A LOOK AHEAD

Supreme Court of the United States October Term 2019

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019 PREVIEW

September 2019

A LOOK AHEAD AT OCTOBER TERM 2019

This report previews the Supreme Court's argument docket for October Term 2019 (OT 2019). The Court has thus far accepted 50 cases for review, including five sets of cases consolidated for one hour of argument, for a total of 40 oral arguments. The Court has calendared nine arguments to be heard in the October argument sitting, and 10 arguments for the November sitting. Assuming the Court schedules another 12 arguments in the December sitting (two arguments on each of six scheduled argument days), the nine remaining arguments will fill most of the January sitting. The current argument docket comprises slightly more than half the cases the Court will decide this Term.

Section I of this Report discusses some especially noteworthy cases the Court will hear. Section II organizes the cases accepted for review into subject-matter categories and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

Altitude Express, Inc. v. Zarda
Bostock v. Clayton County, Georgia

The question in these two cases is whether the prohibition in Title VII against employment discrimination because of sex encompasses discrimination because of sexual orientation. For fifty years, courts of appeals and the EEOC gave the same answer to this question: No. In 2015 the EEOC adopted a different view, raising three distinct theories to explain why it viewed discrimination because of sexual orientation as a subset of discrimination because of sex.

First, it relied on the traditional but-for test for proving causation in discrimination cases: Under that test, an employer discriminates because of sex if it would have treated the employee differently had he or she been the opposite sex. Discrimination based on sexual orientation satisfies that test, the EEOC concluded, because a male who is attracted to a male is treated less favorably than a female is who is attracted to a male, and a female who is attracted to a female is treated less favorably than a male who is attracted to a female. Second, the EEOC relied on the sex-based stereotyping theory the Supreme Court applied in *Price Waterhouse v. Hopkins* to find that an employer discriminates because of sex when it refuses to promote a woman because she is aggressive, and does not conform to the stereotype that aggressiveness is a masculine trait acceptable in men but not women. Discrimination because of sexual orientation, the EEOC concluded, rests on the sex-based stereotype that males should be attracted exclusively to females, and females should be attracted only to males. Third, the EEOC relied on an analogy to interracial association discrimination. Courts had long held that it violates Title VII to discriminate against an employee because he or she associates with someone of a different race. Sexual orientation discrimination is analogous, the EEOC concluded, because it discriminates against persons of one sex based on their association with persons of the same sex.

Two circuit courts agreed with the EEOC in en banc decisions. To the EEOC's three theories, a fourth was added: Discrimination based on sexual orientation inherently discriminates because of sex because an employer who discriminates based on sexual orientation must necessarily consider the sex of both the employee and the person to whom the employee is attracted. After the Eleventh Circuit adhered to the traditional view, the Court granted review in two cases – one petition from an employee in the Eleventh Circuit, and the other from an employer in the Second Circuit. The cases are consolidated for one hour of argument, calendared on October 8.

The employers in both cases advance three basic contentions. First, the ordinary meaning of "sex" refers to a person's gender, *i.e.*, male or female, while "sexual orientation" is generally understood to mean a person's sexual or romantic preference, *i.e.*, heterosexual, homosexual, or bisexual. For this reason, no reasonable person in 1964, when Congress passed Title VII, would have understood the prohibition against discrimination "because of sex" to prohibit discrimination because of sexual orientation. Second, sexual orientation discrimination does not satisfy the basic "but-for" test to identify sex discrimination because it does not treat persons of one sex less favorably than persons of the other, but instead treats males and females who are attracted to persons of the same sex exactly the same. And third, through numerous legislative efforts since 1964, Congress has manifested its consistent understanding that sex and sexual orientation are separate traits that motivate two distinct forms of discrimination, and Title VII encompasses only the former. The Solicitor General supports the employers, disavowing the EEOC's contrary position.

The stakes in these cases are high. Congress has repeatedly rejected proposals to amend Title VII to explicitly prohibit sexual orientation discrimination and, at least for now, seems very unlikely to do so any time soon. While 22 states and some localities have added such prohibitions, most have not. For the majority of gay and lesbian workers nationwide, a right to equal employment opportunity therefore depends on the outcome. If the circuit decisions are predictive, it seems very likely that this issue will sharply divide the Court, with the left-leaning Justices supporting the employees, and those on the right siding with the employers and Solicitor General. But the circuit decisions generated a few votes that defied expectations, and it is not out of the question that the same might be true in the Supreme Court.

R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission

R.G. & G.R. Harris Funeral Homes presents the related question whether discrimination because of transgender status is discrimination because of sex under Title VII. Almost all of the arguments on each side parallel the arguments on sexual orientation.

Harris Funeral Homes, backed by the Solicitor General, argues that because "sex" refers to biological males and females and transgender status refers to a disconnect between a person's biological sex and gender identity, no person in 1964 would have understood the prohibition against discrimination "because of sex" to ban discrimination because of transgender status. They further argue that discrimination based on transgender status does not meet the basic test of sex discrimination because it treats biological males and females who are transgender the same. And they argue that Congress has since 1964 endorsed the view that Title VII does not cover discrimination because of transgender status.

Respondent Aimee Stephens, whose gender identity is female but was born biologically male, argues that transgender status meets the but-for test for sex discrimination: But for the fact that she was born as a biological male, she would not have lost her job for wanting to present as a female, consistent with her gender identity. She also argues that discrimination because of transgender status is motivated by sex-based stereotypes prohibited under *Price Waterhouse*, since such discrimination rests on the stereotype that a person born as a biological male should thereafter present that way.

It is theoretically possible that a Justice could view sexual orientation differently than gender identity in deciding the scope of Title VII's prohibition of discrimination because of sex. For example, transgender status may seem to some more closely identified with a person's sex

than sexual orientation. On the other hand, the Justices are likely to have far less understanding of transgender status, and may be more concerned about the potential repercussions of covering transgender status as a protected class under Title VII. In the end, the arguments for and against coverage of sexual orientation and transgender status run so closely parallel that the Court will likely reach the same outcome in all three cases.

U.S. Dept. of Homeland Security v. Regents of the University of California
Trump v. National Association for the Advancement of Colored People
McAleenan v. Vidal

The Department of Homeland Security (DHS) adopted a policy of Deferred Action for Child Arrivals (DACA) under which it would forebear seeking the removal of certain aliens brought to the United States as children. DHS later expanded DACA and adopted Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a similar policy of deferred action for certain adults. The Fifth Circuit affirmed a preliminary injunction against DAPA and the expanded version of DACA, and an equally divided Supreme Court affirmed the Fifth Circuit's judgment. Citing those rulings, and the Attorney General's view that DACA was unlawful and would likely be subject to successful court challenge, DHS Acting Secretary Duke rescinded DACA.

In early challenges to DHS's decision, courts concluded that notwithstanding the general rule that exercises of enforcement discretion are unreviewable, the rescission was reviewable both because it was a general policy and because the sole rationale was a legal judgment. Those courts went on to hold that the rescission was arbitrary and capricious because DACA was a legal exercise of enforcement discretion, and not an unlawful one, as Acting Secretary Duke had concluded. A third court adopted a different rationale. It held that Duke had not sufficiently explained why the DACA policy was illegal.

That ruling prompted then-Secretary Nielsen to issue a memorandum further explaining why DACA was illegal and should be rescinded. In particular, she said that (i) the policy was indistinguishable from the policy invalidated by the Fifth Circuit and therefore illegal; (ii) even if courts would uphold it, the threat of burdensome litigation would distract from the agency's work; and (iii) polices of non-enforcement should be case-by-case, rather than categorical, to avoid sending a message that illegal border crossing is acceptable. The only court to consider the Nielsen memorandum concluded that insofar as it tracked the reasons given by Duke, it added nothing material, and insofar as it gave new policy-based reasons for the decision, they could not be considered as a justification for a previously issued decision.

The government now argues both that the rescission is unreviewable, and that, even if reviewable, it is not arbitrary or capricious. As for reviewability, the government relies on *Heckler v. Chaney* for the proposition that exercises of prosecutorial discretion are unreviewable even when they are categorical and even when they rest entirely on legal judgments. Relying primarily on the Nielsen memorandum, the government also argues that, in any event, the rescission rests on policy as well as legal judgments, so that any exception to nonreviewability for purely legal judgments is inapplicable. On the merits, the government leans heavily on the policy arguments spelled out in the Nielsen memorandum. But it also argues that DHS reasonably concluded that the DACA policy is illegal.

The fate of nearly 700,000 DACA recipients is now in the Court's hands. If that were not enough, the Court must make its decision in the midst of a Presidential election year in which the issue of immigration, including DACA, is likely to be a salient campaign issue.

As for the predicted outcome, no one doubts that DHS may revoke DACA based on adequately explained policy grounds. So to the extent the government convinces the Court that this is exactly what Nielsen did, even if Duke did not, its chances of prevailing are high. For DACA recipients to prevail, they will have to convince the Court that Duke's decision was based on a slipshod legal analysis, and that Nielson's attempt to rehabilitate the decision with policy considerations is impermissibly post-hoc or insufficiently explained. Only time will tell which of these two perspectives the Court will adopt.

New York State Rifle & Pistol Association Inc. v. City of New York, New York

In *District of Columbia v. Heller* the Court held that the Second Amendment protects an individual's right to possess a handgun for self-defense within the home. Whether the holding or the logical implications of the decision extend beyond that has been a matter of debate. Since *Heller*, the lower courts have struggled with questions such as the extent to which states and municipalities may prohibit individuals from carrying guns for self-defense outside their homes. May states impose tight restrictions on a carry license, such as requiring license applicants to demonstrate a special need beyond that of the general public? May states limit the way in which a person may carry a handgun outside the home, by permitting open carry, but not concealed carry, or the reverse? The Court has refused to grant certiorari in any case presenting such questions.

Many have speculated that the Court's reluctance to grant on those questions reflected uncertainty on the part of both the left and right side of the Court about how Justice Kennedy would vote. When Justice Kennedy retired, many anticipated that the Court would be willing - and perhaps even eager - to jump back into the Second Amendment fray.

Then along came this case. New York City generally permits possession of a handgun only if a person has a premises license or a carry license. A premises license generally limits possession to the gun owner's home. When this suit was filed, there were exceptions, but they did not permit someone with a premises license to transport a handgun to a second home outside the City or to a shooting range outside the City, even if the gun was transported in a locked container, unloaded, and separated from ammunition. These restrictions were challenged as a violation of the Second Amendment and on other grounds. The Second Circuit upheld the restrictions.

After the Court granted certiorari, the City and the State changed their laws to permit persons with premises licenses to carry their handguns to second homes and shooting ranges outside the City, as long as the handguns are locked in a container, unloaded, and separated from ammunition. Once those changes went into effect, the City suggested that the case was moot and sought dismissal. That motion was opposed by the challengers, and the Court denied the City's effort to delay briefing until the mootness issue was resolved.

In their briefing, the parties appear to agree at least to some extent on the methodology for resolving Second Amendment challenges. The Court should first look to the text of the Amendment, its framing history, and tradition. If those sources do not definitively resolve the issue, but Second Amendment rights are implicated, the Court should apply some form of heightened scrutiny under which the City would have to demonstrate, at the very least, that any

restriction is substantially related to important interests. That is where the parties' agreement ends.

The City argues that text, history, and tradition demonstrate there is no freestanding right to obtain firearms training or target practice wherever a person wants; any right is limited to obtaining the training necessary to use firearms effectively, a right not impaired by the City's former restriction on training locations. Similarly, the City argues that right to keep handguns at a second home does not imply a right to carry a firearm from one home to another; a person's right to keep and bears arms at a second home is fully protected as long as he may keep a second handgun there.

The challengers, by contrast, say that text, history, and tradition establish a far more robust Second Amendment right to transport a handgun to wherever it may be lawfully used. The challengers also attack the City's approach on its own terms. The City's target practice locations, they say, are insufficient because they are too few in number and too costly. Similarly, they argue that requiring an owner to purchase a second handgun for his second home imposes added licensing fees and costs, and deprives the homeowner of the right to use the handgun with which he is most familiar.

At the second step of the analysis, the City argues that the former restrictions were substantially related to important interests in limiting the risk of gun violence, and ensuring that persons transporting handguns are doing so for proper purposes. The challengers respond that the City's other licensing restrictions, including its requirement that any handguns must be locked in a container, unloaded, and separated from ammunition during transport, already adequately address public safety concerns. Additional restrictions found nowhere else in the country, the challengers say, add nothing meaningful. The Solicitor General has filed a brief supporting the challengers.

If the Court reaches the merits, it seems likely to hold that the City's former restrictions were unconstitutional. The significance of such a decision depends on how the Court chooses to reach that outcome. Will the Court recognize a broad right to carry a handgun outside the home, calling into question all restrictions on carrying a gun in a public place for self-protection? Or will the Court say that the City's former restrictions are unconstitutional because they are so marginally related to promoting public safety that they fail any possible constitutional standard, deciding this case and little else. A broad ruling would have immense importance; ruling narrowly would not.

It is also unclear whether the Court will reach the merits. Ordinarily, a party that voluntarily changes its practices in response to a lawsuit bears a heavy burden to show there is no reasonable likelihood that it will resume its former practices if the case is dismissed as moot. The City says it has met that burden because changes in both City and State law give the challengers everything they sought in the litigation, and there is no reason to doubt that these changes will be durable. The challengers say that the new laws retain several objectionable features, including a requirement of continuous transport, and a carve-out that allows the City to prohibit non-residents from transporting a licensed handgun into or across the City. And they say that neither the City nor the State can be trusted to adhere to the changes they made.

The case took another turn when several Democratic Senators filed an amicus brief on mootness, accusing various entities of waging a political campaign to change the Court's composition to their benefit, and concluding with a statement that the Court is "not well," but that perhaps it can "heal itself" before the public demands that it be restructured. That brief prompted Senate Republicans to attempt to file a letter in response, informing the Court that they

will serve as a bulwark against the Democratic Party's threat to restructure the Court. If that were not unusual enough, an amicus has asked the Court to give him argument time so that he could explicate the position in his brief that new evidence shows that *Heller* was incorrectly decided. Making predictions ever more complicated, the Court must reach its decision against the backdrop of several recent highly publicized episodes of mass shootings, and a heated debate between the two political parties about solutions to gun violence.

The Court has scheduled the suggestion of mootness for consideration at its first conference, so we may learn sooner rather than later what the Court plans to do with this case. Will it vacate and remand for a determination of mootness? Will it invite the Solicitor General to file a brief addressing mootness? Or will it calendar the case for oral argument on both mootness and the merits? One thing seems almost certain: The Court is very unlikely to grant an amicus time to argue that *Heller* was incorrectly decided. Other than that, who knows?

