2017–18 Wrap-Up
PREVIEW
OF UNITED STATES SUPREME COURT CASES
LETTER FROM THE EDITOR

SUPREME COURT TERM PROVIDES BOON FOR FOURTH AMENDMENT AND PRIVACY ADVOCATES

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PAST AS PRELUDE: IMMIGRATION JURISPRUDENCE AFTER ANTHONY KENNEDY

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U.S. SUPREME COURT October 2018

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As the 2017–18 Supreme Court term wrapped up on the morning of June 27, it seemed to be a slow term, with several instances of the Court “kicking the can down the road.” However, over the course to that single day, the story changed precipitously when Justice Anthony Kennedy announced his retirement. In the blink of an eye, the narrative changed from a somewhat sleepy term to a summer of the Supreme Court dominating the headlines, and midterm elections.

Before delving into the future “what ifs” and confirmation debates, looking back at the 2017–18 term provides some insight into the Court’s ongoing struggles with important issues at the center of democracy. The political gerrymandering cases serve as a prime example of Court watchers thinking the Court may make sweeping pronouncements, while in reality, the Court’s decisions barely registered on the Richter scale. In these cases (Gill v. Wisconsin and Benisek v. Lamone), the Court had the opportunity to announce whether political gerrymandering was justiciable and, if so, the standard of review a court should apply. Instead, the justices failed to come to a consensus on either issue, and we can likely expect to see the questions back before the Court in the near future. Masterpiece Cakeshop v. Colorado Civil Rights Commission was another example of the Court declining a vehicle to issue an impactful decision, and instead, taking a narrower and more confined route. Masterpiece Cakeshop sat at the intersection of a same-sex couple’s right to celebrate their marriage and a Christian baker’s right to exercise his religious beliefs. Rather than providing much guidance on how these various rights interact, the Court instead focused on the Colorado Civil Rights Commission’s failure to approach this case in a neutral manner with regard to religion. In leaving these issues unaddressed, the Court all but ensured that we will see a case presenting similar questions again.

Late June also saw the justices announce a number of high-profile 5–4 splits, including Janus v. State, County, and Municipal Employees (holding that public-sector union agency fees violate the First Amendment), Trump v. Hawaii (holding that the president has authority to suspend entry of certain aliens into the United States), and National Institute of Family and Life Advocates v. Becerra (finding potential First Amendment flaws in California’s abortion notification law). Although those cases garnered much media attention and debate, for many who watch the Court closely, these decisions were far from surprising. With the justices splitting along fairly expected and well-known divides, some conclusions seemed forgone from the moment the Court granted certiorari.

As much as the politically charged cases may have seemed unsurprising, the near future of the Court remains wide-open and unknown. President Trump’s nomination to fill Justice Anthony Kennedy’s seat, Judge Brett Kavanaugh of the D.C. Circuit, certainly has a long and detailed track record from his decade on the bench. But how exactly he will rule as a justice, or even if he will get confirmed, remains to be seen. And for the first time in thirty years, the Supreme Court is about to convene a term without Justice Kennedy. Particularly in the last five to seven years, Justice Kennedy has played a central role on the Supreme Court and its place in our political discourse. What does a Court without Justice Kennedy as its “swing” or “middle” look like? Will advocates alter their arguments to focus on Chief Justice John Roberts? Will another justice eventually shift into the swing vote position?

Of course, beyond the headlines and the intrigue of a Supreme Court nomination and new justice, the business of the Court proceeded throughout the term. Our wrap-up issue features some of our frequent PREVIEW authors providing insightful analysis on trends and developments from this term, including the Court’s evolving immigration doctrines, a few headline cases addressing the First Amendment, and the continuing struggle to define and refine the Fourth Amendment. We hope you enjoy this issue and, if you are not already, will become a regular PREVIEW subscriber!

Sincerely,
Catherine Hawke
Editor, ABA PREVIEW of United States Supreme Court Cases
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Supreme Court Term Provides Boon for Fourth Amendment and Privacy Advocates
by David L. Hudson Jr.

The Supreme Court’s 2017–18 term well may be remembered for its Fourth Amendment decisions, as the Court consistently showed solicitude for the privacy concerns undergirding the Amendment’s prohibition of “unreasonable searches and seizures” by government officials. In a trilogy of cases, the Court ruled that unauthorized drivers of rental cars have a reasonable expectation of privacy in the vehicles; that the automobile exception does not extend to a vehicle parked on the curtilage of a home; and that searching cell phone records constitutes a search.

Reasonable Expectation of Privacy and Rental Cars
In Byrd v. United States (16-1731), the U.S. Supreme Court ruled that defendant Terrance Byrd had a reasonable expectation of privacy in the rental car he drove even though the only authorized driver pursuant to the rental agreement was his live-in girlfriend. An officer stopped Byrd for what seems like dubious reasons—his hands were at the 10 and 2 position on the steering wheel, he was sitting far back from the steering wheel, and he was driving a rental car.

However, the stop and subsequent search revealed 49 bricks of heroin. Byrd entered a conditional guilty plea, reserving the question of the constitutionality of the search denied in an initial suppression motion. As framed, the question for the Court was whether Byrd had a reasonable expectation of privacy in the rental car even though he was not an authorized driver.

The Court unanimously ruled in Byrd’s favor with Justice Anthony Kennedy authoring the main opinion. The key to the case was that presumably Byrd’s girlfriend had allowed him to drive the vehicle. Thus, Byrd had an expectation of privacy when driving the car. Justice Kennedy concluded that “the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.”

The government argued that the rental agreement authorized only the girlfriend to operate the vehicle. But the Court was not persuaded, pointing out that rental care agreements are “filled with long lists of restrictions” and there are many “innocuous reasons” why a person not authorized on the agreement might operate a rental car.

The Court remanded the case to determine the government’s additional arguments, such as whether Byrd had lawful possession of the vehicle in the first place and whether the officers had probable cause to pull over the vehicle.

Resisting the Expansion of the Automobile Exception to the Curtilage
The Court also refused to expand the so-called automobile exception to cover a warrantless search of a motorcycle parked in the driveway of a home. A motorcycle had outrun two different police cars in recent weeks. Officers investigated and determined that Ryan Collins had possession of the motorcycle and that Collins often stayed at his girlfriend’s home.

The officers went to the home and saw in the driveway what appeared to be a parked motorcycle covered by a tarp. One officer exited the car, walked toward the home, pulled off the tarp, and confirmed the motorcycle was stolen. After Collins returned to the home, an officer rang the doorbell, and accosted Collins.

Virginia state courts upheld the warrantless search even though Collins argued that the officer had trespassed on the curtilage of the home. Instead, the state courts relied on the automobile exception first developed by the U.S. Supreme Court in Carroll v. United States, 267 U. S. 132 (1925). Under that exception, because of the ready mobility and pervasive regulation of automobiles, police do not need a warrant before searching the vehicle. They simply need probable cause.

However, the U.S. Supreme Court reversed the Virginia state court rulings in Collins v. Virginia (16-1027) by an 8–1 vote in a majority opinion authored by Justice Sonia Sotomayor, arguably the Court’s premier defender of Fourth Amendment values. She reasoned that the officer in this case could not rely on the automobile exception, because the officer intruded on the curtilage of the home. She wrote that “the scope of the automobile exception extends no further than the automobile.”

Justice Sotomayor concluded that “the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle.” The Court remanded the case asking the lower court to determine whether the officer’s warrantless search was justified by exigent circumstances.

Justice Clarence Thomas wrote a concurring opinion, questioning whether the exclusionary rule should be extended to the states. He wrote that the Founders would not have understood the logic of the exclusionary rule. The Court first applied the exclusionary rule to the states in the celebrated case of Dollee Mapp, Mapp v. Ohio, 367 U.S. 643 (1961). Justice Thomas, however, questioned that ruling, writing that “the exclusionary rule is not rooted in the Constitution or a federal statute.”
Justice Samuel Alito Jr. filed a solitary dissent and questioned the reasonableness of his colleagues’ decision in a colorful way. He wrote:

An ordinary person of common sense would react to the Court’s decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, “the law is a ass—a idiot.”

The Fourth Amendment is neither an “ass” nor an “idiot.” Its hallmark is reasonableness, and the Court’s strikingly unreasonable decision is based on a misunderstanding of Fourth Amendment basics.

Justice Alito reasoned that the automobile exception should apply because the search was of a vehicle, not a home. “Is the vehicle parked in the driveway any less mobile?” he asked. “Are any greater privacy interests at stake?”

Accessing Cell Phone Data from Cell Sites—Is It a Search?
The most sharply divided Fourth Amendment case was Carpenter v. United States (16-402), involving the government’s use of cell phone data obtained from wireless carriers. The Court, in a 5–4 ruling, held that the warrantless acquisition of historical cell phone records amounted to a search within the meaning of the Fourth Amendment.

The case involved the prosecution of Timothy Carpenter, who was identified as a suspect after police initially arrested four other men on suspicion of robbing a string of Radio Shacks and T-Mobile stores in Detroit. One of the arrested men indicated that a group of as many as 15 people also had committed another string of robberies in Ohio and Michigan.

Carpenter was identified as one of the men, and the police obtained his cell phone records from his two cell phone providers, which placed him near four of the robberies at the time they took place. When a person makes a cell phone call, that call is recorded by a cell site under so-called cell-site location information (CSLI). Relying on this CSLI digital data and other evidence, Carpenter was convicted on numerous counts and sentenced for more than 100 years in prison.

On appeal, the U.S. Court of Appeals for the Sixth Circuit denied Carpenter’s Fourth Amendment argument, reasoning that he lacked any reasonable expectation of privacy in the cell phone data since he willingly shared that with his wireless carriers.

On further appeal, the U.S. Supreme Court reversed in an opinion by Chief Justice John Roberts Jr. “The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person’s past movements through the record of his cell phone signals,” he wrote.

Chief Justice Roberts reasoned that cell phone location information was similar to GPS tracking of vehicles in Jones v. United States, 565 U. S. 400 (2014), which the Court ruled was generally impermissible without a warrant. The government argued that there was no reasonable expectation and no search, because Carpenter willingly disclosed his location implicitly to his wireless carriers. Chief Justice Roberts rejected that argument given “the unique nature of cell phone location records.”

Chief Justice Roberts rejected the government’s reliance on the so-called third-party doctrine—that one loses a reasonable expectation of privacy when information is disclosed to a third party. “In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection,” he wrote.

“A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements,” the Chief Justice concluded, adding that “when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.”

Chief Justice Roberts cautioned that the decision was a narrow one that did not call into question “conventional surveillance techniques and tools, including security cameras.”

All four dissenting justices, Justices Anthony Kennedy, Clarence Thomas, Samuel Alito, and Neil Gorsuch, filed separate dissenting opinions. Justice Kennedy contended that the majority failed to follow its precedent on the third-party doctrine in United States v. Miller, 425 U. S. 435 (1976), and Smith v. Maryland, 442 U. S. 735 (1979). In those cases, the Court rejected Fourth Amendment defenses when third parties possessed business records.

Justice Thomas said there was no Fourth Amendment violation because the records in question were the property of Metro PCS and Sprint, not Carpenter. He also criticized the reasonable-expectation-of-privacy test developed by Justice John Marshall Harlan II in Katz v. United States, 389 U. S. 347 (1967).

Justice Alito criticized the Court’s reasoning, writing: “Treating an order to produce like an actual search, as today’s decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent.”

For his part, Justice Gorsuch criticized both the third-party doctrine and the Katz reasonable-expectation-of-privacy analysis. However, he still ruled for the government, because Carpenter failed to advance arguments based on the law of property or the common law.

Conclusion
The Court’s 2017–18 term was a watershed moment for Fourth Amendment law. The Court in a trilogy of cases ruled each time in favor of the defendant and against the government. The Court
continued to follow the *Katz* reasonable-expectation-of-privacy analysis, refused to expand the automobile exception, and showed concern over how increased technological advances could erode individual privacy in the era of mass digital data.

Individual justices continued to refine and define their Fourth Amendment jurisprudence. Justice Sonia Sotomayor continued to be a consistent defender of Fourth Amendment principles. Justice Clarence Thomas continued to call for the abandonment of precedent, *Mapp v. Ohio* and *Katz v. United States*, that do not comport with his constitutional vision. Justice Samuel Alito continued to be quite pro-government in Fourth Amendment cases. And Justice Gorsuch, in his first full term on the bench, analyzed constitutional issues with an approach different from his colleagues.
The Continuing Quest for a Solution to Extreme Partisan Gerrymandering
by Steven D. Schwinn

For nearly half a century, the Court has searched in vain for an elusive judicial remedy to the problem of extreme partisan gerrymandering. While many of the justices over this period agreed that partisan gerrymandering could be a constitutional problem, the Court could never cobble together a majority to agree that the courts (as opposed to state legislatures) should come up with a solution. And even when some justices agreed that the courts could rule on partisan gerrymandering, they couldn’t agree on how.

Still, extreme partisan gerrymandering seems naturally to call for a judicial remedy. That’s because the political branches are inherently unable to address it themselves. In most states, the (partisan) state legislature is responsible for drawing state legislative and congressional districts. Whichever party controls the legislature has a strong incentive to draw districts to hold, enhance, and entrench its partisan advantage. There’s nothing new about this: partisan gerrymandering goes back to the earliest days of our Republic. But with recent advances in redistricting technology, partisan mapmakers today can draw legislative boundaries like never before, with laser-like partisan precision. This allows them to lock in legislative majorities for as much as a decade’s worth of election cycles, even when they lose the statewide overall vote. The result is a death spiral: as technology increases, partisan gerrymandering becomes even more entrenched, and partisan state legislatures become even less able to break out of the spiral. Because state legislatures are inherently unable to solve the problem, “[c]ourts have a critical role to play in curbing partisan gerrymandering.” *Gill v. Whitford*, 138 S. Ct. 1916 (Kagan, J., concurring).

After nearly fifty years of wrestling with the problem, the Court heard two cases this Term that together offered a singular and tantalizing opportunity to resolve it. In one case, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018), plaintiffs challenged an extreme partisan gerrymander in a single district by Democrats in Maryland. The plaintiffs argued that the gerrymander violated their free association rights under the First Amendment and sought a preliminary injunction to stop the state from using the district and to force it to draw a new one. In the second case, *Gill v. Whitford*, plaintiffs challenged extreme partisan gerrymandering in several districts by Republicans in Wisconsin. They argued that the gerrymander violated their equal right to vote under the Fourteenth Amendment. Together, the cases presented the Court with challenges to extreme partisan gerrymandering by both Democrats and Republicans (so that there was ideological symmetry between the two), in a single district and in multiple districts (so that the Court could address the important differences between these kinds of challenges), and under both the right to association and the equal right to vote (so that the Court had doctrinal options). Moreover, the plaintiffs and their amici in both cases pitched multiple workable measures for unconstitutional extreme partisan gerrymandering in order to help the Court identify when partisan gerrymandering goes too far. And just for good measure, one of the cases involved “some of the worst partisan gerrymandering on record.” *Gill v. Whitford* (Kagan, J., concurring). In short, the cases teed the issue up just perfectly for the Court.

But then the Court…whiffed.

The Court in *Benisek* ruled that the plaintiffs were not entitled to a preliminary injunction, because such a late move would unduly interfere with the 2018 elections. The Court held that the “balance of equities” and the “public interest” tilted against a preliminary injunction, so that it didn’t have to say whether the plaintiffs were likely to succeed on their underlying claim against partisan gerrymandering. The ruling thus keeps the gerrymandered district intact for the midterms, and says nothing on the merits.

The Court similarly dodged the merits in *Gill*. There the Court ruled that the plaintiffs lacked standing to bring their claim, because they sought to challenge extreme partisan gerrymandering without specifically demonstrating how it harmed them. The Court remanded the case to give the plaintiffs a second chance to establish particular harm, but, like the Court in *Benisek*, it said nothing on the constitutionality of extreme partisan gerrymandering.

These cases aren’t the end of judicial challenges to extreme partisan gerrymandering. *Gill*, or some similar case, will come back to the Court. But when the case comes back, the Court will still have the same issues before it—whether the Court can address the problem, and, if so, how. Neither *Benisek* nor *Gill* telegraphed anything certain about how this Court (much less a new Court, with Justice Anthony Kennedy’s replacement) will address these questions. In terms of understanding if and how the Court will deal with extreme partisan gerrymandering, they leave us exactly where we were.

But when the issues come back to the Court, depending on the timing, the stakes will be much higher. That’s because plaintiffs could call on the Court to strike maps, and order that they be redrawn, *before* the 2020 elections. And those elections will set the state legislatures that will conduct the next round of partisan redistricting for the next decade.

**Background**

In most states, the (partisan) state legislature is responsible for
drawing state legislative and congressional districts. And because most or all (partisan) state legislatures seek to hold, enhance, and entrench their party majorities, they draw legislative districts in a way that achieves these goals. In particular, partisan map drawers strategically “pack” voters of the opposing party into a minority number of districts, creating supermajorities in those districts that ensure opposing-party control. At the same time, they “crack” voters of the opposing party across a majority number of districts, diluting opposing-party influence in those districts and ensuring their own party’s control. The net effect locks in control of a majority of districts for the partisan majority in the state legislature. When done effectively, and using the rapidly advancing technology to draw partisan boundaries, the state legislative majority can entrench its control over the state legislature and the state’s congressional delegation for a decade (until the next redistricting cycle) or more, even when the legislative majority fails to gain a majority of the statewide vote.

