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Appellate Practice

The Supreme Court's Term

Highlights of '18, Preview of '19

September 30, 2019

Steven J. Wells
Timothy J. Droske

Materials

With special thanks to Michael Brey for his contribution in preparation of the materials.

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Supreme Court Review: Highlights of '18, Preview of '19

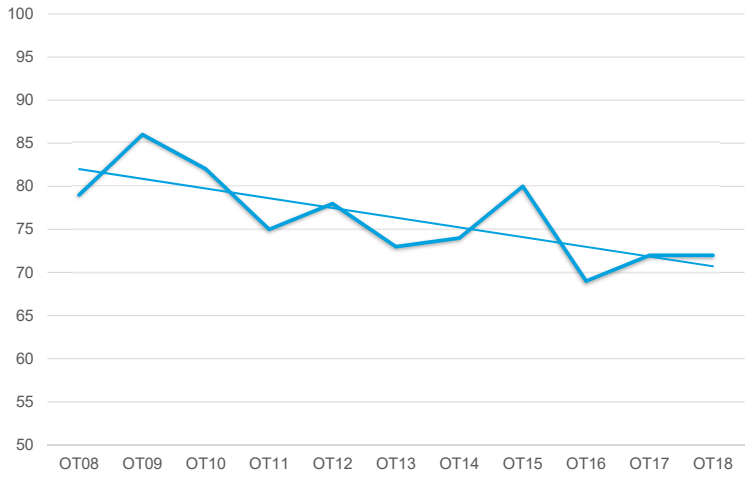
Steven J. Wells & Timothy J. Droske
Dorsey & Whitney

September 30, 2019

Statistics of OT 2018

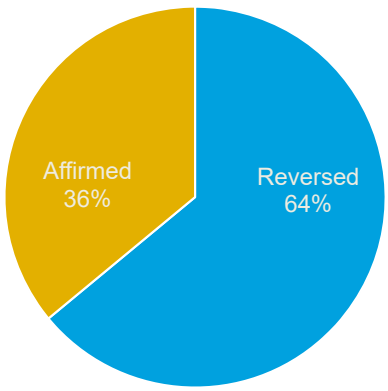
STATISTICS

Cases Decided



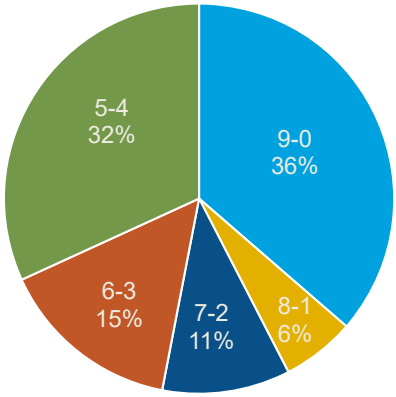
STATISTICS

Outcomes



STATISTICS

Vote Splits



STATISTICS

The Mix-and-Mingle Term

7 Cases

4 Cases

3 Cases

1 Case

1 Case

1 Case

STATISTICS

The Mix-and-Mingle Term, cont.

1 case

1 case

1 case

1 case

10 different majorities in 5-to-4 cases alone.

SUPERLATIVES

Most Likely to Be Swing Vote

SUPERLATIVES

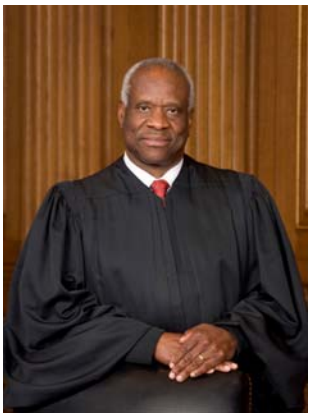
Most Often in the Majority

SUPERLATIVES

Most Likely to Agree

SUPERLATIVES

Most Majority Opinions Authored in 5 - 4 Cases



SUPERLATIVES

Most Unanimous Opinions

SUPERLATIVES

Most Dissents Written

SUPERLATIVES

Fewest Dissents Written

STATISTICS

Takeaways

- The conservatives control the Court, but voting alignments are less predictable than we'd expect.
- Justice Gorsuch: an emerging swing vote?
- Justice Roberts and Justice Kagan continue to be the Court's institutionalists.

Decisions of OT 2018

ADMINISTRATIVE LAW AND THE ENUMERATIONS CLAUSE

Department of Commerce v. New York

ADMINISTRATIVE LAW

Kisor v. Wilkie

OVERRULED PRECEDENT

Franchise Tax Board of Cal. v. Hyatt

ANTITRUST

Apple Inc. v. Pepper

PARTISAN GERRYMANDERING

Rucho v. Common Cause

FIRST AMENDMENT

American Legion v. American Humanist Association

ARBITRATION

Henry Schein Inc. v. Archer and White Sales Inc.

New Prime Inc. v. Oliveira

ARBITRATION

Lamps Plus Inc. v. Varela

COMMERCE CLAUSE & TWENTY-FIRST AMENDMENT

Tennessee Wine & Spirits Retailers Association v. Byrd

CRIMINAL LAW AND ASSET FORFEITURE

Timbs v. Indiana

FIRST AMENDMENT AND TRADEMARK

Iancu v. Brunetti

SECURITIES

Lorenzo v. SEC

Emulex v. Varjabedian

INDIAN LAW

Herrera v. Wyoming

Washington State Dept. of Licensing v. Cougar Den, Inc.

O.T. 19 Preview

INDIAN LAW

Sharp v. Murphy

LGBTQ+ RIGHTS AND EMPLOYMENT DISCRIMINATION

R.C. & G.R. Harris Funeral Homes Inc. v. EEOC

LGBTQ+ RIGHTS AND EMPLOYMENT DISCRIMINATION

Bostock v. Clayton County, Georgia

IMMIGRATION

Department of Homeland Security v. Regents of the University of California

SECOND AMENDMENT

NY State Rifle & Pistol Assoc. Inc. v. NYC

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Decisions of October Term 2019[1]

I. ABORTION

Box v. Planned Parenthood of Indiana and Kentucky, Inc., No. 18-483:

Indiana had petitioned the Court for certiorari over the Seventh Circuit's invalidation of laws relating to (1) the disposition of fetal remains by abortion providers; and (2) the knowing provision of sex-, race-, or disability-selective abortions by abortion providers.

In a *per curiam* opinion issued without oral argument, the Supreme Court reversed with respect to the invalidation of the fetal remains law, and denied review of the petition with respect to the second question concerning the selective abortion ban. The opinion held that Indiana's fetal remains law survived rational basis review, which the Court emphasized was the sole standard under which the law was challenged. The Court denied review as to the second question on the basis that no other circuit had yet considered the issue. Justice Sotomayor indicated she would have denied certiorari on both questions. Justice Thomas concurred, but wrote separately to address the selective abortion ban. Justice Ginsburg concurred in part and dissented in part, stating she would have denied Indiana's petition in its entirety and criticized the Court's summary reversal on the first issue.

II. ADMINISTRATIVE LAW

Department of Commerce v. New York, No. 18-966:

The Secretary of Commerce announced in a March 2018 memo that he was reinstating a question about citizenship on the 2020 census. In the memo, the Secretary claimed he was acting at the request of the Department of Justice, which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act. The memo stated that, after carefully considering different options, the Secretary had determined that "the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate." A number of States, the District of Columbia, counties, cities, and the U.S. Conference of Mayors challenged the Secretary's decision, as did a second group of non-governmental organizations that work with immigrant and migrant communities. The District Court agreed with the challengers, finding that the plaintiffs had standing to sue; that the Secretary's action was arbitrary and capricious; that it violated certain provisions of the Census Act; and that it was based on pretext. The Government appealed to the Second Circuit, and also petitioned the Supreme Court for immediate review, which asked the parties to also brief whether the Enumeration Clause provided an alternative basis to affirm.

[1] These case summaries are from Dorsey & Whitney's Supreme Court eUpdate, which is regularly-issued throughout the Supreme Court's term. **If you would like to subscribe to receive this eUpdate by email, please register and sign up at https://preferences.dorsey.com/login/login.aspx.**

The Supreme Court held, in an opinion by Chief Justice Roberts, that the District Court was warranted in remanding to the agency because the Secretary's decision rested on a pretextual basis. That part of the opinion was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court, however, rejected the District Court's other bases for finding against the Government and found that the Enumeration Clause does not provide a basis to set aside the Secretary's decision, with the Chief Justice's opinion joined on those parts by Justices Thomas, Alito, Gorsuch, and Kavanaugh. Justice Thomas, Justice Breyer, and Justice Alito each filed separate opinions concurring in part and dissenting in part that were joined by other members of the Court.

Gundy v. United States, No. 17-6086:

Congress enacted the Sex Offender Registration and Notification Act ("SORNA") to create a national system for sex offender registration, including registration requirements and criminal penalties for anyone who knowingly fails to register in accord with SORNA's requirements. Although the Act contains detailed "initial registration" requirements for those convicted after SORNA's enactment, for pre-Act offenders – those convicted of a sex offense before SORNA's enactment – the law provided that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders . . . ." 34 U.S.C. §20913(d). The Attorney General correspondingly issued a rule reiterating that SORNA applies to all pre-Act offenders. Petitioner Herman Gundy, a pre-Act offender, was convicted for failing to register, but argued that Congress unconstitutionally delegated legislative power in contravention of the nondelegation doctrine when authorizing the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. The District Court rejected that argument and the Second Circuit affirmed.

A fractured Supreme Court affirmed. Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, concluded that the delegation easily passes constitutional muster. Justice Alito concurred in the judgment, stating that he would support an effort by the majority of the Court to reconsider the Court's prior approach to the nondelegation doctrine, but with that not being the case here, could not say that the statute lacks a discernable standard that is adequate under the approach the Court has taken for many years. Justice Gorsuch dissented, joined by Chief Justice Roberts and Justice Thomas. Justice Kavanaugh did not participate.

Kisor v. Wilkie, No. 18-15:

Petitioner James Kisor is a Vietnam War veteran who sought disability benefits from the Department of Veterans Affairs ("VA"). His first request in 1982 was denied, but in 2006, he moved to reopen his claim. That second request was granted, but the VA only awarded benefits back to the date of the motion to reopen, rather than to the date of Kisor's first request. The Board of Veterans' Appeals affirmed based on its interpretation of an agency rule governing such claims. The Federal Circuit likewise affirmed, applying *Auer* deference (also called *Seminole Rock* deference), under which a court defers to what it deems to be the agency's reasonable interpretation of a genuinely ambiguous regulation.

