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GIBSON DUNN
Supreme Court Round-Up

Overview

The Supreme Court Round-Up previews upcoming cases, summarizes opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case, as well as a substantive analysis of the Court's actions.

October Term 2018

Argued Cases

1. ***Rucho v. Common Cause*, No. 18-422 (M.D.N.C., 318 F. Supp. 3d 777, consolidated with *Lamone v. Benisek*, No. 18-726 (D. Md., 348 F. Supp. 3d 493); jurisdiction postponed Jan. 4, 2019; argued Mar. 26, 2019). The Questions Presented are: (1) Whether plaintiffs have standing to press their partisan gerrymandering claims. (2) Whether plaintiffs' partisan gerrymandering claims are justiciable. (3) Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.**

   Decided June 27, 2019 (588 U.S. __). M.D.N.C. and D. Md./Vacated and remanded. Chief Justice Roberts for a 5-4 Court (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, J.J.). The Court held that partisan gerrymandering claims present a nonjusticiable political question because no "judicially discoverable and manageable standards" exist for resolving them. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The Framers were aware of electoral districting problems, including partisan gerrymandering, when they chose to assign the task of districting to state legislatures. Specifically, the Elections Clause of the U.S. Constitution empowers States to decide the "Times, Places and Manner of holding Elections" for members of Congress, and grants Congress the authority to "make or alter" any such rules. Art. I, § 4, cl. 1. To forbid all partisan gerrymandering would essentially countermand the Framers' decision to entrust districting to political entities. Thus, because "a jurisdiction may engage in political gerrymandering," *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999), any standard for resolving partisan gerrymandering claims must "provid[e] a standard for deciding how much partisan dominance is too much," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006). That is a political, not a legal, question that federal courts are ill-equipped to resolve. Although federal courts can adjudicate one-person, one-vote claims—which recognize that each person is entitled to equal say in the election of representatives—it does not follow that the federal courts can adjudicate claims by persons asserting they are entitled to have their political party achieve representation proportionate to its share of statewide support. The Constitution does not require proportional representation, and none


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of the proposed tests for evaluating the propriety of partisan gerrymandering is based on a "limited and precise rationale" that is "clear, manageable, and politically neutral." *Vieth v. Jubelirer*, 541 U.S. 267, 306-08 (2004). Federal courts therefore "have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."

2. ***Mitchell v. Wisconsin*, No. 18-6210 (Wis., 914 N.W.2d 151; cert. granted Jan. 11, 2019; argued Apr. 23, 2019). Whether, in a State with a civil implied-consent statute, a warrantless blood draw of an unconscious motorist who has been properly arrested for drunk driving is an unreasonable search under the Fourth Amendment.**

Decided June 27, 2019 (588 U.S. __). Wis./Vacated and remanded. Justice Alito for a 5-4 Court (Thomas, J., concurring in the judgment; Sotomayor, J., dissenting, joined by Ginsburg and Kagan, J.J.; Gorsuch, J., dissenting). The Court held that "the exigent circumstances rule almost always permits a blood test without a warrant." Petitioner was arrested for operating a motor vehicle while intoxicated after police administered a preliminary breath test that registered a blood alcohol concentration ("BAC") of 0.24%—triple the legal limit for driving in Wisconsin. The arresting officer transported petitioner to the police station to perform a more reliable breath test with better equipment. Petitioner's condition deteriorated, however, and he became too lethargic for the breath test. He soon became unconscious. The officer drove petitioner to a nearby hospital, where, on the officer's instruction, the hospital staff drew a blood sample. That blood sample showed a BAC of 0.222%. After petitioner was charged with drunk driving, he moved to suppress the results of his blood test, arguing that the warrantless taking of his blood violated his Fourth Amendment right against "unreasonable searches." That argument fails. Drunk-driving arrests, taken alone, justify warrantless breath tests but not blood tests. However, carve-outs to the warrant requirement for a blood test exist when "exigent circumstances" would result in the imminent destruction of evidence. Although the fleeting quality of BAC evidence alone is not enough to justify a warrantless blood test, exigent circumstances exist "when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." Suspected drunk drivers who are unconscious present the required "other factor" that will almost always justify a warrantless blood test. Thus, "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment."

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3. ***Dep't of Commerce v. New York*, No. 18-966 (S.D.N.Y., 2019 WL 190285; cert. granted Feb. 15, 2019, with Question 3 directed by the Court; argued Apr. 23, 2019). The Questions Presented are: (1) Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary's decision violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* (2) Whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis. (3) Whether the Secretary of Commerce's decision to add a citizenship question to the Decennial Census violated the Enumeration Clause of the U.S. Constitution, art. I, § 2, cl. 3.**

Decided June 27, 2019 (588 U.S. __). S.D.N.Y./Affirmed in part, reversed in part, and remanded. Chief Justice Roberts for a 5-4 Court (Thomas, J., concurring in part and dissenting in part, joined by Gorsuch and Kavanaugh, J.J.; Breyer, J., concurring in part and dissenting in part, joined by Ginsburg, Sotomayor, and Kagan, J.J.; Alito, J., concurring in part and dissenting in part). The Court held that the decision of the Secretary of Commerce to reinstate a question about citizenship on the 2020 census questionnaire was consistent with the Enumeration Clause of the U.S. Constitution and the Census Act, but that the district court was warranted in remanding the case to the agency because the Secretary's "sole stated reason" for reinstating the citizenship question "seems to have been contrived." The citizenship question does not violate the Enumeration Clause because the Clause historically has been understood to allow Congress to seek—and Congress historically has sought—citizenship and other demographic information on the census questionnaire. Nor was it unreasonable under the Administrative Procedure Act ("APA") for the Secretary to reinstate the citizenship question despite evidence that doing so would risk a lower response rate; the Secretary considered that possibility and reasonably explained why "obtaining more complete and accurate citizenship data . . . was worth the risk." For similar reasons, the Secretary's decision does not violate the Census Act's requirement that he "acquire and use information" from other available sources where possible rather than "conduct[ ] direct inquiries" using the census questionnaire. 13 U.S.C. § 6(c). Even assuming that provision applies here, the Secretary reasonably concluded that other available data "would not, in his judgment, provide the more complete and accurate data" that he sought. The Secretary also provided Congress adequate notice of his decision to reinstate the citizenship question, in compliance with the Census Act. Nevertheless, the Secretary's decision violates the APA because the Secretary's "sole stated reason" for reinstating the citizenship question—to provide the Department of Justice ("DOJ") improved citizenship data for better enforcement of the Voting Rights Act—"seems to have been contrived." "In the Secretary's telling, Commerce was simply acting on a routine data request from"

the DOJ. Yet the evidence, which includes extra-record discovery that is rarely appropriate but is justified on these facts, shows that "Commerce went to great lengths to elicit the request from DOJ (or any other willing agency)." Although judges generally must avoid inquiring into "executive motivation," *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977), such an inquiry is permitted "[o]n a strong showing of bad faith or improper behavior," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Although there was "no particular step" in the administrative process that was "inappropriate or defective" here, "the Secretary began taking steps to reinstate a citizenship question about a week into his tenure" and did not identify a need for census data to enforce the Voting Rights Act until much later. His explanation therefore seems "contrived." Accepting a contrived reason for an agency action would defeat the purpose of requiring reasoned agency decisionmaking—namely, "to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."

4. ***United States v. Haymond*, No. 17-1672 (10th Cir., 869 F.3d 1153; cert. granted Oct. 26, 2018; argued Feb. 26, 2019). Whether the court of appeals erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. § 3583(k) that required the district court to revoke respondent's ten-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by knowingly possessing child pornography.**

Decided June 26, 2019 (588 U.S. __). Tenth Circuit/Vacated and remanded. Justice Gorsuch for a 5-4 Court (Breyer, J., concurring in the judgment; Alito, J., dissenting, joined by Roberts, C.J., and Thomas and Kavanaugh, J.J.). The Court held that the Fifth and Sixth Amendments preclude a district court from imposing a sentence exceeding the statutory range authorized by the jury's conviction when the court finds facts by a preponderance of the evidence regarding conduct that violated the terms of the defendant's supervised release. Respondent was convicted of possessing child pornography, a crime that triggers a prison sentence of zero to 10 years. 18 U.S.C. § 2252(b)(2). The district court sentenced him to 38 months imprisonment plus 10 years of supervised release. During respondent's term of supervised release, the district court held a hearing and found—without a jury and by a preponderance of the evidence—that respondent engaged in conduct that violated his supervised release, which triggered a statutorily mandated prison term of at least five years and up to life. *Id.* § 3583(k). Imposing that sentence violated the Fifth and Sixth Amendments. "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." Section 3583(k) violates this constitutional protection by requiring "a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt." The Government is wrong to argue that punishments for revocation of supervised release should be treated differently than punishments for criminal conduct: a change in label does not make the Constitution inapplicable or make a prison sentence anything other than a prison sentence. The Government is also wrong to argue that § 3583(k)'s supervised release revocation procedures are similar to historical (and

The National Law Journal named Gibson Dunn to its 2018 Appellate Hot List, which recognized 22 firms that "won key matters before the U.S. Supreme Court and federal courts of appeal."

The American Lawyer named Gibson Dunn a Finalist in its 2018 Litigation Department of the Year competition, following the firm's unprecedented three wins in this biennial competition — as the 2010, 2012, and 2016 Litigation Department of the Year — and 2014 Finalist honors.

constitutional) parole and probation revocation procedures. Section 3583(k) exposes a defendant to *additional* mandatory prison terms beyond that authorized by a jury, whereas historical parole and probation revocation procedures merely expose a defendant to the *remaining* prison term that a jury already authorized.

5. ***Kisor v. Wilkie*, No. 18-15 (Fed. Cir., 869 F.3d 1360; cert. granted Dec. 10, 2018, limited to Question 1; argued Mar. 27, 2019). Whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).**

Decided June 26, 2019 (588 U.S. __). Federal Circuit/Vacated and remanded. Justice Kagan for a unanimous Court (Roberts, C.J., concurring in part; Gorsuch, J., concurring in the judgment, joined by Thomas, J., and joined in part by Kavanaugh and Alito, J.J.; Kavanaugh, J., concurring in the judgment, joined by Alito, J.). The Court declined to overrule *Auer* deference, which sometimes requires courts to defer to an agency's reasonable interpretation of its own ambiguous regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In 1982, the Department of Veterans Affairs ("VA") denied a Vietnam War veteran's claim for benefits after concluding that the veteran did not have post-traumatic stress disorder ("PTSD"). When the veteran again sought benefits in 2006, the VA changed course and awarded benefits after concluding that the veteran did have PTSD. This case arose out of a disagreement as to whether the veteran was entitled to retroactive payments under a VA regulation permitting such payments when the VA fails to consider "relevant" records—in this case, records describing the veteran's combat experience. The VA contended that the newly submitted records are not "relevant" because they do not speak to the reason for its 1982 denial of benefits (i.e., that the veteran did not have PTSD). Citing both *Seminole Rock* and *Auer*, the Federal Circuit deferred to the VA's interpretation of "relevant" in the regulation, affirming the VA's denial of retroactive payments. "The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies." Although four Justices would have overruled *Auer*, the majority declined to do so and instead "reinforce[d]" the limits on when such deference can be deployed. These limits are robust: "When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. . . . But that phrase 'when it applies' is important—because it often doesn't." First, a court may not afford *Auer* deference unless the regulation is genuinely ambiguous. This requires exhausting "all the 'traditional tools' of construction," as even "hard interpretative conundrums . . . can often be solved." Second, a court must conclude that the agency's reading of the ambiguous regulation is "reasonable," which the Court emphasized "is a requirement an agency can fail." Finally, a court must "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." In undertaking this inquiry, courts should consider a variety of factors, including whether the agency's interpretation constitutes the agency's "official position," whether the interpretation "implicate[s]" the agency's "substantive expertise," and whether the interpretation reflects a "fair and considered judgment," as compared to a "convenient litigating position."

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6. ***Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, No. 18-96 (6th Cir., 883 F.3d 608; cert. granted Sept. 27, 2018; argued Jan. 16, 2019). Whether the Twenty-First Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.**

Decided June 26, 2019 (588 U.S. __). Sixth Circuit/Affirmed. Justice Alito for a 7-2 Court (Gorsuch, J., dissenting, joined by Thomas, J.). The Court held that Tennessee's two-year durational residency requirement for applicants seeking to obtain a license to sell liquor within the State violates the dormant Commerce Clause, and that this violation is not rescued by section 2 of the Twenty-First Amendment, which reserves power to each State to regulate the importation of liquor and its distribution within the State. The dormant Commerce Clause "prohibits state laws that unduly restrict interstate commerce." Although section 2 of the Twenty-First Amendment is broadly worded, "the Twenty-First Amendment does not immunize all laws from Commerce Clause challenge." *Granholm v. Heald*, 544 U.S. 460, 488 (2005). Instead, section 2 "constitutionaliz[ed]," *Craig v. Boren*, 429 U.S. 190, 206 (1976), "the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition." This standard gives States "leeway" to adopt alcohol-related public health and safety measures, but does not allow them to adopt "protectionist measures with no demonstrable connection to those interests." Thus, "[r]ecognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens," the Court "ask[s] whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." Tennessee's two-year durational residency requirement fails that test. The requirement "expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety." There is no "concrete evidence," *Granholm*, 544 U.S. at 490, in the record showing that the residency requirement "actually promotes public health or safety." Nor is there any "evidence that nondiscriminatory alternatives would be insufficient to further those interests." Because the "predominant effect" of the residency requirement is to protect in-state retailers from out-of-state competition, it "violates the Commerce Clause and is not saved by the Twenty-First Amendment."

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7. ***United States v. Davis*, No. 18-431 (5th Cir., 903 F.3d 483; cert. granted Jan. 4, 2019; argued Apr. 17, 2019). Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.**

Decided June 24, 2019 (588 U.S. __). Fifth Circuit/Affirmed in part, vacated in part, and remanded. Justice Gorsuch for a 5-4 Court (Kavanaugh, J., dissenting, joined by Thomas and Alito, J.J., and joined in part by Roberts, C.J.). The Court held that the residual clause of 18 U.S.C. § 924(c)—which provides heightened

criminal penalties for using a firearm during a "crime of violence"—is unconstitutionally vague. Section 924(c)(3)(b) defines "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense." In *Johnson v. United* States, 135 S. Ct. 2551 (2015), and *Sessions v. Damaya*, 138 S. Ct. 1204 (2018), the Court held that analogous residual clauses of the Armed Career Criminal Act and 18 U.S.C. § 16(b) were unconstitutionally vague because they required using a "categorical approach" whereby judges determined whether an offense qualified as a "crime of violence" based on an imagined degree of risk in the abstract "ordinary case" of the offense, not by how the defendant actually committed the crime. Although the Government argued that § 924(c)'s residual clause requires a "case-specific approach," not a "categorical approach," the text, context, and history of the clause do not support the Government's argument. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court held that § 16(b) required a categorical approach, and the same is true for § 924(c)'s "nearly identical language." The language of § 924(c) "reinforces the conclusion that the term 'offense' carries the same 'generic' meaning throughout the statute" because § 924(c), "just like § 16(b), speaks of an offense that, 'by its nature,' involves a certain type of risk." Against this backdrop, concluding that only § 16(b)—not § 924(c)—requires a categorical approach would muddle the federal criminal code. Finally, the canon of constitutional avoidance does not save § 924(c)'s residual clause. A case-specific reading of the clause would cause its penalties to *expand* and sweep in new conduct—namely, "categorically nonviolent felonies committed in violent ways." Applying "the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests."

8. ***Food Mktg. Inst. v. Argus Leader Media*, No. 18-481 (8th Cir., 889 F.3d 914; cert. granted Jan. 11, 2019; argued Apr. 22, 2019). The Questions Presented are: (1) Whether the statutory term "confidential" in Freedom of Information Act Exemption 4 bears its ordinary meaning, thus requiring the Government to withhold all "commercial or financial information" that is confidentially held and not publicly disseminated—regardless of whether a party establishes substantial competitive harm from disclosure. (2) If the Court retains the substantial-competitive-harm test, whether that test is satisfied when the requested information could be potentially useful to a competitor, or must the party opposing disclosure establish with near certainty a defined competitive harm like lost market share.**

   Decided June 24, 2019 (588 U.S. __). Eighth Circuit/Reversed and remanded. Justice Gorsuch for a 6-3 Court (Breyer, J., concurring in part and dissenting in part, joined by Ginsburg and Sotomayor, J.J.). The Court held that the Freedom of Information Act ("FOIA") allows a federal agency to withhold from disclosure commercial or financial information that is (i) treated as private by its owner and (ii) submitted to a government agency under an assurance of privacy. FOIA establishes a broad public right to request records from executive branch agencies. However, FOIA Exemption 4 shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The statute does not define the word

"confidential," but its ordinary meaning is "private" or "secret." Webster's Seventh New Collegiate Dictionary 174 (1963). This ordinary meaning does not support the Eighth Circuit's "substantial competitive harm" test, under which commercial information is not "confidential" unless its disclosure is "likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The statute does not include this "substantial harm" requirement. Instead, "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."

9. ***Iancu v. Brunetti*, No. 18-302 (Fed. Cir., 877 F.3d 1330; cert. granted Jan. 4, 2019; argued Apr. 15, 2019). Whether the prohibition in Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), on the federal registration of "immoral" or "scandalous" marks is facially invalid under the Free Speech Clause of the First Amendment.**

   Decided June 24, 2019 (588 U.S. __). Federal Circuit/Affirmed. Justice Kagan for a 6-3 Court (Alito, J., concurring; Roberts, C.J., concurring in part and dissenting in part; Breyer, J., concurring in part and dissenting in part; Sotomayor, J., concurring in part and dissenting in part, joined by Breyer, J.). The Court held that the Lanham Act's prohibition on registering "immoral" or "scandalous" trademarks violates the First Amendment. *See* 15 U.S.C. § 1052(a). In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Court declared unconstitutional the Lanham Act's bar on registering trademarks that "disparage" any "person[ ], living or dead." 15 U.S.C. § 1052(a). *Tam* concluded that a viewpoint-based bar on trademark registration is unconstitutional, and that the disparagement bar was viewpoint based because it permitted registration of marks when their messages celebrate persons, but not when their messages are alleged to disparage. Against that backdrop, the owner of a streetwear brand whose name sounds like a form of the F-word sought federal registration of the trademark "FUCT." The U.S. Patent and Trademark Office denied the application under § 1052(a), which prohibits trademarks that "[c]onsist[ ] of or comprise[ ] immoral, . . ., or scandalous matter." The Federal Circuit correctly invalidated that prohibition. Like the "disparage" trademark bar at issue in *Tam*, the "immoral or scandalous" prohibition at issue here is viewpoint based and "substantially overbroad" because it "allow[s] registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety." "There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all."

10. ***Dutra Grp. v. Batterton*, No. 18-266 (9th Cir., 880 F.3d 1089; cert. granted Dec. 7, 2018; argued Mar. 25, 2019). Whether punitive damages may be awarded to a Jones Act seaman in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.**

    Decided June 24, 2019 (588 U.S. __). Ninth Circuit/Reversed and remanded. Justice Alito for a 6-3 Court (Ginsburg, J., dissenting, joined by Breyer and Sotomayor, J.J.). The Court held that punitive damages are not available under

federal maritime law for a claim of unseaworthiness. Under *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), when crafting common law remedies under federal maritime law, courts must look to historical practice and to Congress's legislative enactments in similar areas of law. Here, "the overwhelming historical evidence suggests that punitive damages are not available" for claims of unseaworthiness because there is a "lack of punitive damages in traditional maritime law cases." Moreover, awarding punitive damages is unnecessary "to maintain uniformity with Congress's clearly expressed policies" in related areas of law. For example, the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.*, permits plaintiffs to recover only compensatory damages. And the Jones Act, 46 U.S.C. § 30104—a federal maritime statute that overlaps significantly with maritime common law—"limits recovery to pecuniary loss." *Miles*, 498 U.S. at 32. Finally, the Court found no persuasive policy justification for deviating from historical practice and allowing punitive damages for unseaworthiness claims. "In contemporary maritime law, our overriding objective is to pursue the policy expressed in congressional enactments, and because unseaworthiness in its current strict-liability form is our own invention and came after passage of the Jones Act, it would exceed our current role to introduce novel remedies contradictory to those Congress has provided in similar areas." Awarding punitive damages to seamen also would place "American shippers at a significant competitive disadvantage" vis-à-vis shippers who hail from countries that do not award punitive damages for seaworthiness claims.