The Supreme Court has wrestled with the problem for nearly five decades. But its rulings have created as many questions as answers. The Court’s foray began in 1973, in Gaffney v. Cummings, 412 U.S. 735. Gaffney was an unusual case (by today’s standards), because the Connecticut legislature gerrymandered districts in order to achieve political party across the state. In the words of the Court, the plan “consciously and overtly adopted and followed a policy of ‘political fairness,’ which aimed at a rough scheme of proportional representation of the two major political parties.” Nevertheless, plaintiffs argued that the plan was unconstitutional, because it was “nothing less than a gigantic political gerrymander.” But the Court rejected this claim, writing that it would be “idle” to hold that “any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it,” because redistricting “inevitably has and is intended to have substantial political consequences.” In other words: politics is part and parcel of gerrymandering, and the courts shouldn’t get involved.

The Court next took on the problem in 1986, in Davis v. Bandemer, 478 U.S. 109. In Davis, plaintiffs argued that Indiana Republicans gerrymandered legislative districts “to favor Republican incumbents and candidates and to disadvantage Democratic voters” by strategically “stacking” and “splitting” Democrats into and across districts. (Today we call this “packing” and “cracking,” respectively.) The plaintiffs argued that this statewide gerrymander violated the Equal Protection Clause. Six justices agreed that the case was justiciable, but they disagreed on a standard for resolving the problem and the result. Four of the six would have required the plaintiffs to “prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” These four argued that the plaintiffs failed to show discriminatory effect, because they relied on results from just one election. Two of the six agreed with the plurality’s basic framework, but would have also considered “other relevant neutral factors” that bear on the question. These two would have affirmed the district court’s conclusion that the gerrymandering violated the Equal Protection Clause. Finally, three justices argued that the case was nonjusticiable, because the “Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims.” The split in the first six seemed to prove the point of the latter three: the courts should stay out of political gerrymandering, because they don’t have the analytical tools to resolve it—as evidenced by the fact that justices themselves can’t agree on a unified test.

Finally, and most recently, in 2004, the Court wrestled with the problem in Vieth v. Jubelirer, 541 U.S. 267. There, the plaintiffs argued that the Pennsylvania legislature drew “meandering and irregular” congressional districts that “ignored all traditional redistricting criteria, including the preservation of local government boundaries,” to advantage Republicans. As in Davis, the Court split again, leaving the issue unresolved. Four justices agreed that the case was justiciable, but they divided into three separate opinions. Justice John Paul Stevens would have applied the standard that the Court used for racial gerrymandering cases, and argued that the plaintiffs stated a claim under that standard, finding that one of the districts violated equal protection. Justices Souter and Ginsburg would have applied a burden-shifting framework borrowed from employment discrimination law, including a requirement that plaintiffs present an alternative, hypothetical district to help show why their own district was an unconstitutional gerrymander. Justices David Souter and Ruth Bader Ginsburg would have remanded the case to allow the plaintiffs to make this showing. Justice Stephen Breyer described “a set of circumstances” that would help the Court distinguish between a legislature’s use of politics in drawing district lines (inevitable and allowable) and a legislature’s “unjustified” entrenchment of a political party (unconstitutional). Like Justices Souter and Ginsburg, Justice Breyer would have remanded the case in order to allow the plaintiffs to develop their case.

In contrast, four justices agreed that the plaintiffs’ claims were nonjusticiable. Like the three justices in Davis, these four argued that there was no “judicially discernable and manageable standard” for resolving these disputes. These four justices, along with Justice Kennedy, had enough votes to dismiss the case.

Finally, Justice Kennedy argued (for himself alone) that “we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden” on constitutional rights. But he went on to say that the Court might discover such a basis in a future case—that “in another case a standard might emerge that suitably demonstrates how an apportionment’s de facto incorporation of partisan classifications burdens” representational rights.

The various tests floated in Davis and Vieth seemed only to underscore the Vieth plurality’s point that there was no “judicially discernable and manageable standard.” (After all, the justices themselves disagreed on the proper test.) Still, Justice Kennedy’s opinion held out the possibility that plaintiffs in a future case might present just such a standard.

The plaintiffs and their amici in Benisek and Gill pitched their cases accordingly—with a sharp eye on Justice Kennedy—putting the long-elusive issue and arguments before the Court in the clearest and most ideal way yet. But in the two rulings that came down the same day, the Court again ducked.

**Benisek v. Lamone**

Benisek involved a challenge to a particular district, Maryland’s...
Sixth Congressional District, as an extreme partisan gerrymander in violation of the First Amendment. The state drew this district, along with all its other congressional districts, in 2011, after the 2010 Census. As was custom in the state, the governor, Governor Martin O’Malley, a Democrat, appointed a Governor’s Redistricting Advisory Committee (GRAC). The GRAC held public hearings around the state to get comments on the current and future shape of the state’s congressional districts. As was also custom, Governor O’Malley consulted with the members of the state’s congressional delegation, including the state’s two Republican representatives, Roscoe Bartlett and Andy Harris.

The congressional delegation contracted with Eric Hawkins to draw a draft map. Hawkins “did not have any meaningful contact with the GRAC” and only met with the GRAC late in the process. Hawkins submitted a map to the GRAC, but Governor O’Malley and the GRAC rejected it.

Instead, Governor O’Malley oversaw the preparation of a different map, which ultimately became law. As to Maryland’s Sixth Congressional District, the one at issue in this case, this map incorporated some traditional, politically neutral characteristics. According to the state, the District

(1) kept intact Washington County and several cities split by the congressional delegation’s map; (2) limited the districts in Prince George’s County to just two; (3) ensured that the Fourth District did not include population from Montgomery County, in response to constituent and state legislative requests; and (4) kept intact the I-270 corridor, making the connection between Frederick and Montgomery Counties a major feature of the Sixth District.

But the mapmakers also used bald and aggressive political criteria. According to the plaintiffs,

Governor O’Malley and others involved in the redistricting have candidly acknowledged their intent to dilute Republican votes in the Sixth District to prevent Republican voters there from reelecting Congressman Roscoe Bartlett.

Governor O’Malley’s map thus had both traditional, politically neutral characteristics and also clear political motivation.

The GRAC received public comments on the map between October 4 and October 11, 2011. Governor O’Malley made minor changes to the map and introduced it during a special legislative session on October 17, 2011. The map, with some technical amendments, passed the House and the Senate, and Governor O’Malley signed it on October 20, 2011.

The final map reconfigured adjoining districts in order to add significant parts of Montgomery County to the Sixth District. Thus, the map moved 145,984 registered voters in the former Sixth District to the Eighth District and 128,992 registered voters in the former Eighth District to the Sixth. According to the state,

[a]ll told, reconfiguration of the Sixth District reassigned 66,417 registered Republicans to other districts and 24,460 registered Democrats to the Sixth. Putting aside changes required by the reconfiguration of the First District… and Fourth District…a net 40,066 registered Republicans were reapportioned out of the Sixth District and 18,420 registered Democrats were reapportioned into the Sixth.

The plaintiffs, however, pointed out that “[g]iven the relatively modest population growth in the district over the prior decade, the alterations to the Sixth District’s lines necessary to comply with the one-person-one-vote mandate were slight.” In other words, the state did not need to make these substantial changes to the Sixth District in order to meet the constitutional minimum requirement. The fact that it did make these changes was yet more evidence of the state’s raw political motivation.

Maryland voters approved the map in a referendum, 64.1 percent to 35.9 percent. According to the state,

[t]he plan won voters’ approval not just in areas of Democratic voting strength, but also in 10 of the 12 counties where registered Republicans outnumbered registered Democrats, including 3 counties located within the present and former boundaries of the Sixth District: Allegany, Washington, and Frederick Counties. Only Carroll and Garrett Counties voted to reject the map.

The parties sharply diverged in their descriptions of the map’s effects. The plaintiffs said that the “targeted subtractions and additions to the district were highly effective at diluting Republican votes, putting Republicans at a concrete electoral disadvantage.” They pointed out that “[o]n October 17, 2010…Republicans comprised 46.7% and Democrats comprised 35.8% of the total. After the redistricting, on October 21, 2012…Republicans then comprised 33.3% and Democrats comprised 44.1% of the total.” The plaintiffs argued that “two different political predictive metrics”—the National Committee for an Effective Congress’s (NCEC) Democratic Performance Index (DPI) and the Cook Political Report’s Partisan Voter Index (PVI)—both “showed that the chance of a Republican victory in the district dropped from 99.7%–100% to just 6%–7.5% in 2012.” They noted that the Cook Political Report rated the district “the single ‘most dramatic alteration[ ]’ in a district’s political complexion in 2011.” They claimed that this was all reflected in the results: “[w]hereas Congressman Bartlett had consistently won reelection in the Sixth District by double-digit margins over the past two decades, Democrat John Delaney defeated Bartlett by a 20.9% margin in 2012.” They further noted that Delaney won reelection in 2014 and again in 2016.

In sharp contrast, the state said that “[t]he Sixth District is, by multiple indications, competitive.” The state pointed out that the Cook Political Report rated the district as a “safe Republican District” before 2011, but after redistricting rated the district merely as a “likely” Democratic district, “with a Partisan Voting Index…of D+2”—“barely” within the Democratic range. It argued that “the mean of the two-party vote in all statewide elections… is consistent with the Sixth District having a 53% Democratic Performance Index,” within the “competitive” range of 45 to 55%. The state claimed that electoral results reflected this: in 2012 Democratic Senator Ben Cardin won the district with only 50% of the vote, compared to winning 56% statewide; Republican Dan
Because the Court held that these two factors weighed against a preliminary injunction, it didn’t need to also rule on the plaintiffs’ merits challenge to extreme partisan gerrymandering. So it didn’t.

**Gill v. Whitford**

Like Maryland in *Benisek*, Wisconsin also drew a new legislative map in 2011. The 2011 redistricting gave Wisconsin a unique opportunity: for the first time in over 40 years, Republicans controlled both houses of the state legislature and the governor’s office, and so for the first time in at least two redistricting cycles, the state could draw legislative maps without the involvement of the courts.

Wisconsin Senate Majority Leader Scott Fitzgerald and Speaker of the Wisconsin Assembly Jeff Fitzgerald retained attorney Eric McLeod and a private law firm to assist with the effort. In April 2011, staff members from the Majority Leader’s and Speaker’s offices worked with a consultant and a political science professor to begin drafting the new map in a law firm office they called the “map room.”

In fashioning the new legislative districts, the map drawers endeavored to comply with the “one-person, one-vote” principle and the Voting Rights Act; they also considered traditional districting principles like compactness and contiguity. But politics was another factor, even a predominate factor. In particular, the map drawers drew legislative districts such that Republicans could win a disproportionate number of seats in the Assembly as compared to their portion of the overall, statewide vote.

The legislature passed the map drawers’ plan, and the governor signed it. The map was published as Wisconsin Act 43 on August 23, 2011.

In the first election under Act 43, in 2012, Republicans won 60 out of 99 seats in the Assembly with just 48.6 percent of the statewide vote. In the next election, in 2014, Republicans won 63 of the 99 seats with just 52 percent of the vote.

Twelve Wisconsin voters, who resided in 11 legislative districts throughout the state, sued state officials in a three-judge federal district court, arguing that the Assembly map was an extreme partisan gerrymander in violation of the First and Fourteenth Amendments. The plaintiffs argued that the packed and cracked districts resulted in a number of excess votes for a winning candidate (in packed districts) and a number of futile votes for a losing candidate (in cracked districts). They argued that the number of these “wasted” votes for Democrats far outnumbered the “wasted” votes for Republicans, creating an “efficiency gap” in the state that could be used as a measure of unconstitutional extreme partisan gerrymandering.

The plaintiffs incorporated the “efficiency gap” into a proposed three-part test to determine when a partisan gerrymander is unconstitutional. First, plaintiffs would have to show that a state had an intent to gerrymander for partisan advantage. Second,
plaintiffs would have to prove a partisan effect. (The plaintiffs here proposed that an “efficiency gap” greater than 7 percent should be presumptively unconstitutional.) Third, if the plaintiffs carried their burdens at the first and second steps, the state would have to show that the plan resulted from “legitimate state policy” or “the state’s underlying political geography” in order to avoid a conclusion that the map was unconstitutional.

The district court adopted the basic framework of the plaintiffs’ test, but modified the second step slightly: it looked to both the efficiency gap and other evidence (including social science evidence) for the partisan effect. Applying the modified test, the court ruled that (1) the map was designed with discriminatory intent, (2) the map caused a “large and durable” discriminatory effect, and (3) there was no neutral way to explain this effect. The court enjoined the state from using Act 43 and ordered that it adopt a new plan by November 1, 2017.

The Supreme Court stayed this order, however, and agreed to hear the case on the merits.

The Court held that the plaintiffs lacked standing to bring this kind of claim. In an opinion by Chief Justice John Roberts, all nine justices agreed that plaintiffs who seek to challenge partisan gerrymandering must allege a specific harm to themselves, and not a more general harm to others. This means that partisan gerrymandering plaintiffs who allege that a gerrymandering scheme has diluted their vote can only challenge the shape of their own district. They cannot challenge the shape of other districts, or allege statewide violations. (This is the same requirement for racial gerrymandering claims.) The Court held that the plaintiffs did not meet this standard:

Here, the plaintiffs’ partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter’s own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter’s harm, therefore, does not necessarily require restructuring all of the State’s legislative districts. It requires revising only such districts as are necessary to reshape the voter’s district—so that the voter may be unpacked or uncracked, as the case may be.

More particularly, the Court said that the plaintiffs’ proposed test, the efficiency gap, measured only average, statewide asymmetry and failed to identify, and distinguish between, district-specific, vote-dilution harms to individual voters. Without a district-specific harm, the plaintiffs lacked standing to sue.

Seven of the justices—all but Justices Clarence Thomas and Neil Gorsuch—agreed to give the plaintiffs a second chance. “We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes.” (Justices Thomas and Gorsuch wrote separately to explain why they would have dismissed the case outright.) And the Court’s opinion—the part signed on to by all nine justices—detailed the plaintiffs’ several shortcomings, giving them, by negative implication, something of a roadmap for how to develop standing on remand.

Justice Kagan, in concurrence, went further. If the Court’s opinion provided a negative roadmap for standing, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sonia Sotomayor, gave all the specific street signs. Justice Kagan specifically instructed the plaintiffs on how to show standing in a district-by-district vote-dilution challenge. Given that the plaintiffs already “should have a mass of packing and cracking proof...a plaintiff residing in each affected district can show, through an alternative map or other evidence, that packing or cracking indeed occurred there.” She also suggested how the Court can consider both district-specific and statewide evidence when it moves beyond standing and addresses the merits. Finally, she wrote at length to explain why extreme partisan gerrymandering “inflict[s] other kinds of harms as well,” including “the First Amendment rights of association held by parties, other political organizations, and their members.” She argued that such a claim may call for “a different standing inquiry than the one in the Court’s opinion”—that is, one based on statewide harm—and that the plaintiffs may seek to develop this kind of claim on remand. (Indeed, she notes that “[t]he plaintiffs here have [already] sometimes pointed to that kind of harm.”)

On the standing issue, all nine justices seem to agree that these or some other plaintiffs might be able to assert standing in some kind of future challenge to extreme partisan gerrymandering. Seven of the justices seem to agree that these plaintiffs might be able to develop standing yet in this case. And four of the justices (those who signed on to Justice Kagan’s concurrence) seem eager to rehear this case and even get to the merits.

But five justices notably did not sign on to Justice Kagan’s concurrence. (Indeed, Chief Justice Roberts reminded readers that “[t]he reasoning of this Court with respect to the disposition of this case is set forth in [his] opinion and none other.”) That means that at least five justices have not yet necessarily agreed that extreme partisan gerrymandering claims are justiciable, let alone what standard to apply to them. When Justice Kennedy’s replacement takes a seat, that five-justice majority will likely become even more skeptical that courts are equipped to hear these kinds of claims.

**The Future of Extreme Partisan Gerrymandering**

The Court’s rulings in *Benisek* and *Gill* don’t answer the fundamental questions—whether the Court can hear challenges to extreme partisan gerrymandering, and, if so, what standard to apply. But these cases aren’t over yet. Indeed, as explained above, the Court remanded the case in *Gill* specifically to give the plaintiffs a chance to develop standing. This case, or a similar one, will come...
back to the Court. When it does, the Court will still need to decide whether the issue is justiciable.

That’s no small task. As an initial matter, there’s the question of whether the Court would treat extreme political gerrymandering as a First Amendment association problem or as a Fourteenth Amendment equal-right-to-vote problem. Beyond that question, the last time the Court ruled on the issue, in Vieth, it split sharply on the justiciability question, and even the justices who would have held that the case was justiciable couldn’t agree on a precise standard to apply. Moreover, at oral argument in Gill, some of the justices expressed open skepticism that the Court could identify a workable standard. (This was best represented by the Chief Justice’s statement that the social science behind the efficiency gap was “gobbledygook.”) Even the plaintiffs and their amici pitched slightly different standards, and thus didn’t agree on every jot and tittle. Finally, the one justice, Justice Kennedy, who previously held out, but who might have joined a majority around a workable test, is retired, and we might reasonably predict that his replacement will be more skeptical. (In theory, the Court could get beyond the justiciability question even if a majority of justices disagree on the standard. (For example, they could agree that under any standard a particular political gerrymander fails.) But even after these cases, and with Justice Kennedy’s retirement, it’s not at all clear that a majority can get beyond justiciability and to the merits.)