The Supreme Court held that *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) are not overruled, yet vacated and remanded, holding that a "redo is necessary" because "the Federal Circuit jumped the gun in declaring the regulation ambiguous," and "assumed too fast that *Auer* deference should apply in the event of genuine ambiguity." Justice Kagan authored the Court's opinion, which was joined in full by Justices Ginsburg, Breyer, and Sotomayor, and joined in part by Chief Justice Roberts. Justice Gorsuch concurred in the judgment (*i.e.*, vacatur), criticizing *Auer*, and was joined in full or in part by Justices Thomas, Kavanaugh and Alito. Chief Justice Roberts filed an opinion concurring in part, to emphasize that the distance between the majority and Justice Gorsuch "is not as great as it may initially appear," and to emphasize that issues surrounding deference to agency interpretations of their own regulations are distinct from those related to deference to agency interpretations of statutes. Justice Kavanaugh, joined by Justice Alito, wrote an additional concurrence in the judgment agreeing with Justice Gorsuch that the *Auer* deference doctrine should be formally retired, while also agreeing with the two separate points made by Chief Justice Roberts in his concurrence.

III. ANTITRUST

Apple, Inc. v. Pepper, No. 17-204:

Apple's App Store is the only place iPhone users may lawfully buy apps. Although Apple sells the apps directly to iPhone users through the App Store, the apps themselves are generally created by independent app developers. The app developers are allowed to set the retail price for their app (so long as the sale price ends in $0.99), but must pay Apple a $99 annual membership fee and give Apple a 30% commission on every sale. Respondents are four iPhone users who brought a putative class action against Apple, alleging that Apple exercised monopoly power in the retail market for the sale of apps and has unlawfully used that monopoly power to force iPhone owners to pay Apple higher-than competitive prices for apps. The District Court dismissed the complaint, holding that because the app developers set the consumers' purchase price, the iPhone users were not "direct purchasers" from Apple as required to sue antitrust violators under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Ninth Circuit reversed.

The Supreme Court in a 5-4 opinion affirmed, holding that the plaintiffs purchased apps directly from Apple and therefore are direct purchasers under *Illinois Brick*. Justice Kavanaugh authored the majority opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

IV. ARBITRATION

Henry Schein, Inc. v. Archer & White Sales, Inc., No. 17-1272:

Under the Federal Arbitration Act ("FAA") and the Court's precedents, who decides arbitrability is a question of contract, and parties can agree that the arbitrator rather than the court will determine threshold arbitrability questions. Here, when respondent Archer & White sued Henry Schein in federal court, Henry Schein asked the District Court to refer the dispute to arbitration over Archer & White's objection that the parties' arbitration agreement did not apply. The parties also disagreed regarding who should decide the

arbitrability issue. The District Court took up the issue of arbitrability on its own and denied the motion to compel arbitration, relying on the Fifth Circuit's "wholly groundless" exception, whereby even when a contract delegates the arbitrability question to an arbitrator, the court can decide the arbitrability question itself if the argument that the arbitration agreement applies to the particular dispute is "wholly groundless." The Fifth Circuit affirmed.

The Supreme Court vacated that opinion, unanimously holding, in Justice Kavanaugh's first opinion, that the "wholly groundless" exception is inconsistent with the Federal Arbitration Act. Instead, when the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.

Lamps Plus, Inc. v. Varela, No. 17-988:

Respondent Frank Varela, an employee of petitioner Lamps Plus, brought a putative class action in federal court alleging claims stemming from the compromising of his tax information kept by the company as a result of a data hack. Lamps Plus moved to compel arbitration on an individual basis, relying on the parties' arbitration agreement. The District Court granted the motion, but found the arbitration could proceed on a class-wide basis. The Ninth Circuit affirmed, reasoning that the contract was ambiguous as to whether class arbitration was permitted, and followed California law requiring that ambiguity be construed against the drafter, Lamps Plus.

The Supreme Court reversed. After first affirming the Court's jurisdiction over the appeal, the Court held that under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary "contractual basis" for compelling class arbitration that the Court previously held was required in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

New Prime Inc. v. Oliveira, No. 17-340:

Respondent Dominic Oliveira works as a driver for petitioner New Prime, Inc., an interstate trucking company, pursuant to a contract that labels him as an independent contractor and also includes an arbitration clause. Oliveira brought a class action in federal court alleging New Prime treats its drivers as employees and fails to pay minimum wage. When New Prime sought to compel arbitration, Oliveira invoked the exception to arbitration under §1 of the Federal Arbitration Act, which excepts "contracts of employment" of certain transportation workers. The District Court and First Circuit agreed with Oliveira and rejected New Prime's arguments that the arbitrator should decide the §1 exception's applicability, and that the exception was limited only to employer-employee relationships.

The Supreme Court affirmed, holding 1) that a court should decide for itself whether §1's "contracts of employment" exclusion applies before ordering arbitration, and 2) that "contracts of employment" refers to any agreement to perform work, such that Oliveira's independent contractor requirement falls within §1's exception.

V. BANKRUPTCY AND DEBT COLLECTION

Mission Product Holdings, Inc. v. Tempnology, LLC, No. 17-1657:

In this bankruptcy-related case, Tempnology, LLC entered into an agreement with Mission Product Holdings, Inc., giving Mission a license to use Tempnology's Coolcore trademarks. Three years later, Tempnology filed a petition for Chapter 11 bankruptcy and sought to "reject" its licensing agreement under 11 U.S.C. §365(a) of the Bankruptcy Code. That section of the code enables a debtor to "reject any executory contract," and specifically provides that such a rejection "constitutes a breach of contract." The Bankruptcy Court, in approving the rejection, also held that this rejection revoked Mission's right to use the trademarks. The Bankruptcy Appellate Panel reversed, finding Mission could continue to use the trademarks. The First Circuit, in turn reversed that decision, reinstating the Bankruptcy Court's termination of Mission's license.

The Supreme Court reversed, holding that a rejection under Section 365 has the same effect as a breach of the contract outside bankruptcy; it breaches the contract but does not rescind it, and thus all the rights that would ordinarily survive a contract breach, including the trademark rights here, remain in place. The opinion was authored by Justice Kagan, with Justice Sotomayor filing a concurring opinion, and Justice Gorsuch dissenting.

Obduskey v. McCarthy v. Holthus LLP, No. 17-1307:

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692 *et seq.*, imposes a number of requirements upon "debt collector[s]." This includes prohibiting debt collectors from using or threatening violence, §1692d, making false, deceptive, or misleading representations, §1692e, and as relevant here, requiring that if a consumer disputes the amount of a debt, that debt collectors "cease collection" until they obtain verification of the debt and mail it to the debtor, §1692g(b). All of those requirements apply to those who fall under the general definition of a "debt collector" under the statute. §1692a(6). The Act also says, however, that "for the purposes of 1692f(6)," which has very limited prohibitions, "[the] term [debt collector] also includes any person . . . in any business the principle purpose of which is the enforcement of security interests." *Id*. This last definition includes businesses engaged in nothing more than nonjudicial foreclosure proceedings. The question posed by this case was whether a "debt collector" in only nonjudicial foreclosure proceedings was only subject to the narrow requirements of §1692f(6), or was also subject to the numerous other requirements detailed in the Act. Here, the District Court dismissed a homeowner's FDCPA suit against a law firm carrying out nonjudicial foreclosure proceedings on the basis it was not a "debt collector" under the broader requirements under the Act. The Tenth Circuit affirmed.

The Supreme Court also affirmed, holding that but for §1692f(6), those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the Act.

Taggart v. Lorenzen, No. 18-489:

Petitioner Bradley Taggart filed for bankruptcy under Chapter 7, under which insolvent debtors may discharge their debts by liquidating assets to pay creditors. Taggart

obtained a discharge order, which barred creditors from attempting to collect any debt covered by the order, simply citing to the relevant section in the Bankruptcy Code, 11 U.S.C. §727. Prior to filing bankruptcy, Taggart was involved in a breach of contract action with Sherwood Park Business Center in Oregon state court. After the discharge order was issued, the State Court entered judgment against Taggart, upon which Sherwood filed a petition seeking attorney's fees incurred after Taggart filed his bankruptcy petition. All parties agreed that those attorney's fees would be discharged unless the debtor (Taggart) "returned to the fray" after filing for bankruptcy. The State Court found Taggart had "returned to the fray" and was thus liable for attorney's fees, and the Bankruptcy Court agreed, but the District Court found Taggart had not returned to the fray. On remand, the Bankruptcy Court then held Sherwood in civil contempt, applying a standard akin to "strict scrutiny"; Sherwood had been aware of the discharge order and intended the actions which violated it. On appeal, the sanctions against Sherwood were vacated, with the Ninth Circuit concluding that civil contempt is precluded when the creditor has a good faith belief the discharge order does not apply, even if that belief is unreasonable.

The Supreme Court vacated and remanded, unanimously holding in an opinion by Justice Breyer that neither a strict scrutiny nor a good-faith belief standard is appropriate. Instead, a court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct, *i.e.*, there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

VI. CIVIL RIGHTS AND QUALIFIED IMMUNITY

Escondido v. Emmons, No. 17-1660:

A Section 1983 claim for excessive force was brought against two officers who stopped, took down, and handcuffed a man who exited a residence the officers were responding to for a domestic disturbance. The District Court rejected the claim, finding one officer did not use force at all, and finding the other was entitled to qualified immunity. The Ninth Circuit reversed as to both, summarily reasoning that "[t]he right to be free of excessive force was clearly established at the time of the events in question."

The Supreme Court reversed the judgment as to the officer who was not involved in the excessive force claim, and vacated and remanded as to the other officer, finding that the clearly established right must be defined with specificity, and that the Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances.

Knick v. Township of Scott, No. 17-647:

Petitioner Rose Mary Knick lives on a farm that includes a small family cemetery in Scott Township, Pennsylvania. After an officer notified Knick that she was violating a recently-passed Township ordinance by failing to open the cemetery to the public during the day, Knick filed a declaratory and injunctive action in state court alleging that the ordinance effected a taking of her property, but failed to also seek an inverse condemnation proceeding. When her state suit stalled, Knick filed a federal action under §1983 alleging

that the ordinance violated the Takings Clause of the Fifth Amendment. The District Court dismissed the claim under the precedent in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which held that a property owner whose property has been taken by a local government has not suffered a Fifth Amendment violation, and cannot bring a federal takings claim in federal court, until a state court has denied the owner's claim for just compensation under state law. The Third Circuit affirmed.

The Supreme Court vacated and remanded, holding that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of the Court's takings jurisprudence, and must be overruled. Instead, a property owner has suffered a violation of his or her Fifth Amendment rights when the government takes the owner's property without just compensation, and may bring his or her claim in federal court under §1983 at that time. Chief Justice Roberts authored the Court's opinion, joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. Justice Thomas also filed a concurring opinion. The remaining justices joined in a dissent by Justice Kagan.

