



# A LOOK AHEAD

**Supreme Court of the United States October Term 2020**

SUPREME COURT INSTITUTE  
GEORGETOWN UNIVERSITY LAW CENTER



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OCTOBER TERM 2020 PREVIEW**

September 2020

**A LOOK AHEAD AT OCTOBER TERM 2020**

# Supreme Court Institute Preview Report

## Supreme Court October Term 2020

This report previews the Supreme Court’s argument docket for the October Term 2020 (OT 20). The Court has thus far accepted 37 cases for review, including seven sets of cases consolidated for one hour of argument, for a total of 30 oral arguments. The Court has calendared 10 arguments to be heard in the October argument sitting; these cases were all rescheduled after the cancellation of the March and April OT 19 sittings.

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

### SECTION I: TERM HIGHLIGHTS

#### *California v. Texas*

#### *Texas v. California*

The Affordable Care Act (ACA) guarantees affordable health insurance to millions of Americans, including those with preexisting conditions. As originally enacted, Section 5000A provided that most Americans “shall” ensure that they have insurance coverage, and that taxpayers who did not obtain coverage must make a shared responsibility payment to the IRS. In *NFIB v. Sebelius*, the Court held that, if viewed as a mandate to purchase insurance, with a penalty for failure to comply, Section 5000A would exceed Congress’s Commerce Power. The Court then interpreted Section 5000A as a tax on persons who failed to purchase insurance and upheld it as a valid exercise of the Tax Power.

After numerous attempts to repeal the ACA in its entirety failed, Congress amended Section 5000A to reduce the shared responsibility payment to zero, while leaving the rest of the ACA intact. That change sparked the current lawsuit brought by Texas and some individuals (Texas). Texas claims that Congress transformed Section 5000A into an unconstitutional mandate to purchase insurance, and that the entire Act must fall as a result. The SG agrees. States led by California (California) and the House of Representatives resist each of those claims, and also argue that the plaintiffs lack standing. The Court has granted certiorari on all three questions. Only the first two are discussed here.

Texas and the SG argue that *NFIB*’s holding that Section 5000A was not a mandate to purchase insurance rested entirely on the possibility of interpreting it as a tax. Now that the shared responsibility payment has been reduced to zero, they argue, it can no longer be interpreted as a tax because it will not raise revenue. And with that alternative off the table, Section 5000A’s “shall ensure” text can only be interpreted as an unconstitutional mandate to purchase insurance. California and the House counter with a *NFIB*/textualist argument of their own: By preserving the choice structure of Section 5000A, and changing only the amount of the responsibility payment, Section 5000A still provides a lawful choice: Before, Section 5000A offered a choice between purchasing insurance and making a responsibility payment of a substantial amount. Now, it offers a choice between purchasing insurance and making a

responsibility payment of zero. And offering a choice between doing something and paying nothing raises no serious question of constitutional power. It follows from Congress's power to repeal statutory obligations and from its power to establish precatory laws.

Based on these competing arguments alone, it is not easy to predict where the Justices will land. For Justices who are not wholly persuaded by either argument, California and the House have this to offer: (i) the President and congressional leaders described the amendment as a repeal of the mandate, not as the creation of one, (ii) a choice interpretation avoids the unseemly conclusion that Congress flouted the Court's decision in *NFIB* by enacting the very command the Court held would be unconstitutional, and (iii) the mandate interpretation would make outlaws of people who choose not to buy insurance when the point of the amendment was to give people more freedom to make that choice. For some Justices, these arguments will likely prove overwhelmingly persuasive; for others, they likely will not. We will have to wait to see how many Justices fall into each camp.

If the Court interprets Section 5000A as a mandate, it then raises the question whether the mandate is severable from the rest of the Act. There are serious disagreements among the Justices about how to approach severability, but a majority of the Court is committed to a strong presumption in favor of severability that can be overcome only if other provisions of the Act cannot operate independently or it is evident that Congress intended the invalidity of one provision to bring down others.

California and the House argue that there is no need for reliance on a presumption. Congress eliminated an enforceable mandate, while preserving everything else. A judicial remedy that declared the already unenforceable mandate constitutionally unenforceable, while leaving the rest of the statute intact, would mirror Congress's choice.

Texas and the U.S.'s inseverability argument rests on a finding that Congress made when it enacted the ACA and failed to repeal when it amended Section 5000A: that the minimum coverage requirement "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." They argue that this finding is the equivalent of an inseverability clause tying together the minimum coverage requirement and the provisions ensuring affordable coverage for persons with preexisting conditions. And once those provisions are severed, they argue, the rest of the statute cannot operate as intended.

California and the House have three responses: first, this is a finding about what is essential in "creating" markets, not what is essential in maintaining them, and the evidence before Congress was that a mandate was not needed to preserve insurance markets. Second, a finding is not the equivalent of an inseverability clause: findings never have operative force and, even if not repealed, they lose their relevance in determining Congress's intent when a statute has substantially changed. The amendment effects just such a substantial change—from a statute with a strong inducement to purchase insurance to a statute with no inducement. Third, it is implausible that Congress, having repeatedly failed to repeal the ACA, would have wanted millions of Americans to lose their insurance simply because an unenforceable mandate was declared unenforceable as a constitutional as well as a statutory matter.

It is not hard to predict how the Court will come out on the severability question if it chooses to reach it. A majority of the Court is not going to allow the unenforceability of an already unenforceable mandate to deprive millions of Americans of insurance based on a finding that is both textually inapplicable and a relic of a different statute. That is particularly true when the effect would be to repeal the very statute that Congress chose not to repeal. In a recent

decision, Justice Kavanaugh, speaking for a plurality of the Court, said that “constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in the statute to take down the whole, otherwise constitutional statute.” This passage reads like he had this case in mind when he wrote it. The Court has saved the ACA from extinction twice when the challenges were far more formidable. It is not going to allow Texas’s game of gotcha to wreak havoc with the lives of Americans.

### ***Fulton v. City of Philadelphia***

The City of Philadelphia contracts with private foster-care agencies to help place children with foster parents. The foster-care agencies decide whether to certify applicants as fit parents. The City then decides whether to place the foster children with the foster parents. Catholic Social Services (CSS) has entered into contracts with the City to provide foster care certifications. Based on its religious views, CSS will not assist same sex couples who wish to become foster parents. After the City learned that CSS would not certify same sex couples, the City put a freeze on assigning children to CSS-certified families, and then informed CSS that future contracts would include specific language that contractors may not discriminate against prospective foster parents based on protected characteristics, including sexual orientation. CSS filed suit, alleging that the City’s actions violated the Free Exercise Clause.

*Employment Division v. Smith* held that neutral laws of general applicability that have the incidental effect of burdening the free exercise of religion do not trigger strict scrutiny. The City argues that the prohibition against discrimination based on sexual orientation is a neutral and generally applicable requirement and therefore does not trigger strict scrutiny. CSS claims that the City’s actions were neither neutral nor generally applicable. And it also contends that *Smith* should be overruled. The Supreme Court granted certiorari on those issues. It also granted certiorari on a Free Speech question that will not be discussed here.

The parties agree that a requirement is not generally applicable if it fails to prohibit nonreligious conduct that endangers the government’s asserted interests to a similar or greater degree than religious conduct. And they also agree that a requirement is not neutral if motivated by religious hostility. Despite an outpouring of amicus briefs urging the overruling of *Smith*, this case has largely become a disagreement about whether the facts establish the absence of general applicability or neutrality.

On the question of general applicability, CSS, supported by the SG, argues that the City has created the following exemptions that endanger the government’s interest in nondiscrimination to the same degree as the religious exemption sought by CSS: (i) it permits other agencies to deny service to foster parents and refer them to another agency; (ii) it permits other agencies to focus their outreach only on foster families of certain ethnicities; (iii) it requires agencies to consider marital status, familial status, and disability; (iv) it permits agencies to specialize in serving Native American children or special needs children; and (v) it considers race and disability in deciding whether to place foster children with particular families. The City responds to these claims by either denying that the practice exists, denying that it constitutes discrimination based on a protected characteristic, or denying that the practice is similar to CSS’s refusal to serve same sex couples.

CSS’s claim of religious hostility, supported by the SG, cites the following: (i) the City targeted religious agencies for investigation; (ii) the City’s justifications for its actions have evolved over time; (iii) a City Council resolution stated that discrimination against same sex



couples occurs under the guise of religious freedom, and (iv) Commissioner Figueroa stated that CSS should follow the teachings of Pope Francis. The City responds by either disputing the accuracy of the asserted facts, disputing that they are evidence of discrimination, or disputing that they have any connection to the challenged decision.

Without probing the record and arguments more thoroughly, it is impossible to say how the Court will respond to this set of fact-based arguments. As *Masterpiece Cakeshop* demonstrates, however, the Court is not averse to conducting that kind of fact-based assessment, particularly when it can avoid more divisive or far reaching issues. Therefore, it would not be surprising if the Court resolved this case through one of these two narrow paths. Indeed, just as it did in *Masterpiece*, it could merge the two forms of evidence under the umbrella of religious hostility.

If it finds itself unable to resolve the case on narrow grounds, the Court will have to confront the broader issues. One of those is whether to recognize a new exception to *Smith* for any law that reserves authority to make individualized exceptions. Relying on *Sherbert v. Verner*, a pre-*Smith* case, CSS and the SG argue that the very fact that the government reserves discretion to grant individualized exemptions is enough to trigger strict scrutiny. The City responds that it has not reserved authority to grant individualized exemptions. It further argues that *Sherbert*, as interpreted in *Smith*, does not establish that the power to make individualized exceptions itself triggers strict scrutiny. If it did, the City argues, every otherwise neutral and generally applicable criminal law would be subject to strict scrutiny simply because prosecutors exercise prosecutorial discretion.

While stranger things have happened, it seems unlikely the Court will overrule *Smith*. The Court has the capacity to create whatever exceptions to *Smith* it wants, and the risk that overruling *Smith* would resurrect the incoherence that preceded it is a risk that a majority of the Court is unlikely to view as worth taking. While some members of the left side of the Court may have at one time thought *Smith* was deeply wrong, their experience with RFRA has likely disabused them of that notion. It is also telling that the SG has not urged *Smith*'s overruling. The SG's reading of *Sherbert* has a better chance of prevailing. But it still does not seem likely that a majority will go that far. The Court's central post-*Smith* concern has been with discrimination against religion. And the reservation of power to make individualized exceptions is far from proof that the power will be exercised in a discriminatory manner. Absent any hint of discrimination, it is unlikely that a majority of the Court would want to hamstring the government's traditional authority to refrain from enforcing requirements based on individualized circumstances.

One final note. The City's lead argument is that the Court's First Amendment cases give the government far broader authority to manage its own affairs through contractors than it has when it acts as a regulator. That argument is unlikely to gain any traction as a response to CSS's claim of religious discrimination. But the argument could very well carry weight if the question becomes whether to adopt the SG's *Sherbert* exception or overrule *Smith*. Making individualized waiver decisions is standard operating procedure for government contracts. And it is not clear that even the Justices attracted to overruling *Smith* as a general matter would necessarily be eager to subject to strict scrutiny a neutral and generally applicable government contracting requirement that incidentally burdens the practice of religion.

***Nestlé USA, Inc. v. Doe I***  
***Cargill v. Doe I***

This case arises under the Alien Tort Statute (ATS). In its first case under the ATS, the Court held that the ATS was enacted with the understanding that courts would have limited authority to create a cause of action for violations of international law. In neither that case nor any other, however, has the Court followed through and recognized one beyond the historic examples that prompted the ATS: protection for ambassadors, safe conduct, and piracy. It has recognized the possibility that claims could be brought against today's human rights violators. But it has also erected substantial barriers to bringing such claims

First, the suit must be based on a norm that is specific, universal, and obligatory. Second the court must determine whether permitting suit is an appropriate exercise of judicial discretion. And third, there is a presumption against extraterritorial application that may be overcome only when a claim sufficiently touches and concerns the territory of the U.S. A later decision has equated the touch and concern requirement with a requirement that conduct relevant to the statute's focus must have occurred in the United States.

