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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 2019

Argued Cases

1. ***McGirt v. Oklahoma*, No. 18-9526 (Okla. Crim. App., No. PC-2018-1057; cert. granted Dec. 13, 2019; argued May 11, 2020). Whether the prosecution of an enrolled tribal member for crimes committed within the historical boundaries of the Creek Nation is subject to exclusive federal jurisdiction.**

Decided July 9, 2020 (591 U.S. __). Oklahoma Court of Criminal Appeals/Reversed. Justice Gorsuch for a 5-4 Court (Roberts, C.J., dissenting, joined by Alito and Kavanaugh, J.J., and joined in part by Thomas, J.; Thomas, J., dissenting). The Court held that for purposes of the Major Crimes Act ("MCA"), land promised to the Creek Nation by 19th Century treaties "remains an Indian reservation." The MCA subjects "[a]ny Indian who commits" certain offenses within "the Indian country" to criminal trials only in federal court. Petitioner is an enrolled member of the Seminole Nation of Oklahoma and committed criminal offenses on land once given to the Creek Nation in a series of treaties. The Court first concluded that those treaties created a "reservation" for the Creek by promising them "a 'permanent home' that would be 'forever set apart'" along with the "right to self-government" on those lands. Congress alone can withdraw a treaty, but it must "clearly express its intent to do so." But Congress has not done so with respect to the Creek Reservation. In the so-called "allotment era," Congress sought to pressure tribes to parcel out their lands to individual members, and eventually individual members of the Creek Nation gained the freedom to "sell their land to Indians and non-Indians alike." But allotment does not disestablish a reservation. Congress also infringed the Creek's sovereignty in many ways, yet "left the Tribe with significant sovereign functions over the lands in question." The Court rejected Oklahoma's view that it should look to "historical practice and demographics," reasoning that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear." And the Court rejected Oklahoma's argument that the eastern half of Oklahoma was never subject to the MCA. Finally, although the Court was "well aware of the

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potential for cost and conflict around jurisdictional boundaries," it noted that "Congress remains free to supplement its statutory directions about the lands in question at any time."

2. ***Trump v. Mazars USA, LLP*, No. 19-715 (D.C. Cir., 940 F.3d 710; cert. granted Dec. 13, 2019, consolidated with *Trump v. Deutsche Bank AG*, No. 19-760 (2d Cir., 943 F.3d 627); argued May 12, 2020). Whether the Committee on Oversight and Reform of the U.S. House of Representatives has the constitutional and statutory authority to issue a subpoena to the accountant for President Trump and several of his business entities.**

   Decided July 9, 2020 (591 U.S.). D.C. Circuit/Vacated and remanded; Second Circuit/Vacated and remanded. Chief Justice Roberts for a 7-2 Court (Thomas, J., dissenting; Alito, J., dissenting). The Court held that the courts of appeals did not "take adequate account" of the separation-of-powers concerns implicated by a congressional subpoena for information from the President. Historically, disputes over congressional subpoenas were resolved by the political branches without ending up in court. The dispute between the House of Representatives and President Trump "therefore represents a significant departure from historical practice" and was "the first of its kind to reach" the Supreme Court. The Court recognized that "disputes of this sort can raise important issues concerning relations between the branches" and noted "that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis." The Court first rejected the President's and the United States' argument that it should require the House to show a "demonstrated, specific need" for the information and that the information is "'demonstrably critical' to its legislative purpose." Those standards apply to communications shielded by executive privilege, not nonprivileged, private information. But the House's proposed test, which asks simply whether the subpoena "relates to a valid legislative purpose" or "concerns a subject on which legislation could be had," failed "to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." Adopting a "balanced approach," the Court concluded that lower courts should take into account several factors, including: "whether the asserted legislative purpose warrants the significant step of involving the President and his papers"; whether the subpoena is "broader than reasonably necessary to support Congress's legislative objective"; "the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose"; and "the burdens imposed on the President by a subpoena." Because the courts of appeals applied a different test, the Court vacated and remanded for further proceedings.

3. ***Trump v. Vance*, No. 19-635 (2d Cir., 941 F.3d 631; cert. granted Dec. 13, 2019; argued May 12, 2020). Whether a grand jury subpoena on a custodian of the President's personal records, demanding production of nearly ten years' worth of the President's financial papers and his tax returns, violates Article II and the Supremacy Clause of the United States Constitution.**

   Decided July 9, 2020 (591 U.S. __). Second Circuit/Affirmed and remanded. Chief Justice Roberts for a 7-2 Court (Kavanaugh, J., concurring in the judgment, joined by Gorsuch, J.; Thomas, J., dissenting; Alito, J., dissenting). The Court

held "that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need." Reviewing historical precedents, the Court noted that Chief Justice Marshall, presiding over the treason trial of Aaron Burr, had ruled that President Jefferson was not immune to a subpoena duces tecum; that Presidents from Monroe to Clinton had accepted Marshall's judgment and "uniformly agreed to testify when called in criminal proceedings"; and that the Court had rejected "an absolute privilege of confidentiality to all presidential communications" in *United States v. Nixon*, 418 U.S. 683 (1974). All of those examples involved federal criminal proceedings, but the Court drew on them in resolving the arguments of the President and the United States with respect to state criminal proceedings. The Court rejected the argument that absolute immunity was warranted to avoid "diversion, stigma, and harassment." As to the possibility of diversion from official duties, the President did not seek immunity "from the diversion occasioned by the prospect of future criminal *liability*." And the argument about the possible diversion caused by the subpoena itself ran "up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process." The Court had previously rejected the argument that the possibility of stigma warranted absolute immunity, and reasoned that grand-jury secrecy laws would serve to prevent such stigma. And while the Court did not discount the possibility of harassment from politically motivated investigations, it had rejected immunity based on that possibility in *Clinton v. Jones*, 520 U.S. 681 (1997), and noted that "the law already seeks to protect against the predicted abuse." The Court next rejected the argument that a heightened standard was warranted for three reasons: First, it would "extend protection designed for official documents to the President's private papers." Second, the United States had not "established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions." Third, "the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence." Thus, the Court affirmed the judgment of the Second Circuit, which had remanded to the district court, "where the President may raise further arguments as appropriate."

4. ***Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19-267 (9th Cir., 769 F. App'x 460; cert. granted Dec. 18, 2019, consolidated with *St. James Sch. v. Biel*, No. 19-348 (9th Cir., 911 F.3d 603); argued May 11, 2020). Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.**

Decided July 8, 2020 (591 U.S. __). Ninth Circuit/Reversed and remanded. Justice Alito for a 7-2 Court (Thomas, J., concurring, joined by Gorsuch, J.; Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that the First Amendment forecloses courts from adjudicating respondents' discrimination claims. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), the Court held that the Religion Clauses incorporate the so-called "ministerial exception." Although the Court did not decide the scope of the exception, it barred courts from adjudicating an employment dispute between a teacher, Cheryl Perich, and a religious school where she had the title "Minister of

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Religion, Commissioned," had significant educational and religious training, and was responsible for teaching religion and participating with students in religious activities. Respondents in these cases were elementary school teachers who alleged that they were discriminated against on the basis of age and a medical leave of absence, respectively. Although neither teacher held the title "minister" and each had "less religious training than Perich, the Court concluded that "their cases f[e]ll within the same rule that dictated [the Court's] decision in *Hosanna-Tabor*." "The religious education and formation of students is the very reason for the existence of most private religious schools," the Court reasoned, "and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission." Thus, "[j]udicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." Although titles and religious training are relevant to determining whether an employee falls within the exception, neither can be dispositive given the variety of approaches religious faiths take to those issues. Instead, "[w]hat matters, at bottom, is what an employee does." And "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." Because both respondents "performed vital religious duties," including "[e]ducating and forming students in the Catholic faith," they fell within the exception.

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5. ***The Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-431, consolidated with *Trump v. Pennsylvania*, No. 19-454 (3d Cir., 930 F.3d 543; cert. granted Jan. 17, 2020; argued May 6, 2020). The Questions Presented are: (1) Whether a litigant who is directly protected by an administrative rule and has been allowed to intervene to defend it lacks standing to appeal a decision invalidating the rule if the litigant is also protected by an injunction from a different court. (2) Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage. (3) Whether the agencies had statutory authority under the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18001 *et seq.*, and the Religious Freedom Restoration Act of 1993 ("RFRA") to expand the conscience exemption to the contraceptive-coverage mandate. (4) Whether the agencies' decision to forgo notice and opportunity for public comment before issuing the interim final rules rendered the final rules—which were issued after notice and comment—invalid under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.* (5) Whether the court of appeals erred in affirming a nationwide preliminary injunction barring implementation of the final rules.**

Decided July 8, 2020 (591 U.S. __). Third Circuit/Reversed and remanded. Justice Thomas for a 7-2 Court (Alito, J., concurring, joined by Gorsuch, J.; Kagan, J., concurring in the judgment, joined by Breyer, J.; Ginsburg, J., dissenting, joined by Sotomayor, J.). The Court held that the Departments of Health and Human Services and the Treasury (the "Departments") "had the authority to provide exemptions from the regulatory contraceptive requirements

for employers with religious and conscientious objections." The ACA requires employers to provide women with "preventative care and screening" without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4). Implementing that provision, the Departments eventually promulgated the contraceptive mandate but offered a "self-certification accommodation" to certain religious organizations. The Court addressed the contraceptive mandate and the self-certification accommodation in *Zubik v. Burwell*, 578 U.S. __ (2016) (per curiam), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). *Zubik* directed the Departments "to accommodate religious exercise . . . against the backdrop of *Hobby Lobby*'s pronouncement that the mandate, standing alone, violated RFRA as applied to religious entities with complicity-based objections." In 2017, the Departments "significantly broadened the definition of an exempt religious employer" and also "created a similar 'moral exemption' for employers . . . with 'sincerely held moral' objections to providing some or all forms of contraceptive coverage." The Court concluded that the Departments had authority to provide the exemptions under the ACA. The ACA grants "virtually unbridled discretion to decide what counts as preventative care and screenings," and confers "equally unchecked" discretion "to identify and create exemptions." Nothing in the ACA, the Court reasoned, limits the Departments' discretion. The Court rejected the dissent's argument that Congress's purpose to provide broad contraceptive coverage foreclosed the exemptions. And although the Court concluded that the Departments appropriately considered RFRA, it did not decide whether RFRA compelled or authorized the Departments' approach. Finally, the Court concluded that the broadened exemptions were not procedurally invalid because the Departments failed to give proper notice or to maintain an open mind through the administrative process. The Court remanded for further proceedings in the Third Circuit consistent with its judgment.

6. ***Colo. Dep't of State v. Baca*, No. 19-518 (10th Cir., 935 F.3d 887; cert. granted Jan. 17, 2020; argued May 13, 2020). The Questions Presented are: (1) Whether a presidential elector who is prevented by his appointing State from casting an Electoral College ballot that violates state law lacks standing to sue his appointing State because he holds no constitutionally protected right to exercise discretion. (2) Whether Article II or the Twelfth Amendment forbids a State from requiring its presidential electors to follow the State's popular vote when casting their Electoral College ballots.**

   Decided July 6, 2020 (591 U.S.). Tenth Circuit/Reversed. Per Curiam (Thomas, J., concurring in the judgment). The Court reversed the judgment of the Tenth Circuit for the reasons given in *Chiafalo v. Washington*, 591 U.S. __ (2020).

7. ***Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631 (4th Cir., 923 F.3d 159; cert. granted Jan. 10, 2020; argued May 6, 2020). The Questions Presented are: (1) Whether the government-debt exception to the Telephone Consumer Protection Act of 1991's ("TCPA") automated-call restriction violates the First Amendment. (2) Whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.**

Decided July 6, 2020 (591 U.S.). Fourth Circuit/Affirmed. Justice Kavanaugh for a 6-3 Court with respect to the merits and a 7-2 Court with respect to the remedy (Sotomayor, J., concurring in the judgment; Breyer, J., concurring in the judgment with respect to severability and dissenting in part, joined by Ginsburg and Kagan, J.J.; Gorsuch, J., concurring in the judgment in part and dissenting in part, joined in part by Thomas, J.). The Court affirmed the judgment of the Fourth Circuit. The plurality concluded that the "robocall" restriction was a content-based law subject to strict scrutiny, which it could not survive. To remedy the constitutional violation, the plurality severed the law's government-debt exception. Justice Sotomayor concluded that the government-debt exception failed intermediate scrutiny and agreed that the exception should be severed. Justice Breyer would have upheld the exception but nonetheless agreed that it should be severed. Justice Gorsuch agreed that the law imposes content-based speech restrictions subject to (and invalid under) strict scrutiny.

8. ***Chiafalo v. Washington*, No. 19-465 (Wash., 441 P.3d 807; cert. granted Jan. 17, 2020; argued May 13, 2020). Whether enforcement of a state law that threatens a fine for presidential electors who vote contrary to how the law directs is unconstitutional because a State has no power to legally enforce how a presidential elector casts his or her ballot and a State penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment.**

   Decided July 6, 2020 (591 U.S. __). Washington Supreme Court/Affirmed. Justice Kagan for a unanimous Court (Thomas, J., concurring in the judgment, joined in part by Gorsuch, J.). The Court held that a State may "penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote." More than 30 States have "pledge laws" requiring electors to cast their ballots for the presidential candidate who received the most statewide votes in the election. Washington is one of 15 States to enforce such pledges with sanctions. In *Ray v. Blair*, 343 U.S. 214 (1952), the Court held that pledge requirements do not violate the Constitution, but it did not address sanctions. For reasons similar to those given in *Ray*, the Court reached the same conclusion with respect to sanctions. Article II, § 1 "gives the States far-reaching authority over presidential electors," and nothing in the text of the Constitution—unlike some early state constitutions—prohibits the States from taking away elector discretion. And although some of the Framers expected electors to exercise discretion, they "did not reduce their thoughts about electors' discretion to the printed page." Moreover, "a tradition more than two centuries old" reflects that "electors are not free agents; they are to vote for the candidate whom the State's voters have chosen." American history reveals only a handful of "faithless votes," only one of which was ever challenged. A State that "chooses to sanction an elector for breaching his promise" follows in that longstanding tradition.