Espinoza v. Montana Department of Revenue

This case requires the Court to determine the extent to which the Free Exercise Clause prohibits a state from refusing to provide certain benefits to religious organizations when it provides such benefits to secular organizations. The Court has addressed that issue twice previously.

In *Locke v. Davey*, the Court upheld against a Free Exercise challenge a State program that offered need-based scholarships to attend both religious and secular colleges, but excluded students who planned to enroll in a program that would prepare them for the ministry. In *Trinity Lutheran v. Comer*, by contrast, the Court held that a State program providing assistance to secular schools, but not religious schools, to resurface their playgrounds, violated the Free Exercise Clause.

In *Trinity Lutheran*, the Court explained the difference between the two as follows: The program in *Trinity Lutheran* expressly disqualified an otherwise eligible recipient from a public benefit solely because of its religious character, and such a discriminatory policy imposes a penalty on the free exercise of religion. By contrast, the program in *Locke* did not deny Davey a scholarship because of who he was, but because he proposed to use public funds to prepare for the ministry. The Court further distinguished *Locke* on the ground that the State had an especially strong interest under the Establishment Clause in not using taxpayer funds to pay for the training of clergy. The Court concluded with a puzzling footnote stating that "this case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."

This case presents the question the Court expressly reserved in that *Trinity Lutheran* footnote. The Montana legislature enacted a program that gives a tax credit to taxpayers who donate to private scholarship organizations. Under the program, students who receive scholarships from those organizations may choose to attend either a religious or a secular school. The Montana Constitution prohibits the State from providing aid to religious institutions, and the Montana Supreme Court read that provision to prohibit students from using their scholarships at religious schools.

Whether Montana may constitutionally prohibit using scholarships funded by taxpayers to attend religious schools depends on how the Court resolves the question left open in *Trinity Lutheran.* If the equal treatment principle applies only to public funding for non-religious activity, or for health and safety purposes, the State's prohibition against funding a student's

scholarship to attend a religious school would be consistent with the Free Exercise Clause. If, however, the only exception to the equal funding principle is funding for religious training, the State's prohibition would violate the Free Exercise Clause. While the *Trinity Lutheran* footnote was written by the Chief Justice and joined by Justice Alito, suggesting that the issue is genuinely open, the body of the opinion indicates that a majority of the Court will likely rule that *Locke* is a carve-out limited to religious training.

The case does present one other complication. The Montana Supreme Court did not simply invalidate the State law as applied to scholarships to attend religious institutions. It invalidated the law in toto. Accordingly, as things stand, a person may not obtain a publicly funded scholarship to attend either a religious or a secular school. That disposition led the State to argue in its opposition to the petition for a writ of certiorari that there is no present violation of the equal treatment principle, no matter how broadly stated. The grant of certiorari suggests that this argument is not likely to prevent the Court from reaching the merits of the question presented.

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Civil Rights Law

Age Discrimination in Employment Act – Federal Sector: Causation

Babb v. Wilkie (18-882)

Question Presented:

Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 29 U.S.C. §633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.

Summary:

In *Gross v. FBL Financial Services*, the Court held that the private-sector provision of the Age Discrimination in Employment Act (ADEA) requires proof of but-for causation, *i.e*. that the defendant employer would not have taken the action but for a discriminatory motive. The Court reasoned that the "because of" language in the provision at issue was most naturally read to impose a but-for requirement since the ordinary meaning of "because of" is that age was the reason the employer decided to act. The federal-sector provision of the ADEA specifies that personnel actions affecting agency employees aged 40 years or older "shall be made free from any discrimination based on age." The question presented is whether that provision requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.

Petitioner Noris Babb is a clinical pharmacist at a Department of Veterans Affairs facility. After Babb failed to obtain a promotion and an increase in pay, she filed suit against respondent Robert Wilkie, Secretary of Veterans Affairs, alleging that she was subjected to discrimination in violation of the ADEA. Applying a but-for causation standard, the district court granted summary judgment for the government.

The Eleventh Circuit affirmed, holding that the federal-sector ADEA provision requires proof that age was the but-for cause of the challenged personnel action. The court acknowledged that the "made free from any discrimination" language could be read to require proof that age was a motivating factor in a personnel decision, rather than proof that age was the but-for cause of the challenged personnel action. But it felt bound by prior precedent to rule that proof of but-for cause was required.

Petitioner argues that plaintiffs need only show that age was a motivating factor to prevail under the federal-sector provision of the ADEA. The "made free from any discrimination" language, petitioner contends, is most naturally read to forbid any discrimination in the employer's decision-making process, regardless of whether it was the but-for cause of the ultimate personnel action. Petitioner further contends that the textual difference between the federal-sector and private-sector ADEA provisions reinforces that conclusion because the private-sector text prohibits discrimination in the ultimate decision, rather than in the decision-making process. That difference in language, petitioner argues, shows that Congress intended for the federal-sector ADEA to provide more expansive protection.

Decision Below:

743 Fed.Appx. 280 (11th Cir. 2018)

Petitioner's Counsel of Record:

Roman Martinez, Latham & Watkins, LLP

Respondent's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

Section 1981 – Race Discrimination: Causation

Comcast Corporation v. National Assoc. of African American-Owned Media (18-1171)

Question Presented:

Does a claim of race discrimination under 42 U.S.C. § 1981 fail in the absence of but-for causation?

Summary:

In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that non-discrimination statutes presumptively require proof of but-for causation, *i.e.*, that defendant would not have taken the challenged action but for a discriminatory motive. That presumption can be overcome when a statute provides an explicit indication of a different standard, such as one that requires proof that a prohibited characteristic was a "motivating factor." The Court further held that the "because of" language in the statute at issue was most naturally read to impose a but-for requirement. Section 1981 guarantees to all persons "the same right" to contract "as is enjoyed by white citizens." The question presented is whether a claim that a person has been deprived of the same right to contract as is enjoyed by white citizens requires proof of but-for causation, or whether proof that race was a motivating factor is sufficient.

Petitioner Comcast Corporation denied respondent Entertainment Studios Networks, an African American-owned operator of television networks, a carriage contract. Respondent sued, alleging that the contract denial was racially motivated in violation of Section 1981. The district court dismissed the complaint.

The Ninth Circuit reversed, holding, in reliance on a prior decision, that plaintiffs need only allege that racial discrimination was a motivating factor to state a claim under Section 1981. In that prior decision, the court concluded that Section 1981's "same right" text is most naturally read to impose a motivating factor standard, not a but-for causation requirement. The court reasoned that when race is a motivating factor in a contracting decision, a person has not enjoyed the "same right" to contract as similarly situated persons.

Petitioner argues that Section 1981 requires proof of but-for causation. Petitioner contends that the absence of "because of" language does not negate the presumption that a non-discrimination statute imposes a but-for causation requirement. Petitioner further contends that the "same right" language does not overcome that presumption, but is instead most naturally read to require but-for cause. When the decisionmaker would have made the same decision even if the person were white, petitioner argues, the person enjoys the same right to contract as white citizens.

Decision Below:

743 Fed.Appx. 106 (9th Cir. 2019)

Petitioner's Counsel of Record:

Miguel A. Estrada, Gibson, Dunn & Crutcher LLP

Respondents' Counsel of Record:

Erwin Chemerinsky, University of California, Berkeley School of Law

Title VII – Sex Discrimination

Gender Identity

R.G. & G.R. Harris Funeral Homes v. Equal Emp. Opportunity Comm. (18-107)

Question Presented:

Whether Title VII [of the Civil Rights Act of 1964] prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Summary:

Under Title VII, an employer may not discriminate against an individual "because of sex." In *Price Waterhouse v. Hopkins*, the Court held that discrimination based on a person's failure to conform to a sex-based stereotype, *e.g.*, women should not be aggressive, can constitute discrimination because of sex. The question presented is whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse*.

Respondent Aimee Stephens is a transgender woman whose sex assigned at birth was male. While working at petitioner R.G. & G.R. Harris Funeral Homes, Stephens presented as a man and used her then-legal name William. When Stephens informed petitioner that she was a transgender female and planned to present as a woman, petitioner fired her. Respondent Equal Employment Opportunity Commission (EEOC) sued petitioner under Title VII, alleging that firing a transgender woman for failure to present as a male constitutes sex stereotyping under *Price Waterhouse*, and that discrimination based on transgender status inherently constitutes discrimination because of sex. The district court ruled for the EEOC based on its sex stereotyping claim, but rejected its transgender status claim.

The Sixth Circuit affirmed in part and reversed in part. The court first held that terminating Stephens because she planned to present as a female constituted sex stereotyping under *Price Waterhouse* because it rested on the sex stereotype that a person born as a male should present as a male, rather than in conformity with their gender identity. The court also held that discrimination based on transgender status necessarily constitutes discrimination because of sex. The inherent tie between transgender discrimination and sex discrimination, the court explained, is demonstrated by the fact that had Stephens's sex assigned at birth been female rather than male, she would not have been fired for wanting to present as a woman.

Petitioner argues that discrimination based on Stephens's desire to present as female did not constitute impermissible sex stereotyping under *Price Waterhouse*. Petitioner contends that *Price Waterhouse* does not prohibit sex stereotyping unless the stereotyping results in favoring one sex over the other, and neither sex is disfavored by a policy that requires both men and women to present in accordance with their birth sex. Petitioner also contends that discrimination based on transgender status does not constitute discrimination because of sex. Petitioner argues that discrimination "because of sex" refers to discrimination between biological males and females, not to discrimination based on gender identity.

Decision Below:

884 F.3d 560 (6th Cir. 2018)

Petitioner's Counsel of Record:

James A. Campbell, Alliance Defending Freedom

Respondent's Counsel of Record:
John A. Knight, American Civil Liberties Union Foundation
U.S. Respondent's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States

Sexual Orientation

Altitude Express, Inc. v. Zarda (17-1623)
Bostock v. Clayton County, Georgia (17-618)
Question Presented:

Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

Summary:

Title VII prohibits employers from discriminating against employees "because of" their "sex." The question presented is whether discrimination based on sexual orientation constitutes discrimination because of sex. The same question is presented in *Bostock v. Clayton County, Georgia*, 17-618 (consolidated for oral argument).

Respondent Donald Zarda was a skydiving instructor at petitioner Altitude Express. After a female customer complained that respondent touched her inappropriately and disclosed his sexual orientation to justify it, petitioner fired him. Zarda filed suit in federal court, alleging that petitioner fired him based on his sexual orientation, and that discrimination based on sexual orientation constitutes discrimination because of sex in violation of Title VII. The district court ruled that discrimination based on sexual orientation does not violate Title VII and granted petitioner's motion for summary judgment.

The en banc Second Circuit vacated and remanded, holding that discrimination based on sexual orientation constitutes discrimination because of sex. The court reasoned that because sexual orientation is defined by reference to a person's sex, sexual orientation discrimination is a subset of sex discrimination. That conclusion, the court thought, was reinforced by the "but for" test for identifying sex discrimination, *i.e.*, had Zarda been female rather than male, he would not have been fired. The court also concluded that discrimination based on sexual orientation rests on the impermissible sex stereotype that a male should be attracted to a female, and vice versa. Finally, the court reasoned that discrimination based on association to a person of the same sex is analogous to discrimination based on association to a person of a different race, a recognized form of discrimination under Title VII.

Petitioner argues that discrimination based on sexual orientation does not constitute discrimination because of sex. The original public understanding of the term "sex," petitioner argues, refers to biological males and females, not to sexual orientation. Petitioner contends that the "but for" test is not a permissible method for determining the critical question whether the term sex encompasses sexual orientation. Even if it were, petitioner argues, the right comparison would be between a male attracted to a male and a female attracted to a female, which would reveal the absence of sex discrimination. Petitioner also argues that proof of sex stereotyping cannot substitute for proof that sex was the actual motivating factor in an employment decision, and that sexual orientation does not, in any event, rest on a sex stereotype, but on the view that a person should have the dominant sexual orientation. Finally, petitioner argues that the analogy

to interracial association discrimination is inapt because interracial association discrimination is rooted in racism, whereas sexual orientation discrimination is not rooted in sexism.

Decisions Below:

723 Fed.Appx. 964 (11th Cir. 2018) (No. 17-1618)
883 F.3d 100 (2d Cir. 2018) (en banc) (No. 17-1623)

Petitioners' Counsel of Record:

Brian J. Sutherland, Buckley Beal, LLP (No. 17-1618)
Saul D. Zabell, Zabell & Associates, P.C. (No. 17-1623)

Respondents' Counsel of Record:

Jack R. Hancock, Freeman Mathis & Gary, LLP (No. 17-1618)
Pamela S. Karlan, Stanford Law School (No. 17-1623)

Constitutional Law

Appointments Clause

Financial Oversight and Management Bd. for Puerto Rico v. Aurelius Invest. (18-1334)
Aurelius Investment v. Puerto Rico (18-1475)
Official Comm. of Debtors v. Aurelius Investment (18-1496)
United States v. Aurelius Investment (18-1514)
UTIER v. Financial Oversight and Management Board for Puerto Rico (18-1521)

Questions Presented:

(1) Whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico.

(2) Does the *de facto* officer doctrine allow courts to deny meaningful relief to successful separation-of-powers challengers who are suffering ongoing injury at the hands of unconstitutionally appointed principal officers?

Summary:

The Appointments Clause prescribes the method of appointing "officers of the United States." The Territorial Clause gives Congress power to regulate U.S. territories, including Puerto Rico. The first question presented in this case is whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico (Board). The de facto officer doctrine is an equitable remedy that confers validity upon acts performed under official color of title even though the legality of the appointment is later determined deficient. The second question presented is whether the de facto officer doctrine precludes relief against ongoing injury caused by past acts of unconstitutionally appointed officers. The same questions are at issue in *Official Comm. of Debtors v. Aurelius Investment* (18-1496), *United States v. Aurelius Investment* (18-1514), and *UTIER v. Financial Oversight and Management Board for Puerto Rico* (18-1521), consolidated for oral argument.

The Board was created through an Act of Congress. The Act authorized the President to appoint Board Members from a list supplied by congressional leadership, without Senate confirmation, which he did. Pursuant to congressional authority, the Board initiated debt adjustment proceedings. Aurelius Investment moved to dismiss, arguing that Board Members were appointed in violation of the Appointments Clause. The district court denied the motion.