McDonough v. Smith, No. 18-485:

Petitioner Edward McDonough brought a §1983 case against respondent Youel Smith, claiming that Smith had fabricated evidence and used it in pursuing criminal charges against McDonough. The statute of limitations on a §1983 claim is three years, and McDonough brought his suit just under the three-year mark from the date of his acquittal. The District Court dismissed the fabricated-evidence claim as untimely, and the Second Circuit affirmed, holding that the limitations period ran from when McDonough learned the evidence was false and used against him in criminal proceedings, and when he suffered a loss of liberty as a result – which had occurred more than three years before the complaint was filed, when McDonough was arrested and stood trial.

The Supreme Court reversed, holding that the statute of limitations period for the fabricated evidence §1983 claim began to run when the criminal proceedings against McDonough terminated in his favor, *i.e.*, when he was acquitted. Justice Sotomayor delivered the Court's opinion. Justice Thomas dissented, joined by Justices Kagan and Gorsuch.

Nieves v. Bartlett, No. 17-1174:

Respondent Russell Bartlett was arrested during a winter sports festival in Alaska by Sergeant Luis Nieves and Trooper Bryce Weight. Although the accounts vary, the incident began when Nieves was talking with some partygoers and Bartlett (while heavily intoxicated according to law enforcement) yelled at them not to speak to police. Nieves approached Bartlett, but by Nieves' account, left to avoid escalating the situation when Bartlett yelled at him to leave. Minutes later, when Bartlett saw Weight asking a minor whether he had been drinking, Bartlett stood between Weight and the minor and told Weight not to speak to the minor. Weight pushed Bartlett back (after Bartlett stepped towards him in an aggressive way, according to Weight), and when Nieves saw the confrontation, he arrested Bartlett, who was forced to the ground after being slow to comply with orders. Bartlett brought a Section 1983 action, alleging that the officers arrested him in retaliation for his speech, in violation of his First Amendment rights. The

District Court granted summary judgment to the officers on the basis that their probable cause to arrest Bartlett precluded his claim, but the Ninth Circuit reversed.

The Supreme Court reversed, holding that because police officers had probable cause to arrest Bartlett, his First Amendment retaliatory arrest claim fails as a matter of law. Chief Justice Roberts wrote the opinion, joined by Justices Breyer, Alito, Kagan, and Kavanaugh. Justice Thomas joined the majority opinion except as to one part, and wrote a separate concurrence. Justice Gorsuch and Justice Ginsburg each filed separate opinions concurring in part and dissenting in part. Justice Sotomayor dissented.

VII. CLASS ACTIONS

Frank v. Gaos, No. 17-961:

Respondent Paloma Gaos and two other named plaintiffs brought a class action against Google. According to the complaint, Google's transmission of users' search terms in referrer headers to the server that hosted the selected webpage violated the Stored Communications Act, 18 U.S.C. §2701 et seq. That Act prohibits "knowingly divulge[ing] to any person or entity the contents of a communication while in electronic storage by that service," §2702(a)(1), and also includes a private right action. After Google's pre-*Spokeo* standing challenges were rejected, Google entered into a class-wide settlement, where all of the funds would go to *cy pres* recipients, administrative costs, the named plaintiffs, and class counsel, and none would go to the absent class members. The District Court approved the settlement over objections by certain absent class members (the petitioners before the Supreme Court) to the *cy pres* relief. The Ninth Circuit affirmed.

In a *per curiam* decision, the Supreme Court vacated and remanded. The Court did not address the question as to whether *cy pres* settlements satisfy the requirement under Rule 23(e)(2) that class settlements be "fair, reasonable, and adequate." Instead, the Court agreed with the Solicitor General's position in an amicus brief that the lower courts should first address the named plaintiffs' standing in light of *Spokeo, Inc. v. Robins*, 578 U.S. __ (2016), in which the Court held that "Article III standing requires a concrete injury even in the context of a statutory violation."

Home Depot U.S.A., Inc. v. Jackson, No. 17-1471:

After Citibank, N.A., filed a debt-collection action in state court against respondent George Jackson for charges related to his Home Depot credit card, Jackson responded by also bringing third-party class-action claims against Home Depot and another party. Home Depot removed the suit to federal court, invoking both the general removal statute, 28 U.S.C. §1441(a), and the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1453(b). The District Court granted Jackson's motion to remand, and the Fourth Circuit affirmed.

The Supreme Court affirmed, holding that references to a "defendant" being able to remove a suit under both the general removal provision and CAFA apply only to the party sued by the original plaintiff, and neither provision allows a third party to remove. The majority opinion was authored by Justice Thomas and joined by Justices Ginsburg,

Breyer, Sotomayor, and Kagan. Justice Alito dissented, joined by Chief Justice Roberts, Justice Gorsuch, and Justice Kavanaugh

VIII. COMMERCE CLAUSE

Tennessee Wine and Spirits Retailers Assn. v. Thomas, No. 18-96:

The State of Tennessee has a number of laws imposing durational-residency requirements on individuals and businesses seeking to obtain or renew a license to operate a liquor store. Although the 21st Amendment to the Constitution specifically grants States authority with respect to the regulation of alcohol, the State Attorney General and Tennessee Alcoholic Beverage Commission ("TABC") refused to enforce these durational-residency requirements on the basis that they impermissibly discriminated against interstate commerce. But when respondents Tennessee Fine Wines and Spirits, LLC – a company doing business as Total Wines and owned by Maryland residents – filed for Tennessee licenses, an in-state trade association – petitioner Tennessee Wine and Spirits Retailers Association – filed a declaratory judgment action to settle the laws' constitutionality and to seek the laws' enforcement. The District Court found the requirements unconstitutional, and on the Association's appeal, the Sixth Circuit affirmed. The Association petitioned the Court only as to one of the State's more modest requirements – a two-year residency requirement for initial licenses.

The Supreme Court affirmed, holding that the two-year residency requirement – which blatantly favors the State's residents and has little relationship to public health and safety – violates the Commerce Clause and is not shielded by the 21st Amendment. Justice Alito authored the Court's opinion. Justice Gorsuch filed a dissent, joined by Justice Thomas.

IX. CONSERVATION

Sturgeon v. Frost, No. 17-949:

Petitioner John Sturgeon traveled by hovercraft along the Nation River in the Yukon-Charley Rivers National Preserve in Alaska to get to the location where he hunted moose. Federal park rangers told Sturgeon a generally-applicable Park Service regulation banned the use of hovercraft within national parks. Sturgeon then sought a preliminary injunction claiming that Congress had created an Alaska-specific exception to the Park Service's broad authority in the Alaska National Interest Lands Conservation Act ("ANILCA"), 94 Stat. 2371, 16 U.S.C. §3101 *et seq.*, whereby the Park Service could only regulate "public lands" in ANILCA, which generally speaking were lands actually owned by the federal government. According to Sturgeon, such "public lands" did not include the part of the river in which he operated his hovercraft. This case previously went before the Court, which in *Sturgeon v. Frost*, 577 U.S. __ (2016) rejected the Ninth Circuit's reasoning for rejecting Sturgeon's claim. On remand, however, the Ninth Circuit again found against Sturgeon, reasoning that the Nation River was public land under ANILCA.

The Supreme Court reversed, holding that the Nation River did not qualify as "public land" under ANILCA, and that the Park Service did not have authority to regulate Sturgeon's activities on that part of the river. The end result, the Court made clear, is that "Sturgeon can again rev up his hovercraft in search of moose."

Weyerhaeuser Co. v. United States Fish and Wildlife Serv., No. 17-71:

The Fish and Wildlife Service, which administers the Endangered Species Act on behalf of the Secretary of the Interior, listed the dusky gopher frog as an endangered species and designated "Unit 1" in St. Tammany Parish, Louisiana as "critical habitat" under 16 U.S.C. §1533(a)(3)(A)(i). Petitioner Weyerhaeuser and other landowners of Unit 1 challenged this designation in federal court. They argued Unit 1 – an area where the frog had once, but did not currently live – could not be critical habitat because the frog could not currently survive there. They also argued that the Secretary erred in failing to exclude their property, as the Secretary is authorized to do under the Act if the benefits of exclusion outweigh the benefits of designation. The District Court rejected these challenges, and the Fifth Circuit affirmed, holding that the "critical habitat" definition does not contain any habitability requirement, and that the Secretary's decision not to exclude Unit 1 was unreviewable.

The Supreme Court vacated and remanded, holding that "critical habitat" must be "habitat," but remanded for the Fifth Circuit to determine in the first instance whether habitat includes areas where the species could not currently survive. The Court also held that the Service's decision not to exclude the landowners' property from critical habitat was subject to judicial review as arbitrary, capricious, or an abuse of discretion, and remanded for the Fifth Circuit's consideration of that issue in the first instance.

X. CRIMINAL LAW

Flowers v. Mississippi, No. 17-9572:

Petitioner Curtis Flowers, who is black, has been tried six separate times before a Mississippi jury for the alleged murder of four people, each time by the same lead prosecutor. The convictions in the first two trials were reversed due to prosecutorial misconduct, the conviction in the third trial was reversed because the prosecutor had discriminated against black prospective jurors in jury selection, and the fourth and fifth trials resulted in hung juries. In the sixth trial, the State struck five of the six prospective jurors, and Flowers was convicted. On appeal, Flowers raised a challenge based on *Batson v. Kentucky*, 476 U.S. 79 (1986), the case in which the Court ruled that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial. A divided Mississippi Supreme Court affirmed the conviction.

The Supreme Court reversed, holding that all the relevant facts and circumstances taken together – including certain facts from the six trials combined – established that the trial court committed clear error in concluding that the State's peremptory strike of a particular black prospective juror was not motivated in substantial part by discriminatory intent. Justice Kavanaugh authored the Court's opinion. Justice Thomas dissented, joined in part by Justice Gorsuch.

Garza v. Idaho, No. 17-1026:

Gilberto Garza Jr. signed two plea agreements, each with clauses waiving his right to appeal. After sentencing, Garza repeatedly asked his trial counsel to file notices of appeal, but trial counsel failed to do so. Later, in post-conviction proceedings, Garza argued that his trial counsel was constitutionally ineffective because he did not file the notices of appeal. But the Idaho Supreme Court held that, given the appeal waivers, Garza needed to, but could not, show prejudice to support his ineffective assistance of counsel claim.

The Supreme Court reversed and remanded. Extending its holding in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court held that—even where a defendant has signed an appeal waiver—prejudice is presumed when an attorney's deficient performance costs the defendant an appeal that the defendant would have otherwise pursued.

