fractures before the FDA required the label change. Merck moved for summary judgment, arguing that the FDA's rejection of Merck's proposed label change preempted failure-to-warn claims for injuries that occurred before the date of the task force report. The district court granted the motion.

The Third Circuit reversed. It held that a failure-to-warn claim is preempted only when there is clear and convincing evidence the FDA would not have approved a change to the label, and that this issue is ordinarily a factual question for the jury rather than a legal question for the court. The court further concluded that the question whether the FDA's rejection of Merck's proposed label change constituted clear and convincing evidence could not be resolved on summary judgment because a jury could reasonably conclude that the rejection was based on the FDA's dissatisfaction with the label's use of the term "stress fracture," rather than the absence of a causal connection between Fosamax and atypical femoral fractures.

Petitioner argues that when a manufacturer brings a risk to the FDA's attention and the FDA rejects the manufacturer's proposed warning to address the risk, claims based on the failure to warn for that risk are preempted as a matter of law. Requiring clear and convincing evidence of the precise reason that the FDA rejected the proposed label change, petitioner argues, would effectively eliminate preemption as a defense at the summary judgment stage and invite juries to reject preemption based on conjecture.

Decision Below:

852 F.3d. 268 (3d Cir. 2017)

Petitioner's Counsel of Record:

Shay Dvoretzky, Jones Day

Respondents' Counsel of Record:
David C. Frederick, Kellogg, Hansen, Todd, Figel & Frederick, PLLC

Virginia Uranium, Inc. v. Warren, (16-1275)
Question Presented:

Does the [Atomic Energy Act] preempt a state law that on its face regulates an activity within its jurisdiction (here uranium mining), but has the purpose and effect of regulating the radiological safety hazards of activities entrusted to the [Nuclear Regulatory Commission] (here, the milling of uranium and the management of the resulting tailings)?

Summary:

The Atomic Energy Act (AEA) establishes a scheme for the regulation of nuclear power. The AEA gives the Nuclear Regulatory Commission (NRC) authority to license acquisition, transfer, and use of nuclear materials. The AEA preserves state authority to regulate "activities for purposes other than protection against radiation hazards." The question presented is whether the AEA preempts a state law that facially prohibits activities that are not federally regulated (here uranium mining), when the law is based on radiological safety concerns about activities that are federally regulated (here the milling of uranium and disposal of tailings).

Virginia enacted a ban on the mining of uranium deposits out of concern that milling uranium and the disposal of tailings would pose radiation hazards. That ban prevents petitioners from mining its uranium deposits. Petitioners brought suit in federal district court to enjoin enforcement of the ban on the ground that it is preempted by the AEA. The district court granted Virginia's motion to dismiss.

The Fourth Circuit affirmed. The court held that because uranium mining is not a federally regulated activity under the AEA, a state law banning such mining is not preempted, regardless of its motivation. The court acknowledged that uranium milling and tailing storage are federally regulated activities, and the state therefore may not regulate those activities based on a concern about their radiation hazards. But it concluded that Virginia's ban does not run afoul of that prohibition, because that law facially regulates only uranium mining.

Petitioners argue that a state law that otherwise falls within the state's authority is preempted by the AEA when the motivation for the law is to prevent federally regulated activities based on radiological safety concerns. Because the purpose of Virginia's ban on mining was to prevent the federally regulated activities of milling of uranium and disposal of tailings based on concerns about their radiation hazards, petitioners argue, the state law is preempted.

Decision Below:
848 F.3d 590 (4th Cir. 2017)
Petitioners' Counsel of Record:
Charles Justin Cooper, Cooper & Kirk, PLLC
Respondents' Counsel of Record:
Toby Jay Heytens, Office of the Attorney General of Virginia

Fifth Amendment – Double Jeopardy Clause

Gamble v. United States (17-646)
Question Presented:

Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.

Summary:

The Fifth Amendment Double Jeopardy Clause prohibits putting a person in jeopardy twice for the "same offense." The Supreme Court has held that that the Double Jeopardy Clause does not prohibit successive prosecutions by separate sovereigns for the same criminal conduct because transgressions against the laws of separate sovereigns do not constitute the "same offense." The question presented is whether the Court should overrule the "separate sovereigns" doctrine.

Alabama prosecuted petitioner Terance Martez Gamble for the state crime of being a felon in possession of a firearm. Based on that same incident, the federal government subsequently charged petitioner with the federal crime of being a felon in possession of a firearm. Petitioner moved to dismiss his federal prosecution based on the Double Jeopardy Clause. The district court denied the motion.

The Eleventh Circuit affirmed. It held that successive prosecutions by state and federal prosecutors for the same conduct does not violate the Double Jeopardy Clause. It reasoned that the "separate sovereigns" doctrine remains good law unless and until the Supreme Court overrules it.

Petitioner argues that the separate sovereigns doctrine should be overruled. Petitioner contends that the text of the Double Jeopardy Clause unambiguously forbids successive prosecutions for the same criminal act, regardless of the identity of the prosecuting authority. Petitioner further argues that the Clause embodies English precedent predating the Constitution under which an acquittal or conviction abroad barred a subsequent prosecution in England for the same crime. Finally, petitioner argues that the dual sovereign doctrine conflicts with the Double Jeopardy Clause's purpose of shielding persons from the ordeal of multiple prosecutions for the same crime.

Decision Below:

694 Fed.Appx. 750 (11th Cir. 2017)

Petitioner's Counsel of Record:

Louis A. Chaiten, Jones Day

Respondent's Counsel of Record:

Jeffrey Bryan Wall, Principle Deputy Solicitor General of the United States

Fifth Amendment – Takings Clause

Knick v. Township of Scott, PA (17-647)

Question Presented:

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court.

Summary:

The Fifth Amendment provides that private property may not "be taken for public use, without just compensation." In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court held that a takings claim in federal court is not ripe until a property owner has exhausted available state law compensation remedies. The question presented in this case is whether that aspect of *Williamson* should be overruled.

The Township of Scott, Pennsylvania enacted an ordinance specifying that an owner whose property contains a cemetery must allow public access during daylight hours. Petitioner

Rose Mary Knick challenged the ordinance as a taking in state court, but the court dismissed the claim as premature. Petitioner then filed suit in federal court challenging the ordinance as a taking. The district court dismissed the claim.

The Third Circuit affirmed. The court held that, under *Williamson*, a takings claim is not ripe until a property owner has exhausted available state court compensation remedies. Because petitioner failed to exhaust an available compensation remedy, the court concluded, petitioner's federal claim was not ripe.

Petitioner contends that *Willamson* should be overruled insofar as it requires a property owner to exhaust state compensation remedies before bringing a federal suit. Petitioner argues that, rather than serving ripeness purposes, *Williamson* effectively bars a property owner from ever bringing a takings claim in federal court. If filed before exhaustion, the suit will be dismissed as unripe; if filed after a state decision, the suit will be dismissed on preclusion grounds. That result, petitioner argues, conflicts with Section 1983's purpose of affording a federal forum for all federal claims. Finally, petitioner argues that because the essence of a takings claim is that property has been taken, not that the government has failed to pay compensation, a takings claim is ripe when property is taken.

Decision Below:
862 F.3d 310 (3d Cir. 2017)
Petitioner's Counsel of Record:
J. David Breemer, Pacific Legal Foundation
Respondents' Counsel of Record:
Teresa Ficken Sachs, Marshall Dennehey Warner Coleman and Goggin

First Amendment – Retaliation

Nieves v. Bartlett (17-1174)
Question Presented:

Does probable cause … defeat a First Amendment retaliatory-arrest claim under [42 U.S.C.] § 1983?

Summary:

The First Amendment prohibits a state officer from arresting a person in retaliation for that person having exercised his First Amendment rights. Under 42 U.S.C. § 1983, a state official is generally subject to liability for subjecting a person to a violation of his constitutional rights. In *Hartman v. Moore*, the Supreme Court held that probable cause defeats a First Amendment retaliatory-prosecution claim under Section 1983. The question presented is whether probable cause also defeats a First Amendment retaliatory-arrest claim under Section 1983.

In the course of patrolling a large outdoor party, Officers Luis Nieves and Bryce Weight (petitioners) approached respondent Russell Bartlett, who refused to speak to them. When one of the officers went to question a minor, respondent loudly demanded that the officer stop talking to the minor. Petitioners then arrested respondent for disorderly conduct and harassment. After the arrest, one of the officers allegedly told respondent he bet he wished he had talked to him now. Respondent filed suit in federal court, alleging that petitioners had arrested him in retaliation for his having exercised his First Amendment rights. The district court granted summary judgment for petitioners.

The Ninth Circuit reversed and remanded, holding that respondent had introduced sufficient evidence to support a First Amendment retaliatory-arrest claim. The court concluded

that there was probable cause to support the arrest of respondent. Relying on prior precedent, however, the court held that the existence of probable cause does not automatically defeat a retaliatory arrest claim. A plaintiff may succeed on a retaliatory arrest claim, the court concluded, when, as here, there is sufficient evidence that an officer's retaliatory motive was a but-for cause for the arrest.

Petitioners contend that the existence of probable cause defeats a First Amendment retaliatory-arrest claim. Petitioners argue that the holding in *Hartman* that probable cause defeats a retaliatory-prosecution claim is also applicable to retaliatory-arrest claims.

Decision Below:
712 Fed. Appx. 613 (9th Cir. 2017)
Petitioners' Counsel of Record:
Dario Borghesan, State of Alaska Department of Law
Respondent's Counsel of Record:
Barbara Schuhmann, CSG, Inc.

Eighth Amendment – Cruel and Unusual Punishment

***Bucklew v. Precythe*,** (17-8151)
Questions Presented:

(1) Should a court evaluating an as-applied challenge to a state's method of execution based on an inmate's rare and severe medical condition assume that medical personnel are competent to manage his condition and that the procedure will go as intended?

