

**GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE**

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A LOOK AHEAD AT OCTOBER TERM 2016

The recently completed Supreme Court Term demonstrates the futility of forecasting expectations when a new Term is about to begin. At this time last year, no one could have foreseen what was by far the most significant event of October Term 2015 – the sudden death of Justice Antonin Scalia. The loss of the Court’s most vibrant member altered the outcome of some of last Term’s most significant cases, and continues to reverberate in the work and operations of the Court. By all appearances, Justice Scalia’s absence has affected the cases accepted for review, the scheduling of those cases for oral argument, and the disposition during the summer recess of stay motions in cases moving through the cert pipeline. The impact of Justice Scalia’s death, and the uncertain identity of the Justice who will occupy his seat, underscore the unsettled ideological balance on the Court and the power of a single vote.

This report previews the Supreme Court’s argument docket for October Term 2016 (OT 2016). The Court has thus far accepted 31 cases for review (two pairs have been consolidated for briefing and argument) – fewer than half the cases that the Court typically hears each Term. Section I discusses some especially noteworthy cases on the Court’s argument docket. Section II organizes the cases accepted for review into subject-matter categories and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

This section highlights five of the potentially significant cases the Court will hear this Term. Two concern the role of race in legislative redistricting, two involve racial bias in the criminal justice system, and the last deals with the proof required to establish criminal liability for insider trading.

Race and Redistricting

Bethune-Hill v. Virginia State Board of Elections* and *McCrorry v. Harris

The Equal Protection Clause generally prohibits states from making decisions based on race, absent compelling justification. The Voting Rights Act (VRA) requires legislators to consider voters’ race in legislative redistricting, however, when necessary to ensure that minority voters have an equal opportunity to elect representatives of their choice. In the context of redistricting, therefore, the Supreme Court has held that a redistricting plan violates equal protection only if race was the legislature’s predominant motivation, and neutral redistricting principles were subordinated, in assigning a significant number of voters to a particular voting district, and the use of race was not narrowly tailored to achieve a compelling state interest (such as compliance with the VRA).

In *Alabama Legislative Black Caucus v. Alabama*, the Court considered an equal protection challenge to Alabama’s legislative redistricting plan as an unconstitutional racial gerrymander. Evidence showed that the Alabama legislature drew district lines to retain a set percentage of black voting age population (BVAP) in districts with a majority of minority voters. The plaintiffs claimed that by packing African-American voters into majority-minority districts, the plan reduced their ability to influence the election of their preferred representatives in neighboring districts. The Court held that prioritizing mechanical racial targets above other

districting criteria was evidence that race was the legislature's predominant motivation in drawing district lines. The Court further held that using such targets was not a narrowly tailored means to comply with the VRA.

This Term, the Court will confront similar claims of racial gerrymandering by African-American voters who challenged redistricting plans adopted in North Carolina and Virginia. Each case comes to the Court on direct appeal from the judgment of a three-judge district court, following a bench trial. In both cases, evidence showed that the challenged districts were designed to achieve a targeted BVAP percentage. The Virginia legislature drew 12 districts for the State House of Delegates to attain a 55% BVAP in each, and North Carolina designed two federal congressional districts to ensure that each had a BVAP of at least 50%. In both cases, state legislators maintained that compliance with the VRA required a majority BVAP in each of the challenged districts. Yet the two district courts reached different conclusions on the questions of racial predominance, and whether the use of race was justified.

The court in *McCrorry v. Harris* found that race was the predominant factor motivating the North Carolina legislature in configuring two congressional districts. The court based its finding on evidence that state legislators instructed their redistricting expert to increase the BVAP in each district to exceed 50%. The court further concluded that the deliberate creation of majority-minority districts was not justified as an effort to comply with the VRA because both districts had routinely elected the candidate preferred by minority voters by wide margins without a majority BVAP.

In *Bethune-Hill v. Virginia State Board of Elections*, the court determined that using a 55% BVAP threshold to draw district lines was evidence, but not conclusive proof, of racial predominance. Unless using a BVAP floor actually conflicted with and compromised traditional redistricting criteria, the court held, the plaintiffs could not establish that neutral factors were subordinated to race, as required to show that race was the predominant motivation in designing a particular district. Applying this rule, the court found that race was predominant in drawing only one of the 12 challenged districts. As to that district, the court concluded that the legislature had a strong basis in fact to believe that a 55% BVAP floor was reasonably necessary to avoid retrogression and comply with the VRA.

These cases offer the Court an opportunity to clarify the analysis of racial gerrymandering claims. In both cases, the parties dispute the weight to be accorded evidence that districts were drawn to attain a set BVAP target, and whether a finding of racial predominance requires further proof that the district would have been drawn differently had the legislature followed neutral redistricting principles. Because motivation is quintessentially a finding of fact, moreover, the racial predominance test raises the prospect of different courts reaching conflicting determinations of legislative motive on similar evidence. The State in *McCrorry*, for instance, points to the decision of a three-judge state trial court (affirmed by the North Carolina Supreme Court) rejecting the racial gerrymandering claims of a different group of voters who challenged the identical redistricting decisions that were invalidated by the three-judge federal district court. Finally, the racial predominance question is complicated by the high correlation between race and voting patterns. Drawing district lines to achieve partisan political advantage is considered a

neutral redistricting criterion, but using race as a proxy for political preference is not. The correspondence of race and party preference, however, can make it hard to tell the difference.

The intersection of Equal Protection doctrine and the requirements of the VRA has generated confusion among state legislators and courts. Before the 2020 census generates a new round of redistricting, predictably followed by a spate of ensuing litigation, increased clarity and guidance from the Court would be a welcome development

Race and Criminal Law

Pena-Rodriguez v. Colorado* and *Buck v. Davis

At a time of heightened public awareness of racial disparities in our criminal justice system, the Court has agreed to review two cases where racial bias was explicitly injected into the jury's deliberations. In each case, the Court will decide whether the usual rules governing criminal proceedings and post-conviction judicial review must yield when the jury's verdict may have been tainted by racial prejudice.

In *Pena-Rodriguez v. Colorado*, the Court will consider whether evidence of a juror's racial bias during jury deliberations is admissible to impeach a guilty verdict and require a retrial. Ordinarily, jurors' testimony about statements made during deliberations is categorically inadmissible to challenge the verdict – and for excellent reasons: the no-impeachment rule protects the secrecy of jury deliberations and the finality of verdicts. Absent the rule, losing litigants or their counsel would have every incentive to solicit testimony from former jurors and expose the deliberative process to post-judgment scrutiny. But suppose a juror was prepared to testify about comments made during deliberations that the defendant was probably guilty of the charged offense because of his race or ethnicity. Does the exclusion of such evidence violate the defendant's Sixth Amendment right to a fair trial by an impartial jury?

The Court has previously rejected arguments that the Constitution demands an exception to the no-impeachment rule. In *Tanner v. United States*, the Court held it was constitutional to bar juror testimony that some jurors were intoxicated during deliberations. Similarly, the Court in *Warger v. Shauers* decided that the constitution did not require an exception to allow juror testimony that another juror was biased because her daughter had caused a car accident similar to the one at issue. In both cases, the Court concluded that other safeguards were adequate to expose juror misconduct or bias and protect the litigants' constitutional rights. The Court cited as examples examination of potential jurors during voir dire; observation of jurors' conduct during the trial; pre-verdict disclosure of juror misconduct during deliberations; and evidence of such misconduct from sources other than juror testimony. The Court left undecided, however, whether "the usual safeguards" would be adequate "to protect the integrity of the process" in "a case of juror bias so extreme that, almost by definition, the jury trial right has been abridged."

The Court will need to decide whether this is that case. A jury convicted Miguel Pena-Rodriguez of unlawful sexual contact and harassment after two teenage girls identified him as the man who had groped them in the bathroom of the racetrack where Pena-Rodriguez worked. Both the defendant and his alibi witness are Hispanic. Shortly after the verdict was entered, two jurors told defense counsel that another juror (a former police officer, denominated

“H.C.”) had expressed racial bias against Pena-Rodriguez and his alibi witness. The defense submitted affidavits from both jurors that during deliberations, H.C. stated, “I think he did it because he’s Mexican and Mexican men take whatever they want”; claimed that “where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls”; and “said that he did not think the alibi witness was credible because, among other things, he was ‘an illegal.’”

The State courts held that the no-impeachment rule barred the jurors’ testimony about biased remarks during deliberations and denied the defendant’s request for a new trial. The Colorado Supreme Court held that the Sixth Amendment did not require an exception to the rule because other mechanisms were adequate to discover and avoid jury bias without invading the secrecy of jury deliberations.

There was nothing secret about the racial bias expressed in open court during the sentencing phase of Duane Buck’s capital murder trial. At issue in *Buck v. Davis* is whether the tangled web of rules that govern federal review of State criminal judgments mean that a court will never actually decide whether his death sentence was the product of a constitutionally defective proceeding.

To impose a death sentence, Texas requires a unanimous jury finding that the defendant is likely to commit violent criminal acts in the future. Defense counsel introduced the expert testimony and report of a psychologist, Dr. Quijano, stating that the defendant’s race (“Black”) increased the probability that he would commit future acts of criminal violence. Dr. Quijano confirmed this opinion on cross-examination, and included it in his report, which was admitted into evidence and requested by the jury during sentencing deliberations. The jury found Buck was likely to be a future danger and he was sentenced to death.

Texas subsequently confessed error in another case where the prosecution had presented Dr. Quijano’s testimony that a capital defendant’s race increased the probability that he would commit future violent crimes. The State conceded that the introduction of race as a factor for the jury’s consideration violated the defendant’s constitutional right to be sentenced without regard to his race, and required a new sentencing trial. The Texas Attorney General announced publicly that the State would waive any procedural objections to post-conviction requests for habeas relief by six other death row prisoners – including Duane Buck – whose sentencing trials featured Dr. Quijano’s racially biased testimony.

The State later decided, however, to assert procedural defenses against Buck’s request for habeas relief because defense counsel, rather than the prosecution, elicited the improper testimony. Both state and federal courts refused to consider Buck’s claim that his appointed lawyer’s introduction of racially prejudicial testimony at his sentencing hearing denied him the effective assistance of counsel, however, because his newly appointed post-conviction counsel failed to raise the issue in his first state habeas petition.

As in many habeas cases, the dense procedural thicket threatens to obscure what would otherwise appear to be a clear constitutional violation. There is no question that Buck’s trial and post-conviction counsel were deficient. The expert evidence introduced by his own attorney infected with racial prejudice the jury finding essential to his death sentence – his future

dangerousness – and his post-conviction counsel failed to raise a substantial claim that trial counsel was constitutionally ineffective. The State that seeks to execute him has conceded the constitutional error of allowing the jury to hear this evidence, and reneged on its pledge to waive procedural impediments to judicial review of his constitutional challenge to his sentencing proceeding. Finally, the Supreme Court has recently held that the failure of post-conviction counsel to raise ineffective assistance in an initial Texas habeas petition is an excusable procedural default that does not bar the federal courts from reviewing the merits of that claim.