The First Circuit reversed in part and affirmed in part. The court first held that the Appointments Clause governs the appointment of Board Members. The court ruled that the

Territories Clause does not displace the Appointments Clause because the Appointments Clause is the more specific of the two. The court then ruled that Board Members are "officers of the United States" within the meaning of the Appointments Clause because they occupy a continuing position, exercise significant authority, and have authority pursuant to U.S. law. The court held that the de facto officer doctrine precludes invalidating the Board's past acts because Board Members acted in good faith under official color of title.

The Board argues that the Appointments Clause does not govern the appointment of Board Members. The Board contends that "officers of the United States" within the meaning of the Appointments Clause are officers who exercise the authority of the federal government on behalf of the nation as a whole. The Board argues that when Congress exercises its authority to create officers under Territorial Clause, as here, the officers do not satisfy that standard because they exercise federal government's authority only as to the territory.

Aurelius Investment contends that the de facto officer doctrine is inapplicable here. Aurelius argues that the doctrine applies only to minor statutory violations or untimely challenges, not to timely challenges to unconstitutional appointments.

Decision Below

915 F.3d 838 (1st Cir. 2019)

Petitioners' Counsel of Record:

Donald B. Verrilli Jr., Munger Tolles & Olson LLP

Respondents' Counsel of Record:

Theodore B. Olson, Gibson Dunn & Crutcher LLP

U.S. Respondent's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

Eleventh Amendment and Copyright Clause – Sovereign Immunity

Allen v. Cooper (18-877)

Question Presented:

Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), in providing remedies for authors of original expression whose federal copyrights are infringed by States.

Summary:

In *Seminole Tribe of Fla. v. Florida*, the Supreme Court concluded that Congress may not rely on its Article I powers to abrogate State sovereign immunity. In *Central Virginia Community College v. Katz*, however, the Court held that Congress may use its Article I bankruptcy power to override a State's immunity from certain bankruptcy suits. Article I gives Congress power to secure to authors for limited times the exclusive right to their writings. The principal question in this case is whether Congress may use its copyright power to subject States to suit for copyright infringement. This case also presents the question whether Congress may enact such legislation under its Section 5 power to enforce the Fourteenth Amendment by appropriate legislation.

Petitioner Rick Allen filmed the salvaging of the remains of the pirate Blackbeard's flagship. Petitioner copyrighted the film, and licensed it to co-petitioner Nautilus Productions. North Carolina copied and publicly displayed the film. The Copyright Remedy Clarifications Act (CRCA) authorizes private parties to sue a State for copyright infringement. Invoking the

CRCA, petitioners sued the State, alleging an infringement of their copyright. The State moved to dismiss on sovereign immunity grounds. The district court denied the motion.

The Fourth Circuit reversed, holding that Congress lacked authority to subject States to suit for copyright infringement. The court reasoned that *Seminole Tribe* precludes Congress from using its Article I powers to abrogate state sovereign immunity. It further held that Section 5 of the Fourteenth Amendment does not support the CRCA. The court reasoned that Congress did not make clear that it was relying on that power, and that the abrogation was not congruent and proportional to any violations of the Fourteenth Amendment committed by the States.

Petitioners argue that Congress has authority under its Article I Copyright power to subject States to suit for copyright infringement. Petitioners contend that, notwithstanding *Seminole Tribe's* broad statement that Congress may not rely on an Article I power to abrogate a State's immunity from suit, *Katz* makes clear that a Clause-by-Clause inquiry is required. Petitioners argue that the text of the Copyright Clause necessarily gives Congress the power to abrogate sovereign immunity because Congress could not "secure" an "exclusive right" in a work unless it had the authority to subject state infringers to suit. Petitioners further contend that, in passing the CRCA, Congress properly relied on Section 5 of the Fourteenth Amendment because the legislative record contains manifest evidence of copyright infringement by States.

Decision Below:
895 F.3d 337 (4th Cir. 2018)
Petitioners' Counsel of Record:
Derek L. Shaffer, Quinn Emanuel Urquhart & Sullivan, LLP
Respondents' Counsel of Record:
Matthew W. Sawchak, North Carolina Department of Justice

Fourth and Fifth Amendments – Excessive Force: *Bivens* Liability

Hernandez v. Mesa (17-1678)
Question Presented:

Whether, when plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).
Summary:

In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, the Supreme Court held that a plaintiff may seek damages against government officials for violations of the Fourth Amendment. In *Ziglar v. Abbasi*, the Court held *Bivens* may not be extended to a "new context" when "special factors" counsel hesitation, and that special factors exist when there is sound reason to think Congress might doubt the desirability of a damages remedy. The question presented is whether a cross-border shooting of a foreign citizen presents a new context, and if so, whether special factors preclude a *Bivens* remedy.

Respondent Jesus Mesa, a border patrol agent, fatally shot Adrián Hernández, a 15-year-old Mexican national. Mesa fired at Hernández from the U.S. side of the border, while Hernández was on the Mexico side. Hernández' parents (petitioners) brought a *Bivens* claim against Mesa for using excessive force in violation of the Fourth and Fifth Amendments. The district court dismissed the claims, the court of appeals affirmed, and the Supreme Court remanded for reconsideration in light of *Abbasi*.

On remand, the Fifth Circuit affirmed, holding that a cross-border shooting of a foreign citizen presents a new context and that special factors preclude a *Bivens* remedy. The court concluded that this case arises in a new context because it is unsettled whether the Constitution protects a foreign citizen on foreign soil. The court identified as special factors the suit's potential to disrupt the government's national security interest in policing the border, its potential to interfere with foreign affairs and diplomacy, Congress's deliberate failure to provide a damages remedy for injuries to foreign citizens on foreign soil, and the presumption against extraterritorial application of U.S. law.

Petitioners contend that a cross-border shooting of a foreign citizen does not present a new context, and that special factors do not preclude a *Bivens* remedy. Petitioners argue that the context is identical to that presented in *Bivens* – the use of excessive force by a rogue government agent. Petitioners further contend that national security is not implicated by allegations that a rogue agent acted contrary to policy, that recognizing such a claim does not intrude on foreign affairs, that Congress gave no consideration to whether damages should be available for cross-border shootings, and that the presumption against extraterritoriality does not apply when, as here, the Constitution itself applies extraterritorially. Finally, petitioners contend that the absence of any alternative remedy counsels strongly in favor of a *Bivens* remedy.

Decision Below:
888 F.3d 811 (5th Cir. 2018)
Petitioners' Counsel of Record:
Stephen I. Vladeck, University of Texas School of Law
Respondent's Counsel of Record:
Randolph J. Ortega, Ellis & Ortega

First and Fourteenth Amendments – Free Exercise and Equal Protection

Espinoza v. Montana Department of Revenue (18-1195)
Question Presented:

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

Summary:

In *Locke v. Davey*, the Court upheld against a Free Exercise and Equal Protection challenge a state program that offered need-based scholarships to attend both religious and secular colleges, but excluded from the program students who wanted to attend a program that would prepare them for the ministry. In *Trinity Lutheran v. Comer*, the Court held that a program that provided assistance to secular schools, but not religious schools, to resurface their playgrounds, violated the Free Exercise Clause. The Court did not reach religious uses of funding or other forms of discrimination. The question presented in this case is whether a State's invalidation of a program that offers aid to students to attend either a religious or secular school on the ground that it affords a religious option violates the Free Exercise or Equal Protection Clause.

The Montana legislature enacted a program that gives a tax credit to taxpayers who donate to private scholarship organizations. Under the program, students who receive scholarships from those organizations may choose to attend either a religious or secular school.

The Montana Constitution prohibits the State from providing aid to religious institutions. Pursuant to its reading of that provision, the Montana Department of Revenue enacted a rule prohibiting students from using their scholarships at religious schools. Parents of scholarship recipients attending religious schools (petitioners) filed suit, alleging that the rule violated the Free Exercise and Equal Protection Clause. The district court ruled in favor of petitioners.

The Montana Supreme Court reversed, holding that the State's aid program violated the State Constitution, and that, as so applied, the State Constitution did not violate the Free Exercise Clause. The court relied on the Court's statement in *Locke* that a State may impose stricter barriers between the government and religion than the Federal Constitution's Establishment Clause. As a remedy, the court invalidated the entire program, not just the option to attend religious schools.

Petitioners argue that the State's invalidation of a neutral program that provides scholarships that may be used at religious or secular schools solely because of the religious option violates the Free Exercise Clause and Equal Protection Clause. Petitioner further argues that the remedy of eliminating scholarships for all students does not cure the violation because it denies petitioners the scholarships the legislature intended to afford them and mandates the exclusion of a religious option from all neutral student aid programs in the future.

Decision Below:
435 P.3d 603 (Mont. 2018)

Petitioner's Counsel of Record:
Erica Joan Smith, Institute for Justice

Respondent's Counsel of Record:
Daniel John Whyte, Montana Department of Revenue

Second Amendment and Commerce Clause – Firearm Regulation

New York State Rifle & Pistol Assoc., Inc. v. City of New York, New York (18-280)

Question Presented:

Whether [New York] City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

Summary:

In *District of Columbia v. Heller* the Court held that the Second Amendment protects an individual's right to possess a handgun for self-defense within the home. The principal question presented is whether the Second Amendment also gives individuals a right to transport a licensed, locked, and unloaded handgun to a second home or to a shooting range outside New York City limits. This case also presents the question whether a prohibition on transporting a licensed, locked, and unloaded firearm to a home or shooting range outside City limits violates the Commerce Clause or the constitutional right to travel.

New York City (respondent) prohibits persons from transporting a licensed, locked, and unloaded firearm to a home or shooting range outside city limits. Petitioners Romolo Colantone, Jose Anthony Irizarry, and Efrain Alvarez filed suit, alleging that this prohibition violates the Second Amendment, the Commerce Clause, and the constitutional right to travel. The district court dismissed the complaint.

The Second Circuit affirmed. The court first held that the City's law does not violate the Second Amendment. The court reasoned that the law does not place a substantial burden on the

right to possess a handgun for self-defense, because persons may obtain a license for a different handgun for their out-of-City homes, and they may obtain adequate training for self-protection at shooting ranges within City limits. The court further concluded that the law is justified by its contribution to public safety in preventing persons from resorting to violence in stressful public situations. The court next held that the law does not violate the Commerce Clause, because persons are free to patronize ranges outside the City as long as they do not bring their City-licensed firearm, and the law furthers safety rather than protectionist concerns. Finally, the court held that the rule does not violate petitioners' right to travel because it does not restrict travel, only traveling armed.

Petitioners argue that the rule's transport restriction violates the Second Amendment. Petitioners contend that the term "bear" arms, the prefatory clause's reference to a "well-regulated militia," and the relevant history demonstrate that the Second Amendment guarantees a right to carry arms to wherever they may lawfully be used. In the alternative, petitioners argue that the transport ban fails under any level of heightened scrutiny because it impinges on the right to bear arms, and there is no evidence that a locked and unloaded gun poses any risk of violence in stressful public situations. Petitioners next argue that the rule violates the Commerce Clause because it effectively regulates commerce outside the City's borders and favors in City ranges over out-of-City ranges. Finally, petitioners argue that the rule violates the constitutional right to travel by forcing petitioners to choose between exercising their right to travel and exercising their right to bear arms.

After the Court granted certiorari, the City amended its law, and the state legislature enacted a law, to permit person to transport a licensed, locked, and unloaded handgun to a home or shooting range outside City limits. There is therefore a substantial question of mootness.

Decision Below:
883 F.3d 45 (2d Cir. 2018)
Petitioners' Counsel of Record:
Paul D. Clement, Kirkland & Ellis LLP
Respondents' Counsel of Record:
Richard Paul Dearing, New York City Law Department

Criminal Law

Armed Career Criminal Act

Shular v. United States (18-6662)
Questions Presented:

Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the Act?

Summary:

The Armed Career Criminal Act (ACCA) requires that a person who is convicted of possession of a firearm by a convicted felon, and whose criminal history includes three prior "violent felonies" or "serious drug offenses," receive at least 15 years in prison. In *Taylor v. United States*, the Supreme Court held that a State law offense is a "violent felony" only if the elements of the State offense categorically match the elements of a generic analogue offense. The ACCA defines a "serious drug offense" to include an offense under State law "involving

manufacturing, distributing, or possessing with intent to distribute, a controlled substance." The question in this case is whether a State drug offense must categorically match the elements of a generic analogue drug offense in order to qualify as a "serious drug offense" under the ACCA.

Petitioner Eddie Lee Shular pleaded guilty to felonious possession of a firearm. Shular had six prior convictions for sale or possession with intent to sell controlled substances under Florida law. Those convictions did not require proof that the defendant knew he was selling a controlled substance. All federal drug distribution offenses (and most analogous State law offenses), however, do require such proof. The State law convictions therefore would not qualify as serious drug offenses if the ACCA required a categorical match between the elements of the State law offense and the elements of a generic analogue. The district court classified Shular's State law convictions as "serious drug offenses" and imposed the ACCA's minimum sentence of 15 years.

The Eleventh Circuit affirmed. The court relied on circuit precedent and held that a State law drug offense need not categorically match the elements of a generic analogue in order to qualify as a serious drug offense under the ACCA. The precedent had reasoned that the definition of "serious drug offense" requires only that the State law offense must be one "involving" drug trafficking, not that it categorically match the elements of a generic analogue.

Petitioner argues that a State drug offense qualifies as a serious drug felony only if its elements categorically match the elements of a generic analogue. Petitioner contends that *Taylor* required a categorical match for violent felonies, and that there is no textual or logical reason for a different rule for serious drug offenses. Petitioner further argues that the statutory term "involving" does not negate the categorical matching requirement because the Court has adopted the same requirement for other statutes containing that term.

Decision Below

736 Fed. Appx. 876 (11th Cir. 2018)

Petitioner's Counsel of Record:

Richard M. Summa, Federal Public Defender

Respondent's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

Federal Wire Fraud

Kelly v. United States (18-1059)

Question Presented:

Does a public official "defraud" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision?

Summary:

The wire fraud statute makes it unlawful to deprive another of money or property by means of false pretenses. The question in this case is whether a public official may be convicted of wire fraud based on evidence that the public policy reason offered for an official decision was not the real reason for the decision.

In what has come to be known as "Bridgegate," petitioner Bridget Anne Kelly and other New Jersey officials closed several traffic lanes leading to Fort Lee, New Jersey, causing severe traffic congestion in Fort Lee. While Kelly claimed the lane closure occurred in order to conduct

a traffic study, the real motivation was to punish Fort Lee's mayor for refusing to endorse former Governor Chris Christie. For her role in those events, Kelly was convicted of wire fraud.