11. ***Flowers v. Mississippi*, No. 17-9572 (Miss., 240 So. 3d 1082; cert. granted Nov. 2, 2018, with the Question Presented limited by the Court; argued Mar. 20, 2019). Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U.S. 79 (1986), in this case.**

Decided June 21, 2019 (588 U.S. __). Miss./Reversed and remanded. Justice Kavanaugh for a 7-2 Court (Alito, J., concurring; Thomas, J., dissenting, joined in part by Gorsuch, J.). The Court held that Mississippi unlawfully discriminated on the basis of race when its prosecutor exercised peremptory challenges against prospective black jurors when trying a black defendant for murder for the sixth time, with the same lead prosecutor in all six trials. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court held that a State may not discriminate on the basis of race when exercising peremptory challenges during a criminal trial. Four "critical facts, taken together" demonstrate that Mississippi here violated *Batson* and, therefore, petitioner's murder conviction must be vacated. First, the State used its peremptory challenges to strike 41 of 42 black prospective jurors. This "relentless, determined effort" to exclude black individuals from the jury strongly suggests a discriminatory intent. Second, in the sixth trial, the State struck five of six black prospective jurors. The State's decision to accept one black juror could not alone free the State from scrutiny, given the overall record of discrimination in this case. Third, in the sixth trial, the State engaged in disparate questioning of black and white prospective jurors to find pretextual reasons to strike black prospective jurors. Although such disparate questioning alone does not constitute a *Batson* violation, the dramatic difference in the number of questions asked of black jurors was not coincidental. Fourth, the State struck at least one black prospective juror

who was similar to white prospective jurors who were not struck by the State. Any one of those four facts might not violate *Batson* standing alone, but taking the "extraordinary facts" together clearly shows that the State was "motivated in substantial part by discriminatory intent."

12. ***N.C. Dep't of Revenue v. Kaestner Family Trust*, No. 18-457 (N.C., 814 S.E.2d 43; cert. granted Jan. 11, 2019; argued Apr. 16, 2019). Whether the Due Process Clause prohibits States from taxing trusts based on trust beneficiaries' in-state residency.**

    Decided June 21, 2019 (588 U.S. __). N.C./Affirmed. Justice Sotomayor for a unanimous Court (Alito, J., concurring, joined by Roberts, C.J., and Gorsuch, J.). The Court held that the mere presence of in-state beneficiaries for a trust does not empower a State to tax trust income that has not been distributed to the beneficiaries if they have no right to demand the income and might not receive it. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." This language prohibits States from imposing taxes that do not "bea[r] fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J.C. Penney Co*., 311 U.S. 435, 444 (1940). Thus, "when assessing a state tax premised on the in-state residency of a constituent of a trust—whether beneficiary, settlor, or trustee—the Due Process Clause demands attention to the particular relationship between the resident and the trust assets that the State seeks to tax." As relevant here, "[w]hen a tax is premised on the in-state residence of a beneficiary, the Constitution requires that the resident have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset." That required constitutional connection is lacking here. North Carolina taxed the income from a trust whose beneficiaries lived in the State even though "the beneficiaries did not receive any income from the trust during the years in question;" "had no right to demand trust income or otherwise control, possess, or enjoy the trust assets in the tax years at issue;" and "could not count on necessarily receiving any specific amount of income from the [t]rust in the future." The beneficiaries thus did "not have the requisite relationship with the [t]rust property to justify the State's tax."

13. ***Rehaif v. United States*, No. 17-9560 (11th Cir., 888 F.3d 1138; cert. granted Jan. 11, 2019; argued Apr. 23, 2019). Whether, in a prosecution for possession of a firearm and ammunition by an alien who is unlawfully present in the United States, in violation of 18 U.S.C. § 922(g)(5), the Government must prove that the person who knowingly possessed a firearm also knew that he was unlawfully in the United States.**

    Decided June 21, 2019 (588 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Breyer for a 7-2 Court (Alito, J., dissenting, joined by Thomas, J.). The Court held that, "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." Section 922(g) makes it unlawful for certain individuals to possess firearms, including aliens who are "illegally or unlawfully in the United States," and § 924(a)(2) requires a fine or term of imprisonment for up to 10 years

for anyone who "knowingly violates" § 922(g). Petitioner was charged with violating both statutes. At trial, the judge instructed the jury that the Government did not have to prove that petitioner knew he was an unlawful alien, and had to prove *only* that he knew he possessed a firearm. Petitioner was convicted and the Eleventh Circuit affirmed. That was error. "Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent," and there is a "longstanding presumption" that Congress intends defendants to possess the requite scienter—i.e., a culpable metal state—for *each* criminal element. Here, there is nothing in the text or history of the statute suggesting that Congress intended to deviate from this presumption. Thus, because a defendant must know that he has "violate[d]" § 922(g), he must know that he has violated all material elements of the statute, which include both the defendant's status (e.g., being an unlawful alien) and the defendant's conduct (e.g., possessing a firearm).

14. ***Knick v. Twp. of Scott*, No. 17-647 (3d Cir., 862 F.3d 310; cert. granted Mar. 5, 2018, limited to Question 1; argued Oct. 3, 2018; restored for reargument Nov. 2, 2018; reargued Jan. 16, 2019). Whether the Court should reconsider the requirement that property owners exhaust state court remedies before a federal takings claim ripens.**

Decided June 21, 2019 (588 U.S. __). Third Circuit/Vacated and remanded. Chief Justice Roberts for a 5-4 Court (Thomas, J., concurring; Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, J.J.). The Court held that "a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under [42 U.S.C.] § 1983 at that time," overruling the state-litigation exhaustion requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In *Williamson County*, the Court held that, when a State provides an adequate inverse condemnation procedure for seeking just compensation, a property owner's federal takings claim is "premature" until he seeks compensation through the State's procedure. 473 U.S. at 197. That ruling carried with it "unanticipated consequences" that became clear when the Court decided *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). Under *San Remo*, if a takings plaintiff complies with *Williamson County* and files in state court an ultimately unsuccessful claim for compensation, the full faith and credit statute, 28 U.S.C. § 1738, "require[s] the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment." This "preclusion trap" signals "that the state-litigation requirement rests on a mistaken view of the Fifth Amendment." *San Remo* renders "hollow" the guarantee of a federal forum to resolve takings claims, forcing takings plaintiffs to litigate their claims in state court—an "unjustifiable burden" that "must be overruled." The *Williamson County* Court "was simply confused," and its "exceptionally" poor reasoning "may be partially explained by the circumstances in which the state-litigation issue reached the Court" in that case. Specifically, the United States, as *amicus curiae*, raised the exhaustion issue despite neither party having done so, and the Court adopted the Solicitor General's reasoning even though a narrower holding was available. The Court thus "may not

have adequately tested the logic of the state-litigation requirement or considered its implications." Moreover, *stare decisis* does not counsel in favor of adhering to *Williamson County* despite its error because (i) "[i]ts reasoning was exceptionally ill founded and conflicted with much of [the Court's] takings jurisprudence;" (ii) the state-litigation requirement has "proved to be unworkable in practice;" and (iii) "there are no reliance interests on the state-litigation requirement." Accordingly, "[t]he state-litigation requirement of *Williamson County* is overruled," and "[a] property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government."

15. ***Gundy v. United States*, No. 17-6086 (2d Cir., 695 F. App'x 639; cert. granted Mar. 5, 2018, limited to Question 4; argued Oct. 2, 2018). Whether the Sex Offender Registration and Notification Act's delegation of authority to the Attorney General to issue regulations under 34 U.S.C. § 20913 (previously 42 U.S.C. § 16913) violates the nondelegation doctrine.**

Decided June 20, 2019 (588 U.S. __). Second Circuit/Affirmed. Justice Kagan for a 5-3 Court (Alito, J., concurring in the judgment; Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.; Kavanaugh, J., took no part in the consideration or decision). The Court affirmed the Second Circuit's judgment that the Sex Offender Registration and Notification Act ("SORNA")—which requires the Attorney General to apply the statute's registration requirements to offenders convicted before Congress enacted the statute—is not an unconstitutional delegation of legislative authority. In 2006, Congress enacted SORNA to establish a national registration system for convicted sex offenders and to penalize individuals who fail to register. SORNA covers anyone "who was convicted of" specified sexual offenses, 34 U.S.C. § 20911, and requires registration either before completing a prison sentence or within three business days after receiving a non-prison sentence, *id.* § 20913. But because pre-Act offenders (those individuals who had committed sex crimes before SORNA's enactment) could not comply with these registration requirements, Congress granted the Attorney General "the authority to specify the applicability of the requirements . . . to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders." *Id.* § 20913(d). Petitioner, a pre-Act offender, claimed that this provision is an unconstitutional delegation of legislative authority to the Attorney General in violation of the nondelegation doctrine. Although Article I vests legislative powers in Congress, the Court has previously held that Congress may nevertheless delegate its legislative authority to another branch so long as Congress provides "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quotation marks omitted) (brackets in original). Here, SORNA provides the requisite "intelligible principle," which is not a demanding requirement, by conveying Congress's policy choice—namely, "that the Attorney General require pre-Act offenders to register as soon as feasible." This delegation "is distinctly small-bore" and "falls well within constitutional bounds" delineated in the Court's intelligible-principle precedents.

16. ***McDonough v. Smith*, No. 18-485 (2d Cir., 898 F.3d 259; cert. granted Jan. 11, 2019; argued Apr. 17, 2019). Whether the statute of limitations for a claim under 42 U.S.C. § 1983 based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use.**

Decided June 20, 2019 (588 U.S. __). Second Circuit/Reversed and remanded. Justice Sotomayor for a 6-3 Court (Thomas, J., dissenting, joined by Kagan and Gorsuch, J.J.). The Court held that the statute of limitations for a 42 U.S.C. § 1983 claim alleging a criminal prosecution tainted by fabricated evidence begins to run when the criminal proceeding is terminated in the defendant's favor, at least when the fabricated-evidence claim is based on an alleged deprivation of liberty during the criminal proceedings. The Court assumed without deciding that there is a due process "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer." *McDonough v. Smith*, 898 F.3d 259, 266 (2d Cir. 2018) (quotation marks omitted). For that kind of fabricated-evidence claim, the most analogous common law tort is malicious prosecution; both claims attack the integrity of a criminal prosecution "pursuant to legal process." *Wallace v. Kato*, 549 U.S. 384, 397 (2007). A malicious-prosecution claim accrues only after the underlying criminal proceeding has been resolved in the defendant's favor (e.g., an acquittal). This accrual rule is "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments." Because the fabricated-evidence claim in this case "implicates the same concerns" as malicious-prosecution claims, "it makes sense to adopt the same rule." The undesirable practical consequences of a contrary rule reinforce this conclusion: If the statute of limitations runs as soon as criminal defendants become aware that fabricated evidence has been used against them, they "could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them."

17. ***Am. Legion v. Am. Humanist Ass'n*, No. 17-1717, consolidated with *Md.-Nat'l Capital Park & Planning Comm'n v. Am. Humanist Ass'n*, No. 18-18 (4th Cir., 874 F.3d 195; cert. granted Nov. 2, 2018; argued Feb. 27, 2019). The Questions Presented are: (1) Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross. (2) Whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), or some other test. (3) Whether, if the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), applies, the expenditure of funds for routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to an excessive entanglement with religion in violation of the First Amendment.**

Decided June 20, 2019 (588 U.S. __). Fourth Circuit/Reversed and remanded. Justice Alito for a 7-2 Court (Breyer, J., concurring, joined by Kagan, J.; Kavanaugh, J., concurring; Kagan, J., concurring in part; Thomas, J., concurring in

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the judgment; Gorsuch, J., concurring in the judgment, joined by Thomas, J.; Ginsburg, J., dissenting, joined by Sotomayor, J.). The Court held that the Bladensburg Peace Cross ("Cross")—a 32-foot tall war memorial in the shape of a Latin cross in Maryland that occupies public land and receives public funding for maintenance—does not violate the Establishment Clause of the First Amendment. In 1925, the American Legion finished construction on the Cross as a tribute to 49 area soldiers who died in World War I. Nearly 40 years later, in 1961, the Maryland-National Capital Park and Planning Commission ("Commission") acquired the Cross and the land on which it sits in order to preserve the monument and address traffic-safety concerns. During the next 50 years, the Commission spent approximately $117,000 to maintain and preserve the monument. In 2008, it budgeted an additional $100,000 for renovations and repairs to the Cross. In 2012, the American Humanist Association challenged the Cross's presence on public land, alleged that the Commission's maintenance of the memorial violated the Establishment Clause, and requested that the Cross as a whole be removed or demolished or the arms of the Cross be removed. The American Legion intervened, and the district court granted summary judgment in favor of the Commission and American Legion. A divided panel of the Fourth Circuit reversed, finding that the Cross failed the "effects" prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because a reasonable observer would view the Commission's ownership and maintenance of the monument as an endorsement of Christianity. That was error. The "message" conveyed by a monument, symbol, or practice may change over time, and even religiously expressive monuments, symbols, or practices can become embedded features of a community's landscape and identity. When, with the passage of time, a religiously expressive monument, symbol, or practice has developed familiarity and historical significance, "removing it may no longer appear neutral." "A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion." Here, although the Cross is undoubtedly a Christian symbol, it has come to represent far more than that over time: it is a symbolic resting place for soldiers who never returned home, a place for the community to gather and honor veterans and their sacrifices, and a historical landmark. Destroying or defacing such a monument would not be a neutral governmental act. Nor would it further the ideals of respect and tolerance embodied in the First Amendment.

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18. ***PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (4th Cir., 883 F.3d 459; cert. granted Nov. 13, 2018, with the Question Presented limited by the Court; argued Mar. 25, 2019). Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.**

Decided June 20, 2019 (588 U.S. __). Fourth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court (Thomas, J., concurring in the judgment, joined by Gorsuch, J.; Kavanaugh, J., concurring in the judgment, joined by Thomas, Alito, and Gorsuch, J.J.). The Court declined to answer the question presented—i.e., whether the Hobbs Act requires district courts to follow Federal Communications Commission ("FCC") orders construing the Telephone Consumer Protection Act ("TCPA"). Petitioners sent healthcare providers an

unsolicited fax offering free copies of an e-book about prescription drugs. One of the providers sued petitioners for violating the TCPA, which prohibits any person from faxing "unsolicited advertisement[s]." 47 U.S.C. § 227(b)(1)(C). The district court dismissed the case, refusing to follow a 2006 FCC order stating that faxes promoting free goods or services are an "unsolicited advertisement" under the TCPA. Reversing, the Fourth Circuit reasoned that the Hobbs Act, which gives federal courts of appeals "exclusive jurisdiction" to determine the validity of certain FCC "final orders," 28 U.S.C. § 2342(1), required the district court to adopt and apply the FCC order's interpretation of the TCPA. The Supreme Court granted certiorari to resolve the issue, but "found it difficult" to determine whether the "exclusive jurisdiction" provision of the Hobbs Act requires district courts to adopt and follow an FCC order interpreting the TCPA because "the answer may depend upon the resolution of two preliminary issues." First, if the FCC order is an interpretive rule, not a legislative rule, then the FCC order would merely announce the agency's construction of the statute and "may not be binding on a district court." Second, if petitioners lacked a "prior" and "adequate" opportunity under the Administrative Procedure Act to challenge the FCC order, 5 U.S.C. § 703, then petitioners might be able to mount that challenge in the current proceeding, even if the FCC order were a legislative rule. On remand, the Fourth Circuit must "consider these preliminary issues."

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19. ***Manhattan Cmty. Access v. Halleck*, No. 17-1702 (2d Cir., 882 F.3d 300; cert. granted Oct. 12, 2018; argued Feb. 25, 2019). The Questions Presented are: (1) Whether the Second Circuit erred in rejecting this Court's state actor tests and instead creating a *per se* rule that private operators of public access channels are state actors subject to constitutional liability. (2) Whether private entities operating public access television stations are state actors for constitutional purposes where the State has no control over the private entity's board or operations.**

Decided June 17, 2019 (587 U.S. __). Second Circuit/Reversed in part and remanded. Justice Kavanaugh for a 5-4 Court (Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, J.J.). The Court held that private operators of public access channels are not state actors subject to First Amendment constraints on their editorial discretion because the "operation of public access channels on a cable system is not a traditional, exclusive public function." Although the First Amendment generally restricts only state action, private entities may be treated as state actors when they perform functions traditionally performed exclusively by the government. Here, New York City designated Manhattan Neighborhood Network ("MNN")—a private, independent nonprofit corporation—to operate public access television channels in Manhattan. After respondents produced a video criticizing MNN, MNN banned the video and prohibited respondents from submitting content to MNN. Respondents sued MNN, alleging violations of their First Amendment rights. The district court dismissed the First Amendment claim because "MNN is not a state actor." The Second Circuit reversed, holding that public access channels are public forums protected by the First Amendment because administering public forums is a function usually performed by the government. That was error. The operation of public access channels on a cable system "has not traditionally and exclusively been performed by government."

Moreover, "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." That New York City designated MNN to operate the channels does not change this analysis. "[A]s the Court has long held, the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function." Similarly, "New York State's extensive regulation of MNN's operation of the public access channels does not make MNN a state actor" because "being regulated by the State does not make one a state actor."

20. ***Va. Uranium, Inc. v. Warren*, No. 16-1275 (4th Cir., 848 F.3d 590; CVSG Oct. 2, 2017; cert. supported Apr. 9, 2018; cert. granted May 21, 2018; argued Nov. 5, 2018). Whether the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2001 *et seq*., preempts state laws that prohibit activities within a State's regulatory jurisdiction (here, conventional uranium mining) when such laws are grounded in radiological-safety concerns about related activities that are federally regulated under the AEA (here, by milling of uranium ore and disposal of "tailings" byproduct material).**

Decided June 17, 2019 (587 U.S. __). Fourth Circuit/Affirmed. Justice Gorsuch for a 6-3 Court (Ginsburg, J., concurring in the judgment, joined by Sotomayor and Kagan, J.J.; Roberts, C.J., dissenting, joined by Breyer and Alito, J.J.). The Court affirmed the Fourth Circuit's judgment that the Atomic Energy Act ("AEA") does not preempt a Virginia law banning uranium mining on private land. Although the AEA grants the federal Nuclear Regulatory Commission extensive authority to regulate most aspects of nuclear fuel production, the AEA does not expressly regulate uranium mining on private land. Virginia Uranium nevertheless contended that the AEA preempts Virginia's ban on uranium mining, arguing that Congress has "occupied the field of nuclear safety regulation" and that the ban is an impermissible obstacle to the purposes of the AEA. Virginia Uranium pointed to section 2021(k) of the AEA, which reads: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities *for purposes other than protection against radiation hazards*." 42 U.S.C. § 2021(k) (emphasis added). Virginia Uranium argued that this provision indicates that States cannot pass *any* laws for the purpose of protecting against radiation hazards, including Virginia's ban on uranium mining on private land. A plurality of Justices disagreed, concluding that § 2021(k) speaks to only the activities expressly covered by § 2021—"a section allowing for the devolution-by-agreement of federal regulatory authority." Thus, the provision does not "displace traditional state regulation over mining or otherwise extend the [Nuclear Regulatory Commission's] grasp to matters previously beyond its control." The plurality also rejected the contention that Virginia's ban presents an "unacceptable obstacle" to the purposes of the AEA, explaining that Congress "elected to leave mining regulation on private land to the States and grant the [Nuclear Regulatory Commission] regulatory authority only *after* uranium is removed from the earth." In other words, Congress "chose[ ] to regulate the more novel aspects of nuclear power while leaving to States their traditional function of regulating mining activities on private lands within their boundaries."

21. ***Gamble v. United States*, No. 17-646 (11th Cir., 694 F. App'x 750; cert. granted June 28, 2018; argued Dec. 6, 2018). Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.**

Decided June 17, 2019 (587 U.S. __). Eleventh Circuit/Affirmed. Justice Alito for a 7-2 Court (Thomas, J., concurring; Ginsburg, J., dissenting; Gorsuch, J., dissenting). The Court declined to overrule the longstanding dual-sovereignty doctrine, under which a State and the Federal Government may separately prosecute a defendant for the same conduct without violating the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause protects individuals from being twice put in jeopardy for the same "offence," not for the same conduct or actions. As originally understood, "an 'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two 'offences.'" Petitioner's historical evidence that the Clause was originally understood to bar successive prosecutions under the laws of different sovereigns is too "muddle[d]" and "spotty" to break the 170-years-long chain of precedent "linking dozens of cases" recognizing the dual-sovereignty doctrine. Nor does the Clause's relatively recent incorporation against the States make any difference. Incorporation simply means that the States must abide by the Court's interpretation of the Clause, which "has long included the dual-sovereignty doctrine, and there is no logical reason why incorporation should change it."