The precise question before the Court, in habeas-speak, is whether reasonable jurists could debate whether Buck’s case is sufficiently extraordinary to warrant reopening the district court’s judgment that his ineffective assistance claim is procedurally barred from federal judicial review. But that technical question will mean nothing to the vast majority of Americans – who nonetheless will certainly understand that a man may be sitting on death row because his jury was told he was more likely to commit violent crimes because he’s Black.

In both *Buck* and *Pena-Rodriguez*, the outcome may ultimately turn on whether a majority believes it would be too damaging to public confidence in the criminal justice system to tolerate the possibility of a conviction or a death sentence tainted by blatant racial bias.

Insider Trading Liability

Salman v. United States

Section 10(b) of Securities Exchange Act of 1934, and the SEC’s implementing Rule 10b-5, broadly prohibit deceptive or fraudulent acts in connection with trading securities. For over 35 years, the Court has recognized insider trading as a deceptive practice that violates Section 10(b) and Rule 10b-5. One type of insider trading occurs when a corporate insider violates his fiduciary duty to the corporation and its shareholders by trading on material, non-public information he has obtained because of his position for his own personal benefit. In *Dirks v. SEC*, the Court held that Section 10(b) also prohibits an insider from disclosing, for personal benefit, inside information to a corporate outsider (a “tippee”) to trade, and prohibits a tippee from trading if he knows the insider received a personal benefit from the disclosure.

At issue in *Salman v. United States* is what type of personal benefit to the insider for disclosing inside information to a trading tippee establishes securities fraud. Basim Salman was charged with securities fraud for trading on inside information he learned from his future brother-in-law, Michael Kara, who passed along (and traded on) stock tips he received from his brother, Maher Kara, a vice president in Citigroup’s healthcare investment banking group. Maher Kara received no money or other pecuniary benefit from giving inside information to his brother Michael. The jury was instructed that the “personal benefit” to Maher could include “the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend,” and convicted Salman.

The Court in *Dirks* gave a number of examples of personal benefits that would demonstrate an insider’s fiduciary breach: pecuniary gain, reciprocal information, reputational benefit expected to increase future earnings, or other things of value. Personal benefit could be

inferred, the Court stated, from evidence of “a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter or an intention to benefit the particular recipient.” The Court further advised that the “elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend.” The Court observed that in these circumstances, “[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.”

In the wake of *Dirks*, courts have struggled to decide what type of “relationship” suggests that the insider received a *quid pro quo* in exchange for the information, or intended to benefit the tippee. Disputes have arisen over who qualifies as a “friend” or “relative” sufficiently close to suggest the inside information was a “gift” from the insider, and whether the emotional gratification the insider derives from his generosity is a personal benefit. In their merits briefs, both sides in *Salman* wisely steer the Court away from the messy territory of evaluating personal relationships and measuring psychological satisfaction.

Petitioner urges the Court to hold that pecuniary gain is required to avoid the constitutional due process and separation of powers problems posed by the indeterminate “gift” scenario. Basing criminal liability on an insider’s emotional response, petitioner argues, invites arbitrary enforcement and is too vague and subjective to give adequate notice to market participants of whether a trade is lawful or illegal. Allowing federal prosecutors and courts to decide which personal favors or relationships permit an inference of an improper *quid pro quo* or intent to benefit the tippee, petitioner maintains, unconstitutionally usurps Congress’s role to define crimes and specify their elements. Petitioner contends that liability for insider trading must be narrowly circumscribed because the offense is tantamount to an impermissible judge-made “common law” crime. Neither Section 10(b) nor Rule 10b-5 explicitly prohibits it, and the elements of the offense are nowhere defined.

The government argues that whenever an insider discloses material nonpublic information to an outsider for trading and lacks any legitimate corporate purpose for the disclosure, a jury may infer that the insider has received the requisite personal benefit. The government reasons that if an insider has no legitimate corporate purpose for disclosing inside information to an outsider for trading, he is by definition acting for his personal benefit, since corporate purpose and personal benefit are “opposite sides of the same coin.” The government warns that requiring pecuniary gain, as petitioner suggests, would harm investors and damage public confidence in the fairness of securities markets, undermining a core purpose of the securities laws.

The outcome in *Salman* will depend on whether a majority is willing to give the government broader latitude to prosecute insider trading, or would rather narrow the scope of liability, as petitioner urges, and leave it to Congress to enact a law that clearly defines the offense and its elements. Either option seems preferable to where the law stands now.

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Civil Rights

Americans with Disabilities Act/Rehabilitation Act

Fry v. Napoleon Community Schools (15-497)

Question Presented:

Whether the [Handicapped Children’s Protection Act] commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages – a remedy that is not available under the [Individuals with Disabilities Education Act].

Summary:

The Individuals with Disabilities Education Act (IDEA) requires school districts receiving federal funds to provide a free appropriate public education to every child with a disability, and specifies administrative procedures that states must provide to enforce its requirements. The Handicapped Children’s Protection Act (HCPA) requires exhaustion of the IDEA’s administrative procedures before suit may be brought under another federal law seeking relief that is also available under the IDEA. The question in this case is whether the HCPA requires exhaustion before filing a suit seeking only relief that is not available under the IDEA.

E.F. was born with cerebral palsy and relies on Wonder, a service dog, to assist her with mobility and daily activities. Napoleon Community Schools and Jackson County Intermediate School District (respondents) refused to permit E.F. to attend school with Wonder. After two years of home-schooling, E.F.’s parents enrolled her in a different public school district where Wonder was allowed in school. E.F. and her parents then sued respondents for violating the Americans with Disabilities Act (ADA) and the Rehabilitation Act by refusing to modify their policies to permit Wonder to assist E.F. at school. Petitioners sought compensatory damages for E.F.’s social and emotional injuries. The district court held that the HCPA required petitioners to exhaust the IDEA’s administrative procedures before filing suit and dismissed their complaint.

The Sixth Circuit affirmed. The court held that the HCPA requires exhaustion when the injuries alleged in a non-IDEA suit relate to the IDEA’s substantive protections or can be remedied through IDEA procedures. The court acknowledged that petitioners sought compensatory damages, relief that is not available under the IDEA. Exhaustion was nonetheless required, the court held, because the harms arising from respondents’ refusal to allow Wonder to accompany E.F. relate to the IDEA’s educational purpose and petitioners could have sought relief available under the IDEA to remedy those harms.

Petitioners contend that the plain text of the HCPA explicitly preserves all rights and remedies available under the ADA and Rehabilitation Act to protect children with disabilities, and requires exhaustion of the IDEA’s administrative process only before seeking relief that is also available under IDEA. Petitioners argue that because they claimed that respondents violated the ADA and Rehabilitation Act (and not the IDEA), and sought only relief that is unavailable under the IDEA dismissal of their suit for failure to exhaust contravenes the text and purpose of the HCPA.

Decision Below:

788 F.3d 622 (6th Cir. 2015)

Petitioners’ Counsel of Record:

Samuel R. Bagenstos, American Civil Liberties Union Fund of Michigan

Respondents’ Counsel of Record:

Neal Katyal, Hogan Lovells US LLP

Ivy v. Morath (15-486)

Question Presented:

Whether the Fifth Circuit erred in deciding that the relationship between public and private actors does not invoke dual obligations to accommodate disabilities in any context other than an express contractual relationship between a public entity and its private vendor.

Summary:

Title II of the Americans with Disabilities Act (ADA) provides that “no qualified individual with a disability shall . . . be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity.” Section 504 of the Rehabilitation Act affords the same protection from discrimination in any federally funded “program or activity.” The question in this case is whether a public entity that contracts with private licensees to operate a program that provides a public benefit is required by these statutes to ensure access for individuals with disabilities.

Texas requires anyone under age 25 to obtain a driver education certificate to be eligible for a driver’s license. Respondent Texas Education Agency (TEA) exercised jurisdiction and control over private driving schools licensed by the TEA to provide driver education and issue certificates. Under state law, the TEA established a statewide curriculum, selected educational materials, credentialed driving instructors, and approved the hiring of key staff members at each school. Petitioners are Texas residents under 25 who are unable to obtain a driver education certificate, or a driver’s license, because they have hearing disabilities and licensed driving schools refuse to make their courses accessible to them. Petitioners sued, claiming the TEA violated the ADA and Section 504 by failing to ensure that the driver education program and certificate required by state law are accessible to people with hearing disabilities. The district court denied the TEA’s motion to dismiss and certified an interlocutory appeal.

The Fifth Circuit reversed. The court held that petitioners failed to state a claim against the TEA under the ADA or § 504. The court concluded that driver education was not a service, program, or activity of the TEA because the TEA did not teach driver education, contract with driving schools, or issue certificates to individual students. The court decided that the TEA’s program was licensing and regulating private driving schools, and petitioners were neither excluded from nor denied the benefits of that program.

Petitioners contend that the ADA and Section 504 require public entities to ensure that individuals with disabilities have access to public programs, services, or benefits, even when delivered by private licensees. Petitioners argue that the Fifth Circuit’s excessively narrow interpretation of “services, programs, or activities” incentivizes public agencies to avoid the costs of compliance with federal law by outsourcing to private licensees tasks and functions requiring interaction with the public. The court’s ruling, petitioners argue, would require individuals with disabilities to sue each licensee individually to enforce the ADA and § 504.

Decision Below:

781 F.3d 250 (5th Cir. 2015)

Petitioner’s Counsel of Record:

Joe T. Sanders, Sanders Bajwa LLP

Respondent’s Counsel of Record:

Scott A. Keller, Solicitor General of the State of Texas

Fair Housing Act

Bank of America Corp. v. City of Miami (15-1111)

Wells Fargo & Co. v. City of Miami (15-1112)

Questions Presented:

No. 15-1111:

(1) Whether, by limiting suit to “aggrieved person[s],” Congress required that a Fair Housing Act plaintiff plead more than just Article III injury-in-fact.

(2) Whether proximate cause requires more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some theoretical chain of contingencies.

No. 15-1112:

(1) Whether the term “aggrieved” in the Fair Housing Act imposes a zone-of-interests requirement more stringent than the injury-in-fact requirement of Article III.

(2) Whether the City is an “aggrieved person” under the Fair Housing Act.

Summary:

The Fair Housing Act (FHA) authorizes a civil action by an “aggrieved person” who has been injured by a discriminatory housing practice. The questions in these consolidated cases are whether a plaintiff must allege an injury within the “zone of interests” protected by the FHA, and whether the claimed injury must be directly caused by, or merely a foreseeable consequence of, the alleged discriminatory conduct.