The Third Circuit affirmed, holding that there was sufficient evidence that Kelly committed money or property wire fraud. The court reasoned that the lane closure would not have occurred but for the deceitful explanation for that decision, and that the scheme deprived the Port Authority of money or property in the form of extra wages for toll workers.

Petitioner contends that a public official may not be convicted of wire fraud based on evidence that the public policy reason offered for an official decision was not the real reason for the decision. Petitioner argues that public officials routinely give public policy explanations for their decisions without confessing the underlying political calculus, and that such conduct has never been understood to constitute money or property fraud. Petitioner also argues that treating such conduct as money or property fraud would allow the government to circumvent the holding in *Skilling v. United States* that honest-services fraud is limited to taking bribes and kickbacks and does not extend to all dishonest political conduct.

Decision Below:
909 F.3d 550 (3rd Cir. 2018)
Petitioner's Counsel of Record:
Jacob M. Roth, Jones Day
Respondent's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States

Fourth Amendment – Investigative Stop

Kansas v. Glover (18-556)
Question Presented:

Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

Summary:

Under the Fourth Amendment, an officer may make an investigative stop of a vehicle when the officer has reasonable suspicion that the driver is unlicensed. The question in this case is whether an officer has reasonable suspicion that a vehicle's owner, whose license has been suspended, is the one driving the vehicle, absent information to the contrary.

While on patrol, a Douglas County, Kansas deputy ran a registration check on a truck and found it belonged to respondent, Charles Glover, Jr. That check also revealed that respondent's license had been revoked. Based on that information, the deputy stopped respondent's truck. After the deputy determined that respondent was the driver, he arrested respondent for driving without a license. The district court determined that the deputy lacked reasonable suspicion for the stop and suppressed the evidence acquired during the stop. The Kansas Court of Appeals reversed.

The Kansas Supreme Court reversed, holding that information that the owner of a vehicle has a suspended license does not furnish reasonable suspicion that the owner is driving the vehicle. The court reasoned that a presumption that the owner is the driver rests on two unreasonable assumptions: first, that an owner of a vehicle is its likely driver, and second, that an owner with a suspended license would likely disregard the suspension and continue to drive.

Kansas contends that an officer has reasonable suspicion that an owner of a vehicle whose license has been suspended is the driver of the vehicle absent information to the contrary. Kansas argues that reasonable suspicion is a minimal standard that may be satisfied by common sense and everyday experience. Kansas further argues that common sense and everyday experience suggest both that a vehicle's owner is very often its driver, and that many persons with suspended licenses continue to drive their vehicles.

Decision Below:
422 P.3d 64 (Kan. 2018)

Petitioner's Counsel of Record:
Toby Crouse, Solicitor General of Kansas

Respondent's Counsel of Record:
Sarah E. Harrington, Goldstein & Russell, P.C.

Habeas Corpus – Antiterrorism and Effective Death Penalty Act

Successive Petition

Banister v. Davis (18-6943)

Question Presented:

Whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzales v. Crosby*, 545 U. S. 524 (2005).

Summary:

The timely filing of a motion to amend or alter a judgement under Fed. R. Civ. P. 59(e) tolls the time period for filing a notice of appeal until the motion is resolved. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), second or successive habeas petitions do not toll the time to file an appeal. The Federal Rules of Civil Procedure do not apply to habeas proceedings if they are inconsistent with AEDPA. A Federal Rule that tolls the time period for filing an appeal therefore does not apply in habeas proceedings when the motion that triggers tolling is properly characterized as a second or successive habeas petition. The Court in *Gonzalez v. Crosby* held that a motion for relief from judgment under Fed. R. Civ. P. 60(b) is properly recharacterized as a "second or successive" habeas petition if it seeks to add a new ground for relief from the state conviction or attacks the federal court's previous resolution of a claim on the merits. The question presented in this case is whether the same rule applies to a timely motion to alter or amend the judgment under Rule 59(e).

Petitioner Gregory Dean Banister was convicted of aggravated assault in state court. A federal district court denied Banister's claim for habeas relief on the merits. Banister then filed a Rule 59(e) motion to amend or alter the denial of his petition for habeas relief. The district court denied the motion. Banister then moved for a Certificate of Appealability (COA) to appeal the district court's denial of habeas relief. The application for a COA was timely only if Banister's Rule 59(e) motion is not properly characterized as a second or successive habeas petition.

The Fifth Circuit denied the application for a COA as untimely. The court held that that a timely Rule 59(e) motion, like a timely Rule 60(b) motion, is property characterized as a second and successive habeas petition when it seeks to add a new ground for relief from the state conviction or when, as here, it attacks the federal court's previous resolution of a claim on the merits. The court viewed its prior precedent and *Gonzales* as controlling on that issue.

Petitioner argues that a timely Rule 59(e) motion may not be reacharacterized as a second or successive habeas petition. Petitioner contends that a Rule 59(e) motion is not a new collateral attack, but is instead part and parcel of the initial habeas proceeding. Petitioner further argues that *Gonzales* is distinguishable because a Rule 60(b) motion seeks to set aside a judgment after the time to appeal has expired and the judgment has become final, whereas a Rule 59(e) motion by definition does not attack a final judgment.

Decision Below

Order, No. 17-10826 (5th Cir., May 8, 2018)

Petitioner's Counsel of Record:

Brian T. Burgess, Goodwin Proctor, LLP

Respondent's Counsel of Record:

Kyle D. Hawkins, Texas Attorney General's Office

Sentencing Juvenile Offenders

Mathena v. Malvo (18-217)

Question Presented:

Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court [*Montgomery v. Louisiana*] addressing whether a new constitutional rule announced in an earlier decision [*Miller v. Alabama*] applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

Summary:

In *Miller v. Alabama*, the Court held that imposing a mandatory sentence of life without the possibility of parole on a juvenile offender violates the Eight Amendment's prohibition on cruel and unusual punishment. Subsequently, in *Montgomery v. Louisiana*, the Court held that *Miller* applies retroactively to cases on collateral review, characterizing *Miller* as substantively deciding that a sentence of life-without-parole is excessive for all but the rare juvenile offender whose crime reflected irreparable corruption, rather than the transient immaturity of youth. The question presented is whether *Miller* retroactively invalidates a discretionary life-without-parole sentence imposed on a juvenile absent a finding that the crime reflected irreparable corruption.

John Allen Muhammed and respondent Lee Boyd Malvo, then 17 years old, committed a series of sniper murders in D.C., Maryland, and Virginia. Malvo was convicted for his role in several of the Virginia murders and sentenced to multiple life-without-parole sentences. After *Miller* was decided, Malvo filed two habeas petitions in federal district court, claiming that his life-without-parole sentences violated *Miller*. The district court agreed and vacated the sentences.

The Fourth Circuit affirmed, holding that *Miller* retroactively invalidates a discretionary sentence of life-without-parole imposed on a juvenile absent a finding that his crime reflected permanent incorrigibility. The court reasoned that while both *Miller* and *Montgomery* involved mandatory life sentences, *Montgomery* made clear that a court also violates *Miller* when it imposes a discretionary life-without-parole sentence on a juvenile offender unless the court finds that the crime reflected permanent incorrigibility.

Virginia contends that *Miller* applies retroactively solely to *mandatory* life-without-parole sentences. Virginia argues that *Miller* repeatedly stated that its holding was so limited, and that M*ontgomery* simply made that holding retroactive. Virginia acknowledges that some language in *Montgomery*, when viewed in isolation, could be read as characterizing *Miller* as

applicable to any sentence imposed without a finding of permanent incorrigibility. The State argues, however, that because the sole question before the Court in both *Miller* and *Montgomery*, involved mandatory life sentences, that language must be read as applicable solely to mandatory life sentences.

Decision Below:
893 F.3d 265 (4th Cir. 2018)
Petitioner's Counsel of Record:
Toby J. Heytens, Office of the Attorney General of Virginia
Respondent's Counsel of Record:
Danielle M. Spinelli, Wilmer Cutler Pickering Hale and Dorr LLP

Capital Sentencing

McKinney v. Arizona (18-1109)
Questions Presented:

(1) Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted.

(2) Whether the correction of error under *Eddings v. Oklahoma,* 455 U.S. 104 (1982), requires resentencing.

Summary:

In *Ring v. Arizona,* the Court held that juries must determine eligibility for the death sentence. *Ring* applies to all non-final sentences, but does not generally apply to sentences that were final before it was decided. The first question presented is whether a sentence that was final before *Ring* was decided is rendered non-final for *Ring* purposes when a state appellate court reexamines the sentence to correct a different error identified on collateral review. In *Eddings v. Oklahoma,* the Court held that courts must consider any mitigating evidence in death penalty cases. The second question is whether an appellate court may correct an *Eddings* error by weighing the mitigating evidence itself, or whether it must instead remand to the district court for resentencing.

Petitioner James McKinney was convicted of first-degree murder and sentenced to death. The Arizona Supreme Court affirmed the sentence, rejecting McKinney's claim that *Eddings* required consideration of his post-traumatic stress disorder (PTSD) as mitigating evidence. Petitioner filed a federal habeas corpus petition, asserting *Eddings* error. The district court denied relief, but the en banc Ninth Circuit reversed, holding that *Eddings* required consideration of McKinney's PTSD. The court remanded with directions to grant the writ, unless the State either corrected the *Eddings* error, or imposed a sentence other than death.

The Arizona Supreme Court affirmed McKinney's death sentence. The court rejected McKinney's contention that *Ring* required resentencing before a jury on the ground that *Ring* was decided after his case was final. Exercising de novo review, the court also concluded that McKinney's PTSD was insufficiently mitigating to warrant a sentence other than death.

Petitioner contends that when a court reopens direct review, it renders a previously final decision non-final, and thereby triggers the application of current law. Petitioner contends such a reopening occurred in this case when the Arizona Supreme Court conducted de novo review to correct the *Eddings* error in his original sentencing. Because the Arizona Supreme Court reopened direct appeal, petitioner argues, it was required to apply current law, including the

decision in *Ring* that a jury must determine eligibility for the death sentence. Petitioner also contends that an appellate court may not correct an *Eddings* error through de novo review, but must instead remand to a trial court for resentencing. Petitioner argues that appellate review is inadequate to cure an *Eddings* error because only jurors and sentencing judges who hear the evidence are in a position to properly assess the weight to assign to mitigating evidence.

Decision Below:
426 P.3d 1204 (Ariz. 2018)

Petitioner's Counsel of Record:
Neal Kumar Katyal, Hogan Lovells US LLP

Respondent's Counsel of Record:
David Robert Cole, Office of the Arizona Attorney General

Insanity Defense

Kahler v. Kansas (18-6135)

Question Presented:

Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?

Summary:

The most prevalent insanity defense prevents conviction of a defendant if, as a result of a mental illness, (i) he did not know what he was doing, or (ii) he did not know his conduct was wrongful. Kansas abolished the insanity defense as such, but still allows the introduction of evidence bearing on mental illness to the extent that it negates the intent element (*mens rea)* of a crime. In practice, that means that Kansas does not permit conviction of a person who did not know what he was doing (*e.g.*, he thought he was killing an animal, rather than a human being), but permits conviction of someone who knew what he was doing, but did not know it was wrong (*e.g.*, he thought God commanded him to kill a human being). The question in this case is whether convicting someone whose mental illness prevented him from understanding that his actions were wrongful violates the Fourteenth Amendment's Due Process Clause or the Eighth Amendment's Cruel and Unusual Punishment Clause.

Petitioner James Kahler was convicted of capital murder and sentenced to death. At trial, Kahler filed a motion arguing that Kansas law unconstitutionally deprived him of an insanity defense. The district court denied the motion and instructed the jury in conformity with Kansas law.

The Kansas Supreme Court affirmed, relying on a previous decision to hold that convicting someone who did not understand the wrongfulness of his conduct does not violate the Constitution. The previous decision reasoned that knowing the difference between right and wrong is not so deeply ingrained in the law as to be a fundamental component of Due Process. It also concluded that the State's approach does not punish mental illness as such, and therefore does not constitute Cruel and Unusual Punishment.

Petitioner argues that convicting someone whose mental illness prevented him from understanding the wrongfulness of his conduct violates Due Process. Petitioner contends that history shows that such persons have never been subject to criminal punishment. Petitioner further argues that current practice in the States and in the federal criminal justice system confirms that knowing the difference between right and wrong is a fundamental prerequisite to criminal punishment. Petitioner also argues that criminally punishing someone who cannot appreciate the wrongfulness of his conduct constitutes Cruel and Unusual Punishment, both

because it was condemned by the common law and because it does not further any legitimate purpose of punishment.

Decision Below:
410 P.3d 105 (Kan. 2018)

Petitioner's Counsel of Record:
Jeffrey T. Green, Sidley Austin

Respondent's Counsel of Record:
Toby Crouse, Office of the Attorney General of Kansas

Preemption – Immigration Reform and Control Act

Kansas v. Garcia (17-834)

Questions Presented:

(1) Whether [the Immigration Reform and Control Act (IRCA)] expressly preempts the States from using any *information* entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications.

(2) Whether the Immigration Reform and Control Act impliedly preempts Kansas's prosecution of respondents.

Summary:

The Immigration Reform and Control Act (IRCA) requires an employer to complete a Form I-9 to verify that their employees are authorized to work in the U.S. Under IRCA, "any information contained in or appended to" the Form I-9 cannot be used to enforce State laws. The first question is whether IRCA expressly preempts the States from prosecuting persons based on information from forms other than the I-9 when the same information appears in the I-9. The second question is whether IRCA impliedly preempts the States from using such information.

Respondents Ramiro Garcia, Donaldo Morales, and Guadalupe Ochoa-Lara used stolen Social Security numbers on Forms I-9 and State tax forms. Relying solely on the tax forms, Kansas prosecuted respondents for identity theft. Respondents moved to suppress the tax forms, arguing that IRCA preempted their use. The trial court denied the motion, and the Court of Appeals of Kansas affirmed.

The Kansas Supreme Court reversed, holding that IRCA expressly preempts States from prosecuting persons based on information from a form other than the I-9 when the same information appears in the I-9. The court reasoned that the text of IRCA not only prohibits the States from introducing the Form I-9 itself, but also prohibits the State from introducing any information contained in the I-9. A concurring opinion concluded that field preemption and conflict preemption barred the prosecutions.