9. ***U.S. Patent & Trademark Office v. Booking.com B.V.*, No. 19-46 (4th Cir., 915 F.3d 171; cert. granted Nov. 8, 2019; argued May 4, 2020). Whether the addition by an online business of a generic top-level domain (".com") to an otherwise generic term can create a protectable trademark.**

Decided June 30, 2020 (591 U.S.). Fourth Circuit/Affirmed. Justice Ginsburg for an 8-1 Court (Sotomayor, J., concurring; Breyer, J., dissenting). The Court held that a descriptive term combined with ".com" is a generic mark only if, taken as a whole, it signifies to consumers a class of goods or services, rejecting a nearly per se rule proposed by the U.S. Patent and Trademark Office ("PTO") that renders such compound terms ineligible for trademark registration. Here, "Booking.com" is not a generic name, because the consuming public primarily understands that it "is descriptive of services involving 'booking' available at that domain name," rather than a genus. Registration of "Booking.com" also will not yield its holder a monopoly on the term "booking," as others are generally permitted to use similarly worded marks. Any potential competitive advantages associated with a descriptive term also should not disqualify it from federal registration.

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10. ***Espinoza v. Mont. Dep't of Rev.*, No. 18-1195 (Mont., 435 P.3d 603; cert. granted June 28, 2019; argued Jan. 22, 2020). Whether it violates 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.**

Decided June 30, 2020 (591 U.S.). Montana Supreme Court/Reversed and remanded. Chief Justice Roberts for a 5-4 Court (Thomas, J., concurring, joined by Gorsuch, J.; Alito, J., concurring; Gorsuch, J., concurring; Ginsburg, J., dissenting, joined by Kagan, J.; Breyer, J., dissenting, joined in part by Kagan, J.; Sotomayor, J., dissenting.). The Court held that applying Montana's constitutional provision that bars aid to church-controlled schools so as to prohibit state-backed scholarships from being used at religious schools violates the Free Exercise Clause. The "no-aid" provision excluded religious schools from public benefits solely because of religious status and, unlike *Locke v. Davey*, 540 U.S. 712 (2004), barred aid to a religious school "simply because of what it is" rather than because a scholarship recipient proposed to use the state funds toward a religious course of instruction. Moreover, no "historical and substantial" tradition supported Montana's decision to disqualify religious schools from government aid. In determining what standard to apply to Montana's disparate treatment of schools based on their religious character, the Court rejected a flexible case-by-case analysis because the Free Exercise Clause does not permit a balancing test of ill-defined interests. Instead, the unequal treatment of religious observers triggered strict scrutiny. Under that standard, the Court held that Montana's interest in creating greater separation of church and State than the U.S. Constitution requires does not qualify as "compelling." Moreover, Montana's argument that the no-aid provision promoted religious freedom could not justify a First Amendment violation, especially because Montana's infringement burdened both schools and families that attend them. Accordingly, the Montana Supreme Court could not simply invalidate the entire scholarship program to ensure no religious schools received state funds; instead, the Montana Supreme Court must disregard the no-aid provision and decide the case consistent with the U.S. Constitution.

11. ***U.S. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, No. 19-177 (2d Cir., 911 F.3d 104; cert. granted Dec. 13, 2019; argued May 5, 2020). Whether the First Amendment further bars enforcement of Congress's directive that respondents "have a policy explicitly opposing prostitution and sex trafficking" as a condition of accepting federal funds to fight HIV/AIDS abroad, 22 U.S.C. § 7631(f), with respect to legally distinct foreign entities operating overseas that are affiliated with respondents.**

    Decided June 29, 2020 (591 U.S.). Second Circuit/Reversed. Justice Kavanaugh for a 5-3 Court (Thomas, J., concurring; Breyer, J., dissenting, joined by Ginsburg and Sotomayor, J.J.). The Court held that because respondents' foreign affiliates do not possess First Amendment rights, applying the policy requirement to them is not unconstitutional. In 2003, Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act ("Leadership Act"), 22 U.S.C. § 7601 *et seq.* To receive funds under the Leadership Act, organizations were required to "have a policy explicitly opposing prostitution and sex trafficking." *Id.* § 7631(f). In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013), the Supreme Court held that applying that policy requirement to respondents, who are American nongovernmental organizations, violated the unconstitutional conditions doctrine. But that holding does not extend to respondents' foreign affiliates, the Court concluded, for two reasons. First, "foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution." Second, "separately incorporated organizations are separate legal units with distinct legal rights and obligations." Because of these two principles, "foreign organizations operating abroad," such as respondents' foreign affiliates, "possess no rights under the First Amendment." Applying the policy requirement to respondents' foreign affiliates would not infringe respondents' First Amendment rights because it was respondents' "choice to affiliate with foreign organizations." And the Court was unwilling to extend First Amendment protection to "foreign organizations that are *closely identified* with American organizations."

12. ***June Med. Servs. L.L.C. v. Russo*, No. 18-1323, consolidated with *Russo v. June Med. Servs. L.L.C.*, No. 18-1460 (5th Cir., 905 F.3d 787; cert. granted Oct. 4, 2019; argued Mar. 4, 2020). The Questions Presented are: (1) Whether the Fifth Circuit's decision upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with this Court's binding precedent in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). (2) Whether abortion providers can be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a "close" relationship with their patients and a "hindrance" to their patients' ability to sue on their own behalf. (3) Whether objections to prudential standing are waivable (per the Fourth, Fifth, Seventh, Ninth, Tenth, and Federal Circuits) or non-waivable (per the D.C., Second, and Sixth Circuits).**

    Decided June 29, 2020 (591 U.S.). Fifth Circuit/Reversed. Justice Breyer for a 5-4 Court (Roberts, C.J., concurring in the judgment; Thomas, J., dissenting;

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Alito, J., dissenting, joined by Gorsuch, J., and joined in part by Thomas and Kavanaugh, J.J.; Gorsuch, J., dissenting; Kavanaugh, J., dissenting). The Court reversed the judgment of the Fifth Circuit. The plurality first concluded that the State's objection to the third-party standing of plaintiffs (abortion providers) was both waived and inconsistent with "a long line of well-established precedents." Next, reviewing the record compiled in the district court, the plurality determined that the district court's factual findings as to the statute's minimal benefits and substantial burdens were not clearly erroneous, and thus justified the district court's ultimate conclusion that the statute was unconstitutional under *Whole Woman's Health v. Hellerstedt*, 579 U.S. (2016). Chief Justice Roberts concurred in the judgment on *stare decisis* grounds, reasoning that the Louisiana statute "burdens women seeking previability abortions to the same extent as the Texas law" held unconstitutional in *Whole Woman's Health*.

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13. ***Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 (9th Cir., 923 F.3d 680; cert. granted Oct. 18, 2019, with Question 2 directed by the Court; argued Mar. 3, 2020). The Questions Presented are: (1) Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau ("CFPB"), an independent agency led by a single director, violates the separation of powers. (2) If the CFPB is found unconstitutional on the basis of the separation of powers, whether 12 U.S.C. § 5491(c)(3) can be severed from the Dodd-Frank Act.**

Decided June 29, 2020 (591 U.S. __). Ninth Circuit/Vacated and remanded. Chief Justice Roberts for a 5-4 Court with respect to the merits and a 7-2 Court with respect to the remedy (Thomas, J., concurring in part and dissenting in part, joined by Gorsuch, J.; Kagan, J., concurring in the judgment with respect to severability and dissenting in part, joined by Ginsburg, Breyer, and Sotomayor, J.J.). The Court held that the structure of the CFPB, whose single Director cannot be removed by the President at will, violates the separation of powers. Article II of the Constitution vests all "executive Power" in the President, who must "take Care that the laws be faithfully executed." As part of that authority, the President generally possesses unrestricted power to remove subordinate executive officials, with just two historically recognized exceptions: Congress can create at least some expert agencies led by multimember bodies of principal officers removable only for cause, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and can provide removal protections to certain inferior officers, *Morrison v. Olson*, 487 U.S. 654 (1988). But the extension of such protection to the CFPB Director, a single principal officer leading an independent agency that wields significant executive power, "lacks a foundation in historical practice and clashes with constitutional structure by concentrating power" in a single unelected official "accountable to no one." Other aspects of the CFPB's "unique" and "unprecedented" structure, including a five-year term and independent funding outside the congressional appropriations process, exacerbated the problem. But the Court held that the Director's unconstitutional removal protection could be severed from the Dodd-Frank Act that created the CFPB, because Congress would have preferred "a CFPB supervised by the President" to "*no agency at all*." The CFPB "may therefore continue to operate," but now with a Director removable at will. The Court remanded for the lower courts to decide the "appropriate remedy"

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for the CFPB's unconstitutional initiation and prosecution of this case, which depended on questions of ratification that were not fully briefed.

14. ***Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161 (9th Cir., 917 F.3d 1097; cert. granted Oct. 18, 2019; argued Mar. 2, 2020). Whether, as applied to respondent, 8 U.S.C. § 1252(e)(2) is unconstitutional under the Suspension Clause.**

Decided June 25, 2020 (591 U.S. __). Ninth Circuit/Reversed and remanded. Justice Alito for a 7-2 Court (Thomas, J., concurring; Breyer, J., concurring in the judgment, joined by Ginsburg, J.; Sotomayor, J., dissenting, joined by Kagan, J.). The Court held that 8 U.S.C. § 1252(e)(2) does not violate the Suspension Clause or Due Process Clause. Congress provided expedited removal procedures for certain "applicants for admission" to the United States; applicants can avoid expedited removal by claiming asylum. An asylum claim is screened by an asylum officer who determines whether the alien has shown a "credible fear of persecution." 8 U.S.C. § 1225(b)(1). If the officer finds that the applicant does not have a credible fear, this finding is reviewed by a supervisor. If the supervisor agrees, the applicant may appeal to an immigration judge, who makes a de novo determination. Section 1252(e) limits the review that an alien in expedited removal may obtain via a petition for habeas corpus to three matters: (1) "whether the petitioner is an alien," (2) "whether the petitioner was ordered removed," and (3) whether the petitioner had already been granted entry as a lawful permanent resident, refugee, or asylee. 8 U.S.C. § 1252(e)(2)(A)-(C). The Court concluded that this limitation on review does not violate the Suspension Clause because the writ of habeas corpus was not "understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result." Instead, the writ "simply provided a means of contesting the lawfulness of restraint and securing release." The historical use of habeas corpus was limited to seeking release from detention in a variety of circumstances, and importantly, the "relief that a habeas court may order and the collateral consequences of that relief are two entirely different things." So, "while the release of an alien may give the alien the opportunity to remain in the country if the immigration laws permit," the Court found "no evidence that the writ as it was known in 1789 could be used to require that aliens be permitted to remain in a country other than their own, or as a means to seek that permission." The Court also concluded that § 1252(e) does not violate the Due Process Clause. "[M]ore than a century of precedent," the Court reasoned, has held that "Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause." This rule applies even for an alien "detained shortly after unlawful entry."

15. ***Liu v. SEC*, No. 18-1501 (9th Cir., 754 F. App'x 505; cert. granted Nov. 1, 2019; argued Mar. 3, 2020). Whether the Securities and Exchange Commission ("SEC") may seek and obtain disgorgement from a court as "equitable relief" for a securities law violation even though this Court has determined that such disgorgement is a penalty.**

Decided June 22, 2020 (591 U.S.). Ninth Circuit/Vacated and remanded. Justice Sotomayor for an 8-1 Court (Thomas, J., dissenting). The Court held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief" that the SEC may seek under 15 U.S.C. § 78u(d)(5). In civil actions brought by the SEC, § 78u(d)(5) permits federal courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." To interpret the statutory phrase "equitable relief," the Court determines whether a remedy falls into "those categories of relief that were *typically* available in equity" before the merger of law courts and equity courts. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). Although the label "disgorgement" is a relatively recent term, courts of equity "have routinely deprived wrongdoers of their net profits from unlawful activity" under a variety of different labels. Nonetheless, equity courts also limited such awards in multiple ways. For example, equity courts generally ensured that the profits would be returned to the victims and refused to award profits-based remedies against multiple wrongdoers under a joint-and-several liability theory. And equity "courts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses." A disgorgement remedy limited by those principles, the Court reasoned, can qualify as "equitable relief" under the statute. The Court declined to decide whether the disgorgement award in this case exceeded the bounds of traditional equity practice, leaving those questions to be resolved on remand.

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16. ***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. NAACP*, 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); argued Nov. 12, 2019). The Questions Presented are: (1) Whether the Department of Homeland Security's ("DHS") decision to wind down the Deferred Action for Childhood Arrivals ("DACA") policy is judicially reviewable. (2) Whether DHS's decision to wind down the DACA policy is lawful.**

Decided June 18, 2020 (591 U.S.). Ninth Circuit/Vacated in part, reversed in part, and remanded; District Court for the District of Columbia/Affirmed and remanded; Eastern District of New York/Vacated in part, affirmed in part, reversed in part, and remanded. Chief Justice Roberts for a 5-4 Court (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part; Thomas, J., concurring in the judgment in part and dissenting in part, joined by Alito and Gorsuch, J.J.; Alito, J., concurring in the judgment in part and dissenting in part; Kavanaugh, J., concurring in the judgment in part and dissenting in part). The Court held that the decision to rescind the DACA policy is judicially reviewable and arbitrary and capricious. A four-Justice plurality of the Court—joined in this conclusion by four other Justices—further held that plaintiffs failed to plausibly allege that the rescission was motivated by animus in violation of equal protection. The Court first rejected the government's argument that rescinding DACA was not judicially reviewable on the ground that DACA is a non-enforcement policy committed to agency discretion. DACA is not "simply a non-enforcement policy," but also "created a program for conferring affirmative immigration relief" and thus is judicially reviewable. Next, the Court concluded

that the decision to rescind DACA was inadequately explained. To evaluate this question, the Court looked only to the contemporaneous explanation given in September 2017 by DHS, not to the explanation offered by DHS Secretary Nielsen in June 2018 during the course of litigation. Rather than take a new action, Secretary Nielsen elected to elaborate on DHS's initial reasoning. But her further explanation did not reflect the initial reasons given and thus amounted to "impermissible *post hoc* rationalization." As a result, the Court considered only the reason initially given by DHS—that the "DACA program should be terminated" because the Fifth Circuit and the Attorney General had concluded that the Deferred Action for Parents of Americans ("DAPA") policy unlawfully conferred benefits. The Court declined to consider whether DHS correctly concluded that DACA was unlawful; DHS was bound by the Attorney General's conclusion that it was, and respondents did not brief how that factor affected the Court's review. Instead, the Court explained that DHS failed to consider an important aspect of the problem before it—namely, DHS "did not appear to appreciate" that it had discretion in "deciding how best to address a finding of illegality moving forward." The Fifth Circuit had held that DAPA was unlawful because it conferred benefits, not because it deferred removal. Thus, even if DACA was similarly unlawful because it conferred benefits, DHS retained discretion to defer removal. But DHS offered "no reason for terminating forbearance." Instead, it "treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation," an omission that rendered DHS's rescission arbitrary and capricious. Moreover, DHS failed to address whether there was legitimate reliance on the DACA policy.