Mont v. United States, No. 17-8995:

Petitioner Jason Mont was convicted in federal court for drug- and firearm-related felonies. He was sentenced to imprisonment, followed by 5 years of supervised release, which commenced on March 6, 2012 and was to end on March 6, 2017. Four years and three months into his supervised release, on June 1, 2016, Mont was arrested on state drug charges and has remained in state custody since that time. Mont pleaded guilty to the state crimes, and on March 21, 2017, was sentenced to six years state imprisonment, with the judge crediting the ten months Mont had already been incarcerated. Meanwhile, the Federal District Court issued a warrant on March 30, 2017 with respect to Mont's violation of the terms of his supervised release by virtue of these state convictions. Mont challenged the District Court's jurisdiction on the basis that his supervised release was set to expire on March 6, 2017. The District Court rejected that argument and ordered Mont to serve an additional 42 months imprisonment consecutive to the state sentence. The Sixth Circuit affirmed the court's jurisdiction, finding that Mont's supervised-release period was tolled while he was in pretrial detention in state custody.

The Supreme Court affirmed, concluding that under the statute governing supervised release, 18 U.S.C. §3624, if the court's later imposed sentence credits the period of pretrial detention as time served for the new offense, then the pretrial detention also tolls the supervised-release period. Justice Thomas wrote the majority opinion, joined by Chief Justice Roberts, and Justices Ginsburg, Alito, and Kavanaugh

Quarles v. United States, No. 17-778:

Under the Armed Career Criminal Act, 18 U.S.C. §924(e), a minimum 15-year prison sentence is mandated for a felon who unlawfully possesses a firearm and has three prior convictions for a "serious drug offense" or "violent felony," the latter of which includes "burglary." Here, petitioner Jamar Quarles argued that a 2002 Michigan conviction under that State's law for third-degree home invasion did not qualify as burglary under §924(e). According to Quarles, the Michigan statute was broader than the generic definition of burglary and thus did not qualify as a prior conviction under §924(e), because the Michigan statute encompassed situations where the defendant forms the intent to commit a crime at any time while unlawfully remaining in a dwelling, not at the exact

moment when the defendant is first unlawfully present in a dwelling, as is the case for generic remaining-in burglary under §924(e). The District Court and Sixth Circuit both rejected Quarles's argument.

The Supreme Court affirmed in a unanimous opinion by Justice Kavanaugh. The Court interpreted remaining-in burglary under §924(e) to occur when the defendant forms the intent to commit a crime at any time while unlawfully present in a building or structure, and thus held that the Michigan statute substantially corresponds to or is narrower than generic burglary for purposes of qualifying for enhanced sentencing under the Armed Career Criminal Act.

Stokeling v. United States, No. 17-5554:

Petitioner Denard Stokeling pleaded guilty to possessing a firearm and ammunition after having been convicted of a felony, in violation of 18 U.S.C. §922(g). The probation officer recommended that Stokeling be sentenced to a 15-year minimum as an armed career criminal under the Armed Career Criminal Act ("ACCA"), based on having three prior "violent felony" convictions. Stokeling objected that his 1997 Florida robbery conviction did not qualify because it lacked as an element "the use, attempted use, or threatened use of physical force against the person of another." Under Florida law, the "use of force" necessary to commit robbery requires "resistance by the victim that is overcome by the physical force of the offender." Although the District Court agreed with Stokeling, concluding that the fact he "grabbed [the victim] by the neck and tried to remove her necklaces" as she "held onto" them, did not justify the enhancement, the Eleventh Circuit reversed.

The Supreme Court affirmed, holding that a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of "physical force" within the meaning of the ACCA.

Timbs v. Indiana, No. 17-1091:

Petitioner Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The State also brought a suit for forfeiture of Timbs's Land Rover, claiming it had been used to transport heroin. The trial court denied the request, finding that because Timbs had purchased the vehicle for $42,000 – more than four times the maximum $10,000 fine assessable against him for the drug conviction – forfeiture would be grossly disproportionate and unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause only applied to federal, and not state impositions.

The Supreme Court vacated and remanded, holding that the Excessive Fines Clause is an incorporated protection applicable to the States by the Due Process Clause of the Fourteenth Amendment.

United States v. Davis, No. 18-431:

Respondents Maurice Davis and Andre Glover were convicted of multiple counts of robbery under the Hobbs Act, and also under 18 U.S.C. §924(c), which imposes

heightened criminal penalties for using, carrying, or possessing a firearm in connection with any federal "crime of violence or drug trafficking crime." Both defendants challenged their convictions on the basis that the residual clause in §924(c)(3)(B) was unconstitutionally vague. That residual clause defines a "crime of violence" as a felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Fifth Circuit, on remand from the Court to consider in light of *Sessions v. Dimaya*, 584 U.S. __ (2018), found the residual clause unconstitutionally vague.

The Supreme Court affirmed in part and vacated in part, holding that the residual clause in §924(c)(3)(B) is unconstitutionally vague, and remanding for determination as to what that holding means for respondents' sentences. Justice Gorsuch authored the Court's opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kavanaugh filed a dissenting opinion, which the remaining justices joined in full or in part.

United States v. Haymond, No. 17-1672:

Respondent Andre Haymond was convicted and sentenced in federal court for possessing child pornography. While on supervised release, the government discovered new child pornography images on Haymond's computers and cellphone, which the district court – applying a preponderance of the evidence standard – found made it more likely than not that Haymond knowingly downloaded and possessed 13 of the images. On sentencing, the district court reluctantly imposed an additional term of five years, being bound by 18 U.S.C. §3583(k), which requires that if a judge finds by a preponderance of the evidence that a defendant on supervised release possessed child pornography, the judge must impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the initial crime of conviction. The Tenth Circuit found that §3583(k) violated the Fifth and Sixth Amendments by imposing a new prison term with a new and higher mandatory minimum based on facts found by a judge by a preponderance of the evidence. It then vacated Haymond's new sentence and remanded for resentencing without regard to the provisions in §3583(k).

The Supreme Court vacated and remanded. Justice Gorsuch announced the judgment of the Court, in a plurality opinion joined by Justices Ginsburg, Sotomayor, and Kagan, which found that §3583(k) violates the Fifth and Sixth Amendments, but remanded to determine the remedy. Justice Breyer concurred in the judgment, agreeing that §3583(k) is unconstitutional, but declining to transplant the *Apprendi* line of cases to the supervised release context. Justice Alito dissented, joined by Chief Justice Roberts, and Justices Thomas and Kavanaugh.

United States v. Stitt, No. 17-765, and
United States v. Sims, No. 17-766:

Respondents in these two consolidated cases were both convicted in federal court of unlawfully possessing a firearm, and found by the district court in each case to have prior state burglary convictions requiring the imposition of a mandatory 15-year minimum prison term under the Armed Career Criminal Act. While "burglary" is a prior felony for

purposes of the Act, the Sixth and Eighth Circuits each held that the state law definitions here, which extended to burglary of structures or vehicles adapted or customarily used for overnight accommodation, did not fall within the Act.

The Supreme Court disagreed, holding that the statutory term "burglary" under the Armed Career Criminal Act includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation.

XI. DEATH PENALTY

Bucklew v. Precythe, No. 17-8151:

Petitioner Russell Bucklew is on death row in Missouri. He argued that the State's lethal injection protocol would be unconstitutional as applied to him because his unique medical condition would result in the State's lethal injection protocol causing him severe pain. Bucklew acknowledged that the Court's decisions in *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross*, 576 U.S. __ (2015), provided the controlling standard for facial challenges to a state's execution protocol, and required the identification of a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." Bucklew contended, however, that showing was not required in an as applied challenge, and that in any event, he had identified the use of nitrogen gas – which neither Missouri nor any other State had ever used to carry out an execution – as an available alternative method. The District Court and Eighth Circuit both rejected Bucklew's arguments.

The Supreme Court affirmed, holding that anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain – including an as-applied challenge – must meet the *Baze-Glossip* test, and that Bucklew had failed to present an alternative that could be "readily implemented," that it was "legitimate" for the State to choose not to be the first to experiment with a new method of execution, and that there was insufficient evidence showing that Bucklew's proposed alternative method would significantly reduce a substantial risk of severe pain.

Madison v. Alabama, No. 17-7505:

In the decades Vernon Madison has spent on death row, his mental condition has sharply deteriorated. He has been diagnosed with vascular dementia with attendant disorientation, confusion, and memory loss. Now he claims he can no longer remember the murder for which he has been sentenced to die. Madison petitioned for relief from his sentence, arguing that, under the Supreme Court's Eighth Amendment jurisprudence, he was no longer mentally competent for execution. Alabama state courts rejected this argument, stating that dementia and memory loss were not sufficient for a finding of mental incompetence.

The Supreme Court reversed and remanded for reconsideration of Madison's competency. The Court held that the determinative factor for competency is whether the prisoner rationally understands the reason why the State seeks his execution. So long as a prisoner's dementia (or any other mental illness) prevents this understanding, the Court held, that illness may support a stay of execution under the Eighth Amendment.

Moore v. Texas, No. 18-443:

Two years ago, the Supreme Court vacated and remanded the Texas Court of Criminal Appeals' decision that petitioner Bobby James Moore did not have an intellectual disability and was thus eligible for the death penalty. The Court's basis for vacating that decision was that, *inter alia*, the state appellate court had overemphasized Moore's perceived adaptive strengths rather than focusing on his adaptive deficits; improperly stressed Moore's improved behavior in a controlled-setting like prison; and relied on the State's *Briseno* factors, which lacked grounding in prevailing medical practice and relied on lay perceptions and stereotypes in assessing intellectual disability. On remand, the Texas appellate court again found that Moore had not demonstrated intellectual disability.

The Supreme Court, in a *per curiam* decision, found that the state appellate court's decision "rests upon analysis too much of which too closely resembles what we previously found improper." The Court further found that when that improper analysis was extricated from the opinion, there was not enough to warrant reaching a different conclusion than the trial court, namely that Moore has shown he is a person with intellectual disability and is thus ineligible for the death penalty

Shoop v. Hill, No. 18-56:

Respondent Danny Hill was convicted and sentenced to death in 1986 for the torture, rape, and murder of a 12-year old boy. His direct appeal and attempt to obtain postconviction relief in state and federal court were unsuccessful. Hill then filed a new petition in the Ohio courts contending his death sentence was illegal under *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the imposition of a death sentence on someone who is "mentally retarded" was unconstitutional. The state courts denied the claim. In 2010, Hill filed a new federal habeas petition seeking review of his *Atkins* claim. Although the District Court denied the petition, the Sixth Circuit reversed, finding that the state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In doing so, the Sixth Circuit relied repeatedly on the Court's subsequent decision in *Moore v. Texas*, 581 U.S. __ (2017), but reasoned that *Moore's* holding was "merely an application of what was clearly established by *Atkins*."