The Court’s so-far refusal to engage with partisan gerrymandering stands in stark contrast to its treatment of racial gerrymandering. Those claims have long been justiciable. Indeed, the Court took up a long-running and extremely complicated racial gerrymandering case just this Term, Abbott v. Perez, 138 S. Ct. 2305 (2018). There, the sharply divided Court held that the evidence was insufficient to show that the Texas legislature engaged in intentional discrimination when it adopted an interim redistricting map earlier ordered by the district court. The 5–4 ruling, along conventional ideological lines, illustrates how divisive racial gerrymandering cases can be. We can expect to see this same divisiveness, and maybe more, if the Court ever gets to the merits in a partisan gerrymandering case. That reality must weigh on the minds of the justices, especially Chief Justice Roberts, as he tries to steer the Court clear of appearing to be just another forum for politics in these hyper-partisan times, and with this hyper-partisan issue.

But in the end, the Court’s engagement with the problem (or not) might matter less than political and legal action outside the Court. For example, voters in five states have placed, or are trying to place, measures on 2018 ballots that would curb partisan gerrymandering or create an independent redistricting commission in their states. (Currently, six states use an independent commission to draw state legislative or congressional districts. Several other states use an advisory commission as part of the process.) Popular support for these measures seems to be growing and has even reached some state legislatures.

At the same time, opponents of extreme political gerrymandering have seen some success in state courts. Most notably, earlier this year the Pennsylvania Supreme Court ruled that extreme partisan gerrymandering violated the state constitution. League of Women Voters v. Commonwealth of Pennsylvania, 178 A.3d 737 (Pa. 2018). This ruling forced a change to the state’s congressional districts, bypassing the federal Constitution and the U.S. Supreme Court.

Still, in many states there is strong political opposition to reform. Republicans, in particular, have an incentive to stonewall. After the 2010 “wave” election, which coincided with the 2010 Census, Republicans took control of many state legislatures and governorships, allowing them to redraw districts to their advantage. If they can maintain control through 2020—which, in turn, depends at least in part on whether their post-2010 gerrymandered maps were durable enough to yield favorable results through five election cycles—then they can control redistricting again, potentially locking in legislative majorities through 2030, and beyond.

But that all depends on a state legislature’s continuing ability to engage in extreme partisan gerrymandering—in the face of movements to curb the practice, to hand it over to an independent commission, to halt the practice through state-court litigation, or to bring the case back to the Supreme Court, and win.

Steven D. Schwinn is a professor of law at the John Marshall Law School and coeditor of the Constitutional Law Prof Blog. He specializes in constitutional law and human rights. He can be reached at sschwinn@jmls.edu or 312.386.2865
The immigration cases that the Supreme Court decided this term offer some useful guidance as to the future of immigration law after the replacement of Justice Anthony Kennedy. Commentators have speculated that Justice Kennedy’s retirement and likely replacement with a reliably conservative justice will substantially reconfigure the jurisprudence of civil rights, voting rights, administrative regulation, and presidential power. Standing at the crossroads of these areas of law is immigration law. The replacement of Justice Kennedy with a more reliably conservative vote will have effects on immigration cases, too, although the effects of the change are less reliably predictable and perhaps less drastic than in other areas of law.

Justice Kennedy’s recent decisions in immigration cases—including those of the last term—have reflected a justice skeptical of claims rooted in antidiscrimination principles, unsympathetic to calls for deference to administrative expertise, and accepting of largely unchecked presidential power as against the substantive rights of immigrants and their families. A new, conservative justice is unlikely to alter these key features of the resulting jurisprudence. One difference, however, is that Justice Kennedy held out some degree of hope (albeit often unrealized) to immigrants, particularly detained immigrants, raising procedural due process challenges. A Court without Justice Kennedy may be even less likely than before to consider such cases, let alone to find in favor of immigrants.

This essay will unpack the Court’s four immigration cases from the 2017–2018 term, with attention to how these cases signal likely outcomes in future immigration cases that come before the Court. The essay begins with Trump v. Hawaii (Docket No. 17-965), in which the Court sided with the president over immigrants’ families and communities, followed by the case of Jennings v. Rodriguez (Docket No. 15-1204), in which the power of the president again prevailed, this time as against the rights of detained migrants. In both cases, Justice Kennedy sided with the government, although the latter case clearly illustrates the potential for more favorable outcomes for the government in detention cases in a post-Kennedy era.

The essay then turns to the term’s cases that raised questions as to the appropriate level of deference to the agencies charged with administration of immigration law: Sessions v. Demaya (Docket No. 15-1498) and Pereira v. Sessions (Docket No. 17-459). In both of these cases, as in a long line of similar cases before them, the Court found in favor of the immigrant’s interpretation of the immigration statute, declining to defer to the agency interpretation of the statute. In neither of these cases was Justice Kennedy’s vote outcome determinative. While his replacement may push the Court further away from deference to administrative agencies across many areas of law—most obviously environmental law—in the area of immigration law, challenged agency interpretations that have made it to the Supreme Court in recent years have rarely been sufficiently reasonable to garner any deference from the Court even when the Court purports to apply existing deference principles.

**Immigration and Executive Power**

The Kennedy Court has been broadly deferential to executive power as against the substantive constitutional and statutory claims of immigrants, their families, and their community allies in the area of immigration law. Two cases from this term, Trump v. Hawaii and Jennings v. Rodriguez, illustrate this rule quite clearly. The following sections situate both of those cases in broader context and explore their future implications.

*Trump v. Hawaii*

The Supreme Court decided one of the foundational constitutional cases of immigration law in the latter half of the 19th century. In the Chinese Exclusion Case, 130 U.S. 581 (1889), the Court upheld a ban on Chinese immigrants that the federal government justified with little more than anti-Chinese racism. The Supreme Court looked to the international law principles of the time and concluded that sovereign nations had unchecked power to close their borders to immigrants. In upholding the ban, the Court thus treated the political branches’ power over immigration policy as plenary, affording itself virtually no role in protecting the rights of intending immigrants against such exercises of immigration power.

Much has changed since the Chinese Exclusion Case. First, the international law norms that (arguably) favored absolute deference to national sovereignty over individual rights gave way to new conceptions of sovereignty and individual rights. Nazi atrocities and the refugee crises generated by authoritarian persecution and massive post-War dislocations prompted a more nuanced understanding of national sovereignty. The new order recognized the legal obligation of sovereign nations to protect refugees and to respect the legal interests of the migrants subject to their power. Second, the domestic legal order has changed markedly on the question of what constituted acceptable discrimination by the government. Responding to the pressure generated by civil rights activists, the Supreme Court began to strike down laws that segregated people on the basis of their race. See, e.g., Brown
The Civil Rights Act and the Voting Rights Act infused antidiscrimination principles into the practices of the government at both the federal and the sub-federal level. But despite the fact that the Immigration and Nationality Act (INA) was clearly cut from the same cloth and signaled Congress’s similar intention to prohibit invidious discrimination on the basis of race and national origin, the Court has never incorporated the Act’s antidiscrimination principles into law. This term Trump v. Hawaii gave the Court an opportunity to do just that. But rather than acknowledge the antidiscrimination principles evinced by the statute in the face of a presidential proclamation plainly rooted in anti-Muslim animus, the Court deferred to the government’s purported national security prerogative in order to uphold a presidential proclamation rooted in religious animus. The decision reads much like the Chinese Exclusion Case—as if much of the 20th century had never happened.

The plaintiffs in Hawaii v. Trump argued that the new proclamation still ran afoul of the Immigration and Nationality Act’s (INA) equal treatment of immigrants of all nationalities and of the Constitution’s Establishment Clause because it emerged out of anti-Muslim animus rather than legitimate policy concerns. Lower courts agreed. The district court judge in the Hawaii litigation enjoined the proclamation, finding that the proclamation ran afoul of the INA both because it did not rest on adequate findings for the banning of a “class of aliens” as required under 8 U.S.C. § 1182(f), and also that the ban ran afoul of 8 U.S.C. § 1152(a)(1)(A), which provides that “no person shall… be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” 265 F. Supp. 3d. 1140 (Haw. 2017). The Ninth Circuit affirmed the ruling on statutory grounds. 878 F.3d 1151 (2017).

Meanwhile, on September 24, 2017, the president issued Proclamation No. 9645. The proclamation superseded the prior orders, included North Koreans and some Venezuelans along with the citizens of six majority Muslim countries on the list of banned nationals and also included a waiver process through which some migrants from countries on the banned list could be admitted. The purported justification for the ban was that these nations’ systems for managing and sharing information about their nationals were deemed inadequate by the president after a review undertaken pursuant to the terms of the March 6, 2017 order.

The Supreme Court heard arguments on the injunction on April 25, 2018, and handed down its decision on June 26, 2018. Chief Justice John Roberts authored the majority opinion, in which the Court held that the proclamation was a proper exercise of the president’s authority under 8 U. S. C. § 1182(f) to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States.” Apparently untroubled by the post hoc nature of the security review process undertaken to justify a ban on migrants from the majority Muslim countries on the proclamation’s list of banned countries, the Court determined
that the investigative steps undertaken by government—which it called “a worldwide review process undertaken by multiple Cabinet officials and their agencies”—constituted a sufficient basis for the exclusion of all nationals of the listed countries under Section 1182(f). The Court also concluded that the INA’s Section 1152(a)(1)(A), which protects immigrant visa applicants from discrimination on the basis of religion and nationality (among other grounds), did not prohibit the ban either, because it applied only to the issuance of the visa and not to entry.

Finally, the Court, citing Kleindienst v. Mandel, 408 U.S. 753 (1972), rejected the Establishment Clause claim. The Court concluded that the president had provided the necessary “facially legitimate and bona fide reason” required by Kleindienst to overcome the First Amendment challenge to the exclusion of the banned nationals. The majority purported to “look behind the face of the Proclamation to the extent of applying rational basis review” in considering “whether the entry policy is plausibly related to the Government’s stated objective to protect the country.” The Court found that “[t]he Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted.”

Although Justice Sotomayor’s dissent urged a higher standard of review given the First Amendment rights at stake, the Court adhered to the line—drawn in the Chinese Exclusion case and extended outward from there—that gives minimal review to the purported “national security” decisions undertaken to justify the exclusion of noncitizens.

The majority in Hawaii v. Trump correctly noted that there are no Supreme Court precedents applying more search standards of review to exclusion policies, but they had the power to change the standard in this rare and troubling case of repeatedly invoked religion-based animus. This Court could have infused antidiscrimination principles into immigration law for the first time; perhaps unsurprisingly, they declined to do so.

Justice Kennedy, who was quick in Masterpiece Cakeshop to see evidence of anti-Christian animus in statements of a Colorado Civil Rights Commissioner, failed to see similarly tainting animus in the many anti-Muslim statements made by the president and other members of his policy team. He concurred in Hawaii v. Trump, signing on to Chief Justice Roberts’s opinion in full, but stressing that if there were ever a case in which an administration was unable to provide some sort of national security reason to accompany its overt and repeated statements of discriminatory religious animus, then the Court would have a role in striking the government’s actions down. Given how obvious this Administration was in manufacturing national security concern retroactively to whitewash the religious animus of its chief policymakers, the concurrence seems more designed to offer comfort to Justice Kennedy himself than to any member of a disfavored religious group. Indeed, Justice Kennedy’s retirement and replacement likely will have no material effect on the many immigrant families whose family members are barred for vague and unsubstantiated national security reasons. See also Kerry v. Din, 576 U.S. ___ (2015), (holding, with Justice Kennedy’s concurrence, that it is constitutionally sufficient for the government to identify the statutory provision under which it excluded a citizen’s spouse on national security grounds without providing any additional reasons for the denial of entry).

Jennings v. Rodriguez
In some ways, Jennings v. Rodriguez is the case that most clearly highlights what could change in immigration jurisprudence with Justice Kennedy’s departure. But the implications of the case are not clear cut. With the Rodriguez case, the Court had an opportunity to build on its decision in Zadvydas v. Davis, 533 U.S. 678 (2001), authored by Justice Kennedy, in which the Court concluded that the INA did not authorize indefinite detention without a hearing for individuals ordered removed but awaiting removal. In Zadvydas, the Court read the statute to require judicial review of postremoval-order detention every six months for a determination that the individual was, in fact, still removable as a practical matter. In so doing, Justice Kennedy, writing for the Court, indicated that construing the statute to require these periodic hearings was necessary to avoid the constitutional problems that would be raised by a statute authorizing indefinite detention without such procedural protections.

Two years after Zadvydas was decided, the Court upheld the government’s interpretation of Section 236(c) of the INA as requiring the automatic, mandatory detention of certain immigrants in removal proceedings without additional hearing procedures. Demore v. Kim, 538 U.S. 510 (2003). Distinguishing Zadvydas, the Court noted that detention imposed pending a removal hearing had a clear end—the date that the removal proceeding was finalized—and that detention under the provision was generally brief. The Court embraced the government’s statement that the average detention under this provision was 47 days and the median was 30 days. Justice Kennedy signed on to the majority opinion and also authored a concurrence in which he noted that, prior to being detained under this statute, individuals were given a hearing in which they could “raise[ ] any non-frivolous argument available to demonstrate that [they were] not properly included in a mandatory detention category.” Of course, in these hearings, an individual had no ability to raise legal questions as to whether the crime that constituted the alleged basis of their removability did not, in fact, render them subject to the mandatory detention provision. The Kim case itself illustrated that reality, illustrating that the “hearing” in question did not actually give Kim an opportunity to contest the government’s claim that his past crime constituted an “aggravated felony” so as to require detention under the statute. Nevertheless, Justice Kennedy found that streamlined, largely pro forma hearings in which the detainee acknowledged his identity and the existence of the criminal charges that purportedly justified his detention, were sufficient process to justify the “brief” pre-hearing detention that the statute mandated.

This term’s Rodriguez case involved a new challenge to the detention provision of the INA at issue in Zadvydas, 8 U.S.C. § 1226(c), along with two others—Sections 1225(b) and

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**Indeed, Justice Kennedy’s retirement and replacement likely will have no material effect on the many immigrant families whose family members are barred for vague and unsubstantiated national security reasons.**
I226(a)—which allowed for, and in some cases mandated, detention for individuals pending the conclusion of removal proceedings against them. Contrary to the Court’s findings in Zadvydas, lower courts found that such detentions were quite lengthy. The Ninth Circuit wrote:

Class members spend, on average, 404 days in immigration detention. Nearly half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years. In some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement. Jennings v. Rodriguez, 804 F.3d 1060 (9th Cir. 2015).

The plaintiffs alleged that these factual findings required the Court to revisit its conclusions in Kim. They argued that the detention provisions should be read to avoid the constitutional problem posed by a statute that authorized lengthy, indefinite detentions with insufficient procedural protections. They therefore argued, and the Ninth Circuit agreed, that detentions of longer than six months under these provisions required the same sort of bond hearings available to detainees in post-removal detention under Zadvydas.

If the plaintiffs were hoping that Justice Kennedy would extend the legacy of Zadvydas by applying its bond hearing requirement into the INA’s other detention provisions, they were disappointed. Justice Kennedy signed on to Justice Samuel Alito’s majority opinion reversing the Ninth Circuit. The Alito opinion contained an extensive discussion of how these provisions differed from the detention provision in Zadvydas and concluded that the statutory provisions at issue in this case did not contain a like requirement of periodic bond hearings.

This does not sound the death knell for the plaintiffs’ claims. The Court did not decide the underlying constitutional question of whether these statutory provisions, which do not require periodic bond hearings, violate due process. One might argue that this is where Justice Kennedy’s absence on the Court will matter, although the evidence is less clear cut than one might think. In remanding the decision, the Court raised questions about whether courts have jurisdiction at all over a class action lawsuit raising a constitutional due process challenge. Perhaps Justice Kennedy would have been less skeptical than his successor of the Court’s jurisdiction over such a challenge and that his vote would swing the Court on this question? It is possible, but it is also notable that Justice Kennedy not only joined the Alito opinion raising this question, but also joined Justice Antonin Scalia’s majority opinion in Reno v. AADC, 525 U.S. 471 (1999), and in Walmart v. Dukes, 564 U.S. 338 (2011), the two cases cited by Justice Alito as supplying the likely bases for denying class action status in Rodriguez.

But perhaps, in the absence of class certification, Justice Kennedy would have been more sympathetic than his successor to the individual due process claims that managed to make their way to the Court against the tremendous odds stacked against immigrant detainees? Certainly, Justice Kennedy’s decision in Boumediene v. Bush, 553 U.S. 723 (2008), suggests that he was different from his fellow conservatives when it came to the question of the Court’s capacity to hear due process challenges from detained noncitizens—even in more controversial contexts than Rodriguez.