In the most recent ATS case, the Court held that foreign corporations may not be held liable for violations of international law. The Court questioned whether there is a universal norm that is applicable to corporations. But it ultimately reserved the question and held only that, for foreign policy and separation of powers reasons, it would not be appropriate to exercise discretion to create a cause of action against foreign corporations.

Even though the Supreme Court has not been friendly to ATS claims, that has not deterred plaintiffs from bringing them. The suits almost always allege egregious violations of international law. This case is a good example. The plaintiffs in these cases are former child slaves who were forced to work cultivating cocoa beans on farms in West Africa. They sued under the ATS, alleging that Nestlé and Cargill, two U.S. corporations, aided and abetted their enslavement by providing funds and technical assistance to the farmers. The Supreme Court granted certiorari on two questions: (1) whether domestic conduct that aids and abets violations that occur in foreign countries overcomes the presumption against extraterritorial application, and (2) whether domestic corporations may be held liable under the ATS.

On the first question, petitioners argue that the focus of an ATS aiding and abetting claim is the primary violation that is assisted, not the aiding and abetting itself. Since respondents' enslavement occurred abroad, that means that respondents' suit is impermissibly extraterritorial. Respondents counter that the focus of an aiding and abetting violation is the aiding and abetting, not the underlying violation. Since the aiding and abetting occurred in the U.S., they argue, their suit is not impermissibly extraterritorial.

On the second question, petitioners argue that there is no universal norm imposing liability on corporations. Even if there were, petitioners argue, there are strong reasons for the Court to decline to exercise its discretion to impose liability on domestic corporations. For one thing, recognizing corporate liability would shift the focus away from the individuals responsible, a point that was decisive in the Court's refusal to extend *Bivens* liability to corporations. For another thing, when faced with an analogous question of whether to create a cause of action against corporations for human rights violations, Congress extended liability only to natural persons. Respondents counter that international law does impose obligations on corporations. And they further argue that the court should exercise its discretion to establish a

cause of action against domestic corporations because corporate liability is a standard feature of domestic tort law, and because, unlike creating a cause of action against foreign corporations, imposing liability on domestic corporations would not adversely affect foreign relations.

If the Court accepts either of petitioners' arguments, that is the end of ATS litigation as a practical matter. Virtually all ATS suits have been against corporations for aiding and abetting violations occurring in another country. A ruling that there is no corporate liability or that aiding and abetting a foreign violation is impermissibly extraterritorial would mean that such suits could no longer be brought. Thus far, the Court has been unwilling to shut down all ATS litigation: it has always chosen narrower grounds for decision that would not have that effect. This time, however, the Court may be more open to a broader ruling. While *stare decisis* considerations will likely preclude a holding that courts have no authority to create causes of action, it seems likely the Court will not extend ATS liability beyond what it has already recognized. That is the approach it has taken with *Bivens*, and there is no reason to think it will take a different approach here. Full briefing may cause the Court to decide the case on a narrower ground, such as that the domestic aiding and abetting alleged in this case does not overcome the presumption against extraterritoriality. But it would not be surprising if the Court finally adopted one of the two broader grounds for decision.

There is one other possible way for the Court to decide the case. In his amicus supporting certiorari, the SG argued that the Court should exercise discretion not to recognize any aiding and abetting liability. And it suggested that the Court add a question on that issue. The Court did not add the question, but it would be easy enough for the Court to view that question as within one of the two questions granted and decide the case on that basis.

### ***Van Buren v. United States***

Petitioner Nathan Van Buren, a local police sergeant in Georgia, was the subject of an FBI sting operation. At the FBI's direction, an FBI informant who knew petitioner gave him money in exchange for his obtaining information from a police database on whether a person the informant supposedly wanted to date was an undercover agent. Petitioner had authority to access information on the database for law enforcement purposes, but not for personal gain. Petitioner's conduct was surely reprehensible. But the question is whether he committed a federal crime.

The federal crime the government charged him with was a violation of the Computer Fraud Statute, a statute that was targeted at the then relatively recent phenomena of computer hacking. The statute contains two prohibitions. The first makes it unlawful to intentionally access a computer without authorization. The second makes it unlawful to intentionally exceed authorized access. The government convicted petitioner of violating the second prohibition. The Court has granted certiorari to decide whether the conviction can stand.

The government's defense of the conviction is straightforward. When a person has authority to access a computer for one purpose, but instead accesses a computer for a different purpose, that person has "exceeded authorized access." Here, while petitioner had authority to access the police database for law enforcement purposes, he was not authorized to access it for non-law enforcement purposes. He therefore exceeded his authorized access when he accessed the computer for personal gain.

Petitioner counters that whatever "exceeds authorized access" might mean in a vacuum, the Computer Fraud Statute defines that phrase in a way that excludes petitioner's conduct. Under the statute, exceeds authorized access means "to access a computer with authorization and



to use such access to obtain or alter information that the accessor *is not entitled to obtain or alter.*” According to petitioner, under that definition, a person does not exceed authorized access unless he has no right to obtain the information *at all*. Because petitioner had a right to access the information in the database, he did not exceed authorized access as that phrase is defined.

Petitioner offers five additional arguments, three of which are discussed here. First, when Congress has wanted to prohibit access for unauthorized purposes, it has said that directly. The failure to use that simple phrase in this statute is therefore telling. Second, given the statute’s focus on hackers, the prohibition on unauthorized access covers outside hackers, while the prohibition on exceeding access covers inside hackers—people authorized to use a computer to access some files who use that access to hack into others. Covering people who are authorized to access a file, but do so for an unauthorized reason, goes well beyond the statute’s anti-hacker focus. Third, and perhaps most importantly, the government’s interpretation would criminalize a wide swath of ordinary human behavior—a person who uses the company computer to check sports scores, or a person who inflates his height on a dating website.

The government has not yet filed its brief. So it is too early to make a definitive prediction. But it is hard to see, at this stage, how the government can prevail. The government has a textual hook for its argument, and may well have the best of the text, but that is unlikely to be enough. The Court has increasingly revolted against what it views as federal prosecutorial overreach—the use of broadly worded federal criminal statutes to prosecute conduct that is more appropriately prosecuted at the state level or not at all. It did so when it rejected the government’s interpretation of the honest services statute in *Skilling*. It did so when it rejected the government’s interpretation of the bribery statute in *McDonnell*. It did so when it rejected the government’s interpretation of the chemical weapons statute in *Bond*. It did so when it rejected the government’s interpretation of the property fraud statute in *Kelly*. In each of those cases, the defendant’s conduct was unethical or worse. In each case, the government’s brief carefully explained how the statutory language covered the defendant’s conduct. But in each case, the Court concluded that the federal statute did not cover the defendant’s conduct. There is little reason to think the outcome will be different here.

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## ***Constitutional Law***

### **Articles I and III—Patient Protection and Affordable Care Act**

***California v. Texas*** (19-840)

***Texas v. California*** (19-1019)

#### **Questions Presented:**

- (1) Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in section 5000A(a) [of the Affordable Care Act (ACA)].
- (2) Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional.
- (3) If so, whether the minimum coverage provision is severable from the rest of the ACA.
- (4) Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

#### **Summary:**

As originally enacted, Section 5000A of the Affordable Care Act (ACA) provided that most Americans shall ensure that they have insurance coverage, and that taxpayers who did not obtain coverage must make a shared responsibility payment to the IRS. In *National Fed'n of Indep. Bus. V. Sebelius*, the Court held that, if viewed as a mandate to purchase insurance, Section 5000A would exceed Congress's Commerce Power. The Court then interpreted Section 5000A as a tax on persons who failed to purchase insurance and upheld it as a valid exercise of the Tax Power. Congress subsequently amended Section 5000A to reduce the shared responsibility payment to zero. The first question presented is whether States or individuals who do not want to purchase insurance have standing to challenge Section 5000A. The second question is whether Section 5000A is constitutional. The third question is whether, assuming Section 5000A is unconstitutional, it is severable from the rest of the ACA. The fourth question is whether, assuming Section 5000A is unconstitutional and non-severable, nationwide relief is appropriate.

Two individuals (individual respondents) and States led by Texas (Texas) filed suit in federal court, alleging that Section 5000A of the ACA is unconstitutional and non-severable from the rest of the ACA. They sought nationwide relief against the ACA in its entirety. Another group of States, led by petitioner California, intervened as defendants. The district court ruled in favor of the individual respondents and Texas.

The Fifth Circuit affirmed in part. The court held that the individual respondents had Article III standing because they bought insurance under the belief that Section 5000A required them to do so, and that the States had standing because Section 5000A increased their costs for printing and processing employee coverage forms. The court held that, in light of the reduction of the responsibility payment to zero, the amendment transformed Section 5000A into an unconstitutional mandate. Finally, the court remanded on the questions of severability and nationwide relief.

California contends that the individual respondents lack standing because Section 5000A does not require them to do anything, and, even if it did, there are no consequences for failing to act. California contends that States lack standing because they failed to introduce any evidence

of financial injury resulting from Section 5000A. On the merits, California contends that Section 5000A is constitutional because offering a choice between purchasing insurance and paying nothing is either a precatory provision or an exercise of the Tax Power. Finally, California contends that even if Section 5000A were unconstitutional, it is severable from the rest of the ACA. California argues that because Congress eliminated any enforcement mechanism for Section 5000A, but left in place the rest of the Act, it is clear that Congress would have wanted the rest of the Act to stand even if Section 5000A were held unconstitutional.

Texas contends that Section 5000A is non-severable from the rest of the ACA because Congress described Section 5000A as essential to coverage of preexisting conditions, and the rest of the ACA's provisions cannot operate in the manner Congress intended without Section 5000A. Texas further contends that nationwide relief is appropriate because anything less would require Texas and other respondent States to subsidize the ACA in the rest of the country.

### **Decision Below:**

945 F.3d 355 (5th Cir. 2019)

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Samuel P. Siegel, California Department of Justice (No. 19-1019)

## **Article III and First Amendment—Standing, Freedom of Association**

### ***Carney v. Adams* (19-309)**

### **Questions Presented:**

- (1) Whether respondent has demonstrated Article III standing?
- (2) Does the First Amendment invalidate a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the State's three highest courts, with the other seats reserved for judges affiliated with the "other major political party"?
- (3) Did the Third Circuit err in holding that a provision of the Delaware Constitution requiring that no more than a "bare majority" of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other "major political party," when the former requirement existed for more than fifty years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts?

### **Summary:**

The "bare majority" provision in the Delaware Constitution limits the number of judges affiliated with any one political party to a bare majority on the State's three highest courts. The "major party" provision reserves the remaining seats for judges affiliated with the other major

political party. Under *Elrod v. Burns*, the First Amendment generally bars a State from disqualifying persons from a public office based on their political affiliation unless political affiliation is an appropriate requirement for the effective performance of the office. The principal question in this case is whether the major party provision violates the First Amendment. This case also raises the questions of whether respondent has standing, and whether the bare majority and major party provisions are severable.

Respondent Adams is a lawyer who switched his party affiliation from Democrat to Independent, rendering him ineligible to serve on the State's highest three courts by virtue of the major party provision. Respondent filed suit in federal court, alleging that both the bare majority and major party provisions violate the First Amendment. The district court agreed and granted judgment in his favor.

The Third Circuit affirmed. The court first held that respondent has standing because the major party requirement disqualifies him from applying for judicial positions on the State's three highest courts. It next held that the major party provision violates the First Amendment. The court reasoned that *Elrod* requires strict scrutiny of party affiliation requirements except when party loyalty is required for effective performance, and that effective service as a judge requires independence, not party loyalty. Applying strict scrutiny, the court concluded that, even assuming judicial political balance is a compelling state interest, the State failed to show that the major party provision is narrowly tailored to serve that interest. Finally, the court held that the major party and bare majority provisions are not severable because they are equally integral to the State's political balance scheme.

The State argues that respondent lacks Article III standing because he did not assert any concrete plans to apply for any judicial position. The State further argues that the bare majority and major party provisions do not violate the First Amendment. The State contends that *Elrod's* strict scrutiny standard is inapplicable to positions that require the exercise of discretion on issues of public importance, and that judges meet that description. For such positions, the State argues, the relevant question is whether using political affiliation is reasonable, a standard that is satisfied for judges because political balance reasonably promotes the quality and independence of the judiciary. The State contends that, in any event, its political balance requirements satisfy strict scrutiny because they are narrowly tailored to further the compelling interest in judicial quality and independence. Finally, the State argues that the bare majority provision is severable because respondent lacks standing to challenge it, and it can operate independently.