The Supreme Court vacated the decision, holding that the Court of Appeals' reliance on *Moore* was plainly improper, and remanded so that Hill's claim regarding intellectual disability can be evaluated based solely on the holdings of the Court that were clearly established at the relevant time.

XII. DOUBLE JEOPARDY CLAUSE

Gamble v. United States, No. 17-646:

The Double Jeopardy Clause of the Fifth Amendment provides that no person may be "twice put in jeopardy" "for the same offence." While that means that those acquitted or convicted of a particular "offence" cannot be tried a second time for the same "offence," it has long been held that under the "dual sovereignty" doctrine, a crime under one

sovereign's law is not the "same offence" as a crime under the laws of another sovereign, thus permitting both a State and the Federal Government to prosecute a defendant for the same conduct under their respective laws. Petitioner Terance Gamble challenged the dual-sovereignty doctrine when he was federally-prosecuted under the United States' felon-in-possession law, after already being convicted by Alabama under its State law for possessing a firearm as a felon. The Eleventh Circuit affirmed the federal conviction.

The Supreme Court, in a 7-2 decision, affirmed the dual sovereignty doctrine, and correspondingly, Gamble's conviction. The majority opinion was authored by Justice Alito. Justice Thomas also filed a concurring opinion. Justices Ginsburg and Gorsuch filed separate dissents.

XIII. DUE PROCESS CLAUSE

N.C. Dept. of Revenue v. Kimberley Rice Kaestner 1992 Family Trust, No. 18-457:

North Carolina law imposes a tax on any trust income that "is for the benefit" of a North Carolina resident. This case involved a trust originally formed by a New Yorker for the benefit of his children, which was governed by New York law and had a New York resident appointed as trustee, who had "absolute discretion" over distributions. One of the adult children, Kimberly Rice Kaestner, moved to North Carolina, where the trustee set up the respondent sub-trust. North Carolina taxed the trust $1.3 million, even though Kaestner received no distributions during the relevant years at issue. The trial court, North Carolina Court of Appeals, and North Carolina Supreme Court, all agreed that there was too tenuous a link between the State and the Trust, and that the State's taxation violated the Due Process Clause.

The Supreme Court affirmed, holding that the State's tax of a trust on the sole basis that the trust's beneficiaries live in the State – even if the beneficiaries received no income from the trust in the relevant tax year, had no right to demand income from the trust in that year, and could not count on ever receiving income from the trust – violates the Due Process Clause of the Fourteenth Amendment. Justice Sotomayor delivered the Court's unanimous opinion. Justice Alito also filed a concurring opinion, joined by Chief Justice Roberts and Justice Gorsuch.

XIV. EMPLOYMENT DISCRIMINATION

Fort Bend County v. Davis, No. 18-525:

In this Title VII claim, respondent Lois M. Davis brought suit against her former employer, Fort Bend County, for discrimination on account of religion and retaliation for reporting sexual harassment. The District Court granted summary judgment on both claims but the Fifth Circuit reversed the religion-based discrimination claim. It was only on remand that Fort Bend for the first time claimed that the District Court lacked jurisdiction to adjudicate the claim because Davis had failed to properly state a claim for religious discrimination in her Equal Employment Opportunity Commission ("EEOC") charge. Under the Act, a precondition to commencing a Title VII action in court is that a complainant must first file a charge with the EEOC. 42 U.S.C. §2000e-5(e)(1), (f)(1). The

District Court held that this statutory requirement was "jurisdictional" and thus nonforfeitable, and dismissed the religious discrimination claim. The Fifth Circuit reversed.

The Supreme Court affirmed, unanimously holding in an opinion by Justice Gorsuch, that Title VII's charge-filing instruction is not jurisdictional, but is instead properly ranked among the array of claim-processing rules that must be timely raised to come into play.

Mount Lemmon Fire Dist. v. Guido, No. 17-587:

The Age Discrimination in Employment Act of 1967 ("ADEA"), applies to "employers," which are defined in the Act as follows: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." 29 U.S.C. §630(b). When the Mount Lemmon Fire District, a political subdivision in Arizona, laid off its two oldest full-time firefighters when faced with budget issues, those firefighters brought suit under the ADEA. The district court granted summary judgment for the fire district, concluding that it was too small to qualify as an "employer" under the ADEA's 20 or more employees specification. The Ninth Circuit reversed, holding that the category for States or political subdivisions had no attendant numerosity limitation.

The Supreme Court affirmed, holding that "twenty or more employees" is confining language, but the confinement is tied to §630(b)'s first sentence, and does not limit the ADEA's governance of the employment practices of States and political subdivisions thereof.

XV. FALSE CLAIMS ACT

Cochise Consultancy, Inc. v. United States ex rel. Hunt, No. 18-315:

The False Claims Act imposes civil liability for false claims for payment or approval against the Government. Such suits can be brought by the Attorney General, or by a private person known as a relator "in the name of the Government" (a *qui tam* action) in cases in which the Government does not intervene. At issue here is the False Claims Act's statute of limitations for "[a] civil action under section 3730," which must be brought within the latter of 6 years after the statutory violation occurred, 31 U.S.C. §3731(b)(1); or within 3 years after the United States official charged with the responsibility to act knew or should have known the relevant facts, but not more than 10 years after the violation, §3731(b)(2). In this case, respondent Billy Joe Hunt filed a *qui tam* action on November 27, 2013 alleging that Cochise had defrauded the Government through early 2007 (more than six years before he filed the complaint). Hunt revealed his knowledge of the alleged fraud to the Government in a November 30, 2010 interview a little less than 3 years before he filed his complaint. The District Court dismissed the action, rejecting an interpretation of §3731(b)(2) as applying in non-intervened actions with the limitations period running from when the official of the United States knew or should have known the relevant facts. The Eleventh Circuit reversed.

The Supreme Court affirmed, unanimously holding that the limitations period in §3731(b)(2) is available in a relator-initiated suit in which the Government has declined to intervene, and that the private person who has initiated the *qui tam* suit cannot be deemed to be the official of the United States whose knowledge triggers §3731(b)(2)'s 3-year limitations period.

XVI. FEDERAL COURTS AND PROCEDURE

Nutraceutical Corp. v. Lambert, No. 17-1094:

In a class action against Nutraceutical Corporation, the district court decertified the class represented by Troy Lambert. Within 10 days of the decertification order, Lambert informed the district court of his intent to file a motion for reconsideration. Lambert filed his motion for reconsideration within 20 days of the decertification order, but this motion was denied. Lambert then filed a petition with the Ninth Circuit for permission to appeal the decertification order. Although Lambert did not file the petition to appeal within 14 days of the decertification order, as required by Federal Rule of Civil Procedure 23(f), the Ninth Circuit held that the Rule 23(f) deadline was tolled by Lambert informing the district court of his intent to file a motion for reconsideration. The Ninth Circuit therefore accepted Lambert's petition as timely.

The Supreme Court reversed and remanded, holding that Rule 23(f) is not subject to equitable tolling. Although Rule 23(f) is a "nonjurisdictional claim-processing rule," the Court reasoned, the text of the relevant rules leaves no flexibility for courts to toll Rule 23(f)'s deadline.

Yovino v. Rizo, No. 18-272:

Eleven days after Judge Stephen Reinhardt passed away, the Ninth Circuit filed an en banc decision listing Judge Reinhardt as the author of the majority opinion. The en banc panel would have been evenly divided without Judge Reinhardt's vote. The Supreme Court reversed and remanded.

The Supreme Court held that, because Judge Reinhardt was no longer a judge at the time the opinion was filed, the Ninth Circuit erred in counting him as a member of the majority.

XVII. FIRST AMENDMENT

American Legion v. American Humanist Assn., No. 17-1717:

Respondent, the American Humanist Association, brought a First Amendment Establishment Clause challenge to the Bladensburg Peace Cross, which was erected in 1925 on public land as a tribute to 49 soldiers in that area of Prince George's County, Maryland, who had given their lives in World War I. Respondent asked the court to order the relocation or demolition of the Cross, or at least the removal of its arms. The District Court rejected the Establishment Clause challenge, but the Fourth Circuit reversed and found the Cross unconstitutional.

The Supreme Court reversed, concluding that the Bladensburg Cross does not violate the Establishment Clause. That judgment was announced by Justice Alito, although the opinion was not fully joined by a majority of the Court, and Justices Breyer, Kavanaugh, Kagan, Thomas, and Gorsuch all filed separate concurring opinions. Justice Ginsburg dissented, joined by Justice Sotomayor.

Manhattan Community Access Corp. v. Halleck, No. 17-1702:

A private nonprofit corporation known as MNN operates the public access channels on Time Warner's cable system in Manhattan. Respondents DeeDee Halleck and Jesus Papoleto Melendez brought a suit against MNN, claiming that MNN violated their First Amendment free-speech rights when it restricted their access to MNN services and facilities after Halleck and Melendez produced – and MNN televised – a film critical of MNN. The District Court dismissed the suit on the basis that MNN is not a state actor subject to the First Amendment, but the Second Circuit reversed.

In a 5-4 decision, the Supreme Court reversed, concluding that under the state-action doctrine, operation of public access channels on a cable system is not a traditional, exclusive public function, and that a private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor. The Court thus held that MNN is not subject to First Amendment constraints on its editorial discretion. Justice Kavanaugh wrote the majority opinion, joined by Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch. Justice Sotomayor, joined by the remaining three justices, dissented.

XVIII. FOURTH AMENDMENT

Mitchell v. Wisconsin, No. 18-6210:

After a preliminary breath test administered by police showed that petitioner Gerald Mitchell had a blood-alcohol level three times the State's legal limit, Mitchell was arrested for operating a vehicle while intoxicated. While on the way to the police station for a more reliable breath test, Mitchell lost consciousness, and was instead taken to a hospital where a blood sample was taken while he was still unconscious. Mitchell moved to suppress the results of the blood test – which showed a blood-alcohol level above the legal limit – as violating his Fourth Amendment right against unreasonable seizures because it was conducted without a warrant. The trial court denied the challenge, and Mitchell was convicted. The Wisconsin Supreme Court affirmed.