17. ***Bostock v. Clayton Cty.*, 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), and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (6th Cir., 884 F.3d 560); argued Oct. 8, 2019). 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 ("Title VII"), 42 U.S.C. § 2000e-2.**

Decided June 15, 2020 (590 U.S. __). Eleventh Circuit/Reversed and remanded; Second Circuit/Affirmed; Sixth Circuit/Affirmed. Justice Gorsuch for a 6-3 Court (Alito, J., dissenting, joined by Thomas, J.; Kavanaugh, J., dissenting). The Court held that an employer who fires an individual "simply for being homosexual or transgender" violates Title VII. "An employer who fires an individual for being homosexual or transgender," the Court explained, "fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." The Court interpreted Title VII's prohibition on "discriminat[ing] against any individual . . . because of . . . sex," 42 U.S.C. § 2000e-2(a)(1), according to "the ordinary public meaning of its terms at the time of its enactment." "Sex," the Court assumed, referred "only to biological distinctions between male and female." "Because of" means by reason of or on account of—thus requiring "but-for causation." "So long as the plaintiff's sex was one but-for cause" of the

employer's "decision, that is enough to trigger the law." And to "discriminate against" means to treat an "individual worse than others who are similarly situated." Adding those together, "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex"—"put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." Applying that rule in these cases means that an individual's homosexuality or transgender status is irrelevant to employment decisions "because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." At its core, discriminating against an individual merely because that individual is homosexual or transgender entails discriminating against that individual "for traits or actions it tolerates in" employees who are of a different sex. The Court's cases "have already confirmed" this plain text interpretation of the statute. For example, the Court held in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), that discrimination based in part on sex violates Title VII. In *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Court recognized that "a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals." And in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court explained that even though the discrimination at issue was not "the principal evil Congress was concerned with when it enacted Title VII," it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Rejecting the arguments of the employers, the Court explained that it makes no difference whether "discrimination of the basis of homosexuality and transgender status [are] referred to as sex discrimination in ordinary conversation"; "these conversational conventions do not control Title VII's legal analysis." Similarly, an employer's insistence that it does not intend to discriminate based on sex is irrelevant. And the mere fact that Congress did not list "homosexuality" or "transgender status" as protected statuses is not dispositive, because "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex." Finally, the Court explained, the employers' appeal to policy cannot overcome the plain text of Title VII.

18. ***U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, No. 18-1584, consolidated with *Atl. Coast Pipeline, LLC v. Cowpasture River Pres. Ass'n*, No. 18-1587 (4th Cir., 911 F.3d 150; cert. granted Oct. 4, 2019; argued Feb. 24, 2020). Whether the U.S. Forest Service has authority under the Mineral Leasing Act and the National Trails System Act to grant rights-of-way through lands traversed by the Appalachian Trail within national forests.**

Decided June 15, 2020 (590 U.S. __). Fourth Circuit/Reversed and remanded. Justice Thomas for a 7-2 Court (Sotomayor, J., dissenting, joined by Kagan, J.). The Court held that the Mineral Leasing Act gives the Forest Service authority to grant rights-of-way through lands within national forests traversed by the Appalachian Trail. The Mineral Leasing Act permits the Forest Service to grant pipeline rights-of-way to "Federal lands" over "which [it] has jurisdiction." 30 U.S.C. § 185(a), (b)(3). And the Forest Service has jurisdiction over the George Washington National Forest, through which part of the Appalachian Trail winds. The question, according to the Court, is whether the lands crossed by the Trail

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were removed from the Forest Service's jurisdiction and transferred to the jurisdiction of the National Park Service. The Court concluded that they were not. Under the National Trails System Act, the Forest Service entered into "right-of-way" agreements with the Park Service for the portion of the Appalachian Trail's route that passed through the George Washington National Forest. Those agreements granted the Park Service an easement to use the land, but did not grant jurisdiction over the land itself any more than an easement between private parties would transfer ownership. Reflecting this distinction, the Trails Act provides that the Park Service administers the Trail, not the land traversed by the Trail. And in other statutes, "Congress has used unequivocal and direct language . . . when it wished to transfer land from one agency to another." Finally, the Court rejected respondents' argument that "the Trail cannot be separated from the underlying land." That theory would give the Department of the Interior "power to vastly expand the scope of the National Park Service's jurisdiction through its delegation choices" and would have "striking implications for federalism and private property rights," all without any grounding in the statutory text.

19. ***Lomax v. Ortiz-Marquez*, No. 18-8369 (10th Cir., 754 F. App'x 756; cert. granted Oct. 18, 2019, with the Question Presented limited by the Court; argued Feb. 26, 2020). Whether a dismissal without prejudice for failure to state a claim counts as a strike under 28 U.S.C. § 1915(g).**

Decided June 8, 2020 (590 U.S.). Tenth Circuit/Affirmed. Justice Kagan for a unanimous Court. The Court held that a dismissal without prejudice for failure to state a claim counts as a "strike" under the Prison Litigation Reform Act of 1995 ("PLRA"). The PLRA's "three-strikes rule" prevents a prisoner from bringing a suit without paying the filing fee if the prisoner has had three or more prior suits "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). The Court reasoned that the "broad language" of the statute "applies to those issued both with and without prejudice to a plaintiff's ability to reassert his claim in a later action." Interpreting the three-strikes rule not to apply to dismissal without prejudice would impermissibly insert "words Congress chose to omit" and "introduce inconsistencies into the statute." The Court rejected petitioner's argument that "dismissed [for] failure to state a claim" is a term of art meaning dismissal with prejudice. And the Court concluded that interpreting the three-strikes rule to include dismissals without prejudice is consistent with Congress's goal "to cabin not only abusive but also simply meritless prisoner suits."

20. ***Nasrallah v. Barr*, No. 18-1432 (11th Cir., 762 F. App'x 638; cert. granted Oct. 18, 2019; argued Mar. 2, 2020). Whether, notwithstanding 8 U.S.C. § 1252(a)(2)(C), the courts of appeals possess jurisdiction to review factual findings underlying denials of withholding (and deferral) of removal relief.**

Decided June 1, 2020 (590 U.S.). Eleventh Circuit/Reversed. Justice Kavanaugh for a 7-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that when a noncitizen is removable because he or she committed a crime specified in 8 U.S.C. § 1252(a)(2)(C), courts of appeals have jurisdiction to review the factual finding underlying a Convention Against Torture ("CAT") order deferentially. Noncitizens may obtain judicial "review of a final order of

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removal" in the courts of appeals. 8 U.S.C. § 1252(a)(1). When a noncitizen is removable because he or she committed certain crimes, the court may review legal and constitutional challenges—but not factual challenges—to the final order of removal. Under the CAT, noncitizens who likely would be tortured if removed to the designated country of removal may not be removed to that country. CAT orders may be reviewed together with final orders of removal in the courts of appeals. In this case, petitioner sought judicial review of the factual question whether he would likely be tortured if removed to Lebanon. The Court concluded that the court of appeals had jurisdiction to review that challenge under a deferential "substantial evidence" standard. The statute precludes review of factual challenges only as to final orders of removal, and CAT orders are not final orders of removal. Nor do CAT orders "merge" into final orders of removal; a ruling on a CAT claim does not affect the validity of the final order, even though the CAT order is reviewable as part of the review of the final order. Moreover, Congress had good reason for distinguishing between the two types of orders: When removal is premised on certain crimes, the "relevant facts will usually just be the existence of the noncitizen's prior criminal convictions," and precluding review of factual challenges to final orders of removal thus prevents relitigation of those crimes. For CAT orders, by contrast, the relevant facts will not previously have been litigated in court.

21. ***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; argued Jan. 13, 2020). The Questions Presented are: (1) Whether an Employee Retirement Income Security Act of 1974 ("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.**

Decided June 1, 2020 (590 U.S.). Eighth Circuit/Affirmed. Justice Kavanaugh for a 5-4 Court (Thomas, J., concurring, joined by Gorsuch, J.; Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, J.J.). The Court held that petitioners lacked Article III standing. Petitioners are retired participants in respondent's defined-benefit retirement plan—meaning that their monthly payments are fixed and do not fluctuate with the value of the plan. They had previously received all of their monthly benefit payments before bringing suit and are entitled to receive those same payments for the rest of their lives, regardless of whether they win or lose their suit alleging that respondent mismanaged the plan. As a result, they "have no concrete stake in the lawsuit" and lack constitutional standing. The Court rejected petitioners' analogy from trust law that any injury to the plan itself harms plan participants. In the trust context, the value of the property to which the beneficiaries are ultimately entitled depends on how the trust is managed. With a defined-benefit plan, by contrast, the value of a participant's retirement benefits do not depend on plan

management. Nor can petitioners represent the plan's interests without a concrete stake of their own. Similarly, because the petitioners lack a concrete injury, it makes no difference that ERISA grants them a right to sue. Finally, the Court declined to decide whether a plaintiff would have standing on a theory that a defined-benefit plan was managed so poorly as to substantially increase the risk that the plan would fail.

22. ***Banister v. Davis*, No. 18-6943 (5th Cir., No. 17-10826; cert. granted June 24, 2019, with the Question Presented limited by the Court; argued Dec. 4, 2019). Whether and under what circumstances a timely motion under Federal Rule of Civil Procedure 59(e) should be re-characterized as a second or successive habeas petition under *Gonzales v. Crosby*, 545 U.S. 524 (2005).**

Decided June 1, 2020 (590 U.S. __). Fifth Circuit/Reversed and remanded. Justice Kagan for a 7-2 Court (Alito, J., dissenting, joined by Thomas, J.). The Court held that a Rule 59(e) motion to alter or amend the judgment is not a second or successive habeas petition. Because "second or successive" is a term of art as used in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the Court has looked to the pre-AEDPA practice of habeas courts and the purposes of the Act to determine when a habeas petition is second or successive. "Here, both historical precedents and statutory aims point in the same direction—toward permitting Rule 59(e) motions in habeas proceedings." Before AEDPA, courts applied Rule 59(e) in habeas proceedings just as they did in other cases, and the Court identified just one case dismissing a Rule 59(e) motion as an abuse of the writ (as opposed to resolving it on the merits). Moreover, Rule 59(e) serves the purposes of AEDPA by "reducing delay, conserving judicial resources, and promoting finality." *Gonzales v. Crosby*, 545 U.S. 524 (2005), which held that a Rule 60(b) motion was second or successive when it "attacks the federal court's previous resolution of a claim on the merits," does not require a different result. Pre-AEDPA, courts frequently dismissed Rule 60(b) motions as an abuse of the writ. And because a "Rule 60(b) motion—often distant in time and scope and always giving rise to a separate appeal—attacks an already completed judgment," its "availability threatens serial habeas litigation."

23. ***Fin. Oversight & Mgmt. Bd. 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.*, No. 18-1521 (1st Cir., 915 F.3d 838; cert. granted June 20, 2019; argued Oct. 15, 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.**

Decided June 1, 2020 (590 U.S. __). First Circuit/Reversed and remanded. Justice Breyer for a unanimous Court (Thomas, J., concurring in the judgment; Sotomayor, J., concurring in the judgment). The Court held that the

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Appointments Clause governs the appointment of officers of the United States who exercise power in relation to Puerto Rico, but the Clause does not restrict the appointment of members of the Board. The Court first concluded that "the Appointments Clause restricts the appointment of all officers of the United States, including those who carry out their powers and duties in or in relation to Puerto Rico." The Clause, like other structural constitutional constraints "designed in part to ensure political accountability," applies "to all exercises of federal power." The text of the Clause does not carve out officers in U.S. Territories, and history confirms "that Congress expected the Appointments Clause to apply to at least some officials with supervisory authority over the Territories." Yet the Clause does not restrict appointment of members of the Board because, the Court concluded, they are not officers "of the United States." The text, structure, and history of the Clause, the Court reasoned, suggest that the Constitution draws a distinction between national officers and local officers who "have primarily local powers and duties." Generally, these local officers are created by the States. But since the Founding, Congress has created "local offices for the Territories and District of Columbia that are filled through election or local executive appointment." In Puerto Rico, for example, the Foraker Act provided for the selection of a lower legislative house through popular election. And the Jones Act initially provided for the election of the Puerto Rican Senate and eventually for an elected Governor. Members of the Board, the Court continued, exercise primarily local powers and duties. The government of Puerto Rico pays the Board's expenses and salaries; the Board can issue subpoenas enforceable under Puerto Rico's laws and only in Puerto Rico's courts; it "works with the elected government of Puerto Rico to develop a fiscal plan"; and it may initiate bankruptcy proceedings for Puerto Rico "in the U.S. District Court for Puerto Rico." In sum, the Board's "power primarily concerns local matters." The Court rejected the First Circuit's test—derived from previous Supreme Court opinions—for who is an "officer of the United States" because those cases considered the importance of duties that were indisputably national in nature. Instead, the Court looked for support to a case that had upheld Congress's power to create local, non-Article III courts for the District of Columbia. Finally, given the Court's conclusion that the Appointments Clause applied in Puerto Rico, it did not need to "consider the request by some of the parties that [it] overrule the much-criticized 'Insular Cases' and their progeny."

24. ***GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, No. 18-1048 (11th Cir., 902 F.3d 1316; cert. granted June 28, 2019; argued Jan. 21, 2020). Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") permits a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.**

Decided June 1, 2020 (590 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Thomas for a unanimous Court (Sotomayor, J., concurring). The Court held that the "New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines." Chapter 1 of the Federal Arbitration Act ("FAA") instructs courts to enforce arbitration agreements according to state-law contract principles,

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including equitable estoppel. Chapter 2 of the FAA, which implements the New York Convention, provides that Chapter 1 applies to actions brought under Chapter 2 to the extent that Chapter 1 is not in conflict with the Convention. Nothing in the text of the Convention addresses whether nonsignatories may enforce arbitration agreements or restricts the application of domestic law to those circumstances. To the contrary, the relevant part of the Convention "contemplate[s] the use of domestic doctrines to fill gaps." And although the drafting and negotiation history of the Convention did not shed much light on the question, the postratification understanding of other contracting States "indicates that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements."