The State argues that IRCA does not expressly preempt it from using information from forms other than the I-9 simply because identical information appears in the I-9. The State contends that the text of the provision focuses on the information contained in the Form I-9 itself, not on information that comes from a different source. The State further argues that there is no field preemption, because Congress has not occupied the field of identity theft, and a state prosecution for identity theft does not intrude on the federal field of work authorization. Finally, the State contends there is no conflict preemption, because a conviction for identity theft does not interfere with the federal purpose of prohibiting the employment of unauthorized aliens.

Decision Below:
401 P.3d 588 (Kan. 2017)
Petitioner's Counsel of Record:
Toby Crouse, Office of the Attorney General of Kansas
Respondents' Counsel of Record:
Paul Whitfield Hughes, McDermott Will & Emery

Sixth and Fourteenth Amendments – Jury Trial and Incorporation

Ramos v. Louisiana (18-5924)
Question Presented:

Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict.

Summary:

The Sixth Amendment guarantees to the accused the right to "an impartial jury." The Court has held that the Fourteenth Amendment incorporates the Sixth Amendment right to be tried by a jury, rather than a judge, making that requirement applicable to the States. In *Apodaca v. Oregon*, five Justices concluded that the Sixth Amendment right to a jury trial requires a unanimous verdict. Five justices concluded, however, that the Fourteenth Amendment does not require a unanimous verdict; four of those five Justices concluded that the Sixth Amendment does not require a unanimous verdict, while the fifth (Justice Powell) concluded that the Sixth Amendment requires a unanimous verdict, but the Fourteenth Amendment does not incorporate that aspect of the Sixth Amendment. The question in this case is whether *Apodaca*'s holding that the Fourteenth Amendment does not require a unanimous verdict should be overruled.

Petitioner Evangelisto Ramos was charged with second-degree murder. Ten of twelve jury members found him guilty, and the district court entered a guilty verdict pursuant to a Louisiana law that permits a conviction based on a 10-2 vote. Petitioner filed a motion for a new trial and a motion for post-verdict judgment of acquittal, asserting that the Fourteenth Amendment requires a unanimous jury verdict. The district court denied both motions.

The Louisiana Court of Appeals affirmed, holding that the Fourteenth Amendment does not guarantee a unanimous verdict. The court relied on *Apodaca*'s holding to that effect.

Petitioner argues that the Fourteenth Amendment requires a unanimous verdict and that decisions since *Apodaca* demonstrate that it should be overruled. Petitioner argues that *Crawford v. Washington* establishes that a historical analysis rather than a functional analysis is required to determine the meaning of the Bill of Rights. Petitioner further argues that a historical analysis supports a requirement of a unanimous verdict, and that the *Apodaca* plurality incorrectly relied on a functional analysis to conclude otherwise. Finally, petitioner argues that *McDonald v. City of Chicago* rejected Justice Powell's view that the Fourteenth Amendment can afford less protection than a Bill of Rights provision that it incorporates.

Decision Below:
231 So.3d 44 (La. Ct. App. 2017)
Petitioner's Counsel of Record:
G. Ben Cohen, The Promise of Justice Initiative
Respondent's Counsel of Record:
Elizabeth Murrill, Office of the Attorney General of Louisiana

Sentencing – Issue Preservation

Holguin-Hernandez v. United States (18-7739)

Question Presented:

Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.

Summary:

Fed. R. Crim. P. 51 requires a party who wishes to preserve a claim of error for appeal to inform the district court of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. When a party fails to comply with Rule 51's contemporaneous objection requirement, appellate court review is limited to plain error. In *U.S. v. Booker*, the Supreme Court held that a sentence is subject to appellate review for reasonableness. The question in this case is whether a party who informs the district court of the sentence he deems appropriate, but fails to object to a sentence after it is pronounced, may obtain reasonableness review or only plain error review.

Petitioner Holguin-Hernandez was convicted of a drug offense and sentenced to a prison term, to be followed by a period supervised release. During his supervised release, petitioner committed another drug offense and was sentenced to another term of imprisonment, to be followed by a period of supervised release. Based on petitioner's second drug offense, the Probation Office sought to revoke his initial period of supervised release. In the revocation proceeding, petitioner argued that he should serve his revocation sentence and his sentence for his second drug crime concurrently, or that his revocation sentence should be less than the minimum Guidelines sentence. The district court sentenced petitioner to the Guidelines' minimum sentence, to run consecutively to his second drug-trafficking sentence. Petitioner's counsel did not object.

The Fifth Circuit affirmed. Relying on prior circuit law, the court held that because petitioner failed to object to the sentence after it was pronounced, appellate review was limited to plain error, rather than reasonableness. In its prior decision, the Fifth Circuit concluded that a post-sentencing objection encourages informed decisions and gives district courts an opportunity to correct errors. The court further concluded that the Supreme Court's holding in *Booker* that sentencing decision are subject to review for reasonableness did not override Rule 51's contemporaneous objection requirement.

Petitioner argues that a defendant is not required to object after a sentence is pronounced to preserve a claim that the sentence is unreasonable. Petitioner contends that, because *Booker* establishes that reasonableness is a standard to be applied by an appellate court, and not a district court, it makes no sense to require the defendant to inform the district court that its sentence is unreasonable. Petitioner further argues that when a defendant has informed the district court of what sentence he deems appropriate, he has fulfilled the requirements of Rule 51.

Decision Below:

746 Fed. Appx. 403 (5th Cir. 2018)

Petitioner's Counsel of Record:

Philip J. Lynch, Law Offices of Phil Lynch

Respondent's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

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

K. Winn Allen, Kirkland & Ellis

Federal Practice and Procedure

Appellate Jurisdiction

Immigration and Nationality Act

Guerrero-Lasprilla v. Barr (No. 18-776)
Ovalles v. Barr (No. 18-1015)
Question Presented:

Is a request for equitable tolling, as it applies to statutory motions to reopen [under the Immigration and Nationality Act], judicially reviewable as a question of law?

Summary:

Under the Immigration and Nationality Act (INA), appellate courts generally have jurisdiction to review removal orders of the Board of Immigration Appeals (BIA). Persons who have committed aggravated felonies, however, may only seek judicial review of constitutional claims or "questions of law." Under the INA, a person may move to reopen a removal proceeding, and an untimely motion is subject to equitable tolling. To be eligible for equitable tolling, a person must establish "due diligence." The question presented in this case whether due diligence in connection with a motion to reopen presents a reviewable question of law. The same question is presented in *Ovalles v. Barr*, No. 18-1015 (consolidated for oral argument).

Petitioner Pedro Pablo Guerrero-Lasprilla was convicted of an aggravated felony and deported. Eighteen years after his removal, petitioner filed a motion to reopen. The immigration judge denied his motion as untimely on the ground that petitioner failed to exercise due diligence. The BIA affirmed.

The Fifth Circuit dismissed for lack of jurisdiction, holding, in reliance on prior precedent, that due diligence in connection with a motion to reopen is an unreviewable question of fact. The prior precedent reasoned that due diligence requires a fact-intensive inquiry and does not lend itself to bright-line rules.

Petitioner argues that due diligence in connection with a motion to reopen presents a mixed question of law and fact when the underlying facts are undisputed, and that such mixed questions constitute reviewable questions of law. Petitioner further argues that because the underlying facts in his case are undisputed, his claim that he exercised due diligence is a reviewable question of law.

Decision Below:
737 Fed.Appx. 230 (5th Cir. 2018) (*Guerrero-Lasprilla*)
741 Fed.Appx. 259 (5th Cir. 2018) (*Ovalles*)
Petitioners' Counsel of Record:
Paul Whitfield Hughes, McDermott Will & Emery
Respondent's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States

Bankruptcy Code

Ritzen Group, Inc. v. Jackson Masonry, LLC (18-938)
Question Presented:

Whether an order denying a motion for relief from the automatic stay is a final order under 28 U.S.C. § 158(a)(1).

Summary:

The Bankruptcy Code authorizes an immediate appeal not only from final decisions in the bankruptcy case, but also from "final" orders in any "proceeding" within the larger case. The question in this case is whether an order denying a motion to lift an automatic stay is a "final" order in a "proceeding" within the larger bankruptcy case and is therefore immediately appealable.

Petitioner Ritzen Group contracted to buy property from respondent Jackson Masonry, but the sale never went through. Ritzen sued in state court for breach of contract, but shortly before the case was to be heard, Jackson filed for bankruptcy, triggering an automatic stay of the state court proceeding. The bankruptcy court denied Ritzen's motion to lift the stay, and Ritzen did not immediately appeal. Instead, it brought its substantive claims in bankruptcy court. After the bankruptcy court found for Jackson, Ritzen appealed the order refusing to lift the stay. The appeal was untimely if the order denying the motion to lift the stay was immediately appealable. The district court concluded that the order was immediately appealable and therefore dismissed the appeal as untimely.

The Sixth Circuit affirmed, holding that, with some exceptions, an order denying a motion to lift an automatic stay is a final order in a proceeding and is therefore immediately appealable. The court reasoned that the process for resolving a motion to lift a stay qualifies as a "proceeding" because it involves a discrete dispute within the overall bankruptcy case that is resolved through a series of procedural steps. The court concluded that the decision denying Ritzen's motion to lift the stay was a "final" order in that proceeding because it finally determined that Ritzen could not pursue his pre-bankruptcy claim against Jackson.

Petitioner argues that an order denying stay relief is not final when it does not resolve the issue underlying the request. Petitioner contends that, under this test, a denial of a motion to lift a stay that is predicated on the argument that the debtor filed the bankruptcy case in bad faith is not final because a claim of bad faith can be renewed at any time during the bankruptcy proceeding.

Decision Below:
906 F.3d 494 (6th Cir. 2018)
Petitioner's Counsel of Record:
Shane Gibson Ramsey, Nelson Mullins Riley & Scarborough, LLP
Respondent's Counsel of Record:
John Isaac Harris III, Schulman, LeRoy & Bennett, PC

Patent Act

Thryv, Inc., fka Dex Media, Inc. v. Click-To-Call Technologies, LP (18-916)
Question Presented:

Whether 35 U.S.C. § 314(d) permits appeal of the [Patent Trial and Appeal Board's] decision to institute an inter partes review upon finding that § 315(b)'s time bar did not apply.

Summary:

The America Invents Act created a procedure for challenging a patent before the Patent Trial and Appeal Board (Board) called inter partes review. Section 314(a) authorizes, but does not require, inter partes review when the Board finds a reasonable likelihood that the petitioner would prevail. Section 314(d) provides that "[t]he determination by the Board whether to institute an inter partes review under this section shall be final and nonappealable." In *Cuozzo Speed Technologies v. Lee*, the Supreme Court held that Section 314(d) bars review of "questions that are closely tied" to the decision whether "to initiate inter partes review." Section 315(b) provides that the Board may not institute review of petitions filed more than one year after service of an infringement complaint. The question presented is whether a Board determination that the Section 315 time bar does not apply is appealable.

InfoRocket.com filed suit against Keen, Inc., asserting infringement of patent '836. After Keen and InfoRocket merged and became Ingenio, Inc., the parties voluntarily dismissed the suit without prejudice. Respondent Click-To-Call Technologies acquired the '836 patent and sued Ingenio for infringement. Ingenio then petitioned the Board for inter partes review of the '836 patent. During the proceedings, Ingenio was merged into a company that was subsequently merged into petitioner Dex Media, Inc., currently renamed Thryv, Inc. The Board instituted review, rejecting Click-to-Call's assertion that Section 315's one-year bar precluded review. The Board then invalidated the patent claims on which it had instituted review. The Federal Circuit dismissed Click-to-Call's appeal for lack of jurisdiction under Section 314(d), and the Supreme Court vacated and remanded for reconsideration in light of *Cuozzo*.

The Federal Circuit initially dismissed for lack of jurisdiction again, but following an en banc Federal Circuit decision in another case, it held on reconsideration that the Board's time-bar determinations are appealable. The en banc court reasoned that the language of Section 314(d) making determinations "under this section" nonappealable is most naturally read to foreclose judicial review only of the Board's reasonable likelihood determinations under Section 314(a) and its decisions not to institute review. The court further concluded that a time-bar determination is not "closely tied" to those determinations under Section 314.

Petitioner argues that the Board's time-bar determinations are nonappealable. Petitioner contends that the bar on judicial review of a determination by the Board "whether to institute an inter partes review under this section" naturally encompasses a timeliness determination because a decision whether to institute review considers any response, and a respondent may argue the petition is time-barred. Petitioner also contends that the question of timeliness is "closely tied" to the Board's decision whether to initiate a review because Section 315(b) precisely addresses when a review "may not be instituted."

Decision Below:

899 F.3d 1321 (Fed. Cir. 2018)

Petitioner's Counsel of Record:

Adam Howard Charnes, Kilpatrick Townsend

Respondents' Counsel of Record:

Noel J. Francisco, Solicitor General of the United States
Daniel L. Geyser, Geyser P.C.

Foreigh Sovereign Immunity Act – Retroactivity

Opati v. Republic of Sudan (17-1268)

Question Presented:

Whether, consistent with [the Supreme] Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Foreign Sovereign Immunities Act applies retroactively; thereby permitting recovery of punitive damages under 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring prior to the passage of the current version of the statute.

Summary:

In *Landgraf v. USI Film Productions*, the Supreme Court held that there is a presumption against applying a provision that increases liability to pre-enactment conduct, and that this presumption against retroactivity can be overcome only by clear statutory language. In *Republic of Austria v. Altmann*, the Supreme Court held that the *Landgraf* presumption did not apply to provisions of the Foreign Sovereign Immunities ACT (FSIA) that withdrew foreign sovereign immunity. The question in this case is whether a provision of the FSIA that gives injured U.S. nationals, service members, and government employees a right to sue state sponsors of terrorism for punitive damages applies retroactively.

Members of Al-Qaeda detonated bombs at various U.S. embassies overseas. Victims and their representatives (petitioners) filed suit against Sudan, alleging that Sudan caused the bombings by giving material support to Al-Qaeda. Petitioners asserted a cause of action under State law. While that litigation was pending, Congress amended the FSIA to provide the federal cause of action for punitive damages discussed above. The district court entered default judgments against Sudan and awarded $4.3 billion in punitive damages.

The D.C. Circuit vacated the award of punitive damages, holding that the FSIA provision authorizing an award of punitive damages does not apply retroactively. The court reasoned that the *Langraf* presumption applied to the punitive damages provision, because it increases liability. The court concluded that the presumption was not overcome because while there was statutory language making the new cause of action retroactive, there was no separate statutory language making punitive damages retroactive. The court distinguished *Altmann* on the ground that the provisions at issue there were procedural, rather than substantive.