The City of Miami (respondent) sued Bank of America and Wells Fargo (petitioners), claiming economic harm resulting from racially discriminatory mortgage lending practices that violated the FHA. The City alleged that the banks targeted black and Latino customers for predatory home loans on terms less favorable than those offered to white borrowers, leading to foreclosures on minority-owned properties. These foreclosures, the City claimed, reduced property values, resulting in decreased tax revenues and increased expenditures for police, fire department, and trash collection services in blighted areas. The district court dismissed both suits. The court held that the City’s claims fell outside the “zone of interests” protected by the FHA, and the complaints did not adequately plead that the banks’ conduct proximately caused the City’s alleged injuries.

The Eleventh Circuit reversed. The court decided that binding Supreme Court precedent held that the right to sue under the FHA extends as broadly as Article III permits. To the extent the FHA requires a “zone of interests” analysis, the court held, the City’s claims of economic injury resulting from the bank’s discriminatory lending fell within it. The court further determined that the City adequately pled that the banks’ conduct proximately caused its alleged injuries because the decrease in property tax revenue and increase in municipal expenses were reasonably foreseeable consequences of the alleged predatory lending.

Petitioners contend that the Supreme Court has recently held that a plaintiff exercising a statutory right to sue must allege an injury with a statute’s zone of interests. Petitioners assert that the Court has discounted as “ill-considered” dictum the language the Eleventh Circuit considered binding precedent. Petitioners rely on *Thompson v. N. American Stainless*, where the Court held that virtually identical “person aggrieved” language in Title VII requires a plaintiff claiming employment discrimination to allege an injury within the statute’s zone of interests. Petitioners argue that the City’s lost tax revenues and increased expenses are not within the FHA’s zone of interests, *i.e.*, to ensure fair housing, and are too attenuated from the banks’

alleged discrimination to establish proximate cause.

Decisions Below:

No. 15-1111: 800 F.3d 1262 (11th Cir. 2015)

No. 15-1112: 801 F.3d 1258 (11th Cir. 2015)

Petitioner’s Counsel of Record:

No. 15-1111: William M. Jay, Goodwin Procter LLP

No. 15-1112: Neal Katyal, Hogan Lovells US LLP

Respondent’s Counsel of Record:

Robert S. Peck, Center for Constitutional Litigation, P.C.

Constitutional Law

Fifth Amendment – Takings

Murr v. Wisconsin (15-214)

Question Presented:

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

Summary:

The Fifth Amendment prohibits the taking of property without just compensation. In *Penn Central Transportation Company v. City of New York*, the Supreme Court held that a court must consider several factors in deciding whether a regulation has effected a taking, including the extent of the interference with rights in the “parcel as a whole.” The question presented is whether two legally distinct, but commonly owned contiguous parcels, may be treated as a single parcel as a whole for purposes of the *Penn Central* analysis.

The Murrs (petitioners) acquired from their parents two legally distinct but contiguous parcels in St. Croix County, Wisconsin. Lot F contains a cabin, while Lot E is undeveloped. Petitioners wanted to sell Lot E and use the proceeds to upgrade the cabin on Lot F. They therefore sought a variance from a St. Croix County ordinance that prohibits the individual sale of adjacent lots under common ownership. The County denied the variance, and the state court affirmed. Petitioners then filed a complaint in state court alleging that the ordinance resulted in an uncompensated taking, because it deprived them of virtually all the value of Lot E. The circuit court rejected petitioners’ claim.

The Wisconsin Court of Appeals affirmed. It held that for the purpose of a takings analysis, contiguous property under common ownership is considered as a whole regardless of the number of legally distinct parcels. Applying that approach, the court concluded that the ordinance did not effect a taking of petitioners’ property.

Petitioners contend that *Penn Central* establishes a presumption that the extent of the interference with property rights must be measured against each legally distinct parcel. While petitioners acknowledge that considerations of fairness and justice may require the aggregation of legally distinct parcels in some circumstances, they argue that no such circumstances are present here. Because they purchased the lots at different times and never treated the lots as a single economic unit, petitioners argue, considerations of justice and fairness require treating the lots as distinct parcels.

Decision Below:

359 Wis.2d 675 (2014)

Petitioners' Counsel of Record:

John Maurice Groen, Pacific Legal Foundation

Respondents' Counsel of Record:

Misha Tseytlin, Solicitor General of Wisconsin

Richard Lazarus, Harvard Law School (for Respondent St. Croix County, WI)

First & Fourteenth Amendments – Free Exercise & Equal Protection*Trinity Lutheran Church of Columbia, Inc. v. Pauley* (15-577)**Question Presented:**

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

Summary:

The State of Missouri awards grants on a competitive basis to nonprofits to purchase playground surfaces made of recycled tires. By virtue of a state constitutional provision that bars state funding “in aid of a church,” churches are ineligible to receive such grants. The question in this case is whether that categorical exclusion violates the Free Exercise or Equal Protection Clause.

Trinity Lutheran Church (petitioner) operates a daycare facility that includes a playground with a pea gravel surface. Because that surface poses safety concerns, Trinity Lutheran applied to the State (respondent) for a grant to purchase a playground surface made from recycled tires. The State denied the grant based on the State’s constitutional prohibition against funding in aid of a church. Trinity Lutheran sued the State, alleging that the categorical exclusion of churches from eligibility to receive grants to resurface their playgrounds violated the Free Exercise and Equal Protection Clauses of the U.S. Constitution. The district court dismissed for failure to state a claim.

The Eighth Circuit affirmed, holding that the State’s constitutional prohibition on funding churches does not violate the Free Exercise or Equal Protection Clause. The court relied on the Supreme Court’s summary affirmance of a three-judge court decision upholding a state’s refusal to provide the same transportation benefits to students of church schools that it provided to students in public schools. The court also relied on the Supreme Court’s holding in *Locke v. Davey* that a state prohibition on awarding public scholarships to students pursuing a degree in theology did not violate the Free Exercise or Equal Protection Clause.

Petitioner contends that the State’s categorical exclusion of churches from the resurfacing program violates the Free Exercise and Equal Protection Clauses because it imposes a special disability on the basis of religious status and reflects hostility to religion. Petitioner further argues that *Locke* is distinguishable because it involved a state’s legitimate interest in refusing to fund a religious activity. A state has no comparable interest, petitioner argues, in categorically excluding churches from seeking funding for their secular activities on the same terms as other nonprofits.

Decision Below:788 F.3d 779 (8th Cir. 2015)

Petitioner’s Counsel of Record:

David A. Cortman, Alliance Defending Freedom

Respondent’s Counsel of Record:

James R. Layton, Solicitor General of Missouri

Fourteenth Amendment – Equal Protection***Bethune-Hill v. Virginia State Board of Elections* (15-680)****Questions Presented:**

- (1) Did the court below err in holding that race cannot predominate unless the use of race results in “actual conflict” with traditional districting criteria?
- (2) Did the court below err by concluding that use of a 55% black voting age population floor to draw districts does not amount to racial predominance and trigger strict scrutiny?
- (3) Did the court below err in disregarding the use of race in drawing district lines in favor of examining circumstantial evidence regarding the contours of the districts?
- (4) Did the court below err in holding that racial goals must negate all other districting criteria in order for race to predominate?
- (5) Did the court below err in concluding that the General Assembly’s predominant use of race in drawing House District 75 was narrowly tailored to serve a compelling government interest?

Summary:

A redistricting plan violates equal protection if the legislature, in assigning voters to a particular district, was predominantly motivated by their race and subordinated neutral redistricting criteria, unless race was used no more than reasonably necessary to achieve a compelling interest. The Voting Rights Act (VRA) prohibits a redistricting plan that deprives minority voters of an equal opportunity to elect representatives of their choice (vote dilution), or diminishes their ability to elect their preferred candidate (retrogression). The Supreme Court in *Ala. Legis. Black Caucus v. Alabama*, held that prioritizing mechanical racial targets above other districting criteria was evidence of racial predominance, and was not a narrowly tailored means to avoid retrogression and comply with the VRA. The questions in this case are whether race necessarily predominates when districts are drawn to attain a targeted black voting age population (BVAP) of at least 55%; whether race cannot predominate unless the use of race actually conflicts with traditional redistricting criteria; and whether the court correctly applied strict scrutiny to uphold the single district in which it found race predominated.

Following the 2010 census, the Virginia General Assembly adopted a redistricting plan for the state House of Delegates. Voters living in twelve of those House Districts (HDs) sued, claiming their districts are unconstitutional racial gerrymanders. Following a trial, a three-judge district court upheld the plan. The court found that the legislators used a 55% BVAP floor in designing each of the challenged districts because they believed this was necessary to avoid retrogression in violation of the VRA. The court recognized that using a BVAP threshold to draw district lines is evidence of racial predominance, but held traditional criteria were not subordinated to race unless using the BVAP floor actually conflicted with and compromised neutral factors. Applying this rule, the court found that race was the predominant factor in drawing only one of the challenged districts, HD 75. As to that district, the court found the legislature had a strong factual basis to believe using a 55% BVAP floor was reasonably necessary to comply with the VRA because the legislators based their selection of the 55% BVAP threshold primarily on their examination of the district’s voting patterns.

Appellants contend that direct evidence showing Virginia legislators prioritized a fixed racial threshold above all other criteria in drawing all twelve challenged districts establishes racial predominance and subjects each of these districting decisions to strict scrutiny. Appellants maintain that the mechanical application of a non-negotiable racial target across the board to all twelve districts demonstrates that the use of race was not narrowly tailored to comply with the VRA. Finally, appellants argue that the district court's analysis subverts the Supreme Court's holding in *Alabama*.

Decision Below:

2015 WL 6440332 (E.D. Va. Oct. 22, 2015)

Appellants' Counsel of Record:

Marc E. Elias, Perkins Cole LLP

Appellees' Counsel of Record:

Efrem M. Braden, Baker & Hostetler LLP

***McCrorry v. Harris* (15-1262)**

Questions Presented:

- (1) Did the lower court err in presuming racial predominance from North Carolina's reliance on *Strickland*?
- (2) Did the lower court apply an unnecessarily strict standard of review to determine whether there was a compelling state interest in the redistricting of District 1?
- (3) Did the lower court err by relieving plaintiffs of their duty to address the possibility that politics may have been the motivating factor in redistricting?
- (4) Was the finding of racial gerrymandering based on clearly erroneous findings of fact?
- (5) Should the lower court have barred plaintiffs' claims due to issue or claims preclusion?