25. ***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; argued Feb. 24, 2020). Whether the Foreign Sovereign Immunities Act ("FSIA") 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**

Decided May 18, 2020 (590 U.S. __). D.C. Circuit/Vacated and remanded. Justice Gorsuch for a unanimous Court. The Court held that the FSIA authorizes plaintiffs to seek punitive damages for preenactment conduct under 28 U.S.C. § 1605A. Even assuming that the general presumption against retroactivity applied, the Court reasoned, the FSIA is clear enough to overcome that presumption. That is because Congress "expressly authorized punitive damages under a new cause of action" and "explicitly made that new cause of action available to remedy certain past acts of terrorism." The fact that the section of the statute creating the new cause of action does not itself authorize punitive damages makes no difference. As respondent conceded, every other form of damages authorized by the relevant section of the FSIA is available retroactively, even though they are all listed in the same statutory sentence as punitive damages. And the Court declined to create a "super-clear" statement rule applying only to punitive damages; although retroactive punitive damages might raise constitutional concerns, litigants should challenge their constitutionality, not ask courts "to ignore the law's manifest direction." Finally, the Court declined to address questions briefed by the parties but not included in the Question Presented. But, as a consequence of the Court's holding, the D.C. Circuit "must also reconsider its decision concerning the availability of punitive damages for claims proceeding under state law."

26. ***Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, No. 18-1086 (2d Cir., 898 F.3d 232; cert. granted June 28, 2019; argued Jan. 13, 2020). 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.**

Decided May 14, 2020 (590 U.S. __). Second Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that petitioner was not barred from raising a defense in a second suit that it had not litigated in the first

suit where the two suits did not share the same claim for relief. The Court has never explicitly recognized the doctrine of "defense preclusion," but explained that it would apply, at most, only where the usual requirements of issue preclusion (which bars relitigation of issues actually and necessarily decided in a prior action) or claim preclusion (which prevents parties from raising issues that could have been raised in the prior action) were satisfied. Only claim preclusion could apply to this suit. The Court did not need to decide whether claim preclusion could ever apply to defenses, because it concluded that the first and second action between the parties did not satisfy the requirement for claim preclusion that both actions share a common nucleus of operative fact. "Put simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times." The second suit thus could not imperil the judgment in the first suit. None of the Court's prior cases or the treatises cited by respondent supported extending defense preclusion to this scenario; indeed, the Court "doubt[ed] that these authorities stand for anything more than that traditional claim- or issue-preclusion principles may bar defenses raised in a subsequent suit"—principles that do not bar petitioner's defense here.

27. ***Kelly v. United States*, No. 18-1059 (3d Cir., 909 F.3d 550; cert. granted June 28, 2019; argued Jan. 14, 2020). Whether a public official "defrauds" 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.**

Decided May 7, 2020 (590 U.S.). Third Circuit/Reversed and remanded. Justice Kagan for a unanimous Court. The Court held that because obtaining money or property was not the object of petitioners' scheme, their convictions for federal fraud could not stand. Petitioners were convicted of wire fraud and fraud on a federally funded program or entity for their role in reducing the toll lanes of traffic on the George Washington Bridge that were reserved for morning commuters from Fort Lee, New Jersey. Petitioners did so to punish the mayor of Fort Lee for his refusal to endorse the reelection campaign of then-Governor Chris Christie. But, as the Court had previously held, both statutes of conviction "target fraudulent schemes for obtaining property," and the government failed to prove that obtaining property—in this case, the Port Authority's money or property—was the goal of petitioners' scheme. First, the Court rejected the government's argument that petitioners "commandeered" part of the Bridge by reducing the number of toll lanes available for Fort Lee commuters. Rather, "that realignment was a quintessential exercise of regulatory power," and "a scheme to alter such a regulatory choice is not one to appropriate the government's property." Second, the Court rejected the government's argument that petitioners committed property fraud by using Port Authority employees to conduct a faux traffic study and as back-up toll collectors. Although "a scheme to usurp a public employee's paid time is one to take the government's property," that was simply an incidental cost of implementing petitioners' regulatory choice, not the object of their scheme. As a result, petitioners "could not have violated the federal-program fraud or wire fraud laws."

28. ***United States v. Sineneng-Smith*, No. 19-67 (9th Cir., 910 F.3d 461; cert. granted Oct. 4, 2019; argued Feb. 25, 2020). Whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional.**

Decided May 7, 2020 (590 U.S.). Ninth Circuit/Vacated and remanded. Justice Ginsburg for a unanimous Court (Thomas, J., concurring). The Court held that the Ninth Circuit "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." In the district court and on appeal, respondent argued that the statute did not cover her conduct, but that if it did, it violated the First Amendment as applied. After argument, the Ninth Circuit panel appointed *amici* and invited them to brief and argue whether the statute was overbroad under the First Amendment, among other questions. "In our adversarial system of adjudication," the Court explained, "we follow the principle of party presentation." Generally, courts must resolve the disputes presented to them by the parties; they "do not, or should not, sally forth each day looking for wrongs to right." *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc). Although this principle is not "ironclad" and there are "circumstances in which a modest initiating role for a court is appropriate," the Ninth Circuit panel's "radical transformation of this case goes well beyond the pale." Accordingly, the Court remanded "for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties."

29. ***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; argued Dec. 2, 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.**

Decided Apr. 27, 2020 (590 U.S. __). Second Circuit/Vacated and remanded. Per Curiam (Kavanaugh, J., concurring; Alito, J., dissenting, joined by Gorsuch, J. and joined in part by Thomas, J.). The Court held that petitioners' claim for declaratory and injunctive relief against respondent's old rule was moot. After the Court granted certiorari, the State of New York amended its firearm licensing statute, and respondent amended its "rule so that petitioners may now transport firearms to a second home or shooting range outside the city, which is the precise relief that petitioners requested in the prayer for relief in their complaint." Although petitioners contended that the new rule might still infringe their constitutional rights, the Court declined to decide that dispute in the first instance. Instead, it vacated the judgment and remanded for further proceedings in which petitioners could amend their pleadings or develop the record more fully. Similarly, although petitioners argued that they were entitled to damages as a result of the old rule, the Court remanded for the Second Circuit and the district court to decide whether petitioners could add a claim for damages.

30. ***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***

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***Lincoln Mut. Health Ins. Co. v. United States*, No. 18-1038 (Fed. Cir., 892 F.3d 1184); argued Dec. 10, 2019). 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.**

Decided Apr. 27, 2020 (590 U.S.). Federal Circuit/Reversed and remanded. Justice Sotomayor for an 8-1 Court (Alito, J., dissenting). The Court held that the ACA "established a money-mandating obligation, that Congress did not repeal this obligation, and that petitioners may sue the Government for damages in the Court of Federal Claims." Congress in the ACA established a "Risk Corridors" program designed to limit unexpected profits or losses for insurers who participated in the health insurance exchanges during the first three years. Each year, profitable insurance plans "shall pay" a certain amount to the Secretary of the Department of Health and Human Services, while the Secretary "shall pay" a certain amount to unprofitable plans. But at the end of each year, Congress enacted an appropriations rider specifying that none of the funds made available could be used for payments under the Risk Corridors program. The Court first concluded that the Risk Corridors statute "created a Government obligation to pay insurers the full amount set out" by the statute. Congress can create an obligation through statutory language and did so by using mandatory language without requiring that the program be budget-neutral. Although the government argued that the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, and the Anti-Deficiency Act, 31 U.S.C. § 1341, "qualified" that obligation, the Court reasoned that neither the Clause nor the Act "addresses whether Congress itself can create or incur an obligation directly by statute." Next, the Court concluded that Congress did not impliedly repeal the government's obligation through the appropriations riders it enacted. Implied repeals are disfavored, especially in the appropriations context, and will not be found unless Congress's intent was clear and manifest or the statutes are irreconcilable. Relying on its previous cases, the Court noted that Congress's mere failure to appropriate sufficient funds will not impliedly repeal a pre-existing statutory obligation to pay those funds. And here, that is all the appropriations riders did; they did not revoke the government's obligation before it was incurred or alter the Risk Corridors program's payment formula. Finally, the Court concluded that petitioners could sue under the Tucker Act in the Court of Federal Claims. Because the Tucker Act waives sovereign immunity but does not create any substantive rights, a plaintiff relying on the Tucker Act must also invoke another source of law, such as a statute or contract. Here, petitioners properly invoked the Risk Corridors statute because it "is fairly interpreted as mandating compensation for damages," it does not provide an alternative remedy, and the Administrative Procedure Act does not provide a different avenue for relief.

31. ***Georgia v. Public.Resource.Org, Inc.*, No. 18-1150 (11th Cir., 906 F.3d 1229; cert. granted June 24, 2019; argued Dec. 2, 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.**

Decided Apr. 27, 2020 (590 U.S.). Eleventh Circuit/Affirmed. Chief Justice Roberts for a 5-4 Court (Thomas, J., dissenting, joined by Alito, J. and joined in part by Breyer, J.; Ginsburg, J., dissenting, joined by Breyer, J.). The Court held that the annotations in Georgia's official annotated code are not copyrightable. Under the government edicts doctrine, "officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties." Examining three 19th Century precedents establishing that doctrine, the Court distilled the doctrine into a two-part test: "copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties." And applying that test, the Court concluded that Georgia's official annotations are not eligible for copyright protection. First, their purported author is the Georgia Code Revision Commission, which "functions as an arm" of the Georgia legislature for purposes of producing the annotations. The Commission was created by and for the legislature, and a majority of its members are legislators. Moreover, the legislature approves the Commission's annotations and, "as a matter of state law, the Commission wields the legislature's authority when it works with" a private company "to produce the annotations." Second, production of the annotations is an act of legislative authority and is similar to a syllabus or headnote created by judges in their capacity as judges. The Court rejected Georgia's arguments against the conclusion that the annotations were not copyrightable. Under the Copyright Act, the relevant question is whether the annotations count as works "of authorship," 17 U.S.C. § 102(a), which they cannot be under the government edicts doctrine. And although the 19th Century cases articulating that doctrine may not be consistent with contemporary statutory interpretation, Congress has repeatedly reused the term "author" without abrogating the doctrine. Nor is Georgia's argument that the government edicts doctrine is limited to works carrying "the force of law" consistent with those cases or rooted in the text of the Copyright Act. Finally, excluding the annotations from copyright protection avoids undesirable policy outcomes.

32. ***Barton v. Barr*, No. 18-725 (11th Cir., 904 F.3d 1294; cert. granted Apr. 22, 2019; argued Nov. 4, 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).**

Decided Apr. 23, 2020 (590 U.S.). Eleventh Circuit/Affirmed. Justice Kavanaugh for a 5-4 Court (Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, J.J.). The Court held that the criminal offense precluding cancellation of removal under the stop-time rule need not be one of the offenses that triggered removal. Lawful permanent residents who are subject to removal are not eligible for discretionary cancellation of removal under the "stop-time rule" if they committed an offense listed in 8 U.S.C. § 1182(a)(2) during their initial seven years of residence in the United States. Reasoning from the text of the statute, the Court explained that "cancellation of removal is precluded if a noncitizen committed a § 1182(a)(2) offense during the initial seven years of residence," even if the conviction occurred later. And lawful permanent residents are rendered "inadmissible" when they are convicted of or admit to the offense.

But nothing in the text or structure of the statute requires that the offense be one of the offenses that subjected the lawful permanent resident to removal.

33. ***Romag Fasteners, Inc. v. Fossil, Inc.*, No. 18-1233 (Fed. Cir., 2019 WL 2677388; cert. granted June 28, 2019; argued Jan. 14, 2020). 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).**

Decided Apr. 23, 2020 (590 U.S.). Federal Circuit/Vacated and remanded. Justice Gorsuch for a unanimous Court (Alito, J., concurring, joined by Breyer and Kagan, J.J.; Sotomayor, J., concurring in the judgment). The Court held that willfulness is not a prerequisite to a profits award under § 1125(a). The text of the statute does not expressly state that a plaintiff must show willful infringement to recover profits, even though many other provisions of the Lanham Act specify certain *mens rea* standards needed to establish liability or award remedies. And although the statute indicates that "a violation under § 1125(a) can trigger an award of the defendant's profits 'subject to principles of equity,'" that does not suggest that Congress intended to incorporate "a narrow rule about a profits remedy within trademark law." Nor does the historical evidence suggest that courts uniformly required willfulness as a prerequisite for a profits award in trademark cases. Thus, while the defendant's *mens rea* is an important consideration in deciding whether a profits award is appropriate, willfulness is not a necessary precondition.

34. ***Cty. of Maui 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; argued Nov. 6, 2019). Whether the Clean Water Act ("CWA") requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.**

Decided Apr. 23, 2020 (590 U.S. __). Ninth Circuit/Vacated and remanded. Justice Breyer for a 6-3 Court (Kavanaugh, J., concurring; Thomas, J., dissenting, joined by Gorsuch, J.; Alito, J., dissenting). The Court held that the CWA "require[s] a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters." The CWA requires a permit before a person discharges any pollutant "from" a point source (*e.g.*, a pipe, ditch, well, or conduit) into navigable waters. The Court first rejected respondents' interpretation of "from" a point source as encompassing any discharge that is "fairly traceable" to a point source. Given modern science, that rule would permit the Environmental Protection Agency ("EPA") to assert virtually limitless permitting authority, contravening Congress's intent "to leave substantial responsibility and autonomy to the States." It would also conflict with legislative history and longstanding regulatory practice. The Court next rejected petitioner's and the United States' interpretation of "from" as excluding discharges from the EPA's permitting authority "if there is *any* amount of groundwater" between the point source and the navigable waters. That interpretation would have created "a large and obvious loophole" in the regulatory scheme and was not required by the statute's text. Instead, the Court adopted a

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"middle ground between these extremes." It concluded that requiring a permit where there is a functional equivalent of a direct discharge "best captures, in broad terms, those circumstances in which Congress intended to require a federal permit." Time and distance, in addition to several other factors, will be relevant in determining whether there is a functional equivalent of a discharge, and courts and the EPA can provide additional guidance. Because the Ninth Circuit applied a different standard, the Court vacated and remanded for further proceedings.