Petitioners argue that the FSIA's punitive damages provision applies retroactively. Petitioners contend that *Altmann*'s retroactivity holding applies to all FSIA provisions, including the punitive damages provision. Petitioners rely on *Altmann*'s explanations for declining to apply the *Landgraph* presumption to the FSIA's withdrawal of immunity: that immunity reflects political realities and is not intended to shape substantive conduct, and that the FSIA defies categorization as procedural or substantive because jurisdictional provisions have substantive effect. Those explanations, petitioners contend, apply equally to all FSIA provisions. Finally, petitioners argue that even if the *Landgraf* presumption applied, clear statutory language makes the punitive damages provision retroactive.

Decision Below:s

864 F.3d 751 (D.C. Cir. 2017)

Petitioners' Counsel of Record:

Steven R. Perles, Perles Law Firm, PC

Respondent's Counsel of Record:

Christopher M. Curran, White & Case LLP

Preclusion Doctrine

Lucky Brand Dungarees Inc. v. Marcel Fashion Group Inc. (18-1086)

Question Presented:

Whether, when a plaintiff asserts new claims, federal preclusion principles can bar a defendant from raising defenses that were not actually litigated and resolved in any prior case between the parties.

Summary:

Claim preclusion bars a party from relitigating the same claim, and applies to issues that could have been litigated in the earlier action, but were not. Issue preclusion bars relitigation of an issue actually litigated and resolved in an earlier action, and applies regardless of whether the new action involves the same claim. The question presented is whether, when a plaintiff asserts a new claim, federal preclusion principles bar a defendant from raising a defense that could have been litigated in the earlier action, but was not.

Respondent Marcel Fashions Group sued petitioner Lucky Brand Dungarees for infringing its "Get Lucky" trademark. In a settlement, Marcel agreed to a release of claims: Marcel says the release covers pre-agreement infringement, while Lucky says it covers any use of the "Lucky Brand" mark. In a subsequent suit between the parties, Marcel filed a counterclaim, alleging post-agreement infringement. Lucky chose not to litigate the release as a defense, and the court ruled in Marcel's favor. Marcel subsequently filed another suit, seeking relief from Lucky's continued use of the "Lucky Brand" mark. The district court dismissed based on claim preclusion, but the Second Circuit reversed and remanded, holding that a claim of post-judgment infringement constitutes a new claim. On remand, Lucky raised the release as a defense, and the district court ruled in Lucky's favor.

The Second Circuit reversed, holding that when a plaintiff asserts new claims, federal preclusion principles can bar a defendant from raising a defense that could have been litigated in an earlier action, but was not. The court reasoned that considerations of efficiency justify application of preclusion when (i) a previous action involved an adjudication on the merits; (ii) the previous action involved the same parties or those in privity with them; (iii) the defense was either asserted or could have been asserted in the prior action; and (iv) the district court, in its discretion, concludes that preclusion of the defense is appropriate because efficiency concerns outweigh any unfairness to the party whose defense would be precluded.

Petitioner argues that when a plaintiff asserts a new claim, federal preclusion principles do not bar a defendant from raising a defense that was not previously litigated or resolved in the earlier litigation. Petitioner argues that under controlling Supreme Court precedent, preclusion bars a defense to a new claim only when the defense was actually litigated and resolved in the earlier action. Petitioner also contends that precluding all defenses to new claims that were not litigated in the earlier action would be inconsistent with the Federal Rules of Civil Procedure, which bar only defenses that were compulsory counterclaims.

Decision Below:

898 F.3d 232 (2d Cir. 2018)

Petitioner's Counsel of Record:

Dale M. Cendali, Kirkland & Ellis LLP

Respondent's Counsel of Record:

Michael B. Kimberly, McDermott Will & Emery

Statutes of Limitations

Employee Retirement Income Security Act

Intel Corp. Investment Policy Committee v. Sulyma (18-1116)

Question Presented:

Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, 29 U.S.C. 1113(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit where all of the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

Summary:

The Employment Retirement Income Security Act, 29 U.S.C. 1113(2), includes a three-year statute of limitations on suits for breach of fiduciary duty. The period runs from "the earliest date on which the plaintiff had actual knowledge of the breach." The question in this case is whether a person has "actual knowledge" when the relevant information was made available to him, or only when he is aware of the relevant information.

Respondent Christopher Sulyma, filed a putative class action suit for breach of fiduciary duty against petitioner, Intel Corporation Investment Policy Committee. Intel moved for summary judgment on the ground that the statute of limitations had run before Sulyma filed suit. In support of the motion, Intel asserted that, more than three years before suit was filed, it had disclosed documents containing the relevant information to Sulyma, triggering the limitations period. In opposition, Sulyma asserted that because he was unaware of that information and did not recall seeing it, the limitations period had not begun. The district court granted summary judgment.

The Ninth Circuit reversed, holding held that actual knowledge requires actual awareness of the relevant facts, not merely that the relevant facts were made available to the plaintiff. The court reasoned that the ordinary meaning of "actual knowledge" is awareness of facts, not just access to them. The court also concluded that Congress's repeal of a constructive knowledge standard demonstrates that mere access to facts is insufficient to trigger the limitations period.

Petitioner argues that actual knowledge encompasses situations in which the plaintiff possesses all the relevant facts. Petitioner contends that the requirement that plan administrators divulge all relevant information to plan holders is premised on the understanding that such disclosures provide actual knowledge and trigger the limitations period. Petitioner also argues that Congress's repeal of a constructive knowledge standard is consistent with that understanding because, while a constructive knowledge standard requires a plaintiff to draw inferences from the information he has and to seek out additional facts, an actual knowledge standard holds him accountable only for the facts in his possession.

Decision Below

909 F.3d 1069 (9th Cir. 2018)

Petitioners' Counsel of Record:

Donald B. Verrilli Jr., Munger, Tolles, & Olson LLP

Respondent's Counsel of Record:

Matthew W. H. Wessler, Gupta Wessler PLLC

Fair Debt Collection Practices Act

Rotkiske v. Klemm (18-328)
Question Presented:

Whether the "discovery rule" applies to toll the one (1) year statute of limitations under the Fair Debt Collection Practices Act, , 15 U.S.C. §§ 1692, et seq., as the Fourth and Ninth Circuits have held but the Third Circuit (*sua sponte en banc*) has held contrarily.

Summary:

The Fair Debt Collection Practices Act (FDCPA) prohibits abusive debt collection practices. Its statute of limitations provides that an action "may be brought within one year from the date on which the violation occurs." A common law doctrine called the discovery rule delays the start of the limitations period until the aggrieved party knew or should have known of the injury. The question presented is whether the discovery rule applies to toll the one-year statute of limitations under the FDCPA.

Petitioner Kevin Rotkiske accumulated credit card debt. Respondent Klemm & Associates was responsible for collection. Klemm attempted service at a house but found that Rotkiske no longer lived there. Later, Klemm again attempted service at the same home, where a resident accepted service, and a default judgment was entered against Rotkiske unbeknownst to him. When Rotkiske found out about the default judgment, he filed suit, alleging that Klemm's collection efforts violated the FDCPA. Rotkiske filed suit more than one year after the violation occurred, but his complaint would have been timely if the FDCPA incorporated a discovery rule. The district court granted Klemm's motion to dismiss Rotkiske's claim as untimely.

The Third Circuit affirmed, holding that the discovery rule does not apply to toll the statute of limitations under the FDCPA. The court reasoned that by providing that the "occurrence" of the "violation" triggers the limitations period, Congress foreclosed application of the discovery rule.

Petitioner argues that the discovery rule applies under the FDCPA. Petitioner contends that text of the statute makes clear that the FDCPA's limitations period is an ordinary limitations period, and not a statute of repose, because it does not pair a shorter limitations period with a corollary unqualified termination of liability. Petitioner further argues that Congress is presumed to legislate against the background common law principles and decisions of the Supreme Court, and both sources establish that ordinary limitations periods, like that set forth in the FDCPA, incorporate a discovery rule in cases involving a blamelessly ignorant plaintiff.

Decision Below:
890 F.3d 422 (3d Cir. 2018)
Petitioner's Counsel of Record:
Scott E. Gant, Boies Schiller Flexner LLP
Respondents' Counsel of Record:
Shay Dvoretzky, Jones Day

Miscellaneous Business

Copyright – Government Edicts Doctrine

Georgia v. Public.Resource.Org, Inc. (18-1150)
Question Presented:

Whether the government edicts doctrine extends to – and thus renders copyrightable – works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.

Summary:

The Supreme Court has held that judicial opinions may not be copyrighted. Courts have extended this "government edict" doctrine to state statutes, and the U.S. Copyright Office applies the doctrine to all government edicts that have the force of law. The question presented is whether the government edicts doctrine extends to annotations of the law that lack legal force.

Georgia contracts with Lexis to publish the Official Code of Georgia Annotated (OCGA). The agreement requires Lexis to compile not only Georgia's statutes, but also annotations to the statutory provisions, including summaries of relevant judicial decisions and State Attorney General opinions. The annotations do not have the force of law. Georgia holds a copyright in the annotations, but not the statutory provisions themselves. After respondent Public.Research.Org, Inc. published the entire OCGA online without authorization, the State filed suit, alleging that respondent had infringed its copyright in the annotations. Respondent defended based on the government edicts doctrine. The district court ruled in favor of the State, on the ground that annotations that lack legal force fall outside the government edicts doctrine.

The Eleventh Circuit reversed, holding that the government edicts doctrine applies to annotations "authored by the People," regardless of whether they have legal force. The court applied a three-factor test to determine authorship, including who created the work, the authoritativeness of the work, and the process that produced the work. Because the annotations were created under the supervision of the Georgia legislature, were merged with the statutory text, and were created as an exercise of legislative authority, the court concluded that the annotations were authored by the People and were therefore not copyrightable.

The State argues that the government edicts doctrine does not apply to annotations that lack the force of law. The State contends that the Copyright Act's express protection for "annotations," and its exemption of *federal* government works from copyright protection, carries the implication that *State*-sponsored annotations may be copyrighted. The State also argues for deference to the U.S. Copyright Office's view that State-sponsored annotations of legal materials are copyrightable unless they have the force of law. Finally, the State argues that a series of Supreme Court decisions recognize that legal annotations are copyrightable.

Decision Below:

906 F.3d 1229 (11th Cir. 2018)

Petitioners' Counsel of Record:

Joshua Stephen Johnson, Vinson & Elkins LLP

Respondent's Counsel of Record:

Eric F. Citron, Goldstein & Russell, P.C.

Employee Retirement Income Security Act

Fiduciary Breach

Retirement Plans Committee of IBM v. Jander (18-1165)

Question Presented:

Whether [*Fifth Third Bancorp v. Dudenhoeffer*]'s "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of

an alleged fraud generally increases over time.

Summary:

In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court held that to state a claim for breach of the fiduciary duty of prudence under the Employee Retirement Income Security Act (ERISA), a plaintiff must plausibly allege that a prudent fiduciary could not have determined that an alternative action would do more harm than good to the fund. The question in this case is whether *Fifth Third*'s "more harm than good" pleading standard can be satisfied by allegations that reputational damage increases the longer fraud goes on, and that disclosure of the fraud was inevitable.

IBM offers its employees an employee stock option plan (ESOP) that gives them several investment options, including the IBM Common Stock Fund. Petitioner Retirement Plans Committee operates the fund, and respondents are employees who invested in the fund. During a period when respondents were invested, IBM operated a microelectronics business that was greatly overvalued. When IBM finally sold the business, and its true value was revealed, IBM's stock price plummeted. The employee investors brought suit against the Committee, alleging that it breached its duty of prudence by continuing to invest in the IBM Common Stock Fund without disclosing the truth about the value of IBM's microelectronics business. The district court dismissed the complaint.

The Second Circuit reversed, holding that the *Dudenhoeffer* "more harm than good" standard was satisfied by respondents' allegations that reputational damage increases the longer fraud continues; it was inevitable that the fraud would eventually be exposed; and a prudent investor therefore could not have concluded that the alternative option of disclosing the truth about Microelectronics' value would have caused more harm than good. The court concluded that the possibility that similar allegations may be made in other cases does not undermine the plausibility of the employees' claim here.

Petitioner argues that the "more harm than good" standard requires context-specific allegations and is not satisfied by generalized allegations that reputational damage increases the longer fraud goes on, and that the fraud would eventually be exposed. If such allegations were sufficient, petitioner argues, the more harm than good standard would not serve as an effective screen against insubstantial claims because such generalized allegations can be made in virtually every nondisclosure case.

Petitioners' Counsel of Record:

Paul D. Clement, Kirkland & Ellis LLP

Respondents' Counsel of Record:

Samuel E. Bonderoff, Zamansky LLC

Decision Below:

910 F.3d 620 (2nd Cir. 2018)

Standing to Sue

Thole v. U.S. Bank, N.A. (17-1712)

Questions Presented:

(1) May an ERISA plan participant or beneficiary seek injunctive relief against fiduciary misconduct under 29 U.S.C. 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof?

(2) May an ERISA plan participant or beneficiary seek restoration of plan losses caused

by fiduciary breach under 29 U.S.C. 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof?

(3) Whether petitioners have demonstrated Article III standing.

Summary:

The Employee Retirement Income Security Act of 1974 (ERISA) authorizes participants to seek appropriate relief, including restoration of plan losses, against plan fiduciaries who breach their duties. In a catchall provision, ERISA further authorizes participants to bring a civil action for injunctive relief. The questions presented in this case are whether ERISA authorizes plan participants who individually suffered no financial loss to seek injunctive relief and restoration of plan losses, and whether they have Article III standing to do so.

Participants in the U.S. Bank pension plan (petitioners), brought a putative class action against U.S. Bank and other pension plan managers (respondents), alleging a breach of fiduciary duty that resulted in loss to the plan. Petitioners sought restoration of plan losses for breach of duty and injunctive relief under the catchall provision. When the plan acquired more money than needed to meet its financial obligations, respondents moved to dismiss for lack of standing. The district court dismissed the claim as moot.

The Eighth Circuit affirmed on substantive grounds. The court first held that ERISA plan participants who do not suffer financial loss are not within the class of persons Congress authorized to sue for breach of duty. The court reasoned that a contrary construction would raise Article III concerns, and would adversely affect individual pension rights by exposing plans and fiduciaries to costly litigation. For similar reasons, the court held that plan participants who do not suffer financial loss are not within the class of persons Congress authorized to sue under the catchall provision.