(2) Must evidence comparing a state's proposed method of execution with an alternative proposed by an inmate be offered via a single witness, or should a court at summary judgment look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate?

(3) Does the Eighth Amendment require an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition?

(4) Whether petitioner met his burden under *Glossip v. Gross*, 576 U.S. __ (2015) to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the state's method of execution.

Summary:

In *Glossip v. Gross*, the Supreme Court held that an inmate challenging his method of execution must establish not only that the State's method of execution is very likely to cause severe pain (severe pain requirement), but also that there is an alternative method that significantly reduces the risk of pain (alternative procedure requirement). The questions presented are: (1) whether, in an as-applied challenge based on a rare medical condition, a court may assume medical personnel are competent and the procedure will go as intended; (2) whether an inmate must introduce comparative evidence through a single witness; (3) whether an inmate making an as-applied challenge based on a rare medical condition may establish an Eighth Amendment claim without satisfying the alternative procedure requirement; and (4) whether petitioner satisfied the alternative procedure requirement.

Petitioner Russell Bucklew was convicted of first degree murder and sentenced to death. The State plans to use a lethal injection of pentobarbital to execute him. Because petitioner has tumors in his throat that periodically rupture, injecting petitioner with pentobarbital will cause

severe choking and suffocation. Petitioner challenged his method of execution on that basis, but the district court granted summary judgment in favor of the State.

The Eighth Circuit affirmed. The court first held that *Glossip's* two requirements apply to all method of execution claims, including ones based on rare medical conditions. The court next held that while petitioner satisfied the severe pain requirement, he failed to satisfy the alternative procedure requirement. The court reasoned that petitioner's expert failed to compare the degree of choking and suffocation associated with lethal injection with that of lethal gas. The court also dismissed petitioner's concern that medical personnel lacked the qualifications to safely access his veins, on the ground that a court must assume medical personnel are competent and the procedure will go as planned.

Petitioner argues that when evaluating an as-applied method of execution claim based on a rare medical condition, courts may not assume that medical personnel are qualified and that the execution will go as intended. Petitioner also argues that the usual summary judgment standard applies to methods of execution claims, and that a challenger therefore need not provide comparative evidence through a single witness. Finally, petitioner argues that an inmate making an as-applied challenge based on a rare medical condition can establish an Eighth Amendment claim without satisfying *Glossip's* alternative procedure requirement.

Decision Below:
883 F.3d 1087 (8th Cir. 2018)

Petitioner's Counsel of Record:
Robert N. Hochman, Sidley Austin, LLP

Respondents' Counsel of Record:
D. John Sauer, Office of the Attorney General of Missouri

Madison v. Alabama (17-7505)

Questions Presented:

(1) Consistent with the Eighth Amendment, and this Court's decisions in [*Ford v. Wainwright*] and [*Panetti v. Quarterman*], may the State execute a prisoner whose mental isability leaves him without memory of his commission of the capital offense?

(2) Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?

Summary:

In *Ford v. Wainwright* and *Panetti v. Quarterman*, the Supreme Court held that executing a person who is incompetent at the time of execution violates the Eighth Amendment. The question presented is whether a person is incompetent when vascular dementia leaves him without any memory of committing the offense.

Petitioner Vernon Madison committed murder, was sentenced to death, and has been on death row for 30 years. As a result of a series of strokes, petitioner now suffers from vascular dementia and does not remember his crime. Petitioner challenged his competency to be executed in state court. The court denied relief on the ground that, notwithstanding petitioner's memory loss, he recognizes that he will be put to death as punishment for the murder he was found to have committed.

On habeas, a federal district court denied relief, but the Eleventh Circuit reversed, holding that petitioner's lack of memory of his crime rendered him incompetent. The Supreme

Court reversed, holding that the state court did not unreasonably apply *Panetti* and *Ford*, making relief unavailable under AEDPA. Petitioner returned to state court, which denied a stay of execution on the ground that petitioner failed to make a substantial threshold showing of incompetency.

Petitioner argues that a person who has no memory of his offense is incompetent to be executed because such a person cannot rationally understand why he is being executed. Petitioner further argues that when a person lacks memory of his offense, his execution fails to serve a retributive or deterrent purpose and offends societal standards of decency.

Decision Below:
No. CC-1985-001385.80 (Circuit Court of Alabama, Mobile County, 2018)

Petitioner's Counsel of Record:
Bryan A. Stevenson, Equal Justice Initiative

Respondent's Counsel of Record:
Andrew L. Brasher, Office of the Alabama Attorney General

Eighth Amendment – Excessive Fines

Timbs v. Indiana (17-1091)

Question Presented:

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

Summary:

The Eighth Amendment prohibits the imposition of "excessive fines." While the first eight Amendments to the Constitution originally applied only to the federal government, the Supreme Court has held that the Fourteenth Amendment incorporates most rights protected by those Amendments, making them applicable to the States. A right is incorporated when it is essential to our scheme of ordered liberty and deeply rooted in our history and tradition. The question presented is whether the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause.

Petitioner Tyson Timbs purchased a Land Rover and used it to buy and transport heroin. Petitioner subsequently sold heroin to undercover agents. Petitioner pleaded guilty to dealing a controlled substance and conspiring to commit theft, and was sentenced to home detention for one year, and probation for five. He also agreed to pay various costs. Based on his illegal use of the car, the State then sought to forfeit the Land Rover. The district court denied the forfeiture on the ground that it would be an excessive fine. The Indiana Court of Appeals affirmed.

The Indiana Supreme Court reversed, holding that the Fourteenth Amendment does not incorporate the Eighth Amendment's Excessive Fines Clause. The court concluded that no decision of the Supreme Court authoritatively holds that the Fourteenth Amendment incorporates the Excessive Fines Clause, and that statements to that effect in the Court's decisions are dicta. The court stated that it would not impose the Excessive Fines Clause on Indiana unless mandated to do so by the Supreme Court.

Petitioner argues that the Fourteenth Amendment incorporates the Excessive Fines Clause because it is fundamental to ordered liberty and deeply rooted in the nation's history and tradition. Petitioner also argues that the Court has already incorporated the Eighth Amendment's protections against excessive bail and cruel and unusual punishment, and that the Excessive Fines Clause was intended to work together with those two protections to prevent excessive punishment. Finally, petitioner argues that the Excessive Fines Clause was intended to

counteract the sovereign impulse to use the courts to extract large payments or forfeitures for the purpose of raising revenue or disabling individuals, and that this animating concern applies as much to state and local governments as to the federal government.

Decision Below:
84 N.E.3d 1179 (Ind. 2017)

Petitioner's Counsel of Record:
Wesley Patrick Hottot, Institute for Justice

Respondent's Counsel of Record:
Thomas M. Fisher, Office of the Indiana Attorney General

Sixth Amendment – Assistance of Counsel

Garza v. Idaho, (17-1026)

Question Presented:

Does the "presumption of prejudice" recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

Summary:

In *Strickland v. Washington*, the Supreme Court held that to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. In *Roe v. Flores-Ortega*, the Supreme Court held that prejudice is presumed when defense counsel's deficient performance in failing to file a notice of appeal deprives the defendant of an appeal that he otherwise would have taken. The question presented is whether a presumption of prejudice applies when counsel fails to file an appeal despite his client's instructions to do so because his client waived his right to appeal.

Petitioner Gilberto Garza, Jr. pleaded guilty to aggravated assault and possession of a controlled substance. Both plea agreements included a provision stating that petitioner waived his right to appeal. After sentencing, petitioner directed his counsel to file a notice of appeal, but counsel failed to do so. Petitioner then filed a motion for post-conviction relief in state court, asserting ineffective assistance of counsel. The court denied the claim, and the Court of Appeals of Idaho affirmed.

The Supreme Court of Idaho affirmed. The court held when a defendant enters a plea agreement that waives his right to appeal, counsel's failure to appeal does not result in a presumption of prejudice. The court reasoned that *Flores-Ortega's* presumption of prejudice depends a defendant having a right to appeal, and that a defendant who signs an appeal waiver has no such right. Because defendant failed to show a non-frivolous basis for appeal, the court concluded that no actual prejudice was established.

Petitioner argues that when counsel fails to follow specific instructions to appeal, prejudice is presumed notwithstanding a defendant's waiver of his right to appeal. Petitioner contends that even the broadest waiver leaves open issues relating to the voluntariness of the plea, ineffectiveness of counsel during the plea process, and the legality of sentencing, and that it would be inequitable to require an uncounseled defendant to show prejudice by demonstrating a non-frivolous basis for appeal on one of those grounds.

Decision Below:
405 P.3d 576 (Idaho 2017)

Petitioner's Counsel of Record:
Amir H. Ali, Roderick & Solange MacArthur Justice Center
Respondent's Counsel of Record:
Kenneth K. Jorgensen, Office of Attorney General of Idaho

State Sovereign Immunity

Franchise Tax Board of California v. Hyatt (17-1299)
Question Presented:

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

Summary:

In *Nevada v. Hall*, the Supreme Court held that the Constitution does not grant the States sovereign immunity from suit in the courts of other States. The question presented is whether *Nevada v. Hall* should be overruled.

The Franchise Tax Board of California (petitioner) assessed respondent Gilbert Hyatt $10 million in taxes. Respondent sued petitioner in Nevada state court, alleging that petitioner engaged in abusive auditing and investigative practices. After a trial, respondent was awarded damages exceeding $490 million. The Nevada Supreme Court affirmed in part and reversed in part, rejecting petitioner's contention that it was entitled to the same limit on damages as Nevada agencies.

The Supreme Court reversed and remanded. The Court divided 4-4 on the principal question presented – whether *Nevada v. Hall* should be overruled. A majority of the Court agreed, however, that the Full Faith and Credit Clause requires Nevada to extend to California agencies the same limits on damages that it extends to Nevada agencies. On remand, the Nevada Supreme Court modified its previous opinion to conform to that holding.