### **Decision Below:**

922 F.3d 166 (3rd Cir. 2019)

### **Petitioner's Counsel of Record:**

Michael W. McConnell, Wilson, Sonsini, Goodrich. & Rosati, PC

### **Respondent's Counsel of Record:**

David Lee Finger, Finger & Slanina, LLC

## **First Amendment—Free Exercise**

### ***Fulton v. City of Philadelphia* (19-123)**

#### **Questions Presented:**

- (1) Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by

someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held?

(2) Whether *Employment Division v. Smith* should be revisited?

(3) Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?

### **Summary:**

The City of Philadelphia will not contract with foster care agencies unless they agree not to discriminate in placements based on sexual orientation. The City refuses to make an exception for agencies that have a religious objection to that policy. In *Employment Division v. Smith*, the Court held that “neutral, generally applicable” laws that interfere with the free exercise of religion do not trigger strict scrutiny. The first question presented is whether the City's policy is neutral and generally applicable. The second question presented is whether *Smith* should be overruled. The First Amendment prohibits the government from compelling speech. The third question presented is whether the City's policy violates that prohibition on compelled speech.

The City refuses to contract with petitioner Catholic Social Services to provide foster care services unless petitioner agrees to comply with the City's nondiscrimination policy. Complying with that policy would violate petitioner's religious beliefs. Petitioner filed suit in federal court, alleging that the City's policy violates the Free Exercise Clause and compels speech in violation of the First Amendment. The district court denied a preliminary injunction.

The Third Circuit affirmed. The court held that the City's policy does not violate the Free Exercise Clause under *Smith* because petitioner failed to show that it had been treated worse than similarly situated entities because of its religious beliefs. The court further held that the City's policy did not compel speech in violation of the First Amendment because participation in the program simply requires petitioner to act in a nondiscriminatory manner, not to proclaim its support for same sex marriage.

Petitioner argues that the City's policy violates the Free Exercise Clause. Petitioner argues that the City's policy is not neutral within the meaning of *Smith* because the City reverse engineered a policy to justify an outcome and expressed hostility towards petitioner's exercise of religion. Petitioner also contends that the City's policy is not generally applicable because the City is willing to make individualized exceptions to its policy. Petitioner further argues that *Smith*'s holding that neutral and generally applicable laws that interfere with free exercise are not subject to strict scrutiny should be overruled. Finally, petitioner contends that the City compels speech in violation of the First Amendment because, in order to participate in the foster care program, petitioner must certify that same sex couples are fit foster parents.

### **Decision Below:**

922 F.3d 140 (3d Cir. 2019)

### **Petitioners' Counsel of Record:**

Mark Leonard Rienzi, The Becket Fund for Religious Liberty

### **Respondents' Counsel of Record:**

Leslie Cooper, American Civil Liberties Union

## ***FEDERAL PRACTICE AND PROCEDURE***

### **Civil Procedure—Personal Jurisdiction**

***Ford Motor Co. v. Montana Eighth Judicial District Court*** (19-368)

***Ford Motor Co. v. Bandemer*** (19-369)

**Question Presented:**

Whether the “arise out of or relate to” requirement [for specific personal jurisdiction] is met when none of the defendant’s forum contacts caused the plaintiff’s claims, such that the plaintiff’s claims would be the same even if the defendant had no forum contacts.

**Summary:**

The Due Process Clause of the Fourteenth Amendment permits a State to exercise specific personal jurisdiction over a defendant only if the plaintiff’s suit “arises out of or relates to” the defendant’s contacts in the State. The question presented in this case is whether the “arise out of or relate to” limitation requires a causal relationship between the defendant’s forum contacts and the plaintiff’s claims. The same question is at issue in *Ford Motor Co. v. Bandemer*, 19-369, consolidated for oral argument.

Markkaya Jean Gullet, a Montana resident, was driving a Ford Explorer on a Montana highway when a tire on the car separated, causing the car to roll into a ditch and land upside down. Gullet died at the scene. Petitioner Ford sells cars, including Ford Explorers, in Montana. Petitioner did not, however, sell in Montana the Ford Explorer Gullet was driving. The representative of Gullet’s estate (respondent) sued petitioner in Montana state court, alleging state law claims of negligence, defective design, and failure-to-warn. Petitioner moved to dismiss for lack of personal jurisdiction, and the district court denied the motion.

Montana’s highest court affirmed, holding that the “arise out of or relate to” requirement for specific jurisdiction does not demand a causal relationship between the defendant’s forum contacts and the plaintiff’s claims. That requirement is satisfied, the court held, when the defendant’s forum contacts are connected to the plaintiff’s claims through related activities directed to others, and the defendant could reasonably have foreseen its product being used in the forum state. Applying that standard, the court concluded that petitioner’s sale of Explorers in Montana to others had a connection to plaintiff’s claims, and that petitioner could have reasonably foreseen that the Explorer driven by Gullet would be used in Montana.

Petitioner argues that the “arise out of or relate to” requirement is satisfied only when there is a causal relationship between the defendant’s forum contacts and the plaintiff’s claims. For that reason, petitioner argues, similar activity directed to non-plaintiffs, such as petitioner’s sale of Explorers to others, is not sufficient. Petitioner contends that a causal connection is required by the Court’s precedent, prevents States from exercising jurisdiction when they lack an interest in regulating the defendant’s conduct, provides a defendant with fair warning of where it may be sued, and preserves the distinction between general and specific jurisdiction.

**Decisions Below:**

443 P.3d 407 (Mont. 2019)

931 N.W.2d 744 (Minn. 2019)

**Petitioner’s Counsel of Record:**

Sean Marotta, Hogan Lovells US LLP  
**Respondents' Counsel of Record:**  
 Deepak Gupta, Gupta Wessler PLLC

## **Mootness**

### ***Uzuegbunam v. Preczewski* (19-968)**

#### **Question Presented:**

Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.

#### **Summary:**

A federal court has no jurisdiction under Article III of the U.S. Constitution when a case becomes moot. The question presented in this case is whether a claim for nominal damages for past unlawful conduct pursuant to a challenged policy prevents a case from becoming moot when a change to that policy otherwise makes the case moot.

While he was a student at Georgia Gwinnett College, petitioner Uzuegbunam distributed religious literature in a campus plaza. Campus police stopped him because he was outside the college's designated free speech zones. Petitioner then tried to speak about his faith in the free speech zone, but campus police stopped him again, claiming he was engaging in disorderly conduct. Petitioner brought suit in federal court, challenging the college's policies as a violation of the First Amendment. After the college changed the challenged policies and petitioner graduated, the district court dismissed the case as moot.

The Eleventh Circuit affirmed, holding that a request for nominal damages for past conduct under a challenged policy cannot prevent a case from becoming moot when a change to that policy otherwise makes a case moot. The court reasoned that a grant of nominal damages in that circumstance would amount to an advisory opinion that has no practical effect on the rights and obligations of the parties and does nothing more than put a judicial seal of approval on an already realized outcome.

Petitioner argues that a change in policy does not moot a claim for nominal damages for past unlawful conduct under that policy. Petitioner argues that nominal damages do have a practical effect because they require the defendant to pay money to the plaintiff, and they prevent the defendant from reenacting its unlawful policies. Petitioner further contends that nominal damages are critical to ensuring that government officials respect constitutional freedoms when there is no financial injury.

#### **Decision Below:**

*Uzuegbunam v. Preczewski*, 781 F. App'x 824 (11th Cir. 2019)

#### **Petitioner's Counsel of Record:**

John J. Bursch, Alliance Defending Freedom

#### **Respondent's Counsel of Record:**

Andrew Alan Pinson, Office of the Georgia Attorney General



## **Foreign Sovereign Immunities Act—Expropriation Exception**

***Federal Republic of Germany v. Philipp*** (19-351)

***Republic of Hungary v. Simon*** (18-1447)

(cases are not consolidated but present the same questions of law)

### **Questions Presented:**

(1) Whether the “expropriation exception” of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when “rights in property taken in violation of international law are in issue,” provides jurisdiction over claims that a foreign sovereign has violated international human-rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing states’ responsibility for takings of property.

(2) Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims.

### **Summary:**

The “expropriation exception” to the Foreign Sovereign Immunities Act (FSIA) creates an exception to sovereign immunity for any case involving a foreign nation’s taking of property in violation of international law. The first question in this case is whether a nation’s taking of the property of its own citizens falls within the expropriation exception when the taking is part of a genocide campaign. The doctrine of international comity that preexisted the FSIA allowed a U.S. court to require plaintiffs to exhaust remedies in a foreign forum. The second question is whether FSIA makes court-ordered exhaustion unavailable in cases against foreign sovereigns. This question is also presented in *Republic of Hungary v. Simon* (18-1447).

A consortium of Jewish art dealers purchased a collection of art before World War II. After the Nazis came to power, they purchased a portion of the collection from the consortium. Heirs of the consortium (respondents) brought a claim for return of the collection before a Germany Advisory Commission, alleging that the collection had been sold under duress. The Commission found that the sale was voluntary and recommended against return of the property. Respondents then brought suit in federal court against the Federal Republic of Germany (petitioner), seeking the return of the collection. The court rejected petitioner’s assertion of sovereign immunity and refused to require exhaustion in German courts.

The D.C. Circuit affirmed. The court held that the expropriation exception applies when a foreign nation takes the property of its own citizens as part of a genocide campaign. The court acknowledged that a nation’s taking of its own citizens’ property does not violate the international law of takings. It concluded, however, that such a taking violates international law when it is connected to genocide because genocide violates international law, even when perpetrated against a nation’s own citizens. It further held that a court may not order plaintiffs to exhaust their claim against a foreign government in that nation’s courts. The court reasoned that the text of the expropriation exception does not require exhaustion, and that comity defenses must stand or fall on the text.

Petitioner argues that the expropriation exception does not apply when a nation takes the property of its own citizens, even when the taking is connected to genocide. Petitioner contends

that the exception is most naturally read to reference the international law of takings, which does not prohibit a nation's taking of its own citizens' property. Petitioner further argues that the absence of any exception to sovereign immunity for violations of international human rights norms reinforces that reading. It would be odd, petitioner argues, for Congress to permit a claim of genocide only when it is connected to a taking of property. Petitioner also contends that a court may require plaintiffs to exhaust a claim against a foreign nation in that nation's courts. Petitioner contends that the FSIA displaced comity based sovereign immunity doctrines, but it left intact non-immunity comity rules, such as the requirement of exhaustion. Petitioner further argues that the provision making a foreign nation liable to the same extent as private individuals makes an exhaustion defense available to a foreign nation because private individuals may assert that defense.

**Decision Below:**

925 F.3d 1349 (D.C. Cir. 2019) (19-351)

911 F.3d 1172 (D.C. Cir. 2018) (18-1447)

**Petitioner's Counsel of Record:**

Jonathan M. Freiman, Wiggin & Dana LLP (19-351)

Gregory Silbert, Weil, Gotshal & Manges LLP (18-1447)

**Respondent's Counsel of Record:**

Nicholas Michael O'Donnell, Sullivan & Worcester LLP (19-351)

Sarah Harrington, Goldstein Russell, P.C. (18-1447)

**Alien Tort Statute—Extraterritoriality Bar**

***Nestlé USA, Inc. v. Doe I* (19-416)**

***Cargill v. Doe I* (19-453)**

**Questions Presented:**

(1) Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity.

(2) Whether the Judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations.

**Summary:**

The Alien Tort Statute (ATS) enables courts to create a cause of action for violations of international human rights law in limited circumstances. The ATS is presumed not to apply extraterritorially, and that presumption can be overcome only when conduct relevant to the statute's focus occurred in the United States. The first question presented is whether a claim of domestic aiding and abetting of a foreign violation overcomes the ATS's presumption against extraterritoriality. A court may create a cause of action under the ATS only if it reflects a specific, universal, and obligatory norm. Even when that condition is satisfied, a cause of action may not be created if there are sound reasons to leave the decision to Congress. Without reaching the first step, the Court in *Jesner v. Arab Bank* held that there are sound reasons to leave the

liability of foreign corporations to Congress. The second question presented is whether a domestic corporation can be held liable under the ATS. The same two questions are presented in *Cargill, Inc. v. Doe I*, 19-453, consolidated for oral argument.