While Justice Kennedy has been far from a consistent voice for the procedural due process claims of detained immigrants—as illustrated not only by Kim but also by Reno v. Flores, 801 U.S. 292 (1992)—he has certainly done more than any of his fellow conservative justices to preserve a path for detained noncitizens to at least raise procedural due process claims. In the rare future cases where individuals are able to get their detention claims into court, Justice Kennedy’s absence may make it even harder for them to prevail on such claims.

### Administrative Defeance

Depending on who replaces Justice Kennedy, it is quite conceivable that Justice Neil Gorsuch will have a new ally in his efforts to move courts away from their deferential review of agency interpretations of statutes. This will have a significant effect on areas of law such as environmental law, where much of the substantive law has been developed by regulators acting within broad delegations of authority from Congress. Courts that do not see themselves as obliged to defer to the expertise of agencies will be able to exercise far more power to strike down protective environmental regulations.

It is not entirely clear that the replacement of Justice Kennedy will result in a Court less deferential to agency interpretations of statutes. But even if it does, that shift may not have much of an effect on the substantive outcomes of immigration cases, in spite of the fact that a great deal of immigration law is the product of regulations and agency interpretation. Two cases from this term, Sessions v. Dimaya and Pereira v. Sessions, help to illustrate why this is the case.

### Sessions v. Dimaya

Immigrants, including longtime lawful permanent residents, who are convicted of a crime that is an “aggravated felony” under Section 101(a)(43) of the Immigration and Nationality Act face almost certain deportation and a lifelong bar to reentry into the United States. With stakes this high, one might assume that the term “aggravated felony” would be defined narrowly and precisely. In fact, the opposite is true. In 1996, Congress enacted a definition of “aggravated felony” that sweeps incredibly broadly, encompassing offenses neither aggravated nor felonies. The term includes hundreds of state and federal crimes, many that are quite minor, including state misdemeanors.

Given what is at stake for longtime residents, one might also assume that the federal government would be selective, bringing removal charges on aggravated felony grounds only against those immigrants whose conduct truly seems to warrant certain and permanent removal. Here again, the opposite is often true. Rather than interpreting the term narrowly and bringing aggravated
felony charges sparingly, the federal government has a long history of relying on expansive interpretations of the aggravated felony definition in cases involving longtime lawful permanent residents. In many cases, the government has been able to rely on dubiously expansive constructions of the term for years, deporting hundreds of residents, before the Supreme Court steps in to require course corrections. For example, hundreds of immigrants were deported under an overly expansive understanding of the “crime of violence” provision of the aggravated felony removal grounds before the Supreme Court decided in the case of Leocal v. Ashcroft, 543 U.S. 1 (2004), that a conviction for causing bodily injury while driving under the influence of alcohol was not a crime of violence—and therefore not an aggravated felony—where the state could obtain a conviction for negligently caused injuries.

Since Leocal, the Supreme Court has intervened numerous times to rescue longtime residents from the executive branch’s overly expansive interpretation of the aggravated felony grounds. In Lopes v. Gonzalez, 549 U.S. 47 (2006), Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010), Moncrieffe v. Holder, 569 U.S. ___ (2013), and Mellouli v. Lynch, 575 U.S. ___ (2015), the Court time and again rejected the federal government’s attempt to interpret the “drug trafficking” subsection of the aggravated felony provision as a basis for achieving the permanent deportation of longtime lawful permanent residents on the basis of their minor state-law drug convictions.

This term, the Court was once again confronted with the federal government seeking to deport a longtime lawful permanent resident on aggravated felony grounds. Once again, the Supreme Court ruled in favor of the immigrant facing removal. But this time, the Court not only disagreed with the government’s interpretation of the “crime of violence” subsection at issue, it found that the subsection as a whole was unconstitutionally vague.

Wesley Fonseca Pereira has lived in the United States since 2000. He entered on a visitor’s visa at the age of 19, but remained in the country without legal authorization when his visa expired. Lacking legal status, he was subject to removal under the immigration statute. But Congress offered a form of relief from removal, cancellation of removal, for a small number of otherwise removable noncitizens if they have ten years of continuous physical presence in the country and meet certain other requirements. 8 U.S.C. § 1229(b)(b). The accrual of the ten-year period of continuous residence ends when the noncitizen is served with a “notice to appear under [8 U.S.C.] § 1229(a).” Section 1229(a), in turn, provides that the government shall serve a “written notice (in this section referred to as a ‘notice to appear’) … specifying[,]” among other things, “[t]he time and place at which the [removal] proceedings will be held.”

In 2006, the government served Pereira personally with a document labeled a notice to appear. The document briefly stated the factual and legal bases of his charged removal, but it did not contain the date of the intended proceedings. Pereira argued that the absence of the date of proceedings meant that the document was not a
“notice to appear under” Section 1229(a). The government tried to argue that the document stopped Pereira’s accrual of continuous physical presence even if it lacked the date requirement set forth in Section 1229(a). The Supreme Court sided with Pereira, holding that the statutory requirements of Section 1229(a) are definitional: A document that does not contain information required by the cancellation of removal statute’s definition of a “notice to appear” is not a “notice to appear” for purposes of that provision. Because the notice served by the government lacked the date of Pereira’s hearing, that notice did not stop Pereira’s accrual of continuous physical presence.

Both the majority decision, and more pointedly, Justice Kennedy’s concurrence, expressed skepticism toward agency deference principles. The justices did not explicitly back away from the principle articulated in 1984 in Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, that courts should defer to an agency’s legitimate interpretation of an ambiguous statute. But the justices in the majority clearly encourage courts to take an independent look at statutes to determine whether there are even sufficient ambiguities to warrant deference. Justice Sotomayor, writing for the majority, found that “the Court need not resort to Chevron deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand.” Justice Kennedy further stressed the need for courts to engage in their own, independent appraisals of statutory text before capitulating to an agency’s conclusion that a statute is ambiguous. He chastised some courts of appeals for engaging “in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress’ intent could be discerned,…and whether the BIA’s [Board of Immigration Appeals] interpretation was reasonable.”

Justice Kennedy was certainly part of a group of justices urging greater court skepticism to agency interpretations. In immigration cases, this has coincided with the liberal justices’ skepticism of government overreach at the expense of the rights of immigrants. The resulting alliance has favored immigrants’ interpretations of removal statutes over agency interpretations. But Justice Kennedy has not been a swing voter in these cases, and vote counts suggest that the alliance is likely to persist even on a post-Kennedy Supreme Court.

Conclusion

The past term provides evidence that Justice Kennedy’s retirement will probably not hearken a radical shift in the Court’s immigration jurisprudence. But the resulting changes in court composition may further decrease the Court’s already low tolerance to hearing, let alone deciding favorably, the claims brought by noncitizens detained and excluded by the federal government.

There are many interesting constitutional questions in immigration law that the Court did not tackle this term. Perhaps the most notable of these—with huge looming significance—is the question of immigration federalism. Justice Kennedy’s opinion in Arizona v. United States, 567 U.S. 387 (2012), has been widely read to stand for the proposition that the federal government has broad latitude to preempt states from enacting immigration policies. In upholding Arizona’s law requiring police to investigate immigration status upon reasonable suspicion of an immigration violation, however, Justice Kennedy crafted an opinion that steered well clear of adopting the strongest possible form of federal preemption in this sphere. Likewise, Justice Kennedy’s vote to affirm the Fifth Circuit in Texas v. U.S., 579 U.S. ___ (2016), suggested his willingness to allow states to challenge executive interpretations of immigration statutes even when those statutes seemingly contain broad Congressional grants of authority to the executive branch. As Justice Scalia’s dissent in Arizona v. United States illustrates, a new justice could probably move the Court much further than Justice Kennedy did in the direction of giving states and localities greater power in immigration matters. In the short term, that seems an unlikely outcome given that it is Democratic states and localities that are testing the boundaries of federal immigration power. But changes in electoral politics could lead to changes in the landscape of immigration federalism, too.

Jennifer Chacón is a professor of law at the UCLA School of Law focusing on immigration law. Her work centers on mediating institutions in immigration enforcement—including local police and schools—and on the ways that immigration law and policy marginalize and shape the identities (including the racial identities) of many immigrants in the United States. Jennifer earned an A.B. with Distinction from Stanford University and her J.D. from Yale Law School, then clerked for Judge Sidney Thomas on the U.S. Court of Appeals for the Ninth Circuit. She spent four years as an associate at Davis Polk & Wardwell in New York, She can be reached at chacon@law.ucla.edu.

PREVIEW of United States Supreme Court Cases, pages 270–275. © 2018 American Bar Association
The U.S. Supreme Court’s 2017–18 term was not a blockbuster one for First Amendment jurisprudence, but it certainly had its moments. The Court decided cases involving a clash between antidiscrimination laws and the free exercise of religion, labor unions and compelled fees, political expression at polling places, and retaliatory arrests.

**Masterpiece Cakeshop**
The most widely watched First Amendment case was *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (Docket No. 16-111), a case that engendered more than 100 amicus briefs, nearly evenly split in support of the different parties. The case involved whether the Colorado Civil Rights Commission had violated the First Amendment rights of Jack Phillips, the cake-maker who operated Masterpiece Cakeshop.

Phillips ran afoul of the Colorado Civil Rights Commission for refusing to bake a wedding cake for a same-sex couple. When Phillips refused, citing his religious objections to same-sex marriage, the couple filed a charge of discrimination with the Colorado Civil Rights Commission. The complaint alleged that Phillips had discriminated against the couple on the basis of their sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that Phillips, through his shop, had violated the antidiscrimination law. Colorado state courts affirmed. Phillips appealed the case up to the U.S. Supreme Court, contending that the Colorado Civil Rights Commission had violated his First Amendment rights to freedom of speech, association, and free exercise of religion.

The Court, in a 7–2 decision, ruled in favor of the cakeshop, reasoning that the Civil Rights Commission had violated the fundamental principle requiring the state to be neutral in matters of religion. The majority opinion, authored by Justice Anthony Kennedy, reasoned that the Commission’s actions showed hostility toward Phillips’s religious beliefs.

“The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection,” wrote Justice Kennedy. He cited a commissioner’s statement—“it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others”—as clear evidence of hostility to Phillips’s religious views. He also noted the Commission treated Phillips differently than three other cakemakers who refused to bake cakes that would have contained messages the bakers said were offensive or demeaning to same-sex couples.

Justice Kennedy concluded that “the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”

At the center of the case was whether the Court would provide more guidance as to when certain forms of conduct are expressive enough to constitute speech for purposes of the First Amendment. Stated another way, is the act of making a cake a form of speech? If it is, then what about creating a fancy hair design or preparing an elaborate presentation of food? Are they forms of speech triggering the protections of the First Amendment or closer to what former U.S. Supreme Court Chief Justice William Rehnquist referred to as conduct with “kernels” of expression.

Justice Kennedy acknowledged the difficulty of the free-speech question, writing: “The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.” However, as noted, Justice Kennedy did not explore this question further.

Justice Clarence Thomas, however, wrote a separate concurring opinion, addressing the free-speech question. Justice Thomas explained that a wide array of conduct—such as burning a flag or dancing in the nude before an audience—can qualify as expression for purposes of the First Amendment. Justice Thomas reasoned thatPhillips’s creation of custom wedding cakes is expressive for First Amendment purposes and that Colorado violated Phillips’s First Amendment free-speech rights by compelling him to engage in certain speech.

**Labor Unions**
Speaking of compelled speech, the Court directly addressed that question in a context long plagued by controversy: compelled fees or so-called agency fees. Agency fees are contributions nonunion members must pay to the union as their collective bargaining representative. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (Docket No. 16-1466), a sharply divided Supreme Court ruled 5–4 that such fees amount to unconstitutional compelled speech in violation of the First Amendment.

The Court overruled *Abood v. Detroit Board of Education*, 431 U.S.
209 (1977), in reaching its decision in favor of Mark Janus, an employee with the Illinois Department of Healthcare and Family Services, who objected to the mandatory fees.

“Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned,” wrote Justice Samuel Alito Jr. in his majority opinion. He described Abood as an “anomaly in our First Amendment jurisprudence.”

Justice Elena Kagan authored an opinion for the four dissenters, reasoning that Abood struck a reasonable balance between public employees’ First Amendment rights and government’s workplace operational interests. She noted that “basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work.” She warned that the majority had once again used the First Amendment in an “aggressive manner” to invalidate “workaday economic and regulatory policy.”

First Amendment Expression at Polling Places
This term, the U.S. Supreme Court also took on free expression at polling places when it invalidated a Minnesota law that prohibited individuals from wearing political badges, political buttons, or other political insignia at or near polling places. The Court reasoned in Minnesota Voters Alliance v. Mansky (Docket No. 16-1435) that the challenged law’s nearly complete ban on political speech in the non-public forum was unreasonable.

The state’s interpretation of the law allowed election officials to ban political expression “promoting a group with recognizable political views.” The Court found the law unconstitutional after emphasizing that the polling place was a nonpublic forum that could be subject to reasonable restrictions. According to the Court, the law was strikingly overbroad and restricted political speech, the core type of speech protected by the First Amendment.

The state had argued that allowing individuals to wear such political apparel might lead to voter intimidation or harassment. But, in his majority opinion, Chief Justice John Roberts expressed concern over the broad reach of the law to anything deemed “political” speech: “Here, the unmoored use of the term ‘political’ in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota’s restriction to fail even this forgiving test.”

Some amici had urged the Court to reevaluate Burson v. Freeman, 504 U.S. 191 (1992), a 6–3 decision in which the Court upheld a Tennessee law that prohibited the distribution of campaign materials within 100 feet of a polling place. Burson is one of the few examples of the Court upholding a law even after applying strict scrutiny. According to these amici, Burson was wrongly decided. After all, people have a right to receive campaign materials and listen to others’ opinions about political candidates at polling places. A key strand of First Amendment doctrine is the right to receive information and ideas.

The state had pressed the idea that Burson justified the Minnesota law banning political insignia. But the Court recognized that Burson and the Minnesota case were quite different. The Court differentiated the two in part because the Minnesota law banned voters’ own individual self-expression.

Case on Retaliatory Arrests
In Lozman v. City of Riviera Beach (Docket No. 17-21), the U.S. Supreme Court addressed an unusual retaliatory arrest claim filed by Fane Lozman, a frequent critic of Riviera Beach, Florida’s policies on eminent domain. Lozman had a vested interest in those policies, as he lived on a houseboat in the city’s waterfront area.

Lozman had a history with city officials, which escalated after he sued the city for violating open meetings law after officials met secretly with developers. Lozman later attended a city council meeting and spoke critically of city officials during the public comment period. A councilmember ordered him to stop uttering those remarks. After Lozman continued, the councilmember ordered a police officer to arrest Lozman.

The officer handcuffed Lozman and escorted him from the building. Officials charged him with disorderly conduct, though a prosecutor later dropped the charges. The gist of Lozman’s First Amendment lawsuit was that city officials arrested him in retaliation for his open meetings lawsuit and other public criticisms.

The city argued that Lozman’s retaliation lawsuit should be dismissed, because the police officer had probable cause to arrest Lozman. The city prevailed before a jury after the court ruled that, to prevail, Lozman had to show the individual police officer had animus against Lozman.

On appeal, the U.S. Circuit Court of Appeals for the Eleventh Circuit determined that the city erred when it reasoned that the officer himself must harbor a retaliatory animus but determined any such error harmless because the jury determined the arrest was backed by probable cause.

Lozman filed a petition for writ of certiorari to the U.S. Supreme Court. He contended that probable cause for an arrest does not bar a retaliatory arrest claim. The city countered that, pursuant to the Court’s decision in Hartman v. Moore, 547 U.S. 250 (2006), probable cause for arrest is an absolute bar just as the Court determined it was in Hartman for retaliatory prosecution cases.

Writing for the majority, Justice Kennedy reasoned that probable cause should not be a bar for those retaliation cases in which the plaintiff alleges that a governmental entity engaged in a pattern of retaliation against a plaintiff for protected speech or petitioning.

“The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman’s claim from the typical retaliatory arrest claim,” Justice Kennedy wrote, adding that “there is a risk that some police officers may exploit the arrest power as a means of suppressing speech.” According to Justice Kennedy, Lozman does not need to show a lack of probable cause. Justice Thomas filed a solitary dissent, contending that Lozman should have to show a lack of probable cause.
As this author has explained in another piece, there are three golden nuggets for free-expression advocates to take from the Lozman case: (1) The Court recognized that probable cause for an arrest does not mean that government officials did not unlawfully retaliate against someone; (2) the Court specifically warned that the government’s arrest power should not be used arbitrarily and in a retaliatory fashion; and (3) the Court emphasized that Lozman’s speech was “high in the hierarchy of First Amendment values” as he had engaged in the right to petition by suing the city. See David L. Hudson Jr., “Golden Nuggets for Free Expression Advocates in an Unusual Case,” Freedom Forum Institute, June 19, 2018, at https://www.freedomforuminstitute.org/2018/06/19/golden-nuggets-for-free-expression-advocates-in-an-unusual-case/.

Conclusion
The Court’s First Amendment term was not without its moments, but the decisions left First Amendment advocates often wishing for more guidance. Advocates wanted more from the Court on Masterpiece in terms of exploring the contours of the speech-conduct dichotomy. Likewise, the Minnesota polling place decision could have addressed more directly the constitutionality of a complete speech ban under strict scrutiny. Finally, the Lozman decision, given its unusual facts, may not have a great impact on other retaliatory arrest cases.