A fractured Supreme Court vacated and remanded. Justice Alito, in an opinion joined by Chief Justice Roberts, Justice Breyer, and Justice Kavanaugh, found that when a driver is unconscious, the general rule is that the exigent-circumstances doctrine permits a blood test without a warrant, but vacated to allow Mitchell an opportunity to argue whether the facts here fell within a narrow exception to that general rule. Justice Thomas concurred in the judgment, favoring instead a per se rule that the natural metabolization of alcohol in the bloodstream creates an exigency once police have probable cause to believe the driver is drunk, regardless of whether the driver is conscious. Justice Sotomayor dissented, joined by Justices Ginsburg and Kagan. Justice Gorsuch also dissented, stating he would have dismissed the case as improvidently granted.

XIX. FREEDOM OF INFORMATION ACT

Food Marketing Institute v. Argus Leader Media, No. 18-481:

Respondent Argus Leader, a newspaper, filed a Freedom of Information Act ("FOIA") request for data collected by the United States Department of Agriculture as to the names and addresses of all retail stores that participate in the Supplemental Nutrition Assistance Program ("SNAP"), and for all corresponding store-level SNAP data over a multi-year period. The USDA refused to release the store-level SNAP data, invoking FOIA Exemption 4, which shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). Argus Leader sued, and the District Court ordered disclosure, applying precedent imposing a "competitive harm" test, whereby commercial information is not "confidential" under the Exemption unless its disclosure is "likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." Petitioner Food Marketing Institute intervened and appealed, but the Eighth Circuit affirmed, applying the same test.

The Supreme Court reversed and remanded, first finding that the trade association Food Marketing Institute had standing, and then holding that the "competitive harm" requirement was inconsistent with the terms of the statute, and that instead, at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of Exemption 4. Justice Gorsuch delivered the Court's opinion. Justice Breyer concurred in part and dissented in part, joined by Justices Ginsburg and Sotomayor.

XX. GERRYMANDERING

Rucho v. Common Cause, No. 18-422:

Voters and other plaintiffs in North Carolina challenged their State's congressional districting maps as unconstitutional partisan gerrymanders discriminating against Democrats, and plaintiffs in Maryland brought similar allegations that their State's districting discriminated against Republicans. The District Courts in both cases found for the plaintiffs.

The Supreme Court held that claims of excessive partisanship in districting are political questions that are nonjusticiable, and vacated and remanded with instructions to dismiss for lack of jurisdiction. The Court's opinion was authored by Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. Justice Kagan filed a dissent joined by the remaining justices.

Virginia House of Delegates v. Bethune-Hill, No. 18-281:

After Virginia redrew legislative districts for the State's Senate and House of Delegates, voters in twelve of the impacted House districts brought claims of racial gerrymandering against two State agencies and four election officials (collectively, the "State Defendants"). The Virginia House of Delegates and its Speaker (collectively, the

"House"), intervened as defendants and took the lead in defending the constitutionality of the redistricting. After multiple rounds of litigation, a three-judge District Court found racial gerrymandering in eleven of the districts, enjoined further elections until a new redistricting plan was adopted, and gave the General Assembly four months to adopt a new plan. The Virginia Attorney General then announced that the State would not pursue an appeal because it "would not be in the best interest of the Commonwealth or its citizens." The House, however, proceeded with an appeal to the Supreme Court, which the State Defendants moved to dismiss for lack of standing.

In a 5-4 decision, the Supreme Court held that the House lacks authority to displace Virginia's Attorney General as representative of the State, and that the House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part. Justice Ginsburg authored the majority opinion, which was joined by Justices Thomas, Sotomayor, Kagan, and Gorsuch. Justice Alito filed a dissent, joined by the remaining justices.

XXI. IMMIGRATION

Nielsen v. Preap, No. 16-1363:

Generally, aliens who are arrested on the basis that they are believed to be deportable may apply for release on bond or parole by proving at a hearing that they would not endanger others and would not flee if released from custody. *See* 8 U.S.C. §1226(a). Congress enacted an exception, however, under §1226(c), mandating that certain aliens thought to pose a heightened risk of engaging in further crime or failing to appear for their removal hearings be arrested and detained without a chance to apply for release on bond or parole. Under that statutory exception, §1226(c)(1) first sets out four categories of covered aliens based on having committed certain crimes or having some relationship to terrorist activity. That first paragraph also provides that the Secretary of Homeland Security "shall take into custody" any such alien "when the alien is released." The second paragraph, §1226(c)(2), then provides that the Secretary can only release "an alien described in paragraph (1)" pending a decision on removal under one circumstance that is inapplicable here. The respondents in this case claimed they were entitled to a bond hearing because, although they fell within the four categories of aliens covered by §1226(c)(1), they were not immediately taken into custody "when [they were] released." They argued they were thus not "an alien described in paragraph (1)," and could not be detained under §1226(c)'s exception. The District Court ruled for respondents, and the Ninth Circuit affirmed.

The Supreme Court reversed, concluding that the Ninth Circuit's interpretation of §1226(c) is contrary to the plain text and structure of the statute

Rehaif v. United States, No. 17-9560:

Federal law provides that "[i]t shall be unlawful" for certain individuals to possess firearms, including aliens who are "illegally or unlawfully in the United States." 18 U.S.C. §922(g). Another provision requires a fine or up to 10 years imprisonment for anyone who "knowingly violates" the first provision. 18 U.S.C. §924(a)(2). Petitioner Hamid Rehaif entered the United States on a nonimmigrant student visa, but was dismissed

from the university he was attending for poor grades, and told his "immigration status" would be terminated if he did not transfer to a different university or leave the country. When the Government learned that Rehaif had, after his dismissal, shot two firearms at a firing range, it prosecuted him for possessing firearms as an alien unlawfully in the United States under §922(g) and §924(a)(2). The judge instructed the jury that the Government did not need to prove that Rehaif "knew that he was illegally or unlawfully in the United States." Rehaif was convicted, sentenced to 18 months' imprisonment, and the Eleventh Circuit affirmed.

The Supreme Court reversed, holding the word "knowingly" in §924(a)(2) applies both to the defendant's conduct and to the defendant's status, such that the Government must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it. Justice Breyer delivered the Court's opinion. Justice Alito filed a dissent, which Justice Thomas joined.

XXII. IMMUNITIES

Franchise Tax Bd. of Cal. v. Hyatt, No. 17-1229:

Respondent Gilbert Hyatt, a long-time California resident, earned substantial income from a patent. When Hyatt filed his tax returns listing Nevada as his primary place of residence (after renting an apartment, registering to vote, opening a bank account, and acquiring a driver's license in Nevada), the Franchise Tax Board of California ("Board") was suspicious Hyatt's move was a sham to take advantage of the fact Nevada did not collect personal income tax. Hyatt sued the Board in Nevada state court, claiming it had committed torts in its audit of him. The Court previously granted review of this case twice, first holding that under the Full Faith and Credit Clause Nevada could apply its own immunity law to the case rather than California's, and the second time holding that the Full Faith and Credit Clause also required the Nevada court to grant the Board the same immunity Nevada agencies enjoy, including a cap on damages. This third time, the Court granted review to decide whether *Nevada v. Hall*, 440 U.S. 410 (1979) – which held that the Constitution does not bar private suits against a State in the courts of another State – should be overruled.

The Supreme Court, in a 5-4 decision, found that *Hall* is contrary to the Constitution's design and the understanding of sovereign immunity shared by the States that ratified the Constitution, and that *stare decisis* did not compel continued adherence to that decision. The Court therefore overruled *Hall* and held that States retain their sovereign immunity from private suits in the courts of other States. Justice Thomas authored the majority opinion, joined by Chief Justice Roberts, and Justices Alito, Gorsuch, and Kavanaugh.

Jam v. International Finance Corporation, No. 17-1011:

The International Finance Corporation is a U.S.-based international development bank of which 184 countries are members. Plaintiffs sued the IFC for damages and injunctive relief related to the construction of a power plant which the IFC financed in India. The D.C. Circuit, however, held that the IFC was absolutely immune from suit under the International Organizations Immunities Act of 1945 ("the Act").

The Supreme Court reversed and remanded. The Court held that, under the Act, international organizations have the same immunities as those enjoyed by foreign governments under the Foreign Sovereign Immunities Act. And because foreign governments do not enjoy absolute immunity under the FSIA, neither do international organizations.

Republic of Sudan v. Harrison, No. 16-1094:

Under the Foreign Sovereign Immunities Act ("FSIA"), a foreign state may be served by means of mailing that is "addressed and dispatched . . . to the head of foreign affairs of the foreign state concerned." 28 U.S.C. §1608(a)(3). Respondents, who are victims (and their family members) of the USS *Cole* bombing in Yemen by al Qaeda, sued the Republic of Sudan alleging that it provided material support to al Qaeda. The complaint and other required materials in the service packet were mailed to Sudan's Minister of Foreign Affairs, addressed to the Sudan Embassy in Washington DC. Sudan failed to appear, a default judgment was entered by the District Court for the District of Columbia, and respondents then sought to enforce the judgment in federal court in New York. Sudan then made an appearance arguing lack of personal jurisdiction based on improper service. The Second Circuit rejected the argument that §1608(a)(3) required service to the foreign minister's principal office in the capital of Sudan.

The Supreme Court reversed, holding that §1608(a)(3) requires that a mailing be sent directly to the foreign minister's office in the minister's home country.

XXIII. INDIAN LAW

Herrera v. Wyoming, No. 17-532:

Petitioner Clayvin Herrera is a member of the Crow Tribe who was hunting a group of elk and pursued them past the boundary of the Crow Reservation in Montana into the Bighorn National Forest in Wyoming. Herrera was convicted by the State of Wyoming for taking elk off-season and without a state hunting license, over his objections that he had a protected right to hunt under the 1868 Treaty between the Crow Tribe and the United States. In that 1868 Treaty, the United States promised that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists . . . on the borders of the hunting districts." Wyoming's appellate court likewise rejected Herrera's argument, following the Supreme Court's 1896 decision in *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Race Horse*, the Court had concluded Wyoming's admission to the United States extinguished a different treaty with the same language – reasoning later repudiated by the Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The Wyoming appellate court also alternatively concluded that the Tenth Circuit's prior decision holding that the 1868 Treaty's hunting rights expired when Wyoming became a State in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), had issue-preclusive effect against Herrera as a member of the Crow Tribe, which was a party to that suit.

The Supreme Court vacated and remanded, following *Mille Lacs* in holding that the hunting rights under the 1868 Treaty did not expire when Wyoming became a State;

finding that the Tenth Circuit's decision was not of preclusive effect; and further holding that Bighorn National Forest did not became categorically "occupied" within the meaning of the Treaty when the national forest was created. Justice Sotomayor authored the majority opinion, joined by Justices Ginsburg, Breyer, Kagan, and Gorsuch. The other four justices dissented.