22. ***Va. House of Delegates v. Bethune-Hill*, No. 18-281 (E.D. Va., 326 F. Supp. 3d 128; jurisdiction postponed Nov. 13, 2018, with Question 7 directed by the Court; argued Mar. 18, 2019). The Questions Presented are: (1) Whether the district court conducted a proper "holistic" analysis of the majority-minority Virginia House of Delegates districts under the prior decision in this case, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), even though it ignored a host of evidence, including: (a) the overwhelming majority of district lines, which were carried over unchanged from the prior map; (b) the geographic location of population disparities, which imposed severe redistricting constraints and directly impacted which voters were moved into and out of the majority-minority districts; and (c) the degree of constraint the House's Voting Rights Act compliance goals imposed in implementation, which was minimal. (2) Whether the *Bethune-Hill* "predominance" test is satisfied merely by a lengthy description of ordinary Voting Rights Act compliance measures. (3) Whether the district court erred in relying on expert analysis it previously rejected as unreliable and irrelevant and expert analysis that lacked any objective or coherent methodology. (4) Whether the district court committed clear error in ignoring the entirety of the House's evidentiary presentation under the guise of credibility determinations unsupported by the record and predicated on expert testimony that should not have been credited or even admitted. (5) Whether Virginia's choice to draw eleven "safe" majority-minority districts of around or above 55 percent black voting-age population ("BVAP") was narrowly tailored in light of: (a) the discretion the Voting Rights Act afforded covered jurisdictions to "choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), or (b) the**

requirement the Voting Rights Act, as amended, imposed on covered jurisdictions "to prove the absence of racially polarized voting" to justify BVAP reductions towards or below 50 percent BVAP, *id.* at 500 n.3 (Souter, J., dissenting). (6) Whether the district court erred in ignoring the district-specific evidence before the House in 2011 justifying safe districts at or above 55 percent BVAP. (7) Whether Appellants have standing to bring this appeal.

Decided June 17, 2019 (587 U.S. __). E.D. Va./Appeal dismissed. Justice Ginsburg for a 5-4 Court (Alito, J., dissenting, joined by Roberts, C.J., and Breyer and Kavanaugh, J.J.). The Court held that the Virginia House of Delegates and its Speaker (together, "the House") lack standing to appeal a ruling invalidating Virginia's redistricting plan. After Virginia redrew its Senate and House districts in 2011, voters in 12 of the redrawn House districts sued the Commonwealth. A three-judge panel of the Eastern District of Virginia held that 11 of the 12 districts were unconstitutionally gerrymandered. Virginia's Attorney General announced that the Commonwealth would not appeal, but the House nevertheless filed an appeal. To establish Article III standing, a litigant must show "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." The House cannot make that showing. Under Virginia law, only the Attorney General has the authority to represent the Commonwealth's "interests in civil litigation." And although Virginia itself would have standing to appeal, neither it—through its Attorney General—nor a Virginia court has authorized or understood the House to represent the Commonwealth's interests in this case. In addition, the House has purported to represent only *its* interests throughout this litigation. But the House does not have standing to appeal "in its own right" because the lower court's decision did not inflict a discrete, cognizable injury on the House. The Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts an injury on each individual organ of government that participated in passing the law. Although the redrawn districts may affect the House's membership, the House has no "cognizable interest" in its members' identities because the House does not select its own members. "In short, Virginia would rather stop than fight on. One House of its bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process."

23. ***Quarles v. United States*, No. 17-778 (6th Cir., 850 F.3d 836; cert. granted Jan. 11, 2019; argued Apr. 24, 2019). Whether the definition of generic "burglary" under 18 U.S.C. § 924(e) adopted in *Taylor v. United States*, 495 U.S. 575 (1990), requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, or whether it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure.**

Decided June 10, 2019 (587 U.S. __). Sixth Circuit/Affirmed. Justice Kavanaugh for a unanimous Court (Thomas, J., concurring). The Court held that a "burglary" for purposes of the Armed Career Criminal Act ("ACCA") includes cases where "the defendant forms the intent to commit a crime *at any time* during the continuous event of unlawfully remaining in a building or structure." Petitioner pleaded guilty to unlawfully possessing a firearm under 18 U.S.C.

§ 922(g)(1)—a crime that triggers enhanced sentencing under ACCA if the defendant has three prior "violent felony" convictions, including for "burglary." *Id.* § 924(e). Among petitioner's three prior convictions was a conviction under Michigan's third-degree home invasion statute, which prohibits burglarizing a dwelling and committing a misdemeanor "*at any time* while . . . entering, [being] *present in*, or exiting the dwelling." Mich. Comp. Laws Ann. § 750.110a(4)(a) (emphasis added). In *Taylor v. United States*, 495 U.S. 575 (1990), the Court defined "burglary" in § 924(e) to mean "an unlawful or unprivileged entry into, or *remaining in*, a building or structure, with intent to commit a crime." *Id.* at 599 (emphasis added). The Michigan statute fits squarely within that definition. First, in ordinary use, the phrase "remaining in" means "a continuous activity," such as being unlawfully present in a dwelling. Second, the majority of state burglary statutes in effect in 1986—when Congress passed ACCA—included the "remaining in" concept, and all state appellate courts that had addressed the issue at the time had adopted the "at any time" position. Third, excluding "remaining in" burglaries from the definition of "burglary" in "§ 924(e) would make little sense" and "defeat Congress' stated objective" of requiring enhanced imprisonment terms for armed career criminals. Congress viewed burglary as an inherently dangerous crime that "creates the possibility of a violent confrontation between the offender and an occupant." *Taylor*, 495 U.S. at 588. That possibility does not depend on the "exact moment" when criminal intent is formed, whether upon first unlawful entry or sometime thereafter while the defendant unlawfully remains in a dwelling.

24. ***Return Mail, Inc. v. U.S. Postal Serv.*, No. 17-1594 (Fed. Cir., 868 F.3d 1350; cert. granted Oct. 26, 2018, limited to Question 1; argued Feb. 19, 2019). Whether the Government is a "person" who may petition to institute review proceedings under the Leahy-Smith America Invents Act.**

Decided June 10, 2019 (587 U.S. __). Federal Circuit/Reversed and remanded. Justice Sotomayor for a 6-3 Court (Breyer, J., dissenting, joined by Ginsburg and Kagan, J.J.). The Court held that the Federal Government is not a "person" capable of instituting patent review proceedings before the Patent Trial and Appeal Board. The Leahy-Smith America Invents Act of 2011 ("AIA") provides that any "person" other than the patent owner may file a petition with the Patent Trial and Appeal Board to challenge the validity of a patent. 35 U.S.C. § 311. Because the statute does not define the word "person," the definition is controlled by the "longstanding interpretive presumption that 'person' does *not* include the sovereign"—and, as such, excludes the Federal Government and its agencies. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000) (emphasis added). To rebut this presumption, the Government "must point to some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government" within the definition of "person." The Government has failed to make that showing. Although some parts of the AIA use the word "person" to encompass the Government, other parts of the statute use the word in a way that does *not* encompass the Government. In short, "there is no clear trend." Nor does the Government's "longstanding history with the patent system" or its ability to obtain "patents in the name of the United States" show that that the AIA allows the Government to institute review proceedings.

"[T]he Government's ability to obtain a patent . . . does not speak to whether Congress meant for the Government to participate as a third-party challenger in AIA review proceedings," and "[a]s to those proceedings, there is no longstanding practice" because the statute was enacted less than a decade ago.

25. ***Parker Drilling Mgmt. Servs. v. Newton*, No. 18-389 (9th Cir., 881 F.3d 1078; cert. granted Jan. 11, 2019; argued Apr. 16, 2019). Whether, under the Outer Continental Shelf Lands Act, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law.**

Decided June 10, 2019 (587 U.S. __). Ninth Circuit/Vacated and remanded. Justice Thomas for a unanimous Court. The Court held that state law applies on the Outer Continental Shelf ("OCS") only if federal law does not address the relevant issue. Among other things, the Outer Continental Shelf Lands Act ("OCSLA") (i) extends federal law across the OCS; (ii) grants the Federal Government complete "jurisdiction, control, and power of disposition" over the area; (iii) denies States any "interest in or jurisdiction" over the OCS; and (iv) applies federal law to the OCS as if it "were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. §§ 1332(1), 1333(a)(1), 1333(a)(3). Section 1333(a)(2)(A) of the statute, however, adopts the adjacent State's laws to be federal law "[t]o the extent that they are applicable and not inconsistent with" federal law. In other words, "state law is not 'applicable' on the OCS in the absence of a gap in federal law that needs to be filled." Because the OCS provides that federal law controls on the OCS, "it would make little sense to treat the OCS as a mere extension of the adjacent State, where state law applies unless it conflicts with federal law." That sort of preemption-type analysis is improper because "the OCS is not, and never was, part of a State, so state law has never applied of its own force." Accordingly, OCSLA's "reference to 'not inconsistent' state laws does not present the ordinary question in preemption cases—*i.e.*, whether a conflict exists between federal and state law." Rather, that reference refers to gap filling: state law applies only if there is no applicable federal law.

26. ***Azar v. Allina Health Servs.*, No. 17-1484 (D.C. Cir., 863 F.3d 937; cert. granted Sept. 27, 2018, with the Question Presented limited by the Court; argued Jan. 15, 2019). Whether 42 U.S.C. § 1395hh(a)(2) or § 1395hh(a)(4) required the Department of Health and Human Services to conduct notice-and-comment rulemaking before providing the challenged instructions to a Medicare Administrator Contractor making initial determinations of payments due under Medicare.**

Decided June 3, 2019 (587 U.S. __). D.C. Circuit/Affirmed. Justice Gorsuch for a 7-1 Court (Breyer, J., dissenting; Kavanaugh, J., took no part in the consideration or decision). The Court held that the Government failed to satisfy the requisite notice-and-comment period under the Medicare Act, 42 U.S.C. § 1395hh(a)(2), when it established a "substantive legal standard" by posting on its website a new policy that significantly and retroactively "reduced payments to hospitals serving low-income patients." Section 1395hh(a)(2) requires the Government to satisfy a notice-and-comment period for any "rule, requirement, or other statement of

policy . . . that establishes or changes a substantive legal standard governing . . . the payment for services" under Medicare. The phrase "substantive legal standard" in the Medicare Act is "more expansive" than the phrase "substantive rule" in the Administrative Procedure Act ("APA") for at least three reasons. First, the Medicare Act contemplates that statements of policy can establish or change a "substantive legal standard," but statements of policy under the APA are by definition *not* substantive. Second, the Medicare Act permits substantive changes to interpretive rules and statements of policy, but that statutory authority would make no sense if the Medicare Act's use of "substantive" was the same as the APA's "because, again, interpretive rules and statements of policy—and any changes to them—are *not* substantive under the APA." Third, the Medicare Act explicitly cross-references the APA's good-cause exemption from notice and comment, but does not also cross-reference the APA's exemption for interpretive rules and policy statements, strongly suggesting that Congress acted "intentionally and purposefully in the disparate" treatment. *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, the Government's announcement of "a new policy on its website that dramatically—and retroactively—reduced payments to hospitals serving low-income patients" easily qualifies as a "substantive legal standard" affecting Medicare benefits and, as such, the Government cannot make the change without first affording the public notice and providing a chance to comment under § 1395hh(a)(2), regardless of whether notice and comment would be required under the APA. And "[b]ecause affected members of the public received no advance warning and no chance to comment first, and because the government has not identified a lawful excuse for neglecting its statutory notice-and-comment obligations, . . . the new policy cannot stand."

27. ***Taggart v. Lorenzen*, No. 18-489 (9th Cir., 888 F.3d 438; cert. granted Jan. 4, 2019; argued Apr. 24, 2019). Whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.**

Decided June 3, 2019 (587 U.S. __). Ninth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. The Court held that courts may hold a creditor in civil contempt for violating a bankruptcy court's discharge order "when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." At the end of a bankruptcy proceeding, a bankruptcy court typically enters a "discharge order" that "bars creditors from attempting to collect any debt covered by the order." The Ninth Circuit concluded that civil contempt sanctions for violating a discharge order are improper if the creditor has a subjective "good faith belief" that the order does not apply to the creditor's claim. That was error. Two provisions of the Bankruptcy Code are relevant. First, section 524 provides that a discharge order "operates as an injunction against the commencement or continuation of an" attempt to collect a discharged debt. 11 U.S.C. § 524(a)(2). Second, section 105 provides that a court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* § 105(a). These provisions "incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction." Those traditional standards, in turn, prohibit civil contempt sanctions "where there is [a] fair ground

of doubt as to the wrongfulness of the defendant's conduct." *Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885). This is an objective standard. Accordingly, although a party's subjective intent might be relevant to the nature of an appropriate sanction, "traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context," and permit civil contempt sanctions "when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order."

28. ***Fort Bend Cty., Tex. v. Davis*, No. 18-525 (5th Cir., 893 F.3d 300; cert. granted Jan. 11, 2019; argued Apr. 22, 2019). Whether Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit, or a waivable claim-processing rule.**

    Decided June 3, 2019 (587 U.S. __). Fifth Circuit/Affirmed. Justice Ginsburg for a unanimous Court. The Court held that Title VII's requirement that employment-discrimination plaintiffs present their claims to the Equal Employment Opportunity Commission ("EEOC") before filing suit is a mandatory claim-processing rule subject to ordinary principles of waiver and forfeiture, not a jurisdictional prerequisite that can be raised at any point during litigation. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, requires employees to file a charge with the EEOC before suing an employer for discrimination. When it receives a charge, the EEOC must notify the employer and investigate the allegations. If the EEOC chooses not to sue, or if the EEOC cannot complete its investigation within 180 days, the employee is entitled to a "right-to-sue" notice. That notice allows the employee to sue the employer for the claim(s) presented in the charge. In this case, an employer litigated a religious-discrimination claim for five years before arguing that the plaintiff did not properly raise the claim in her EEOC charge. The district court agreed, reasoned that Title VII's charge-filing requirement is a non-waivable jurisdictional rule, and dismissed the case for lack of jurisdiction. The Fifth Circuit correctly reversed that decision. Title VII's charge-filing requirement is not a jurisdictional rule because it does not speak to the court's ability to "exercise adjudicatory authority." Instead, it is a mandatory claim-processing rule that "require[s] complainants to submit information to the EEOC and to wait a specified period before commencing a civil action." As a claim-processing rule, the charge-filing requirement is "subject to forfeiture if tardily asserted."

29. ***Mont v. United States*, No. 17-8995 (6th Cir., 723 F. App'x 325; cert. granted Nov. 2, 2018; argued Feb. 26, 2019). Whether a period of supervised release for one offense is tolled under 18 U.S.C. § 3624(e) during a period of pretrial confinement that upon conviction is credited toward a defendant's term of imprisonment for another offense.**

    Decided June 3, 2019 (587 U.S. __). Sixth Circuit/Affirmed. Justice Thomas for a 5-4 Court (Sotomayor, J., dissenting, joined by Breyer, Kagan, and Gorsuch, J.J.). The Court held that a "convicted criminal's period of supervised release is tolled . . . during his pretrial detention for a new criminal offense" if the court imposing the sentence for the new offense credits as "time served" the period of pretrial detention for the new offense. During petitioner's five-year period of federal supervised release, he violated the terms of his release by, among other

things, trafficking marijuana—a crime for which he was indicted in state court and pleaded guilty. While he was incarcerated for those new state charges and awaiting trial, the term of his federal supervised release period was scheduled to end. After that period ended, petitioner pleaded guilty, and the state court judge imposed a (new) six-year sentence and credited as "time served" the ten months petitioner had already been incarcerated for the charges. A few days later, the federal district court issued a warrant for petitioner, revoked his supervised release, and ordered him to serve an additional 42 months of imprisonment to run consecutively with his new state sentence. Petitioner argued that the federal court lacked jurisdiction to take these actions because the scheduled period of his supervised release ended while he was incarcerated on the state charges, and the federal court did not act until *after* the scheduled period had ended. The Sixth Circuit correctly rejected this argument. The plain language of 18 U.S.C. § 3624(e) tolled the supervised release period while petitioner was incarcerated for the state crimes. That statute provides that a "term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a . . . crime unless the imprisonment is for a period of less than 30 consecutive days." The phrase "'is imprisoned' may well include pretrial detention," and "the phrase 'in connection with a conviction' encompasses a period of pretrial detention for which a defendant receives credit against the sentence ultimately imposed." Accordingly, "pretrial detention tolls the supervised-release period, even though the District Court may need to make the tolling determination after the conviction."

30. ***Smith v. Berryhill*, No. 17-1606 (6th Cir., 880 F.3d 813; cert. granted Nov. 2, 2018; argued Mar. 18, 2019). Whether a decision of the Social Security Administration's Appeals Council dismissing as untimely a request for review of a decision issued by an ALJ after a hearing is a "final decision of the Commissioner of Social Security made after a hearing" that is subject to judicial review under 42 U.S.C. § 405(g).**

    Decided May 28, 2019 (587 U.S. __). Sixth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that the Social Security Administration Appeals Council's dismissal for untimeliness after a claimant receives a hearing on the merits qualifies as "any final decision . . . made after a hearing" for purposes of Article III judicial review under 42 U.S.C. § 405(g). After a hearing, an administrative law judge denied petitioner Social Security benefits. He appealed, and the Appeals Council dismissed the appeal as untimely. The lower federal courts then held that they lacked jurisdiction to review the case, reasoning that the Appeals Council's dismissal on timeliness grounds was not a "final decision" under § 405(g). That was error. The word "any" in § 405(g) has an expansive meaning, and "any final decision" that ends a proceeding on a claim, such as a dismissal of an appeal as untimely, is plainly a "final decision." Moreover, the dismissal in this case occurred "after a hearing"—namely, after a hearing on the merits before an administrative law judge. The federal courts therefore have jurisdiction for review under § 405(g).

31. ***Home Depot U.S.A., Inc. v. Jackson*, No. 17-1471 (4th Cir., 880 F.3d 165; cert. granted Sept. 27, 2018, with Question 2 directed by the Court; argued Jan. 15,**

2019). The Questions Presented are: (1) Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act when the class action was originally asserted as a counterclaim against a co-defendant. (2) Should this Court's holding in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?

Decided May 28, 2019 (587 U.S. __). Fourth Circuit/Affirmed. Justice Thomas for a 5-4 Court (Alito, J., dissenting, joined by Roberts, C.J., and Gorsuch and Kavanaugh, J.J.). The Court held that a third-party counterclaim defendant may not remove a class-action claim from state court to federal court. Citibank filed an action in state court to collect on a credit card debt. In response, the defendant debtor filed a class action counterclaim under state consumer protection law against Citibank *and* Home Depot—a third-party retailer not previously involved in the case. Home Depot sought to remove the case to federal court, relying on the general removal statute, which provides that "the defendant or the defendants" may remove to federal court "any civil action" over which a federal court would have original jurisdiction. 28 U.S.C. § 1441(a). Home Depot also relied on the removal provision of the Class Action Fairness Act, which permits "any defendant" to remove to federal court certain state class actions. *Id.* § 1453(b). The federal district court concluded that Home Depot could not remove the case because Home Depot was not a defendant in the original debt-collection action and, therefore, was not a "defendant" within the meaning of either removal provision. The Fourth Circuit affirmed, and the Court agreed. District courts must determine whether a civil action is removable by assessing whether the *action*—not the *claim*—could have been filed in federal court. Thus, removability is based on the initial complaint, not any later-filed counterclaims or third-party claims. In other words, "the filing of counterclaims that include[ ] class-action allegations against a third party [do] not create a new 'civil action' with a new 'plaintiff' and a new 'defendant.'" Instead, the "defendant" for purposes of removal under § 1441(a) and § 1453(b) is the party that the original plaintiff sues. The Class Action Fairness Act does not require a different result. That statute was "intended only to alter certain restrictions on removal," such as the requirement that all defendants agree to removal, "not [to] expand the class of parties who can remove a class action."

32. ***Nieves v. Bartlett*, No. 17-1174 (9th Cir., 712 F. App'x 613; cert. granted June 28, 2018; argued Nov. 26, 2018). Does the existence of probable cause defeat a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983?**

Decided May 28, 2019 (587 U.S. __). Ninth Circuit/Reversed and remanded. Chief Justice Roberts for a 6-3 Court (Thomas, J., concurring in part and concurring in the judgment; Gorsuch, J., concurring in part and dissenting in part; Ginsburg, J., concurring in the judgment in part and dissenting in part; Sotomayor, J., dissenting). The Court held that, except for a "narrow qualification," claims for First Amendment retaliatory arrest under 42 U.S.C. § 1983 require a plaintiff to "plead and prove the absence of probable cause for the arrest." To prevail on a retaliatory arrest claim, a plaintiff must show that a governmental official acted

with a retaliatory motive and that the motive was a but-for cause of the plaintiff's injury. However, "it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." A "purely subjective approach" to this causation question—i.e., focusing solely on the arresting officer's state of mind—would turn the policing of certain events into "overwhelming litigation risks" by allowing for wide-ranging discovery into the mind sets of officers. The subjective approach "would also compromise evenhanded application of the law by making the constitutionality of an arrest . . . depend[ ] on the personal motives of individual officers" instead of depending on the conduct of the arrestee. Focusing on the motives of officers, in turn, "would leave everyone worse off" by incentivizing officers to "minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive." The proper test is therefore an objective one that asks "whether the circumstances, viewed objectively, justify [the challenged] action." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (quotation marks omitted). If so, the action was reasonable regardless of the officer's subjective intent. Accordingly, the existence of probable cause—an objective inquiry—defeats a retaliatory arrest claim, with one "narrow qualification . . . for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so," such as jaywalking. In these situations, "an unyielding requirement" for a plaintiff to show a lack of probable cause could risk officers exploiting their arrest power by picking-and-choosing what speech to suppress. Accordingly, "the no-probable cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."