Petitioner argues that *Hall* should be overruled. Petitioner contends that before adoption of the Constitution, it was widely accepted that States enjoyed sovereign immunity from suit in each other's courts. Petitioner further argues that the Constitution did not abrogate this conception of state sovereignty. Finally, petitioner argues that the Court's decisions on State sovereign immunity since *Hall* have undermined the basis for that decision.

Decision Below:
407 P.3d 717 (Nev. 2017)
Petitioner's Counsel of Record:
Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP
Respondent's Counsel of Record:
Erwin Chemerinsky, University of California, Berkeley School of Law

Criminal Law

Armed Career Criminal Act

Stokeling v. United States (17-5554)
Question Presented:

Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense

that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

Summary:

The Armed Career Criminal Act (ACCA) increases the sentence of a person who has previously committed three or more violent felonies. The ACCA defines "violent felony" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." The Supreme Court has interpreted "physical force" to mean "violent force." Florida law defines robbery as the taking of property from another through "the use of force, violence, assault, or putting in fear," and Florida courts have interpreted "the use of force" to encompass any use of force that is sufficient to overcome the victim's resistance. The question in this case is whether force sufficient to overcome a victim's resistance necessarily constitutes "violent force" within the meaning of the ACCA.

Petitioner Denard Stokeling was convicted of possession of a firearm and ammunition by a convicted felon. Petitioner had three prior convictions, including one for robbery under Florida law. The district court refused to enhance petitioner's sentence under the ACCA on the ground that petitioner's Florida law robbery did not constitute a violent felony.

The Eleventh Circuit reversed, holding that robbery under Florida law categorically qualifies as a violent felony under the ACCA. The court of appeals acknowledged that any use of force that is sufficient to overcome resistance qualifies as robbery under Florida law. But it concluded that force sufficient to overcome resistance necessarily constitutes "violent force" within the meaning of the ACCA.

Petitioner argues that robbery statutes that permit conviction based on any use of force that overcomes a victim's resistance do not require proof of "violent force" and therefore do not qualify as violent felonies under the ACCA. Petitioner contends that "violent force" means a substantial degree of force, and therefore is not satisfied by minimal force, such as bumping, grabbing, or peeling fingers, simply because such force is sufficient to overcome a victim's resistance. Because Florida's robbery statute permits convictions based on such modest uses of force, petitioner contends, it does not qualify as a violent felony under the ACCA.

Decision Below:

684 Fed.Appx. 870 (11th Cir. 2017)

Petitioner's Counsel of Record:

Brenda G. Bryn, Assistant Federal Public Defender

Respondent's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

United States v. Sims (17-766)

Question Presented:

Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

Summary:

The Armed Career Criminal Act (ACCA) increases the sentence of a defendant who has three or more prior convictions for a violent felony, and defines violent felony to include "burglary." The Supreme Court has interpreted the term "burglary" to mean any unlawful entry into a "building or structure" with intent to commit a crime. With exceptions not relevant here, when a state burglary statute criminalizes conduct that does not meet the ACCA definition, a

conviction under it does not qualify as an ACCA burglary. The Supreme Court has held that state laws that define burglary to include any unlawful entry into a "vehicle" cover more conduct than the ACCA definition because a car is not a "building or structure" within the meaning of the ACCA. The Arkansas burglary statute covers unlawful entry into a vehicle, but only when a person lives there or when it is customarily used for overnight accommodation. The question presented is whether a conviction under a state burglary statute that is so limited qualifies as an ACCA burglary. A similar question is presented in *United States v. Stitt*.

Respondent Jason Sims was convicted of possession of a firearm by a convicted felon. Sims had previously been convicted of four offenses, two of which were under the Arkansas burglary statute, and two of which were concededly for ACCA felonies. The district court enhanced respondent's sentence under the ACCA, rejecting his contention that a conviction under the Arkansas burglary statute does not qualify as an ACCA burglary.

The Eighth Circuit reversed. The court held that a conviction under the Arkansas burglary statute does not qualify as an ACCA burglary. The court reasoned that the Arkansas statute defines burglary more broadly than the ACCA definition because it encompasses entry into vehicles, while the ACCA's definition does not. It makes no difference, the court concluded, that the Arkansas statute limits coverage of vehicles to those in which a person lives and those that are customarily used for overnight accommodation.

The government argues that a vehicle adapted or used for overnight accommodation is a "structure" within the meaning of the ACCA, and a conviction for burglary of such a vehicle therefore qualifies as an ACCA burglary. The government contends that coverage of such burglaries accords with the views of most states that unlawful entry into a residential vehicle is burglary, and with Congress's understanding that invasion of a home is a violent crime. The Court's previous cases, the government argues, addressed only whether unlawful entry into any vehicle qualifies as an ACCA burglary, not whether unlawful entry into a residential vehicle qualifies.

Decision Below:
854 F.3d 1037 (8th Cir. 2017)
Petitioner's Counsel of Record:
Noel J. Francisco, Solicitor General for the United States
Respondent's Counsel of Record:
Jeffrey L. Fisher, Stanford Law School Supreme Court Clinic

United States v. Stitt (17-765)
Question Presented:

Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

Summary:

The Armed Career Criminal Act (ACCA) increases the sentence of a defendant who has three or more prior convictions for a violent felony, and defines violent felony to include "burglary." The Supreme Court has interpreted the term "burglary" to mean any unlawful entry into a "building or structure" with intent to commit a crime. With exceptions not relevant here, when a state burglary statute criminalizes conduct that does not meet the ACCA definition, a conviction under it does not qualify as an ACCA burglary. The Supreme Court has held that state laws defining burglary to include any unlawful entry into a "vehicle" cover more conduct than the ACCA definition because a car is not a "building or structure" within the meaning of

ACCA. The Tennessee burglary statute covers unlawful entry into vehicles (such as mobile homes) and movable enclosures (such as tents) that are adapted for overnight accommodation. The question presented is whether a conviction under a state burglary statute that is so limited qualifies as an ACCA burglary. A similar question is presented in *United States v. Sims*.

Respondent Victor Stitt was convicted of possession of a firearm by a convicted felon. Petitioner had six previous convictions under the Tennessee burglary statute. The district court enhanced petitioner's sentence under the ACCA.

The Sixth Circuit reversed, holding that convictions under the Tennessee burglary statute do not qualify as ACCA burglaries. The court reasoned that the Tennessee statute defines burglary more broadly than the ACCA definition because it encompasses entry into vehicles and movable enclosures, while the ACCA's definition does not. It makes no difference, the court concluded, that the Tennessee statute limits coverage of vehicles and movable enclosures to those that are adapted for overnight accommodation, because the ACCA definition is based on the "form" rather than "purpose" of the structure.

The government argues that a vehicle or movable enclosure that is adapted for overnight accommodation is a "structure" within the meaning of ACCA, and a conviction for burglary of such a vehicle or movable enclosure therefore qualifies as an ACCA burglary. The government contends that ACCA coverage of such burglaries accords with the law in most states that define burglary to include unlawful entry into residential vehicles or movable enclosures, and with Congress's understanding that invasion of a home is a violent crime. The Court's previous cases, the government argues, addressed only whether unlawful entry into any vehicle qualifies as an ACCA burglary, not whether unlawful entries into residential vehicles and movable enclosures qualify.

Decision Below:
860 F.3d 854 (6th Cir. 2017) (en banc)
Petitioner's Counsel of Record:
Noel J. Francisco, Solicitor General for the United States
Respondent's Counsel of Record:
Timothy Carl Ivey, Federal Public Defender, N.D. Ohio

Federal Practice and Procedure

Class Actions

Frank v. Gaos (17-961)
Question Presented:

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."
Summary:

Fed. R. Civ. P. 23 authorizes certification of class actions only when they are "superior" to other methods for adjudicating the controversy. A class action settlement may be approved under Rule 23 only when it is "fair, reasonable, and adequate." A *cy pres* award is a distribution of class proceeds to charities or foundations that will benefit the class indirectly. The question presented is when, if ever, a *cy pres* award is consistent with a finding that a class action is "superior" to other methods of adjudication, and comports with the requirement that a class action settlement must be "fair, reasonable, and adequate."

Respondents Paloma Gaos and others filed a class action suit in federal district court against Google (also a respondent), alleging that Google disclosed their search terms to third-party websites in violation of the Stored Communications Act. The parties reached a settlement that did not provide any direct relief to class members. Instead, the settlement awarded attorneys' fees to class counsel, incentive payments to the named plaintiffs, and the rest to six *cy pres* organizations that would use the funds to promote the protection of Internet privacy. Over petitioners' objections, the district court certified the class and approved the settlement.

The Ninth Circuit affirmed, holding that a court may approve a *cy pres* settlement when distributing the proceeds to all class members would be infeasible. That standard was satisfied, the court explained, because each class member would receive only pennies, and the costs of distribution would exceed the amount of the fund. The court added that the feasibility of an award to some class members does not make a *cy pres* award inappropriate. The court also held that the infeasibility of distributing funds to all class members is consistent with a finding that a class action is superior to other methods of adjudication.

Petitioners contend that a *cy pres* award is not "fair, reasonable and adequate" when it is possible to compensate at least some class members. Some class members could have been compensated in this case, petitioners contend, through a standard claims process that assumed only a small number of class members would make claims or through a lottery. Petitioners further contend that when an award to class members is truly infeasible, class actions are not superior to other forms of litigation and a class therefore may not be certified.

Decision Below:
869 F.3d 737 (9th 2017)
Petitioners' Counsel of Record:
Theodore Harold Frank, Competitive Enterprise Institute
Respondents' Counsel of Record:
Donald Manwell Falk, Mayer Brown LLP

Nutraceutical Corp. v. Lambert (17-1094)
Question Presented:

Did the Ninth Circuit err by holding that equitable exceptions apply to mandatory claim-processing rules and excusing a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the Rule 23(f) deadline?