Washington State Dept. of Licensing v. Cougar Den, Inc., No. 16-1498:

The State of Washington has a statute that taxes "motor vehicle fuel importer[s]" who bring fuel into the State by "ground transportation," which includes "railcar, trailer, [or] truck." Wash. Rev. Code §§82.36.010(4), (12), (16) (2012). The State tried to enforce this tax against respondent Cougar Den, Inc., a wholesale fuel importer owned by a member of the Yakama Nation, which buys fuel in Oregon and transports the fuel over public highways to the Yakama Reservation, where it is sold to Yakama-owned retail gas stations. Cougar Den challenged the assessment on the basis that it was pre-empted by the Yakama Nation's 1855 treaty with the United States, which reserved for the Yakamas "the right, in common with citizens of the United States, to travel upon all public highways." A Washington Superior Court, as well as the Washington Supreme Court, agreed that the tax was pre-empted.

A fractured Supreme Court affirmed, concluding that the 1855 treaty forbids the State of Washington to impose its fuel tax upon fuel importers that are members of the Yakama Nation.

XXIV. MARITIME

Air & Liquid Systems Corp. v. DeVries, No. 17-1104:

In this maritime tort case, respondents Kenneth McAfee and John DeVries brought negligent failure to warn claims against petitioner Air & Liquid Systems Corp. and others based on their exposure to asbestos when aboard Navy ships. The manufacturers produced equipment for Navy ships that required asbestos insulation or parts to function as intended, but the manufacturers delivered the equipment without asbestos, which the Navy later added. The district court granted summary judgment to the manufacturers, agreeing with their "bare-metal defense" that they should not be liable for harm caused by later-added third-party parts. The Third Circuit vacated and remanded, based on a foreseeability approach.

The Supreme Court affirmed that the District Court should reconsider summary judgment, holding that in the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger.

Dutra Group v. Batterton, No. 18-266:

Respondent Christopher Batterton was a deckhand on a boat owned and operated by the Dutra Group when his hand was injured after a hatch blew open. Batterton brought a

maritime action against Dutra, including a claim for unseaworthiness for which he sought general and punitive damages. The District Court denied Dutra's motion to strike Batterton's claim for punitive damages, and the Fifth Circuit affirmed, finding that punitive damages are available for unseaworthiness claims.

The Supreme Court reversed, concluding that because there is no historical basis for allowing punitive damages in maritime unseaworthiness actions, and in order to promote uniformity with the way courts have applied parallel statutory causes of action, punitive damages remain unavailable in unseaworthiness actions. Justice Alito issued the Court's opinion. Justice Ginsburg dissented, joined by Justices Breyer and Sotomayor

XXV. MEDICARE

Azar v. Allina Health Services, No. 17-1484:

Congress has passed a law specific to Medicare, requiring that the government provide the public with advance notice and the opportunity to comment on any "rule, requirement, or other statement of policy" that "establishes or changes a substantive legal standard governing . . . the payment of services." 42 U.S.C. §1395hh(a)(2). In 2014, the government posted on its website a new policy that, according to the Court, "dramatically—and retroactively—reduced payments to hospitals serving low-income patients," and without the opportunity for notice-and-comment. Allina Health Services and other hospitals that provided care to low-income Medicare patients in 2012 challenged the government's failure to follow its notice-and-comment obligations. The District Court found for the government, but the D.C. Circuit reversed and found for the hospitals.

The Supreme Court affirmed, holding that the government had failed to advance any argument as to why it could evade its statutory notice-and-comment obligations when establishing or changing the "gap"-filling policy at issue here. Justice Gorsuch authored the majority opinion. Justice Breyer dissented, and Justice Kavanaugh did not participate in the case.

XXVI. PATENTS

Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc., No. 17-1229:

Every patent statute over the past two centuries has included an "on-sale" bar, which as a general matter precludes a person from obtaining a patent on an invention that was "on sale" before the effective filing date of the patent application. In 2011, Congress enacted the Leahy-Smith America Invents Act ("AIA"), which, *inter alia*, bars a person from receiving a patent on an invention that was "in public use, on sale, or otherwise available to the public before the effective date of the claimed invention." 35 U.S.C. §102(a)(1). The predecessor version of the law was similar in precluding a patent on an invention that was "in public use or on sale in this country, more than one year prior to the date of application for patent in the United States," but did not include the "or otherwise available to the public" language in the AIA. *See* 35 U.S.C. §102(b) (2006 ed.). Here, petitioner Helsinn Healthcare sued two Teva Pharmaceutical entities for patent infringement regarding one of its pharmaceutical products. Teva asserted the on-

sale bar under the AIA as a defense, based on two agreements Helsinn entered into with another company to distribute, promote, and market its product in the United States, both of which required the other company to keep any propriety information confidential. The District Court concluded that the on-sale bar did not apply here, because under the AIA, an invention is not "on sale" unless the sale or offer in question made the claimed invention available to the public. The Federal Circuit reversed, holding that so long as the sale itself was publicly disclosed, the on-sale bar applied.

The Supreme Court affirmed, unanimously holding that the reenactment of the phrase "on sale" in the AIA did not alter its pre-AIA meaning that an invention was "on sale" when it was the subject of a commercial offer for sale and ready for patenting, and thus, a commercial sale to a third party who is required to keep the invention confidential may place the invention "on sale" under the AIA.

Return Mail, Inc. v. Postal Service, No. 17-1594:

The Patent Trial and Appeal Board was created by Congress in the Leahy-Smith America Invents Act of 2011 ("AIA"), 35 U.S.C. §100 *et seq*. The AIA sets forth three new types of administrative proceedings by which a "person" other than the patent owner can challenge the validity of a patent before the Board after the patent has issued. Here, the United States Postal Service initiated one of these types of administrative review proceedings before the Board, challenging the validity of a patent owned by Return Mail, Inc. The Board found that the subject matter of Return Mail's patent claims was ineligible for patenting. The Federal Circuit affirmed, also finding that the Federal Government is a "person" eligible to petition for the type of Board review under the AIA that the Postal Service sought here.

The Supreme Court reversed, holding that a federal agency is not a "person" who may petition for post-issuance review under the AIA. Justice Sotomayor delivered the opinion of the Court, with Justices Breyer, Ginsburg, and Kagan dissenting.

XXVII. PRE-EMPTION / FEDERAL–STATE RELATIONS

Dawson v. Steager, No. 17-419:

Petitioner James Dawson is a West Virginia resident who retired from the U.S. Marshals Service. West Virginia law exempts from state taxation the pension benefits of certain former state law enforcement employees, but does not afford the same exemption to former federal employees. Dawson brought suit alleging that the West Virginia statute violated the inter-governmental tax immunity doctrine codified at 4 U.S.C. §111, under which the United States has only consented to state taxation if the "taxation does not discriminate against the officer or employee because of the source of the pay or compensation." The West Virginia trial court found that there were no significant differences between Dawson's powers and duties as a U.S. Marshall and those of the state and local law enforcement officers West Virginia exempted, and that the West Virginia law was prohibited under §111. The West Virginia Supreme Court of Appeals reversed, stressing that few state employees receive the tax break and that its intent was not to harm federal retirees.

The Supreme Court unanimously reversed, holding that a State violates §111 when it treats retired state employees more favorably than retired federal employees and no significant differences between the two classes justify the differential treatment.

Merck Sharp & Dohme Corp. v. Albrecht, No. 17-290:

In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Supreme Court held that "clear evidence" that the Food and Drug Administration ("FDA") would not have approved a change to a drug's label pre-empts a state law claim that a drug manufacturer failed to warn consumers of risks associated with the drug. Here, separate actions were brought by more than 500 individuals who took Merck's drug Fosamax, a drug that treats and prevents osteoporosis, but also may increase the risk of "atypical femoral fractures" – a type of fracture affecting the thigh bone. When the FDA first approved Fosamax in 1995, the label did not warn of atypical femoral fractures, but as stronger evidence developed, the FDA ordered Merck to include a warning on its label in 2011. The plaintiffs here brought state law failure to warn claims related to atypical femoral fractures they suffered between 1999 and 2010. Merck argued the claim was pre-empted, specifically pointing to the FDA's rejection of Merck's attempt in 2008 to include a more general warning regarding the risk of "stress fractures." The District Court found the claim pre-empted, but the Third Circuit vacated and remanded.

The Supreme Court in turn vacated and remanded, holding that this pre-emption issue is for a judge to decide, rather than a jury, and that the "clear evidence" standard in *Wyeth* requires evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning. Justice Breyer issued the majority opinion, joined by Justices Thomas, Ginsburg, Sotomayor, Kagan, and Gorsuch. Justice Alito, Chief Justice Roberts, and Justice Kavanaugh concurred in the judgment.

Parker Drilling Management Services, Ltd. v. Newton, No. 18-389:

Petitioner Parker Drilling Management Services operates drilling platforms off the coast of California. These platforms are subject to the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1331, which provides that all law on the Outer Continental Shelf ("OCS") is federal law, administered by federal officials. Under the OCSLA, States are denied any interest in or jurisdiction over the OCS, and the adjacent State's laws are deemed to be federal law "[t]o the extent that they are applicable and not inconsistent with" other federal law. 43 U.S.C. §1333(a)(2)(A). Here, respondent Brian Newton worked on Parker's platforms – where he was not paid for his standby time -- and filed a class action alleging violations of a number of California wage-and-hour laws and related state-law claims. The District Court applied a rule that under the OCSLA, "state law only applies to the extent it is necessary to fill a significant void or gap in federal law," and determined that because of the comprehensive nature of the Fair Labor Standards Act, there was no place for Newton's state law claims. The Ninth Circuit vacated and remanded, finding state law is "applicable" under the OCSLA so long as it "pertains to the subject matter at hand," and is "not inconsistent with existing federal law" so long as they are not "mutually incompatible, incongruous, or inharmonious." Under that standard, the Ninth Circuit found that Newton's claims could survive.

The Supreme Court vacated and remanded in a unanimous opinion by Justice Thomas, holding that where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the Outer Continental Shelf.

Virginia Uranium, Inc. v. Warren, No. 16-1275:

Petitioner Virginia Uranium sought to mine for uranium in the Commonwealth of Virginia, but Virginia State law flatly prohibits that type of mining. The company thus brought a lawsuit in federal court, claiming that the federal Atomic Energy Act ("AEA") – which gives significant authority to the Nuclear Regulatory Commission – preempted Virginia's law. The District Court and Fourth Circuit both rejected Virginia Uranium's claim, finding that despite the considerable authority Congress gave to the Nuclear Regulatory Commission, there was no indication Congress intended to preempt States' traditional power to regulate mining on private lands within their borders.