33. ***Mission Prod. Holdings, Inc. v. Tempnology, LLC*, No. 17-1657 (1st Cir., 879 F.3d 389; cert. granted Oct. 26, 2018, limited to Question 1; argued Feb. 20, 2019). Whether, under section 365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. § 365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.**

Decided May 20, 2019 (587 U.S. __). First Circuit/Reversed and remanded. Justice Kagan for an 8-1 Court (Sotomayor, J., concurring; Gorsuch, J., dissenting). The Court held that a bankruptcy debtor's rejection of a contract granting a license has the same effect as an ordinary breach of contract outside of the bankruptcy context and, therefore, the rejection itself does not "rescind rights that the contract previously granted" to the licensee. The Bankruptcy Code allows a debtor to "reject any executory contract"—i.e., a contract that has not yet been fully performed, such as a trademark license. 11 U.S.C. § 365(a). A debtor's rejection of an executory contract under this provision "constitutes a breach of such contract." *Id.* § 365(g). The Code does not define the word "breach," so the word "means in the Code what it means in contract law outside of bankruptcy." In contract law, when a breach occurs, the non-breaching party "retains the rights it has received under the agreement" and can choose whether to "continue the contract or walk away." Thus, in bankruptcy, when the debtor rejects a license or other executory agreement, that functional breach alone does not rescind the

agreement and "the licensee can continue to do whatever the license authorizes" while seeking monetary or other relief. Finally, the case is not moot: If petitioner (the licensee) were to prevail, petitioner would have a damages claim against respondent (the licensor). Although petitioner's claim might not succeed, a case remains a live controversy so long as there is "any chance of money changing hands," even if, as here, recovery "may be uncertain or even unlikely for any number of reasons."

34. ***Herrera v. Wyoming*, No. 17-532 (Wyo. Dist. Ct., No. 2016-242; CVSG Jan. 8, 2018; cert. supported May 22, 2018; cert. granted June 28, 2018; argued Jan. 8, 2019). Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.**

Decided May 20, 2019 (587 U.S. __). Wyo. Dist. Ct./Vacated and remanded. Justice Sotomayor for a 5-4 Court (Alito, J., dissenting, joined by Roberts, C.J., and Thomas and Kavanaugh, J.J.). The Court held that (1) hunting rights established by an 1868 Treaty between the United States and the Crow Tribe were not extinguished when Wyoming obtained statehood, and (2) the lands of the Bighorn National Forest in Wyoming did not become "occupied"—and thus exempt from the Tribe's hunting rights—when the national forest was created. Under the 1868 Treaty, the Crow Tribe ceded to the United States 30 million acres of its territory in what is now Montana and Wyoming. In exchange, the United States promised to preserve the Crow Tribe's "right to hunt" on land beyond its reservation so long as the off-reservation land is "unoccupied." Treaty Between the United States of America and the Crow Tribe of Indians, Art. IV, May 7, 1868, 15 Stat. 650. In 1890, Congress passed the Wyoming Statehood Act and admitted Wyoming as a new State. In 1897, President Grover Cleveland set aside a tract of land in Wyoming as the Bighorn National Forest; the tract was part of the land that the Crow Tribe ceded in the 1868 Treaty. Petitioner, a member of the Crow Tribe, was arrested in Bighorn National Forest for illegally hunting elk. He raised the 1868 Treaty as a defense, but the trial judge rejected the defense and a jury convicted. The appellate court affirmed, holding that the Crow Tribe's off-reservation hunting rights expired when Wyoming became a State, and that Bighorn National Forest became categorically "occupied"—and thus exempt from the Tribe's hunting rights—when it was created. Reversing, the Court held that the Wyoming Statehood Act did not nullify the Crow Tribe's hunting rights because "[t]here simply is no evidence that Congress intended to abrogate the 1868 Treaty right" through the Act, which does not even mention the Treaty. Further, although the Treaty included several situations that would terminate the hunting right, including if "the lands [were] no longer 'unoccupied,'" "[s]tatehood is not one of them." Nor are the lands "no longer 'unoccupied'" within the meaning of the Treaty because, at the time of the Treaty, "the Crow Tribe would have understood the word 'unoccupied' to denote an area free of residence or settlement by non-Indians." Establishing a new State or a new national park, without more, does not bring "residence or settlement by non-Indians" to an area. Accordingly, the "Wyoming Statehood Act did not abrogate the Crow Tribe's

hunting right," and the creation of Bighorn National Forest did not categorically remove the forest lands from the scope of the 1868 Treaty.

35. ***Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290 (3d Cir., 852 F.3d 268; CVSG Dec. 4, 2017; cert. supported May 22, 2018; cert. granted June 28, 2018; argued Jan. 7, 2019). Does the FDA's rejection of a drug-label warning preempt a state-law failure-to-warn claim based on the absence of that warning?**

Decided May 20, 2019 (587 U.S. __). Third Circuit/Vacated and remanded. Justice Breyer for a unanimous Court (Thomas, J., concurring; Alito, J., concurring in the judgment, joined by Roberts, C.J., and Kavanaugh, J.). The Court held that courts, not juries, must decide as a matter of law whether there is "clear evidence" that the FDA would not have approved a proposed label warning about a risk of a drug, thereby preempting a state-law failure-to-warn claim based on that same risk. *Wyeth v. Levine*, 555 U.S. 555, 571 (2009). Patients sued Merck and claimed that the company violated state law by failing to warn that one of its prescription drugs is associated with "atypical femoral fractures." Merck moved for summary judgment, arguing that the claims were preempted because the FDA had rejected Merck's proposed label for the drug warning about the risk of the fractures. Specifically, Merck submitted to the FDA a "Prior Approval Supplement"—which requires the agency's preapproval to add language to a warning label—seeking to warn about the risk of "stress fractures," but the FDA rejected the proposal on the basis that Merck's justification was "inadequate" because "[i]dentification of 'stress fractures' may not be clearly related to the atypical subtrochanteric fractures that have been reported in the literature." Merck argued that the FDA's decision made it impossible for the company to comply with both state law and federal law and, therefore, the patients' state-law failure-to-warn claims were preempted. The district court granted summary judgment to Merck, but the Third Circuit reversed, holding that *Wyeth* established an evidentiary standard of proof that required the factfinder to conclude that there is "clear evidence" that the FDA would not have approved a change to the drug's label to include the warning allegedly required under state law. And because there was a genuine issue of material fact as to why the FDA had rejected Merck's proposed label, Merck was not entitled to summary judgment. Reversing, the Court explained that the "clear evidence" wording in *Wyeth* does not define an "evidentiary standard[ ]," and that impossibility preemption is a legal question that asks "whether the relevant federal and state laws 'irreconcilably conflic[t].'" *Rice v. Norman Williams Co.*, 459 U.S. 654, 659 (1982). An irreconcilable conflict occurs in the failure-to-warn context if (i) a manufacturer fully informed the FDA of the justifications for a drug label warning required by state law, and (ii) the FDA nevertheless disapproved of the manufacturer's proposed change to the drug's label to include the warning. The "complexity" of determining "agency disapproval" demonstrates why the question "is a legal one" for judges to decide, particularly because judges are "better equipped" than jurors "to understand and to interpret agency decisions in light of the governing statutory and regulatory context." The case is remanded for the Third Circuit to reconsider the preemption question as one of law, not fact.

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36. ***Apple Inc. v. Pepper*, No. 17-204 (9th Cir., 846 F.3d 313; CVSG Oct. 10, 2017; cert. supported May 8, 2018; cert. granted June 18, 2018; argued Nov. 26, 2018). Whether respondents can seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, based on their claim that Apple has monopolized the distribution of iPhone apps, where respondents were injured by Apple's conduct only to the extent that third-party app developers passed on Apple's allegedly supracompetitive commissions in setting the prices that respondents paid.**

Decided May 13, 2019 (587 U.S. __). Ninth Circuit/Affirmed. Justice Kavanaugh for a 5-4 Court (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas and Alito, J.J.). The Court held that iPhone users who purchase apps on Apple's App Store are "direct purchasers" from Apple and thus have standing to sue Apple for alleged monopolistic overcharges under Section 2 of the Sherman Act. To list an app in the App Store, a third-party developer must pay Apple a yearly fee plus a commission for each sale of the app. The third-party developer—not Apple—sets the app's retail price. A group of iPhone users allege that this arrangement causes them to pay inflated prices for apps and seek antitrust damages from Apple. Under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977), only "direct purchaser[s], and not others in the chain of manufacture or distribution," can sue for damages under federal antitrust law. The district court dismissed the action under *Illinois Brick*, reasoning that the app developers—not the iPhone users—were the direct purchasers of Apple's app-distribution services because they paid the annual fees and commissions charged by Apple. The Ninth Circuit reversed, holding that the iPhone users could sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps. Affirming, the Court explained that a purchaser may sue for damages whenever there is "no intermediary between the purchaser and the antitrust violator." Here, the "iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive." Thus, under *Illinois Brick*, "iPhone owners are direct purchases from Apple and are proper plaintiffs to maintain this antitrust suit."

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37. ***Cochise Consultancy, Inc. v. United States ex rel. Hunt*, No. 18-315 (11th Cir., 887 F.3d 1081; cert. granted Nov. 16, 2018; argued Mar. 19, 2019). Whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of Section 3731(b)(2).**

Decided May 13, 2019 (587 U.S. __). Eleventh Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held that the limitations period in 31 U.S.C. § 3731(b)(2)—which provides that a False Claims Act action must be brought within 3 years after "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts, but not more than 10 years after the violation—applies in a *qui tam* suit

regardless of whether the United States intervenes, and that the relator in any nonintervened suit is not "the official of the United States" whose knowledge triggers the limitations period. Section 3731(b) provides that the later of two limitations periods applies to a "civil action under section 3730." First, § 3731(b)(1) requires that the action be brought within 6 years after the statutory violation occurred; second, § 3731(b)(2) requires that the action be brought within 3 years after "the official of the United States charged with responsibility to act" knew or should have known the relevant facts, but not more than 10 years after the violation. Because both Government-initiated and relator-initiated suits are "civil action[s] under section 3730," "the plain text of the statute makes the two limitations periods applicable in both types of suits." This reading conforms to the rule of statutory interpretation that, "[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." Because "[t]here is no textual basis to base the meaning of '[a] civil action under section 3730' on whether the Government has intervened," the limitations period in § 3731(b)(2) is available in a relator-initiated suit in which the Government has declined to intervene. Nor should the relator in a nonintervened suit be considered "the official of the United States charged with responsibility to act" under § 3731(b)(2). A private relator is not an "official of the United States" in the ordinary sense of the phrase, and the definite article "the" suggests that Congress did not intend to encompass "any and all private relators."

38. ***Franchise Tax Bd. of Cal. v. Hyatt*, No. 17-1299 (Nev., 407 P.3d 717; cert. granted June 28, 2018; argued Jan. 9, 2019). Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.**

Decided May 13, 2019 (587 U.S. __). Nev./Reversed and remanded. Justice Thomas for a 5-4 Court (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that States retain their sovereign immunity from private suits filed in the courts of a different State, overruling *Nevada v. Hall*, 440 U.S. 410 (1979). At the time of the founding, common law and international law had established that States—which "considered themselves fully sovereign nations"—were immune from private suits in the courts of other States. Article III "abrogated certain aspects of this traditional immunity" by providing a "neutral federal forum in which the States agreed to be amenable to suits brought by other States" and by the United States. When *Chisholm v. Georgia*, 2 Dall. 419 (1793), extended Article III to include controversies between a State and citizens of a different State, Congress and the States "swiftly" ratified the Eleventh Amendment, which "confirmed that the Constitution was not meant to [allow] any suits against the States" that were not already allowed when the Constitution was ratified. This historical record paints a clear picture: "The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Hall* is therefore "contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution." *Stare decisis* "does not compel continued adherence to this erroneous precedent" because it "failed to account for the historical understanding of state sovereign immunity" and "stands as an outlier in our sovereign-immunity jurisprudence." Although "some plaintiffs

. . . have relied on *Hall* by suing sovereign States," those reliance interests do not "persuade us to adhere to an incorrect resolution of an important constitutional question."

39. ***Thacker v. Tenn. Valley Auth.*, No. 17-1201 (11th Cir., 868 F.3d 979; cert. granted Sept. 27, 2018, limited to Question 1; argued Jan. 14, 2019). May the Tennessee Valley Authority invoke immunity for its performance of governmental, discretionary functions?**

Decided Apr. 29, 2019 (587 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Kagan for a unanimous Court. The Court held that the Tennessee Valley Authority ("TVA") "is subject to suits challenging any of its commercial activities," but the TVA might nevertheless "have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties." Although the TVA is a Government-owned corporation that would otherwise be entitled to sovereign immunity, a federal law provides that the TVA "[m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b). "That provision serves to waive sovereign immunity from suit." The Eleventh Circuit thus erred in holding that the TVA enjoys immunity from suit for exercising "discretionary functions." Section 831c(b) provides a "broad" waiver of sovereign immunity "that contains no such limit." Moreover, although the Federal Tort Claims Act retains the Government's immunity for tort claims challenging discretionary conduct, while allowing other tort claims to proceed, the statute expressly does not apply to the TVA, and § 831c(b) contains no similar carve out for the TVA. Thus, when the TVA "operates in the marketplace as private companies do, it is as liable as they are for choices and judgments." That said, the TVA maintains its immunity when "necessary to avoid grave interference with the performance of a governmental function." *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940). Accordingly, the case is remanded to the Eleventh Circuit to determine in the first instance "whether the conduct alleged to be negligent is governmental or commercial in nature." If the conduct is commercial, "the TVA cannot invoke sovereign immunity."

40. ***Lamps Plus, Inc. v. Varela*, No. 17-988 (9th Cir., 701 F. App'x 670; cert. granted Apr. 30, 2018; argued Oct. 29, 2018). Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.**

Decided Apr. 24, 2019 (587 U.S. __). Ninth Circuit/Reversed and remanded. Chief Justice Roberts for a 5-4 Court (Thomas, J., concurring; Ginsburg, J., dissenting, joined by Breyer and Sotomayor, J.J.; Breyer, J., dissenting; Sotomayor, J., dissenting; Kagan, J., dissenting, joined by Ginsburg and Breyer, J.J., and joined in part by Sotomayor, J.). The Court held that courts may not compel classwide arbitration when an agreement is ambiguous as to whether the parties agreed to authorize such arbitration. Before turning to the merits, the Court explained that it has jurisdiction over the case pursuant to a provision of the Federal Arbitration Act that allows parties to appeal "a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3). An order that both compels arbitration and dismisses the underlying claims is a requisite "final decision." The Court rejected

the argument that petitioner lacked standing to appeal because petitioner had obtained the relief requested—namely, an order compelling arbitration. That argument failed because petitioner "sought an order compelling *individual* arbitration," yet got "an order rejecting that relief and instead compelling arbitration on a classwide basis." Because there is a "fundamental" difference between individual and classwide arbitration, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010), petitioner is sufficiently aggrieved to have standing to appeal. On the merits, the Ninth Circuit wrongly applied the doctrine of *contra proferentem*—a state-law contract principle that requires resolving contractual ambiguities against the drafter—in holding that the arbitration agreement at issue here, which was ambiguous about the availability of classwide arbitration, permits such arbitration. Again, there is a "fundamental" difference between individual and classwide arbitration, and this difference requires the parties to expressly agree to classwide arbitration. In keeping with *Stolt-Nielsen*, which held that arbitrators cannot order classwide arbitration when the arbitration agreement is silent as to the class procedure, "[n]either silence nor ambiguity provides a sufficient basis for concluding" that there is a contractual right to classwide arbitration. To be sure, courts usually interpret arbitration agreements by applying state contract law, but the Federal Arbitration Act preempts state laws that "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic Sys. Corp. v.* Lewis, 138 S. Ct. 1612, 1623 (2018). Thus, "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."

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41. ***Bucklew v. Precythe*, No. 17-8151 (8th Cir., 883 F.3d 1087; cert. granted Apr. 30, 2018, with Question 4 directed by the Court; argued Nov. 6, 2018). The Questions Presented are: (1) Whether a court evaluating an as-applied challenge to a State's method of execution based on an inmate's rare and severe medical condition may assume that medical personnel are competent to manage his condition and that the procedure will go as intended. (2) Must evidence comparing a State's method of execution to an alternative proposed by the inmate be offered by a single witness, or should a court on a motion for summary judgment look to the record as a whole to determine whether a factfinder could conclude that the methods significantly differ in the risks they pose to the defendant? (3) Does the Eighth Amendment require an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the State's proposed method of execution based on his rare and severe medical condition? (4) Whether the petitioner met his burden to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution.**

Decided Apr. 1, 2019 (587 U.S. __). Eighth Circuit/Affirmed. Justice Gorsuch for a 5-4 Court (Thomas, J., concurring; Kavanaugh, J., concurring; Breyer, J., dissenting, joined in part by Ginsburg, Sotomayor, and Kagan, J.J.; Sotomayor, J., dissenting). The Court held that applying Missouri's single-drug protocol to execute petitioner was not unconstitutionally cruel in violation of the Eighth Amendment, even if the protocol would cause petitioner severe pain because of his particular medical condition. Petitioner was convicted of murder and sentenced to

death. He accepts that "the State's lethal injection protocol is constitutional in most applications," but contends that the protocol is unconstitutional as applied to him because of his "unusual medical condition." He proposed instead that Missouri execute him with nitrogen gas. The Court rejected that proposal, explaining that "the Eighth Amendment does not guarantee a prisoner a painless death," but instead prohibits States from using methods of execution that cruelly "superadd terror, pain, or disgrace." Thus, regardless of whether an inmate is challenging a method of execution generally or as applied, the inmate "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." "A minor reduction in risk is insufficient; the difference must be clear and considerable." Further, a State's decision not to be the "first to experiment with a new method of execution is a legitimate reason to reject" the method. Ultimately, petitioner had not met the burden of showing his proposed alternative method (nitrogen hypoxia) was "feasible and readily implemented" and that it would significantly reduce his risk of pain. The State also had a legitimate reason to reject his proposed method: no State has used nitrogen gas to carry out an execution and, thus, the method could not be "readily implemented."

42. ***Biestek v. Berryhill*, No. 17-1184 (6th Cir., 880 F.3d 778; cert. granted June 25, 2018; argued Dec. 4, 2018). To determine whether an applicant is eligible for Social Security benefits, an administrative law judge must determine whether the applicant "can make an adjustment to other work," 20 C.F.R. § 404.1520(a)(4)(v), and that determination must be supported by substantial evidence, 42 U.S.C. § 405(g). Does a vocational expert's testimony constitute substantial evidence of "other work" available to an applicant when the expert does not provide the data underlying the testimony?**

Decided Apr. 1, 2019 (587 U.S. __). Sixth Circuit/Affirmed. Justice Kagan for a 6-3 Court (Sotomayor, J., dissenting; Gorsuch, J., dissenting, joined by Ginsburg, J.). The Court held that a vocational expert's refusal to provide the data underlying her opinion during a Social Security disability benefits hearing, despite a request from the applicant to provide that data, does not categorically preclude the testimony from counting as "substantial evidence" in federal court under 42 U.S.C. § 405(g), which provides that an administrative law judge's factual findings at a disability benefits hearing are "conclusive" if supported by "substantial evidence." Petitioner applied for Social Security disability benefits claiming that he could no longer work due to physical and mental disabilities. The administrative law judge accepted testimony from a vocational expert about the types of jobs petitioner could still perform and the availability of such jobs in the economy. The expert's testimony was based on her personal individual market surveys, which she refused to disclose when petitioner requested that she do so. When the administrative law judge denied petitioner benefits based on the expert's testimony, petitioner sought review in federal court, arguing that the expert's testimony could not constitute "substantial evidence" under § 405(g) because she declined to produce the data supporting her testimony. The Sixth Circuit correctly rejected that argument. Substantial evidence is "more than a mere scintilla," and means only "such relevant evidence that a reasonable mind might accept as

adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The parties agree that expert testimony would provide substantial evidence even unaccompanied by supporting data if the applicant does *not* demand the data, and "if that is true, why should one additional fact—a refusal to a request for that data—make a vocational expert's testimony categorically inadequate?" If the administrative law judge "views the expert and her testimony as otherwise trustworthy, and thinks she has good reason to keep her data private, her rejection of an applicant's demand need not make a difference."