Summary:

Fed. R. Civ. P. 23(f) is a mandatory claim-processing rule that establishes a 14-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. The courts of appeals agree that filing a motion for reconsideration within the 14-day period tolls that deadline. The question presented is whether equitable exceptions apply to mandatory claim-processing rules so that a party's failure to file a petition for permission to appeal or a motion for reconsideration within the Rule 23(f) deadline can be excused.

Petitioner Nutraceutical sells an energy drink that it promotes as enhancing sexual performance. Respondent Lambert, a purchaser of the product, filled a class action suit against petitioner, alleging state law claims of unfair competition and false advertising. The district court first certified, then decertified the class. Ten days later, Lambert orally informed the court of his intention to move for reconsideration, and the court directed the motion to be filed within 10 days. Respondent filed the motion within that time period, but outside the 14-day deadline for seeking permission to appeal. The court denied the motion. Within fourteen days of that ruling, respondent petitioned for permission to appeal the decertification order.

The Ninth Circuit granted permission to appeal, and reversed and remanded. The court held that the appeal was timely even though respondent's motion for reconsideration and his petition for permission to appeal were filed outside Rule 23(f)'s 14-day deadline. The court reasoned that Rule 23(f) is a mandatory claim-processing rule, that such rules are subject to equitable exceptions, and that such an exception was warranted here.

Petitioner argues that mandatory claim-processing rules in general, and Rule 23(f) in particular, are not subject to equitable exceptions. Petitioner contends that creating equitable exceptions would conflict with the Supreme Court's statement that courts must observe the strict limits of claim-processing rules when they are properly invoked. Petitioner further maintains that such exceptions would violate Fed. R. App. P. 26(b)(1), which prohibits extending deadlines for petitions for permission to appeal, and would thwart Rule 23(f)'s purpose of limiting the delay and disruption associated with interlocutory appeals.

Decision Below:
870 F.3d 1170 (9th Cir. 2017)
Petitioner's Counsel of Record:
John Charles Hueston, Hueston Hennigan LLP
Respondent's Counsel of Record:
Ronald Albert Marron, Law Offices of Ronald A. Marron

Foreign Sovereign Immunity

Jam v. International Finance Corporation (17-1011)
Question Presented:

Whether the International Organizations Immunities Act - which affords international organizations the "same immunity" from suit that foreign governments have, 22 U.S.C. § 288a (b) - confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11.

Summary:

The International Organizations Immunities Act (IOIA) gives international organizations the "same immunity" from suit as is enjoyed by foreign governments. It also gives the President authority to limit the immunity of any international organization. The Foreign Sovereign Immunities Act (FSIA), enacted after the IOIA, provides that foreign governments do not enjoy immunity from suit for their commercial activities in the U.S. The question presented is whether international organizations have the "same immunity" that foreign governments had when the IOIA enacted, or the "same immunity" that foreign governments now have under the FSIA.

Respondent International Finance Corporation (IFC) provided loans for a power plant in India. The operation of the plant caused serious damage to the surrounding community. Indian nationals who live and work near the plant (petitioners) filed suit in federal district court, seeking to hold the IFC liable for the damage. The IFC moved to dismiss, asserting absolute immunity from suit under the IOIA. The district court granted the motion.

The District of Columbia Circuit affirmed, holding that international organizations are entitled to absolute immunity under the IOIA. The court reasoned that the IOIA confers the same absolute immunity that foreign governments enjoyed when the IOIA was enacted, not the narrower immunity that the FSIA confers. Rather than linking the immunity enjoyed by international organizations to congressional changes in the immunity of foreign governments, the court concluded, the IOIA conferred on the President the power to alter the immunity of international organizations.

Petitioners argue that the IOIA confers the same immunity on international organizations that the FSIA confers on foreign governments, not the immunity foreign governments enjoyed when the IOIA was enacted. Petitioners contend that under the reference canon, a statute that incorporates other law by reference incorporates changes in that underlying law. The conferral of power on the President to make changes in immunity, petitioners argue, does not alter that background rule. Petitioners also argue that it would make no sense to confer greater immunity on international organizations than on foreign governments.

Decision Below:
860 F.3d 703 (D.C. Cir. 2017)

Petitioners' Counsel of Record:
Jeffrey L. Fisher, Stanford Law School Supreme Court Clinic

Respondent's Counsel of Record:
Francis A. Vasquez Jr., White & Case LLP

Republic of Sudan v. Harrison (16-1094)

Question Presented:

Whether the Second Circuit erred by holding - in direct conflict with the D.C., Fifth, and Seventh Circuits and in the face of an amicus brief from the United States - that plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs "via" or in "care of" the foreign state's diplomatic mission in the United States, despite U.S. obligations under the Vienna Convention on Diplomatic Relations to preserve mission inviolability.

Summary:

The Foreign Sovereign Immunities Act (FSIA) authorizes service to a foreign state through a mailing "to the head of the ministry of foreign affairs." The Vienna Convention provides that "the premises" of a foreign mission "shall be inviolable." The question presented is whether the FSIA, when read in light of the Vienna Convention, authorizes service to a foreign state through a mailing to its minister of foreign affairs "via" its embassy in the United States.

Respondent Rick Harrison and others injured in the terrorist bombing of the USS Cole sued Sudan in federal district court, alleging that Sudan provided material support to the bombers. Respondents served the complaint through a mailing addressed to the Minister of Foreign Affairs at Sudan's Embassy in Washington, D.C. The court entered a default judgment against Sudan. A different federal district court issued turnover orders against Sudanese banks in partial satisfaction of the judgment.

The Second Circuit affirmed the turnover orders, holding that the FSIA authorized respondents' method of service. The court reasoned that the text of the FSIA specified that service was required on the minister of foreign affairs, but did not specify the location for such service. The court concluded that because service at the embassy could be expected to reach the minister, service at that location complied with the FSIA. The court recognized that the FSIA, when read in light of its legislative history and the Vienna Convention, bars service "on" an embassy. But the court concluded that there was a fundamental distinction between service "on" an embassy and service on a minister of foreign affairs via an embassy.

Petitioner contends that the FSIA requires service on a foreign government through a mailing to the minister of foreign affairs in his home country. Petitioner argues that a requirement to serve the minister of foreign affairs is most naturally read to require service

where he is located. That is particularly true, petitioner argues, given the absence of any language authorizing service on an agent of the minister. Petitioner argues that any ambiguity in the FSIA should be resolved by interpreting it to conform to the Vienna Convention and the legislative history of the FSIA, both of which reject service on an embassy.

Decision Below:
802 F.3d 399 (2d Cir. 2016)
Petitioner's Counsel of Record:
Christopher M. Curran, White & Case LLP
Respondent's Counsel of Record:
Kannon K. Shanmugam, Williams & Connolly LLP

Miscellaneous Business

Antitrust

Apple Inc. v. Pepper (17-204)
Question Presented:

Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense.

Summary:

The Clayton Act provides for treble damages for any person injured "by reason of anything forbidden in the antitrust laws." In *Illinois Brick Co. v. Illinois*, the Supreme Court held that the Act limits recovery of damages to direct purchasers of a product, excluding indirect purchasers who allege that an antitrust violator overcharged a third party, and the third party passed on the overcharge to them. The question presented is whether consumers may sue the distributer of a product for damages when damages exist only if the distributer overcharged third parties and the third parties set their price based on the overcharge.

Petitioner Apple Inc. operates an App Store where iPhone users can purchase apps developed by third parties. Customers who purchase apps submit payment to the App Store, 30% of which goes to Apple, and the rest of which goes to the developer. Purchasers of apps (respondents) filed suit against Apple, alleging it had monopolized the app market, inflating the price of apps. Apple filed a motion to dismiss, asserting that consumers were indirect purchasers and therefore lacked standing to sue. The district court granted Apple's motion.

The Ninth Circuit reversed, holding that respondents directly purchased apps from Apple and therefore had standing to sue. The court reasoned that the question posed by *Illinois Brick* is whether Apple is a distributor from whom consumers purchase apps directly, or whether it is a manufacturer or producer from whom consumers purchase apps indirectly. Because Apple is a distributer from whom consumers purchase Apps directly, the court concluded, consumers have standing to sue.

Apple argues that purchasers of apps do not have standing to sue for damages stemming from Apple's operation of the App Store. Apple contends that the key question under *Illinois Brick* is not whether Apple distributes apps to consumers, but whether the damages that respondents claim depend on a theory of pass-through harm. Respondents rely on such a pass-through theory there, Apple contends, because respondents' claim of damages depends on proof that Apple overcharges developers, and the developers then set their prices based on the overcharge.

Decision Below:
846 F.3d 313 (9th Cir. 2017)
Petitioner's Counsel of Record:
Daniel M. Wall, Latham & Watkins LLP
Respondents' Counsel of Record:
Mark Carl Rifkin, Wolf Haldenstein Adler Freeman & Herz LLP

Arbitration

Henry Schein, Inc. v. Archer and White Sales, Inc. (17-1272)
Question Presented:

Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

Summary:

The Supreme Court has held that the Federal Arbitration Act (FAA) permits parties to an arbitration agreement to delegate to an arbitrator the resolution of questions relating to arbitrability, such as whether the agreement covers a particular dispute. The question presented is whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes that a party's assertion of arbitrability is "wholly groundless."

Petitioners manufacture and distribute dental equipment, and respondent distributed that equipment on behalf of some of them. Petitioners and respondent agreed to arbitrate their disputes in accordance with the rules of the American Arbitration Association. Under those rules, the arbitrator has authority to resolve disputes relating to the scope of the agreement. The agreement also contains a carve-out clause that excludes from arbitration actions seeking injunctive relief. Respondent filed suit in district court seeking damages and injunctive relief based on petitioners' alleged violations of state and federal antitrust laws. Petitioners moved to compel arbitration, but the district court denied the motion.