David L. Hudson Jr. is a visiting associate professor of legal practice at Belmont Law School in Nashville, Tennessee. He is also the author, coauthor, or coeditor of more than 40 books, including a coeditor of The Encyclopedia of the Fourth Amendment (2013).
CASE SUMMARIES

Administrative Law

Encino Motorcars, LLC v. Navarro
Docket No. 16-11362

Reversed and Remanded:
The Ninth Circuit

Argued: January 17, 2018
Decided: April 2, 2018
Analysis: ABA PREVIEW 127, Issue 4

Overview: This case is on its second trip to the Supreme Court to determine whether automobile shop “service advisors” are exempt from time-and-a-half overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 213(b)(10)(A). That statute exempts from overtime pay requirements “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.” Until this case, every court that addressed the issue deemed service advisors to be exempt from overtime requirements. However, in 2011, the Department of Labor deemed service advisors to be nonexempt and entitled to overtime, resulting in this lawsuit. The Ninth Circuit agreed. The Supreme Court vacated that ruling and remanded the case. On remand, the Ninth Circuit found service advisors nonexempt under the most natural reading of the statute.

Issue: Are automobile service advisors exempt from overtime requirements under the Fair Labor Standards Act (FLSA)?

Yes. Service advisors are exempt from the FLSA’s overtime-pay requirement.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch):

Service advisors are also “primarily engaged in…servicing automobiles.” § 213(b)(10)(A). The word “servicing” in this context can mean either “the action of maintaining or repairing a motor vehicle” or “[t]he action of providing a service.” …Service advisors satisfy both definitions. Service advisors are integral to the servicing process. They “mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sell[1] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles.” …If you ask the average customer who services his car, the primary, and perhaps only, person he is likely to identify is his service advisor. True, service advisors do not spend most of their time physically repairing automobiles. But the statutory language is not so constrained. All agree that partsmen, for example, are “primarily engaged in…servicing automobiles.” …But partsmen, like service advisors, do not spend most of their time under the hood. Instead, they “obtain the vehicle parts…and provide those parts to the mechanics.” …In other words, the phrase “primarily engaged in…servicing automobiles” must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. That description applies to partsmen and service advisors alike.

Dissenting: Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan)

Appellate Jurisdiction

Hamer v. Neighborhood Housing Services of Chicago
Docket No. 16-658

Vacated and Remanded:
The Seventh Circuit

Argued: October 10, 2017
Decided: November 8, 2017
Analysis: ABA PREVIEW 21, Issue 1

Overview: Petitioner Charmaine Hamer filed suit alleging that respondents Neighborhood Housing Services of Chicago and Fannie Mae’s Mortgage Help Center discriminated against her on the basis of age when they terminated her employment. After entering summary judgment for respondents, the district court granted petitioner a 60-day extension of time to file a notice of appeal. Although petitioner appealed within the extended deadline, the Seventh Circuit dismissed her appeal as untimely, holding:

(1) the limits imposed by Rule 4(a)(5)(C) of the Federal Rules of Appellate Procedure on extensions of time for filing a notice of appeal are mandatory and jurisdictional; (2) the 60-day extension granted by the district court exceeded those limits; (3) petitioner’s notice of appeal was therefore untimely; and (4) the Seventh Circuit had “no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements.” This appeal asked the Supreme Court to determine whether the limits imposed on extensions under Rule 4(a)(5)(C) are jurisdictional, even though no such limits are imposed by statute; and (2) if not jurisdictional, whether forfeiture, waiver, or other equitable considerations permit the appellate court to address the merits of the appeal despite the violation of Rule 4(a)(5)(C).

Issue: Are the limits imposed on extensions under Rule 4(a)(5)(C) jurisdictional, even though no such limits are imposed by statute?

No. The Court of Appeals erred in treating as jurisdictional Rule 4(a)(5)(C)’s limitation on extensions of time to file a notice of appeal.

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Issue: Are the limits imposed on extensions under Rule 4(a)(5)(C) jurisdictional, even though no such limits are imposed by statute?

No. The Court of Appeals erred in treating as jurisdictional Rule 4(a)(5)(C)’s limitation on extensions of time to file a notice of appeal.

From the unanimous opinion by Justice Ginsburg: Quoting Bowles at length, the Court of Appeals in this case reasoned that “[t]he Rule 4(a)(5)(C) is the vehicle by which § 2107(c) is employed and it limits a district court’s authority to extend the notice of appeal filing deadline to no more than an additional 30 days.” …In conflating Rule 4(a)(5)(C) with § 2107(c), the Court of Appeals failed to grasp the distinction our decisions delineate between jurisdictional appeal filing deadlines and mandatory claim-processing rules, and therefore misapplied Bowles.

Appellate Procedure

Azar v. Garza
Docket No. 17-654

Vacated and Remanded:
The District of Columbia Circuit
Appellate Procedure

*Tharpe v. Sellers*

Docket No. 17-6075

**Vacated and Remanded: The Eleventh Circuit**

Argued: N/A

Decided: January 8, 2017

Analysis: N/A

**Overview:** A jury convicted Keith Tharpe of murder. Tharpe, who is black, asked to have his *habeas corpus* proceedings reopened due to his claim that a white juror, Gattie, had been biased against him. The district court held that Tharpe’s claim was procedurally defaulted in state court. According to the district court, Tharpe failed to produce any clear and convincing evidence contradicting the state court’s determination that the jury was not prejudiced. The Eleventh Circuit denied Tharpe’s certificate of appealability (COA), holding that reasonable jurists could not dispute the district court’s procedure ruling.

**Issue:** Was the Eleventh Circuit’s decision, rooted in the state court’s fact-finding, that the defendant had failed to show prejudice in connection with this procedurally defaulted claim correct?

**No.** A review of the record, including a sworn affidavit from the juror in question, presents a strong factual basis for the argument that the defendant’s race affected the death verdict.

From the per curiam opinion: The state court’s prejudice determination rested on its finding that Gattie’s vote to impose the death penalty was not based on Tharpe’s race... And that factual determination is binding on federal courts, including this Court, in the absence of clear and convincing evidence to the contrary. See 28 U. S. C. § 2254(e)(1).

Here, however, Tharpe produced a sworn affidavit, signed by Gattie, indicating Gattie’s view that “there are two types of black people: 1. Black folks and 2. Niggers”; that Tharpe, “who wasn’t in the ‘good’ black folks category in my book, should get the electric chair for what he did”; that “[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn’t my reason”; and that, “[a]fter studying the Bible, I have wondered if black people even have souls.”… Gattie’s remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe’s race affected Gattie’s vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court’s factual determination was wrong.

Dissenting: Justice Thomas (joined by Justices Alito and Gorsuch)
needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges...Consider in order the four specific (if overlapping) powers Freytag mentioned. First, the Commission’s ALJs (like the Tax Court’s STJs) “take testimony.”...More precisely, they “[r]eceive[e] evidence” and “[e]xamine witnesses” at hearings, and may also take pre-hearing depositions...Second, the ALJs (like STJs) “conduct trials.”...As detailed earlier, they administer oaths, rule on motions, and generally “regulate[e] the course of” a hearing, as well as the conduct of parties and counsel...Third, the ALJs (like STJs) “rule on the admissibility of evidence.”...They thus critically shape the administrative record (as they also do when issuing document subpoenas)...And fourth, the ALJs (like STJs) “have the power to enforce compliance with discovery orders.”...In particular, they may punish all “[c]ontemptuous conduct,” including violations of those orders, by means as severe as excluding the offender from the hearing...So point for point—straight from Freytag’s list—the Commission’s ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

Concurring: Justice Thomas (joined by Justice Gorsuch)

Concurring in judgment and dissenting in part: Justice Breyer (joined as to Part III by Justices Ginsburg and Sotomayor)

Dissenting: Justice Sotomayor (joined by Justice Ginsburg)

Bankruptcy

Lamar, Archer & Cofrin,
LLP v. Appling

Docket No. 16-1215

Affirmed: The Eleventh Circuit

Argued: April 17, 2018
Decided: June 4, 2018
Analysis: ABA PREVIEW 256, Issue 7

Overview: A basic purpose of bankruptcy law is to provide a fresh start to the “honest but unfortunate” debtor. The bankruptcy discharge is therefore not generally available for debts incurred by “false pretenses, a false representation, or actual fraud.” However, if the false statement alleged by the creditor is one “respecting the debtor’s or an insider’s financial condition,” it is only nondischargeable if the creditor can show that it was in writing and that the creditor reasonably relied on it. The question in this case was whether a statement by the debtor regarding a single asset, rather than its overall net worth or solvency, is a statement respecting the debtor’s financial condition and, thus, subject to this higher standard for nondischargeability.

Issue: Is a statement by the debtor regarding a single asset, rather than its overall net worth or solvency, a statement respecting the debtor’s financial condition and, thus, subject to a higher standard for nondischargeability?

Yes. A statement about a single asset can be a “statement respecting the debtor’s financial condition” under 11 U.S.C. § 523(a)(2).

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan and joined by Justices Thomas, Alito, and Gorsuch as to all but Part III-B): The Court finds no basis to conclude, however, at least in this context, that “related to” has a materially different meaning than “about,” “concerning,” “with reference to,” and “as regards.” The definitions of these words are overlapping and circular, with each one pointing to another in the group. “Relate” means “to be in relationship: have reference, and, in the context of the phrase “in relation to,” “reference, respect.”...“About” means “with regard to,” and is the equivalent of “concerning.”...“Concerning” means “relating to,” and is the equivalent of “regarding, respecting, about.”...“Reference” means “the capability or character of alluding to or bearing on or directing attention to something,” and is the equivalent of “relation” and “respect.”...And “regard” means “to have relation to or bearing upon: relate to,” and is the equivalent of “relation” and “respect.”...The interconnected web formed by these words belies the clear distinction Lamar attempts to impose. Lamar also fails to put forth an example of a phrase in a legal context similar to the one at issue here in which toggling between “related to” and “about” has any pertinent significance.

Bankruptcy

Merit Management Group,
LP v. FTI Consulting, Inc.

Docket No. 16-784

Affirmed and Remanded:
The Seventh Circuit

Argued: November 6, 2017
Decided: February 27, 2018
Analysis: ABA PREVIEW 47, Issue 2

Overview: The litigation trustee in a bankruptcy case attempted to recover several million dollars from the recipient of a bank transfer challenged as fraudulent. Because the money transfer related to the settlement of a sale of securities (corporate stock), the recipient invoked a safe harbor provision prohibiting the recovery of transfers “made by or to” a “financial institution.” Since the money transfers were made via the banking system, rather than in a direct exchange of cash, the recipient asserted that the transfer was made “by” the buyer’s bank and “to” the seller’s bank; therefore, these transfers were insulated from attack by the plain language of the bankruptcy law. The trustee countered that this seemingly plain language is actually ambiguous, since one would ordinarily consider a money transfer to be sent “by” the buyer-payer (like the sender of a letter) and “to” the ultimate recipient seller-payee (like the addressee), not “by” or “to” either the seller’s or buyer’s banks, who were simply conduits for the delivery of the payment (like the Postal Service). The statute at hand was designed, the trustee argued, to protect only financial institutions that had some substantive connection to the payment transaction, not mere delivery agents for the money. The District Court dismissed the case, accepting the recipient’s “plain meaning” approach, consistent with the position of the Second, Third, Sixth, Eighth, and Tenth Circuits. On appeal, the Seventh Circuit reversed, adopting the trustee’s ambiguity argument and departing from its sister circuits. The Supreme Court granted certiorari in this case to resolve this split among the appeals courts as to the proper interpretation of federal bankruptcy law.

Issue: Does Section 546(e) of the Bankruptcy Code prohibit the recovery of allegedly fraudulent stock sale settlement payments “made by or to” a bank, where the banks had no substantive stake in the stock sale transaction but were merely conduits for the money transfer from buyer to seller?
No. The only relevant transfer for purposes of the Section 546(e) safe harbor is the transfer that the trustee seeks to avoid; the transfer here falls outside the Section 546(e) safe harbor.

From the unanimous opinion by Justice Sotomayor: [I]f any doubt remained, the language that follows dispels that doubt: The transfer that the “trustee may not avoid” is specified to be “a transfer that is” either a “settlement payment” or made “in connection with a securities contract.” § 546(e)…Not a transfer that involves. Not a transfer that comprises. But a transfer that is a securities transaction covered under § 546(e). The provision explicitly equates the transfer that the trustee may otherwise avoid with the transfer that, under the safe harbor, the trustee may not avoid. In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria. Thus, the statutory language and the context in which it is used all point to the transfer that the trustee seeks to avoid as the relevant transfer for consideration of the § 546(e) safe-harbor criteria.

Bankruptcy

U.S. Bank v. The Village at Lakerridge
Docket No. 15-1509

Affirmed: The Ninth Circuit

Argued: October 31, 2017
Decided: March 5, 2018
Analysis: ABA PREVIEW 42, Issue 2

Overview: The Bankruptcy Code has special rules and requirements that apply to insiders of the debtor. For example, unlike ordinary creditors, insiders are subject to an extended preference reach-back period of 1 year instead of 90 days. Another provision bars severance payments to insiders unless certain narrow exceptions are met. Under the statutory definition of an insider, various enumerated persons and entities are deemed per se insiders based on their relationship to the debtor. A family relative of an individual debtor, for instance, is an insider. Or, if the debtor is a corporation, an officer or director is deemed an insider. The definition, however, is nonexclusive, meaning that a court may determine that a party nonetheless qualifies as a “nonstatutory insider” based on the particular facts and circumstances of the case. Courts principally focus on whether the debtor and the third party have such a close relationship that their transactions are not conducted at arm’s length. The issue presented by this appeal was certainly rather arcane. Should a court’s assessment of arm’s-length conduct be treated as a factual finding, subject to review for clear error, or as a matter of statutory interpretation, subject to de novo review? Alternatively, is the task a mixed question of law and fact?

Issue: Is “clearly erroneous” the appropriate standard of appellate review for a bankruptcy court’s determination that a party is or is not a nonstatutory insider?

Yes. The Ninth Circuit was right to review the Bankruptcy Court’s determination for clear error (rather than de novo).

From the unanimous opinion by Justice Kagan: [A]pplication of the Ninth Circuit’s arm’s-length legal standard really requires what we have previously described as a “factual inference[ ] from undisputed basic facts.” Commissioner v. Duberstein, 363 U. S. 278 (1960)…The court takes a raft of case-specific historical facts, considers them as a whole, balances them one against another—all to make a determination that when two particular persons entered into a particular transaction, they were (or were not) acting like strangers. Just to describe that inquiry is to indicate where it (primarily) belongs: in the court that has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and the deepest understanding of the record—i.e., the bankruptcy court.

Concurring: Justice Kennedy

Concurring: Justice Sotomayor (joined by Justices Kennedy, Thomas, and Gorsuch)

Civil Procedure

Artis v. District of Columbia
Docket No. 16-460

Reversed and Remanded: The District of Columbia Court of Appeals

Argued: November 1, 2017
Decided: January 22, 2018
Analysis: ABA PREVIEW 55, Issue 2

Overview: This case was about the meaning of the word toll as used in 28 U.S.C. § 1367(d). That statute governs the federal courts’ supplemental jurisdiction over state law claims brought along with federal claims. The federal court may deny jurisdiction over the state law claims or, as happened here, dismiss the federal claim and then decline jurisdiction over the state claim. Section 1367(d) states that the “period of limitations” for any state claim asserted under supplemental jurisdiction shall be tolled while the claim is pending, and for a period of 30 days after it is dismissed, unless state law provides for a longer tolling period. The issue was whether tolled means the state limitations period is stopped or suspended, as petitioner argued, or whether it means that it continues to run, but a grace period is added at the end of the limitations period to allow a refiling of the case, as the D.C. Circuit ruled.

Issue: Does the word tolled in 28 U.S.C. § 1367(d), the supplemental jurisdiction statute, mean that a statute of limitations period is suspended during the pendency of a federal court procedure that is ultimately dismissed?

Yes. Section 1367(d)’s instruction to toll a state limitations period means to hold it in abeyance, or to stop the clock.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan): [T]he District’s reading could yield an absurdity: It could permit a plaintiff to refile in state court even if the limitations period on her claim had expired before she filed in federal court. To avoid that result, the District’s proposed construction of “tolled” as “removed” could not mean simply “removed.” Instead, “removed” would require qualification to express “removed, unless the period of limitations expired before the claim was filed in federal court.” In sum, the District’s interpretation maps poorly onto the language of § 1367(d), while Artis’ interpretation is a natural fit.

Dissenting: Justice Gorsuch (joined by Justices Kennedy, Thomas, and Alito)

Civil Procedure

China Agritech, Inc. v. Resh
Docket No. 17-432

Reversed and Remanded: The Ninth Circuit
Argued: March 26, 2018
Decided: June 11, 2018
Analysis: ABA PREVIEW 176, Issue 6

Overview: This case involved a class action suit alleging a fertilizer manufacturer and seller in China violated various aspects of the Securities Exchange Act and Securities Act. The Court was asked to decide whether the tolling rule in American Pipe & Construction Co. v. Utah (1974) permits an absent class member to bring a subsequent class action when the applicable statute of limitations period has expired.