43. ***Lorenzo v. SEC*, No. 17-1077 (D.C. Cir., 872 F.3d 578; cert. granted June 18, 2018; argued Dec. 3, 2018). Whether a person who knowingly disseminates false or misleading statements can be found to have violated SEC Rule 10b-5(a) or (c) even if the person does no "make" false or misleading statements within the meaning of SEC Rule 10b-5(b).**

Decided Mar. 27, 2019 (587 U.S. __). D.C. Circuit/Affirmed. Justice Breyer for a 6-2 Court (Thomas, J., dissenting, joined by Gorsuch, J.; Kavanaugh, J., took no part in the consideration or decision). The Court held that a person who knowingly disseminates a false or misleading statement can be liable for fraud under subsections (a) and (c) of SEC Rule 10b-5, as well as related statutory provisions, even if the disseminator cannot be liable under subsection (b) because he did not "make" the statement. Subsections (a) and (c) of Rule 10b-5, which prohibit fraudulent "scheme[s]" and "act[s]" (among other things), are "sufficiently broad to include within their scope the dissemination of false or misleading information." An individual need not "make" false statements in order to be liable for "employ[ing]" a scheme to defraud under Rule 10b-5(a) or for "engag[ing]" in an act that operates as a fraud under Rule 10b-5(c). That subsection (b) specifically prohibits false statements does not suggest that it "*exclusively* regulates conduct involving false or misleading statements." Moreover, there is "considerable overlap among the subsections of the Rule and related [statutory] provisions," and those provisions "capture a wide range of conduct," including the "paradigmatic" securities fraud in this case: petitioner "sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company."

44. ***Sturgeon v. Frost*, No. 17-949 (9th Cir., 872 F.3d 927; cert. granted June 18, 2018; argued Nov. 5, 2018). Does the Alaska National Interest Lands Conservation Act prohibit the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska?**

Decided Mar. 26, 2019 (587 U.S. __). Ninth Circuit/Reversed and remanded. Justice Kagan for a unanimous Court (Sotomayor, J., concurring, joined by Ginsburg, J.). The Court held that the National Park Service could not prohibit petitioner from operating his hovercraft on the Nation River in Alaska because the Nation River is not public land for purposes of the Alaska National Interest Lands Conservation Act ("ANILCA"), and therefore the river falls outside the ambit of the Park Service's authority to regulate navigable waters in national parks. A Park Service regulation prohibits operating a hovercraft on navigable waters located

within the boundaries of a national park. 36 C.F.R. § 2.17(e). But ANILCA, which sets aside millions of acres of federally owned land in Alaska for preservation purposes, provides that "[o]nly . . . public lands" are subject to Park Service regulations. 16 U.S.C. § 3103(c). The statute defines "public lands" as "lands, waters, and interests therein," "the title to which is in the United States." *Id.* § 3102(1)-(3). The Nation River is not public land under ANILCA because it is running water, and running water cannot be owned; thus, the United States does not have "title" to the Nation River, and the Park Service's hovercraft regulation does not apply to the river. The same is true even if the United States has "title" to an "interest" in protecting waters from depletion or diversion. Any such interest could not justify applying the hovercraft rule on the Nation River because the rule does nothing to prevent the depletion or diversion of waters. Legislative history confirms this reading of ANILCA: the Senate Report specifically states that federal regulations would not apply to any part of Alaskan lands not owned by the federal government.

45. ***Republic of Sudan v. Harrison*, No. 16-1094 (2d Cir., 802 F.3d 399; CVSG Oct. 2, 2017; cert. petition should be held in abeyance May 22, 2018; cert. granted June 25, 2018; argued Nov. 7, 2018). Whether a plaintiff suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C. § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs via the foreign state's diplomatic mission in the United States.**

Decided Mar. 26, 2019 (587 U.S. __). Second Circuit/Reversed and remanded. Justice Alito for an 8-1 Court (Thomas, J., dissenting). The Court held that when civil process is served on a foreign state under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(a)(3), the mailing cannot be sent to the foreign state's embassy in the United States, but rather must be sent directly to the foreign minister's office in the foreign state. If an exception to FSIA immunity applies, federal courts have personal jurisdiction "where service has been made under section 1608." 28 U.S.C. § 1330(b). Section 1608 provides four methods of service, including service "by any form of mail requiring a signed receipt, to be addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned." *Id.* § 1608(a)(3). "A letter or package is 'addressed' to an intended recipient when his or her name and 'address' is placed on the outside of the item to be sent." And the dictionary definition of "address" is "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." Webster's Third New International Dictionary 25 (1971). Thus, because a foreign state's embassy in the United States is "neither the residence nor the usual place of business of that nation's foreign minister and is not a place where the minister can customarily be found, the most common understanding of the minister's 'address' is" the foreign minister's office in the foreign state. Other provisions of § 1608 support this reading. For example, § 1608(b)(3)(B) contains the same "addressed and dispatched" language as § 1608(a)(3), but adds prefatory language that service is permissible "if reasonably calculated to give actual notice." This "reasonably calculated" language should not be read into § 1608(a)(3) because "Congress generally acts intentionally when it uses particular language in one section of a

statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015). Moreover, reading § 1608(a)(3) as requiring service in the foreign state avoids potential tension with the Vienna Convention, which the State Department has interpreted as precluding service of a foreign nation by mailing process to that nation's embassy in the United States.

46. ***Frank v. Gaos*, No. 17-961 (9th Cir., 869 F.3d 737; cert. granted Apr. 30, 2018; argued Oct. 31, 2018). Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with Federal Rule of Civil Procedure 23's requirement that a class settlement be "fair, reasonable, and adequate."**

Decided Mar. 20, 2019 (586 U.S. __). Ninth Circuit/Vacated and remanded. Per Curiam opinion for an 8-1 Court (Thomas, J., dissenting). The Court did not answer the question presented, but instead remanded for the lower courts to decide in the first instance whether any named plaintiff in the putative class action had alleged violations of the Stored Communications Act that are "sufficiently concrete and particularized to support standing." The district court, in holding that the named plaintiffs had standing, relied on a Ninth Circuit decision that was abrogated years later in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Neither the district court nor the Ninth Circuit reconsidered the named plaintiffs' standing in light of *Spokeo*. The Solicitor General brought the standing issue to the Court's attention in an *amicus* brief and urged the Court to vacate and remand for the lower courts to decide the issue. After ordering supplemental briefing, the Court agreed with the Solicitor General. The standing issue could not be avoided because a "court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing." The Court declined to decide the standing issue in the first instance because the issue raised "a wide variety of legal and factual issues not addressed in the merits briefing . . . or at oral argument."

47. ***Obduskey v. McCarthy & Holthus LLP*, No. 17-1307 (10th Cir., 879 F.3d 1216; cert. granted June 28, 2018; argued Jan. 7, 2019). Whether the Fair Debt Collection Practices Act applies to nonjudicial foreclosure proceedings.**

Decided Mar. 20, 2019 (586 U.S. __). Tenth Circuit/Affirmed. Justice Breyer for a unanimous Court (Sotomayor, J., concurring). The Court held that a business engaged in only nonjudicial foreclosures is not a "debt collector" under the Fair Debt Collection Practices Act ("FDCPA"), except for the limited purpose of enforcing security interests under 15 U.S.C. § 1692f(6). Petitioner bought a home with a loan that he secured with the property. When he defaulted two years later, the bank that financed the loan hired respondent, a law firm, to act as its agent in carrying out a nonjudicial foreclosure. Petitioner filed a lawsuit in federal court alleging that the law firm had violated the FDCPA by, among other things, failing to comply with the statute's debt-verification procedure. The district court dismissed the suit on the ground that the law firm was not a "debt collector" within the meaning of the FDCPA, the Tenth Circuit affirmed, and the Court agreed. The FDCPA's primary definition of "debt collector" is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." 15 U.S.C. § 1692a(6).

The Act further provides, however, that "[f]or the purpose of section 1692f(6)," the "term [debt collector] *also includes* any person . . . in any business the principal purpose of which is the enforcement of security interests." *Id.* (emphasis added). Because the law firm is engaged in enforcing security interests, it is clearly encompassed by the "also includes" language and is therefore subject to § 1692f(6). But the law firm is not subject to the general "debt collector" definition, and thus is not subject to the FDCA's coverage as a whole. First, the word "also" in § 1692a(6) indicates that those who enforce security interests do not fall within the primary definition; if they did, the "also" clause would be superfluous. Second, "Congress may well have chosen to treat security-interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes." Third, the legislative history reveals that the statutory text reflects a compromise between two competing versions of the bill, one that would have excluded security-interest enforcement from the FDCPA entirely, and another that would have treated such enforcement like ordinary debt collection under the statute. "These considerations convince us that, but for § 1692f(6), those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the Act."

48. ***Air & Liquid Sys. Corp. v. DeVries*, No. 17-1104 (3d Cir., 873 F.3d 232; cert. granted May 14, 2018; argued Oct. 10, 2018). Whether products-liability defendants can be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute.**

Decided Mar. 19, 2019 (586 U.S. __). Third Circuit/Affirmed. Justice Kavanaugh for a 6-3 Court (Gorsuch, J., dissenting, joined by Thomas and Alito, J.J.). The Court held that, in the maritime tort context, a product manufacturer has a duty to warn when "(i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger." At trial, manufacturers of equipment for Navy ships won summary judgment after they raised the "bare-metal defense"—a doctrine that protects manufacturers from liability for integrated products when the harm results from a later-incorporated part. The Third Circuit reversed and remanded for reconsideration under a broader "foreseeability" rule. The Court affirmed, articulating a middle-ground test that is broader than the bare-metal defense but narrower than the foreseeability rule. There are three general approaches to defining a manufacturer's "duty to warn" for tort purposes. The first approach—the foreseeability rule—sweeps too broadly by providing that manufacturers may be liable when their products would be foreseeably used with another product, even if the manufacturers' product does not require incorporation of that other product. The second approach—the bare-metal defense—sweeps too narrowly because product manufacturers are better positioned than parts manufacturers to issue warnings about the ultimate integrated product. The third approach—imposing a duty to warn when a product "*requires* incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended use"—"is the most appropriate for th[e] maritime tort context," which has a "longstanding solicitude for sailors."

49. ***Nielsen v. Preap*, No. 16-1363 (9th Cir., 831 F.3d 1193 & 667 F. App'x 966; cert. granted Mar. 19, 2018; argued Oct. 10, 2018). Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.**

Decided Mar. 19, 2019 (586 U.S. __). Ninth Circuit/Reversed and remanded. Justice Alito for a 5-4 Court (Kavanaugh, J., concurring; Thomas, J., concurring in part and concurring in the judgment, joined by Gorsuch, J.; Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that aliens subject to mandatory detention without bond under the Immigration and Nationality Act, *see* 8 U.S.C. § 1226(c), are subject to such detention regardless of whether they are arrested by immigration officials immediately after they are released from jail. Aliens arrested because they are believed to be deportable are generally eligible to apply for release on bond pending a determination of their removability, but aliens who have committed certain dangerous crimes or have connections to terrorism are required to be detained without bond. Section 1226(c)(1) directs the Secretary of Homeland Security to arrest such aliens "when . . . released" from jail, and § 1226(c)(2) forbids the Secretary from releasing any "alien described in paragraph (1)" pending a determination of removal (with one exception not relevant here). Respondents are aliens who argued that, because they were not *immediately* detained by immigration officials after their release from jail, they "are not 'described in' § 1226(c)(1)" and, therefore, are eligible for a bond hearing. That reading defies the plain text of the statute. Because an adverb cannot modify a noun, § 1226(c)(1)'s adverbial clause "when . . . released" cannot modify the noun "alien." Rather, "alien" is modified by § 1226(c)(1)(A)-(D), which defines the categories of aliens who are subject to mandatory detention "when . . . released." Moreover, the "when . . . released" clause in § 1226(c)(1) "plays no role in identifying for the Secretary *which* aliens she must immediately arrest. If it did, the directive in § 1226(c)(1) would be nonsense." Because it is the Secretary's action of arresting an alien that determines which aliens are arrested upon release, being arrested upon release "cannot be one of [the] criteria in figuring out whom to arrest." The "when . . . released" clause therefore does not "defeat officials' duty to impose . . . mandatory detention when it comes to aliens who are arrested well after their release."

50. ***Wash. State Dep't of Licensing v. Cougar Den, Inc.*, No. 16-1498 (Wash., 392 P.3d 1014; CVSG Oct. 2, 2017; cert. supported May 15, 2018; cert. granted June 25, 2018; argued Oct. 30, 2018). An 1855 treaty between the United States and the Yakama Indian Nation provides tribal members with "the right, in common with citizens of the United States, to travel upon all public highways." Can Washington enforce a state tax upon a tribal member for importing fuel into Washington on the public highways?**

Decided Mar. 19, 2019 (586 U.S. __). Wash./Affirmed. Justice Breyer for a 5-4 Court (Gorsuch, J., concurring in the judgment, joined by Ginsburg, J.; Roberts, C.J., dissenting, joined by Thomas, Alito, and Kavanaugh, J.J.; Kavanaugh, J., dissenting, joined by Thomas, J.). The Court held that an 1855 Treaty between the United States and the Yakama Nation—which reserved the Yakamas' "right, in

common with citizens of the United States, to travel upon all public highways," 12 Stat. 953—preempted a state fuel tax as applied to the importation of fuel, via a State public highway, for sale within the reservation. Respondent, a wholesale fuel importer owned by a member of the Yakama Nation, imports fuel using Washington's highways in order to sell the fuel within the Yakama Reservation. The State imposed a tax against respondent under Wash. Rev. Code § 82.36.010, which taxes "motor vehicle fuel importer[s]" who bring large quantities of fuel into the State by "ground transportation." The Washington Supreme Court held that the tax was preempted by the 1855 Treaty, and the Supreme Court affirmed. First, the language of the Treaty "should be understood as bearing the meaning that the Yakamas understood it to have in 1855," and the "in common with" language in the Treaty meant to them at the time rights that are greater than those other citizens may enjoy. *See Tulee v. Washington*, 315 U.S. 681, 684 (1942). Second, the historical record—such as the Treaty's negotiation history—"indicates that the right to travel includes a right to travel with goods for sale or distribution." Third, "to impose a tax upon traveling with certain goods burdens that travel." Because the Treaty protects the right to travel on public highways without burdens like the taxes imposed by the Washington taxation statute, the Treaty preempts that statute "as applied" to the facts here.

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51. ***Rimini Street, Inc. v. Oracle USA, Inc.*, No. 17-1625 (9th Cir., 879 F.3d 948; cert. granted Sept. 27, 2018; argued Jan. 14, 2019). Whether the Copyright Act's allowance of "full costs" (17 U.S.C. § 505) to a prevailing party is limited to taxable costs under 28 U.S.C. §§ 1920 and 1821 or also authorizes non-taxable costs.**

Decided Mar. 4, 2019 (586 U.S. __). Ninth Circuit/Reversed in part and remanded. Justice Kavanaugh for a unanimous Court. The Court held that a provision in the Copyright Act authorizing a prevailing party to recover "full costs" entitles that party to recover only those six categories of costs enumerated in 28 U.S.C. §§ 1821 and 1920, not all litigation expenses. Although the so-called "American Rule" generally requires each litigant to bear its own costs, §§ 1821 and 1920 provide six categories of costs that a court may, in its discretion, award a prevailing party. Separately, the Copyright Act provides in relevant part that, in any civil action under the statute, a court "in its discretion may allow the recovery of full costs by or against any party." 17 U.S.C. § 505. The Ninth Circuit held that the phrase "full costs" in the Copyright Act authorizes an award of costs beyond those categories set forth in §§ 1821 and 1920, but the Court reversed. The Copyright Act does not explicitly authorize the award of litigation expenses beyond the six categories in §§ 1821 and 1920, and the word "costs" is a term of art that encompasses only those categories. The modifier "full" in the Copyright Act does not expand the categories of "costs" awardable because "full" is simply an adjective that describes the quantity or amount of the noun "costs." "A 'full breakfast' means breakfast, not lunch."

52. ***BNSF Ry. Co. v. Loos*, No. 17-1042 (8th Cir., 865 F.3d 1106; cert. granted May 14, 2018; argued Nov. 6, 2018). Whether a railroad's payment to an employee for time lost from work is taxable under the Railroad Retirement Tax Act.**

Decided Mar. 4, 2019 (586 U.S. __). Eighth Circuit/Reversed and remanded. Justice Ginsburg for a 7-2 Court (Gorsuch, J., dissenting, joined by Thomas, J.). The Court held that taxable "compensation" under the Railroad Retirement Tax Act ("RRTA") includes not only payments for active service but also payments for periods of absence from active service that stem from the "employer-employee relationship." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 366 (1946). The RRTA, which funds the retirement benefits system for railroad workers through payroll taxes, defines taxable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee." 26 U.S.C. § 3231(e)(1). Congress intended the RRTA to mirror the Federal Insurance Contributions Act ("FICA"), which similarly funds the Social Security system through payroll taxes on "wages." The RRTA's definition of taxable "compensation" is "materially indistinguishable" from the FICA's definition of taxable "wages," which includes "all remuneration" for "any service, of whatever nature, performed . . . by an employee." 26 U.S.C. § 3121. Thus, following the Court's interpretation of FICA "wages" in *Nierotko*, taxable "compensation" under the RRTA also means "pay for active service plus pay received for periods of absence from active service" stemming from the "employer-employee relationship." This construction also makes sense because it harmonizes the meaning of the word "compensation" in the two statutes governing railroad employee retirement benefits: (1) the Railroad Retirement Act, which determines benefits payable to railroad employees; and (2) the RRTA, which taxes employee "compensation" to pay for those benefits. The Railroad Retirement Act defines "compensation" to include payment "for time lost as an employee." 45 U.S.C. § 231(h)(1).

53. ***Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571 (11th Cir., 856 F.3d 1338; CVSG Jan. 8, 2018; cert. supported May 16, 2018; cert. granted June 28, 2018; argued Jan. 8, 2019). Section 411(a) of the Copyright Act says that "no civil action for infringement of [a] copyright shall be instituted until preregistration or registration of the copyright claim has been made." 17 U.S.C. § 411(a). Does "registration of [a] copyright claim" occur when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, or when the Copyright Office acts on the application?**

Decided Mar. 4, 2019 (586 U.S. __). Eleventh Circuit/Affirmed. Justice Ginsburg for a unanimous Court. The Court held that a copyright claimant may commence an infringement suit only after the Copyright Office has processed a copyright registration application. The first sentence of 17 U.S.C. § 411(a) provides that "no civil action for infringement . . . shall be instituted until preregistration or registration of the copyright claim has been made." The second sentence of § 411(a) carves out an exception to that rule: When the required "deposit, application, and fee . . . have been delivered to the Copyright Office in proper form and registration has been refused," the claimant "[may] institute a civil action for infringement if notice thereof . . . is served on the Register." These sentences "focus not on the claimant's act of applying for registration, but on action by the Copyright Office—namely, its registration or refusal to register a copyright claim." If merely applying for registration were enough to register under the statute, then § 411(a)'s second sentence—permitting suit upon *refusal* of registration—would be "superfluous." Accordingly, although copyright protection

attaches immediately upon an original work's creation, § 411(a) is "akin to an administrative exhaustion requirement" that must be satisfied before a copyright owner may pursue an infringement claim. Although there may be some "administrative lag" between when a registration application is filed and when the Copyright Office processes it, the lag "does not allow [the Court] to revise § 411(a)'s congressionally composed text."

54. ***Madison v. Alabama*, No. 17-7505 (Ala. Cir. Ct., No. CC-1985-001385.80; cert. granted Feb. 26, 2018; argued Oct. 2, 2018). The Questions Presented are: (1) Whether the Eighth Amendment allows the State to execute a prisoner whose mental disability leaves him with no memory of his commission of the capital offense. (2) Whether the Eighth Amendment prohibits the execution of a prisoner whose competency has been compromised by dementia and multiple strokes.**

Decided Feb. 27, 2019 (586 U.S. __). Ala. Cir. Ct./Vacated and remanded. Justice Kagan for a 5-3 Court (Alito, J., dissenting, joined by Thomas and Gorsuch, J.J.; Kavanaugh, J., took no part in the consideration or decision). The Court held that the Eighth Amendment may permit executing a prisoner "even if he cannot remember committing his crime," but may prohibit executing a prisoner who suffers from dementia or another disorder that prevents him from understanding "why the State wants to execute him." Petitioner was found guilty of capital murder and sentenced to death. While awaiting execution, he was diagnosed with vascular dementia and suffered several strokes. The state court found that petitioner was mentally competent and refused to stay the execution. That may have been error. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that the Eighth Amendment bans the execution of a prisoner who loses his sanity after sentencing. And in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court held that a State may not execute a prisoner whose mental illness prevents him from reaching a "rational understanding" of "why the State seeks to execute him." Those decisions mean that, even if a prisoner cannot remember committing a capital offense, the Eighth Amendment does not bar his execution if he can rationally understand why the State seeks to execute him. Because the Court was unable to discern whether the lower court properly applied that standard, it vacated the judgment and remanded for reconsideration. On remand, the sole question is whether petitioner can reach a "rational understanding" about why the State wants to execute him. *Panetti*, 551 U.S. at 958.