Petitioner Nestlé USA purchases cocoa beans produced in West Africa by farmers who enslave their laborers. Some of the laborers (respondents) filed suit in federal court under the ATS, alleging that petitioner aided and abetted child slavery by providing funds and technical assistance to the farmers. The district court dismissed, the court of appeals reversed, and the district court dismissed again.

The Ninth Circuit again reversed and remanded. The court first held that domestic aiding and abetting of a foreign violation overcomes the presumption against extraterritoriality. The court reasoned that the focus of an aiding and abetting claim is the aiding and abetting, not the underlying violation. The court further held that domestic corporations can be liable under the ATS for a violation of a universal norm against slavery. The court concluded that the Supreme Court's decision in *Jesner* has no application to domestic corporations.

Petitioner argues that a claim of domestic aiding and abetting of a foreign violation is insufficient to overcome the extraterritoriality bar. Petitioner contends that the focus of an aiding abetting claim is the underlying violation and injury, not the aiding and abetting. Petitioner also argues that courts cannot impose liability on domestic corporations. Petitioner contends that international law does not recognize a universal, obligatory norm that is applicable to corporations and that, in any event, there are sound reasons to leave the decision whether to impose liability on domestic corporations to Congress.

#### **Decision Below:**

929 F.3d 623 (9th Cir.)

#### **Petitioners' Counsel of Record:**

Neal Kumar Katyal, Hogan Lovells US LLP

#### **Respondents' Counsel of Record:**

Paul Lindsey Hoffman, Schonbrun Seplow Harris & Hoffman LLP

## ***Criminal Law and Procedure***

### **Fourth Amendment—Seizure**

#### ***Torres v. Madrid* (19-292)**

#### **Question Presented:**

Is an unsuccessful attempt to detain a suspect by use of physical force a “seizure” within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold, or must physical force be successful in detaining a suspect to constitute a “seizure,” as the Tenth Circuit and the D.C. Court of Appeals hold?

#### **Summary:**

The Fourth Amendment prohibits “seizures” that involve the use of excessive force. The question in this case is whether the use of physical force to restrain a suspect is a “seizure” when it does not result in officers obtaining control of the suspect.

Respondents Madrid and Williamson, New Mexico State Police officers, saw petitioner Torres parked in a car in an apartment complex. When respondents approached the car, petitioner drove forward to escape. Respondents then fired their weapons at petitioner, and two bullets struck her. Petitioner nonetheless managed to drive away and make it to a hospital. Petitioner was later arrested and pleaded guilty to several charges. Petitioner subsequently filed suit in federal court, alleging that respondents seized her through use of excessive force, in violation of the Fourth Amendment. The district court granted respondents' motion for summary judgment.

The Tenth Circuit affirmed. Relying on a prior decision, the court held that a shooting of a suspect is not a seizure unless it results in officers obtaining control of the suspect. Because the shots fired at petitioner did not result in respondents obtaining control over her, the court concluded, petitioner was never seized.

Petitioner contends that a Fourth Amendment seizure occurs whenever officers use physical force with the intent to restrain a suspect, regardless of whether it results in the officers obtaining control of the suspect. Petitioner argues that the Fourth Amendment incorporates pre-framing, common law understandings, and that the common law has always treated the use of physical force to restrain as a seizure. Petitioner also relies on a statement in the Supreme Court's decision in *California v. Hodari D* that the use of physical force to restrain a suspect is a seizure, even if the suspect escapes. Finally, petitioner argues that the ultimate purpose of the Fourth Amendment is to protect personal security, and that shooting a bullet into a suspect violates that overriding purpose.

**Decision Below:**

769 F. App'x 654 (10<sup>th</sup> Cir. 2019).

**Petitioner's Counsel of Record:**

Kelsi Brown Corkran, Orrick, Herrington & Sutcliffe LLP

**Respondent's Counsel of Record:**

Mark Daniel Standridge, Jarmie & Rogers, P.C.

**Habeas Corpus—Sixth Amendment—Retroactivity**

***Edwards v. Vannoy* (19-5807)**

**Question Presented:**

Whether the Supreme Court's decision in *Ramos v. Louisiana*, 590 U.S. \_\_\_\_ (2020), applies retroactively to cases on federal collateral review.

**Summary:**

A Supreme Court decision applies retroactively to cases on federal collateral review if it was either dictated by a prior decision, or if is a watershed rule that implicates the fundamental fairness and accuracy of a criminal proceeding. In *Ramos v. Louisiana*, the Supreme Court held that the Sixth Amendment, as incorporated against the states by the Fourteenth Amendment, requires a unanimous jury verdict in state criminal trials. The question presented in this case is whether the *Ramos* decision applies retroactively to cases on federal collateral review.

Petitioner Edwards was convicted of armed robbery, aggravated rape, and kidnapping by a non-unanimous jury and sentenced to life without parole. At the time, the Supreme Court's decision in *Apodaca v. Louisiana* was understood by Louisiana to permit non-unanimous verdicts. The Louisiana Court of Appeals affirmed the convictions, and the State Supreme Court

denied review. Petitioner then applied to the state district court for post-conviction relief, which was denied; the State Court of Appeals and the State Supreme Court denied review.

Petitioner then sought a writ of habeas corpus in federal district court, arguing that Louisiana's non-unanimous jury practice violated his rights under the Sixth and Fourteenth Amendments. The district court denied petitioner's habeas petition. Petitioner sought a certificate of appealability, but the Fifth Circuit denied the application. Petitioner then petitioned the Supreme Court for a writ certiorari. While that petition was pending, the Supreme Court decided *Ramos*. The Supreme Court then granted certiorari to answer the question whether *Ramos* applies retroactively.

Petitioner contends that *Ramos* applies retroactively to cases on federal collateral review. Petitioner argues that *Ramos* was dictated by precedent establishing that: (i) the Sixth Amendment guarantees the right to a unanimous verdict, (ii) the Sixth Amendment is applicable to the States through the Fourteenth Amendment, and (iii) all incorporated rights apply identically against the states and the federal government. Petitioner alternatively argues that if *Ramos* was not dictated by prior precedent, it is then a watershed rule that implicates the fundamental fairness and accuracy of a criminal proceeding. Petitioner contends that *Ramos* has watershed status because jury unanimity is the core of the jury trial right, and a nonunanimous verdict creates an impermissibly large risk of inaccurate convictions.

#### **Decision Below:**

Order 5-20-2019, 18-31095 (5th Cir. 2019)

#### **Petitioner's Counsel of Record:**

Andre Robert Belanger, Manasseh, Gill, Knipe & Belanger

#### **Respondent's Counsel of Record:**

Michelle Ward Ghetti, Attorney General for the State of Louisiana

### **Eight Amendment—Sentencing Juvenile Offenders**

#### ***Jones v. Mississippi* (18-1259)**

#### **Question Presented:**

Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

#### **Summary:**

In *Miller v. Alabama*, the Supreme Court held that a mandatory sentence of life without parole for juvenile offenders constitutes cruel and unusual punishment in violation of the Eighth Amendment. In *Montgomery v. Louisiana*, the Supreme Court held that *Miller* established a rule that a sentence of life without parole is unconstitutional for juvenile offenders unless they are permanently incorrigible. The question in this case is whether the Eighth Amendment requires a sentencing court to make a finding of permanent incorrigibility before imposing a sentence of life without parole on a minor.

Petitioner Jones was a juvenile when he was convicted of murdering his grandfather and sentenced to life in prison without parole. In light of its understanding of *Miller*, the Mississippi Supreme Court vacated his sentence and remanded to the circuit court for a hearing to consider a series of youth-related factors before imposing a new sentence. After holding such a hearing, the circuit court resentenced petitioner to life without parole.

The Mississippi Court of Appeals affirmed, holding that a sentencing court is not required to find that a juvenile is permanently incorrigible before imposing a sentence of life without parole. Instead, the court held that such a sentence is permissible if the sentencing court considers all relevant youth-related factors and applies those factors in a non-arbitrary fashion. The court concluded that the circuit court in this case satisfied those requirements. The Mississippi Supreme Court initially granted certiorari, but then dismissed the writ.

Petitioner argues that the Eight Amendment requires a sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. Petitioner contends that *Miller* and *Montgomery* establish a rule that only juveniles who are permanently incorrigible may be sentenced to life without parole. As a necessary incident of that rule, petitioner argues, a sentencing court must first make a finding of permanent incorrigibility before a juvenile may receive such a sentence. Petitioner argues that if no such finding were required, the permanent incorrigibility rule would be meaningless.

**Decision Below:**

*Jones v. State*, No. 2015-CT-00899-SCT (Miss. Nov. 27, 2019)

**Petitioners' Counsel of Record:**

David Michael Shapiro, Roderick & Solange MacArthur Justice Center

**Respondents' Counsel of Record:**

Krissy Casey Nobile, Mississippi Attorney General's Office

## **Grand Jury Secrecy**

### ***Department of Justice v. House Committee on the Judiciary* (19 - 1328)**

**Question Presented:**

Whether an impeachment trial before a legislative body is a “judicial proceeding” under Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure.

**Summary:**

The Federal Rules of Criminal Procedure generally require that any matter occurring before the grand jury be kept secret. An exception permits courts to authorize the disclosure of grand-jury material when it is preliminary to or in connection with a “judicial proceeding.” The question presented in this case is whether a Senate impeachment trial qualifies as such a “judicial proceeding.”

The Department of Justice (DOJ) appointed Robert Muller to investigate Russian interference in the 2016 presidential election. Mueller released a report on the investigation to the public, but redacted grand-jury material from it. The House Committee on the Judiciary (respondent) petitioned the district court for those grand-jury materials for use in the Senate impeachment trial of President Trump. The district court granted the petition.

The District of Columbia Circuit affirmed, holding that a Senate impeachment trial is a “judicial proceeding” within the meaning of the exception to the requirement of grand jury secrecy. The court reasoned that the Constitution’s reference to the Senate’s power to “try” impeachments over which the “Chief Justice shall preside” demonstrates the Framers’ understanding that a Senate impeachment trial is a “judicial proceeding.” The court also relied on the historical practice of Congress gaining access to grand-jury material to investigate its members.



DOJ contends that a “judicial proceeding” within the meaning of the exception to the requirement of grand jury secrecy is limited to court proceedings and does not encompass a Senate impeachment trial. Petitioner contends that this interpretation accords with the ordinary meaning of the term and with other uses of the term throughout the Rule on grand jury secrecy. DOJ further argues that if a judicial proceeding encompassed a Senate impeachment trial, it would raise serious separation of power concerns: a court could not impose the Rule’s ordinary time, place, and manner restrictions, and a court would have to scrutinize impeachment theories to determine whether the Rule’s requirement of “special need” was satisfied. DOJ argues that in order to avoid those serious constitutional concerns, “judicial proceeding” should be given its ordinary meaning of court proceeding.

**Decision Below:**

951 F.3d 589 (D.C. Cir. 2020)

**Petitioner’s Counsel of Record:**

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

**Respondent’s Counsel of Record:**

Douglas Neal Letter, United States House of Representatives

## **Computer Fraud**

### ***Van Buren v. United States* (19-783)**

**Question Presented:**

Whether a person who is authorized to access information on a computer for certain purposes violated Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.

**Summary:**

The Computer Fraud and Abuse Act (CFAA) subjects to criminal punishment any person who “intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer.” The CFAA defines “exceeds authorized access” to mean “to access a computer with authorization and to use such access to obtain or alter information that the accesser is not entitled so to obtain or alter.” The question in this case is whether a person who is authorized to access information on a computer for certain purposes “exceeds authorized access” if they access the same information for an improper purpose.