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

Decided Apr. 20, 2020 (590 U.S.). Court of Appeal of Louisiana, Fourth Circuit/Reversed. Justice Gorsuch for a 6-3 Court (Sotomayor, J., concurring in part; Kavanaugh, J., concurring in part; Thomas, J., concurring in the judgment; Alito, J., dissenting, joined by Roberts, C.J. and joined in part by Kagan, J.). The Court held that the Sixth Amendment's requirement of a unanimous verdict to secure a conviction is incorporated against the States under the Fourteenth Amendment. The Sixth Amendment's guarantee of a right to a "trial by an impartial jury" includes "*some* meaning about the content and requirements of a jury trial." Four hundred years of common-law history, early state constitutions, postadoption treatises, and more than a dozen Supreme Court cases confirm that one of those requirements is unanimity. And because the jury trial right is "fundamental," it is incorporated against the States and "bears the same content" in both contexts. A fractured Court reached a different conclusion in *Apodaca v. Oregon*, 406 U.S. 404 (1972). There, four justices concluded that the Sixth Amendment did not require unanimity, while four justices concluded that it did. Justice Powell, however, concluded that although the Sixth Amendment requires unanimity, the Fourteenth Amendment does not fully apply this guarantee against the States. Assuming that *Apodaca* established a governing precedent, the Court declined to apply *stare decisis*: "no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Apodaca* was poorly reasoned; "the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws," and "Justice Powell refused to follow this Court's incorporation precedents." *Apodaca* is inconsistent with prior and subsequent Supreme Court precedent. And overturning *Apodaca* was unlikely to upset significant reliance interests.

36. ***Thryv, Inc. v. Click-To-Call Techs., LP*, No. 18-916 (Fed. Cir., 899 F.3d 1321; cert. granted June 24, 2019; argued Dec. 9, 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.**

Decided Apr. 20, 2020 (590 U.S.). Federal Circuit/Vacated and remanded. Justice Ginsburg for a 7-2 Court (Gorsuch, J., dissenting, joined in part by Sotomayor, J.). The Court held that the agency's application of § 315(b)'s time limit "is closely related to its decision whether to institute inter partes review and is therefore rendered nonappealable by § 314(d)." "Inter partes review is an administrative process in which a patent challenger" may request reconsideration of "the validity of earlier granted patent claims." A request for inter partes review may not be made more than one year after a patent infringement suit against the requesting party, § 315(b), and the agency's determination "whether to institute an inter partes review under this section shall be final and nonappealable," § 314(d). Here, the agency decided to institute inter partes review notwithstanding a decade-old patent infringement suit against respondent that had been dismissed without prejudice. In *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. (2016), the Court held that § 314(d)'s bar on appeals applied "where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review." The agency's determination whether § 315(b)'s time limitation applies, the Court reasoned, satisfies that standard. Moreover, permitting § 315(b) appeals would waste agency resources and leave bad patents enforceable, undermining Congress's objectives. As a result, the agency's decision that § 315(b) does not bar inter partes review is nonappealable.

37. ***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; argued Dec. 3, 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 that is 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 the EPA's approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if the 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.**

Decided Apr. 20, 2020 (590 U.S.). Montana Supreme Court/Affirmed in part, vacated in part, and remanded. Chief Justice Roberts for a unanimous Court (with respect to the Supreme Court's jurisdiction), for an 8-1 Court (with respect to the state court's jurisdiction), and for a 7-2 Court (with respect to the merits) (Alito, J., concurring in part and dissenting in part; Gorsuch, J., concurring in part and dissenting in part, joined by Thomas, J.). The Court held that it had jurisdiction to review the decision of the Montana Supreme Court and that the Montana courts had jurisdiction over the landowners' claims, but that the landowners were "potentially responsible parties" who were required to seek the EPA's approval. The Court concluded that it had jurisdiction because "the Montana Supreme Court exercised review in this case through a writ of supervisory control," which is a "self-contained case" under Montana law. Next, the Court concluded that the

state courts had jurisdiction over the suit notwithstanding the Act's provision vesting exclusive jurisdiction in federal courts "over all controversies arising under" the Act, because this suit arose under state law, not under the Act. Finally, the Court concluded that the landowners in this suit were "potentially responsible parties" and thus needed EPA approval before taking remedial action. The Act defines such parties to include any "owner" of "a facility"—that is, "any site or area where a hazardous substance has been deposited, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B). Because the pollutants at issue "have 'come to be located' on the landowners' properties, the landowners are potentially responsible parties." It makes no difference that the landowners could not be held liable under the Act's statute of limitations; potentially responsible parties does not mean parties liable for the payment of response costs. Holding that the landowners were potentially responsible parties effectuated Congress's purpose of developing a comprehensive response to hazardous waste pollution. Thus, before taking statutorily defined "remedial" action at a Superfund site, the landowners must seek EPA approval.

38. ***Babb v. Wilkie*, No. 18-882 (11th Cir., 743 F. App'x 280; cert. granted June 28, 2019, with Question 1 limited by the Court and Question 2 directed by the Court; argued Jan. 15, 2020). The Questions Presented are: (1) Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967 ("ADEA"), which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 29 U.S.C. § 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action. (2) Whether a federal employee may obtain prospective administrative or judicial relief under laws other than the ADEA, including under the civil service laws or the Constitution, against age-related policies, practices, actions, or statements that were not the but-for cause of an adverse employment action against the complaining employee.**

Decided Apr. 6, 2020 (589 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Alito for an 8-1 Court (Sotomayor, J., concurring, joined by Ginsburg, J.; Thomas, J., dissenting). The Court held that the federal-sector provision of the ADEA imposes liability when age plays a part in a federal employment decision, even if age is not a but-for cause of the decision. The statute provides that "[a]ll personnel actions affecting employees or applicants who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). Because "'based on age' is an adjectival phrase that modifies the noun 'discrimination,'" the Court reasoned, age "must be a but-for cause of discrimination—that is, of differential treatment—but not necessarily a but-for cause of a personnel action itself." And because "'free from any discrimination' is an adverbial phrase that modifies the verb 'made,'" a "personnel action must be 'made'" without age playing "any part" in the decision. Thus, "the statute does not require proof that an employment decision would have turned out differently if age had not been taken into account." The Court's "prior cases interpreting different statutes" did not undermine this textual interpretation, because they addressed different language requiring but-for causation in other contexts. Nor is it "anomalous to hold the Federal Government to a stricter standard than private

employers or state and local governments." Congress deliberately wrote the federal-sector provision using language distinct from previous enactments. Nonetheless, a plaintiff must prove that age discrimination was a but-for cause of the ultimate employment decision in order to obtain "reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision," as opposed to "injunctive or other forward-looking relief."

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39. ***Kansas v. Glover*, No. 18-556 (Kan., 422 P.3d 64; cert. granted Apr. 1, 2019; argued Nov. 4, 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.**

Decided Apr. 6, 2020 (589 U.S. __). Kansas Supreme Court/Reversed and remanded. Justice Thomas for an 8-1 Court (Kagan, J., concurring, joined by Ginsburg, J.; Sotomayor, J., dissenting). The Court held that when a police officer learns that the owner of a vehicle has a revoked driver's license and "lacks information negating an inference that the owner is the driver of the vehicle," the officer has reasonable suspicion sufficient to justify an investigative traffic stop under the Fourth Amendment. The commonsense inference that the owner of a vehicle is often the vehicle's driver may give rise to reasonable suspicion, even though the registered owner of a vehicle is not always the driver. Empirical studies, the Court reasoned, confirm that persons with revoked licenses frequently continue to drive. And the inference that persons with revoked licenses may continue to do so is especially reasonable in Kansas because that "State's license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive." The Court rejected respondent's argument that officers must rely on their training and expertise to draw commonsense inferences that give rise to reasonable suspicion. But it emphasized that an officer must consider the totality of the circumstances when formulating a reasonable suspicion. A significant visible discrepancy between the person driving and the demographic information listed on the vehicle registration, for example, "might dispel reasonable suspicion."

40. ***CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, No. 18-565 (3d Cir., 886 F.3d 291; cert. granted Apr. 22, 2019; argued Nov. 5, 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.**

Decided Mar. 30, 2020 (589 U.S.). Third Circuit/Affirmed. Justice Sotomayor for a 7-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that the safe-berth clause in the parties' charter contract constituted a warranty of safety that imposed liability for an unsafe berth on the charterer regardless of its diligence in selecting the berth. Following the maxim that maritime contracts are to be construed like any other contract, the Court's analysis "start[ed] and end[ed] with the language of the safe-berth clause." The clause provided that the charterer "'shall . . . designat[e] and procur[e]' a 'safe place or wharf,' 'provided [that] the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat.'" Because the clause was an unqualified statement of material fact regarding the condition of the berth selected by the

charterer, the Court concluded that it bound the charterer to a warranty of safety even though the clause never used the term "warranty." The Court rejected the petitioner's proposal to read in an implicit limitation shielding the charterer from liability if it exercised due diligence in selecting the location of the berth. "[A]s a general rule," the Court observed, "due diligence and fault-based concepts of tort liability have no place in the contract analysis required here." Instead, the default contract-law principle is strict liability. Although parties can negotiate around the default rule, the parties here did not do so in the safe-berth clause despite having incorporated due diligence limitations in other portions of the charter contract. The Court declined to rely on a leading admiralty treatise urging that safe-berth clauses should not be construed as establishing warranties of safety as inconsistent with the plain language of the parties' clause in this case.

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41. ***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, 2019, limited to Question 1; argued Nov. 13, 2019). Whether a claim of race discrimination under 42 U.S.C. § 1981 fails in the absence of but-for causation.**

Decided Mar. 23, 2020 (589 U.S. __). Ninth Circuit/Vacated and remanded. Justice Gorsuch for a unanimous Court (Ginsburg, J., concurring in part and concurring in the judgment). The Court held that a plaintiff suing for racial discrimination under 42 U.S.C. § 1981 must plead facts plausibly showing that race was a but-for cause of the defendant's conduct. The Civil Rights Act of 1866—codified, in relevant part, at 42 U.S.C. § 1981—guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." "It is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation." This is the default rule against which Congress is presumed to have legislated. And usually, "the essential elements of a claim remain constant through the life of a lawsuit." Here, "[a]ll the traditional tools of statutory interpretation" confirm "that § 1981 follows the usual rules, not any exception. To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." Although the text of § 1981 "does not expressly discuss causation," its "same right" language "is suggestive." Nor does § 1981's text "signal that this [but-for causation] test should change its stripes (only) in the face of a motion to dismiss." Moreover, nothing in "[t]he larger structure and history of the Civil Rights Act of 1866" indicates that anything less than a but-for causation standard applies at any stage of § 1981 litigation. And the Court's precedent confirms that all of this is true. The "motivating factor" causation test in Title VII does not apply to § 1981 claims; nor does the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), alter the pleading standard for § 1981 claims. Rather, "a plaintiff bears the burden of showing that race was a but-for cause of its injury. And, while the materials the plaintiff can rely on to show causation may change as a lawsuit progresses from filing to judgment, the burden itself remains constant."

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42. ***Kahler v. Kansas*, No. 18-6135 (Kan., 410 P.3d 105; cert. granted Mar. 18, 2019; argued Oct. 7, 2019). Whether the Eighth and Fourteenth Amendments permit a State to abolish the insanity defense.**

Decided Mar. 23, 2020 (589 U.S.). Kansas Supreme Court/Affirmed. Justice Kagan for a 6-3 Court (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, J.J.). The Court held that the Due Process Clause does not require States to adopt an insanity test that permits the "acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing his crime." The Court explained that States generally enjoy broad latitude to fashion rules of criminal liability that balance competing ideas of social policy and moral culpability, among other things. Those rules violate the Due Process Clause only if they "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," a standard that requires consideration of "eminent common-law authorities" and "early English and American judicial decisions." Turning to those sources, the Court acknowledged that jurists and judges have long recognized that an insanity defense of some kind relieves defendants of responsibility for their crimes. But it concluded that there has never been a consensus favoring the particular insanity test at issue here—one based on the defendant's inability to make moral judgments as opposed to his inability, for example, to form the requisite criminal intent. It is therefore enough that Kansas permits defendants to invoke mental illness to show that they lacked the requisite intent for the crime and to justify a lighter sentence following conviction; the State is not also required to recognize a moral-incapacity test. The Court stressed that, "[i]n a sphere of flux and disagreement, with fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no one view of legal insanity."

43. ***Allen v. Cooper*, No. 18-877 (4th Cir., 895 F.3d 337; cert. granted June 3, 2019; argued Nov. 5, 2019). Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act ("CRCA"), Pub. L. No. 101-553, 104 Stat. 2749 (1990), in providing remedies for authors of original expression whose federal copyrights are infringed by States.**

Decided Mar. 23, 2020 (589 U.S.). Fourth Circuit/Affirmed. Justice Kagan for a unanimous Court (Thomas, J., concurring in part and concurring in the judgment; Breyer, J., concurring in the judgment, joined by Ginsburg, J.). The Court held that Congress lacked constitutional authority to abrogate States' immunity from copyright infringement suits through the CRCA, which provides that a State "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court" for copyright infringement. 17 U.S.C. § 551(a). The Court explained that its previous decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999)—which held that Congress may not use its Article I powers to abrogate States' sovereign immunity for patent infringement—"all but prewrote [its] decision" with respect to copyright infringement. Although the Court took a different position with respect to bankruptcy proceedings in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), that decision reflects "bankruptcy exceptionalism" and has a "good-for-one-clause-only holding" that does not permit clause-by-clause examination of Congress's powers under Article I to abrogate state sovereign immunity. Moreover, the CRCA could not be sustained as an exercise of Congress's authority to protect constitutional rights under Section 5 of the Fourteenth Amendment because the CRCA is not

"congruent and proportional" to any constitutional injury Congress considered. Ruling that Congress constitutionally abrogated state sovereign immunity in the CRCA would thus require the Court to overrule *Florida Prepaid*, but petitioner had pointed to no "special justification" warranting a departure from *stare decisis*.

44. ***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); argued Dec. 9, 2019). 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).**

Decided Mar. 23, 2020 (589 U.S.). Fifth Circuit/Vacated and remanded. Justice Breyer for a 7-2 Court (Thomas, J., dissenting, joined by Alito, J. as to all but Part II-A-1). The Court held that the provision in the Immigration and Nationality Act limiting judicial review in removability cases involving certain crimes to "constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D), permits courts to review the application of legal standards to undisputed or established facts. The statute permits judicial review only of "questions of law," but it does not exclude the possibility that such questions may include the application of a legal standard to settled facts—sometimes called a "mixed question of law and fact." In the absence of such preclusive language, the presumption in favor of judicial review of administrative action suggests that § 1252(a)(2)(D) should be construed broadly. Moreover, § 1252(a)(2)(D) was enacted as a partial response to *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Court construed the prior version of the statute (which entirely prohibited judicial review in certain cases) as not prohibiting habeas corpus proceedings. And because habeas corpus proceedings have long included review of the application of law to facts, the Court presumed that Congress intended the newly enacted § 1252(a)(2)(D) to cover at least that class of questions.