Summary:

A redistricting plan is an unconstitutional racial gerrymander if race was the predominant factor motivating the legislature to place a significant number of voters within or outside of a particular district, and its use of race in drawing district lines was not narrowly tailored to serve a compelling interest. The Voting Rights Act (VRA) prohibits a redistricting plan that deprives minority voters of an equal opportunity to elect representatives of their choice (vote dilution), or diminishes their ability to elect their preferred candidate (retrogression). The questions in this case concern the evidence required to sustain a finding that race was a predominant factor in redistricting, and the showing necessary to demonstrate that racial predominance was constitutionally justified under strict scrutiny.

Following the 2010 census, the North Carolina legislature adopted a congressional redistricting plan that created two "majority-minority" districts by increasing the black voting age population (BVAP) in Congressional District (CD) 1 and CD 12 to above 50%. Voters filed suit, claiming both districts were racial gerrymanders in violation of the Equal Protection Clause. Following a trial, a three-judge district court found that race was the predominant consideration motivating the legislature in configuring CDs 1 and 12. The court relied on evidence that the legislature's expert, who designed the plan, followed instructions to increase the BVAP in CDs 1 and 12 to exceed a numerical target of 50%. Assuming that compliance with the VRA is a compelling interest, the court concluded that the deliberate creation of majority-minority districts was not justified because CD 1 and CD 12 routinely elected the candidate preferred by minority voters by wide margins without a majority BVAP.

Appellants contend the legislature was justified in drawing CD 1 to create a majority-minority district to avoid liability under the VRA for vote dilution or retrogression. Appellants further argue that the legislature reconfigured CD 12 using voting patterns from the 2008 presidential election to gain partisan political advantage in adjoining districts, and the increase in BVAP was not racially motivated but merely the consequence of a high correlation between race and voting history. Appellants also maintain that to prove racial predominance, appellees were required to submit an alternative plan comparably consistent with traditional redistricting principles that would accomplish the legislature's legitimate political goals yet achieve greater racial balance. Finally, appellants contend that appellees' claims are barred by the judgment of the Supreme Court of North Carolina rejecting similar claims asserted by different voters.

Decision Below:

2016 WL 482052 (M.D.N.C. Feb. 5, 2016)

Appellants' Counsel of Record:

Thomas A. Farr, Olgetree, Deakins, Nash, Smoak & Stewart, P.C.

Appellees' Counsel of Record:

Marc E. Elias, Perkins Coie LLP

Fourth Amendment – Malicious Prosecution

Manuel v. City of Joliet (14-9496)

Question Presented:

Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

Summary:

The Fourth Amendment protects against unreasonable searches and seizures. The question presented is whether an individual may bring a Fourth Amendment claim for pretrial detention pursuant to legal process without probable cause.

Officers of the City of Joliet, Illinois arrested Elijah Manuel (petitioner) for possession of ecstasy pills. Following petitioner's arrest, an officer swore out a criminal complaint, and a state court judge accepted the charge and remanded petitioner to custody. The charges were dismissed 47 days later following the prosecution's discovery that the pills had not tested positive for ecstasy. Petitioner sued the City of Joliet and several police officers (respondents) claiming that he was detained pursuant to legal process without probable cause in violation of the Fourth Amendment. In particular, petitioner claimed that officers fabricated evidence in order to secure his pretrial detention. The district court dismissed the claim.

The Seventh Circuit affirmed. It held that claims of malicious prosecution for pretrial detention are founded on due process, not the Fourth Amendment, and can be brought only when state law fails to provide an adequate remedy. The court reasoned that the Fourth Amendment gives way to the due process clause as a basis for challenging detention when detention by reason of arrest turns into detention by reason of legal process.

Petitioner contends that the Fourth Amendment governs claims for malicious prosecution for pretrial detention. For purposes of the Fourth Amendment, petitioner argues, there is no difference between detention based on an arrest and detention based on legal process: both constitute "seizures" within the meaning of the Fourth Amendment, and both violate the Fourth Amendment absent probable cause.

Decision Below:

590 Fed. Appx. 641 (7th Cir. 2015)

Petitioner's Counsel of Record:

Stanley Bert Eisenhammer, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP

Respondents' Counsel of Record:

Michael A. Scodro, Jenner & Block LLP

Criminal Law**Bank Fraud**

Shaw v. United States (15-5991)

Question Presented:

Whether, for purposes of subsection (1) of the bank fraud statute, 18 U.S.C. §1344, a "scheme to defraud a financial institution" requires proof of a specific intent not only to deceive, but also to cheat, a bank, as the majority of circuits -- nine of twelve -- have held and as petitioner Lawrence Shaw argued before the Ninth Circuit Court of Appeals, which instead joined the minority view in affirming his convictions for a scheme directed at a non-bank third-party.

Summary:

The bank fraud statute contains two criminal prohibitions: the first clause criminalizes schemes "to defraud a financial institution"; the second criminalizes schemes to obtain bank assets or property under a bank's control "by means of false or fraudulent pretenses, representations, or promises." In *Loughrin v. United States*, the Supreme Court held that while the first clause requires proof of intent to defraud a financial institution, the second clause does not. The question presented is whether in order to establish intent to defraud a bank under the first clause, the government is required to prove the defendant intended for the bank to suffer a monetary loss.

Petitioner Shaw created a PayPal account in Stanley Hsu's name, linked that account to Hsu's Bank of America account, and transferred money from the Bank of America account to the PayPal account. Petitioner was charged with 17 counts of defrauding a financial institution in violation of the first clause of the bank fraud statute. Shaw asked for jury instructions that would have required the government to prove that Shaw intended to expose the bank to monetary loss. That instruction would have allowed the jury to acquit if it found that petitioner intended to expose Hsu, but not the bank, to monetary loss. The district court declined to give Shaw's requested jury instructions. The jury found Shaw guilty of 14 counts of bank fraud.

The Ninth Circuit affirmed, holding that the first clause of the bank fraud statute does not require proof that the defendant intended to expose a bank to monetary loss. The court reasoned that the text of the first clause does not refer to monetary loss. The court also concluded that imposing such a requirement would entangle courts in technical banking law issues relating to whether a bank or its depositors would suffer loss from a successful fraud.

Petitioner argues that the first clause of the bank fraud statute requires the government to prove that the defendant intended to expose a bank to monetary loss. Petitioner relies on the Supreme Court's holding *McNally v. United States*, that the mail fraud statute requires the government to prove that the defendant intended to obtain money or property from the one who is deceived. Petitioner further contends that unless the first clause requires proof that the

defendant intended to expose a bank to monetary loss, there would be no meaningful distinction between the first and second clauses.

Decision Below:

791 F.3d 1130 (9th Cir. 2015)

Petitioner's Counsel of Record:

Koren L. Bell, Office of the Federal Public Defender

Respondent's Counsel of Record:

Ian Heath Gershengorn, Acting Solicitor General of the United States

Capital Sentencing

Buck v. Davis (15-8049)

Question Presented:

Did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an "expert" who testified that Mr. Buck was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?

Summary:

To appeal a final judgment denying habeas relief, a habeas petitioner must obtain a Certificate of Appealability (COA). A COA may be granted when reasonable jurists could disagree on the merits of a claim. The question in this case is whether reasonable jurists could disagree on whether petitioner established exceptional circumstances that would justify relief from judgment under Fed. R. Civ. P. 60(b) on his claim that his trial counsel was ineffective in presenting testimony that petitioner was dangerous because he is black.

Duane Buck (petitioner) was found guilty of capital murder and sentenced to death. For a defendant to be death-eligible in Texas, the jury must find future dangerousness. At Buck's sentencing hearing, his counsel offered an expert who testified that Buck was more likely to commit violent crimes in the future because he is black. Petitioner did not raise any claim of ineffective assistance in presenting that testimony in his initial habeas petition, but raised the claim in subsequent state and federal habeas proceedings. The subsequent claims were denied based on forfeiture in the initial state habeas proceeding. Following the Supreme Court's decision in *Trevino v. Thaler* that counsel's ineffectiveness in habeas could excuse procedural default, petitioner sought relief from the judgment of the federal habeas court under Rule 60(b). The district court denied relief, and refused to issue a COA.

The Fifth Circuit also refused to issue a COA. The court concluded that petitioner's application did not make a minimal showing that his case was exceptional, as required by Rule 60(b).

Petitioner contends that he was entitled to a COA because reasonable jurists could disagree on whether he made a showing of exceptional circumstances warranting relief under Rule 60(b). Petitioner relies on the following circumstances as sufficient to meet that threshold standard: his lawyer's presentation of race-based testimony about his future dangerousness, the state's concession that the testimony allowed the jury to consider a factor that it was constitutionally barred from considering, the state's failure follow through on its agreement to

waive procedural default, and the decision in *Trevino*, under which procedural default would not bar petitioner's claim if it were brought today.

Decision Below:

623 Fed. Appx.668 (5th Cir. 2015)

Petitioner's Counsel of Record:

Christina A. Swarns, NAACP Legal Defense & Educational Fund, Inc.

Respondent's Counsel of Record:

Fredericka Sargent, Office of the Attorney General of Texas

***Moore v. Texas* (15-797)**

Question Presented:

Whether it violates the Eighth Amendment and the Supreme Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

Summary:

In *Atkins v. Virginia*, the Supreme Court held that the execution of intellectually disabled individuals violates the Eighth Amendment. Following *Atkins*, Texas adopted the medical standards for intellectual disability set forth in a manual published in 1992 by the American Association of Mental Retardation. Despite substantial changes in medical standards, Texas continues to adhere to the 1992 standards. The question presented in this case is whether the Eighth Amendment requires the use of current medical standards in determining whether an individual is intellectually disabled.

In 1980, Bobby James Moore shot and killed a sales clerk in the course of a robbery. Moore was convicted of capital murder and sentenced to death. After *Atkins*, the state habeas court determined that Moore is intellectually disabled and therefore could not be executed under *Atkins*. In reaching that conclusion, the court applied current medical standards

The Texas Criminal Court of Appeals reversed. It held that, absent legislative revision, its decisions required application of the 1992 medical standards for determining intellectual disability. Applying those standards, it determined that Moore is not intellectually disabled.

Petitioner argues that *Hall* and *Atkins* require the use of current medical standards to determine whether a person is intellectually disabled and therefore barred from execution under *Atkins*. Under current medical standards, petitioner contends, he is intellectually disabled.

Decision Below:

470 S.W.3d 481 (Tex. Crim. App. 2015).

Petitioner's Counsel of Record:

Clifford M. Sloan, Skadden, Arps, Slate, Meagher & Flom

Respondent's Counsel of Record:

Jeremy C. Greenwell, Office of the Attorney General of Texas

Double Jeopardy

***Bravo-Fernandez v. United States* (15-537)**

Question Presented:

Whether, under *Ashe v. Swenson* and *Yeager v. United States*, a vacated unconstitutional

conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.