The Fifth Circuit affirmed. The court assumed without deciding that the agreement delegated to the arbitrator issues relating to arbitrability. It held, however, that even when such a delegation exists, a court may refuse to order arbitration when the assertion of arbitrability is "wholly groundless." Petitioners' assertion of arbitrability was wholly groundless here, the court concluded, because the present dispute fell within the carve-out for actions seeking injunctive relief.

Petitioners argue that when parties agree to delegate questions of arbitrability to an arbitrator, a court must enforce that agreement without inquiring into whether the assertion of arbitrability is wholly groundless. Petitioners argue that the language of the FAA making arbitration agreements "valid" and "enforceable," except on grounds that exist for revoking any contract, requires courts to enforce the terms of the agreement as written. That statutory text, petitioners contend, leaves no room for the court to decline to enforce an agreement delegating arbitrability issues to the arbitrator simply because the court believes that an assertion of arbitrability is wholly groundless.

Decision Below:
878 F.3d 488 (5th Cir. 2017)
Petitioners' Counsel of Record:
Kannon K. Shanmugam, Williams & Connolly LLP

Respondent's Counsel of Record:
Lewis T. LeClair, McKool Smith

Lamps Plus, Inc. v. Varela (17-988)
Question Presented

Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

Summary:

In *Stolt-Nielson, S.A. v. AnimalFeeds International Corp.*, the Supreme Court held that a court may not order class arbitration unless there is a contractual basis for concluding that the parties have agreed to it. The Court further held that a court may not presume consent to class arbitration from the parties' agreement to arbitrate. The question presented is whether, in light of *Stolt-Nielson*, a court may infer consent to class arbitration from broad general language relating to the scope of arbitration, together with the state law rule that ambiguous contracts must be construed against the drafter.

Respondent Varela is an employee of petitioner Lamps Plus. At the beginning of his employment, respondent signed an arbitration agreement. After a data breach resulted in a release of respondent's personal information, respondent filed a class action suit against petitioner in federal district court, asserting various statutory and common law claims. Petitioner moved for individual arbitration, but the district court ordered class arbitration.

The Ninth Circuit affirmed, holding that the arbitration agreement authorized class arbitration. The court reasoned that that the contract was ambiguous on whether it authorized class arbitration, and that state law required that ambiguity to be resolved against the drafter. In reaching the conclusion that the contract was ambiguous, the court referred to provisions specifying that arbitration shall be "in lieu of" any "civil legal proceedings," that arbitrable claims are those that "would have been available to the parties by law," and that the arbitrator may award "any remedy allowed by applicable law."

Petitioner argues that, under *Stolt-Nielson*, consent to class arbitration may not be inferred from provisions that are common in arbitration agreements, and that the provisions on which the court of appeals relied meet that description. Petitioner further argues that because consent to class arbitration may not reasonably be inferred from these provisions, the rule that ambiguous contracts must be read against the drafter is inapplicable.

Decision Below:
701 F. Appx. 670 (9th Cir. 2017)
Petitioners' Counsel of Record:
Andrew J. Pincus, Mayer Brown LLP
Respondent's Counsel of Record:
Michele M. Vercoski, McCune Wright Arevalo

New Prime Inc. v. Oliveira (17-340)
Questions Presented:

(1) Whether a dispute over applicability of the [Federal Arbitration Act's (FAA's)] Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause.

(2) Whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements.

Summary:

The Federal Arbitration Act (FAA) does not apply to "contracts of employment" of interstate truck drivers. The first question presented is whether a dispute over the applicability of that exemption must be resolved by the court or is instead an issue of arbitrability that the parties may delegate to be resolved by the arbitrator. The second question is whether the FAA's exemption of "contracts of employment" applies to agreements with independent contractors.

Petitioner New Prime, Inc., an interstate trucking company, hired respondent Dominic Oliveira as a truck driver. The parties' agreement describes respondent as an independent contractor. The agreement also requires arbitration of workplace disputes, and delegates to the arbitrator issues of arbitrability. Respondent filed a class action suit in federal district court, alleging that petitioner failed to pay minimum wage to truck drivers, in violation of state and federal law. The district court denied petitioner's motion to compel arbitration.

The First Circuit affirmed. The court held that the applicability of the "contracts of employment" exemption is a threshold question to be determined by the court, because it implicates the court's authority to order arbitration under the FAA. The court also held that the "contracts of employment" exemption applies to agreements with independent contractors. The court reasoned that when the FAA was enacted, "contracts of employment" meant any agreement to perform work," including agreements with independent contractors.

Petitioner argues that the applicability of the FAA exemption of "contracts of employment" must be resolved by the arbitrator, because the FAA requires enforcement of the parties' agreement to submit questions of arbitrability to the arbitrator. Petitioner also argues that the "contracts of employment" exemption does not apply to agreements with independent contractors. When the FAA was enacted, petitioner contends, contracts of employment referred to contracts with employees, not contracts with independent contractors.

Decision Below:

857 F.3d 7 (1st Cir. 2017)

Petitioner's Counsel of Record:

Theodore J. Boutrous, Gibson, Dunn & Crutcher, LLP

Respondent's Counsel of Record:

Jennifer D. Bennett, Public Justice

Copyright

Fourth Estate Public Benefit Corp. v. Wall-Street.com (17-571)

Question Presented:

Whether "registration of [a] copyright claim has been made" within the meaning of § 411 (a) [of the Copyright Act] when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, as the Fifth and Ninth Circuits have held, or only once the Copyright Office acts on that application, as the Tenth Circuit and, in the decision below, the Eleventh Circuit have held.

Summary:

The Copyright Act bars the institution of a civil action for copyright infringement "until preregistration or registration of the copyright claim has been made in accordance with this title." The question presented is whether "registration of [a] copyright claim has been made" within the meaning of the Act when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, or only once the Copyright Office acts on the application.

Petitioner Fourth Estate is a news organization that licensed some of its articles to Wall-Street.com. Under the license, Wall-Street agreed that if it canceled its account, it would remove the licensed articles. After cancelling its account, however, Wall-Street continued to display the licensed articles. Petitioner filed suit alleging copyright infringement. Before doing so, it filed applications to register the articles with the Copyright Office, but did not wait for the Office to act on them. Wall-Street moved to dismiss, asserting that the Copyright Office's failure to act precluded suit. The district court granted the motion.

The Eleventh Circuit affirmed, holding that "registration of a copyright claim has been made" only when the Copyright Office acts on an application. The court relied on the language of the Act specifying that the Copyright Office "shall register" the copyright only when, "after examination," it "determines" that the material is copyrightable. That language, the court reasoned, demonstrates that registration occurs when the Copyright Office acts on an application, not when the application has been filed.

Petitioner argues that "registration of [a] copyright claim has been made" when a copyright holder files an application that complies with the procedures for registration. Petitioner notes that all other provisions that use the phrase "make registration" or "registration made" use the term "registration" to refer to actions of the copyright holder. Petitioner therefore argues that while the Act uses the term "registration" in isolation to refer to actions of the Copyright Office, "registration" refers to the actions of the copyright holder when, as here, it is joined with "make" or "made." Finally, petitioner contends that because neither the copyright holder's right to sue nor the copyright holder's remedies depend on the outcome of the examination by the Copyright Office, no purpose is served by requiring a copyright holder to wait to sue until the Office completes its examination.

Decision Below:
856 F.3d 1338 (11th Cir. 2017)

Petitioner's Counsel of Record:
Aaron M. Panner, Kellogg, Hansen, Todd, Figel & Frederick, PLLC

Respondents' Counsel of Record:
Peter K. Stris, Stris & Maher LLP

Patent

Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA Inc. (17-1229)

Question Presented:

Whether, under the Leahy-Smith America Invents Act, an inventor's sale of an invention to a third party that is obligated to keep the invention confidential qualifies as prior art for purposes of determining the patentability of the invention.

Summary:

The America Invents Act (AIA) entitles a person to a patent unless the "the claimed invention" was "in public use, on sale, or otherwise available to the public." The question presented is whether, under the AIA, an inventor's sale of an invention to a third party that is obligated to keep the invention confidential triggers the AIA's "on sale" bar to patentability.

While conducting trials for FDA approval of a new drug, petitioner Helsinn Healthcare sold the drug to MGI Pharma in return for up-front funding for testing and future royalties if the drug received FDA approval. The agreement required MGI to keep the drug's formulations confidential. MGI publicly disclosed the agreement in a filing with the Securities and Exchange Commission, but redacted the drug's formulations. Petitioner ultimately obtained a patent for

the drug. When respondent Teva Pharmaceuticals sought FDA approval to market a generic version of the drug, petitioner brought suit alleging patent infringement. The district court granted judgement in favor of petitioner, rejecting respondent's claim that the sale to MGI triggered the AIA's "on sale" bar.

The Federal Circuit reversed. It held that the AIA's on-sale bar applies when the existence of a sale is made public, even though the details of the invention are not publicly disclosed. The court reasoned that its precedent predating the AIA had treated such sales as triggering the then existing "on sale" bar, and that nothing in the AIA abrogated that precedent.

Petitioner argues that the AIA "on sale" bar to patentability does not apply when a sale is made to a third party obligated to keep the invention confidential. Petitioner contends that, under the series modifier canon, the catchall phrase "or otherwise available to the public" applies to all preceding terms, including the term "on sale." The "on sale" bar therefore applies, petitioner argues, only when a sale discloses the invention to the public, a condition that is not satisfied when the sale requires the invention to be kept confidential.

Decision Below:
855 F.3d 1356 (Fed. Cir. 2017)
Petitioner's Counsel of Record:
Kannon K. Shanmugam, Williams & Connolly LLP
Respondents' Counsel of Record:
Steffen Nathanael Johnson, Winston & Strawn LLP

Tax

BNSF Railway Company v. Loos (17-1042)
Question Presented:

Whether a railroad's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.