45. ***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; argued Oct. 16, 2019). 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 IRCA impliedly preempts Kansas's prosecution of respondents.**

Decided Mar. 3, 2020 (589 U.S.). Kansas Supreme Court/Reversed. Justice Alito for a 5-4 Court (Thomas, J., concurring, joined by Gorsuch, J.; Breyer, J., concurring in part and dissenting in part, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that IRCA does not preempt state prosecutions premised on an "unauthorized alien's use of false documents on forms submitted for the purpose of securing employment." Kansas prosecuted three unauthorized aliens for identify theft because they used other persons' Social Security numbers

in filling out federal and state tax withholding forms. The Court first held that those state prosecutions are not expressly preempted by IRCA's broad restriction on any use of information contained in an I-9 Form. The mere fact that respondents used the same Social Security numbers on both their tax withholding forms and their I-9 Forms does not mean that such information was "contained in" their I-9 Forms under IRCA. Nor are the state prosecutions expressly preempted by IRCA restrictions on using the federal employment verification system, because tax withholding forms are not part of that system. For similar reasons, the Court rejected respondents' argument that IRCA preempts the "field *relating to* the federal employment verification system": tax withholding forms are "*fundamentally unrelated*" to that field. And IRCA does not exclusively occupy the field of employment verification. Finally, the Court held that the state prosecutions do not conflict with IRCA. It is possible to comply both with IRCA and the relevant Kansas statutes. And permitting prosecutions based on those state statutes does not pose an obstacle to IRCA's purposes. Rather, federal and state criminal laws frequently overlap, and there is no "suggestion that the Kansas prosecutions frustrated any federal interests."

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46. ***Intel Corp. Inv. Policy Comm. v. Sulyma*, No. 18-1116 (9th Cir., 909 F.3d 1069; cert. granted June 10, 2019; argued Dec. 4, 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.**

Decided Feb. 26, 2020 (589 U.S.). Ninth Circuit/Affirmed. Justice Alito for a unanimous Court. The Court held that § 1113(2) "requires more than evidence of disclosure alone," but instead requires that "the plaintiff must in fact have become aware of" the relevant information. Under § 1113(2), a plaintiff must bring suit against an ERISA fiduciary within three years of the date on which the plaintiff had "actual knowledge" of the fiduciary's breach or violation. The Court reasoned that "actual knowledge" means just what it says—knowledge "existing in fact or reality" as opposed to imputed or presumed knowledge. Elsewhere in ERISA, Congress drew the same distinction by including language allowing either actual or constructive knowledge to trigger the time to file. But because Congress did not include that language in § 1113(2), the Court could not presume that § 1113(2) "encompass[es] both what a plaintiff actually knows and what he reasonably could know." Finally, the Court noted that its opinion does not "foreclose[ ] any of the 'usual ways' for proving actual knowledge," including through circumstantial evidence or by showing a plaintiff's willful blindness.

47. ***Holguin-Hernandez v. United States*, No. 18-7739 (5th Cir., 746 F. App'x 403; cert. granted June 3, 2019; argued Dec. 10, 2019). Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.**

Decided Feb. 26, 2020 (589 U.S.). Fifth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court (Alito, J., concurring, joined by Gorsuch,

J.). The Court held that a criminal defendant preserves a claim that the trial court's sentence was unreasonably long by advocating for a sentence shorter than the one imposed. A criminal defendant preserves a claim that a ruling of a trial court was in error by either informing the trial court of "the action the party wishes the court to take" or "objecti[ng] to the court's action." Fed. R. Crim. P. 51(b). Under 18 U.S.C. § 3553, trial courts must impose sentences that are "sufficient, but not greater than necessary." By advocating for a sentence shorter than what the district court eventually imposes, the Court reasoned, a criminal defendant brings to the district court's attention his argument that the sentence imposed is greater than necessary. But criminal defendants are not required to object specifically to the "reasonableness" of a sentence to preserve a claim for appeal, because "reasonableness" is the label used for appellate review of a sentencing decision, not the substantive standard that criminal defendants must invoke.

48. ***Shular v. United States*, No. 18-6662 (11th Cir., 736 F. App'x 876; cert. granted June 28, 2019; argued Jan. 21, 2020). Whether the determination of a "serious drug offense" under the Armed Career Criminal Act ("ACCA") requires the same categorical approach used in the determination of a "violent felony" under the Act.**

Decided Feb. 26, 2020 (589 U.S.). Eleventh Circuit/Affirmed. Justice Ginsburg for a unanimous Court (Kavanaugh, J., concurring). The Court held that the definition of a "serious drug offense" under the ACCA, 18 U.S.C. § 924(e)(2)(A)(ii), requires only that the state offense involve the conduct specified in the statute, not that the state offense match certain generic drug offenses. Unlike the generic offenses of burglary and arson, which are specifically enumerated as examples of "violent felonies" under the ACCA, the definition of a "serious drug offense" describes "conduct a court can compare directly against the state crime's elements." Congress defined a "serious drug offense" as one "involving" certain conduct, and the use of the word "involving" indicates Congress intended to describe a class of conduct that would constitute a "serious drug offense," not to list exemplar offenses. The Court declined to apply the rule of lenity in this circumstance because there was no remaining ambiguity to resolve.

49. ***McKinney v. Arizona*, No. 18-1109 (Ariz., 426 P.3d 1204; cert. granted June 10, 2019; argued Dec. 11, 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.**

Decided Feb. 25, 2020 (589 U.S.). Arizona Supreme Court/Affirmed. Justice Kavanaugh for a 5-4 Court (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that when an *Eddings* error is identified on collateral review, a state appellate court is not required to order resentencing before a jury to reweigh mitigating and aggravating circumstances. Rather, the state appellate court may itself reweigh those circumstances under *Clemons v. Mississippi*, 494 U.S. 738 (1990). The Court reasoned that the

"analysis in *Clemons* hinged on its assessment of appellate courts' ability to weigh aggravating and mitigating evidence, not on any unique effect of aggravators as distinct from mitigators" and that the Court's later decisions "did not overrule *Clemons* so as to prohibit appellate reweighing of aggravating and mitigating circumstances." As a result, the Court concluded that the Ninth Circuit's finding that Arizona courts improperly ignored mitigating circumstances was sufficiently analogous to *Clemons*'s improperly considered aggravating circumstance to permit the state appellate court to conduct the reweighing itself as a remedy to the *Eddings* error. The Court also rejected petitioner's argument that the appellate court's reweighing of the circumstances constituted direct review. Instead, the Court found that the appellate reweighing constituted an independent review in a collateral proceeding, and thus petitioner could not receive the benefits of nonretroactive Supreme Court precedents decided after his original sentencing.

50. ***Rodriguez v. Fed. Deposit Ins. Corp.*, No. 18-1269 (10th Cir., 914 F.3d 1262; cert. granted June 28, 2019; argued Dec. 3, 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.**

Decided Feb. 25, 2020 (589 U.S.). Tenth Circuit/Vacated and remanded. Justice Gorsuch for a unanimous Court. The Court held that "[t]he *Bob Richards* rule is not a legitimate exercise of federal common lawmaking" and that courts should determine the ownership of a tax refund paid to a designated agent based on applicable state law. Absent congressional authorization, federal courts may engage in common lawmaking in a new area only when it is "necessary to protect uniquely federal interests." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Because the federal government does not have a unique interest in determining how a consolidated corporate tax refund should be distributed among group members, federal courts should consult the relevant state law to decide the ownership of the refund.

51. ***Hernández 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; argued Nov. 12, 2019). 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 Federal Bureau of Narcotics*, 403 U.S. 388 (1971).**

Decided Feb. 25, 2020 (589 U.S.). Fifth Circuit/Affirmed. Justice Alito for a 5-4 Court (Thomas, J., concurring, joined by Gorsuch, J.; Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that the holding of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should not be extended to create a damages remedy for claims based on a cross-border shooting. In *Bivens*, the Supreme Court held a person alleging to be the victim of an unlawful arrest and search could bring a Fourth

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Amendment claim for damages against the responsible federal agents. The Court later extended *Bivens* to cover a Fifth Amendment claim of dismissal based on sex and an Eighth Amendment claim of failure to provide adequate medical treatment. But the Court has since "stated that expansion of *Bivens* is a disfavored judicial activity" and has "consistently rebuffed requests to add to the claims allowed under *Bivens*." Here, the Court declined to extend *Bivens*. Although the *Bivens* claims in this case involve the Fourth and Fifth Amendments, they nonetheless "assuredly arise in a new context"—that is, a "meaningfully different" context than claims involving an arrest and search in New York City or sex discrimination on Capitol Hill. Moreover, "multiple, related factors" counsel against extending *Bivens* to this new context. A cross-border shooting involving border patrol agents implicates U.S. foreign policy interests—the purview of the Executive Branch and Congress—and would require courts to arbitrate the differing views of Mexico and the United States. Also, "[s]ince regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." And "[w]hen Congress has enacted statutes creating a damages remedy for persons injured by United States Government officers, it has taken care to preclude claims for injuries that occurred abroad." In short, "this case features multiple factors that counsel hesitation about extending *Bivens*, but they can all be condensed to one concern—respect for the separation of powers."

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52. ***Monasky v. Taglieri*, No. 18-935 (6th Cir., 907 F.3d 404; cert. granted June 10, 2019; argued Dec. 11, 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.**

Decided Feb. 25, 2020 (589 U.S.). Sixth Circuit/Affirmed. Justice Ginsburg for a unanimous Court (Thomas, J., concurring in part and concurring in the judgment; Alito, J., concurring in part and concurring in the judgment). The Court held that "the determination of habitual residence does not turn on the existence of an actual agreement," and a trial court's determination of a child's country of "habitual residence" under the Hague Convention should be reviewed for clear error. Under the Convention, a child wrongfully removed from her country of "habitual residence" must ordinarily be returned to it. But the Convention neither prescribes a standard of appellate review of a trial court's habitual-residence determination nor defines the term "habitual residence." As for the habitual-residence determination itself, the Court concluded that the Convention's text suggests and its explanatory report confirms that the determination involves "a fact-sensitive inquiry" and that "[n]o single fact" is "dispositive across all cases." This conclusion is bolstered by the views of the Convention's other signatories and its negotiation and drafting history. And the contrary view that an actual agreement between a child's parents is necessary to establish her habitual residence "would undermine the Convention's aim to stop unilateral decisions to remove children across international borders." In short, "a

child's habitual residence depends on the specific circumstances of the particular case." As for the standard of review, the Court explained that, unless specified by treaty or statute, "the appropriate level of deference to a trial court's habitual-residence determination depends on whether that determination resolves a question of law, a question of fact, or a mixed question of law and fact." Habitual-residence determinations involve a mixed question of law and fact because the district court must first identify the governing totality-of-the-circumstances test and then apply that test to answer a question of fact. Because the habitual-residence determination "presents a task for factfinding courts," it "should be judged on appeal by a clear-error review standard."

53. ***Ret. Plans Comm. of IBM v. Jander*, No. 18-1165 (2d Cir., 910 F.3d 620; cert. granted June 3, 2019; argued Nov. 6, 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.**

Decided Jan. 14, 2020 (589 U.S.). Second Circuit/Vacated and remanded. Per Curiam (Kagan, J., concurring, joined by Ginsburg, J.; Gorsuch, J., concurring). The Court vacated the judgment and remanded to allow the Second Circuit an opportunity to consider arguments raised for the first time before the Supreme Court. ERISA imposes a duty of prudence on the fiduciary of an Employee Stock Ownership Plan ("ESOP"). *Dudenhoeffer* held that a claim for breach of this duty on the basis of inside information requires a plaintiff to "allege an alternative action that the defendant could have taken" that would not have violated the securities laws and "that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than help it." The question on which the Court granted certiorari involved what a plaintiff must allege to satisfy the "more harm than good" standard. Yet petitioners' merits briefs primarily argued that ERISA imposes no duty on the fiduciary of an ESOP to act on inside information. And the United States contended that an additional ERISA-based duty to disclose would frustrate the goals of the securities laws' complex insider trading and disclosure provisions. Because the Second Circuit had not addressed those arguments, the Court remanded to give it an opportunity to do so.

54. ***Ritzen Grp. v. Jackson Masonry, LLC*, No. 18-938 (6th Cir., 906 F.3d 494; cert. granted May 20, 2019; argued Nov. 13, 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).**

Decided Jan. 14, 2020 (589 U.S.). Sixth Circuit/Affirmed. Justice Ginsburg for a unanimous Court. The Court held that a bankruptcy court's conclusive grant or denial of a motion for relief from the stay of creditors' actions automatically imposed when a bankruptcy petition is filed is a final, appealable order. "Orders in bankruptcy cases qualify as 'final'"—and are thus immediately appealable as of right—"when they definitively dispose of discrete disputes within the overarching bankruptcy case." Whether a debt collector should be granted relief from the automatic stay, the Court reasoned, is a discrete dispute. It involves "a discrete procedural sequence" that "occurs before and apart from proceedings on

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the merits of the creditors' claim." The bankruptcy court's order granting or denying relief from the automatic stay resolves not only the forum where the creditor's claim will be resolved, but also the manner in which it will be adjudicated. Moreover, permitting an immediate appeal of stay-relief decisions avoids delays, inefficiencies, and the possibility of duplicative litigation. Thus, the Sixth Circuit correctly concluded that an order conclusively denying a motion for relief from the automatic stay is final and appealable.

55. ***Peter v. NantKwest, Inc.*, No. 18-801 (Fed. Cir., 898 F.3d 1177; cert. granted Mar. 4, 2019; argued Oct. 7, 2019). Whether the phrase "[a]ll the expenses of the proceedings" in 35 U.S.C. § 145 encompasses the personnel expenses the PTO incurs when its employees, including attorneys, defend the agency in § 145 litigation.**

Decided Dec. 11, 2019 (589 U.S.). Federal Circuit/Affirmed. Justice Sotomayor for a unanimous Court. The Court held that 35 U.S.C. § 145, which requires patent applicants challenging the denial of a patent application in district court to pay "[a]ll the expenses of the proceedings," does not include the salaries of the PTO attorneys and paralegals. The American Rule establishes a presumption that each party will pay its own attorney's fees. That presumption applies, the Court explained, even to fee-shifting statutes, like § 145, that apply to nonprevailing parties. And nothing in the statute rebuts that presumption. In particular, "the term 'expenses' alone has never been considered to authorize an award of attorney's fees with sufficient clarity to overcome the American Rule presumption." Rather, various fee-shifting statutes show that Congress understands "expenses" and "attorney's fees" to be distinct terms and not inclusive of each other. Moreover, in the 170-year history of § 145, the PTO had never before sought attorney's fees under the statute. Thus, "the PTO cannot recover the pro rata salaries of its legal personnel under § 145."