Summary:

In *Ashe v. Swenson*, the Supreme Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a new prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. In *United States v. Powell*, the Court held that a jury's acquittal on one count does not invalidate a simultaneous inconsistent conviction on another count because there is no way to know what the jury, in rendering inconsistent verdicts, actually decided. In *Yeager v. United States*, the Court held that when a jury acquits on one count and inconsistently hangs on another, *Ashe* bars a new prosecution on the hung count. The question presented is whether, when a jury acquits on some counts and inconsistently convicts on another, and the latter is vacated for legal error, *Ashe* bars a new prosecution on the vacated count.

Bravo-Fernandez bought Puerto Rican Senator Martinez-Maldonado a ticket for a boxing match in Las Vegas, and also covered the costs of his airline ticket and hotel room. Martinez-Maldonado took steps to facilitate the enactment of legislation that benefitted Bravo-Fernandez. Bravo-Fernandez and Martinez-Maldonado (petitioners) were convicted of bribery, but inconsistently acquitted of related conspiracy and Travel Act counts. Finding instructional error, the First Circuit vacated the bribery convictions and remanded. Petitioners then moved for an acquittal on the bribery counts on the ground that the acquittals on the related counts necessarily determined that they had not committed bribery. The district court denied the motion.

The First Circuit affirmed, holding that the acquittals on the related counts did not bar a new prosecution of the bribery counts. Relying on *Powell*, the court reasoned that because the jury rendered inconsistent verdicts, it was impossible to say that the jury's acquittal on the related counts reflected a jury determination that petitioners were not guilty of bribery. The court distinguished *Yeager's* holding that a hung count plays no role in the *Ashe* analysis, on the ground that a hung count represents a jury's failure to decide, whereas a vacated conviction reflects a jury decision.

Petitioners contend that the acquittals on the related counts necessarily determined that they did not commit bribery, and that *Ashe* therefore precludes a new prosecution on the bribery counts. Petitioners argue that a vacated conviction plays no role in the *Ashe* analysis for the same reason that a hung count plays no role. Like a hung count, petitioners argue, a vacated conviction is a nonevent that that enjoys no respect as a matter of law or history.

Decision Below:

790 F.3d 41 (1st Cir. 2015)

Petitioners' Counsel of Record:

Lisa S. Blatt, Arnold & Porter LLP

Respondent's Counsel of Record:

Ian Heath Gershengorn, Acting Solicitor General of the United States

Sentencing Guidelines

Beckles v. United States (15-8544)

Question Presented:

(1) Whether *Johnson [v. United States]*, applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in [United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2) (defining "crime of violence")]?

(2) Whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?

(3) Whether possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*?

Summary:

The U.S. Sentencing Guidelines (USSG) prescribe a longer sentence for a "career offender" who has been convicted of a felony drug offense or "crime of violence" and has two prior such convictions. The definition of "crime of violence" includes a residual clause covering any offense that "involves conduct that presents a serious potential risk of physical injury to another." In *Johnson v. United States*, the Supreme Court held that the identical residual clause defining "violent felony" in the Armed Career Criminal Act (ACCA) is unconstitutionally vague. In *Welch v. United States*, the Court held that *Johnson* announced a new substantive rule that retroactively applies to cases on collateral review. The question in this case is whether the holdings of *Johnson* and *Welch* apply to career offenders serving sentences enhanced under the USSG residual clause.

Travis Beckles was convicted of being a felon in possession of a firearm after police found a sawed-off shotgun in his girlfriend's apartment. Commentary to the USSG career offender provision states that unlawful possession of certain firearms, including a sawed-off shotgun, is a crime of violence. The district court sentenced Beckles as a career offender based on his firearm conviction and two prior drug convictions. Without the career offender enhancement, Beckles's USSG sentencing range was 180 months; his enhanced range was 360 months to life. Beckles received 360 months (later reduced to 216 months on unrelated grounds).

The Eleventh Circuit affirmed the sentence on direct appeal, and denied post-conviction relief. The Supreme Court granted certiorari, vacated the judgment, and remanded for consideration in light of *Johnson*. On remand, the Eleventh Circuit again denied relief. The court held that *Johnson* was not controlling because Beckles was sentenced under the "express language" of USSG commentary specifying that possession of a sawed-off shotgun is a crime of violence, and not under the ACCA residual clause.

Petitioner argues that the holding of *Johnson* applies because the unconstitutionally vague language in ACCA's residual clause is identical to the residual clause in the USSG career offender enhancement. Petitioner contends that if the USSG residual clause is unconstitutional, the commentary stating that firearm possession is a crime of violence is likewise invalid because it is inconsistent with the remaining textual definition.

Decision Below:

616 Fed. Appx. 415 (11th Cir. 2015)

Petitioner's Counsel of Record:

Janice L. Bergmann, Office of the Federal Public Defender

Respondent's Counsel of Record:

Ian Heath Gershengorn, Acting Solicitor General of the United States

Court-appointed Amicus Curiae:

Adam K. Mortara, Bartlit Beck Herman Palenchar & Scott LLP

Sixth Amendment – Trial by Impartial Jury

Pena-Rodriguez v. Colorado (15-606)

Question Presented:

Whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

Summary:

To safeguard the secrecy of jury deliberations, the no-impeachment rule prohibits the introduction of juror testimony regarding statements made during deliberations to challenge the jury's verdict. In *Tanner v. United States*, the Supreme Court held that the no-impeachment rule could constitutionally be applied to bar juror testimony that a juror was intoxicated. In *Warger v. Shauers*, the Court held that the no-impeachment rule could be constitutionally applied to bar juror testimony that a juror was biased because her daughter had caused a car accident similar to the one at issue. In both cases, the Court left open the possibility that juror testimony regarding juror misconduct during deliberations may not be excluded in certain circumstances. The question in this case is whether a court may constitutionally bar juror testimony regarding the expression of racial bias by a juror during jury deliberations.

In May 2007, a man made sexual advances to two teenage girls in the bathroom of a horse racing facility. The girls identified petitioner Pena-Rodriguez as the assailant. A jury subsequently found petitioner guilty of unlawful sexual contact and harassment. Petitioner thereafter submitted affidavits to the trial court from jurors alleging that a juror made ethnic slurs during deliberations regarding both petitioner and his alibi witness. Petitioner moved for a new trial. The trial court denied the motion.

The Supreme Court of Colorado affirmed. The court held that the application of the no-impeachment rule to bar juror testimony concerning racial bias during jury deliberations does not violate the Sixth Amendment right to an impartial jury. Relying on *Tanner* and *Warger*, the court held that other mechanisms are sufficient to ensure that verdict does not reflect racial bias, including the ability of jurors to report misconduct before the verdict, and the potential availability of non-juror testimony after the verdict. The court also could discern no dividing line between racial bias and other forms of juror misconduct.

Petitioner contends that precluding juror testimony on racial bias violates the right to an impartial jury. Petitioner argues that the alternatives identified in *Tanner* and *Wagner* are not as effective in ferreting out racial bias as they are in uncovering other forms of juror misconduct, and that, in any event, racial bias is an especially pernicious form of prejudice that the Constitution is uniquely concerned with eradicating.

Decision Below:

350 P.3d 287 (Co. 2015)

Petitioner's Counsel of Record:

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

Respondent's Counsel of Record:

Frederick R. Yarger, Solicitor General of Colorado

Federal Practice and Procedure

Appellate Jurisdiction

Manrique v. United States (15-7250)

Question Presented:

Should the Court grant certiorari to resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court's decision in *Dolan v. United States*, 560 U.S. 605, 618 (2010)?

Summary:

Rule 4(b)(2) of the Federal Rules of Appellate Procedure states that a notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment – is treated as filed on the date of and after the entry. The question presented is whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award.

Marcelo Manrique (petitioner) pleaded guilty to possession of child pornography. The district court entered a judgment imposing a term of imprisonment and supervised release, but deferred the issue of restitution. Petitioner filed a notice of appeal from that judgment. Subsequently, the district court entered a second judgment, identical to the first, except that it also ordered petitioner to pay a specific amount of restitution. Petitioner did not file a notice of appeal from that judgment.

The Eleventh Circuit affirmed petitioner's sentence. As relevant here, it held that it lacked jurisdiction to decide the restitution issue. It reasoned that a notice of appeal from a sentencing judgment deferring restitution is ineffective to appeal a subsequent restitution award. To effectively appeal the amount of restitution, the court concluded, a defendant must file a notice of appeal after the restitution award has been made.

Petitioner contends that a notice of appeal from a sentence that defers the amount of restitution is effective to appeal a subsequent restitution award. Petitioner asserts that under Rule 4(b)(2), the original notice of appeal ripens to include the amended judgment once it is entered. Petitioner further relies on the Court's holding in *United States v. Lemke* that under the predecessor to Rule 4(b)(2), a premature notice of appeal constituted harmless error and therefore did not preclude a challenge to a subsequently entered judgment.

Decision Below:

618 Fed. Appx. 579 (11th Cir. 2015)

Petitioner's Counsel of Record:

Paul M. Rashkind, Office of the Federal Public Defender

Respondent's Counsel of Record:

Ian Heath Gershengorn, Acting Solicitor General of the United States

Class Actions

Microsoft Corp. v. Baker (15-457)

Question Presented:

Whether a federal court of appeals has jurisdiction under both Article III and 28 U. S. C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.

Summary

In *Coopers & Lybrand v. Livesay*, the Supreme Court held that an order denying class certification is not reviewable as a final decision under 28 U.S.C. § 1291, even though the order would make it economically imprudent for plaintiffs to pursue the lawsuit to a final judgment. The question presented is whether a court of appeals has jurisdiction under Article III and Section 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.

Petitioner Microsoft released a video game system known as Xbox 360. Consumers who purchased Xbox 360 (respondents) sued Microsoft, claiming that any small vibrations to the machine would cause the game disc to become permanently damaged. Respondents' motion for class certification was denied, and respondents' petition for interlocutory review was also denied. Respondents then stipulated to voluntary dismissal of their individual claims with prejudice, and the district court dismissed.

The Ninth Circuit reversed the district court's denial of class certification. As relevant here, it held that it had jurisdiction to review the district court's denial of class certification. It reasoned that absent a settlement, a voluntary stipulation to dismiss creates a final decision that is sufficiently adverse to the plaintiff to support appeal of an order denying class certification.

Petitioner contends that a court lacks jurisdiction under Section 1291 and Article III to review a class certification order after the named plaintiffs voluntarily dismiss their individual claims. Petitioner argues that permitting such an appeal would circumvent the holding in *Livesay* that class certification orders are not appealable as final decisions, even when they sound the death knell for the plaintiffs' individual claims. Petitioner further argues that allowing such an appeal would thwart the discretionary review process for class certification orders in Fed. R. Civ. P. 23(f). Finally, petitioner contends that Article III generally precludes an appeal of a voluntary dismissal order because such an order is not adverse to the plaintiff. While there is an exception for cases where the order prompting voluntary dismissal effectively decides the plaintiff's claim on the merits, petitioner argues, that exception is inapplicable here.