55. ***Garza v. Idaho*, No. 17-1026 (Idaho, 405 P.3d 576; cert. granted June 18, 2018; argued Oct. 30, 2018). For purposes of ineffective assistance of counsel, does a presumption of prejudice apply where a criminal defendant instructs his trial counsel to file a notice of appeal, but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?**

Decided Feb. 27, 2019 (586 U.S. __). Idaho/Reversed and remanded. Justice Sotomayor for a 6-3 Court (Thomas, J., dissenting, joined by Gorsuch, J., and joined in part by Alito, J.). The Court held that the presumption of prejudice for Sixth Amendment purposes recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), applies regardless of whether a defendant has signed an appeal waiver. Petitioner signed two plea agreements that waived his right to appeal.

Nevertheless, after sentencing, petitioner repeatedly told his counsel that he wanted to appeal. Counsel did not notice the appeal. After the time period to preserve the appeal expired, petitioner sought state postconviction relief on the basis that his trial counsel was ineffective for failing to file a notice of appeal despite repeated requests to do so. The Idaho Supreme Court held that petitioner could not show the requisite deficient performance and prejudice because he had twice agreed to waive his right to appeal. That was error. In *Flores-Ortega*, the Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant is presumed "with no further showing from the defendant of the merits of his underlying claims." 528 U.S. at 484. A "direct application of *Flores-Ortega*'s language resolves this case" because "there is no dispute here that [petitioner] wished to appeal" but his counsel failed to do so. Petitioner had a right to appeal and was denied that right because of counsel's deficient performance. That petitioner "surrendered many claims by signing his appeal waivers does not change things" because (i) he could have raised claims beyond the scope of the appellate waiver; (ii) filing a notice of appeal would not necessarily have breached the plea agreements; and (iii) the decision whether to appeal, in any event, is ultimately a defendant's, not counsel's, to make.

56. ***Jam v. Int'l Fin. Corp.*, No. 17-1011 (D.C. Cir., 860 F.3d 703; cert. granted May 21, 2018, limited to Question 1; argued Oct. 31, 2018). The Questions Presented are: (1) Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have—confers the same immunity on those organizations as foreign governments have under the Foreign Sovereign Immunities Act. (2) If not, what rules govern the immunity to which international organizations are entitled?**

Decided Fed. 27, 2019 (586 U.S. __). D.C. Circuit/Reversed and remanded. Chief Justice Roberts for a 7-1 Court (Breyer, J., dissenting; Kavanaugh, J., took no part in the consideration or decision). The Court held that the International Organizations Immunities Act ("IOIA") affords international organizations the same level of immunity from suit that foreign governments presently enjoy under the Foreign Sovereign Immunities Act ("FSIA"). Congress passed the IOIA in 1945, granting international organizations (like the World Bank) the "same immunity from suit . . . as is enjoyed by foreign governments." 28 U.S.C. § 288a(b). In 1945, foreign governments were entitled to virtually absolute immunity as a matter of comity. But today, foreign governments enjoy more limited immunity under the FSIA, *id.* § 1602, which created several exceptions to the sovereign immunity of foreign governments, including an exception for commercial activity with a sufficient nexus with the United States, *id.* § 1605(a)(2). The most natural reading of the IOIA's language giving international organizations the "same immunity" as foreign governments is that the scope of immunity for both types of entities is "continuously link[ed] . . . to ensure ongoing parity between the two." If Congress had intended otherwise, it could have "specified some . . . fixed level of immunity" in the IOIA or "incorporate[d] the law of foreign sovereign immunity as it existed on a particular date." The "reference canon" confirms this reading of the IOIA. Under that canon of

construction, "when a statute refers to a general subject"—rather than to a specific statutory title or section—"the statute adopts the law on that subject as it exists whenever a question under the statute arises." Thus, because the IOIA refers to the general subject of foreign governments' immunity, "the IOIA should therefore be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other." As a result, just as the FSIA currently pierces the immunity of foreign governments based on certain of their commercial activities, so too does the IOIA pierce the immunity of international organizations when they engage in the same types of commercial activities.

57. ***Nutraceutical Corp. v. Lambert*, No. 17-1094 (9th Cir., 870 F.3d 1170; cert. granted June 25, 2018; argued Nov. 27, 2018). Federal Rule of Civil Procedure 23(f) sets a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class certification. Is that deadline subject to equitable exceptions that would excuse a party's failure to timely file a petition for permission to appeal or a motion for reconsideration?**

Decided Feb. 26, 2019 (586 U.S. __). Ninth Circuit/Reversed and remanded. Justice Sotomayor for unanimous Court. The Court held that Rule 23(f)'s fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification is not subject to equitable tolling. The district court decertified a class and granted the named plaintiff twenty days to file a motion for reconsideration. The plaintiff timely filed the motion, which the district court denied three months later. The plaintiff then filed a Rule 23(f) petition for permission to appeal fourteen days after the denial of reconsideration. The Ninth Circuit deemed the petition timely, concluding that the Rule 23(f) deadline is a nonjurisdictional claim-processing rule subject to equitable tolling. That was error. "Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility," and Rule 23(f) does not. Instead, Rule 23(f) "conditions the possibility of an appeal on the filing of a petition 'within 14 days' of 'an order granting or denying class-action certification,'" and Federal Rule of Appellate Procedure 26(b) provides that "[a] court of appeals 'may not extend the time to file . . . a petition for permission to appeal.'" "The Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." The Ninth Circuit erred in applying a more flexible approach that conflicts with the plain language of the rules. The Court did not address whether a motion for reconsideration filed before Rule 23(f)'s deadline has elapsed may reset the fourteen-day clock, or whether an order denying reconsideration may itself be appealable under Rule 23(f).

58. ***Dawson v. Steager*, No. 17-419 (W. Va., 2017 WL 2172006; CVSG Jan. 8, 2018; cert. supported May 15, 2018; cert. granted June 25, 2018, limited to Question Presented by SG; argued Dec. 3, 2018). Whether the doctrine of intergovernmental tax immunity, as codified by 4 U.S.C. § 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of retired state law-enforcement officers without providing the same exemption for retired employees of the U.S. Marshals Service.**

Decided Feb. 20, 2019 (586 U.S. __). W. Va./Reversed and remanded. Justice Gorsuch for a unanimous Court. The Court held that West Virginia unlawfully discriminates against federal retirees in violation of 4 U.S.C. § 111. After petitioner retired from the U.S. Marshals Service, West Virginia taxed his federal pension benefits. The State, however, exempts from taxation the pension benefits of certain state law-enforcement retirees. That disparate taxation treatment violates 4 U.S.C. § 111(a), which allows States to tax the compensation of federal employees only if the taxation scheme does "not discriminate against the officer or employee because of the source of the pay or compensation." West Virginia unlawfully affords state law-enforcement retirees a tax benefit that federal retirees cannot receive, and there are no "significant differences" between petitioner's former job responsibilities and those of the tax-exempt state employees to justify the differential treatment. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 814-16 (1989).

59. ***Timbs v. Indiana*, No. 17-1091 (Ind., 84 N.E.3d 1179; cert. granted June 18, 2018; argued Nov. 28, 2018). Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.**

    Decided Feb. 20, 2019 (586 U.S. __). Ind./Vacated and remanded. Justice Ginsburg for a unanimous Court (Gorsuch, J., concurring; Thomas, J., concurring in the judgment). The Court held that the Eighth Amendment's Excessive Fines Clause is an incorporated right under the Fourteenth Amendment's Due Process Clause and therefore applies to the States. The "historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming." All fifty States "have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality," and the lineage of these protections and the Excessive Fines Clause of the Eighth Amendment stretches back to the Magna Carta. Accordingly, because the Excessive Fines Clause is "fundamental to our scheme of ordered liberty" and/or "deeply rooted in this Nation's history and tradition," *McDonald v. Chicago*, 561 U.S. 742, 767 (2010), it is incorporated and applies to the States under the Fourteenth Amendment's Due Process Clause.

60. ***Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, No. 17-1229 (Fed. Cir., 855 F.3d 1356; cert. granted June 25, 2018; argued Dec. 4, 2018). Whether, under the Leahy-Smith America Invents Act, an inventor's sale of an invention to a third party that is obligated to keep the invention confidential qualifies as prior art for purposes of determining the patentability of the invention.**

    Decided Jan. 22, 2019 (586 U.S. __). Federal Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held that the sale of an invention to a third party who is required to keep the invention confidential can trigger the "on sale" bar of the Leahy-Smith America Invents Act ("AIA"), which prevents a person from patenting an invention that was "in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention." 35 U.S.C. § 102(a)(1). "Every patent statute since 1836 has included an on-sale bar," and the Court's precedents interpreting those statutes indicate "that a sale or offer of sale need not make an invention available to the public" in order for the sale to trigger

the bar. The AIA kept the "exact language used in its predecessor statute ('on-sale')." Thus, the Court presumed that Congress adopted the preexisting judicial construction of the phrase "on sale" when it enacted the AIA. Although § 102(a)(1) added the phrase "or otherwise available to the public," the addition of that "broad catchall phrase" was not enough to upset the body of precedent interpreting "on sale" bars to apply even if an invention is not publicly available.

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61. ***New Prime Inc. v. Oliveira*, No. 17-340 (1st Cir., 857 F.3d 7; cert. granted Feb. 26, 2018; argued Oct. 3, 2018). Section 1 of the Federal Arbitration Act says that the Act does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Questions Presented are: (1) Whether a dispute over the applicability of the Section 1 exemption must be resolved in arbitration pursuant to a valid delegation clause. (2) Whether the exemption applies to independent-contractor agreements.**

Decided Jan. 15, 2019 (586 U.S. __). First Circuit/Affirmed. Justice Gorsuch for a unanimous Court (Ginsburg, J., concurring; Kavanaugh, J., took no part in the consideration or decision). The Court held that, before ordering a dispute to arbitration, courts must first determine whether the dispute is excluded from arbitration by Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, and that the § 1 exemption applies to independent-contractor agreements. Although the Act generally requires courts to enforce the terms of written arbitration agreements, § 1 provides that "nothing" in the Act "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." A court's authority under the Act to compel arbitration thus does not extend to all arbitration agreements, but extends only to those agreements not exempted by § 1. For that reason, "a court should decide for itself whether § 1's 'contracts of employment' exclusion applies before" sending the parties to arbitration. Further, the § 1 carve out applies to contracts of employment with independent contractors because, when Congress passed the Act, the phrase "contract of employment" generally "meant nothing more than an agreement to perform work," and independent-contractor agreements are clearly agreements to perform work.

62. ***Stokeling v. United States*, No. 17-5554 (11th Cir., 684 F. App'x 870; cert. granted Apr. 2, 2018; argued Oct. 9, 2018). Whether a prior conviction for robbery under Florida law—which requires as an element overcoming "victim resistance"—is categorically a "violent felony" under the Armed Career Criminal Act.**

Decided Jan. 15, 2019 (586 U.S. __). Eleventh Circuit/Affirmed. Justice Thomas for a 5-4 Court (Sotomayor, J., dissenting, joined by Roberts, C.J., and Ginsburg and Kagan, J.J.). The Court held that a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance qualifies as a crime involving "physical force" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). Under ACCA, a defendant faces a fifteen-year mandatory minimum sentence if he has three prior convictions for a "violent felony." *Id.* § 924(e)(1). ACCA defines "violent felony" in relevant part as any crime that "has as an element the use, attempted use, or threatened use of *physical*

force against the person of another." *Id.* § 924(e)(2)(B)(i) (emphasis added). The common law used "'violence' and 'force' interchangeably" without "distinguish[ing] between gradations of 'violence,'" and any act sufficient to overcome a victim's resistance "necessarily constituted violence." Congress adopted the ACCA against this common-law background without indicating that it intended a different meaning. Thus, any crime with an element of force sufficient to overcome the victim's resistance is a crime involving "physical force" under ACCA.

63. ***Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272 (5th Cir., 878 F.3d 488; cert. granted June 25, 2018; argued Oct. 29, 2018). Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes that the claim of arbitrability is "wholly groundless."**

Decided Jan. 8, 2019 (586 U.S. __). Fifth Circuit/Vacated and remanded. Justice Kavanaugh for a unanimous Court. The Court held that courts must enforce agreements to delegate arbitrability disputes to an arbitrator even if the court concludes that a claim of arbitrability is "wholly groundless." The Federal Arbitration Act requires courts to interpret contracts "as written," and the Court "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator." Nevertheless, the Fifth Circuit held that the district court properly declined to refer an arbitrability dispute to an arbitrator because it concluded that the request for arbitration was "wholly groundless." That was error. "The Act does not contain a 'wholly groundless' exception," and the Court is "not at liberty to rewrite the statute." Thus, when an agreement delegates the arbitrability question to an arbitrator, "the courts must respect the parties' decision as embodied in the contract."

64. ***Culbertson v. Berryhill*, No. 17-773 (11th Cir., 861 F.3d 1197; cert. granted May 21, 2018; argued Nov. 7, 2018). Under 42 U.S.C. § 406(b), when a "court renders a judgment favorable" to a Social Security claimant "who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." The Question Presented is whether the 25-percent cap applies only to fees for representation in court, or also to fees for representation at the administrative level.**

Decided Jan. 8, 2019 (586 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Thomas for a unanimous Court. The Court held that 42 U.S.C. § 406(b), which caps the fees attorneys may charge for representing successful Social Security claimants, applies only to fees awarded for representation before a court, not before the Social Security Administration. Section 406(b) provides that a court rendering a favorable judgment to a Social Security claimant "represented before the court by an attorney" may award "a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits." The word "such" plainly refers back to the specified representation "before the court," not any previous representation before the agency. The structure of the statute confirms this reading because § 406(a) imposes separate caps on recoverable fees for

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representation before the agency, and also calculates such fees differently. The 25-percent cap in § 406(b) thus "applies only to fees for representation before the court, not the agency."

65. ***United States v. Stitt*, No. 17-765 (6th Cir., 860 F.3d 854; cert. granted Apr. 23, 2018, consolidated with *United States v. Sims*, No. 17-766 (8th Cir., 854 F.3d 1037); argued Oct. 9, 2018). Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act.**

Decided Dec. 10, 2018 (586 U.S. __). Sixth Circuit/Reversed; Eighth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. The Court held that the term "burglary" in the Armed Career Criminal Act "includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." The two respondents were convicted of unlawfully possessing a firearm under 18 U.S.C. § 922(g)(1), which carries a fifteen-year minimum sentence if the defendant has three prior convictions for certain offenses, including "burglary," *id.* § 924(e). Respondents previously violated state burglary statutes—one from Arkansas and one from Tennessee—that prohibit burglarizing a structure or vehicle that has been adapted or is customarily used for overnight accommodation, such as a tent or mobile home. In *Taylor v. United States*, 495 U.S. 575 (1990), the Court defined the word "burglary" in the Act to mean "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598. Both state statutes fit within that definition. First, Congress intended "burglary" to carry the meaning the word had in state criminal codes when Congress passed the Act in 1986. At that time, "a majority of state burglary statutes covered vehicles adapted or customarily used for lodging—either explicitly or by defining 'building' or 'structure' to include those vehicles." Second, Congress "viewed burglary as an inherently dangerous crime" that, as *Taylor* noted, "creates the possibility of a violent confrontation between the offender and an occupant," 495 U.S. at 588, and that possibility exists when an offender breaks into a vehicle or structure adapted or customarily used for overnight lodging. It does not matter whether a vehicle is used for lodging only part time because there is "no reason to believe that Congress intended to make a part-time/full-time distinction."

66. ***Weyerhaeuser Co. v. Fish & Wildlife Serv.*, No. 17-71 (5th Cir., 827 F.3d 452; cert. granted Jan. 22, 2018; argued Oct. 1, 2018). The Endangered Species Act requires the Secretary of the Interior to designate the "critical habitat" of an endangered species, which may include areas "occupied by the species," plus "areas outside the geographical area occupied by the species" that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). The Fish and Wildlife Service designated a 1500-acre tract of land as critical habitat for the dusky gopher frog. The Questions Presented are: (1) Whether the Endangered Species Act allows the designation of private land that neither contains nor (absent a radical change in land use) could provide habitat for an endangered species. (2) Whether an agency's decision not to exclude an area from critical habitat based on the economic impact of the designation is subject to judicial review.**

Decided Nov. 27, 2018 (586 U.S. __). Fifth Circuit/Vacated and remanded. Chief Justice Roberts for a unanimous Court (Kavanaugh, J., took no part in the consideration or decision). The Court held that the Endangered Species Act ("ESA") does not authorize the Fish and Wildlife Service, which administers the statute on behalf of the Secretary of the Interior, to designate an area as "critical habitat" unless the area is also "habitat" of the endangered species, and that the Service's decision not to exclude an area from a "critical habitat" designation is subject to judicial review. The case involves a challenge to the Service's designation of certain commercial property in Louisiana as "critical habitat" for the endangered dusky gopher frog, even though the frog has not been seen there for decades and the area would require "some degree of modification to support a sustainable population" of the species. When the Service lists a species as endangered, the ESA requires the agency to "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). The Court reasoned that "critical habitat" must be *habitat* of the species because "critical" denotes a subcategory of "habitat," and only the "habitat of such species" is eligible for designation as "critical habitat." The circuit court therefore erred in concluding that "critical habitat" designations were not limited to areas that qualified as "habitat." Because the ESA does not define "habitat," the Court remanded for the circuit court to consider in the first instance whether "habitat" includes areas where a species does not currently live and could not currently survive. The Court further held that federal courts may review the Service's decision not to exclude property from a "critical habitat" designation, rejecting the Service's position that such decisions are "committed to agency discretion by law" and thus unreviewable under the Administrative Procedure Act. 5 U.S.C. § 701(a)(2). The case involves a type of claim that federal courts "routinely assess"—namely, that the agency did not appropriately consider all economic and other statutory factors meant to guide its discretion.

67. ***Mount Lemmon Fire Dist. v. Guido*, No. 17-587 (9th Cir., 859 F.3d 1168; cert. granted Feb. 26, 2018; argued Oct. 1, 2018). The Age Discrimination in Employment Act applies to private entities only if they had "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b). Does the twenty-employee minimum apply to political subdivisions of a State, or does the Act apply to State political subdivisions of any size?**

Decided Nov. 6, 2018 (586 U.S. __). Ninth Circuit/Affirmed. Justice Ginsburg for a unanimous Court (Kavanaugh, J., took no part in the consideration or decision). The Court held that the Age Discrimination in Employment Act ("ADEA") governs the employment practices of States and local governments regardless of the number of employees they have. An "employer" covered by the ADEA is "a person engaged in an industry affecting commerce who has twenty or more employees. . . . The term *also means* . . . a State or political subdivision of a State." 29 U.S.C. § 630(b) (emphasis added). The ordinary meaning of the phrase "also means" is "additive rather than clarifying"—that is, the phrase signals a separate category of employers in addition to those with twenty or more employees. The phrase also occurs dozens of times in the U.S. Code, where it typically has an "additive meaning." The numerosity specification in § 630(b)

therefore does not apply to States or their political subdivisions; the ADEA applies to those entities "with no attendant numerosity limitation."

Cases Decided Without Argument

1. ***Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-483 (7th Cir., 888 F.3d 300; Reversed May 28, 2019).** Per Curiam (Thomas, J., concurring; Ginsburg, J., concurring in part and dissenting in part; Sotomayor, J., would deny the petition for a writ of certiorari). The Court upheld under rational-basis review an Indiana law excluding fetal remains from the definition of infectious and pathological waste, "thereby preventing incineration of fetal remains along with surgical byproducts" and authorizing "simultaneous cremation of fetal remains." Indiana has a "legitimate interest in proper disposal of fetal remains," *Akron v. Akron Ctr. for Reproductive Health, Inc*., 462 U.S. 416, 452 n.45 (1983), and the law is rationally related to that interest. The Court expressed "no view" on whether the law imposed an undue burden on a woman's right to obtain an abortion because respondents did not argue that it does.