A fractured Supreme Court affirmed. Justice Gorsuch, joined by Justices Thomas and Kavanaugh, concluded that the AEA does not preempt Virginia's law banning uranium mining. Justice Ginsburg, joined by Justices Sotomayor and Kagan, concurred in the judgment, agreeing that Virginia's ban is not preempted, but finding Justice Gorsuch's opinion "sweeps well beyond the confines of this case." Chief Justice Roberts, joined by Justices Breyer and Alito, dissented.

XXVIII. RAILROAD RETIREMENT TAX ACT

BNSF Railway Co. v. Loos, No. 17-1042:

Michael Loos, an employee of BNSF Railway Co., was injured while working in BNSF's railyard. In a suit against BNSF, a jury awarded Loos, among other damages, $30,000 for wages lost during the time Loos was unable to work because of the injury. BNSF argued that the lost-wages award was "compensation" under the Railroad Retirement Tax Act and that BNSF must therefore withhold $3,765 to cover Loos's share of the taxes under the Act. The district court and the Eighth Circuit rejected BNSF's argument.

The Supreme Court reversed and remanded. The Court held that taxable "compensation" under the Act includes lost-wages awards, even though an employee did not render services for the lost-wages award.

XXIX. SECURITIES

Lorenzo v. SEC, No. 17-1077:

The Securities and Exchange Commission charged petitioner Francis Lorenzo, an investment banker, with violations of Securities and Exchange Commission Rule 10b-5 and other related provisions. The basis for the charge was two emails that Lorenzo had sent to prospective investors in the company Waste2Energy describing a $15 million debenture offering. Those emails – which Lorenzo signed, but sent at the direction of his boss, who had supplied and approved the emails' content – identified Waste2Energy as having $10 million in confirmed assets, despite the company having revealed (and

Lorenzo knowing) its assets were actually worth less than $400,000. The Commission found Lorenzo had violated Rule 10b-5. On appeal, the D.C. Circuit found that Lorenzo could not be held liable under subsection (b) of Rule 10b-5, under which it is unlawful "[t]o make any untrue statement of a material fact." Relying on *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), the D.C. Circuit held that Lorenzo's boss, not Lorenzo himself, had been the one to "make" the untrue statement. The D.C. Circuit, however, sustained the Commission's finding that Lorenzo, by knowingly disseminating the false information, had violated the other subsections of Rule 10b-5, which make it unlawful to "employ any device, scheme, or artifice to defraud," subsection (a), or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit," subsection (c).

The Supreme Court affirmed, holding that dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5, as well as relevant statutory provisions, even if the disseminator did not "make" the statements and consequently falls outside of subsection (b) of the Rule.

XXX. SOCIAL SECURITY

Biestek v. Berryhill, No. 17-1184:

Petitioner Michael Biestek, a former construction laborer, applied for social security disability benefits after he developed a degenerative disc disease and other ailments. An Administrative Law Judge ("ALJ") was assigned to hold a hearing to determine whether Biestek could successfully transition to less physically demanding work. The Social Security Administration relied on an expert who testified to the availability of other jobs in the economy, based largely on private market-survey data. But when Biestek requested that the expert turn over those surveys, the expert refused. The ALJ denied Biestek's application, basing the conclusion on the expert's testimony. While an agency's factual findings in such a proceeding are "conclusive" in judicial review so long as they are supported by "substantial evidence," 42 U.S.C. §405(g), Biestek argued on appeal that the expert's testimony could not be deemed "substantial evidence" given that the expert refused to provide the underlying data relied upon when specifically requested. The District Court rejected that argument, and the Sixth Circuit affirmed.

The Supreme Court likewise affirmed, holding that a vocational expert's refusal to provide private market-survey data during a Social Security disability benefits hearing upon the applicant's request does not categorically preclude the testimony from counting as "substantial evidence" in federal court under 42 U.S.C. §405(g).

Culbertson v. Berryhill, No. 17-773:

Attorneys who represent Social Security claimants before the Social Security Administration and a reviewing court have their fees regulated by the Social Security Act. There are certain fee caps applicable under 42 U.S.C. §406(a) that apply to representation in administrative proceedings. Section 406(b), in turn, which is titled "Fees for representation before court," limits fees to no more than 25% of past-due benefits. Here, the District Court and Eleventh Circuit held that the 25% limit under

§406(b) was an aggregate limit that applied to the total fees awarded under both §§406(a) and (b).

The Supreme Court reversed and remanded, holding that because §406(b) by its own terms imposes a 25% cap on fees only for representation before a court, and §406(a) has separate caps on fees for representation before the agency, the statute does not impose a 25% cap on aggregate fees.

Smith v. Berryhill, No. 17-1606:

The Social Security Act permits judicial review only of "any final decision of the [agency] made after a hearing." 42 U.S.C. §405(g). This normally requires claimants to first seek an initial decision as to their eligibility; second, seek reconsideration; third, request a hearing by an administrative law judge ("ALJ"); and fourth, seek review by the Appeals Council, before being able to pursue judicial review in federal district court. Here, petitioner Ricky Lee Smith proceeded through the first three steps, but the Appeals Council dismissed Smith's request for review as being untimely filed, and without good cause for missing the deadline. When Smith sought judicial review, the District Court held it lacked jurisdiction, and the Sixth Circuit affirmed.

The Supreme Court unanimously reversed in an opinion by Justice Sotomayor, holding that where the Social Security Administration's Appeals Council has dismissed a request for review as untimely after a claimant has obtained a hearing from an ALJ on the merits, that dismissal qualifies as a "final decision" within the meaning of §405(g).

XXXI. TELECOMMUNICATIONS

PDR Network, LLC v. Carlton Harris Chiropractic, Inc., No. 17-1705:

Petitioner PDR produces the *Physicians' Desk Reference*, which is distributed to health care providers for free, and instead makes money by charging pharmaceutical companies that wish to include their drugs in the *Reference*. PDR advertised its new e-book version of the *Reference* by sending health care providers faxes saying they could reserve a free copy online. Respondent Carlton & Harris Chiropractic received one of the faxes and brought a putative class action under the Telephone Consumer Protection Act ("TCPA"), seeking statutory damages for what it claimed was an "unsolicited advertisement" prohibited by the Act. The TCPA's text was silent as to whether this prohibition included goods offered for free, but gave the Federal Communications Commission ("FCC") authority to prescribe regulations. And in a 2006 Order, the FCC stated that the term "unsolicited advertisement" includes faxes that "promote goods or services even at no cost . . . ." The District Court, however, found in PDR's favor that the fax was not an "unsolicited advertisement," despite recognizing that the FCC Order might be read to indicate the contrary, and that the Hobbs Act gave appellate courts, rather than district courts, "exclusive jurisdiction" to "determine the validity" of certain FCC "final orders." *See* 28 U.S.C. §2342(1). The Fourth Circuit vacated that decision, holding that the Hobbs Act required the District Court to apply the interpretation in the FCC Order.

The Supreme Court vacated and remanded, concluding that whether district courts were bound to follow the FCC Order may depend on two preliminary questions the Court of Appeals should first consider: (1) whether the Order is the equivalent of a legislative rule, which has the force and effect of law, or an interpretative rule, which does not; and (2) whether petitioners had a "prior" and "adequate" opportunity to seek judicial review of the Order. Justice Breyer authored the Court's opinion, joined by Chief Justice Roberts, and Justices Ginsburg, Sotomayor, and Kagan. The remaining justices concurred in the judgment.

XXXII. TRADEMARK AND COPYRIGHT

Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, No. 17-571:

Under §411(a) of the Copyright Act, a party generally cannot bring a civil action for copyright infringement until "registration of the copyright claim has been made." In this case, Fourth Estate Benefit Corp., a news organization, filed applications to register its copyright for several news articles. Before the Register of Copyrights acted on those applications, however, Fourth Estate filed an infringement suit against Wall-Street.com, LLC, for displaying the articles. The district court dismissed Fourth Estate's complaint as premature because the Register had not acted on the copyright applications, and the Eleventh Circuit, in conflict with other circuits, upheld that dismissal.

The Supreme Court affirmed. The Court held that, under §411(a), registration "has been made" when the Register acts on an application—not when an application has merely been filed.

Iancu v. Brunetti, No. 18-302:

Respondent Erik Brunetti founded a clothing line that uses as its trademark four letters that though spelled differently, when read aloud would be commonly pronounced the same as a swear word. When Brunetti tried to register his mark with the U.S. Patent and Trademark Office ("PTO), the application was denied under a provision of the Lanham Act that prohibits the registration of trademarks that "[c]onsist[] of or comprise[] immoral[] or scandalous matter." 15 U.S.C. §1052(a). The PTO Board stated that the mark was "highly offensive" and "vulgar," and that it had "decidedly negative sexual connotations." On appeal, the Federal Circuit invalidated that provision of the Lanham Act as violating the First Amendment.

The Supreme Court affirmed, holding that, as was the case with the Court's invalidation of the Lanham Act's bar on the registration of "disparage[ing] trademarks two Terms ago in *Matel v. Tam*, 582 U.S. __ (2017), the Lanham Act's prohibition on the registration of "immoral[] or scandalous" trademarks infringes the First Amendment because it disfavors certain ideas. Justice Kagan authored the Court's opinion, joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh. Justice Alito also filed a concurrence. Chief Justice Roberts, Justice Breyer, and Justice Sotomayor all concurred in part and dissented in part, reasoning that the term "scandalous" could be construed more narrowly to bar only marks that offend because of their mode of expression – marks that are obscene, vulgar, or profane.

Rimini Street, Inc. v. Oracle USA Inc., No. 17-1625:

Section 505 of the Copyright Act permits courts to award "full costs" to a party in a civil action. Broadly interpreting the term "full costs," the district court in this case awarded Oracle $12.8 million for expenses not enumerated by the general statute governing "costs." *See* 28 U.S.C. §§1821, 1920. The Ninth Circuit upheld that award. The Supreme Court reversed and remanded.

The Supreme Court held that, notwithstanding its use of the term "full costs," the Copyright Act does not allow a district court to award expenses beyond those categories enumerated by the general statute governing costs.

Preview of October Term 2019

I. EMPLOYMENT DISCRIMINATION

R.C. and G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, No. 18-107:

Issue(s): Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Bostock v. Clayton County, Georgia, No. 17-1618:

Issue(s): Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2.

II. IMMIGRATION

Department of Homeland Security v. Regents of the University of California, No. 18-587:

Issue(s): (1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

III. SECOND AMENDMENT

New York State Rifle & Pistol Association Inc. v. City of New York, New York, No. 18-280:

Issue(s): 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.