Summary:

The Railroad Retirement Tax Act (RRTA) taxes "compensation" of railroad employees, and defines "compensation" as "any form of money remuneration paid to an individual for services rendered." The question presented is whether damage awards for lost wages are "remuneration" for "services rendered" and therefore taxable as "compensation" under the RRTA.

Respondent Michael Loos injured his knee while working for petitioner BNSF Railway Company. Respondent brought suit in federal district court, alleging that petitioner negligently caused his injury. The jury awarded damages for the wages respondent lost while he was injured. Petitioner moved to reduce that award by the amount that would reflect that it was taxable as compensation under the RRTA. The district court denied the motion.

The Eighth Circuit affirmed, holding that damages for lost wages are not taxable as compensation under the RRTA. The court reasoned that because damages for lost wages are remuneration for a period during which an employee did not render services, they cannot be "remuneration" for "services rendered." The court also found it significant that an amendment to the RRTA removed "pay for time lost" from the definition of compensation.

Petitioner contends that lost wages are taxable as compensation under the RRTA. Petitioner relies on the definition of compensation in the Railroad Retirement Act (RRA), which defines compensation to include "remuneration paid for time lost." Because the RRTA taxes

compensation to fund benefits under the RRA, petitioner argues, the two statutes should be interpreted *in pari materia.* At the very least, petitioner argues, the IRS Guidelines interpreting compensation under the RRTA to include payment for time lost is reasonable and therefore entitled to *Chevron* deference.

Decision Below:
865 F.3d 1106 (8th Cir. 2017)

Petitioner's Counsel of Record:
Charles Glaston Cole, Steptoe & Johnson, LLP

Respondent's Counsel of Record:
David C. Frederick, Kellogg, Hansen, Todd, Figel & Frederick

Dawson v. Steager (17-419)

Question Presented:

Whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of certain former state law-enforcement officers, without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service.

Summary:

A federal statute prohibits the imposition of state taxes that discriminate against federal employees "because of the source of the pay or compensation." The Supreme Court has interpreted the statute to embody the doctrine of intergovernmental tax immunity. Under that doctrine, a State may not impose a heavier tax burden on federal employees than on state employees unless the disparate treatment is "justified by significant differences between the two classes." West Virginia allows certain state law enforcement retirees to exempt all retirement benefits from their taxable income, but it permits retired U.S. Marshalls to exempt only a portion of their retirement benefits. The question presented is whether that differential treatment violates the doctrine of intergovernmental tax immunity.

Petitioner James Dawson is a West Virginia taxpayer and retired U.S. Marshal. Relying on the doctrine of intergovernmental tax immunity, petitioner filed a tax return claiming an exemption for all his federal retirement benefits. Respondent West Virginia Tax Commissioner denied petitioner's claim for a complete exemption. The Circuit Court of Mercer County, West Virginia reversed, holding that petitioner was entitled to the full exemption.

The Supreme Court of Appeals of West Virginia reversed, holding that the State's disparate treatment of retired U.S. Marshals and certain state law enforcement retirees did not violate the doctrine of intergovernmental tax immunity. Applying a totality of the circumstances test, the court concluded that the State's intent was not to discriminate against retired U.S. Marshals, but to benefit a narrow class of state retirees. In reaching that conclusion, the court emphasized that retired U.S. Marshals receive a greater tax benefit then some state retirees, and the same benefit as the vast majority of state retirees.

Petitioner argues that West Virginia's differential treatment of retired U.S. Marshals and certain state law enforcement retirees violates the doctrine of intergovernmental tax immunity. Petitioner contends that any disparate treatment of similarly situated state and federal employees violates that doctrine, no matter how small the size of the class of similarly situated state employees. Because retired U.S. Marshals are similarly situated to a class of retired state law enforcement personnel, petitioner argues, the State must afford them the same tax benefits.

Decision Below:
2017 WL 2172006 (W. Va., 2017)
Petitioners' Counsel of Record:
Lawrence David Rosenberg, Jones Day
Respondent's Counsel of Record:
Thomas M. Johnson Jr., Office of the Attorney General of West Virginia

Securities

Lorenzo v. Securities and Exchange Commission (17-1077)
Question Presented:

Whether a misstatement claim [under SEC Rule 10b-5(b)] that does not meet the elements set forth in [*Janus Capital Group, Inc. v. First Derivative Traders*] can be repackaged and pursued as a fraudulent scheme claim.

Summary:

The Securities and Exchange Commission (SEC) has adopted Rules governing securities fraud. Rule 10b-5(b) makes it unlawful "[t]o make" any false statement of material fact. Rule 10b-5(a) makes it unlawful to "employ any device, scheme, or artifice to defraud," and Rule 10b-5(c) makes it unlawful to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." In *Janus Capital Group, Inc. v. First Derivative Traders,* the Supreme Court held that the "maker" of a statement under Rule 10b-5(b) is the person with ultimate authority over its content. The question presented is whether a person who transmits a false statement, but does not have ultimate authority over its content, can be held liable for employing a fraudulent scheme or engaging in an act that operates as a fraud under Rules 10b-5(a) and (c).

Petitioner Francis Lorenzo, an investment banker, sent two emails to potential investors containing misleading statements relating to a debt offering. While petitioner's boss had ultimate authority over the content of the emails, petitioner signed them in his capacity as head of Investment Banking, and urged investors to call him with any questions. The SEC found that petitioner violated Rules 10b-5(a), (b), and (c).

The D.C. Circuit affirmed. The court concluded that because petitioner did not have ultimate authority over the statements, he could not be held liable as the maker of the statements under Rule 10b-5(b). It further held, however, that by transmitting the misleading statements, petitioner violated Rules 10b-5(a) and (c). The court reasoned that, unlike Rule 10b-5(b), neither of those rules requires the "making" of a statement. And it further concluded that petitioner's conduct in transmitting false statements in his capacity as head of Investment Banking fit comfortably within the language of those rules: he both "employ[ed]" a deceptive "device" and "engag[ed]" in an "act" that operated as a fraud.

Petitioner contends that a person may not be held liable under Rules 10b-5(a),and (c) for transmitting false statements. Petitioner argues that misleading statements fall exclusively within the scope of Rule 10b-5(b), and that Rules 10b-5(a) and (c) address deceptive practices other than the use of misleading statements. Petitioner contends that if transmitting misleading statements were sufficient to establish liability under Rules 10b-5(a) and (c), it would eviscerate the holding in *Janus* that only the person with ultimate authority over a statement may be held liable for it under Rule 10b-5(b).

Decision Below:
872 F.3d 578 (D.C. Cir. 2017)
Petitioner's Counsel of Record:
Robert G. Heim, Meyers & Heim LLP
Respondent's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States

Other Public Law

Age Discrimination in Employment Act

Mount Lemmon Fire District v. Guido (17-587)
Question Presented:

Under the Age Discrimination in Employment Act, does the same twenty-employee minimum that applies to private employers also apply to political subdivisions of a State, as the Sixth, Seventh, Eighth, and Tenth Circuits have held, or does the ADEA apply instead to all State political subdivisions of any size, as the Ninth Circuit held in this case?

Summary:

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against employees because of their age. Under the ADEA, the term "employer" means a "person" in an industry affecting interstate commerce who has 20 or more employees. The term "also means" "a State or a political subdivision of a State." A "person" is defined to include "any organized groups of persons." The question presented is whether the 20-employee minimum that is applicable to "persons" in an industry affecting interstate commerce applies to political subdivisions.

Petitioner Mount Lemmon Fire District, a political subdivision of Arizona, terminated the employment of respondents, its two oldest employees. Respondents filed suit in federal district court, alleging impermissible age discrimination under the ADEA. Petitioner sought summary judgment on the ground that it has fewer than 20 employees, and therefore is not covered by the ADEA. The district court granted summary judgment.

The Ninth Circuit reversed, holding that the 20-employee minimum does not apply to political subdivisions. The court reasoned that the term "also" that precedes the inclusion of political subdivisions in the ADEA's definition of "employer" unambiguously establishes a second category of covered employers, distinct from the category of "persons" who have 20 or more employees.

Petitioner argues that political subdivisions are "persons" subject to the ADEA's 20-employee minimum because they are "organized groups of persons" within the meaning of the ADEA's "person" definition. The term "also" that precedes political subdivisions, petitioner argues, does not create a new category of employers, but instead clarifies that persons includes political subdivisions.

Decision Below:
859 F.3d 1168 (9th Cir. 2017)
Petitioner's Counsel of Record:
E. Joshua Rosenkranz, Orrick Herrington & Sutcliffe LLP
Respondent's Counsel of Record:
Don T. Awerkamp, Awerkamp & Bonilla, PLC

Environmental Law

Sturgeon v. Frost (17-949)

Question Presented:

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

Summary:

Congress authorized the National Park Service (NPS) to prescribe regulations concerning boating and other activities on or relating to water located within NPS units, including water subject to the jurisdiction of the United States. Pursuant to that authority, the NPS issued a regulation prohibiting the use of hovercraft on navigable waters within units of the National Park System. An Alaska-specific statute, the Alaska National Interest Lands Conservation Act (ANILCA) restricts the authority of the NPS to "public lands" within the National Park System in Alaska. "Public lands" are defined as lands, waters, and interests therein in which the U.S. has title. The question presented is whether ANILCA precludes the NPS from applying its hovercraft regulation to navigable waters within the National Park System in Alaska.

Petitioner John Sturgeon uses a hovercraft to reach hunting grounds via the Nation River, a navigable water of the U.S. After an NPS ranger warned him that his use of the hovercraft violated federal law, petitioner filed suit challenging the application of the federal hovercraft rule to the Nation River. The district court dismissed the complaint and the Ninth Circuit affirmed, but the Supreme Court reversed and remanded for consideration of whether the Nation River is "public" land and whether the NPS could regulate it even if it were not.