Decision Below:

797 F.3d 607 (9th Cir. 2015)

Petitioner's Counsel of Record:

Stephen M. Rummage, Davis Wright Tremaine, LLP

Respondents' Counsel of Record:

Brendan S. Maher, Stris & Maher LLP

Federal Jurisdiction

Lightfoot v. Cendant Mortgage Corp. (14-1055)

Questions Presented:

(1) Whether the phrase “to sue and be sued, and to complain and defend, in any court of competent jurisdiction, State or Federal” in Fannie Mae’s charter confers original jurisdiction over every case brought by or against Fannie Mae to the federal courts.

(2) Whether the majority’s decision in *Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247 (1992) (5-4 decision), should be reversed.

Summary:

The charter of the Federal National Mortgage Association (Fannie Mae) authorizes Fannie Mae to sue and be sued “in any court of competent jurisdiction, State or Federal.” In *American National Red Cross v. S.G.*, the Supreme Court held that “a congressional charter’s ‘sue and be sued’ provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts.” The question in this case is whether the provision in Fannie Mae’s charter provides an independent source of federal jurisdiction over every case brought by or against Fannie Mae.

Following foreclosure on their home, petitioners sued Cendant Mortgage and Fannie Mae (respondents) in state court, raising only state law claims. Fannie Mae removed the suit to federal district court, relying solely on the “sue-and-be-sued” clause in its charter as the basis for federal jurisdiction. Petitioners sought to remand the case to state court, asserting lack of federal jurisdiction. The district court denied the motion to remand.

The Ninth Circuit affirmed. It held that, under the rule announced in *Red Cross*, the sue-and-be-sued clause in Fannie Mae’s charter confers federal jurisdiction over all suits by or against Fannie Mae because the clause specifically mentions federal courts. The court rejected petitioners’ argument that, unlike the charter provision in *Red Cross*, Fannie Mae’s charter includes the limiting phrase “in any court of competent jurisdiction,” and that this language requires an independent basis of federal jurisdiction.

Petitioners contend that the “court of competent jurisdiction” language and the history of the sue-and-be-sued clause in Fannie Mae’s charter demonstrate that Congress intended to require an independent source of federal jurisdiction over suits to which Fannie Mae is a party. Petitioner asserts that the Court in *Kiefer & Kiefer v. Reconstruction Fin. Corp.* construed identical language in a federal charter as a waiver of sovereign immunity, not a source of federal jurisdiction. Petitioners further urge the Court to reconsider its decision in *Red Cross*.

Decision Below:

769 F.3d 681 (9th Cir. 2014)

Petitioners’ Counsel of Record:

E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP

Respondents’ Counsel of Record:

Jonathan D. Hacker, O’Melveny & Myers LLP

Foreign Sovereign Immunities Act

Venezuela v. Helmerich & Payne International (15-423)

Question Presented:

Whether the pleading standard for alleging that a case falls within the [Foreign Sovereign Immunities Act's] expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.

Summary:

The Foreign Sovereign Immunities Act (FSIA) grants foreign states immunity from suit in American courts unless one of several enumerated exceptions applies. The expropriation exception denies foreign sovereign immunity and provides federal court jurisdiction in any case in which rights in property taken in violation of international law are at issue. The question in this case is whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.

Petitioner Venezuela contracted with Helmerich & Payne International Drilling Co. and its Venezuelan subsidiary (respondents) to provide oil drilling services for two state-owned petroleum corporations (also petitioners). Following disputes over payment, Venezuela expropriated 11 drilling rigs and related property owned by the subsidiary. Respondents sued in federal court, claiming the drilling equipment was taken in violation of international law. Venezuela moved to dismiss for lack of subject-matter jurisdiction. The district court dismissed the Venezuelan subsidiary's claim under the domestic-takings rule, which provides that a state's taking of property owned by its own national does not violate international law.

The D.C. Circuit reversed. The court concluded that the subsidiary's expropriation claim was neither "wholly insubstantial" nor "frivolous," as required to defeat subject-matter jurisdiction under the federal-question statute, 28 U.S.C. § 1331. The court determined that respondents' complaint was therefore sufficient to establish jurisdiction under the FSIA's expropriation exception at the pleading stage.

Petitioners contend that the standard for pleading jurisdiction under the federal-question statute is not compatible with the text or purpose of the FSIA. While Section 1331 provides federal subject-matter jurisdiction over cases "arising under" federal law, the FSIA's expropriation exception requires a plaintiff to allege conduct - a taking of property - in actual "violation of international law" to establish jurisdiction. Petitioners assert that foreign sovereign immunity shields foreign states from the burdens of litigation, as well as liability. Petitioners argue that the failure to provide meaningful review at the pleading stage of the legal adequacy of respondents' claim of a taking in violation of international law deprives petitioners of the protection from litigation required by the FSIA.

Decision Below:

784 F.3d 804 (D.C. Cir. 2015)

Petitioners' Counsel of Record:

Bruce D. Oakley, Hogan Lovells US LLP

Respondents' Counsel of Record:

David W. Ogden, Wilmer Cutler Pickering Hale and Dorr LLP

Miscellaneous Business

Antitrust

Visa, Inc. v. Osborn (15-961)

Visa, Inc. v. Stoumbos (15-962)

Question Presented:

Whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as the Court of Appeals held below or are insufficient, as the Third, Fourth and Ninth Circuits have held.

Summary:

Section 1 of the Sherman Antitrust Act makes it unlawful to engage in a conspiracy in restraint of trade or commerce. To state a claim under Section 1 and survive a motion to dismiss, a complaint must plausibly allege that the challenged anti-competitive conduct stems from an express or implicit agreement. The question in these consolidated cases is whether allegations that members of a business association agreed to follow rules adopted by a board of directors that included their appointed representatives are sufficient to plead an agreement to engage in allegedly anti-competitive conduct required by those rules.

Operators and users of independent (non-bank) automated teller machines (ATMs) (respondents) filed class complaints alleging that Visa and MasterCard (MC) agreed with their respective affiliated banks (petitioners) to adopt an anticompetitive pricing scheme for ATM access fees. Visa and MC operate networks that link an ATM to a card-holder's bank account to process transactions. To access Visa and MC networks, independent ATM operators must agree to allegedly anticompetitive access fee rules. At the time Visa and MC adopted these rules, each was owned and operated as a joint venture by their affiliated member banks. Respondents claimed that Visa and MC agreed with their member banks, through bank executives appointed to the Visa and MC boards, to adopt and enforce these rules to insulate Visa and MC from price competition with other ATM networks. The district court held these allegations insufficient to plead that petitioners engaged in the concerted activity required to state a Section 1 claim and dismissed the complaints.

The D.C. Circuit reversed. The court held that respondents' allegations that the member banks fixed an element of access fee pricing through rules adopted when the banks owned, operated, and controlled Visa and MC stated a plausible claim of concerted activity sufficient to survive a motion to dismiss at the pleading stage.

Petitioners contend that allegations that the banks had equity interests in the Visa and MC bankcard associations, appointed bank executives to the Visa and MC boards, and adhered to association rules, are insufficient to plead that they agreed to engage in allegedly anticompetitive activity. Petitioners argue that permitting cases to proceed based on allegations of active participation in a business association would subject these associations and their members to the debilitating expense of defending against antitrust claims for conduct that may be perfectly lawful and economically beneficial.

Decision Below:

797 F.3d 1057 (D.C. Cir. 2015)

Petitioners' Counsel of Record:

Neal Katyal, Hogan Lovells US LLP

Respondents' Counsel of Record:

Steve W. Berman, Hagens Berman Sobol Shapiro LLP

Bankruptcy

Czyzewski v. Jevic Holding Corporation (15-649)

Question Presented:

Whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme.

Summary:

The Bankruptcy Code prioritizes the order in which a debtor in bankruptcy under Chapter (Ch.) 11 or Ch. 7 must pay the claims of its creditors. Section 507 identifies unsecured claims entitled to priority, and specifies the order of payment. Higher-priority claims must be paid in full before lower-priority claims are paid anything. The question in this case is whether a bankruptcy court may order a structured dismissal of a Ch. 11 case that settles claims against the estate and pays settlement proceeds to creditors in violation of the Code's priority scheme.

Respondent Jevic, a trucking company, fired Casimir Czyzewski and nearly 1800 other truck drivers (petitioners) without notice the day before filing for Ch. 11 bankruptcy. Petitioners won summary judgment against Jevic on claims for lost wages and benefits. Petitioners' claim for roughly \$8.3 million in lost wages is entitled to priority under Section 507. A Committee of unsecured creditors with non-priority claims filed suit against two secured creditors, respondents Sun and CIT, claiming fraudulent conveyance on behalf of the estate. Jevic, Sun, CIT, and the Committee sought approval of a structured dismissal that would settle the estate's claims against Sun and CIT, distribute the settlement proceeds among the unsecured non-priority creditors, and dismiss the bankruptcy case. Under the proposed settlement, petitioners' priority claim for lost wages would go unpaid. The bankruptcy court approved the structured dismissal over the objections of petitioners and the U.S. Trustee, and the district court affirmed.

The Third Circuit affirmed. The court held that bankruptcy courts have discretion under Bankr. R. 9019 (authorizing "fair and equitable" settlements), to approve a structured dismissal that favors lower-priority creditors to the detriment of creditors with higher-priority claims, if specific and credible grounds justify the deviation from the Code's priority scheme. The court found sufficient grounds to justify the structured dismissal of Jevic's case because there was no prospect of a confirmable plan of reorganization under Ch. 11, and liquidating the estate under Ch. 7 would leave nothing for unsecured creditors, including petitioners, after secured creditors had depleted the remaining assets. The critical question, in the court's view, was whether the settlement served the interests of the estate and creditors as a whole, not one particular group.

Petitioners contend that bankruptcy courts lack authority to order structured dismissals that deviate from the Code's priority scheme in distributing estate assets. Petitioners assert that the phrase "fair and equitable" is a bankruptcy term of art meaning a rule of full or absolute priority. Petitioners maintain that the Code authorizes three dispositions of Ch. 11 bankruptcy cases: (1) approval of a reorganization plan that respects priority of payment; (2) conversion to Ch. 7, liquidation of the estate, and distribution of assets in priority order; or (3) dismissal, which vacates all orders entered by the bankruptcy court, returns estate property to its pre-petition owner, and enables creditors to pursue claims against the debtor outside of bankruptcy.

Decision Below:

787 F.3d 173 (3d Cir. 2015)

Petitioner’s Counsel of Record:

Craig Goldblatt, Wilmer Cutler Pickering Hale and Dorr LLP

Respondent’s Counsel of Record:

Christopher Landau, Kirkland & Ellis LLP

Copyright

Star Athletica, L.L.C., v. Varsity Brands, Inc. (15-866)

Question Presented:

What is the appropriate test to determine when a feature of a useful article is protectable under § 101 of the Copyright Act?