Issue: Does the tolling rule in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), permit an absent class member to bring a subsequent class action beyond the applicable statute of limitations period?

No. Upon denial of class certification, a putative class member may not, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, Alito, Kagan, and Gorsuch): The watchwords of American Pipe are efficiency and economy of litigation, a principal purpose of Rule 23 as well. Extending American Pipe tolling to successive class actions does not serve that purpose. The contrary rule, allowing no tolling for out-of-time class actions, will propel putative class representatives to file suit well within the limitation period and seek certification promptly. For all the above-stated reasons, it is the rule we adopt today: Time to file a class action falls outside the bounds of American Pipe.

Concurring: Justice Sotomayor

Civil Procedure

CNH Industrial, N.V. v. Reese
Docket No. 17-515
Reversed and Remanded: The Sixth Circuit

Argued: N/A
Decided: February 20, 2018
Analysis: N/A

Overview: In 2015, the Supreme Court rejected the Sixth Circuit’s practice of applying principles from International Union, United Auto, Aerospace & Agriculture Implement Works of Am. v. Yard-Man, 716 F. 2d 1476 (1983), to collective-bargaining agreements. According to the Supreme Court, a court is required to interpret such agreements based on “ordinary principles of contract law.” In the current case, the Sixth Circuit applied Yard-Man to hold that a collective-bargaining agreement was ambiguous as a matter of law. The retirees and surviving spouses, as respondents, claimed that the Sixth Circuit’s interpretation of the agreement was incorrect under the Court’s precedent.

Issue: Was the Sixth Circuit correct to apply Yard-Man to a collective-bargaining agreement and, in turn, find that the agreement was ambiguous?

No. A contract is not ambiguous unless it is subject to more than one reasonable interpretation, and the Yard-Man inferences cannot generate a reasonable interpretation because they are not “ordinary principles of contract law.”

From the per curiam opinion: Tellingly, no other Court of Appeals would find ambiguity in these circumstances. When a collective-bargaining agreement is merely silent on the question of vesting, other courts would conclude that it does not vest benefits for life. Similarly, when an agreement does not specify a duration for health care benefits in particular, other courts would simply apply the general durational clause. And other courts would not find ambiguity from the tying of retiree benefits to pensioner status. The approach taken in these other decisions “only underscores” how the decision below “deviat[ed] from ordinary principles of contract law.”

Civil Procedure

Epic Systems Corp. v. Lewis, Ernst & Young v. Morris, and National Labor Relations Board v. Murphy Oil USA, Inc.
Docket No. 16-285, 16-300, and 16-307
Reversed: The Seventh Circuit

Argued: October 2, 2017
Decided: May 21, 2018
Analysis: ABA PREVIEW 13, Issue 1

Overview: These consolidated cases involved actions filed by various employees in federal court in the Southern District of New York alleging that they had been misclassified as employees for the purposes of overtime pay under the Fair Labor Standards Act (FLSA). The plaintiffs sought back pay. Their action was pursued as a collective action under the FLSA. The FLSA provides for opt-in collective actions that are similar to class actions under Federal Rule of Civil Procedure 23. These employees had been required to sign an employment contract as a condition of employment, which includes an alternative dispute resolution provision. The Court was asked to decide if the provisions of the National Labor Relations Act (NLRA) invalidate class action waivers included in arbitration clauses in employment contracts. The Court was also asked to decide whether the NLRA invalidates such provisions, requiring that employees arbitrate their claims individually, rather than on a collective basis.

Issue: Do provisions of the National Labor Relations Act effectively invalidate class action waivers in employment arbitration clauses, requiring that employees arbitrate their grievances on an individual, rather than a collective, basis?

No. Congress has instructed in the Arbitration Act that arbitration agreement providing for individualized proceedings must be enforced, and neither the Arbitration Act’s saving clause nor the NLRA suggest otherwise.

From the opinion by Justice Gorsuch (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito): The employees’ efforts to distinguish Concepcion fall short. They note that their putative NLRA defense would render an agreement “illegal” as a matter of federal statutory law rather than “unconscionable” as a matter of state common law. But we don’t see how that distinction makes any difference in light of Concepcion’s rationale and rule. Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, Concepcion tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle
means the Arbitration Act’s saving clause can no more save the defense at issue in these cases than did the defense at issue in Concepcion. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

Concurring: Justice Thomas

Dissenting: Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan)

Civil Procedure

Jesner v. Arab Bank, PLC
Docket No. 16-499

Affirmed: The Second Circuit

Argued: October 11, 2017
Decided: April 24, 2018
Analysis: ABA PREVIEW 157, Issue 5

Overview: The Court was asked to decide whether the Alien Tort Statute (ATS), 28 U.S.C. § 1350, embraces or forecloses corporate liability. The plaintiffs, foreign citizens who were injured in Israel during the Second Intifada, alleged that the defendant, the Arab Bank based in Jordan, provided financial services to terrorists who engaged in the Second Intifada. The Bank argued, and the lower court agreed, that the ATS barred corporate liability for such a case.

Issue: Does the Alien Tort Statute, 28 U.S.C. § 1350, create a federal common law right of action against corporations?

No. Foreign corporations may not be defendants in suits brought under the Alien Tort Statute.

From the opinion of the Court by Justice Kennedy as to Parts I, II-B-1, and II-C (joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch; and an opinion with respect to Parts II-A, II-B-2, II-B-3, and III joined by Chief Justice Roberts and Justice Thomas): Like the presumption against extraterritoriality, judicial caution under Sosa “guards against our courts triggering...serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.”...If, in light of all the concerns that must be weighed before imposing liability on foreign corporations via ATS suits, the Court were to hold that it has the discretion to make that determination, then the cautionary language of Sosa would be little more than empty rhetoric. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.

Concurring: Justice Thomas

Concurring in part and judgment: Justice Alito

Concurring in part and judgment: Justice Gorsuch

Dissenting: Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan)

Contracts Clause

Sveen v. Melin
Docket No. 16-1432

Reversed and Remanded: The Eighth Circuit

Argued: March 19, 2018
Decided: June 11, 2018
Analysis: ABA PREVIEW 192, Issue 6

Overview: Mark Sveen married Kay Melin in 1998 and named her as the beneficiary of his life insurance policy. In 2002, the Minnesota legislature enacted a statute that automatically revokes life insurance beneficiary designations in favor of an ex-spouse upon divorce. Sveen and Melin divorced in 2007. Sveen died in 2011 without changing the beneficiary designation. Melin, desiring to receive the life insurance proceeds, argued that a retroactive application of the statute would violate Sveen’s rights under the Contracts Clause.

Issue: Does the application of a revocation-upon-divorce statute to a life insurance contract signed before the statute’s effective date violate the Contracts Clause of the United States Constitution?

No. The retroactive application of Minnesota’s statute does not violate the Contracts Clause, which restricts the power of states to disrupt contractual arrangements, but does not prohibit all laws affecting preexisting contracts.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, and Sotomayor): The Minnesota statute places no greater obligation on a contracting party—while imposing a lesser penalty for noncompliance. Even supposing an insured wants his life insurance to benefit his ex-spouse, filing a change-of-beneficiary form with an insurance company is as “easy” as, say, providing a landowner with notice or recording a deed...Here too, with only “minimal” effort, a person can “safeguard” his contractual preferences...And here too, if he does not “wish to abandon his old rights and accept the new,” he need only “say so in writing.”...What’s more, if the worst happens—if he wants his ex-spouse to stay as beneficiary but does not send in his form—the consequence pales in comparison with the losses incurred in our earlier cases. When a person ignored a recording obligation, for example, he could forfeit the sum total of his contractual rights—just ask the plaintiffs in Jackson and Vance. But when a policyholder in Minnesota does not redesignate his ex-spouse as beneficiary, his right to insurance does not lapse; the upshot is just that his contingent beneficiaries (here, his children) receive the money. See supra, at 5. That redirection of proceeds is not nothing; but under our precedents, it gives the policyholder—who, again, could have “easily” and entirely escaped the law’s effect—no right to complain of a Contracts Clause violation.

Dissenting: Justice Gorsuch

Criminal Law

Currier v. Virginia
Docket No. 16-1348

Affirmed: The Supreme Court of Virginia

Argued: February 20, 2018
Decided: June 22, 2018
Analysis: ABA PREVIEW 142, Issue 5

Overview: This case examined the relationship between issue preclusion and the decision to try criminal charges arising out of one incident in multiple trials. Specifically, the Court was asked to determine whether an agreement to multiple trials forecloses a defendant from exercising his Double Jeopardy Clause rights to issue preclusion with respect to a jury acquittal in the first of multiple cases.

Issue: Does a defendant who consents to severance of multiple charges into sequen-
Yes. Because the defendant consented to a severance, his trial and conviction on the felon-in-possession charge does not violate the Double Jeopardy Clause.

From the opinion by Justice Gorsuch (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito with respect to Parts I and II and joined by Chief Justice Roberts and Justices Thomas and Alito as to Part III): The fact is, civil preclusion principles and double jeopardy are different doctrines, with different histories, serving different purposes. Historically, both claim and issue preclusion have sought to “promot[e] judicial economy by preventing needless litigation.”...That interest may make special sense in civil cases where often only money is at stake. But the Double Jeopardy Clause and the common law principles it built upon govern criminal cases and concern more than efficiency. They aim instead, as we’ve seen, to balance vital interests against abusive prosecutorial practices with consideration to the public’s safety. The Clause’s terms and history simply do not contain the rights Mr. Currier seeks.

Concurring: Justice Kennedy

Dissenting: Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan)

Criminal Law

Dahda v. United States
Docket No. 17-43

Affirmed: The Tenth Circuit

Argued: February 21, 2018
Decided: May 14, 2018
Analysis: ABA PREVIEW 149, Issue 5

Overview: This case examined the consequences of a wiretap order issued by a federal district court that exceeds the court’s territorial jurisdiction. Specifically, it considered whether the applicable federal statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, required suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge’s territorial jurisdiction?

No. Because the orders were not lacking any information that the statute required them to include and would have been sufficient absent the challenged language authorizing interception outside the court’s territorial jurisdiction, the orders were not facially insufficient.

From the opinion by Justice Breyer (joined by all members except Justice Gorsuch who took no part): An order is “insufficient” insofar as it is “deficient” or “lacking in what is necessary or requisite.”...And, looking, as the Dahdas urge us to do, at “the four corners of the order itself,”...we cannot find any respect in which the Orders are deficient or lacking in anything necessary or requisite. The Orders do contain a defect, namely, the sentence authorizing interception outside Kansas, which we set forth above...But not every defect results in an insufficiency. In that sentence, the District Court “further” ordered that interception may take place “outside the territorial jurisdiction of the court.”...The sentence is without legal effect because, as the parties agree, the Orders could not legally authorize a wiretap outside the District Court’s “territorial jurisdiction.” But, more importantly, the sentence itself is surplus. Its presence is not connected to any other relevant part of the Orders. Were we to remove the sentence from the Orders, they would then properly authorize wiretaps within the authorizing court’s territorial jurisdiction. As we discussed above, a listening post within the court’s territorial jurisdiction could lawfully intercept communications made to or from telephones located within Kansas or outside Kansas...Consequently, every wiretap that produced evidence introduced at the Dahdas’ trial was properly authorized under the statute.

Criminal Procedure

Ayestas v. Davis
Docket No. 16-6795

Vacated and Remanded:
The Fifth Circuit

Argued: October 30, 2017
Decided: March 21, 2018
Analysis: ABA PREVIEW 58, Issue 2

Overview: The Criminal Justice Act is a federal law that provides indigent criminal defendants with a right to legal representation that includes counsel and the services necessary to develop and defend a case. For those facing the death penalty, 18 U.S.C. § 3599 requires better qualified lawyers, greater funding, and representation across every phase of capital representation in federal court. Section 3599(f) specifically allows for “investigative, expert, or other services” that are “reasonably necessary for the representation of the defendant” in the post-conviction phase. The question in this case focused on what it takes for a defendant to meet the statute’s “reasonably necessary” benchmark.

Issue: Did the Fifth Circuit err in holding that Section 3599(f) withholds “reasonably necessary” resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, when the claimant’s existing evidence does not meet the ultimate burden of proof at the time the Section 3599(f) motion is made?

Yes. The Fifth Circuit did not apply the correct legal standard; Section 3599 authorizes funding for the “reasonably necessary” services of experts, investigators, and the like, but the Fifth Circuit’s requirement for a showing of “substantial need” is a more demanding standard.

From the unanimous opinion by Justice Alito: Proper application of the “reasonably necessary” standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way. To be clear, a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks. But the “reasonably necessary” test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.

Concurring: Justice Sotomayor (joined by Justice Ginsburg)
City of Hays v. Vogt
Docket No. 16-1495

Dismissing: The Tenth Circuit
Argued: February 20, 2018
Decided: May 29, 2018
Analysis: ABA PREVIEW 146, Issue 5

Overview: Petitioner City of Hays is a municipality in Kansas. Respondent Matthew Vogt is a former police officer of the city. In 2013, while still working for the city, Vogt applied for a job with the police department of a different municipality, the City of Haysville. During an interview, Vogt revealed that “while working as a * * * police officer” for Hays, he had “come into possession” of a knife. Instead of reporting that he found the knife, Vogt “kept [it] for his personal use.” Haysville extended a job offer, but conditioned the offer on Vogt telling Hays about the knife and returning it. In early 2014, Vogt was charged with two felony counts related to his possession of the knife. During the district court proceedings in Ellis County, Kansas, the judge conducted a probable cause hearing, during which the state had to establish probable cause to believe that Vogt had committed a felony. In early 2015, the state dismissed the criminal charges against Vogt. Subsequently, Vogt filed a civil rights lawsuit under 42 U.S.C. § 1983 against the City of Hays, the City of Haysville, and certain officials of both cities in their individual and official capacities. His complaint alleged, among other things, that the use of his compelled statements in the criminal case against him violated his Fifth Amendment rights.

Issue: Is the Fifth Amendment violated when statements are used at a probable cause hearing but not at a criminal trial?

Dismissed.

Per curiam opinion. The writ of certiorari is dismissed as improvidently granted.

Justice Gorsuch took no part.

City of Hays v. Vogt
Docket No. 16-1495

Dismissing: The Tenth Circuit
Argued: February 20, 2018
Decided: May 29, 2018
Analysis: ABA PREVIEW 146, Issue 5

Overview: Charged with violating a federal statute prohibiting the possession of weapons on the grounds of the U.S. Capitol in Washington, D.C., Rodney Class admitted to having weapons in his vehicle parked on Capitol Grounds, but claimed that the statute was unconstitutional. After the trial court ruled against Class, he pleaded guilty to the offense and appealed his conviction, raising the constitutional arguments. Holding that the guilty plea waived these issues, the appellate court affirmed the conviction. Class argued to the Supreme Court that the appellate court erred and that guilty pleas waive only issues related to factual guilt but not arguments that the statute of conviction was unconstitutional.

Issue: Does a defendant’s unconditional guilty plea prevent him from raising on appeal the argument, rejected in pretrial rulings, that the statute under which he was charged was unconstitutional?

No. A guilty plea, by itself, does not bar federal criminal defendants from challenging the constitutionality of their statute of conviction on direct appeal.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Gorsuch): Unlike the claims in Broce, Class’ constitutional claims here, as we understand them, do not contradict the terms of the indictment or the written plea agreement. They are consistent with Class’ knowing, voluntary, and intelligent admission that he did what the indictment alleged. Those claims can be “resolved without any need to venture beyond that record.”…Nor do Class’ claims focus upon case-related constitutional defects that “occurred prior to the entry of the guilty plea.”…They could not, for example, “have been ‘cured’ through a new indictment by a properly selected grand jury.” Ibid…Because the defendant has admitted the charges against him, a guilty plea makes the latter kind of constitutional claim “irrelevant to the constitutional validity of the conviction.” Haring v. Prossie, 462 U. S. 306 (1983). But the cases to which we have referred make clear that a defendant’s guilty plea does not make irrelevant the kind of constitutional claim Class seeks to make. In sum, the claims at issue here do not fall within any of the categories of claims that Class’ plea agreement forbids him to raise on direct appeal.

Dissenting: Justice Alito (joined by Justices Kennedy and Thomas)

Wilson v. Sellers
Docket No. 16-6855

Reversed and Remanded:
The Eleventh Circuit
Argued: October 30, 2017
Decided: April 17, 2018
Analysis: ABA PREVIEW 51, Issue 2

Overview: After being convicted of murder and sentenced to death, Marion Wilson claimed that his trial lawyers were ineffective. A Georgia Superior Court considered and rejected those claims in a “reasoned opinion,” and the Georgia Supreme Court affirmed in a “summary order.” On federal habeas corpus review, the federal courts must decide whether “judication on the merits” to review: the Superior Court’s reasoned opinion or the Supreme Court’s summary order.

Issue: Did the Court’s decision in Harrington v. Richter, 562 U.S. 86 (2011), silently abrogate the presumption set forth in Ylst v. Nunnemaker, 501 U.S. 797 (1991)—that a federal court sitting in habeas proceedings should “look through” a summary state court ruling to review the last reasoned decision—as a slim majority of the en banc Eleventh Circuit held in this case, despite the agreement of both parties that the Ylst presumption should continue to apply?