Petitioners argue that Congress has authorized plan participants who do not suffer financial loss to seek recovery of losses to the plan, as well as injunctive relief. Petitioners contend that the text of both the breach-of-duty provision and the catchall provision expressly authorize plan participants to sue, and do not limit the right to sue to those who suffer financial loss. Petitioners further contend that plan participants who do not suffer financial injury have Article III standing. Petitioners argue that the Article III standing inquiry is informed by history and Congress's judgment, and that both recognize that a person suffers injury in fact from a breach of fiduciary duty.

Decision Below

873 F.3d 617 (8th Cir. 2017)

Petitioners' Counsel of Record:

Peter K. Stris, Stris and Maher LLP

Respondents' Counsel of Record:

Joseph R. Palmore, Morrison & Foerster LLP

International Arbitration – Equitable Estoppel

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA (18-1048)

Question Presented:

Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.

Summary:

Chapter 1 of the Federal Arbitration Act (FAA), makes a domestic arbitration agreement enforceable in accordance with state law contract principles, including the doctrine of equitable estoppel. That doctrine allows a non-signatory to an arbitration agreement to enforce an arbitration clause against a signatory to the agreement. Chapter 2 of the FAA make an international agreement enforceable in accordance with Chapter 1, but not when it conflicts with the New York Convention. The Convention recognizes only an "agreement in writing" that is "signed by the parties." The question presented is whether a non-signatory to an international arbitration agreement may compel arbitration against a signatory to the agreement.

Respondent Outokumpu, entered into a contract with Fives St. Corp ("Fives"). The contract stipulated that any dispute arising in connection with performance of the contract "shall be submitted to arbitration" in Germany. Fives subcontracted with petitioner GE Energy to supply nine motors to Outokumpu. When GE's motors failed, Outokumpu sued GE in Alabama state court. GE removed to federal court and moved to compel arbitration. The district court granted the motion.

The Eleventh Circuit reversed, holding that a non-signatory to an arbitration agreement may not compel arbitration against a signatory to the agreement. The court reasoned that the New York Convention's requirement of an agreement in writing "signed by parties" means that only a party who has signed the arbitration agreement may enforce it, precluding application of FAA Chapter 1's estoppel principles.

Petitioner argues that a non-signatory to an international arbitration agreement may compel arbitration against a signatory to the agreement. Petitioner contends that Chapter 1 authorizes a non-signatory to enforce a domestic arbitration agreement against a signatory to the agreement under principles of equitable estoppel, that Chapter 2 incorporates those principles absent a conflict with the Convention, and that nothing in the Convention addresses, much less precludes, the application of equitable estoppel. Petitioner argues that the Convention's requirement that an agreement must be "signed by the parties" means only that an arbitration agreement is not valid unless signed by parties, not that only parties to the agreement may enforce it.

Decision Below:
902 F.3d 1316 (11th Cir. 2018)
Petitioner's Counsel of Record:
Shay Dvoretzky, Jones Day
Respondents' Counsel of Record:
Eddie Travis Ramey, Burr & Forman LLP

Maritime Law

Citgo Asphalt Refining Company* v. *Frescati Shipping Company, Ltd. (18-565)
Question Presented:

Whether under federal maritime law a safe berth clause in a voyage charter contract is a guarantee of a ship's safety, as the Third Circuit below and the Second Circuit have held, or a duty of due diligence, as the Fifth Circuit has held.

Summary:

The standard form safe berth clause in a voyage charter contract specifies that the vessel "shall load and discharge at any safe place or wharf . . . designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely

afloat." The question presented is whether a safe berth clause requires the charterer to guarantee the ship's safety or rather to exercise due diligence to select a safe berth.

Petitioner Citgo Asphalt Refining Company (CARCO) chartered the *Athos I* under a contract containing a safe berth clause. As the *Athos I* was approaching CARCO's berth, it struck an abandoned anchor causing a crude oil spill. Respondent Frescati Shipping owned the *Athos I* and paid the clean-up costs, subject to partial reimbursement by co-respondent United States. Respondents filed suit in federal district court, seeking reimbursement for the clean-up costs based on the safe berth clause. The district court held the safe berth provision imposes a duty of due diligence on the charterer to select a safe berth, and that there was no breach of that duty.

The Third Circuit vacated and remanded, holding that the safe berth provision guarantees a vessel's safety, and does not merely impose a duty of due diligence. The court reasoned that the contractual language promising a "safe" berth to which the vessel can proceed "always safely afloat" is most naturally understood as an express assurance. On remand, the district court held petitioner liable under the safe berth provision. The Third Circuit affirmed, reiterating that the safe berth provision is a guarantee of safety, not merely a promise to exercise due diligence.

Petitioner argues that a safe berth provision imposes on the charterer a duty of due diligence, not a guarantee against unknowable risks. Petitioner contends that while the contractual language requiring the charterer to select a "safe" berth naturally implies a duty to exercise due care in doing so, nothing in the text of the safe berth clause warrants against unknowable risks. The language requiring the vessel be "always afloat," petitioner argues, simply requires that the berth or port permit the vessel to float, rather than strike the ground.

Decision Below:
886 F.3d 291 (3d Cir. 2018)
Petitioners' Counsel of Record:
Carter G. Phillips, Sidley Austin LLP
Respondents' Counsel of Record:
Sarah Elaine Harrington, Goldstein & Russell, P.C. (Frescati, et al.)
U.S. Respondent's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States

Patent – Recovery of Litigation Expenses

Peter v. NantKwest Inc. (18-801)
Question Presented:

Whether the phrase "[a]ll the expenses of the proceedings" in 35 U.S.C. 145 encompasses the personnel expenses the [United States Patent and Trademark Office] incurs when its employees, including attorneys, defend the agency in Section 145 litigation.

Summary:

The United States Patent and Trademark Office (PTO) is responsible for issuing patents. The Patent Trial and Appeal Board (Board) is the unit within PTO that reviews appeals from an examiner's decision denying a patent. An applicant may seek judicial review of the Board's decision in the Federal Circuit or in a civil action in district court. The Patent Act requires the applicant to pay for all the "expenses" of the civil action. The question in this case is whether the "expenses" of the civil action include the agency's personnel expenses, including attorneys' fees.

Respondent NankKwest applied for a patent. The PTO examiner rejected the application, and the Board affirmed. NantKwest sought judicial review of the Board's decision by initiating a civil action in district court. After the district court granted petitioner PTO's motion for summary judgment, PTO sought reimbursement of personnel expenses, including attorneys' fees. The district court denied the request.

The en banc Federal Circuit affirmed, holding that the term "expenses" in the Patent Act does not include the PTO's attorneys' fees. The court relied on the American Rule, a background rule of statutory construction under which each side bears its own attorneys' fees absent specific statutory language to the contrary. The court concluded that the term "expenses" is not sufficiently specific to displace the American Rule, particularly because other statutes expressly identify expenses and attorneys' fees as two separate items of recovery.

Petitioner PTO contends that the term "expenses" includes attorneys' fees. Petitioner argues that the ordinary meaning of the term expenses encompasses attorneys' fees, particularly when contrasted with the term "costs," which is a term of art used in other statutes to refer to relatively minor incidental litigation expenses. PTO further argues that the American Rule does not apply because the Patent Act requires the applicant to pay all expenses without regard to the outcome of litigation, whereas statutes that displace the American Rule overwhelmingly refer to the prevailing party or to the outcome of litigation. Finally, petitioner argues that, in any event, the term "expenses" is sufficiently specific to displace the American Rule.

Decision Below:
898 F.3d 1177 (Fed. Cir. 2018)
Petitioner's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States
Respondent's Counsel of Record:
Morgan Chu, Irell & Manella

Tax – Refund Ownership

Rodriguez v. Federal Deposit Insurance Co. (18-1269)
Question Presented:

Whether courts should determine ownership of a tax refund paid to an affiliated group based on the federal common law "*Bob Richards* rule," as three circuits hold, or based on the law of the relevant State, as four Circuits hold.

Summary:

The Internal Revenue Code authorizes an affiliated group of corporations consisting of a parent and its subsidiaries to file a consolidated tax return. When the Internal Revenue Service (IRS) issues a tax refund to an affiliated group, it does so "directly to and in the name of" the parent corporation, even if the losses are attributable in whole or in part to one or more of the subsidiaries. The Code, however, does not specify who owns the refund. That issue arises in bankruptcy. If a parent that files for bankruptcy owns the refund, it becomes part of the estate. If the subsidiary that experienced the losses owns it, it does not. A federal common law rule, known as the *Bob Richards* rule, specifies that, absent agreement of the parties, the refund belongs to the corporation responsible for the losses, not the party who would own the refund under applicable State law. The question presented is whether ownership of the refund should be determined based on the *Bob Richards* rule, or on applicable State law.

A parent bank and its subsidiary filed a consolidated tax return, claiming a refund attributable to the subsidiary's losses. The IRS issued the refund to the parent. When the subsidiary closed, respondent Federal Deposit Insurance Company (FDIC) was appointed as receiver. The parent later filed for bankruptcy, and petitioner Simon Rodriguez was appointed trustee. Rodriguez sought a declaration that the tax refund belonged to the parent's estate, while the FDIC asserted ownership as the subsidiary's receiver. The bankruptcy court ruled in favor of Rodriguez, that the refund belonged to the parent's estate, but the district court reversed.

The Tenth Circuit affirmed, holding that circuit precedent required it to apply the *Bob Richards* federal common law rule in determining ownership of the refund. The court noted the reasoning underlying the *Bob Richards* rule: Because the Code does not address who owns the refund, federal common law should resolve questions of ownership; and, absent agreement between the parent and the subsidiary, the federal common law rule assigns the refund to the corporation that experienced the losses because allowing the parent to keep it unjustly enriches the parent.

Petitioner argues that ownership of tax refunds should be determined based on state law, not on the *Bob Richards* federal common law rule. Petitioner argues that a federal court lacks authority to create federal common law absent a conflict between State law and some identified federal policy or interest. Petitioner further argues that application of State law does not conflict with any federal policy or interest. Because there is no basis for creating a federal common law rule, petitioner argues, ownership of a tax fund must be determined under applicable State law.

Decision Below:
914 F.3d 1262 (10th Cir. 2019)
Petitioner's Counsel of Record:
Neal Kumar Katyal, Hogan Lovells US LLP
Respondent's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States

Trademark – Remedies

Romag Fasteners, Inc. v. Fossil, Inc. (18-1233)
Question Presented:

Whether, under section 35 of the Lanham Act, 15 U.S.C. § 1117(a), willful infringement is a prerequisite for an award of an infringer's profits for a violation of section 43(a), *id.* § 1125(a).

Summary:

The Lanham Act provides three forms of trademark protection, each enacted at a different time. Section 43(a) prohibits false representations regarding another's distinctive mark; Section 43(c) prohibits trademark dilution; and Section 43(d) prohibits cyberpiracy. As originally enacted, the Lanham Act's remedial provision applied solely to a "violation" of Section 43(a) and authorized, subject to "principles of equity," recovery of the infringer's profits. The current version of the Lanham Act's remedial provision sets forth the remedies for a violation of all three prohibitions. For a "violation" of Sections 43(a) or (d), or for a "willful" violation of Section 43(c), it authorizes, subject to "principles of equity," recovery of the infringer's profits. The question presented is whether willful infringement is a prerequisite for an award of the infringer's profits for a violation of Section 43(a).

Petitioner Romag Fasteners makes magnetic snap fasteners under its registered trademark. Respondent Fossil agreed to use Romag's fasteners in its products. After Fossil's manufacturers used counterfeit fasteners, Romag sued Fossil for trademark infringement under Section 43(a). The jury found that Fossil's trademark infringement was negligent, not willful, and the district court rejected Romag's request for an award of Fossil's profits on that basis.

The Federal Circuit affirmed, holding, based on binding Second Circuit law, that willful infringement is a prerequisite for an award of an infringer's profits for a violation of Section 43(a). The court noted that the Second Circuit had interpreted the original remedial provision's reference to equitable principles to require a finding of willfulness for an award of infringer's profits. The court rejected Romag's argument that the amendment to the remedial provision specifying that willfulness is a requirement for a Section 43(c) infringer's profits remedy implies that it is not a requirement for a Section 43(a) infringer's profits remedy. The court reasoned that the amendment addressed only Section 43(c) remedies, and left intact the equitable principles language that the Second Circuit interpreted to require a finding of willfulness for a Section 43(a) infringer's profits remedy.

Petitioner argues that willfulness is not a prerequisite for an award of infringer's profits for a violation of Section 43(a). Petitioner contends that the inclusion of "willful" before "violation" of Section 43(c), but not before "violation" of Section 43(a) demonstrates Congress's intent to require willfulness only for a Section 43(c) infringer's profits remedy. Petitioner further contends that the remedial provision's drafting history supports that interpretation because Congress introduced an explicit willfulness requirement for a Section 43(c) infringer's profits remedy, but simultaneously failed to add that requirement for the same remedy under Sections 43(a) and (d).

Decision Below:
2019 WL 2677388 (Fed. Cir. 2019)
Petitioner's Counsel of Record:
Lisa Schiavo Blatt, Williams & Connolly LLP
Respondents' Counsel of Record:
Jeffrey Evan Dupler, Gibney, Anthony & Flaherty, LLP

Other Public Law

Administrative Law – Deferred Action on Childhood Arrivals

Dept. of Homeland Security v. Regents of the Univ. of Cal. (18-587)
Trump v. National Assoc. for the Advancement of Colored People (18-588)
McAleenan v. Vidal, (18-589)
Questions Presented:

(1) Whether [the Department of Homeland Security's (DHS's)] decision to wind down the [Deferred Action for Child Arrivals] policy is judicially reviewable.

(2) Whether DHS's decision to wind down the DACA policy is lawful.

Summary:

The Department of Homeland Security (DHS) adopted a policy of Deferred Action for Child Arrivals (DACA) under which it would forebear seeking the removal of certain aliens brought to the U.S. as children. DHS later expanded DACA and adopted Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a similar policy of deferred

action on removal of certain adults. The Fifth Circuit affirmed a preliminary injunction against DAPA and the expanded version of DACA, and an equally divided Supreme Court affirmed the Fifth Circuit's judgment. Citing those rulings, and the Attorney General's view that DACA was unlawful and likely would be subject to successful court challenge, DHS rescinded DACA. The questions presented in this case are whether DHS's decision to rescind DACA is judicially reviewable and, if so, whether that decision is lawful. The same questions are raised in *Trump v. NAACP*, No. 18-588 and *McAleenan v. Vidal*, No. 18-589, consolidated for argument.