Summary:

Under the Copyright Act, a “useful article” is not subject to copyright protection. The components, features, or elements of a useful article qualify for protection only if they can be “identified separately from and are capable of existing independently of the utilitarian aspects of the article.” The question in this case is to identify the proper test to determine when a feature of a useful article is protectable.

Varsity Brands (respondent) is the world’s largest manufacturer of cheerleading uniforms. Varsity’s uniforms feature designs composed of stripes, chevrons, and color blocks. When Star Athletica (petitioner) tried to enter the cheerleading uniform market, Varsity sued, claiming that Star’s uniform designs infringed on Varsity’s copyrights. The district court entered summary judgment in Star’s favor.

The Sixth Circuit reversed, holding that Varsity’s designs qualify for copyright protection. The court reasoned that the utilitarian functions of a cheerleading uniform are to cover the body, wick away moisture, and withstand the rigor of athletic movements, and that Varsity’s designs are separable from and capable of existing apart from those utilitarian functions. The court explained that cheerleading uniforms are recognizable as such without stripes, chevrons, and color blocks, and that Varsity’s designs may be incorporated into other garments besides cheerleading uniforms.

Petitioner argues that Varsity’s designs do not qualify for copyright protection. Petitioner specifically contends that the decorative elements of cheerleading uniforms are intrinsically linked to their utilitarian functions, which include identifying the wearer as a cheerleader, associating the wearer with a certain team, and enhancing the wearer’s attractiveness. Petitioner further argues that extending copyright protection to Varsity’s designs would be inconsistent with Congress’s repeated refusal to extend copyright protection to garment designs.

Decision Below:

799 F.3d 468 (6th Cir. 2015)

Petitioner’s Counsel of Record:

John J. Bursch, Warner, Norcross & Judd, LLP

Respondent’s Counsel of Record:

William M. Jay, Goodwin Procter LLP

False Claims Act

State Farm Fire and Casualty Co. v. United States, ex rel. Rigsby (15-513)

Question Presented:

What standard governs the decision whether to dismiss a relator's claim for violation of the [False Claims Act's] seal requirement?

Summary:

The False Claims Act (FCA) imposes liability on any person who submits a fraudulent claim for payment to the United States. The FCA allows private individuals (known as qui tam relators) to bring suit. A qui tam plaintiff's complaint "shall be filed in camera," and "shall remain under seal for at least 60 days." The question presented is whether a violation of the seal requirement automatically requires dismissal of the complaint.

Cori and Kerry Rigsby (respondents) filed a complaint against State Farm Fire and Casualty Co. (petitioner), alleging that petitioner submitted fraudulent claims to the United States in the wake of Hurricane Katrina. Respondents specifically alleged that petitioner submitted claims for flood damage under the National Flood Insurance Program when the damage was in fact caused by wind. After filing the complaint, respondents violated the seal requirement by disclosing the suit. The district court refused to dismiss respondents' complaint, and the jury found petitioner guilty of defrauding the government under the FCA.

The Fifth Circuit affirmed. It held that a violation of the seal requirement does not automatically require dismissal of a qui tam plaintiff's complaint. Instead, the court concluded that a district court should consider three factors in deciding whether to dismiss: the harm to the government, the nature of the violation, and whether the violations were made willfully or in bad faith. Applying those factors, the court concluded that the district court did not abuse its discretion in refusing to dismiss respondents' complaint.

Petitioner contends a violation of the seal requirement automatically requires dismissal of a qui tam plaintiff's suit. Petitioner relies on cases holding that a failure to comply with a mandatory precondition to suit requires dismissal of the suit. Those cases apply here, petitioner contends, because the seal requirement is set forth in the same provision that creates the cause of action, and because the term "shall" makes clear that the requirement is mandatory.

Decision Below:

794 F.3d 457 (5th Cir. 2015)

Petitioner's Counsel of Record:

Sheila L. Birnbaum, Quinn, Emanuel, Urquhart & Sullivan, LLP

Respondents' Counsel of Record:

William E. Copley, Weisbrod Matteis & Copley PLLC

Patent

Life Technologies Corp. v. Promega Corp. (14-1538)

Question Presented:

Whether the Federal Circuit erred in holding that supplying a single, commodity component of a multi-component invention from the United States is an infringing act under 35 U.S.C. § 271(f)(1), exposing the manufacturer to liability for all worldwide sales.

Summary:

Under Section 271(f)(1) of the Patent Act, it is an act of infringement to supply from the U.S. “all or a substantial portion of the components of a patented invention” to induce their combination outside the U.S. It is infringement under § 271(f)(2) to supply from the U.S. “any component” especially made or adapted for use in a patented invention that is “not a staple article or commodity of commerce suitable for substantial non-infringing use . . . intending that such component will be combined” outside the U.S. The question in this case is whether a supplier who ships a single commodity component from the U.S. for combination into a patented invention abroad can be liable for infringement under § 271(f)(1) for supplying “all or a substantial portion” of the invention’s components.

Promega (respondent) holds the patent for a kit used to copy short repeated sequences of DNA, suitable for genetic testing. Each kit has at least five components. Life Tech. (petitioner) shipped one component – *Taq* polymerase, an enzyme that causes a sample DNA sequence to replicate – from the U.S. to the U.K., where it was combined with the remaining components to assemble the kit. *Taq* polymerase is a commodity suitable for substantial non-infringing use. Promega sued Life Tech. for infringement under § 271(f)(1) and sought damages for global sales of the kit. Following a jury verdict for Promega, the district court granted judgment as a matter of law for Life Tech. The court held § 271(f)(1)’s reference to “all or a substantial portion” of an invention’s “components” requires that multiple components be supplied from the U.S.

The Federal Circuit reversed. The court held that a single commodity component can be a “substantial portion” of an invention’s components if it is a sufficiently important part of the invention. The court decided that § 271(f)(1) uses the term “substantial” in a qualitative sense, to mean “important” or “essential.” The court sustained the jury’s finding that *Taq* polymerase is a substantial portion of the kit because the enzyme was essential to copy the DNA sequence to produce a sample sufficient for testing, and the invention would be inoperable without it.

Petitioner contends that the statutory text and structure make clear that “a substantial portion” refers to the quantity, not the relative importance, of the components supplied. In contrast with § 271(f)(2), which consistently refers to a single “component,” petitioner notes that § 271(f)(1) consistently refers to “components” in the plural. Petitioner argues that both provisions read together demonstrate that Congress did not intend to impose liability for supplying a single staple commodity component for combination into a multi-component invention abroad. Finally, petitioner maintains that the Federal Circuit improperly expanded the statute’s extraterritorial reach, putting domestic manufacturers of commodity supplies at a competitive disadvantage in the global market.

Decision Below:

786 F.3d 983 (Fed. Cir. 2015)

Petitioners’ Counsel of Record:

Carter G. Phillips, Sidley Austin LLP

Respondent’s Counsel of Record:

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

Samsung Electronics Co. v. Apple (15-777)

Question Presented:

Where a design patent is applied to only a component of a product, should an award of infringer's profits be limited to those profits attributable to the component?

Summary:

The Patent Act provides that whoever applies a patented design to any “article of manufacture” for the purpose of sale shall be liable to the patent owner “to the extent of his total profit.” The Act also provides that while a patent holder may pursue alternative remedies, he shall not twice recover the profit “made from the infringement.” The question in this case is whether, when a patented design is applied only to a component of a product, an award of infringer’s profits should be limited to profits attributable to that component.

In 2011, Apple (respondent) sued Samsung (petitioner) for infringement of three design patents: the front face of the iPhone, the bezel of the iPhone, and the graphical user interface. The jury found infringement and awarded Apple \$399 million, the entirety of Samsung’s profits on eleven smartphones containing the patented designs.

The Federal Circuit affirmed, holding that Samsung was liable for the entirety of the profits made from sale of the smartphones, not just the profits attributable to the infringed designs. The court reasoned that the relevant “article of manufacture” is the finished product, and the plain language of the Act therefore requires an award of the total profits made from the sale of that product.

Petitioner argues that Patent Act limits damages to the profits attributable to infringement of the patented design. The term “article of manufacture,” petitioner contends, refers to the component of the product to which a patented design is applied, not to the finished product. For that reason, petitioner argues, the total profit recoverable is that attributable to the component. In further support of that limitation, petitioner relies on language in the double recovery provision referring to the profit recoverable as that “made from the infringement,” and on background principles of causation.

Decision Below:

786 F.3d 983 (Fed. Cir. 2015)

Petitioners’ Counsel of Record:

Kathleen M. Sullivan, Quinn, Emanuel, Urquhart & Sullivan, LLP

Respondent’s Counsel of Record:

William F. Lee, Wilmer Cutler Pickering Hale and Dorr, LLP

SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC* (15-927)*Question Presented:**

Whether and to what extent the defense of laches may bar a claim for patent infringement brought within the Patent Act’s six-year statutory limitations period, 35 U.S.C. § 286.

Summary:

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the Supreme Court held that laches is unavailable to bar copyright infringement claims brought within the Copyright Act’s three-year limitations period. The Patent Act specifies that “[e]xcept as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement.” The question presented is whether and to what extent the defense of laches may bar a claim for patent infringement brought within the Patent Act’s six-year statutory limitations period.

SCA Hygiene Products (petitioner) patented a protective underwear design. First Quality Baby Products (respondent) manufactured products that emulated SCA’s patented products. SCA sent a letter to First Quality claiming infringement, but First Quality responded that SCA’s patent was invalid. SCA sought guidance from the U.S. Patent and Trademark Office (PTO). Almost

three years later, the PTO confirmed the validity of SCA's patent. SCA filed suit two years and four months later, claiming damages for infringement. The district court granted summary judgment in favor of First Quality on its laches defense.

The Federal Circuit, sitting en banc, affirmed in relevant part. It held that laches remains a viable defense to a patent infringement suit for damages after *Petrella*. The court reasoned that the general defenses delineated by Congress (including "absence of liability for infringement" and "unenforceability") are broad enough to encompass a laches defense. The court also relied on commentary by the principal draftsman of the defenses, and on judicial precedent recognizing laches as a common law defense to damages prior to Congress's codification of the general defenses.

Petitioners argue that laches is not a defense to claims for damages within the six-year statutory limitation period. Petitioners rely on the holding in *Petrella*, that when Congress establishes a statutory limitations period, courts may not cut it short through recognition of a laches defense.