No. A federal habeas court reviewing an unexplained state-court decision on the merits should “look through” that decision to the last related state-court decision that provides a relevant rationale and presume that the unexplained decision adopted the same reasoning.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Sotomayor, and Kagan): Since Ylst, every Circuit to have considered the matter has applied this presumption, often called the “look through” presumption, but for the Eleventh Circuit—even where the state courts did not apply a procedural bar to review—...
[t]hat is not surprising in light of the fact that the “look through” presumption is often realistic, for state higher courts often (but certainly not always...) write “denied” or “affirmed” or “dismissed” when they have examined the lower court’s reasoning and found nothing significant with which they disagree. Moreover, a “look through” presumption is often (but not always) more efficiently applied than a contrary approach—an approach, for example, that would require a federal habeas court to imagine what might have been the state court’s supportive reasoning. The latter task may prove particularly difficult where the issue involves state law, such as state procedural rules that may constrain the scope of a reviewing court’s summary decision, a matter in which a federal judge often lacks comparative expertise.

Dissenting: Justice Gorsuch (joined by Justices Thomas and Alito)

Criminal Restitution

Lagos v. United States

Docket No. 16-1519

Reversed and Remanded: The Fifth Circuit

Overview: In this case, the Supreme Court was asked to determine whether a defendant may be required, under the Mandatory Victims Restitution Act, to pay restitution for legal, expert, and consulting fees incurred by a lender in investigating the fraud and its legal fees from a related bankruptcy proceeding. The Fifth Circuit ruled that the defendant in this case had to pay $15,970,517, including legal, expert, and consulting fees, to a lender victimized by his fraud.

Issue: Did the United States Court of Appeals for the Fifth Circuit err by holding that a criminal defendant was required, under the Mandatory Victims Restitution Act, to pay restitution for legal, expert, and consulting fees incurred by the lender victimized by his fraud in investigating the fraud and its legal fees from related bankruptcy proceedings?

Yes. The words “investigation” and “proceedings” in subsequent (b)(4) of the Mandatory Victims Restitution Act are limited to government investigations and criminal proceedings and do not include private investigations and civil or bankruptcy proceedings.

From the unanimous opinion by Justice Breyer: [T]here would be an awkwardness about the statute’s use of the word “participation” to refer to a victim’s role in its own private investigation, and the word “attendance” to refer to a victim’s role as a party in noncriminal court proceedings. A victim opting to pursue a private investigation of an offense would be more naturally said to “provide for” or “conduct” the private investigation (in which he may, or may not, actively “participate”). And a victim who pursues civil or bankruptcy litigation does not merely “attend[d]” such other “proceedings related to the offense” but instead “participates” in them as a party. In contrast, there is no awkwardness, indeed it seems perfectly natural, to say that a victim “participat[es] in the investigation” or “attend[s]…proceedings related to the offense” if the investigation at issue is a government’s criminal investigation, and if the proceedings at issue are criminal proceedings conducted by a government.

Dormant Commerce Clause

South Dakota v. Wayfair, Inc.

Docket No. 17-494

Vacated and Remanded: The Supreme Court of South Dakota

Overview: In cases involving mail-order catalog sales, the Court has historically held that mere use of mail or common carrier is not a sufficient nexus with a taxing state to permit that state to require out-of-state vendors to collect state sales taxes from in-state consumers for remittance to the taxing state. This rule was most recently reaffirmed in Quill Corp. v. North Dakota, 504 U.S. 298 (1992). The petitioner, South Dakota, is essentially asking the Court to find this rule is no longer viable in light of the substantial impact of the internet on the commercial marketplace. Petitioner asks the Court to “abrogate Quill’s sales-tax-only, physical-precence requirement” and uphold a South Dakota statute that requires collection of state sales tax by any retailer conducting more than 200 transactions with or deriving more than $100,000 in revenue from sales to South Dakota consumers.

Issue: Does the dormant Commerce Clause prohibit South Dakota from requiring certain out-of-state businesses with no physical presence in South Dakota to collect sales taxes on goods and services sold to South Dakota consumers?

No. Because the physical presence rule of Quill is unsound and incorrect, Quill and National Bellas Hess, Inc. v. Department of Revenue of Ill. are overruled.

From the opinion by Justice Kennedy (joined by Justices Thomas, Ginsburg, Alito, and Gorsuch): Worse still, the rule produces an incentive to avoid physical presence in multiple States. Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable. The Commerce Clause must not permit States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the State.

Concurring: Justice Thomas

Concurring: Justice Gorsuch

Dissenting: Chief Justice Roberts (joined by Justices Breyer, Sotomayor, and Kagan)

Election Law

Abbott v. Perez

Docket No. 17-586 and 17-626

Reversed; Reversed in part and affirmed in part and remanded: The Western District of Texas

Overview: In 2011, Texas adopted redistricting plans for its state legislative and congressional districts. Texas sought preclearance for the plans from a district court in Washington, D.C., while plaintiffs sued...
to halt the plans in a district court in Texas. The Texas court ordered the state to use interim plans that differed in some, but not all, respects from the challenged 2011 plans. (That is, some of the districts remained exactly the same as those in the 2011 plans, while the court redrew others.) After the Texas court ordered the state to use the interim plans, the D.C. court ruled that the 2011 plans failed to satisfy the requirements for preclearance under the Voting Rights Act.

Then, in 2013, the Texas legislature adopted the Texas-court-ordered plans as its own. Plaintiffs challenged both the 2011 plans and the 2013 plans, arguing that they violated the Fourteenth Amendment, the Voting Rights Act, or both. The district court agreed and ordered the state to say whether the legislature would adopt new plans.

**Issue:** Does the Court have jurisdiction over these appeals?

**Yes.** The Court has jurisdiction to review the orders at issue.

**Issue:** Was the lower court correct to require the state to show that the 2013 plans removed the pervasive discriminatory concerns?

**No.** The Texas court erred in requiring the state to show that the 2013 legislature purged the “taint” that the court attributed to the defunct and never-used plans enacted by a prior legislature in 2011. One of the challenged districts is an impermissible racial gerrymander.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch): Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature. The 2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court pursuant to instructions from this Court “not to incorporate...any legal defects.”...Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs’ burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent. The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true “change of heart” and had “engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.”

**Concurring:** Justice Thomas (joined by Justice Gorsuch)

**Dissenting:** Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan)

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**Election Law**

**Gill v. Whitford**

Docket No. 16-1220

Vacated and Remanded: The Western District of Wisconsin

Argued: October 3, 2017
Decided: June 18, 2018
Analysis: ABA PREVIEW 26, Issue 1

**Overview:** The Wisconsin legislature redrew its state Assembly districts in the wake of the 2010 Census. The legislature took into account traditional redistricting criteria; it also considered politics. The resulting Assembly map was an extreme partisan gerrymander that resulted in significant over-representation for the majority party (as compared with the statewide vote) and effectively locked in majority-party control of the Assembly. Voters from 11 Assembly districts sued, arguing that the map violated the First and Fourteenth Amendments.

**Issue:** Do voters from just 11 state legislative districts have standing to challenge the entire Wisconsin Assembly map?

**No.** The plaintiffs have filed to demonstrate Article III standing.

From the opinion by Chief Justice Roberts (joined by Justices Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan and joined by Justices Thomas and Gorsuch except as to Part III): The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest “in their collective representation in the legislature,” and in influencing the legislature’s overall “composition and policymaking.”...But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on “the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.”...A citizen’s interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen’s abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable “general interest common to all members of the public.”

**Concurring:** Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor)

**Concurring in part and in judgment:** Justice Thomas (joined by Justice Gorsuch)

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**Election Law**

**Husted v. A. Philip Randolph Institute**

Docket No. 16-980

Reversed: The Sixth Circuit

Argued: January 10, 2018
Decided: June 11, 2018
Analysis: ABA PREVIEW 130, Issue 4

**Overview:** Ohio has a two-step “Supplemental Process” for ensuring that its voter-registration rolls are accurate. First, when registered voters fail to engage in a “voter activity” for two years, the state sends these voters a notice asking them to confirm that they live at the same address. Next, if the voters fail to return the notice or fail to update their registration, and they fail to vote for four consecutive years, including two consecutive, regular federal elections, the state removes these voters from the rolls.

**Issue:** Can a state send a confirmation notice based only on voters’ failure to vote for two years, and then remove these voters from the rolls after they fail to respond to the notice or update their registration, and after they then fail to vote in two federal elections?

**Yes.** The process that Ohio uses to remove voters on change-of-residence grounds does not violate the Failure-to-Vote Clause or any other part of the National Voter Registration Act.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch): The dissents have a policy disagreement, not
just with Ohio, but with Congress. But this case presents a question of statutory interpretation, not a question of policy. We have no authority to second-guess Congress or to decide whether Ohio’s Supplemental Process is the ideal method for keeping its voting rolls up to date. The only question before us is whether it violates federal law. It does not.

Concurring: Justice Thomas

Dissenting: Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan)

Dissenting: Justice Sotomayor

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**Election Law**

*North Carolina v. Covington*

Docket No. 17-1364

Affirmed in part and reversed in part: The Middle District of North Carolina

Argued: N/A  
Decided: June 28, 2018  
Analysis: N/A

**Overview:** This case represented a continual battle of racial gerrymandering in North Carolina, specifically challenges over state legislative districts created in 2011 in response to the 2010 census. This most recent iteration involves recommendations made by a Special Master in 2017 at the direction of the district court. The Special Master’s plan was an attempt to “redraw the lines of the districts to which the plaintiffs objected, along with any nonadjacent districts, to the extent ‘necessary’ to comply” with the district court’s criteria. The defendants subsequently challenged the district court’s adoption of the Special Master’s recommendations.

**Issue:** Did the district court err when it found that a number of challenged districts constituted racial gerrymanders and directed the defendants to implement the Special Master’s recommended district lines?

Affirmed in part and reversed in part. The district court order is affirmed as to four districts, to the extent “necessary” to comply with the district court’s criteria. The defendant’s waiver objection, along with any nonadjacent districts, to the extent ‘necessary’ to comply” with the district court’s criteria. The defendants subsequently challenged the district court’s adoption of the Special Master’s recommendations.

Dissenting: Justice Thomas

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**Environmental Law**

*National Association of Manufacturers v. Department of Defense*

Docket No. 16-299

Reversed and Remanded: The Sixth Circuit

Argued: October 11, 2017  
Decided: January 22, 2018  
Analysis: ABA PREVIEW 36, Issue 1

**Overview:** Challenges to federal statutes (or agency action pursuant to federal statutes) typically begin in the federal district courts. The Clean Water Act (33 U.S.C. § 1251 et seq.) contains a judicial review provision—33 U.S.C. § 1369(b)(1)—stating that seven types of specific actions taken by a federal agency under the Clean Water Act are directly reviewable in the federal circuit courts of appeal, rather than in the federal district courts, thus cutting out any further litigation. The question in this case was whether challenges to the “WOTUS Rule” (waters of the United States)—jointly promulgated by the Environmental Protection Agency (EPA) and the Department of the Army (on behalf of the Army Corps of Engineers) (80 Fed. Reg. 37034, June 29, 2015)—meet the requirements of Section 1369(b)(1). If the Court determined the Section 1369(b)(1) criteria are met, original jurisdiction would lie in the federal circuit courts; otherwise, jurisdiction would lie initially in the federal district courts, with the potential for appellate review in the federal circuit courts.

**Issue:** Does the court of appeals have original jurisdiction under 33 U.S.C. § 1369(b) (1) over a petition for review challenging a regulation that defines the scope of the term “waters of the United States” in the Clean Water Act?

No. Because the WOTUS Rule falls outside Section 1369(b)(1), challenges to the Rule must be filed in federal district courts.

From the unanimous opinion by Justice Sotomayor: Unable to anchor its preferred reading in the statutory text, the Government seeks refuge in a litany of extratextual considerations that it believes support direct circuit court review of the WOTUS Rule. Those considerations—alone and in combination—provide no basis to depart from the statute’s plain language.

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**Federal Court Jurisdiction**

*United States v. Sanchez-Gomez*

Docket No. 17-312

Vacated and Remanded: The Ninth Circuit

Argued: March 26, 2018  
Decided: May 14, 2018  
Analysis: ABA PREVIEW 189, Issue 6

**Overview:** The United States District Court for the Southern District of California adopted “a district-wide policy that permitted [U.S.] Marshal Service to produce all in-custody defendants in full restraints for most nonjury proceedings.” This meant that, with certain minor exceptions, the Marshal Service would produce all defendants with their hands closely handcuffed together, with the handcuffs connected by a chain to another chain running around the defendant’s waist, and with the defendant’s feet shackled and chained together. Four defendants challenged their shackling and the district-wide policy at the United States Court of Appeals for the Ninth Circuit. The circuit court accepted jurisdiction and ruled in their favor.

**Issue:** Did the Ninth Circuit err in accepting jurisdiction over criminal defendants’ chal-
lenges to their pretrial physical restraints, even after their cases became moot?

Yes. In determining that the case was not moot, the Ninth Circuit incorrectly relied on the Court’s class action precedents.

From the unanimous opinion by Chief Justice Roberts: This case, which does not involve any formal mechanism for aggregating claims, is even further removed from Rule 23 and *Gerstein*. The Federal Rules of Criminal Procedure establish for criminal cases no vehicle comparable to the FLSA collective action, much less the class action. And we have never permitted criminal defendants to band together to seek prospective relief in their individual criminal cases on behalf of a class. As we said when declining to apply nonparty preclusion outside the formal class action context, courts may not “recognize… a common-law kind of class action” or “create de facto class actions at will.” *Taylor v. Sturgell*, 553 U. S. 880 (2008) …The court below designated respondents’ case a “functional class action” because respondents were pursuing relief “not merely for themselves, but for all in-custody defendants in the district.” …But as explained in *Genesis HealthCare*, the “mere presence of… allegations” that might, if resolved in respondents’ favor, benefit other similarly situated individuals cannot “save [respondents’] suit from mootness once the[ir] individual claim[s]” have dissipated.

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**First Amendment**

*Janus v. American Federation of State, County, and Municipal Employees, Council 31*

Docket No. 16-1466

**Reversed and Remanded:**

The Seventh Circuit

Argued: February 26, 2018
Decided: June 27, 2018
Analysis: ABA *PREVIEW* 152, Issue 5

**Overview:** Illinois law permits public employees to designate a union to represent them in collective bargaining with the government. When public employees designate a union, state law requires the union to provide fair representation to every government employee in the collective bargaining unit, whether they are a member of the union or not. Finally, Illinois law allows a collective bargaining agreement to require nonmembers to pay an “agency fee” or a “fair share” fee to cover the union’s costs of representing them under the collective bargaining agreement. The agency fee does not cover the union’s costs of outside political or ideological speech, however.

**Issue:** Does the First Amendment permit a state to include a provision in a public-sector collective-bargaining agreement that requires nonunion members to pay the proportional costs of the union’s collective-bargaining activities?

No. The state’s extraction of agency fees from nonconsenting public-sector employees violates the First Amendment.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch):

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this. Perhaps because such compulsion so plainly violates the Constitution, most of our free-speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

**Dissenting: Justice Sotomayor**

Dissenting: Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor)

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**First Amendment**

*Lozman v. City of Riviera Beach, FL*

Docket No. 17-21

**Vacated and Remanded:**

The Eleventh Circuit

Argued: February 27, 2018
Decided: June 18, 2018
Analysis: ABA *PREVIEW* 26, Issue 1

**Overview:** Fane Lozman was arrested and charged with disorderly conduct and resisting arrest without violence during his speech at an open session of the Riviera Beach City Council. The prosecution dropped the charges, and Lozman sued, arguing that his arrest was in retaliation for his opposition to city policies and for previously suing the city regarding those policies. The lower courts rejected his argument, however, concluding that he failed to show that the city lacked probable cause for his arrest.

**Issue:** Does a plaintiff have to plead and prove that the government lacked probable cause in order to prevail on a First Amendment retaliatory arrest claim?

No. The existence of probable cause does not bar Lozman’s First Amendment retaliation claim under the circumstance of this case.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, Kagan, and Gorsuch):

The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman’s claim from the typical retaliatory arrest claim. An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

**Dissenting: Justice Thomas**

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**First Amendment**

*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*

Docket No. 16-111

**Reversed:** The Court of Appeals of Colorado

Argued: December 5, 2017
Decided: June 4, 2018
Analysis: ABA *PREVIEW* 95, Issue 3

**Overview:** Charlie Craig and David Mullins asked Jack C. Phillips, owner of Masterpiece
Cakeshop outside of Denver, Colorado, and self-described “cake artist,” to design and create a cake for their wedding celebration. Phillips declined, saying that he objected to same-sex weddings, but that he would provide any other baked goods for the couple. Craig and Mullins brought a complaint under Colorado’s anti-discrimination law and won. Phillips argued that the law violated his rights to free speech and free exercise of religion under the First Amendment.

Issue: Does Colorado’s anti-discrimination law, which forbids businesses engaged in sales to the public from denying service because of a customer’s sexual orientation, violate the free-speech and free-exercise-of-religion rights of a person who designs and makes custom wedding cakes, but who refuses to make a cake for the wedding of a same-sex couple?