Petitioner Nathan Van Buren, a local police sergeant in Georgia, was the subject of an FBI sting operation. At the FBI’s direction, Andrew Albo gave petitioner money in exchange for petitioner obtaining information from a police database on whether a person Albo was dating was an undercover agent. Petitioner had authority to access information on the database for law enforcement purposes but not for his own financial gain. Petitioner was charged with exceeding authorized access to a computer in violation of the CFAA. The district court denied petitioner’s motion for acquittal, and a jury found petitioner guilty.

The Eleventh Circuit affirmed, holding, in conformity with a prior decision, that a person who has authority to access a computer violates the CFAA’s prohibition on exceeding authorized access if they access the computer for an improper purpose. In that prior decision, the court grounded its interpretation in its understanding of the plain language of the CFAA.

Petitioner contends that a person who is authorized to access information on a computer for certain purposes does not violate the CFAA’s prohibition on exceeding authorized access if they obtain the same information for an improper purpose. Petitioner argues that under the most natural reading of the text, whether persons “obtain information” they are “entitled to” turns on whether they have the right to acquire the information at all, not on the purpose of their access. When Congress wants to forbid access for an unauthorized purpose, petitioner contends, it says so expressly. Petitioner further argues that limiting the statute to circumstances in which a person is categorically forbidden from accessing the information accords with the statute’s focus on hacking. By contrast, adopting a more expansive interpretation, petitioner contends, would lead to the untenable conclusion that Congress intended to criminalize everyday conduct of ordinary people, such as checking sports scores on a company computer.

**Decision Below:**

940 F.3d 1192 (11th Cir. 2019)

**Petitioner’s Counsel of Record:**

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

**Respondent’s Counsel of Record:**

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

**Armed Career Criminal Act**

***Borden v. United States* (19-5410)**

**Question Presented:**

Does the “use of force” clause in the Armed Career Criminal Act encompass crimes with a *mens rea* of mere recklessness?

**Summary:**

The Armed Career Criminal Act (ACCA) imposes an enhanced sentencing penalty on anyone convicted of unlawful possession of a firearm, and who previously was convicted of three or more “violent felon[ies].” The ACCA defines a violent felony as an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” The question presented is whether a criminal offense committed with a *mens rea* of recklessness may qualify as a “violent felony” under the ACCA.

Petitioner Charles Borden pleaded guilty in federal court to possession of a firearm. Petitioner had three prior convictions for aggravated assault. Two of the three involved intentional or knowing assaults, and the third involved a reckless assault. Petitioner agreed that the first two were violent felonies but objected to classifying the third as a violent felony. The district court concluded that all three were violent felonies and sentenced petitioner to an enhanced sentence under the ACCA.

The Sixth Circuit affirmed, holding, in reliance on a prior decision, that a reckless use of force qualifies as a violent felony under the ACCA. In that prior decision, the court concluded that an offense may require the “use of physical force against the person of another” and thus constitute a violent felony even if a mental state of recklessness suffices for conviction. The court reasoned that “use” refers to the act of employing something and does not require a purposeful or knowing state of mind.

Petitioner contends that a criminal offense committed with a *mens rea* of recklessness may not qualify as a violent felony under the ACCA. Petitioner argues that the requirement that force be used “against the person of another” means that a use of force must be aimed at another person. Petitioner further argues that a person who uses force recklessly does not target another person, but instead is indifferent as to whether it falls on another person or no one. Petitioner also contends that excluding crimes committed recklessly conforms with Congress’ intent to enhance sentences for offenders whose previous convictions demonstrate that they might deliberately point a gun at someone in the future. Finally, petitioner argues that because the ACCA is, at most, ambiguous on whether it covers a reckless use of force, the rule of lenity requires its exclusion.

**Decision Below:**

769 Fed. Appx. 266 (6th Cir. 2019)

**Petitioner’s Counsel of Record:**

Erin Phillippi Rust, Federal Defender Services

**Respondent’s Counsel of Record:**

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

**Uniform Code of Military Justice—Statute of Limitations**

***United States v. Briggs*** (19-108)

***United States v. Collings*** (19-184)

**Question Presented:**

Whether the Court of Appeals for the Armed Forces erred in concluding—contrary to its own longstanding precedent—that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.

**Summary:**

Article 43(a) of the Uniform Code of Military Justice (UCMJ) provides that any offense punishable by death may be tried at any time. The default limitations period for other offenses is five years. Article 120(a) of the UCMJ provides that rape may be punished by death. In *Coker v. Georgia*, the Supreme Court held that the Eighth Amendment bars capital punishment for civilian rape. In 2006, Congress amended Article 43(a) to provide that a person charged with rape could be tried at any time. The question presented in this case is whether the UCMJ allows prosecution of a rape that occurred between 1986 and 2006 only within a five-year statute of limitations. The same question is presented in *U.S. v. Collins*, No. 19-184 (consolidated for oral argument).

Respondent Briggs was a captain in the Air Force. In 2005, respondent entered the room of a junior member of his squadron and raped her. Years later, the victim recorded a conversation in which respondent apologized for the rape. Respondent was subsequently charged with rape in 2014, a charge that is untimely if the five-year limitations period applies. Respondent was found guilty at his court-martial and the Air Force Court of Criminal Appeals affirmed.

The Court of Appeals for the Armed Forces (CAAF) initially affirmed, but after the Supreme Court vacated and remanded, it reversed. The court held, in reliance on a recent CAAF

decision, that rape was not punishable by death within the meaning of the pre-2006 version of Article 43(a) because Coker’s rationale barred the imposition of the death penalty for rape in the military context. The court then held that the post-2006 version of Article 43(a) did not apply because there is a presumption against retroactive application of limitations periods and applying the post-2006 version to respondent’s 2005 charge of rape would be retroactive. The court concluded that because neither unlimited period applied, the default five-year limitations period governed respondent’s charge.

The government argues that Article 43(a)’s unlimited period applies to rapes committed between 1986 and 2006. The government contends that because Article 43(a) provides that any person charged with an offense punishable by death may be tried any time, and because Article 120(a) provides that rape may be punished by death, no limitations period applies to a military rape. The government also argues that the statutory text links the phrase punishable by death to the statutory availability of that punishment, not to subsequent developments in Eighth Amendment law. The government further argues that, even if Article 120(a) incorporates evolving Eighth Amendment standards, it is permissible to impose the death penalty for military rapes because of the distinctive harms that rape causes in the military context. Finally, the government argues that the 2006 unlimited limitations period applies because it codified existing law and is therefore not impermissibly retroactive as applied to respondent’s conduct.

**Decision Below:**

United States v. Briggs, 78 M.J. 289 (C.A.A.F. 2019)

**Petitioners’ Counsel of Record:**

United States Department of Justice

**Respondents’ Counsel of Record:**

Stephen I. Vladeck,

## ***Immigration***

### **Eligibility for Cancellation of Removal**

***Pereida v. Barr* (19-428)**

**Question Presented:**

Whether a criminal conviction bars a noncitizen from applying for relief from removal when state criminal records are merely ambiguous as to whether the conviction corresponds to an offense listed in the Immigration and Nationality Act.

**Summary:**

Under the Immigration and Nationality Act (INA), a noncitizen who is charged with removal may apply for cancellation of removal. The noncitizen has the burden to prove they are eligible for cancellation. If convicted of certain offenses, including crimes involving moral turpitude (CIMTs), noncitizens are ineligible for cancellation. When a criminal statute describes a single offense, the categorical approach applies to determine whether it is a CIMT. The question under the categorical approach is whether the offense “necessarily” entails a CIMT. That question is answered by presuming that the conviction rested upon the least serious of the acts criminalized. When a statute describes multiple, divisible crimes, not all of

which are CIMTs, the modified categorical approach applies. A limited number of documents are then examined in an effort to determine which of the multiple crimes is the crime of conviction, one that is a CIMA, or one that is not. The question presented in this case is what happens when the record is ambiguous on which of the multiple crimes is the crime of conviction. Is a noncitizen ineligible for relief because they failed to satisfy their burden of proof or are they eligible for relief because of a presumption that they committed the least serious offense?

Petitioner Pereida, a noncitizen, was convicted of “criminal impersonation” for using a fraudulent social security card to gain employment. Parts (a), (b) and (d) of the criminal impersonation statute are CIMTs while part (c) is not. When petitioner was charged with removal, he conceded that he was removable and applied for cancellation. The immigration judge found that his impersonation conviction made him ineligible for cancellation and the Board of Immigration Appeals affirmed.

The Eighth Circuit affirmed. The court held that when a statute describes multiple, divisible crimes, at least one of which is disqualifying, the INA’s burden of proof provision requires a noncitizen to establish that they were not convicted of a disqualifying offense. Because the record was ambiguous on whether petitioner committed one of the three impersonation crimes that are disqualifying CIMTs or the one that is not, the court concluded that petitioner failed to satisfy his burden of proving that he was eligible for cancellation of removal.

Petitioner argues that when a statute describes multiple, divisible offenses, and the record is ambiguous on which offense was committed, there is a presumption that it was the least serious act. Petitioner argues that the least-serious-act presumption is an accepted feature of the categorical approach, and there is no reason the rule should be any different for statutes that trigger the modified categorical approach. Petitioner argues that the INA provision that places the burden of proof on noncitizens to establish eligibility for cancellation is irrelevant, because it applies to factual questions, and the modified categorical approach poses a legal question. Finally, petitioner contends that the least-serious-act presumption is necessary to avoid the unfairness of requiring a noncitizen to prove the unprovable in order to be eligible for discretionary relief.

**Decision Below:**

916 F.3d 1128 (8th Cir. 2019)

**Petitioner’s Counsel of Record:**

Brian Goldman, Orrick, Herrington & Sutcliffe LLP

**Respondent’s Counsel of Record:**

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

**Detention during Withholding-Only Proceeding**

***Albence v. Guzman Chavez* (19-897)**

**Question Presented:**

Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. 1231, or instead by 8 U.S.C. 1226.

### **Summary:**

Under the Immigration and Nationality Act (INA), when a noncitizen is ordered removed from the U.S. and reenters illegally, their original removal order is reinstated from its original date and is not subject to reopening or review. If the noncitizen has a reasonable fear of persecution or torture in the country designated in the order, however, the noncitizen may seek to prevent return to that country in what are known as withholding-only proceedings. In that event, the government remains free to execute removal to any other country. Under the INA's mandatory detention provision, a noncitizen who "is ordered removed" is subject to a 90-day mandatory detention period once the order becomes "administratively final." Under the discretionary detention provision, a noncitizen may seek release on bond from an immigration judge if their status is "pending a decision" on whether the noncitizen is "to be removed." The question in this case is whether a noncitizen who is subject to a reinstated removal order and who is in withholding-only proceedings is governed by the mandatory or the discretionary detention provision.

Respondents are noncitizens who illegally entered the U.S. after they were removed. All were apprehended, and their removal orders were reinstated. Respondents expressed fear of persecution or torture in the countries listed in their removal orders, and an asylum officer found those fears reasonable. Respondents were then placed in withholding-only proceedings, and detained. Respondents filed suits in federal court, seeking an individualized bond hearing. The district courts awarded judgments to respondents.

The Fourth Circuit affirmed, holding that the discretionary detention provision governs noncitizens who are subject to a reinstated removal order and who are in withholding-only proceedings. The court concluded that a withholding-only proceeding is a "pending" proceeding that will determine whether a noncitizen "is to be removed" within the meaning of the discretionary detention provision. The court reasoned that, while a noncitizen subject to a reinstated removal order is theoretically removable, the text of the discretionary detention provision focuses on whether the government has the practical authority to execute removal, and that authority does not exist until the withholding-only proceeding is complete. The court further concluded that the mandatory detention provision is inapplicable because the order is not "administratively final" until withholding-only proceedings are complete.

The government argues that the mandatory detention provision governs noncitizens who are subject to a reinstated removal order and who are in withholding-only proceedings. The government contends that a person subject to a reinstated removal order has been "ordered removed" within the meaning of the mandatory detention provision. It further argues that the order is "administratively final" because it is not subject to reopening or review. The government also contends that, because a reinstated order is not subject to reopening or review, a decision on whether the noncitizen is "to be removed" is not "pending" within the meaning of the discretionary detention provision. Instead, that decision has already been made, and all that remains to be decided is the location of removal.