56. ***Rotkiske v. Klemm*, No. 18-328 (3d Cir., 890 F.3d 422; cert. granted Feb. 25, 2019; argued Oct. 16, 2019). Whether the "discovery rule" applies to toll the one-year statute of limitations under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.***

Decided Dec. 10, 2019 (589 U.S.). Third Circuit/Affirmed. Justice Thomas for an 8-1 Court (Sotomayor, J., concurring; Ginsburg, J., dissenting in part and dissenting from the judgment). The Court held that the one-year limitations period for private civil actions brought under the FDCPA begins to run on the date on which the alleged FDCPA violation occurs, not the date on which the plaintiff first discovers the violation. Private civil actions under the FDCPA may be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). "That language," according to the Court, "unambiguously sets the date of the violation as the event that starts the one-year limitations period." It would thus constitute inappropriate "[a]textual judicial supplementation" were the Court to read a discovery rule into the statute. The Court declined to decide whether the limitations period is subject to an equitable, fraud-specific discovery rule because the petitioner failed to preserve the issue.

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Cases Decided Without Argument

1. ***Sharp 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).**

   Decided July 9, 2020 (591 U.S. __). Per Curiam (Thomas, J., dissenting; Alito, J., dissenting). The Court affirmed the judgment of the Tenth Circuit for the reasons stated in *McGirt v. Oklahoma*, 591 U.S. __ (2020).

2. ***Andrus v. Texas*, No. 18-9674 (Tex. Crim. App., 2019 WL 622783; Vacated and remanded June 15, 2020).** Per Curiam (Alito, J., dissenting, joined by Thomas and Gorsuch, J.J.). The Court held that petitioner had shown that his trial counsel's performance was deficient under *Strickland v. Washington*, 466 U.S. 668 (1984), and remanded for the Texas Court of Criminal Appeals to properly consider whether petitioner was prejudiced by that deficient performance. Petitioner's counsel overlooked significant potential mitigating evidence, presented mitigating evidence that "backfired by bolstering the State's aggravation case," and failed to investigate the State's aggravating evidence. "Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms." Because it was unclear, however, whether the Court of Criminal Appeals adequately considered *Strickland*'s prejudice prong, the Court vacated and remanded for the Court of Criminal Appeals to do so in the first instance.

3. ***Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016 (W.D. Wisc., __ F. Supp. 3d __; Stayed Apr. 6, 2020).** Per Curiam (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court stayed the district court's order granting a preliminary injunction to the extent that it would have required Wisconsin to count absentee ballots postmarked after the date of its election—April 7, 2020. After concluding that existing deadlines for absentee balloting would unconstitutionally burden Wisconsin citizens' right to vote, the district court entered a preliminary injunction that, among other things, provided that absentee ballots would be accepted as long as they were received by April 13, 2020, regardless of when they were postmarked. In the Supreme Court, all parties agreed that the receipt deadline for absentee ballots had been extended to April 13. But the Court stayed the injunction to the extent it would require Wisconsin to accept absentee ballots that were mailed and postmarked after election day. Citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the Court explained that it had "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." The district court's "extraordinary relief" violated the *Purcell* principle "and would fundamentally alter the nature of the election by allowing voting for six additional days after the election." Thus, the Court stayed that aspect of the district court's injunction pending final disposition of an appeal in the Seventh Circuit and the subsequent filing and disposition of a petition for certiorari.

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4. ***Davis v. United States*, No. 19-5421 (5th Cir., 769 F. App'x 129; Vacated and remanded Mar. 23, 2020).** Per Curiam. The Court held that unpreserved factual arguments are reviewable on appeal for plain error. Alone among the courts of appeals, the Fifth Circuit had held that certain unpreserved factual arguments are unreviewable, even for plain error. But neither the text of Rule 52(b) nor the Court's cases preclude plain-error review of factual errors. The Court thus vacated and remanded without expressing any opinion on whether petitioner satisfied the plain-error standard.

5. ***Roman Catholic Archdiocese of San Juan v. Feliciano*, No. 18-921 (P.R., 2018 PRSC 106; CVSG June 24, 2019; grant, vacate, and remand supported or, in the alternative, cert. supported Dec. 9, 2019, with a Question 2 proposed by the SG; Vacated and remanded Feb. 24, 2020).** Per Curiam (Alito, J., concurring, joined by Thomas, J.). The Court held that the Puerto Rico Court of First Instance lacked jurisdiction to issue payment and seizure orders because it issued those orders after the case had been removed to federal district court and before it was remanded. Petitioner had not restored jurisdiction to the Court of First Instance by filing motions in that court. Nor did the federal court's subsequent "*nunc pro tunc*" remand retroactively confer jurisdiction on the Court of First Instance to issue orders while the matter was pending in federal court.

6. ***Thompson v. Hebdon*, No. 19-122 (9th Cir., 887 F.3d 453; Vacated and remanded Nov. 25, 2019).** Per Curiam (Ginsburg, J., filed a statement). The Court held that the Ninth Circuit erred in upholding Alaska's non-aggregate political contribution limits against a First Amendment challenge. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Court invalidated Vermont's non-aggregate contribution limits for excessively restricting political speech and association. But the Ninth Circuit "declined to consider *Randall* 'because no opinion commanded a majority of the Court.'" The Court noted that Alaska's contribution limits share some of the same constitutional "danger signs" as the law invalidated in *Randall*: They are substantially lower than limits previously upheld by the Court and comparable limits in other States, and they are not indexed for inflation. The Court thus vacated and remanded for the Ninth Circuit to "revisit whether Alaska's contribution limits are consistent with" the Supreme Court's "First Amendment precedents."

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 borders. (3) Whether Mississippi is entitled to damages and 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 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 2020

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1. ***United States v. Briggs***, **No. 19-108 (C.A.A.F., 78 M.J. 289; cert. granted Nov. 15, 2019, consolidated with *United States v. Collins*, No. 19-184 (C.A.A.F., 78 M.J. 415 & 79 M.J. 150); argument originally scheduled Mar. 23, 2020, postponed). Whether the Court of Appeals for the Armed Forces erred in concluding—contrary to its own longstanding precedent—that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.**

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2. ***Google LLC v. Oracle Am., Inc.***, **No. 18-956 (Fed. Cir., 886 F.3d 1179 & 750 F.3d 1339; CVSG Apr. 29, 2019; cert. opposed Sept. 27, 2019; cert. granted Nov. 15, 2019; argument originally scheduled Mar. 24, 2020, postponed). 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.**

3. ***FNU Tanzin v. Tanvir***, **No. 19-71 (2d Cir., 894 F.3d 449; cert. granted Nov. 22, 2019; argument originally scheduled Mar. 24, 2020, postponed). Whether RFRA, 42 U.S.C. § 2000bb *et seq.*, permits suits seeking money damages against individual federal employees.**

4. ***Carney v. Adams***, **No. 19-309 (3d Cir., 922 F.3d 166; cert. granted Dec. 6, 2019, with Question 3 directed by the Court; argument originally scheduled Mar. 25, 2020, postponed). The Questions Presented are: (1) Whether the First Amendment invalidates a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the State's three highest courts, with the other seats reserved for judges affiliated with the "other major political party." (2) Whether the Third Circuit erred in holding that a provision of the Delaware Constitution requiring that no more than a "bare majority" of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other "major political party," when the former requirement existed for more than fifty years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts. (3) Whether respondent has demonstrated Article III standing.**

5. ***Torres v. Madrid***, **No. 19-292 (10th Cir., 769 F. App'x 654; cert. granted Dec. 18, 2019; argument originally scheduled Mar. 30, 2020, postponed). Whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold, or whether physical force must be successful in detaining a suspect to constitute a "seizure," as the Tenth Circuit and the D.C. Court of Appeals hold.**

6. ***Pereida v. Barr***, **No. 19-438 (8th Cir., 916 F.3d 1128; cert. granted Dec. 18, 2019; argument originally scheduled Mar. 30, 2020, postponed). Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act.**

7. ***City of Chicago v. Fulton***, **No. 19-357 (7th Cir., 926 F.3d 916; cert. granted Dec. 18, 2019; argument originally scheduled Apr. 20, 2020, postponed). Whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code's automatic stay, 11 U.S.C. § 362, to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.**

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8. ***Rutledge v. Pharm. Care Mgmt. Ass'n***, **No. 18-540 (8th Cir., 891 F.3d 1109; CVSG Apr. 15, 2019; cert. supported Dec. 4, 2019; cert. granted Jan. 10, 2020; argument originally scheduled Apr. 27, 2020, postponed). 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.**

9. ***Salinas v. U.S. R.R. Ret. Bd.***, **No. 19-199 (5th Cir., 765 F. App'x 79; cert. granted Jan. 10, 2020). Whether, under Section 5(f) of the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), and Section 8 of the Railroad Retirement Act, 45 U.S.C. § 231g, the Railroad Retirement Board's denial of a request to reopen a prior benefits determination is a "final decision" subject to judicial review.**

10. ***Ford Motor Co. v. Mont. Eighth Judicial Dist. Court***, **No. 19-368 (Mont., 443 P.3d 407; cert. granted Jan. 17, 2020, consolidated with *Ford Motor Co. v. Bandemer*, No. 19-369 (Minn., 931 N.W.2d 744); argument originally scheduled Apr. 27, 2020, postponed). Whether the "arise out of or relate to" requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts.**

11. ***Texas v. New Mexico***, **No. 22O65 (Original Jurisdiction; CVSG June 3, 2019; motion for review opposed Dec. 9, 2019; motion for review set for oral argument in due course Jan. 27, 2020; argument originally scheduled Apr. 21, 2020, postponed). 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.

12. ***Fulton v. City of Philadelphia*, No. 19-123 (3d Cir., 922 F.3d 140; cert. granted Feb. 24, 2020). The Questions Presented are: (1) Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held. (2) Whether *Employment Division v. Smith*, 494 U.S. 872 (1990), should be revisited. (3) Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs.**

13. ***U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, No. 19-547 (9th Cir., 925 F.3d 1000; cert. granted Mar. 2, 2020). Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), by incorporating the deliberative process privilege, protects against compelled disclosure a federal agency's draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536, and that concerned a proposed agency action that was later modified in the consultation process.**

14. ***California v. Texas*, No. 19-840, consolidated with *Texas v. California*, No. 19-1019 (5th Cir., 945 F.3d 355; cert. granted Mar. 2, 2020). The Questions Presented are: (1) Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in 26 U.S.C. § 5000A(a). (2) Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional. (3) Whether the minimum coverage provision is severable from the rest of the ACA. (4) Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.**

15. ***Borden v. United States*, No. 19-5410 (6th Cir., 769 F. App'x 266; cert. granted Mar. 2, 2020, limited to Question 1). Whether the "use of force" clause in the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), encompasses crimes with a *mens rea* of mere recklessness.**

16. ***Jones v. Mississippi*, No. 18-1259 (Miss. Ct. App., 285 So. 3d 626; cert. granted Mar. 9, 2020). Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.**

17. ***Brownback v. King*, No. 19-546 (6th Cir., 917 F.3d 409; cert. granted Mar. 30, 2020). Whether a final judgment in favor of the United States in an action brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), on the ground that a private person would not be liable to the claimant under**

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state tort law for the injuries alleged, bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant's FTCA claim.

18. ***Van Buren v. United States*, No. 19-783 (11th Cir., 940 F.3d 1192; cert. granted Apr. 20, 2020). Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.**

19. ***CIC Servs., LLC v. IRS*, No. 19-930 (6th Cir., 925 F.3d 247; cert. granted May 4, 2020). Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.**

20. ***Edwards v. Vannoy*, No. 19-5807 (5th Cir., No. 18-31095; cert. granted May 4, 2020, with the Question Presented directed by the Court). Whether the Court's decision in *Ramos v. Louisiana*, 590 U.S. ___ (2020), applies retroactively to cases on federal collateral review.**

21. ***Niz-Chavez v. Barr*, No. 19-863 (6th Cir., 789 F. App'x 523; cert. granted June 8, 2020). Whether, to serve notice in accordance with 8 U.S.C. § 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.**

22. ***Albence v. Guzman Chavez*, No. 19-897 (4th Cir., 940 F.3d 867; cert. granted June 15, 2020). Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. § 1231, or instead by 8 U.S.C. § 1226.**

23. ***Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963 (5th Cir., 935 F.3d 274; cert. granted June 15, 2020). Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.**

24. ***Republic of Hungary v. Simon*, No. 18-1447 (D.C. Cir., 911 F.3d 1172; CVSG Jan. 21, 2020; cert. supported May 26, 2020, limited to Question 1; cert. granted July 2, 2020, limited to Question 1). Whether the district court may abstain from exercising jurisdiction under the FSIA for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II and plaintiffs made no attempt to exhaust local Hungarian remedies.**

25. ***Fed. Republic of Germany v. Philipp***, **No. 19-351, consolidated with *Philipp v. Fed. Republic of Germany*, No. 19-520 (D.C. Cir., 894 F.3d 406; CVSG Jan. 21, 2020; cert. supported May 26, 2020; cert. granted July 2, 2020). The Questions Presented are: (1) Whether the "expropriation exception" of the FSIA, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when "rights in property taken in violation of international law are in issue," provides jurisdiction over claims that a foreign sovereign has violated international human rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing States' responsibility for takings of property. (2) Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims. (3) Whether the Federal Republic of Germany is subject to jurisdiction under the expropriation exception of the FSIA because Germany's instrumentality (and possessor of the property at issue) Stiftung Preussischer Kulturbesitz is engaged in commercial activity in the United States.**

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26. ***Nestlé USA, Inc. v. Doe I***, **No. 19-416, consolidated with *Cargill, Inc. v. Doe I*, No. 19-453 (9th Cir., 929 F.3d 623; CVSG Jan. 13, 2020; cert. supported May 26, 2020, limited to No. 19-453, with a Question 3 proposed by the SG; cert. granted July 2, 2020). The Questions Presented are: (1) Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity. (2) Whether the Judiciary has the authority under the ATS to impose liability on domestic corporations.**

27. ***Dep't of Justice v. House Comm. on the Judiciary***, **No. 19-1328 (D.C. Cir., 951 F.3d 589; cert. granted July 2, 2020). Whether an impeachment trial before a legislative body is a "judicial proceeding" under Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure.**

28. ***Collins v. Mnuchin***, **No. 19-422, consolidated with *Mnuchin v. Collins*, No. 19-563 (5th Cir., 938 F.3d 553; cert. granted July 9, 2020). The Questions Presented are: (1) Whether the Federal Housing Finance Agency's ("FHFA") structure violates the separation of powers. (2) Whether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent. (3) Whether the statute's anti-injunction clause, which precludes courts from taking any action that would "restrain or affect the exercise of powers or functions of the Agency as a conservator," 12 U.S.C. § 4617(f), precludes a federal court from setting aside the Third Amendment to agreements between FHFA and the Department of the Treasury. (4) Whether the statute's succession clause—under which FHFA, as conservator, inherits the shareholders' rights to bring derivative actions on behalf of the**

enterprises—precludes the shareholders from challenging the Third Amendment.