The Regents of the University of California and others (respondents) filed suit against DHS, challenging the legality of the DACA rescission under the Administrative Procedure Act (APA). The district court granted a preliminary injunction requiring the government to allow those already enrolled in DACA to renew their enrollments.

The Ninth Circuit affirmed. The court first held that the rescission was judicially reviewable. The court reasoned that an agency's decision regarding how it will enforce the law is reviewable when, as here, it is based on the agency's view of its legal authority. The court also ruled that the Immigration and Naturalization Act (INA) did not bar review because the rescission was not a decision "to commence proceedings, adjudicate cases, or execute removal orders." On the merits, the court held that the rescission of DACA violated the APA because DHS acted based on the misconception that DACA is unlawful. The court reasoned that DACA is lawful because DHS has broad authority under the INA to grant deferred action, and because the Fifth Circuit's reasons for invalidating DAPA were either unpersuasive or inapplicable to DACA.

The government contends that DHS's decision to rescind DACA is not judicially reviewable. The government argues that decisions governing how to enforce the law are committed to agency discretion, and do not become judicially reviewable when the agency gives a legal reason for its decision. The government further argues that, at a minimum, the INA bars review of enforcement decisions except through review of a removal order. On the merits, the government contends that DHS gave three lawful reasons for its decision to rescind DACA. First, the government argues that the decision was reasonable in light of DHS's serious doubts about the legality of DACA. Second, the government argues that the decision was reasonable in light of policy concerns about adopting a policy of non-enforcement for a broad class of persons. Finally, the government argues that the rescission was reasonable in light of DHS's correct determination that DACA is unlawful.

Decision Below

908 F.3d 476 (9th Cir. 2018) (No. 18-587)
315 F.Supp.3d 457 (D.D.C. 2018) (No. 18-588)
295 F.Supp.3d 127 (E.D.N.Y. 2018) (No. 18-589)

Petitioner's Counsel of Record:

Noel J. Francisco, Solicitor General of the United States

Respondents' Counsel of Record:

Michael J. Mongan, State of California, Department of Justice (No. 18-587)
Theodore J. Boutrous Jr., Gibson, Dunn & Crutcher LLP (No. 18-588)
Barbara Dale Underwood, Solicitor General of New York (No. 18-589)

Environmental Law

Comprehensive Environmental Response, Compensation, and Liability Act

Atlantic Richfield Co. v. Christian (17-1498)
Questions Presented:

(1) Whether a common-law claim for restoration seeking cleanup remedies that conflict with [Environmental Protection Agency (EPA)]-ordered remedies is a "challenge" to EPA's cleanup jurisdictionally barred by § 113 of [Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)].

(2) Whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup.

(3) Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

Summary:

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides that **"**no Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action" selected by EPA, and "no potentially responsible party may undertake any remedial action . . . unless such remedial action has been authorized." The questions presented in this case are whether respondents' claims for restoration are a "challenge" to EPA-ordered cleanup remedies, whether respondents are potentially responsible parties (PRP), and whether CERCLA otherwise preempts respondents' claims for restoration.

The EPA issued a required clean-up of a Superfund site containing a copper smelter owned by petitioner, Atlantic Richfield Company. Respondents, who own residential land within the site, sued Atlantic Richfield for restoration damages to fund cleanup beyond what the EPA had required. Atlantic Richfield moved for summary judgment, arguing the claims were barred by CERCLA. The district court denied summary judgment for Atlantic Richfield.

The Montana Supreme Court affirmed. The court first held that the restoration claim was not a prohibited "challenge" to an EPA remedial action. The court reasoned that a challenge must interfere with EPA's work, and that respondents' claims did not do so. The court also ruled that respondents are not PRPs requiring EPA authorization for remedial action. The court reasoned that each of the three ways to identify a PRP – a party that entered into a voluntary settlement with the EPA, a party judicially determined to be a PRP, or a party that is a defendant in a CERCLA lawsuit – is inapplicable here. Finally, the court held that respondents' claims are not otherwise preempted by CERCLA. The court reasoned that CERCLA's savings clauses preserve respondents' ability to pursue common law claims when, as here, they do not interfere with EPA's work.

Petitioner argues that respondents' claims are a "challenge" to EPA's selected remedy. Petitioner notes that the ordinary meaning of "challenge" is "to object to" or "to put in question." Petitioner then argues that because respondents' preferred remedy dramatically departs from EPA's, respondents necessarily "object to" and "put in question" EPA's remedy. Petitioner also argues that respondents are PRPs because CERCLA defines PRP as the "owner" of "any site or area where a hazardous substance has . . . come to be located," and respondents meet that definition. Finally, petitioner contends that respondents' remedy is impliedly preempted because

it is impossible to comply with both EPA's selected remedy and the common-law restoration plan, and because granting a restoration remedy would usurp EPA's authority to select the appropriate remedy.

Decision Below

408 P.3d 515 (Mont. 2017)

Petitioner's Counsel of Record:

Lisa S. Blatt, Williams & Connolly LLP

Respondents' Counsel of Record:

Joseph R. Palmore, Morrison & Foerster LLP

Clean Water Act

County of Maui, Hawaii v. Hawaii Wildlife Fund (18-260)

Question Presented:

Whether the [Clean Water Act] requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

Summary:

Under the Clean Water Act (CWA), no party may discharge "any pollutant to navigable waters from any point source" without a permit. A point source is defined as a "discernible, confined and discrete conveyance from which pollutants are discharged," such as a pipe or well. By contrast, parties do not need permits to discharge pollutants from nonpoint sources, such as groundwater. The question presented is whether a permit is required when a pollutant is discharged from a point source, travels through a nonpoint source, and ends up in navigable waters.

The County of Maui (petitioner) collects and processes sewage in four wells that concededly meet the definition of a point source. Treated wastewater travels from the wells into groundwater and ends up in the Pacific Ocean. Hawaii Wildlife Fund (respondent) filed suit, alleging that petitioner was discharging pollutants from point sources through ground water into navigable waters without a permit, in violation of the CWA. The district court granted summary judgment in favor of respondents.

The Ninth Circuit affirmed, holding that a permit is required when pollutants are discharged from a point source, the pollutants are fairly traceable from the point source to a navigable water, and the pollutant levels reaching navigable water are more than *de minimis.* The court rejected petitioner's argument that the CWA applies only when a point source conveys pollutants directly into navigable waters. The court reasoned that that the text of the CWA applies to discharges from a point source "to" navigable waters, not "directly to" navigable waters. The court also concluded that the CWA should not be interpreted to permit a polluter to accomplish indirectly what it could not accomplish directly.

Petitioner argues that the CWA requires a permit only when pollutants are conveyed directly from any point source to navigable waters. Petitioner argues that, in light of the definition of point source as a conveyance, the term "from" any point source is most naturally understood to mean that the point source must be what delivers the pollutant, rather than the place where the pollution originates. Petitioner also argues that this test accords with the CWA's separate regulatory programs for point source and nonpoint source pollution, while the indirect conveyances test would effectively obliterate that distinction.

Decision Below:
886 F.3d 737 (9th Cir. 2018)
Petitioner's Counsel of Record:
Elbert Lin, Hunton Andrews Kurth LLP
Respondents' Counsel of Record:
David Lane Henkin, Earthjustice

Hague Convention – Child Custody

Monasky v. Taglieri (18-935)
Questions Presented:

(1) Whether a district court's determination of habitual residence under the Hague Convention should be reviewed *de novo*, as seven circuits have held, under a deferential version of *de novo* review, as the First Circuit has held, or under clear-error review, as the Fourth and Sixth Circuits have held.

(2) Where an infant is too young to acclimate to her surroundings, whether a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Hague Convention.

Summary:

The Hague Convention requires children wrongfully removed from their country of "habitual residence" to be returned to that country. A custody determination is then made in the country of habitual residence. The questions presented in this case are whether a district court's determination of habitual residence should be reviewed *de novo* or for clear error, and whether, when a child is too young to acclimate to her surroundings, a subjective agreement between parents on where the child should live is necessary to establish habitual residence.

Petitioner Michelle Monasky and respondent Domenico Taglieri had a daughter together in Italy. Later, Monasky brought the infant to the United States. Taglieri filed a petition under the Hague Convention to return their daughter to Italy. The district court found that Italy was the child's place of habitual residence and granted the petition.

The en banc Sixth Circuit affirmed. The court reviewed the district court's determination of habitual residence for clear error. The court relied on a Hague Convention explanatory report treating habitual residence as a factual question. The court also held that when an infant is too young to acclimate to her surroundings, a child's habitual residence should be based on the parents' shared intent on where the child should live. The court held that a finding of shared intent does not require subjective agreement between the parties, but may rest on objective considerations, such as the location of the marital home. The court concluded that a subjective agreement requirement would leave too many children without a habitual residence and thus without protection under the Convention.

Petitioner argues that a district court's determination of habitual residence is subject to *de novo* review. Petitioner contends that because habitual residence requires application of a legal standard to historical fact, it is a mixed question of law and fact. Petitioner then argues that mixed questions are reviewed *de novo* when, as here, there is a compelling need for uniformity. Petitioner also argues that when a child is too young to acclimate to her surroundings, a subjective agreement between parents is necessary to establish habitual residence. Petitioner relies on the ordinary meaning of the term "habitual residence" as presence in a country "with a degree of settled purpose" or "continuity." Petitioner argues that absent the parents' subjective

agreement, an infant's presence in a country does not have the "settled purpose" or "continuity" necessary to establish habitual residence.

Decision Below
907 F.3d 404 (6th Cir. 2018)

Petitioner's Counsel of Record:
Amir C. Tayrani, Gibson, Dunn and Crutcher LLP

Respondent's Counsel of Record:
Andrew J. Pincus, Mayer Brown LLP

Immigration and Nationality Act – Stop-Time Rule

Barton v. Barr (18-725)

Question Presented:

Whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] . . . inadmissible" for the purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1).

Summary:

Under the Immigration and Nationality Act (INA), a lawful permanent resident alien (LPR) who becomes removable may seek cancellation of removal if he has continuously resided in the United States for seven years. The INA has a "stop-time rule" under which continuous residence ends when an alien commits a specified offense that "renders the alien inadmissible to the United States." The question in this case is whether an LPR who is not seeking admission to the United States can be rendered inadmissible for purposes of the stop-time rule.

Petitioner Andre Martello Barton, a native of Jamaica, was admitted to the United States, and subsequently was adjusted to LPR status. Barton was later convicted of aggravated assault, an offense that renders an alien inadmissible. Based on his commission of two different offenses, the government sought to deport him, and Barton then sought cancellation of removal. If Barton's aggravated assault conviction stopped the clock, he would not be eligible to seek cancellation, but if did not stop the clock, he would be. The immigration judge concluded that the aggravated assault conviction stopped the clock and that Barton was therefore ineligible to seek cancellation. The Board of Immigration Appeals dismissed Barton's appeal.

The Eleventh Circuit denied Barton's petition for review, holding that an alien can be "rendered inadmissible" for purposes of the time-stop rule regardless of whether he presently seeks admission to the United States. The court reasoned that the ordinary meaning of the words "renders" and "inadmissible" refers to a person's present status, independent of any facts on the ground. Applying that understanding, the court concluded that an alien is rendered inadmissible by one of the qualifying offenses even if he is not actually seeking admission at a particular time.

Petitioner argues that a lawful permanent resident cannot be rendered inadmissible unless he is seeking admission to the United States. Petitioner contends that because an immigration judge in a removal proceeding must decide the "inadmissibility or deportability of an alien," an offense "renders the alien inadmissible" only if it is the actual basis for that decision with respect to the alien himself. Petitioner argues that the government's contrary interpretation would rewrite the phrase "renders the alien inadmissible" as "could render a hypothetical alien inadmissible."

Decision Below:
904 F.3d 1294 (11th Cir. 2018)

Petitioner's Counsel of Record:
Adam G. Unikowsky, Jenner & Block LLP
Respondent's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States

Patient Protection and Affordable Care Act – Provider Reimbursement

Moda Health Plan, Inc. v. United States (18-1028)
Maine Community Health Options v. United States (No. 18-1023)
Land of Lincoln Mutual Health Insurance Co. v. United States (18-1038)
Question Presented:

Whether Congress can evade its unambiguous statutory promise to pay health insurers for losses already incurred simply by enacting appropriations riders restricting the sources of funds available to satisfy the government's obligation?

Summary:

Section 1342 of the Patient Protection and Affordable Care Act (ACA) provides that the Secretary of Health and Human Services (HHS) "shall" partially reimburse insurance companies participating in ACA's exchanges when their costs have exceeded their premiums. Congress subsequently passed a series of appropriations riders providing that none of the funds made available under each of the Appropriations Acts could be used for that purpose. The question presented is whether the appropriations riders suspended the government's Section 1342 reimbursement obligation. The same question is presented in *Maine Community Health Options v. United States* (18-1023) and *Land of Lincoln Mutual Health Insurance Co. v. United States* (18-1038)

Petitioner health insurance providers were participants in the ACA exchanges. Petitioners' costs exceeded their premiums, so they sought the repayments specified in Section 1342. When HHS paid petitioners only a portion of what Section 1342 specified, petitioners filed suit in the Court of Federal Claims to recover the remainder. The court ruled for petitioners.

The Federal Circuit reversed, holding that the appropriations riders suspended the government's Section 1342 reimbursement obligation. The court reasoned that the appropriations riders at issue used language similar to that used in other statutes the Supreme Court had interpreted as repealing or suspending prior commitments. The court also relied on statements from the House Appropriations Chairman as confirming that conclusion.

Petitioners argue that the appropriations riders did not override the mandatory obligation created by Section 1342. Petitioners contend that under the presumption against implied repeals, if Congress wishes to modify or repeal a prior commitment through an appropriations measure, it must use words that expressly, or by clear implication, modify or repeal the previous law. Petitioners contend that the language in the appropriations riders does not satisfy that standard for implied repeals because the riders say nothing about repealing or suspending the prior obligation, but instead say only that funds to pay the obligations may not come from those appropriations.

Decisions Below:
892 F.3d 1311 (Fed. Cir. 2018) (No. 18-1028)
892 F.3d 1184 (Fed. Cir. 2018) (No. 18-1038)
729 Fed.Appx. 939 (Fed. Cir. 2018) (No. 18-1023)

Petitioners' Counsel of Record:
Paul D. Clement, Kirkland & Ellis LLP (No. 18-1028)
Jonathan S. Massey, Massey & Gail LLP (No. 18-1038)
Stephen J. McBrady, Crowell & Moring LLP (No. 18-1023)
Respondent's Counsel of Record:
Noel J. Francisco, Solicitor General of the United States