### **Decision Below:**

940 F.3d 867 (4th Cir. 2019)

### **Petitioner's Counsel of Record:**

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

**Respondent's Counsel of Record:**

Paul W. Hughes, McDermott Will & Emery

**Stop-Time Rule*****Niz-Chavez v. Barr* (19-863)****Question Presented:**

Whether, to serve notice in accordance with section 1229(a) [of the Immigration and Nationality Act] and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.

**Summary:**

The Immigration and Nationality Act (INA) authorizes the Attorney General to cancel the removal of noncitizens who are continuously present in the United States. for ten years. The continuous presence requirement is subject to a stop-time rule, under which continuous presence ends when the government serves “a notice to appear.” In *Pereira v. Sessions*, the Supreme Court held that “a notice to appear” must include all statutorily required information, including the time and place of the proceedings, in order to trigger the stop-time rule. The question presented is whether the government must provide a notice to appear that includes all statutorily required information in a single document in order to trigger the stop-time rule.

Petitioner Augusto Niz-Chavez immigrated to the United States. Eight years later, the Department of Homeland Security (DHS) served petitioner with a “notice to appear” that included some of the statutorily required information but did not include the time and place of the proceedings. Later in that same year, an immigration court sent petitioner a “notice of hearing” that included the time and the place of the proceedings. Petitioner sought cancellation of his removal, but the immigration judge concluded that he was ineligible, and the Board of Immigration Appeals (BIA) affirmed.

The Sixth Circuit denied a petition for review, holding, in reliance on a prior decision, that the stop-time rule is triggered when the government provides a person with all the statutorily required information through more than one document. In that prior decision, the court reasoned that because the “a” in “a notice to appear” precedes a noun, its ordinary meaning does not require that a single document contain the statutorily required information. The court also concluded that if the text were deemed ambiguous, the BIA’s multiple document interpretation would be entitled to deference under *Chevron*.

Petitioner argues that the stop-time rule can only be triggered by the delivery of a single document with all the required information. Petitioner contends that the singular “a” in “a notice to appear” indicates that only a single document can trigger the stop-time rule. Petitioner also points out that in enacting the current “notice to appear” procedure, Congress eliminated a previous “show cause” procedure that gave the government the option of providing certain information in the initial document, and then providing the time and place of proceedings in a second document. Petitioner argues that Congress’s elimination of that more flexible procedure shows that Congress intended the statutorily required information to be provided in a single document. Finally, petitioner contends that the BIA’s interpretation is not entitled to deference

under *Chevron* because the BIA departed from its initial interpretation without justification and because its new interpretation is inconsistent with the statute’s text and history.

**Decision Below:**

789 F. App’x 523 (6th Cir. 2019)

**Petitioner’s Counsel of Record:**

David Jacob Zimmer, Goodwin Procter LLP

**Respondent’s Counsel of Record:**

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

## ***Miscellaneous Business***

### **Bankruptcy—Automatic Stay Provision**

#### ***City of Chicago v. Fulton* (19-357)**

**Question Presented:**

Whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code’s automatic stay to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.

**Summary:**

The “automatic stay” provision of the Bankruptcy Code specifies that the filing of a bankruptcy petition operates as a “stay” of any “act . . . to exercise control over property of the estate.” The Code also contains a “turnover” provision that specifies that an entity in possession, custody, or control of certain property shall deliver the property to the trustee. The question presented is whether the automatic stay provision requires a creditor to immediately return an asset seized prior to the filing of a petition.

The City of Chicago impounded respondents’ vehicles for failure to pay traffic fines. Respondents subsequently filed a petition for Chapter 13 bankruptcy. Following the filing of the petition, respondents demanded a return of their cars, but the City refused. The bankruptcy court in each case found that the City’s refusal violated the automatic stay provision and ordered the return of the cars.

The Seventh Circuit affirmed, holding, in reliance on a prior decision, that the City’s refusal to return the vehicles violated the automatic stay provision. In that prior decision, the court reasoned that passively holding an asset falls within the ordinary meaning of an “act . . . to exercise control” over property. The court further concluded that the turnover provision operates in tandem with the automatic stay provision to bring property in which the debtor has an interest into the estate. The court added that once the property is in the estate, a court may condition its retention on adequate protection for the creditor’s interests.

The City argues that the automatic stay provision does not require creditors to return property seized prior to the filing of a petition. Instead, a debtor must file a turnover action for delivery of such property to the estate. The City contends that the ordinary meaning of the term “stay” is to stop something from happening, and that the ordinary meaning of an “act” is to do something. The City therefore contends that the text of the automatic stay provision stops



creditors from doing something after the petition is filed to exercise control over the debtor's property; it does not affirmatively require the creditor to return property that it passively retains. That interpretation, the City argues, also accords with the automatic stay's purpose of preserving the status quo and with established bankruptcy practice. Finally, the City argues that the Seventh Circuit's contrary interpretation would render the turnover provision superfluous and would deprive creditors of the right to adequate protection of their interests before they lose control of the property.

**Decision Below:**

926 F.3d 916 (7th Cir. 2019)

**Petitioner's Counsel of Record:**

Craig Goldblatt, Wilmer Cutler Pickering Hale and Dorr LLP

**Respondent's Counsel of Record:**

Eugene R. Wedoff

### **Copyright—Software Interface**

***Google LLC v. Oracle America Inc.* (18-956)**

**Questions Presented:**

- (1) Whether copyright protection extends to a software interface.
- (2) Whether, as the jury found, petitioner's use of a software interface in the context of creating a new computer program constitutes fair use.

**Summary:**

The Copyright Act protects original works of authorship, including computer programs. The Act does not protect any "idea" or "method of operation." Under the merger doctrine, copyright protection also does not apply when an idea can be expressed in only a limited number of ways. The Act also provides that "fair use" of a copyrighted work is a defense to a claim of infringement. The first question presented is whether computer code that is widely used by programmers to develop new programs is excluded from copyright protection as either a method of operation or under the merger doctrine. The second question is whether a commercial use of such code to create new programs constitutes fair use.

Respondent Oracle's predecessor copyrighted the Java platform for use in writing programs in the Java language. Google copied 11,500 lines of respondent's declaring code in order to enable software developers to create new applications for petitioner's Android smartphone. Respondent filed suit in federal court, alleging that petitioner's unauthorized use of the code and its organization constituted copyright infringement. The district court issued a directed verdict that the code and its organization were not copyrightable.

The Federal Circuit reversed, holding that respondent's declaring code and organization were entitled to copyright protection. The court concluded that the functional characteristics of the code did not make it a method of operation because computer programs are functional by definition. It concluded that the merger doctrine did not apply because respondent had unlimited options on the selection and arrangement of the code. The court remanded for a decision on fair use.

The jury found that petitioner's copying was fair use, and the district court upheld the jury verdict. The Federal Circuit reversed, holding that there was not fair use. The court reasoned

that petitioner's use was commercial, that it was not transformative, and that it had an adverse impact on the market for respondent's code.

Petitioner argues that respondent's declaring code is not copyrightable. Petitioner contends that declaring codes are methods of operation because they are for developers, not computers, to use, and that the merger doctrine applies because the declarations cannot be written in any other way that is usable by Java programmers. Petitioner argues that, even assuming the declarations were copyrightable, it engaged in fair use. Petitioner contends that fair use is a jury question, not a question of law subject to *de novo* review, and that substantial evidence supports the jury's finding of fair use. Petitioner primarily contends that its use was transformative because it resulted in the creation of a new and innovative smartphone operating system and the development of new programs.

**Decision Below:**

886 F.3d 1179 (Fed. Cir. 2018)

**Petitioner's Counsel of Record:**

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

**Respondent's Counsel of Record:**

E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP

**Arbitration—Determining Arbitrability**

***Henry Schein, Inc. v. Archer & White Sales, Inc.* (19-963)**

**Question Presented:**

Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.

**Summary:**

Under the Federal Arbitration Act, the question of whether an arbitration agreement applies to a particular dispute (known as a question of arbitrability) must be decided by a court unless the arbitration agreement clearly and unmistakably delegates the question of arbitrability to the arbitrator. The question presented in this case is whether an arbitration agreement that exempts certain actions from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.

Respondent Archer & White Sales, Inc. had a contract with petitioner Henry Schein, Inc. to distribute petitioner's dental equipment. Respondent filed suit in federal court against petitioner, alleging violations of antitrust laws and seeking damages and injunctive relief. Petitioner moved to compel arbitration under a contractual provision stating that any dispute except for actions seeking injunctive relief shall be resolved by arbitration in accordance with the rules of the American Arbitration Association (AAA). The district court denied the motion to compel arbitration, the court of appeals affirmed, and the Supreme Court vacated and remanded for consideration of the question whether there was a clear and unmistakable delegation to the arbitrator to decide the question of arbitrability.

The Fifth Circuit once again affirmed, holding that the exemption of actions from arbitration can negate an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. The court concluded that the delegation of authority to decide

disputes in accordance with AAA rules is generally a clear and unmistakable delegation to the arbitrator to decide questions of arbitrability because AAA rules give arbitrators authority to decide questions of arbitrability. The court reasoned, however, that the agreement's placement of an exemption from arbitration for actions for injunctive relief before the incorporation of AAA rules is most naturally read to carve out those actions from the scope of that delegation.

Petitioner argues that an arbitration agreement that exempts some claims from arbitration rarely, if ever, negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. Petitioner contends that, absent clear evidence to the contrary, an exceptions clause applies only to whether a claim is arbitrable, not to the question of who decides whether a claim is arbitrable. Petitioner contends that any other interpretation would defy the intent of the parties and common sense because parties who have chosen to delegate questions of arbitrability to an arbitrator would only rarely intend to exempt claims from that delegation.

**Decision Below:**

935 F.3d 274 (5th Cir. 2019)

**Petitioner's Counsel of Record:**

Kannon K. Shanmugam, Paul, Weis, Rifkind, Wharton & Garrison LLP

**Respondent's Counsel of Record:**

Lewis T. LeClair, McKool Smith

## *Other Public Law*

### **Religious Freedom Restoration Act**

***Tanzin v. Tanvir*** (19-71)

**Question Presented:**

Whether the Religious Freedom Restoration Act of 1993 permits suits seeking money damages against individual federal employees.

**Summary:**

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from imposing a substantial burden on a person's religious exercise unless the burden is the least restrictive means to further a compelling interest. A person whose rights under RFRA have been violated may seek "appropriate relief" against the federal "government." The term "government" is defined to include a federal "official" or "any other person acting under color of [federal] law." The question presented in this case is whether RFRA permits a plaintiff to seek damages against federal officials in their personal capacities.

Several FBI agents (petitioners) sought to enlist certain practicing Muslims (respondents) as informants in terrorism investigations. After respondents refused to work as informants based in part on their religious views, petitioners had them placed on the No Fly List. Respondents filed suit in federal court, alleging that petitioners had them placed on the No Fly List in retaliation for their refusal to act contrary to their religious views, in violation of RFRA. They

sought damages from petitioners in their personal capacities. The district court dismissed the claim.

The Second Circuit reversed, holding that RFRA authorizes monetary awards against federal officials in their personal capacities. The court first concluded that RFRA permits suits against federal officers in their individual capacity. It reasoned that the term “official” contemplates individual capacity suits because official capacity suits are simply another way of suing the government and therefore would not need to have been identified separately. It further reasoned that the phrase “under color of law” incorporates language from Section 1983 that the Supreme Court has interpreted to encompass personal capacity suits. The court then concluded that “appropriate relief” against federal officers in their personal capacity includes monetary relief. The court relied on a presumption that damages are “appropriate relief” if not expressly excluded by statute.

The government contends that RFRA does not authorize money damages against federal officers in their personal capacities. The government argues that RFRA only permits relief against “a government,” and that individual capacity suits are not suits against the government in any meaningful sense. The government further argues that prior law under *Bivens* did not allow suits against federal officers in their personal capacity for violations of religious liberty, and there is no indication that Congress intended to change the law in that respect. Finally, the government argues that Congress speaks clearly when it intends to authorize damage awards against individual federal officers, and the term “appropriate relief” does not clearly identify damages as a possible form of relief.