2. ***Yovino v. Rizo*, No. 18-272 (9th Cir., 887 F.3d 453; Vacated and remanded Feb. 25, 2019).** Per Curiam (Sotomayor, J., concurring in the judgment). The Court held that circuit courts may not count as a member of the majority a judge who dies before the court's opinion in the case is filed. The Ninth Circuit listed Judge Stephen Reinhardt as the author of an en banc decision that was issued eleven days after he died. Without his vote, the opinion attributed to him would have been approved by only five of the ten members of the en banc panel still living when the opinion issued. His vote should not have counted. When "the Ninth Circuit issued its opinion in this case, Judge Reinhardt was neither an active judge nor a senior judge" and, therefore, "he was without power to participate in the en banc court's decision at the time it was rendered." The Ninth Circuit erred by effectively allowing a deceased judge to cast a deciding vote and exercise Article III judicial power.

3. ***Moore v. Texas*, No. 18-443 (Tex. Ct. Crim. App., 548 S.W.3d 552; Reversed and remanded Feb. 19, 2019).** Per Curiam (Roberts, C.J., concurring; Alito, J., dissenting, joined by Thomas and Gorsuch, J.J.). The Court held that the redetermination of the Texas Court of Criminal Appeals ("TCCA") that petitioner Bobby Moore does not have an intellectual disability and is therefore eligible for the death penalty is inconsistent with *Moore v. Texas*, 137 S. Ct. 1039 (2017). The TCCA previously held that Moore was eligible for the death penalty because he does not qualify as a person with an intellectual disability, but in 2017 the Court vacated and remanded that decision for reconsideration. On remand, the TCCA reached the same conclusion after committing the same errors. The TCCA's redetermination often repeated—with only "small variations"—the same analysis that the Court "previously found wanting." For example, in both decisions, the TCCA "overemphasized Moore's perceived adaptive strengths," *Moore*, 137 S. Ct. at 1051, but the proper analysis focuses on adaptive *deficits*. The TCCA also repeated its mistake of relying on the so-called "*Briseno* factors," which have "no grounding in prevailing medical practice." The proper analysis relies on "clinical factors" that, the Court explained in *Moore*, are "informed by the medical

community's diagnostic framework." *Id.* at 1048. In short, the TCCA's opinion "too closely resembles what [the Court] previously found improper." Excising that improper analysis from the TCCA's most recent opinion compels the conclusion that, "on the basis of the trial court record, Moore has shown he is a person with intellectual disability."

4. ***Shoop v. Hill*, No. 18-56 (6th Cir., 881 F.3d 483; Vacated and remanded Jan. 7, 2019).** Per Curiam. The Court held that the Sixth Circuit improperly relied on *Moore v. Texas*, 137 S. Ct. 1039 (2017), in finding that a state court's denial of habeas relief in 2008 violated "clearly established" federal law pursuant to 28 U.S.C. § 2254(d)(1). After he was sentenced to death in 1985, respondent unsuccessfully sought state habeas relief by contending that his death sentence is illegal under *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment prohibits imposing a death sentence on defendants who have intellectual disabilities. On federal habeas review, however, the Sixth Circuit granted habeas relief, relying heavily on *Moore*—an opinion about the meaning of intellectual disabilities that was issued years after the state court's decision. But the federal habeas statute allows federal courts to issue relief only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of," Supreme Court precedent that was "clearly established" at the time of the adjudication. 28 U.S.C. § 2254(d)(1). Because the reasoning of the Sixth Circuit "leans so heavily on *Moore*," the Court vacated with instructions for the Sixth Circuit to "determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time."

5. ***City of Escondido, Cal. v. Emmons*, No. 17-1660 (9th Cir., 716 F. App'x 724; Reversed in part and vacated in part Jan. 7, 2019).** Per Curiam. The Court held that the Ninth Circuit conducted the wrong legal analysis in determining that two police officers were not entitled to qualified immunity. Officers Craig and Toth responded to a domestic disturbance call. When respondent left the apartment, Officer Craig told him not to close the door. Respondent did so anyway. Officer Craig then "stopped the man, took him quickly to the ground, and handcuffed him"—all without hitting respondent, displaying a weapon, or causing any visible pain. Although Officer Toth was not involved in the takedown, respondent sued both Officers Craig and Toth for using excessive force. The district court granted qualified immunity to the officers, but the Ninth Circuit reversed, reasoning that the law clearly established "the right to be free of excessive force." That was error. Allowing the excessive force claim to proceed against Officer Toth makes no sense because he was not even involved in the arrest; the Court thus reversed as to him. As to Officer Craig, the Court vacated and remanded because the Ninth Circuit defined the "clearly established law" at far too high a level of generality. "Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quotation marks omitted). The Ninth Circuit "contravened those settlement principles" by generally asking whether respondent had a right to be "free of excessive force" instead of specifically asking "whether

clearly established law prohibited the officers from stopping and taking down a man in these circumstances." Because the Ninth Circuit failed to conduct the proper analysis, the Court vacated and remanded for reconsideration of whether Officer Craig is entitled to qualified immunity.

Pending Original Cases

1. ***Mississippi v. Tennessee*, No. 22O143 (Original Jurisdiction; CVSG Oct. 20, 2014; leave to file bill of complaint opposed May 12, 2015; leave to file bill of complaint granted June 29, 2015). The Questions Presented are: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents' use of a pumping operation to take approximately 252 billion gallons of high quality groundwater. (2) Whether Mississippi has sole sovereign authority over and control of groundwater naturally stored within its borders, including in sandstone within Mississippi's border. (3) Whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.**

2. ***Delaware v. Pennsylvania & Wisconsin*, No. 22O145, consolidated with *Arkansas v. Delaware*, No. 22O146 (Original Jurisdiction; leave to file a bill of complaint granted Oct. 3, 2016). Whether check-like instruments that function like a money order or traveler's check, issued in relatively large amounts by a bank or other financial institution, are governed by the Disposition of Abandoned Money Orders and Traveler's Checks Act of 1974, 12 U.S.C. § 2501 *et seq.*, and which State has authority to claim ownership of such instruments that go unclaimed.**

October Term 2019

1. ***N.Y. State Rifle & Pistol Ass'n v. City of New York*, No. 18-280 (2d Cir., 883 F.3d 45; cert. granted Jan. 22, 2019). Whether New York City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.**

2. ***Cty. of Maui, Haw. v. Haw. Wildlife Fund*, No. 18-260 (9th Cir., 886 F.3d 737; CVSG Dec. 3, 2018; cert. supported Jan. 3, 2019, limited to Question 1; cert. granted Feb. 19, 2019, limited to Question 1). Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.**

3. ***Rotkiske v. Klemm*, No. 18-328 (3d Cir., 890 F.3d 422; cert. granted Feb. 25, 2019). Whether the "discovery rule" applies to toll the one year statute of limitations under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*.**

4. ***Peter v. NantKwest, Inc.*, No. 18-801 (Fed. Cir., 898 F.3d 1177; cert. granted Mar. 4, 2019). Whether the phrase "[a]ll the expenses of the proceedings" in**

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35 U.S.C. § 145 encompasses the personnel expenses the U.S. Patent and Trademark Office incurs when its employees, including attorneys, defend the agency in Section 145 litigation.

5. ***Kansas v. Garcia*, No. 17-834 (Kan., 401 P.3d 588, 401 P.3d 159, & 401 P.3d 155; CVSG Apr. 16, 2018; cert. supported Dec. 4, 2018; cert. granted Mar. 18, 2019, limited to Question 1 and with Question 2 directed by the Court). The Questions Presented are: (1) Whether the Immigration Reform and Control Act ("IRCA") expressly preempts the States from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and Social Security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications. (2) Whether the IRCA impliedly preempts Kansas's prosecution of respondents.**

6. ***Mathena v. Malvo*, No. 18-217 (4th Cir., 893 F.3d 265; cert. granted Mar. 18, 2019). Whether the Fourth Circuit erred in concluding that a decision of the Supreme Court (*Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)) addressing whether a new constitutional rule announced in an earlier decision (*Miller v. Alabama*, 567 U.S. 460 (2012)) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question.**

7. ***Ramos v. Louisiana*, No. 18-5924 (La. Ct. App.; 231 So. 3d 44; cert. granted Mar. 18, 2019). Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict.**

8. ***Kahler v. Kansas*, No. 18-6135 (Kan., 410 P.3d 105; cert. granted Mar. 18, 2019). Whether the Eighth and Fourteenth Amendments permit a State to abolish the insanity defense.**

9. ***Kansas v. Glover*, No. 18-556 (Kan., 422 P.3d 64; cert. granted Apr. 1, 2019). Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.**

10. ***Bostock v. Clayton Cty., Ga.*, No. 17-1618 (11th Cir., 723 F. App'x 964; cert. granted Apr. 22, 2019, consolidated with *Altitude Express, Inc. v. Zarda*, No. 17-1623 (2d Cir., 833 F.3d 100)). Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.**

11. ***R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (6th Cir., 884 F.3d 560; cert. granted Apr. 22, 2019, with the Question Presented limited by the Court). Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).**

12. ***CITGO Asphalt Refining Co. v. Frescati Shipping Co.*, No. 18-565 (3d Cir., 886 F.3d 291; cert. granted Apr. 22, 2019). Whether, under federal maritime law, a safe berth clause in a voyage charter contract is a guarantee of a ship's safety or a duty of due diligence.**

13. ***Barton v. Barr*, No. 18-725 (11th Cir., 904 F.3d 1294; cert. granted Apr. 22, 2019). Whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] . . . inadmissible" for the purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(l).**

14. ***Ritzen Grp., Inc. v. Jackson Masonry, LLC*, No. 18-938 (6th Cir., 906 F.3d 494; cert. granted May 20, 2019). Whether an order denying a motion for relief from the automatic stay is a final order under 28 U.S.C. § 158(a)(1).**

15. ***Hernandez v. Mesa*, No. 17-1678 (5th Cir., 885 F.3d 811; CVSG Oct. 1, 2018; cert. supported Apr. 11, 2019, limited to Question 1; cert. granted May 28, 2019, limited to Question 1). Whether, when plaintiffs plausibly allege that a rogue federal law-enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).**

16. ***Allen v. Cooper*, No. 18-877 (4th Cir., 895 F.3d 337; cert. granted June 3, 2019). Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), in providing remedies for authors of original expression whose federal copyrights are infringed by States.**

17. ***Ret. Plans Comm. of IBM v. Jander*, No. 18-1165 (2d Cir., 910 F.3d 620; cert. granted June 3, 2019). Whether the "more harm than good" pleading standard of *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 429-30 (2014), can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.**

18. ***Holguin-Hernandez v. United States*, No. 18-7739 (5th Cir., 746 F. App'x 403; cert. granted June 3, 2019). Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.**

19. ***McKinney v. Arizona*, No. 18-1109 (Ariz., 426 P.3d 1204; cert. granted June 10, 2019). The Questions Presented are: (1) Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted. (2) Whether the correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), requires resentencing.**

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20. ***Intel Corp. Inv. Policy Comm. v. Sulyma***, **No. 18-1116 (9th Cir., 909 F.3d 1069; cert. granted June 10, 2019). Whether the three-year limitations period in Section 413(2) of ERISA, 29 U.S.C. § 1113(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit where all of the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.**

21. ***Monasky v. Taglieri***, **No. 18-935 (6th Cir., 907 F.3d 404; cert. granted June 10, 2019). The Questions Presented are: (1) Whether a district court's determination of habitual residence under the Hague Convention should be reviewed de novo, under a deferential version of de novo review, or under clear-error review. (2) Where an infant is too young to acclimate to her surroundings, whether a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Hague Convention.**

22. ***Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media***, **No. 18-1171 (9th Cir., 743 F. App'x 106; cert. granted June 10, limited to Question 1). Whether a claim of race discrimination under 42 U.S.C. § 1981 fails in the absence of but-for causation.**

23. ***Atl. Richfield Co. v. Christian***, **No. 17-1498 (Mont., 408 P.3d 515; CVSG Oct. 1, 2018; cert. opposed Apr. 30, 2019; cert. granted June 10, 2019). The Questions Presented are: (1) Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a "challenge" to the EPA's cleanup jurisdictionally barred by 42 U.S.C. § 9613 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). (2) Whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup. (3) Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.**

24. ***Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC***, **No. 18-1334, consolidated with *Aurelius Inv., LLC v. Puerto Rico*, No. 18-1475; *Official Comm. of Unsecured Creditors of All Title III Debtors Other Than COFINA v. Aurelius Inv., LLC*, No. 18-1496; *United States v. Aurelius Inv., LLC*, No. 18-1514; and *Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, No. 18-1521 (1st Cir., 915 F.3d 838; cert. granted June 20, 2019). The Questions Presented are: (1) Whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico. (2) Whether the *de facto* officer doctrine allows courts to deny meaningful relief to successful separation-of-powers challengers who are suffering ongoing injury at the hands of unconstitutionally appointed principal officers.**

25. ***Guerrero-Lasprilla v. Barr*, No. 18-776 (5th Cir., 737 F. App'x 230; cert. granted June 24, 2019, consolidated with *Ovalles v. Barr*, No. 18-1015 (5th Cir., 741 F. App'x 259, limited to Question 2)). Whether the circuit courts have jurisdiction to review an agency's decision denying an alien's request for equitable tolling under 8 U.S.C. § 1252(a)(2)(D), or whether such review is precluded by 8 U.S.C. § 1252(a)(2)(C).**

26. ***Dex Media, Inc. v. Click-To-Call Techs., LP*, No. 18-916 (Fed. Cir., 899 F.3d 1321; cert. granted June 24, 2019). The Questions Presented are: (1) Whether 35 U.S.C. § 314(d) permits appeal of the Patent Trial and Appeal Board's decision to institute an inter partes review upon finding that § 315(b)'s time bar did not apply. (2) Whether 35 U.S.C. § 315(b) bars institution of an inter partes review when the previously served patent infringement complaint, filed more than one year before the inter partes review petition, had been dismissed without prejudice.**

27. ***Me. Cmty. Health Options v. United States*, No. 18-1023 (Fed. Cir., 729 F. App'x 939; cert. granted June 24, 2019, consolidated with *Moda Health Plan, Inc. v. United States*, No. 18-1028 (Fed. Cir., 892 F.3d 1311), and *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 18-1038 (Fed. Cir., 892 F.3d 1184)). Whether Congress can evade its unambiguous statutory promise to pay health insurers for losses already incurred simply by enacting appropriations riders restricting the sources of funds available to satisfy the Government's obligation.**

28. ***Georgia v. Public.Resource.Org, Inc.*, No. 18-1150 (11th Cir., 906 F.3d 1229; cert. granted June 24, 2019). Whether the government edicts doctrine extends to—and thus renders copyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.**

29. ***Banister v. Davis*, No. 18-6943 (5th Cir., No. 17-10826; cert. granted June 24, 2019, with the Question Presented limited by the Court). Whether and under what circumstances a timely motion under Federal Rule of Civil Procedure 59(e) should be recharacterized as a second or successive habeas petition under *Gonzales v. Crosby*, 545 U.S. 524 (2005).**

30. ***Carpenter v. Murphy*, No. 17-1107 (10th Cir., 875 F.3d 896; cert. granted May 21, 2018; argued Nov. 27, 2018; restored for reargument June 27, 2019). Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).**

31. ***Opati v. Republic of Sudan*, No. 17-1268 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018; cert. supported May 21, 2019, limited to Question 2; cert. granted June 28, 2019, limited to Question 2). Whether the Foreign Sovereign Immunities Act applies retroactively to permit punitive damages under 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring before the current version of the statute was enacted.**

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32. ***Thole v. U.S. Bank, N.A.*, No. 17-1712 (8th Cir., 873 F.3d 617; CVSG Oct. 1, 2018; cert. supported May 21, 2019, with a Question 3 proposed by the SG; cert. granted June 28, 2019, with Question 3 directed by the Court). The Questions Presented are: (1) Whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof. (2) Whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. § 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof. (3) Whether petitioners have demonstrated Article III standing.**

33. ***Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, No. 18-587 (9th Cir., 908 F.3d 476; cert. granted June 28, 2019, consolidated with *Trump v. Nat'l Ass'n for the Advancement of Colored People*, No. 18-588 (D.D.C., 315 F. Supp. 3d 457), and *McAleenan v. Batalla Vidal*, No. 18-589 (E.D.N.Y., 295 F. Supp. 3d 127)). The Questions Presented are: (1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable. (2) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is lawful.**

34. ***Babb v. Wilkie*, No. 18-882 (11th Cir., 743 F. App'x 280; cert. granted June 28, 2019, with the Question Presented limited by the Court). Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 28 U.S.C. § 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.**

35. ***GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, No. 18-1048 (11th Cir., 902 F.3d 1316; cert. granted June 28, 2019). Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.**

36. ***Kelly v. United States*, No. 18-1059 (3d Cir., 909 F.3d 550; cert. granted June 28, 2019). Does a public official "defraud" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision?**

37. ***Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, No. 18-1086 (2d Cir., 898 F.3d 232; cert. granted June 28, 2019). Whether, when a plaintiff asserts new claims, federal preclusion principles can bar a defendant from raising defenses that were not actually litigated and resolved in any prior case between the parties.**

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38. ***Espinoza v. Mont. Dep't of Revenue***, **No. 18-1195 (Mont., 435 P.3d 603; cert. granted June 28, 2019). Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?**

39. ***Romag Fasteners, Inc. v. Fossil, Inc.***, **No. 18-1233 (Fed. Cir., 2019 WL 2677388; cert. granted June 28, 2019). Whether, under section 35 of the Lanham Act, 15 U.S.C. § 1117(a), willful infringement is a prerequisite for an award of an infringer's profits for a violation of section 43(a), *id.* § 1125(a).**

40. ***Rodriguez v. Fed. Deposit Ins. Corp.***, **No. 18-1269 (10th Cir., 914 F.3d 1262; cert. granted June 28, 2019). Whether courts should determine ownership of a tax refund paid to an affiliated group based on the law of the relevant State, or based on the federal common law "*Bob Richards* rule," under which the refund is presumed to belong to the corporate subsidiary whose losses gave rise to the refund unless the parties clearly agree otherwise.**

41. ***Shular v. United States***, **No. 18-6662 (11th Cir., 736 F. App'x 876; cert. granted June 28, 2019). Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the Act.**

Pending Cases Calling For The Views Of The Solicitor General

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1. ***Clearstream Banking S.A. v. Peterson***, **No. 17-1529, consolidated with *Banca UBAE S.p.A. v. Peterson*, No. 17-1530, and *Bank Markazi v. Peterson*, No. 17-1534 (2d Cir., 876 F.3d 63; CVSG Oct. 1, 2018). The Questions Presented are: (1) Whether the court of appeals correctly held that the FSIA affords execution immunity only to assets located "in the United States." (2) Whether, instead of determining personal jurisdiction for the first time on appeal, a court of appeals may remand a case to the district court to decide the question of personal jurisdiction in the first instance.**

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2. ***HP Inc. v. Berkheimer***, **No. 18-415 (Fed. Cir., 881 F.3d 1360; CVSG Jan. 7, 2019). Whether patent eligibility is a question of law for the court based on the scope of the claims or a question of fact for the jury based on the state of the art at the time of the patent.**

3. ***Patterson v. Walgreen Co.***, **No. 18-349 (11th Cir., 727 F. App'x 581; CVSG Mar. 18, 2019). Title VII prohibits an employer from firing an employee for engaging in a religious practice "unless [the] employer demonstrates that he is unable to reasonably accommodate to" the employee's "religious . . . practice without undue hardship." 42 U.S.C. § 2000e(j). The Questions Presented are: (1) Whether an accommodation that merely lessens or has the potential to**

eliminate the conflict between work and religious practice is "reasonable" per se or instead creates a jury question, or must an accommodation fully eliminate the conflict in order to be "reasonable." (2) Whether speculation about possible future burdens is sufficient to meet the employer's burden in establishing "undue hardship," or must the employer demonstrate an actual burden. (3) Whether the portion of *TWA v. Hardison*, 432 U.S. 63 (1977) opining that "undue hardship" simply means something more than a "de minimis cost" should be disavowed or overruled?