Decision Below:

807 F. 3d 1311 (Fed. Cir. 2015) (en banc)

Petitioners' Counsel of Record:

Martin J. Black, Dechert LLP

Respondents' Counsel of Record:

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

Securities

Salman v. United States (15-628)

Question Presented:

Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

Summary:

Section 10(b) of the Securities Exchange Act of 1934 prohibits the use of a "manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. In *Dirks v. SEC*, the Supreme Court held that a recipient of information gained from a corporate insider may be held liable for insider trading under Section 10(b) when he knows that the insider will "personally benefit" from the disclosure. The question presented in this case is whether "personal benefit" refers only to pecuniary gain or whether it can also encompass making a gift to a relative or friend.

Maher Kara worked for Citygroup's healthcare investment banking group. His brother Michael requested inside information from Maher, and Maher obliged. Michael then traded on the inside information. Michael passed on some of the inside information to his friend and future brother-in-law, Basim Salman (petitioner), who mirrored Michael's trades. Salman was subsequently indicted for securities fraud in violation of Section 10(b). The jury was instructed that a personal benefit need not consist of a pecuniary gain but could also include a gift to a trading friend or relative. The jury found petitioner guilty.

The Ninth Circuit affirmed. Relying on *Dirks*, the court held that a personal benefit can consist of a gift to a trading friend or relative. Requiring proof of a pecuniary benefit, the court concluded, would be inconsistent with *Dirks*. Because there was sufficient evidence that petitioner knew that Maher was making a gift of inside information to his brother, and that his brother was trading on it, the court concluded that the personal benefit requirement was satisfied.

Petitioner argues that a personal benefit is limited to pecuniary gain. Petitioner contends that the text of Section 10(b) does not refer to insider trading at all, much less to insider trading where the sole benefit to the insider is the psychic satisfaction of making a gift to a friend or relative. Petitioner also contends that *Dirks* and other insider trading cases equate personal benefit with pecuniary gain. Finally, petitioner argues that expanding personal benefit to include the psychic benefit of gift-giving would render the personal benefit requirement indeterminate, raising separation-of-powers and due process concerns.

Decision Below:

792 F.3d 1087 (9th Cir. 2015)

Petitioner’s Counsel of Record:

Alexandra A.E. Shapiro, Shapiro Arato LLP

Respondent’s Counsel of Record:

Ian Heath Gershengorn, Acting Solicitor General of the United States

Other Public Law

Federal Vacancies Reform Act

National Labor Relations Board v. SW General, Inc. (15-1251)

Question Presented:

Whether the precondition in 5 U.S.C. 3345(b)(1) [of the Federal Vacancies Reform Act] on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis applies only to first assistants who take office under Subsection (a)(1) of 5 U.S.C. 3345, or whether it also limits acting service by officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

Summary:

The Federal Vacancies Reform Act (FVRA) designates three kinds of officials who can temporarily fill a vacant position that is otherwise subject to Senate confirmation: the first assistant to the vacant post (Section 3345(a)(1)); a Senate-confirmed official occupying another Executive Branch office (Section 3345(a)(2)); and a senior official in the same agency (Section 3345(a)(3)). Section 3345(b) provides that “notwithstanding subsection (a)(1),” “a person” nominated to fill a vacant office may not serve as an acting officer “under this section,” unless that person served as first assistant to the vacant office for at least 90 days. The question presented is whether the requirement of 90-day service as first assistant is applicable only to first assistants designated under Section 3345(a)(1), or whether it also applies to Senate-confirmed officials in another Executive Branch office and senior officials in the same agency designated under Sections 3345(a)(2) and (3).

The General Counsel of the National Labor Relations Board (NLRB) is a position subject to the FVRA. In 2010, the General Counsel of the NLRB resigned, and the President designated Life Solomon, a senior official in the same agency, to serve as the Acting General Counsel. Six months later, the President nominated Solomon for the position, but he was never confirmed.

After Solomon's nomination, SW General was charged with an unfair labor practice, and the NLRB issued an order sustaining that charge.

The D.C. Circuit vacated the order, holding that Solomon was serving as Acting General Counsel in violation of the FVRA when the complaint against SW General was filed. The court concluded that the requirement of 90-days service as first assistant applies not only to first assistants designated under Section 3345(a)(1), but to all acting officers. The court reasoned that the term "a person" naturally includes all officers, and that the phrase "this section," refers to Section 3345 in its entirety. Had Congress wanted to apply the limitation in Section 3345(b) solely to first assistants, the court added, it would have said "first assistant" and "that subsection," not "a person" and "this subsection."

The government argues that subsection (b)(1)'s 90-day service requirement applies only to first assistants designated under subsection (a)(1). The government contends that the introductory phrase "notwithstanding subsection (a)(1)" shows that the limitation that follows overrides only subsection (a)(1). Had Congress wished to subject all three methods of appointment to the 90-day service requirement as first assistant, the government argues, it would have said "notwithstanding subsection (a)," not "notwithstanding subsection (a)(1)."

Decision Below:

796 F.3d 67 (D.C. Cir. 2015)

Petitioner's Counsel of Record:

Ian Heath Gershengorn, Acting Solicitor General of the United States

Respondent's Counsel of Record:

Shay Dvoretzky, Jones Day

Immigration

Jennings v. Rodriguez (15-1204)

Questions Presented:

- (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under [8 U.S.C. 1225(b)] must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.
- (2) Whether criminal or terrorist aliens who are subject to mandatory detention under [8 U.S.C. 1226(c)] must be afforded bond hearings, with the possibility of release, if detention lasts six months.
- (3) Whether, in bond hearings for aliens detained for six months under [8 U.S.C. 1225(b), 1226(c), or 1226(a)], the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months.

Summary:

Federal immigration law mandates that inadmissible aliens who seek admission at the U.S. border, and aliens convicted of certain crimes or engaged in terrorist activities, must be detained in federal custody during removal proceedings. Other aliens in the U.S. may either be detained during removal proceedings, or released on bond if they convince an immigration judge (IJ) that they would not endanger the community or pose a flight risk; if bond is denied, an alien may seek a redetermination upon showing a material change in circumstances. The questions in this case are whether all detained aliens are automatically entitled to a bond hearing after every

six-month period of detention, and to release on bond unless the government shows by clear and convincing evidence that release would pose a flight risk or endanger the community.

Respondents are six non-citizens who filed petitions for habeas corpus seeking class-wide relief on behalf of aliens subject to prolonged detention. The district court granted summary judgment for respondents and issued a permanent injunction requiring the government to provide a bond hearing to any alien detained for longer than six months. The court required the government to prove by clear and convincing evidence that a detainee is a flight risk or danger to others to justify continued detention without bond.

The Ninth Circuit largely affirmed. The court decided that prolonged detention without an individual determination of flight risk or dangerousness raises serious due process concerns. The court relied on constitutional avoidance to read into the provisions mandating detention of certain aliens an implicit requirement of a bond hearing for any alien detained over six months. The court also imposed on the government a heightened burden to justify continued detention, and further held that IJs must consider length of detention and likelihood of removal. Finally, the court required automatic bond hearings after every six-month period of detention.

Petitioner contends that the statutory text mandates detention of aliens detained at the U.S. border, and aliens with criminal convictions, for the duration of their removal proceedings. Petitioner asserts that constitutional avoidance applies only where statutory language admits of more than one permissible interpretation, and cannot be used to rewrite an unambiguous statutory directive. Petitioner argues that the court disregarded federal regulations warranting *Chevron* deference that specify the burden and standard of proof for granting bond, and improperly required IJs to consider additional factors in bond hearings. Finally, petitioner asserts that requiring automatic bond hearings after six months gives aliens subject to mandatory detention a strong incentive to delay removal proceedings to obtain a bond hearing – and potential release – otherwise unavailable to them.

Decision Below:

804 F.3d 1060 (9th Cir. 2015)

Petitioner’s Counsel of Record:

Ian Heath Gershengorn, Acting Solicitor General of the United States

Respondents’ Counsel of Record:

Ahilan T. Arulanantham, ACLU Foundation of Southern California

***Lynch v. Morales-Santana* (15-1191)**

Questions Presented:

(1) Whether Congress’s decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment’s guarantee of equal protection.

(2) Whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

Summary:

The Immigration and Naturalization Act (INA) requires a U.S citizen to have spent a specified period of time in U.S. territory to transmit U.S. citizenship to a child born abroad. For unwed parents, the length of time varies depending on whether the mother or the father is a U.S. citizen. A child born abroad is a U.S. citizen at birth if his unwed mother is a U.S. citizen who was continuously present in U.S. territory for one year at any time before his birth. The INA

requires an unwed father to have spent a much longer period in U.S. territory to transmit his U.S. citizenship to a child born abroad to a foreign mother. The questions in this case are whether imposing different physical-presence requirements for unwed parents to transmit U.S. citizenship to foreign-born children violates equal protection and if so, whether the proper remedy is to require all unwed parents to meet the longer period required of fathers or the shorter period required of mothers.

Respondent Morales-Santana was born abroad in 1962 to an unwed foreign mother. His father was a U.S. citizen who left Puerto Rico at age 18. At that time, the INA required a father to have been present in U.S. territory for a total of 10 years, at least 5 after age 14, to transmit U.S. citizenship to the child of a foreign mother. Respondent's parents subsequently married, and he was admitted to the U.S. as a lawful permanent resident in 1975. After respondent was convicted of several felonies, the government commenced removal proceedings. An immigration judge ordered removal. The Board of Immigration Appeals rejected respondent's claim of derivative U.S. citizenship because his father had not spent the requisite five years in U.S. territory after age 14.

The Second Circuit reversed. Applying intermediate scrutiny, the court held the gender-based distinction in the physical-presence requirements for unwed parents to transmit U.S. citizenship to foreign-born children violates equal protection. The court concluded that the government's interests in reducing statelessness and assuring that children born abroad are sufficiently connected with the U.S. were not advanced by treating unwed mothers and fathers differently. The court invalidated the longer physical-presence requirement for unwed fathers and declared respondent a U.S. citizen from birth because his father had met the one-year requirement for unwed mothers to transmit U.S. citizenship.

The government contends that the INA's gender-based distinction is subject to rational-basis review because the judiciary owes heightened deference to Congress's determinations of who is entitled to U.S. citizenship. The government further argues that the distinction survives intermediate scrutiny because a child of unwed parents has only one legally recognized parent at birth – his mother; thus, the child of an unwed U.S.-citizen mother has no competing allegiance to another country at birth, while the child of an unwed foreign mother and U.S.-citizen father has competing national allegiances. This difference, the government maintains, justifies a longer presence requirement for unwed citizen fathers to ensure that children with competing foreign allegiances have a sufficient connection to the U.S. Finally, the government contends that if the statutory distinction is invalid, Congress would have imposed the lengthier presence requirement for transmitting U.S. citizenship to all foreign-born children of couples in which only one parent is a U.S. citizen.

Decision Below:

804 F.3d 520 (2d Cir. 2015)

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