**Decision Below:**

894 F.3d 449 (2d Cir. 2018)

**Petitioner’s Counsel of Record:**

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

**Respondent’s Counsel of Record:**

Ramzi Kassem, City University of New York School of Law

## **Federal Tort Claims Act—Bivens**

### ***Brownback v. King* (19-546)**

**Question Presented:**

Whether a final judgment in favor of the United States in an action brought under Section 1346(b)(1) [of the Federal Tort Claims Act], on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant’s FTCA claim.

**Summary:**

The Federal Tort Claims Act [FTCA] creates a cause of action against the United States and waives its sovereign immunity for state law torts committed by federal employees when the applicable state law would make a private employer liable. An FTCA judgment operates as a complete bar to any action against the employee whose conduct gave rise to the FTCA claim. Under *Bivens*, a plaintiff may sue a federal employee for damages for violations of their Fourth

Amendment rights. The question presented in this case is whether, when an FTCA claim is dismissed for failure to establish state law liability, the FTCA’s judgment bar precludes a *Bivens* claim against the employee whose conduct gave rise to the FTCA claim (a related *Bivens* claim).

Officers Brownback and Allen (petitioners) mistook James King (respondent) for a suspect in an ongoing federal investigation. Petitioners confronted respondent, and a violent altercation ensued. Respondent filed an action in federal district court against the United States under the FTCA and against petitioners under *Bivens*. The district court concluded that respondent failed to establish state law liability and dismissed respondent’s FTCA claim for lack of subject-matter jurisdiction. It granted summary judgment to petitioners on the *Bivens* claims.

The Sixth Circuit reversed, holding that when an FTCA claim is dismissed for failure to establish state law liability, the FTCA’s judgment bar does not preclude a related *Bivens* claim. The court reasoned that when a plaintiff fails to establish state law liability under the FTCA, the district court lacks subject-matter jurisdiction. Without jurisdiction, the court concluded, a court cannot issue a “judgment,” and the FTCA’s “judgment” bar cannot apply.

Petitioners argue that when an FTCA claim is dismissed for failure to establish state law liability the FTCA’s judgment bar precludes a related *Bivens* claim. Petitioners contend that such a dismissal necessarily results in a “judgment” under the ordinary meaning of that term, triggering the judgment bar. Petitioners further argue that applying the judgment bar to such a dismissal furthers Congress’s purpose of preventing unnecessarily duplicative litigation. Because respondent had a fair chance to recover damages under the FTCA, petitioners argue, it makes no sense to give him a second chance to obtain damages by allowing another suit based on the same conduct.

#### **Decision Below:**

917 F.3d 409 (6th Cir. 2019)

#### **Petitioners’ Counsel of Record:**

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

#### **Respondent’s Counsel of Record:**

Patrick Michael Jaicomo, Institute for Justice

### **Federal Housing Recovery Act**

***Collins v. Mnuchin*** (19-422)

***Mnuchin v. Collins*** (19-563)

#### **Questions Presented:**

- (1) Whether the . . . anti-injunction clause [of the Federal Housing Recovery Act (Recovery Act)] precludes a federal court from setting aside the Third Amendment [to the agreement between the Federal Housing Finance Agency (FHFA) and the Department of Treasury].
- (2) Whether the statute’s succession clause precludes shareholders from challenging the Third Amendment.
- (3) Whether the FHFA structure violates the separation of powers.
- (4) Whether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent.

### Summary:

The Recovery Act provides that FHFA may appoint itself as conservator for Fannie Mae and Freddie Mac and take action to put them in sound condition. Invoking that authority, FHFA first appointed itself conservator and later entered into an agreement with Treasury, known as the Third Amendment, that sets the dividends that Fannie and Freddie pay Treasury. The Act's anti-injunction clause bars a court from taking any action to restrain the exercise of FHFA's powers as conservator. The Act's succession clause gives FHFA as conservator all rights of any stockholder. The first two questions ask whether the anti-injunction clause or the succession clause bar a shareholder's challenge to the Third Amendment. The Recovery Act establishes FHFA as an independent agency headed by a single director who the President may only remove for cause. The third and fourth questions are whether the "for cause" restriction on removal of the Director violates the separation of powers, and, if so, whether the remedy should include setting aside the Third Amendment.

Fannie and Freddie shareholders brought suit in federal court under the Administrative Procedure Act (APA), alleging that the Third Amendment exceeded FHFA's powers as conservator. The shareholders further alleged that the FHFA structure violates the Constitution's separation of powers, and that the remedy for that violation should include setting aside the Third Amendment. The district court ruled for the government.

The en banc Fifth Circuit affirmed in part and reversed in part. The court first held that the anti-injunction clause does not preclude shareholders from challenging the Third Amendment. The court reasoned that the anti-injunction clause bars claims that FHFA improperly exercised a power, but not claims that it exceeded its authority, and that the shareholders' claim is of the latter type. The court also held that the succession clause does not bar the shareholders' claims, reasoning that while that clause bars derivative actions, it does not bar direct suits against FHFA under the APA. Turning to the constitutional question, the court held that the "for cause" removal restriction unconstitutionally insulated FHFA from oversight by the President. Finally, the court held that the appropriate remedy was to sever the "for cause" removal restriction from the statute, not to set aside the Third Amendment. The court reasoned that the President's power to remove the Secretary of the Treasury without cause gave him adequate oversight of the adoption of the Third Amendment because the Third Amendment could not have been adopted without the Secretary's agreement.

The government contends that the Recovery Act's anti-injunction clause forecloses the shareholders' challenge to the Third Amendment. The government contends that the Recovery Act gives FHFA the power to renegotiate debt and ensure access to capital, and that the anti-injunction clause prohibits courts from reviewing whether FHFA improperly exercised that power when it adopted the Third Amendment. The government also argues that the Act's succession clause prohibits shareholders from pursuing derivative actions during the conservatorship, and that this lawsuit qualifies as a derivative action. Finally, the government contends that the shareholders' lawsuit is a derivative action because the alleged harm is a harm to each corporation rather than to individual shareholders, and because any relief would flow to the corporations rather than to the shareholders.

The shareholders contend that the "for cause" restriction on removal of the Director violates the separation of powers. The shareholders also contend that the appropriate remedy for that violation is to set aside the Third Amendment. The shareholders argue that awarding only prospective relief violates the APA's command to set aside agency action that violates the Constitution, conflicts with the Court's established remedial approach for analogous appointment

clause violations, amounts to impermissible prospective decision making, and eliminates the incentives for bringing structural challenges.

**Decision Below:**

938 F.3d 553 (5th Cir. 2019)

**Petitioner’s Counsel of Record:**

Charles Justin Cooper, Cooper & Kirk, PLLC (19-422)

Jeffrey B. Wall, Acting Solicitor General of the United States (No. 19-563)

**Respondent’s Counsel of Record:**

Jeffrey B. Wall, Acting Solicitor General of the United States (19-422)

Charles Justin Cooper, Cooper & Kirk, PLLC (No. 19-563)

## **Federal Trade Commission Act**

***AMG Capital Management, LLC v. Federal Trade Commission (19- 508)***

***Federal Trade Commission v. Credit Bureau Center, LLC (19-825)***

**Question Presented:**

Whether § 13(b) of the [Federal Trade Commission Act], by authorizing “injunction[s],” also authorizes the [Federal Trade Commission] to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief.

**Summary:**

The Federal Trade Commission Act (FTCA) authorizes the Federal Trade Commission (FTC) to seek injunctions to prevent unfair or deceptive practices. The question presented in this case is whether that authority encompasses the power to seek monetary relief, such as restitution. The same question is presented in *Federal Trade Commission v. Credit Bureau Center, LLC* (19-825).

Petitioner Scott Tucker managed businesses that provided short-term, high interest loans to consumers over the Internet. The FTC (respondent) filed suit against petitioner, alleging that his businesses were engaged in unfair or deceptive practices, in violation of the FTCA. The FTC sought restitution as a remedy. The district court found petitioner liable and ordered restitution.

The Ninth Circuit affirmed. Relying on circuit precedent, the court held that by authorizing district courts to enter injunctions, the FTCA empowers district courts to grant any ancillary relief that they deem necessary to accomplish complete justice, including restitution. Ninth Circuit precedent based that conclusion on the Supreme Court’s decision in *Porter v. Warner Holding*, which interpreted a different statute authorizing injunctions as empowering courts to award any appropriate equitable relief, including restitution.

Petitioner contends that the FTCA does not authorize courts to grant monetary remedies such as restitution to prevent unfair or deceptive trade practices. Petitioner contends that the text of the FTCA unambiguously authorizes only injunctions to prevent unfair or deceptive practices, not monetary relief. Petitioner further contends that when Congress intended to authorize courts to award equitable relief besides injunctions, it said so expressly, as it did in two other provisions of the FTCA. Finally, petitioner contends that the statute at issue in *Porter* expressly authorized other orders besides injunctions, and that, in any event, *Porter*’s approach to statutory interpretation has been overtaken by subsequent decisions that limit a court’s authority to award relief to that specified by the statute’s text.

**Decisions Below:**

910 F.3d 417 (9th Cir. 2018) (19-508)

937 F.3d 764 (7th Cir. 2019) (19-825)

**Petitioner's Counsel of Record:**

Jeffrey Alan Lamken, MoloLamken LLP (19-508)

Alden Francis Abbott, Federal Trade Commission (19-825)

**Respondent's Counsel of Record:**

Jeffrey B. Wall, Acting Solicitor General of the United States (19-508)

Neal Kumar Katyal, Hogen Lovells US LLP (19-825)

Stephen R. Cochell, The Cochell Law Firm, P.C. (19-825)

**Anti-Injunction Act*****CIC Services, LLC v. Internal Revenue Service* (19-930)****Question Presented:**

Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.

**Summary:**

The Anti-Injunction Act bars suits brought “for the purpose of restraining the assessment or collection of any tax.” The Internal Revenue Code (Code) gives the Internal Revenue Service (IRS) authority to establish certain reporting requirements. The Code authorizes the imposition of a penalty for failing to comply with those requirements, and it treats such a penalty as a “tax” for purposes of the Anti-Injunction Act. Such a tax is known as a regulatory tax. The question presented is whether the Anti-Injunction Act bars a suit to enjoin an IRS reporting requirement that is enforceable through a regulatory tax.

Petitioner CIC Services, LLC advises taxpayers who engage in insurance practices called micro-captive transactions. The IRS (respondent) issued a Guidance document requiring taxpayers and their advisors to report micro-captive transactions. Failure to comply with the reporting requirement is enforceable through a regulatory tax. Petitioner filed suit in federal court seeking to enjoin the reporting requirement on the ground that it was issued without notice and comment, in violation of the Administrative Procedure Act. The district court dismissed the suit as barred by the Anti-Injunction Act.

The Sixth Circuit affirmed, holding that the Anti-Injunction Act bars suits to enjoin IRS reporting requirements that are enforceable through a regulatory tax. The court reasoned that while such a suit is aimed at the reporting requirement, it would, if successful, necessarily restrain the collection of the related regulatory tax.

Petitioner argues that the Anti-Injunction Act does not bar a suit to enjoin a reporting requirement that is enforceable through a regulatory tax. Petitioner contends that the Anti-Injunction Act applies only when the “purpose” of the suit is to restrain the collection of a tax, and the purpose of a suit challenging a reporting requirement is to be freed from the costs of complying with the reporting requirement, not to escape the regulatory tax. Petitioner further contends that because the Anti-Injunction Act makes the purpose of the suit its touchstone, it is



irrelevant that the incidental effect of enjoining the reporting requirement is to restrain the collection of the related regulatory tax.

**Decision Below:**

925 F.3d 247 (6th Cir. 2019)

**Petitioner’s Counsel of Record:**

Patrick Strawbridge, Consovoy McCarthy PLLC

**Respondent’s Counsel of Record:**

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

## **Telephone Consumer Protection Act**

### ***Facebook, Inc. v. Duguid* (19-511)**

**Question Presented:**

Whether the definition of ATDS [automatic telephone dialing system] in the TCPA [Telephone Consumer Protection Act] encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator."

**Summary:**

The Telephone Consumer Protection Act (TCPA) makes it unlawful to send unsolicited text messages using an automatic telephone dialing system (ATDS). The TCPA defines an ATDS as equipment that has capacity “(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” The question presented is whether a device that can store and automatically dial numbers is an ATDS, even if that device does not use a random or sequential number generator.