The Ninth Circuit again affirmed, holding that the Nation River is "public land" and therefore subject to federal regulation under ANILCA. The court reasoned that public land includes navigable waters in which the U.S. has reserved water rights, and that the U.S. has reserved water rights in the Nation River. The court acknowledged that the definition of public land is limited to land in which the U.S. has title, and that the U.S. does not have title to navigable waters. But it concluded that, under the reserved water rights doctrine, the U.S. retained a property "interest" in the Nation River, and that this interest was sufficient to make it public lands within the meaning of ANILCA. Two judges concurred on the separate ground that the NPS has authority to regulate navigable waters even if they are not public lands.

Petitioner contends that ANILCA precludes the NPS from applying its hovercraft rule to the Nation River because the Nation River is not public land within the meaning of ANILCA. Petitioner argues that public land is defined to include only property in which the U.S. has title, and that reserved water rights cannot establish title. Petitioner also argues that, as the more specific statute, ANILCA trumps the NPS's more general authority to regulate navigable waters.

Decision Below:

872 F.3d 927 (9th Cir. 2017)

Petitioner's Counsel of Record:

Matthew Todd Findley, Ashburn & Mason, P.C.

Respondents' Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

Weyerhaeuser Company v. United States Fish and Wildlife Service (17-71)

Questions Presented:

(1) Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

(2) Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

Summary:

The Endangered Species Act (ESA) requires the U.S. Fish and Wildlife Service (FWS) to designate any "habitat" of an endangered species, which is then considered to be "critical habitat." Critical habitat may include unoccupied land that is "essential for the conservation of the species." The first question presented is whether the FWS has authority under the ESA to designate unoccupied land as "critical habitat" for a species when the land is not currently habitable by that species. The FWS "may" exclude an area from designation based on economic impact. The second question is whether the FWS's decision not to exclude an area based on economic impact is subject to judicial review.

The FWS designated Unit 1 as critical habitat of the dusky gopher frog based on a finding that the land was essential to conservation of the species. Unit 1 contains ephemeral ponds needed for the frogs to breed, but it lacks other features necessary for the species to thrive. The FWS estimated the cost of designation at nearly $34 million, but declined to exclude Unit 1 on that basis. Petitioner Weyerhaeuser Company and other owners of Unit 1 filed suit in federal district court, challenging the designation. The district court granted summary judgment in favor of the FWS.

The Fifth Circuit affirmed. The court held that a designation of unoccupied land as critical habitat does not require a finding that the land is currently habitable. Instead, the FWS need only find that the unoccupied land is essential for the conservation of the species. The court also held that a decision not to exclude land from designation based on economic impact is not judicially reviewable. The court reasoned that because ESA provides that the FWS "may" exclude an area from designation, that decision is committed to the agency's discretion by law.

Petitioner argues that in order for land to be "critical habitat," it must be "habitat" and in order for land to be "habitat," it must currently contain all features essential for a species to thrive. Because Unit 1 does not currently contain all features essential for the dusky gopher frog to thrive, petitioner argues, the FSW lacked authority to designate it as critical habitat. Petitioner also argues that the FWS's decision not to exclude land from designation based on economic impact is subject to judicial review under the APA's abuse of discretion standard.

Decision Below:

827 F.3d 452 (5th Cir. 2016)

Petitioner's Counsel of Record:

Timothy S. Bishop, Mayer Brown, LLP

Respondents' Counsel of Record:

Noel J. Francisco, Solicitor General of the United States
David Thomas Goldberg, Stanford Law School Supreme Court Litigation Clinic

Fair Debt Collection Practices Act

Obduskey v. McCarthy & Holthus LLP (17-1307)
Question Presented:

Whether the [Fair Debt Collection Practices Act] applies to non-judicial foreclosure proceedings.

Summary:

The Fair Debt Collection Practices Act (FDCPA) imposes certain obligations on debt collectors. The term "debt collector" is defined as "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due . . . another." The question presented is whether the FDCPA applies to non-judicial foreclosure proceedings.

Petitioner Dennis Obduskey obtained a loan to buy a home that was secured by the property. After petitioner defaulted on the loan, Wells Fargo retained the law firm of McCarthy & Holthus LLP (respondent) to foreclose on petitioner's home. Respondent sent petitioner a letter identifying the amount owed and stating that it had been instructed to commence foreclosure proceedings. Petitioner disputed the debt, but respondent nonetheless initiated foreclosure. Petitioner filed suit in federal court, alleging that respondent failed to verify the debt after it was disputed, in violation of the FDCPA. The district court granted respondent's motion to dismiss.

The Tenth Circuit affirmed, holding that the FDCPA does not apply to non-judicial foreclosure proceedings. The court reasoned that the term "debt" in the FDCPA is synonymous with money, so that a person can be a debt collector only if that person is attempting to collect money. The court further concluded that a person initiating non-judicial foreclosure proceedings is not attempting to collect money from the debtor, but is instead seeking to force a sale and to obtain the proceeds from the sale.

Petitioner argues that the FDCPA applies to non-judicial foreclosure proceedings. Petitioner contends that non-judicial foreclosure proceedings are attempts to collect a debt, and that persons who initiate such proceedings therefore fall within the FDCPA's definition of debt collector.

Decision Below:
879 F.3d 1216 (10th Cir. 2018)
Petitioner's Counsel of Record:
Daniel L. Geyser, Geyser P.C.
Respondents' Counsel of Record:
Kannon K. Shanmugam, Williams & Connolly LLP

Immigration and Nationality Act

Nielsen v. Preap (16-1363)
Question Presented:

Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

Summary:

Under the Immigration and Naturalization Act, the Department Homeland Security (DHS) "shall take into custody any alien who" has committed certain criminal or terrorist

offenses "when the alien is released" from criminal custody. 8 U.S.C. 1226(c) (Paragraph 1). Under Paragraph (2) of Section 1226(c), DHS "may release" an alien "described in paragraph (1)" only if the release is necessary to provide protection to a witness. All other aliens "described in Paragraph 1" are subject to mandatory detention. The issue in this case is whether a criminal alien who is not eligible for the witness protection exception is exempt from mandatory detention if DHS fails to take him into custody promptly following his release from criminal custody.

Respondents are lawful permanent residents who committed crimes subjecting them to removal from the United States, served criminal sentences, and were released from criminal custody. Years after their release, DHS placed the named respondents in immigration custody without bond and initiated removal proceedings. Respondents filed a class action for habeas relief on behalf of all aliens not immediately taken into immigration custody after criminal release. The district court certified the class and granted a preliminary injunction, mandating bond hearings for all class members.

The Ninth Circuit affirmed, holding that the mandatory detention provision applies only to those criminal aliens taken into immigration custody promptly after their release from criminal custody. The court reasoned an alien "described in Paragraph 1" unambiguously refers to an alien who committed a covered offense *and* who was taken into immigration custody "when . . . released," and the phrase "when . . . released" unambiguously means promptly following release.

The government argues that a covered criminal alien is subject to mandatory detention regardless of the length of time between criminal and immigration custody. The government argues that "an alien described in Paragraph 1" refers to aliens who have committed one of the criminal offenses covered in Paragraph 1. The phrase "when the alien is released," the government argues, does not "describe" an alien at all, and therefore does not narrow the class of aliens subject to mandatory detention. Any other reading, the government argues, would frustrate Congress's purpose of ensuring that deportable criminal aliens do not continue to engage in crime and fail to appear for removal hearings.

Decision Below:
831 F.3d 1193 (9th Cir. 2016)
Petitioners' Counsel of Record:
Noel J. Francisco, Solicitor General of the United States
Respondents' Counsel of Record:
Michael King Thomas Tan, American Civil Liberties Union Foundation

Indian Law

Carpenter v. Murphy (17-1107)
Question Presented:

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

Summary:

States generally lack jurisdiction over crimes committed by Indians in "Indian country." Federal law defines the term "Indian country" to include any "Indian reservation." The question presented is whether the historic territory of the Creek Nation within the State of Oklahoma remains an Indian reservation, precluding the State from prosecuting a crime committed by an

Indian in that territory.

Respondent Patrick Dwayne Murphy, a member of the Creek Nation, was convicted in Oklahoma state court of the first degree murder of another member of the Creek Nation that occurred within the Creek Nation's historic territory. Respondent was sentenced to death. The state court denied respondent's second motion for post-conviction relief. The Oklahoma Court of Criminal Appeals affirmed, rejecting respondent's contention that the crime occurred in Indian country, and that the State therefore lacked jurisdiction to prosecute him. Respondent then sought habeas relief in federal district court, and the district court denied the petition.

The Tenth Circuit reversed, holding that because Congress failed to disestablish the Creek Nation reservation, Oklahoma did not have jurisdiction to prosecute respondent. On the question of disestablishment, the court applied the three-part framework set forth in the Supreme Court's decision in *Solem v. Bartlett*: (i) the text of the relevant statutes; (ii) the events surrounding their passage; and (iii) subsequent events. The court concluded that no statute contained specific language signaling disestablishment, and that neither the events surrounding passage nor subsequent events unequivocally revealed an intent to disestablish.

The State argues that a series of statutes culminating in Oklahoma's ascent to statehood disestablished the Creek Nation reservation. In particular, the State relies on statutes that dismantled tribal governments and their communal ownership of lands. The State also contends that Congress's transfer of general criminal jurisdiction over the Indian population to Oklahoma is incompatible with the continued existence of a Tribal reservation. The *Solem* framework is inapplicable here, the State argues, because it applies only when Congress opens reservation land within a preexisting State to non-Indian settlement. Finally, the State argues that, in any event, the statutes culminating in statehood and subsequent events satisfy the *Solem* test for disestablishment.