4. ***Hikma Pharm. v. Vanda Pharm.*, No. 18-817 (Fed. Cir., 887 F.3d 1117; CVSG Mar. 18, 2019). Whether patents that claim a method of medically treating a patient automatically satisfy Section 101 of the Patent Act, 35 U.S.C. § 101, even if they apply a natural law using only routine and conventional steps.**

5. ***Rutledge v. Pharm. Care Mgmt. Ass'n*, No. 18-540 (8th Cir., 891 F.3d 1109; CVSG Apr. 15, 2019). Whether 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 ERISA.**

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6. ***Putnam Invs., LLC v. Brotherston*, No. 18-926 (1st Cir., 907 F.3d 17; CVSG Apr. 22, 2019). The Questions Presented are: (1) Whether an ERISA plaintiff bears the burden of proving that "losses to the plan result[ed] from" a fiduciary breach, 29 U.S.C. § 1109(a), or whether ERISA defendants bear the burden of disproving loss causation. (2) Whether showing that particular investment options did not perform as well as a set of index funds, selected by the plaintiffs with the benefit of hindsight, suffices as a matter of law to establish "losses to the plan."**

7. ***Google LLC v. Oracle Am., Inc.*, No. 18-956 (Fed. Cir., 886 F.3d 1179 & 750 F.3d 1339; CVSG Apr. 29, 2019). The Questions Presented are: (1) Whether copyright protection extends to a software interface. (2) Whether petitioner's use of a software interface in the context of creating a new computer program constitutes fair use.**

8. ***Texas v. New Mexico*, No. 22O65 (Original Jurisdiction; CVSG June 3, 2019). The Questions Presented are: (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 that governs modification of the manual and the period for review of the River Master's final determinations. (2) Whether the River Master clearly erred by charging Texas for evaporative losses without authority under the Pecos River Compact.**

9. ***Arizona v. California*, No. 22O150 (Original Jurisdiction; CVSG June 24, 2019). Whether California's tax on all business entities that purportedly conduct business in California violates Due Process Clause of the Fourteenth Amendment, the Commerce Clause, and the Fourth Amendment.**

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10. ***Roman Catholic Archdiocese of San Juan, P.R. v. Feliciano*, No. 18-921 (P.R., 2018 PRSC 106; CVSG June 24, 2019). Whether the First Amendment empowers courts to override the chosen legal structure of a religious organization and declare all of its constituent parts a single legal entity subject to joint and several liability.**

11. ***Avco Corp. v. Sikkelee*, No. 18-1140 (3d Cir., 907 F.3d 701; CVSG June 24, 2019). Whether the Federal Aviation Act preempts state-law design-defect claims.**

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Va. Uranium, Inc. v. Warren*, No. 16-1275 (4th Cir., 848 F.3d 590; CVSG Oct. 2, 2017; cert. supported Apr. 9, 2018; cert. granted May 21, 2018; argued Nov. 5, 2018; decided June 17, 2019). Whether the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2011 *et seq*., preempts state laws that prohibit activities within a State's regulatory jurisdiction (here, conventional uranium mining) when such laws are grounded in radiological-safety concerns about related activities that are federally regulated under the AEA (here, the milling of uranium ore and disposal of "tailings" byproduct material.**

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2. ***Apple Inc. v. Pepper*, No. 17-204 (9th Cir., 846 F.3d 313; CVSG Oct. 10, 2017; cert. supported May 8, 2018; cert. granted June 18, 2018; argued Nov. 26, 2018; decided May 13, 2019). Whether respondents can seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, based on their claim that Apple has monopolized the distribution of iPhone apps, where respondents were injured by Apple's conduct only to the extent that third-party app developers passed on Apple's allegedly supracompetitive commission in setting the prices that respondents paid.**

3. ***Wash. State Dep't of Licensing v. Cougar Den, Inc.*, No. 16-1498 (Wash., 392 P.3d 1014; CVSG Oct. 2, 2017; cert. supported May 15, 2018; cert. granted June 25, 2018; argued Oct. 30, 2018; decided Mar. 19, 2019). An 1855 treaty between the United States and the Yakama Indian Nation provides tribal members with "the right, in common with citizens of the United States, to travel upon all public highways." Can Washington enforce a state tax upon a tribal member for importing fuel into Washington on the public highways?**

4. ***Dawson v. Steager*, No. 17-419 (W. Va., 2017 WL 2172006; CVSG Jan. 8, 2018; cert. supported May 15, 2018; cert. granted June 25, 2018, limited to Question Presented by SG; argued Dec. 3, 2018; decided Feb. 20, 2019). Whether the doctrine of intergovernmental tax immunity, as codified by 4 U.S.C. § 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of retired state law-enforcement officers without**

providing the same exemption for retired employees of the U.S. Marshals Service.

5. ***Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571 (11th Cir., 856 F.3d 1338; CVSG Jan. 8, 2018; cert. supported May 16, 2018; cert. granted June 28, 2018; argued Jan. 8, 2019; decided Mar. 4, 2019). Section 411(a) of the Copyright Act says that "no civil action for infringement of [a] copyright shall be instituted until preregistration or registration of the copyright claim has been made." 17 U.S.C. § 411(a). Does "registration of [a] copyright claim" occur when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, or when the Copyright Office acts on the application?**

6. ***Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290 (3d Cir., 852 F.3d 268; CVSG Dec. 4, 2017; cert. supported May 22, 2018; cert. granted June 28, 2018; argued Jan. 7, 2019; decided May 20, 2019). Does the FDA's rejection of a drug-label warning preempt a state-law failure-to-warn claim based on the absence of that warning?**

7. ***Herrera v. Wyoming*, No. 17-532 (Wyo. Dist. Ct., No. 2016-242; CVSG Jan. 8, 2018; cert. supported May 22, 2018; cert. granted June 28, 2018; argued Jan. 8, 2019; decided May 20, 2019). Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.**

8. ***Kansas v. Garcia*, No. 17-834 (Kan., 401 P.3d 588, 401 P.3d 159, & 401 P.3d 155; CVSG Apr. 16, 2018; cert. supported Dec. 4, 2018; cert. granted Mar. 18, 2019, limited to Question 1 and with Question 2 directed by the Court). The Questions Presented are: (1) Whether the Immigration Reform and Control Act ("IRCA") expressly preempts the States from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and Social Security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications. (2) Whether the IRCA impliedly preempts Kansas's prosecution of respondents.**

9. ***Cty. of Maui, Haw. v. Haw. Wildlife Fund*, No. 18-260 (9th Cir., 886 F.3d 737; CVSG Dec. 3, 2018; cert. supported Jan. 3, 2019, limited to Question 1; cert. granted Feb. 19, 2019, limited to Question 1). Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.**

10. ***Kinder Morgan Energy Partners, L.P. v. Upstate Forever*, No. 18-268 (4th Cir., 887 F.3d 637; CVSG Dec. 3, 2018; cert. supported Jan. 3, 2019, limited to Question 1). The Questions Presented are: (1) Whether the Clean Water Act's permitting requirement is confined to discharges from a point source to**

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navigable waters, or whether it also applies to discharges into soil or groundwater whenever there is a "direct hydrological connection" between the groundwater and nearby navigable waters. (2) Whether an "ongoing violation" of the Clean Water Act exists for purposes of the Act's citizen-suit provision when a point source has permanently ceased discharging pollutants, but some of the pollutants are still reaching navigable water through groundwater.

11. ***Hernandez v. Mesa*, No. 17-1678 (5th Cir., 885 F.3d 811; CVSG Oct. 1, 2018; cert. supported Apr. 11, 2019, limited to Question 1; cert. granted May 28, 2019, limited to Question 1). The Questions Presented are: (1) Whether, when plaintiffs plausibly allege that a rogue federal law-enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). (2) If not, whether the Westfall Act violates the Due Process Clause of the Fifth Amendment insofar as it preempts state-law tort suits for damages against rogue federal law-enforcement officers acting within the scope of their employment for which there is no alternative legal remedy.**

12. ***Opati v. Republic of Sudan*, No. 17-1268 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018; cert. supported May 21, 2019, limited to Question 2; cert. granted June 28, 2019, limited to Question 2). The Questions Presented are: (1) Whether a party who does not contest a nonjurisdictional legal issue before judgment may demonstrate extraordinary and exceptional circumstances warranting appellate review of the issue post-judgment. (2) Whether the Foreign Sovereign Immunities Act applies retroactively to permit punitive damages under 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring before the current version of the statute was enacted.**

13. ***Thole v. U.S. Bank, N.A.*, No. 17-1712 (8th Cir., 873 F.3d 617; CVSG Oct. 1, 2018; cert. supported May 21, 2019, with a Question 3 proposed by the SG; cert. granted June 28, 2019, with Question 3 directed by the Court). The Questions Presented are: (1) Whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof. (2) Whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. § 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof. (3) Whether petitioners have demonstrated Article III standing.**

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Republic of Sudan v. Harrison*, No. 16-1094 (2d Cir., 802 F.3d 399; CVSG Oct. 2, 2017; cert. petition should be held in abeyance May 22, 2018; cert.**

granted June 25, 2018; argued Nov. 7, 2018; decided Mar. 26, 2019). Whether a plaintiff suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C. § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs via the foreign state's diplomatic mission in the United States.

2. ***Missouri v. California*, No. 22O148 (Original Jurisdiction; CVSG Apr. 16, 2018; motion for leave to file bill of complaint opposed Nov. 29, 2018; motion denied Jan. 7, 2019). Whether a California law requiring farms raising egg-laying hens to let those hens move around freely violates the Commerce Clause.**

3. ***Indiana v. Massachusetts*, No. 22O149 (Original Jurisdiction; CVSG Apr. 16, 2018; motion for leave to file bill of complaint opposed Nov. 29, 2018; motion denied Jan. 7 2019). Whether a Massachusetts law barring sales of eggs, pork, and veal from animals confined in a cruel manner violates the Commerce Clause.**

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4. ***Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936 (9th Cir., 862 F.3d 890; CVSG Apr. 16, 2018; cert. opposed Nov. 30, 2018; cert. denied Jan. 7, 2019). The False Claims Act creates a cause of action, which private parties may invoke on the Government's behalf, based on the submission of false claims to the Government for payment. A plaintiff must show that any misrepresentation was material to the Government's payment decision. The Question Presented is whether a misrepresentation is material if the Government pays a claim in full despite knowledge of the alleged misrepresentation and the pleadings do not otherwise suggest the misrepresentation was material.**

5. ***Osage Wind, LLC v. Osage Minerals Council*, No. 17-1237 (10th Cir., 871 F.3d 1078; CVSG May 14, 2018; cert. opposed Dec. 4, 2018; cert. denied Jan. 7, 2019). The Questions Presented are: (1) Whether the court of appeals had jurisdiction over an appeal filed by a nonparty that did not participate in any capacity in the district court, but where the suit was filed by the United States as trustee for that nonparty. (2) Whether the court of appeals erred in applying the Indian canon of construction to interpret the term "mining" under the Osage Act to include the removal of dirt and rocks in order to construct a structure on the surface.**

6. ***City of Cibolo, Tex. v. Green Valley Special Util. Dist.*, No. 17-938 (5th Cir., 866 F.3d 339; CVSG May 21, 2018; cert. opposed Dec. 4, 2018; cert. denied Jan. 7, 2019). Under 7 U.S.C. § 1926(b), a rural utility association that receives a federal loan for water or wastewater infrastructure enjoys monopoly protection for "[t]he service provided or made available" by the association during the term of the loan. The Questions Presented are: (1) Whether the term "service" refers to the service funded by the loan or all services provided by the loan recipient. (2) Whether an association, to show it has "provided or made available" the service, must show that the service is or can promptly be furnished or whether the association must show that it had a legal duty under state law to provide the service.**

7. ***Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra*, No. 17-1285 (9th Cir., 870 F.3d 1140; CVSG June 18, 2018; cert. opposed Dec. 4, 2018; cert. denied Jan. 7, 2019). The Questions Presented are: (1) Whether a State's ban on the sale of federally approved poultry products based on the State's disapproval of the way in which the poultry product was produced imposes an "ingredient requirement" in addition to or different than those in the Poultry Products Inspection Act. (2) Whether Congress has preempted the field of poultry products regulation.**

8. ***Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation*, No. 17-1301 (Utah, 2017 UT 75; CVSG June 25, 2018; cert. opposed Dec. 4, 2018; cert. denied Jan. 7, 2019). The Questions Presented are: (1) Whether the tribal remedies exhaustion doctrine, which requires federal courts to stay cases challenging tribal jurisdiction until the parties have exhausted parallel tribal court proceedings, applies to state courts as well. (2) Whether the tribal remedies exhaustion doctrine requires that nontribal courts yield to tribal courts when the parties have not invoked the tribal court's jurisdiction.**

9. ***de Csepel v. Republic of Hungary*, No. 17-1165 (D.C. Cir., 859 F.3d 1094; CVSG June 25, 2018; cert. opposed Dec. 4, 2018; cert. denied Jan. 7, 2019). Whether, under the Foreign Sovereign Immunities Act, a foreign state itself is immune from suit in the United States in a case in which rights in property taken in violation of international law are in issue, the property is located outside the United States, the property is owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in commercial activity in the United States.**

10. ***Swartz v. Rodriguez*, No. 18-309 (9th Cir., 899 F.3d 719; CVSG Oct. 29, 2018; cert. petition should be held in abeyance Apr. 11, 2019). The Questions Presented are: (1) Whether the panel's decision to create an implied remedy for damages under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), in the new context of a cross-border shooting, misapplies Supreme Court precedent and violates separation-of-powers principles, where foreign relations, border security, and the extraterritorial application of the Fourth Amendment are some of the special factors that counsel hesitation against such an extension. (2) Whether petitioner, a U.S. Border Patrol agent, is entitled to qualified immunity because there is no clearly established law applying the Fourth Amendment to protect a Mexican citizen with no significant connection to the United States, who is injured in Mexico by a federal agent's cross-border shooting.**

11. ***Atl. Richfield Co. v. Christian*, No. 17-1498 (Mont., 408 P.3d 515; CVSG Oct. 1, 2018; cert. opposed Apr. 30, 2019; cert. granted June 10, 2019). The Questions Presented are: (1) Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a "challenge" to the EPA's cleanup jurisdictionally barred by 42 U.S.C. § 9613 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). (2) Whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if**

EPA has never ordered the landowner to pay for a cleanup. (3) Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

12. ***RPX Corp. v. ChanBond LLC*, No. 17-1686 (Fed. Cir., No. 17-2346; CVSG Oct. 1, 2018; cert. opposed May 9, 2019; cert. denied June 17, 2019). Whether a party dissatisfied with a final written decision of the Patent Trial and Appeal Board has Article III standing to appeal that decision based solely on the statutory provisions of 35 U.S.C. §§ 315, 318, and 319, regardless of whether the appellant otherwise suffered an injury in fact.**

13. ***First Solar, Inc. v. Mineworkers' Pension Scheme*, No. 18-164 (9th Cir., 881 F.3d 750; CVSG Oct. 9, 2018; cert. opposed May 15, 2019; cert. denied June 24, 2019). Whether a private securities-fraud plaintiff may establish the critical element of loss causation based on a decline in the market price of a security where the event or disclosure that triggered the decline did not reveal the fraud on which the plaintiff's claim is based.**

14. ***Toshiba Corp. v. Auto. Indus. Pension Trust Fund*, No. 18-486 (9th Cir., 896 F.3d 933; CVSG Jan. 14, 2019; cert. opposed May 20, 2019; cert. denied June 24, 2019). Whether the Securities Exchange Act applies, without exception, whenever a claim is based on a domestic transaction, or whether in certain circumstances the Act does not apply, despite the claim being based on a domestic transaction, because other aspects of the claim make it impermissibly extraterritorial.**

15. ***Airline Serv. Providers Ass'n v. L.A. World Airports*, No. 17-1183 (9th Cir., 873 F.3d 1074; CVSG June 4, 2018; cert. opposed May 21, 2019; cert. denied June 24, 2019). Although federal labor law and the Airline Deregulation Act generally preempt state and local regulations concerning labor-management relations and airline prices, an exception applies where the state or local government does not exercise its sovereign power to regulate, but instead purchases goods or services in the marketplace. The City of Los Angeles enacted a licensing rule barring companies from providing services to airlines at Los Angeles International Airport unless they enter into a "labor peace" agreement with any union that demands one. Does the "market participant" exception apply given that the City owns and operates the Airport?**

16. ***Poarch Band of Creek Indians v. Wilkes*, No. 17-1175 (Ala., 2017 WL 4385738; CVSG Oct. 1, 2018; cert. opposed or, in the alternative, grant, vacate, and remand supported May 21, 2019; cert. denied June 24, 2019). Whether an Indian tribe is immune from civil liability for tort claims asserted by nonmembers.**

17. ***YPF S.A. v. Petersen Energia Inversora S.A.U.*, No. 18-575, consolidated with *Argentine Republic v. Petersen Energia Inversora S.A.U.*, No. 18-581 (2d Cir., 895 F.3d 194; CVSG Jan. 7, 2019; cert. opposed May 21, 2019; cert. denied June 24, 2019). Whether the "commercial activity" exception to sovereign immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), is**

inapplicable to suits challenging conduct inextricably intertwined with a sovereign act of expropriation.

18. ***Tex. Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc.*, No. 18-600 (Fed. Cir., 895 F.3d 1304; CVSG Jan. 7, 2019; cert. opposed May 21, 2019; cert. denied June 24, 2019). Under 35 U.S.C. § 271(a), a person directly infringes a patent whenever she "offers to sell" a patented invention "within the United States." Does an "offer[ ] to sell" occur where the offer is actually made or where the offer contemplates that the proposed sale will take place?**

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19. ***Republic of Sudan v. Owens*, No. 17-1236 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018; cert. opposed May 21, 2019). The Questions Presented are: (1) Whether plaintiffs suing a foreign state bear a lighter burden in establishing the facts necessary for jurisdiction than in proving a case on the merits. (2) Whether plaintiffs suing a foreign state can establish facts necessary for jurisdiction based solely on the opinion testimony of terrorism experts. (3) Whether a plaintiff's failure to prove that a foreign state specifically intended or directly advanced a terrorist attack is relevant to proximate cause and jurisdictional causation under the Foreign Sovereign Immunities Act's terrorism exception.**

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20. ***Republic of Sudan v. Opati*, No. 17-1406 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018; cert. opposed May 21, 2019). The Questions Presented are: (1) Whether the term "extrajudicial killing" under the Foreign Sovereign Immunities Act means a summary execution by state actors. (2) Whether foreign sovereign immunity may be withdrawn for emotional distress claims brought by family members of victims under the Act. (3) Whether 28 U.S.C. § 1605A(c) provides the exclusive remedy for actions brought under § 1605A(a), and thus forecloses state causes of action previously asserted through the "pass through" provision of 28 U.S.C. § 1606. (4) Whether the statute of limitations contained in § 1605A(b) is jurisdictional in nature, and if not, whether the D.C. Circuit should have heard Sudan's limitations defense asserted through a timely, direct appeal. (5) Whether the undisputed fact of civil war, internal strife, and partitioning of Sudan into two countries constitutes excusable neglect or extraordinary circumstances for vacatur under Federal Rule of Civil Procedure 60(b).**

21. ***Ariosa Diagnostics, Inc. v. Illumina, Inc.*, No. 18-109 (Fed. Cir., 705 F. App'x 1002; CVSG Oct. 29, 2018; cert. opposed May 21, 2019; cert. denied June 24, 2019). Do unclaimed disclosures in a published patent application and an earlier application it relies on for priority enter the public domain and thus become prior art as of the earlier application's filing date, or, as the Federal Circuit held, does the prior art date of the disclosures depend on whether the published application also claims subject matter from the earlier application?**

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22. ***Ala. Dep't of Revenue v. CSX Transp., Inc.*, No. 18-447, consolidated with *CSX Transp., Inc. v. Ala. Dep't of Revenue*, No. 18-612 (11th Cir., 888 F.3d 1163; CVSG Jan. 14, 2019; cert. opposed May 21, 2019; cert. denied June 24, 2019). The Questions Presented are: (1) Under 49 U.S.C. § 11501(b)(4), when can a State justifiably maintain a sales-and-use tax exemption for fuel used by vessels to transport goods interstate without extending the same exemption to rail carriers? (2) Whether Alabama's imposition of a motor fuels tax on the fuel used by interstate motor carriers sufficiently justifies Alabama's imposition of a facially discriminatory sales and use tax on railroad diesel fuel.**

Cases Removed From The Argument Calendar

1. ***Gray v. Wilkie*, No. 17-1679 (Fed. Cir., 875 F.3d 1102; cert. granted Nov. 2, 2018; argument scheduled Feb. 25, 2019; removed from argument calendar Feb. 6, 2019; vacated and remanded with instructions to dismiss as moot June 24, 2019). Whether the Federal Circuit has jurisdiction under 38 U.S.C. § 502 to review an interpretive rule reflecting the Department of Veteran Affairs' definitive interpretation of its own regulation, even if the Department chooses to promulgate that rule through its adjudication manual.**

2. ***Dep't of Commerce v. U.S. Dist. Ct. for the S. Dist. of N.Y.*, No. 18-557 (2d Cir., Nos. 18-2856 & 18-2857; cert. granted Nov. 16, 2018; argument scheduled Feb. 19, 2019; removed from argument calendar Jan. 18, 2019; remanded with instructions to vacate June 28, 2019). Whether, in an action seeking to set aside agency action under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*., a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—when there is no evidence that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.**

Cases Dismissed As Improvidently Granted

1. ***Emulex Corp. v. Varjabedian*, No. 18-459 (9th Cir., 888 F.3d 399; cert. granted Jan. 4, 2019; argued Apr. 15, 2019; dismissed as improvidently granted Apr. 23, 2019). Whether Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.**

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