Petitioner Facebook texts security notifications to users who consent. Respondent Noah Duguid is not a Facebook user and never consented to Facebook sending him text messages. Facebook nonetheless sent respondent several security messages, and respondent was unable to unsubscribe to the messages. Respondent filed suit in federal court, alleging that Facebook used an ATDS to send messages to him without his consent, in violation of the TCPA. The district court dismissed his claim.

The Ninth Circuit reversed, holding that a device that can store numbers and dial them automatically is an ATDS even when the device does not use a random or sequential number generator. The court reasoned that the phrase “using a random or sequential number generator” in the ATDS definition modifies only “to produce” and not “to store.” The court therefore concluded that any device that can store numbers and dial them automatically falls within the ATDS definition.

Petitioner argues that a device that can store and automatically dial numbers is not an ATDS unless the device uses a random or sequential number generator. Petitioner contends that a modifying phrase offset by a comma is most naturally read to modify the entire preceding clause, not just the nearest antecedent. Thus, petitioner argues, a device qualifies as an ATDS under the ATDS definition if it can either store telephone numbers using a random or sequential number generator or produce numbers using a random or sequential number generator. Petitioner further contends that if an ATDS included any device that can store numbers and dial them automatically, it would render unlawful any wrong number called from a contact list on a smart phone—a result Congress could not possibly have intended.

**Decision Below:**

926 F.3d 1146 (9th Cir. 2019)

**Petitioner's Counsel of Record:**

Paul D. Clement, Kirkland &amp; Ellis LLP

**Respondents' Counsel of Record:**

Sergei Lemberg, Lemberg Law LLC

**Freedom of Information Act—Deliberative Process Privilege*****U.S. Fish and Wildlife Service v. Sierra Club* (19-547)****Question Presented:**

Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), by incorporating the deliberative process privilege, protects against compelled disclosure of federal agencies' draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536, and that concerned a proposed agency action that was later modified in the consultation process.

**Summary:**

The Endangered Species Act (ESA) requires federal agencies to consult with the Fish and Wildlife Service and the National Marine Fisheries Service (the Services) whenever an agency proposes a regulation that may affect an endangered species. As part of that consultation process, the Services prepare a written opinion on whether the proposed regulation poses a risk to an endangered species. The Freedom of Information Act (FOIA) requires agencies to disclose their records unless they fall within an enumerated exception. FOIA's Exemption 5 authorizes an agency to withhold intra-agency and inter-agency documents that are protected by the deliberative process privilege. The deliberative process privilege protects pre-decisional documents prepared to assist an agency in arriving at its final decision. The question presented in this case is whether draft opinions prepared by the Services in connection with an ESA consultation process are protected by Exemption 5's deliberative process privilege.

The Services were consulting with the Environmental Protection Agency (EPA) on a proposed regulation for cooling water intake structures. The Services drafted opinions stating that the regulation was likely to jeopardize ESA-protected species. Portions of those draft opinions were sent to the EPA, but they were not signed by the decisionmakers, and the draft opinions were never transmitted in full. After the partial transmission of the draft opinions, the EPA issued a new version of the rule. The Services then produced a joint final opinion, concluding that the new rule did not jeopardize ESA-protected species. The district court ordered disclosure of the draft opinions and various related documents.

The Ninth Circuit largely affirmed, holding that the draft opinions and most of the related documents are not protected by the deliberative process privilege. The court held that the deliberative process privilege only protects documents that are pre-decisional and deliberative, and that the draft opinions were neither. The court concluded that the drafts were final, rather than pre-decisional, because they had been approved by final decisionmakers. It added that one decisionmaker made final edits and the draft opinion was awaiting his autopen signature, and the other agency was preparing talking points in preparation for public release.

The court concluded that the draft opinions were not deliberative because they did not contain line edits, marginal comments, or other written material exposing internal agency discussion, and they did not reflect any insertions from lower-level employees.

The government argues that the draft opinions and related documents at issue are protected by the deliberative process privilege. The government contends that the documents are pre-decisional because they were not signed by decisionmakers, were not publicly issued, and were never circulated in final form to the EPA. The government argues that the documents are deliberative because they were created to assist in the development of the Services' final position.

**Decision Below:**

*Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000 (9th Cir. 2019)

**Petitioners' Counsel of Record:**

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

**Respondents' Counsel of Record:**

Sanjay Narayan, Sierra Club Environmental Law Program

Paul Lindsey Hoffman, Schonbrun Seplow Harris & Hoffman LLP

## ***Employee Benefits***

### **Employee Retirement Income Security Act—Preemption**

#### ***Rutledge v. Pharm. Care Mgmt. Ass'n* (18-540)**

**Question Presented:**

Whether the Eight Circuit erred in holding that Arkansas's statute regulating [pharmacy benefit managers'] drug-reimbursement rates, which is similar to laws enacted by a substantial majority of States, is preempted by [the Employee Retirement Income Security Act of 1974 (ERISA)], in contravention of this Court's precedent that ERISA does not preempt rate regulation.

**Summary:**

ERISA expressly preempts state laws that “relate to ERISA benefit plans.” The Court has held that a state law relates to an ERISA plan if it has an impermissible “connection with” ERISA plans or makes “reference to” such plans. An Arkansas statute (Act 900) regulates the rates at which pharmacy benefit managers (PBMs) reimburse pharmacies for drugs sold to plan participants. The question presented is whether ERISA preempts Act 900's regulation of PBM rates either because it is impermissibly connected with ERISA plans or because it makes reference to such plans.

PBMs are intermediaries between pharmacies and health plans. When a plan participant fills a drug prescription at a pharmacy, the PBM reimburses the pharmacy at a contractually determined rate, regardless of the pharmacy's acquisition cost, and then gets reimbursed by the health plan usually at a higher rate. Act 900 requires PBMs to reimburse pharmacies at their acquisition rate, rather than their contract rate. A PBM trade association (respondent) filed suit in federal court, asserting that Act 900 is preempted by ERISA. The district court ruled in its favor.

The Eight Circuit affirmed, holding, in reliance on a prior decision, that Act 900 relates to ERISA plans and is therefore preempted. In that prior decision, the court concluded that ERISA preempted an Iowa law that similarly regulated PBMs. The court reasoned that laws that regulate PBMs are impermissibly connected with ERISA plans because they interfere with uniform plan administration, and they refer to ERISA plans because the plans that PBMs administer include ERISA plans as well as non-ERISA plans.

The State argues that ERISA does not preempt Act 900's regulation of the rates at which PBMs reimburse pharmacies. The State argues that Act 900 does not have an impermissible connection with ERISA plans, because it regulates rates, not plan administration, and any effect on plan administration is necessary and incidental to rate regulation. The State contends that Act 900 does not refer to ERISA plans because it imposes obligations on PBMs, regardless of whether the PBM provides services to an ERISA plan or a non-ERISA plan.

**Decision Below:**

891 F.3d 1109 (8th Cir. 2018)

**Petitioner's Counsel of Record:**

Nicholas J. Bronni, Solicitor General, Arkansas Attorney General's Office

**Respondent's Counsel of Record:**

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

## **Railroad Unemployment Insurance Act—Judicial Review**

### ***Salinas v. U.S. Railroad Retirement Board*** (19-199)

**Question Presented:**

Whether, under section 5(f) of the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), and section 8 of the Railroad Retirement Act, 45 U.S.C. § 231g, the Railroad Retirement Board's denial of a request to reopen a prior benefits determination is a "final decision" subject to judicial review.

**Summary:**

The Railroad Unemployment Insurance Act (RUIA) provides short-term benefits to railroad workers who miss work because of sickness or unemployment. The Railroad Retirement Act (RRA) provides long term benefits to railroad workers who are permanently disabled from working. The RUIA judicial review provision authorizes "claimant[s]," labor unions, employers, and "any other party aggrieved by a final decision under [section 355(c)]" to seek judicial review of "any final decision of the [Railroad Retirement] Board [(Board)]." A Board decision refusing to reopen a prior benefits determination is not made under Section 355(c), but under the agency's own regulations. With an exception not relevant here, the RRA authorizes judicial review to the same extent as the RUIA. The question presented in this case is whether the RRA, through its incorporation of the RUIA's judicial review provision, authorizes a claimant to obtain judicial review of the Board's denial of a request to reopen a prior benefits determination.

Petitioner Salinas is a former railroad employee who has filed multiple applications for disability benefits. His first three applications were denied, and his motion for reconsideration of the third was denied as untimely. Petitioner's fourth application was granted. Petitioner then moved to reopen the denial of his third application, and the Board denied the motion.

The Fifth Circuit dismissed petitioner’s appeal for lack of jurisdiction. Relying on a previous circuit decision, the court held that a Board decision denying a request to reopen a benefits determination is not judicially reviewable. In that previous decision, the court reasoned that the text of the RUIA judicial review provision limits review to decisions made under Section 335(c), and that a refusal to reopen a benefits determination is made outside that Section.

Petitioner argues that the RRA, through its incorporation of the RUIA’s judicial review provision, authorizes a claimant to obtain judicial review of the Board’s refusal to reopen a prior benefits determination. Petitioner argues that the text of the RUIA’s judicial review provision authorizes a claimant to appeal “any” final decision without qualification. Because the Board’s refusal to reopen a benefits determination is a final decision, petitioner contends, a claimant is authorized to appeal it. Petitioner contends that a claimant’s right to obtain review of final decisions is not limited to decisions made under Section 335(c). Under the last antecedent rule, petitioner argues, that limitation applies exclusively to the other parties besides claimants, labor unions, and employers who are authorized to seek review.

**Decision Below:**

765 Fed.Appx. 79 (5th Cir. 2019)

**Petitioner’s Counsel of Record:**

Sarah Michelle Harris, Williams & Connolly LLP

**Respondent’s Counsel of Record:**

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

## ***Original Jurisdiction***

### **Compact Between States—Water Rights**

#### ***Texas v. New Mexico (22065)***

**Questions Presented:**

- (1) Whether the River Master clearly erred in retroactively amending the River Master Manual and his final accounting for 2015 without Texas’s consent and contrary to this Court’s decree.
- (2) Whether the River Master clearly erred by charging Texas for evaporative losses without authority under the Compact.

**Summary:**

New Mexico and Texas agreed to the Pecos River Compact (Compact) to allocate the waters of the Pecos River. The Supreme Court later issued a decree relating to the Compact and appointed a River Master to make annual calculations for delivery obligations in accordance with a document known as the River Master’s Manual (Manual). The first question in this case is whether the River Master clearly erred in entertaining New Mexico’s request for a retroactive adjustment in his annual calculation to account for water evaporation losses. The second question is whether the River Master clearly erred in charging Texas for evaporation losses.

A tropical storm caused heavy rainfall in both New Mexico and Texas. The Bureau of Reclamation (Bureau), a federal entity, temporarily impounded floodwater in a reservoir in New

Mexico. During that period of storage, some of the water evaporated. New Mexico requested that the River Master retroactively adjust his annual report to charge Texas for the evaporation losses. Texas opposed the motion.

The River Master ruled for New Mexico. The River Master concluded that nothing in the Compact limited his authority to entertain New Mexico's request for a retroactive adjustment to account for the evaporation of the water. He further concluded that because the water stored in New Mexico was held for Texas, the Manual required Texas to be charged for the evaporation losses.

Texas contends that the River Master clearly erred in entertaining New Mexico's request for a retroactive adjustment. Texas argues that New Mexico's request was untimely, that equitable tolling is not available to circumvent the decree's time limits, and that neither the Manual nor the decree authorizes retroactive adjustments without Texas's consent. Texas contends that even if the River Master had authority to make a retroactive adjustment, he clearly erred in doing so. Texas asserts that the Bureau stored water in the reservoir for public safety reasons, not for Texas's use, and the River Master clearly erred in concluding otherwise.

**Petitioner's Counsel of Record:**

Kyle D. Hawkins, Solicitor General, Texas Attorney General's Office

**Respondent's Counsel of Record:**

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Amy I. Haas, New Mexico Interstate Stream Commission

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