29. *AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (9th Cir., 910 F.3d 417; cert. granted July 9, 2020, consolidated with *FTC v. Credit Bureau Ctr.*, No. 19-825 (7th Cir., 937 F.3d 764)). The Questions Presented are: (1) Whether § 13(b) of the Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914), by authorizing "injunction[s]," also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief. (2) Whether § 13(b) authorizes district courts to enter an injunction that orders the return of unlawfully obtained funds.

30. *Facebook, Inc. v. Duguid*, No. 19-511 (9th Cir., 926 F.3d 1146; cert. granted July 9, 2020, limited to Question 2). Whether the definition of "automatic telephone dialing system" in the TCPA encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator."

31. *Uzuegbunam v. Preczewski*, No. 19-968 (11th Cir., 781 F. App'x 824; cert. granted July 9, 2020). Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.

Pending Cases Calling For The Views Of The Solicitor General ("CVSG")

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1. *CACI Premier Tech., Inc. v. Al Shimari*, No. 19-648 (4th Cir., 775 F. App'x 758; CVSG Jan. 27, 2020). Whether an order denying a federal contractor's claim of derivative sovereign immunity is an immediately appealable final order under the collateral-order doctrine.

2. *Ams. for Prosperity Found. v. Becerra*, No. 19-251, consolidated with *Thomas More Law Ctr. v. Becerra*, No. 19-255 (9th Cir., 903 F.3d 1000; CVSG Feb. 24, 2020). The Questions Presented are: (1) Whether exacting scrutiny or strict scrutiny applies to disclosure requirements that burden nonelectoral, expressive association rights. (2) Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest. (3) Whether California's disclosure requirement violates charities' and their donors' freedom of association and speech facially or as applied to the Law Center.

3. *Texas v. California*, No. 22O153 (Original Jurisdiction; CVSG June 15, 2020). The Questions Presented are: (1) Whether California's economic sanctions

against Texas and Texans are unconstitutional. (2) Whether California must remove Texas from its travel ban list.

4. ***PennEast Pipeline Co. v. New Jersey***, No. 19-1039 (3d Cir., 938 F.3d 96; CVSG June 29, 2020). Whether the Natural Gas Act, 15 U.S.C. § 717f(h), delegates to Federal Energy Regulatory Commission certificate holders the authority to exercise the federal government's eminent domain power to condemn land in which a State claims an interest.

5. ***FMC Corp. v. Shoshone-Bannock Tribes***, No. 19-1143 (9th Cir., 942 F.3d 916; CVSG June 29, 2020). The Questions Presented are: (1) Whether the Ninth Circuit correctly holds that tribal jurisdiction over nonmembers is established whenever a *Montana v. United States*, 450 U.S. 544 (1981), exception is met, or whether, as the Seventh and Eighth Circuits have held, a court must also determine that the exercise of such jurisdiction stems from the Tribe's inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations. (2) Whether the Ninth Circuit has construed the *Montana* exceptions to swallow the general rule that Tribes lack jurisdiction over nonmembers.

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***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; argued Jan. 13, 2020; decided June 1, 2020). 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.

2. ***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; argued Feb. 24, 2020; decided May 18, 2020). Whether the FSIA 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.

3. ***Cty. of Maui 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; argued Nov. 6, 2019; decided Apr. 23, 2020). Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

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4. ***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; argued Oct. 16, 2019; decided Mar. 3, 2020). The Questions Presented are: (1) Whether 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 IRCA impliedly preempts Kansas's prosecution of respondents.**

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5. ***Hernández 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; argued Nov. 12, 2019; decided Feb. 25, 2020). 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 Federal Bureau of Narcotics*, 403 U.S. 388 (1971).**

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6. ***Rutledge v. Pharm. Care Mgmt. Ass'n***, **No. 18-540 (8th Cir., 891 F.3d 1109; CVSG Apr. 15, 2019; cert. supported Dec. 4, 2019; cert. granted Jan. 10, 2020; argument originally scheduled Apr. 27, 2020, postponed). 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.**

7. ***Republic of Hungary v. Simon***, **No. 18-1447 (D.C. Cir., 911 F.3d 1172; CVSG Jan. 21, 2020; cert. supported May 26, 2020, limited to Question 1; cert. granted July 2, 2020, limited to Question 1). Whether the district court may abstain from exercising jurisdiction under the FSIA for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II and plaintiffs made no attempt to exhaust local Hungarian remedies.**

8. ***Fed. Republic of Germany v. Philipp***, **No. 19-351, consolidated with *Philipp v. Fed. Republic of Germany*, No. 19-520 (D.C. Cir., 894 F.3d 406; CVSG Jan. 21, 2020; cert. supported May 26, 2020; cert. granted July 2, 2020). The Questions Presented are: (1) Whether the "expropriation exception" of the FSIA, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when "rights in property taken in violation of international law are in issue," provides jurisdiction over claims that a foreign sovereign has violated international human rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing States' responsibility for takings of property. (2) Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and**

political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims. (3) Whether the Federal Republic of Germany is subject to jurisdiction under the expropriation exception of the FSIA because Germany's instrumentality (and possessor of the property at issue) Stiftung Preussischer Kulturbesitz is engaged in commercial activity in the United States.

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9. ***Nestlé USA, Inc. v. Doe I*, No. 19-416, consolidated with *Cargill, Inc. v. Doe I*, No. 19-453 (9th Cir., 929 F.3d 623; CVSG Jan. 13, 2020; cert. supported May 26, 2020, limited to No. 19-453, with a Question 3 proposed by the SG; cert. granted July 2, 2020). The Questions Presented are: (1) Whether an aiding and abetting claim against a domestic corporation brought under the ATS, 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity. (2) Whether the Judiciary has the authority under the ATS to impose liability on domestic corporations.**

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; grant, vacate, and remand May 4, 2020). The Questions Presented are: (1) Whether the CWA's permitting requirement is confined to discharges from a point source to 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 CWA 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. ***Mutond v. Lewis*, No. 19-185 (D.C. Cir., 918 F.3d 142; CVSG Jan. 21, 2020; cert. supported May 26, 2020; cert. denied June 29, 2020). The Questions Presented are: (1) Whether a plaintiff can preclude conduct-based immunity for foreign government officials merely by suing them in their personal capacities. (2) Whether the Torture Victim Protection Act of 1991 abrogates all common-law, conduct-based immunity for foreign officials, as the D.C. Circuit held below, or leaves immunity intact, as the Second and Ninth Circuits have held.**

12. ***Patterson v. Walgreen Co.*, No. 18-349 (11th Cir., 727 F. App'x 581; CVSG Mar. 18, 2019; cert. supported Dec. 9, 2019, limited to Question 3; cert. denied Feb. 24, 2020). The Questions Presented are: (1) Whether an accommodation under Title VII 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.

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***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; argued Dec. 3, 2019; decided Apr. 20, 2020). 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 that is jurisdictionally barred by 42 U.S.C. § 9613 of CERCLA. (2) Whether a landowner at a Superfund site is a "potentially responsible party" that must seek the EPA's approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if the 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.

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2. ***Google LLC v. Oracle Am., Inc.***, No. 18-956 (Fed. Cir., 886 F.3d 1179 & 750 F.3d 1339; CVSG Apr. 29, 2019; cert. opposed Sept. 27, 2019; cert. granted Nov. 15, 2019; argument originally scheduled Mar. 24, 2020, postponed). 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.

3. ***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; grant, vacate, and remand Mar. 2, 2020). 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 Federal 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.

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4. ***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; cert. opposed Dec. 9, 2019; grant, vacate, and remand Jan. 13, 2020). 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.

5. *N. B. D. v. Ky. Cabinet for Health & Family Servs.*, No. 19-638 (Ky., 577 S.W.3d 73; CVSG Jan. 13, 2020; cert. opposed May 21, 2020; cert. denied June 29, 2020). Whether federal law requires state courts of competent jurisdiction to make predicate findings for special immigrant juvenile status determinations upon request.

6. *HSBC Holdings plc v. Picard*, No. 19-277 (2d Cir., 917 F.3d 85; CVSG Dec. 9, 2019; cert. opposed Apr. 10, 2020; cert. denied June 1, 2020). The Questions Presented are: (1) Whether applying 11 U.S.C. § 550(a)(2) to permit recovery of the proceeds of a foreign transaction that occurred abroad between two foreign parties governed by foreign law constitutes a "domestic" application of § 550(a)(2) for the purpose of an extraterritoriality analysis. (2) Whether a bankruptcy court's and district court's abstentions from applying U.S. law on grounds of international comity should be reviewed for abuse of discretion, as all seven other circuits that reached the issue have held, or de novo, as the court below held.

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7. *Republic of Sudan v. Owens*, No. 17-1236 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018; cert. opposed May 21, 2019; cert denied May 26, 2020). 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 FSIA's terrorism exception.

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8. *Republic of Sudan v. Opati*, No. 17-1406 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018; cert. opposed May 21, 2019; cert denied May 26, 2020). The Questions Presented are: (1) Whether the term "extrajudicial killing" under the FSIA 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).

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9. *Putnam Invs., LLC v. Brotherston*, No. 18-926 (1st Cir., 907 F.3d 17; CVSG Apr. 22, 2019; cert. opposed Nov. 27, 2019; cert. denied Jan. 13, 2020). The Questions Presented are: (1) Whether an ERISA plaintiff bears the burden

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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."

10. ***HP Inc. v. Berkheimer*, No. 18-415 (Fed. Cir., 881 F.3d 1360; CVSG Jan. 7, 2019; cert. opposed Dec. 6, 2019; cert. denied Jan. 13, 2020). 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.**

11. ***Hikma Pharm. v. Vanda Pharm.*, No. 18-817 (Fed. Cir., 887 F.3d 1117; CVSG Mar. 18, 2019; cert. opposed Dec. 6, 2019; cert. denied Jan. 13, 2020). 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.**

12. ***Avco Corp. v. Sikkelee*, No. 18-1140 (3d Cir., 907 F.3d 701; CVSG June 24, 2019; cert. opposed Dec. 9, 2019; cert. denied Jan. 13, 2020). Whether the Federal Aviation Act preempts state-law design-defect claims.**

Petition For Certiorari Voluntarily Dismissed

1. ***Mathena v. Malvo*, No. 18-217 (4th Cir., 893 F.3d 265; cert. granted Mar. 18, 2019; argued Oct. 16, 2019; cert. dismissed Feb. 26, 2020). 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.**

2. ***Peterson v. Linear Controls, Inc.*, No. 18-1401 (5th Cir., 757 F. App'x 370; CVSG Oct. 15, 2019; cert. supported Mar. 20, 2020; cert. dismissed July 10, 2020). Whether the "terms, conditions, or privileges of employment" covered by Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), are limited only to hiring, firing, promotions, compensation, and leave.**

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Impeachment Trial Of President Donald J. Trump

In addition to his other responsibilities, Chief Justice Roberts presided over the impeachment trial of President Trump. Article I, Section 3 of the U.S. Constitution provides that "[w]hen the President of the United States is tried, the Chief Justice shall preside." The Constitution does not further clarify the Chief Justice's role. The Senate Impeachment Rules offer additional guidance. Rule V provides: "The Presiding Officer shall have power to make and issue, by himself or by the Secretary

of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide." Rule VII provides: "[T]he Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision without debate; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate."

There have been only two prior impeachment trials of Presidents. In President Andrew Johnson's trial, Chief Justice Chase played an active role. He "insisted he should rule on the competency of witnesses and on the evidence, in the latter instance subject to the vote of the Senate. He also insisted that the presiding officer have a vote in breaking a tie" and "decid[ed] points of order." John Niven, *Salmon P. Chase: A Biography* (1st ed. 1995). In President Clinton's trial, Chief Justice Rehnquist observed that he "did nothing in particular and [he] did it very well." Linda Greenhouse, *William H. Rehnquist, Chief Justice of Supreme Court, Is Dead at 80*, N.Y. Times, Sept. 4, 2005. Chief Justice Roberts did not take a particularly active role. For example, when asked by Senate Minority Leader Schumer whether he was aware that Chief Justice Chase had cast tiebreaking votes in President Andrew Johnson's trial, the Chief Justice responded: "I do not regard those isolated episodes, 150 years ago, as sufficient to support a general authority to break ties." Siobhan Hughes, *Chief Justice Says He Wouldn't Break a Tie in Impeachment Trial*, Wall St. J., Jan. 31, 2020. He explained that "those tiebreaking votes had involved a motion to adjourn and a motion to close deliberations" and concluded that "it would be improper for him to break a Senate tie." *Id.* However, he did admonish counsel for both sides to maintain decorum. *See* Adam Liptak, *Rebuke from Roberts Signals His Limited Role in Trump's Senate Trial*, N.Y. Times, Jan. 22, 2020.

Supreme Court Statistics:

Gibson Dunn has a longstanding, high-profile presence before the Supreme Court of the United States, appearing numerous times in the past decade in a variety of cases. During the Supreme Court's 5 most recent Terms, 9 different Gibson Dunn partners have presented oral argument; the firm has argued a total of 16 cases in the Supreme Court during that period, including closely watched cases with far-reaching significance in intellectual property, separation of powers, and federalism. Moreover, although the grant rate for petitions for certiorari is below 1%, Gibson Dunn's petitions have captured the Court's attention: Gibson Dunn has persuaded the Court to grant 29 petitions for certiorari since 2006.

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