Decision Below:
875 F.3d 896 (10th Cir. 2017)
Petitioner's Counsel of Record:
Lisa S. Blatt, Arnold & Porter Kaye Scholer, LLP
Respondent's Counsel of Record:
Patti Palmer Ghezzi, Federal Public Defender

Herrera v. Wyoming, (17-532)
Question Presented:

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

Summary:

The Crow Treaty provides that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States." The question presented is whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest extinguished the Crow Tribe's right to hunt.

Petitioner Clayvin Herrera is a member of the Crow Tribe and resides on the Tribe's reservation in Montana. While hunting in the Bighorn National Forest, petitioner killed three elk. Wyoming authorities charged petitioner with two misdemeanors for hunting off-season. The Circuit Court denied petitioner's motion to dismiss based on the Treaty, and petitioner was subsequently convicted.

The District Court of Wyoming affirmed. The court held that Wyoming's admission into the Union implicitly extinguished the Tribe's right to hunt. It further held that creation of the Bighorn National Forest resulted in occupation of the land, terminating the right to hunt on that land. The Wyoming Supreme Court denied certiorari.

Petitioner argues that the Supreme Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians* establishes that treaty rights are not impliedly terminated upon statehood. For that reason, petitioner argues, Wyoming's admission to the Union did not abrogate the Crow Tribe's right to hunt. Petitioner also contends that establishment of the Bighorn National Forest did not terminate the Tribe's right to hunt on land within the Forest. Because that establishment "reserved the Forest from entry or settlement," petitioner argues, it maintained the land's "unoccupied" status.

Decision Below:
CV 2016-242 (Wyo. Dist. 2017)
Petitioner's Counsel of Record:
George William Hicks Jr., Kirkland & Ellis LLP
Respondent's Counsel of Record:
Peter K. Michael, Office of the Attorney General of Wyoming

Washington State Department of Licensing v. Cougar Den, Inc., (16-1498)
Question Presented:

Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

Summary:

Article III of the Yakama Nation Treaty of 1855 secures to tribal members "the right, in common with citizens of the United States, to travel upon all public highways." The State of Washington imposes a fuel tax on distributers at the point of intrastate purchase and on importers at the point of entry into the State. The question presented is whether the imposition of the tax on tribal members who import fuel and transport it to the reservation via public highways violates Article III.

Respondent Cougar Den is a corporation owned by a member of the Yakama Nation. Respondent contracts with a trucking company to have fuel transported from Oregon to the Tribe's reservation in Washington via public highways. Respondent did not obtain a fuel importer license or pay the fuel tax. Petitioner Washington State Department of Licensing issued an assessment for 3.6 million dollars in unpaid taxes, penalties, and licensing fees, and its Director affirmed the assessment. On review, the Yakima County Superior Court reversed.

The Supreme Court of Washington affirmed, holding that the assessment of the fuel tax on respondent violated Article III of the Treaty. Based on Article III's historical background, the court concluded that Article III was intended to preserve the right of tribal members to use the highway for trade purposes. That right was directly implicated by the fuel tax, the court concluded, because it was impossible for respondent to import fuel without using public highways.

Petitioner argues that its fuel tax does not violate Article III because its terms protect only the right to travel on the public highways, not the right to engage in tax-free trade. Because the tax applies regardless of whether highways are used, petitioner argues, it is a tax on trade, not a tax on the use of the highways. Finally, petitioner argues that the background of the Treaty cannot override its plain text.

Decision Below:
392 P.3d 1014 (Wash. 2017)
Petitioner's Counsel of Record:
Noah Guzzo Purcell, Office of the Attorney General of Washington
Respondent's Counsel of Record:
Matthew Lane Harrington, Stokes Lawrence, P.S.

Maritime Law

Air and Liquid Systems Corp. v. DeVries (17-1104)
Question Presented:

Can products-liability defendants be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute?

Summary:

In establishing rules of maritime liability, the Supreme Court takes into account general common law principles and the purposes of maritime law. The question in this case is whether, in light of common law principles and maritime purposes, a defendant may be held liable under maritime law for injuries caused by a product only when the defendant makes, sells, or distributes the injury-causing product.

Petitioners manufactured certain devices and sold them to the Navy without insulation. The Navy then purchased asbestos from other manufacturers and added it to the devices as insulation. Two Navy mechanics exposed to the asbestos later contracted lung cancer. The two mechanics (who subsequently died) and their wives (respondents) filed suit in federal district court against petitioners, alleging that petitioners were negligent in failing to warn about the dangers of adding asbestos. The district court dismissed that claim.

The Third Circuit reversed. It held that under maritime law, a manufacturer may be held liable for injuries suffered from later-added asbestos if plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning. The court reasoned that under general common law principles, foreseeability satisfies both the duty and causation elements of common law negligence. The court emphasized that a foreseeability standard would also promote the maritime law purpose of compensating deserving seamen. And it concluded that a foreseeability standard is consistent with maritime law's goals of simplicity, uniformity, and protection of maritime commerce.

Petitioners argue that a defendant may be held liable under maritime law for injuries caused by a product only when it makes, sells, or distributes the product. Only in such circumstances, petitioners argue, may a plaintiff satisfy the common law requirement of causation. Petitioners also contend that a foreseeability standard would thwart maritime law's interests in simplicity, uniformity, and protection of maritime commerce. Finally, petitioners argue that admiralty courts may not expand remedies simply because it might work to the benefit of seamen.

Decision Below:
873 F.3d 232 (3rd Cir. 2017)
Petitioners' Counsel of Record
Shay Dvoretzky, Jones Day
Respondents' Counsel of Record:
Richard Phillips Meyers, Paul, Reich & Myers

Social Security Act

Biestek v. Berryhill (17-1184)

Question Presented:

Whether a vocational expert's testimony can constitute substantial evidence of "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised.

Summary:

When assessing an individual's eligibility for social security disability benefits, an Administrative Law Judge (ALJ) must determine if the applicant "can make an adjustment to other work." That determination must be "supported by substantial evidence." To assist in that determination, the ALJ may call a vocational expert to testify about what work is available to the applicant. The question presented in this case is whether a vocational expert's testimony can constitute substantial evidence of "other work" if the expert does not provide, upon the applicant's request, the underlying data on which that testimony is based.

Petitioner Michael Biestek worked as a carpenter and laborer until he developed lower back pain, at which point he became unemployed. Petitioner applied for disability benefits, and a hearing was held before an ALJ. Based on her knowledge and experience, a vocational expert testified that petitioner could have found alternate employment. Petitioner requested the data underlying the expert's testimony, but the expert refused to provide it, citing confidentiality concerns. The ALJ then denied petitioner's request to require its production. Relying on the vocational expert's testimony, the ALJ denied benefits, and the district court affirmed.

The Sixth Circuit affirmed, holding that an ALJ may rely on the testimony of a vocational expert without requiring the expert to provide the data on which the testimony is based. The court reasoned that Congress exempted social security proceedings from the Federal Rules of Evidence in order to allow consideration of a broader range of information. Requiring a vocational expert to produce underlying data, the court concluded, would effectively impose Fed. R. Evid. 702 on the administrative process in conflict with Congress's intent.

Petitioner contends that, in order to be supported by "substantial evidence," an expert's testimony must have the support of data. Petitioner argues that in no other area of law can an expert's testimony constitute "substantial evidence" if the expert does not supply the underlying data. Finally, petitioner argues that there is no justification for denying an applicant access to the underlying data at least in redacted form.

Decision Below:

880 F.3d 778 (6th Cir. 2017)

Petitioner's Counsel of Record:

Ishan Kharshedji Bhabha, Jenner and Block LLP

Respondent's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

Culbertson v. Berryhill (17-773)

Question Presented:

Whether fees subject to [Social Security Act] § 406(b)'s 25-percent cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court or, as the Fourth, Fifth, and Eleventh Circuits hold, also fees for representation before the agency.

Summary:

The Social Security Act authorizes an award of attorney's fees for representation of individuals claiming benefits. Section 406(a) authorizes the agency to fix "a reasonable fee" when it "makes a determination favorable to the claimant." Section 406(b) specifies that whenever a court "renders a judgment favorable to a claimant," the court may allow a reasonable fee for such representation, "not in excess of 25 percent of the total of the past-due benefits." The question presented is whether Section 406(b)'s 25% cap applies only to fees for representation in court or if the cap also applies to fees for representation before the agency.

Petitioner Richard Culbertson represented Katrina Wood on her claim for Social Security benefits. Petitioner obtained a reversal of an adverse agency determination from the federal district court, and then successfully obtained benefits from the agency. The agency awarded attorneys' fees for petitioner's work before the agency. Petitioner then sought from the district court an additional award for his work in obtaining the reversal of the agency's determination. The court capped the aggregate award for petitioner's representation before the agency and the court at 25% of the benefits.

The Eleventh Circuit affirmed, holding that the 25% cap applies to the aggregate award for representation before the agency and the court. The court based that interpretation on legislative history expressing an intent to protect benefits from being diluted by fee awards of one-third or one-half of the benefits received.

Petitioner contends that the 25% cap applies only to fee awards for representation in court. Petitioner argues that the text of Section 406(b) applies the 25% cap to "such representation," a term that can only refer to the subject matter of that provision – representation before the court. Petitioner further argues that Section 405(a) expressly authorizes a separate award for work before the agency without imposing a 25% cap. The legislative history, petitioner contends, cannot override the unambiguous text. In any event, petitioner argues, allowing a separate reasonable fee for work before the agency that is not subject to the 25% cap furthers Congress's purpose of achieving effective representation while still preventing excessive awards.

Decision Below:

861 F.3d 1197 (11th Cir. 2017)

Petitioner's Counsel of Record:

Daniel Roy Ortiz, University of Virginia School of Law Supreme Court Litigation Clinic

Respondent's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

Court-appointed amicus curiae in support of the judgment below:

Amy Levin Weil, The Weil Firm