Yes. The Commission’s actions in this case violated the Free Exercise Clause.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Breyer, Alito, Kagan, and Gorsuch): Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality. The reason and motive for the baker’s refusal were based on his sincere religious beliefs and convictions. The Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires. Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission’s actions here violated the Free Exercise Clause; and its order must be set aside.

Concurring: Justice Kagan (joined by Justice Breyer)
We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.

Concurring: Justice Kennedy (joined by Chief Justice Roberts and Justices Alito and Gorsuch)

Dissenting: Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan)

Foreign Sovereign Immunity

Rubin v. Islamic Republic of Iran
Docket No. 16-534

Affirmed: The Seventh Circuit

Argued: December 4, 2017
Decided: February 21, 2018
Analysis: ABA PREVIEW 75, Issue 3

Overview: Victims of a terror attack obtained a default judgment against Iran and tried to attach certain artifacts loaned by Iran to the University of Chicago. The lower court determined that the artifacts were immune from attachment because no exception to the general grant of immunity under the Foreign Sovereign Immunities Act of 1976 applies. The Court was asked to decide whether 28 U.S.C. § 1610(g) not only eases attachment of certain property, but provides a separate exception to attachment immunity, independent of the exceptions in Section 1610(a) and (b).

Issue: Does 28 U.S.C. § 1610(g) provide a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under Section 1610?

No. Section 1610(g) does not provide a freestanding basis for parties holding a judgment under Section 1605A to attach and execute against the property of a foreign state; rather, for Section 1610(g) to apply, the immunity of the property at issue must be rescinded under a separate provision within Section 1610.

From the opinion by Justice Sotomayor (joined by all other members of the Court except Justice Kagan who took no part in consideration or decision): Section 1610(g) conspicuously lacks the textual markers, “shall not be immune” or “notwithstanding any other provision of law,” that would have shown that it serves as an independent avenue for abrogation of immunity. In fact, its use of the phrase “as provided in this section” signals the opposite: A judgment holder seeking to take advantage of § 1610(g)(1) must identify a basis under one of § 1610’s express immunity-abrogating provisions to attach and execute against a relevant property. Reading § 1610(g) in this way still provides relief to judgment holders who previously would not have been able to attach and execute against property of an agency or instrumentality of a foreign state in light of this Court’s decision in Bancec.

Fourth Amendment

Byrd v. United States
Docket No. 16-1371

Vacated and Remanded: The Third Circuit

Argued: January 9, 2018
Decided: May 14, 2018
Analysis: ABA PREVIEW 110, Issue 4

Overview: Drivers of automobiles generally have a reasonable expectation of privacy in the cars they own and operate. Renting an automobile does not deprive one of that expectation of privacy. However, the question in this case was whether a driver of a rental car who is not an authorized driver pursuant to the rental contract has such an expectation of privacy.

Issue: Does a rental-car driver who is not authorized by the rental agreement to operate the vehicle have a reasonable expectation of privacy in the vehicle?

Yes. The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.

From the unanimous opinion by Justice Kennedy: The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it, much as it did not seem to matter whether the friend of the defendant in Jones owned or leased the apartment he permitted the defendant to use in his absence. Both would have the expectation of privacy that comes with the right to exclude. Indeed, the Government conceded at oral argument that an unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a carjacker.

Concurring: Justice Thomas (joined by Justice Gorsuch)
Concurring: Justice Alito

Fourth Amendment

Carpenter v. United States
Docket No. 16-402

Reversed and Remanded: The Sixth Circuit

Argued: November 29, 2017
Decided: June 22, 2018
Analysis: ABA PREVIEW 91, Issue 3

Overview: The government obtained “trans‐actional” cell phone records from cell phone carriers as part of its investigation into a string of armed robberies in and around Detroit. The government obtained the records by filing applications with magistrates pursuant to the Stored Communications Act, which permits the government to obtain these kinds of records based on a standard less stringent than probable cause. After the government used these records to obtain a conviction, the defendant appealed, arguing that the searches and seizures violated the Fourth Amendment.

Issue: Does the government’s search of locational cell phone records without a warrant, but pursuant to the Stored Communications Act, violate the Fourth Amendment?

Yes. The government’s acquisition of Carpenter’s cell-site records was a Fourth Amendment search.

From the opinion by Chief Justice Roberts (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan): The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person’s past movements through the record of his cell phone signals. Such tracking partakes of
many of the qualities of the GPS monitoring we considered in Jones. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled. At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of Smith and Miller. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when Smith was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements. We decline to extend Smith and Miller to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter’s wireless carriers was the product of a search.

Dissenting: Justice Kennedy (joined by Justices Thomas and Alito)
Dissenting: Justice Thomas
Dissenting: Justice Alito (joined by Justice Thomas)
Dissenting: Justice Gorsuch

Fourth Amendment

Collins v. Virginia
Docket No. 16-1027

Reversed and Remanded: The Supreme Court of Virginia

Argued: January 9, 2018
Decided: May 29, 2018
Analysis: ABA PREVIEW 124, Issue 4

Overview: The Fourth Amendment presump-tively requires an officer to obtain a warrant before searching a house or its curtilage, the area immediately surrounding and associ-ated with the house. But at the same time, the Fourth Amendment permits a warrantless search of a vehicle, so long as the officer has probable cause to believe that the vehicle was engaged in an illegality. This case tested the intersection of these two well-established Fourth Amendment principles. An Albemarle County, Virginia, police officer entered an enclosed, open-roofed, carport at the top of a house’s driveway in order to search a covered motorcycle. The officer had probable cause to believe that the motorcycle was involved in prior illegalities, but the officer did not have a warrant or permission to enter the property or conduct the search.

Issue: Does the vehicle exception to the Fourth Amendment allow an officer to search a parked motorcycle, under a cover and close to a house, without a warrant and without permission of the owner?

No. The automobile exception does not permit the warrantless entry of a home or its curtilage in order to search a vehicle therein.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Kagan, and Gorsuch): Applying the relevant legal principles to a slightly different factual scenario confirms that this is an easy case. Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not. The reason is that the scope of the automobile exception extends no further than the automobile itself. See, e.g., Pennsylvania v. Labron, 518 U. S. 938 (1996); Wyoming v. Houghton, 526 U. S. 295 (1999)...Virginia asks the Court to expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. Nothing in our case law, however, suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Expanding the scope of the automobile exception in this way would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and “untether” the automobile exception “from the justifications underlying” it. Riley v. California, 573 U. S. _____ (2014).

Concurring: Justice Thomas
Dissenting: Justice Alito

Fourth Amendment

District of Columbia v. Wesby
Docket No. 15-1485

Reversed and Remanded: The District of Columbia Circuit

Argued: October 4, 2017
Decided: January 22, 2018
Analysis: ABA PREVIEW 21, Issue 1

Overview: Police officers responded to a complaint of illegal activities taking place at a house party in the District of Columbia. Partygoers told the officers that they had the owner’s permission to enter the house. But the owner of the house and the soon-to-be tenant of the house (who were not present at the house) both told the officers that they did not give permission. The officers arrested the partygoers for unlawful entry. Many of the partygoers sued the officers and the District of Columbia for unlawful arrest in violation of the Fourth Amendment.

Issue: Did officers have probable cause to arrest partygoers for unlawful entry, where the partygoers believed that they had permission to be in the house, but the owner denied this?

Yes. The officers had probable cause to arrest the partygoers.

Issue: Are the officers entitled to qualified immunity, even if they lacked probable cause to believe that the partygoers intended to trespass?

Yes. The officers are entitled to qualified immunity.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, and Gorsuch): The circumstances here certainly suggested criminal activity. As explained, the officers found a group of people who claimed to be having a bachelor party with no bachelor, in a near-empty house, with strippers in the living room and sexual activity in the bedroom, and who fled at the first sign of police. The panel majority identified innocent explanations for most of these circumstances in isolation, but again, this kind of divide-and-conquer approach is improper.
A factor viewed in isolation is often more "readily susceptible to an innocent explanation" than one viewed as part of a totality… And here, the totality of the circumstances gave the officers plenty of reasons to doubt the partygoers' protestations of innocence.

Concurring in part and in judgment: Justice Sotomayor

Concurring in judgment in part: Justice Ginsburg

Habeas Corpus

Dunn v. Madison
Docket No. 17-193

Reversed: The Eleventh Circuit

Argued: N/A
Decided: November 6, 2017
Analysis: N/A

Overview: Vernon Madison was sentenced to death for the murder of a police officer more than 30 years ago. Since that time, Madison suffered a number of strokes and his attorneys argued the strokes had left him incompetent to be executed. Madison indicated that he understood that the state was seeking retribution against him for criminal acts, but could not remember committing the acts for which he was convicted. The state trial court concluded that Madison had failed to show that his mental illness deprived him of the capacity to rationally understand why he would be executed. The Eleventh Circuit disagreed and held that the trial court's conclusion was an unreasonable application of clearly established Supreme Court precedent.

Issue: Was the Eleventh Circuit's decision to overturn the trial court's conclusion that the defendant was competent to be executed "plainly unreasonable" and unable to be "reconciled with any reasonable application" of precedent?

No. The Supreme Court addressed the question of whether the Eighth Amendment forbids execution of a prisoner who lacks the necessary mental capacity in Panetti v. Quarterman, 551 U.S. 960 (2007); however, no precedent says that prisoners are incompetent to be executed because of a failure to remember their commission of the crime.

From the per curiam opinion: Nor was the state court's decision founded on an unreasonable assessment of the evidence before it. Testimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime. In short, the state court's determinations of law and fact were not "so lacking in justification" as to give rise to error "beyond any possibility for fair-minded disagreement."…Under that deferential standard, Madison's claim to federal habeas relief must fail. We express no view on the merits of the underlying question outside of the AEDPA [Antiterrorism and Effective Death Penalty Act] context.

Concurring: Justice Ginsburg (joined by Justices Breyer and Sotomayor)

Concurring: Justice Breyer

Habeas Corpus

Kernan v. Daniel
Docket No. 16-1468

Reversed and Remanded:
The Ninth Circuit

Argued: N/A
Decided: November 6, 2017
Analysis: N/A

Overview: Michael Cuero pleaded guilty to two felony counts related to an automobile accident. The initial plea would have led to a maximum sentence of 14 years and 4 months. The trial court allowed the state to amend the complaint; Cuero withdrew his initial guilty plea and reentered a guilty plea to the amended complaint. Under the new complaint, Cuero was sentenced to a term with a minimum of 25 years. Cuero petitioned for federal habeas relief.

Issue: Did the state-court decision to sentence a defendant to the minimum sentence associated with an amended complaint rather than the minimum sentence for the original criminal complaint involve an "unreasonable application of clearly established Federal law"?

No. No Supreme Court decision has clearly established that a state court must impose a lower sentence when the state amends a criminal complaint after the defendant had already pleaded guilty to an offense with a lower sentence.

From the per curiam opinion: There are several problems with the Ninth Circuit's reasoning below. First, "fair-minded jurists could disagree" with the Ninth Circuit's reading of Santobello…Moreover, in Mabry v. Johnson, 467 U. S. 504 (1984), the Court wrote that "Santobello expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea."…The Court added that "permitting Santobello to replead was within the range of constitutionally appropriate remedies."…Where, as here, none of our prior decisions clearly entitles Cuero to the relief he seeks, the "state court's decision could not be 'contrary to' any holding from this Court." Woods v. Donald, 575 U. S. ___ (2015). Finally, as we have repeatedly pointed out, "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'"

Habeas Corpus

Sexton v. Beaudreaux
Docket No. 17-1106

Reversed and Remanded:
The Ninth Circuit

Argued: N/A
Decided: June 28, 2018
Analysis: N/A

Overview: Nicholas Beaudreaux shot and killed a man in front of two witnesses who identified Beaudreaux at trial. Beaudreaux challenged his conviction on the basis that his attorney had failed to challenge a number of potential problems with the witness identifications. The California Court of Appeals and the California Supreme Court denied review. The Ninth Circuit reversed, determining that the counsel's failure to file the suppression motion prejudiced Beaudreaux.

Issue: Did the Ninth Circuit err when it reversed the denial of a habeas claim on the basis that the state court had unreasonably rejected the respondent's claim of ineffective assistance of counsel?

Yes. The Ninth Circuit erred by reversing the denial of the respondent's habeas claim that the state court had unreasonably rejected his claim of ineffective assistance of counsel.

From the per curiam opinion: The Ninth Circuit's opinion was not just wrong. It also committed fundamental errors that this
Court has repeatedly admonished courts to avoid. First, the Ninth Circuit effectively inverted the rule established in Richter. Instead of considering the “arguments or theories [that] could have supported” the state court’s summary decision…the Ninth Circuit considered arguments against the state court’s decision that Beaudreaux never even made in his state habeas petition. Additionally, the Ninth Circuit failed to assess Beaudreaux’s ineffectiveness claim with the appropriate amount of deference. The Ninth Circuit essentially evaluated the merits de novo, only tacking on a perfunctory statement at the end of its analysis asserting that the state court’s decision was unreasonable. But deference to the state court should have been near its apex in this case, which involves a Strickland claim based on a motion that turns on general, fact-driven standards such as suggestiveness and reliability. The Ninth Circuit’s analysis did not follow this Court’s repeated holding that, “[t]he more general the rule…the more leeway [state] courts have.”…Nor did it follow this Court’s precedents stating that, “because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.”…The Ninth Circuit’s essentially de novo analysis disregarded this deferential standard.

Dissenting: Justice Breyer

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**Immigration Law**

*In re United States*  
Docket No. 17-801

**Vacated and Remanded:**  
The Ninth Circuit

**Argument:**  
No. The federal immigration law does not give detained aliens the right to periodic bond hearings during the course of their detention. From the dissenting opinion by Justice Breyer (joined by Chief Justice Roberts and Justice Kennedy; and joined by Justices Thomas and Gorsuch as to all by Part II; and joined by Justice Sotomayor as to Part III-C): First, respondents argue that §§ 1225(b)(1) and (b)(2) contain an implicit 6-month limit on the length of detention. Once that 6-month period elapses, respondents contend, aliens previously detained under those provisions must instead be detained under the authority of § 1226(a), which allows for bond hearings in certain circumstances. There are many problems with this interpretation. Nothing in the text of § 1225(b)(1) or § 1225(b)(2) even hints that those provisions restrict detention after six months, but respondents do not engage in any analysis of the text. Instead, they simply cite the canon of constitutional avoidance and urge this Court to use that canon to read a “six-month reasonableness limitation” into § 1225(b). Brief for Respondents 48. That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.

**From the dissenting opinion by Justice Breyer (joined by Justices Ginsburg and Sotomayor):** The bail questions before us are technical but at heart they are simple. We need only recall the words of the Declaration of Independence, in particular its insistence that all men and women have “certain unalienable Rights,” and that among them is the right to “Liberty.” We need merely remember that the Constitution’s Due Process Clause protects each person’s liberty from arbitrary deprivation. And we need just keep in mind the fact that, since Blackstone’s time and long before, liberty has included the right of a confined person to seek release on bail. It is neither technical nor unusually difficult to read the words of these statutes as consistent with this basic right. I would find it far more difficult, indeed, I would find it alarming, to believe...
that Congress wrote these statutory words in order to put thousands of individuals at risk of lengthy confinement all within the United States but all without hope of bail. I would read the statutory words as consistent with, indeed as requiring protection of, the basic right to seek bail.

Concurring in part and in judgment: Justice Thomas (joined by Justice Gorsuch except for footnote 6)

Dissenting: Justice Breyer (joined by Justices Ginsburg and Sotomayor)

Taking no part: Justice Kagan

Immigration Law

Pereira v. Sessions
Docket No. 17-459

Reversed and Remanded: The First Circuit

Argued: April 23, 2018
Decided: June 21, 2018
Analysis: ABA PREVIEW 235, Issue 7

Overview: Removal proceedings are serious business, as they can lead to deportation. A few aliens subject to deportation qualify for a form of relief known as cancellation of removal. A key requirement for eligibility for cancellation of removal is continuous residence in the United States for at least ten years. In this case, an alien who overstayed his visa was in the country for six years when he first received a document entitled “notice to appear.” Normally, a sufficient “notice to appear” stops the time that an alien is in the country for cancellation of removal purposes. However, this notice failed to provide any date and time for a scheduled hearing. The question before the Court is whether the government’s purported “notice to appear” qualifies when it fails to provide key information listed in the statute that defines and describes “notices to appear.”

Issue: To trigger the stop-time rule by serving a “notice to appear,” must the government “specify” the items listed in the statute defining a “notice to appear,” which include the time and place of the proceedings?

Yes. A putative notice to appear that fails to designate the specific time or place of the noncitizen’s removal proceedings is not a “notice to appear” and does not trigger the stop-time rule.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Kagan, and Gorsuch): [C]ommon sense compels the conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a “notice to appear” that triggers the stop-time rule. If the three words “notice to appear” mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens “notice” of the information, i.e., the “time” and “place,” that would enable them “to appear” at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings. To hold otherwise would empower the Government to trigger the stop-time rule merely by sending noncitizens a barebones document labeled “Notice to Appear,” with no mention of the time and place of the removal proceedings, even though such documents would do little if anything to facilitate appearance at those proceedings. “We are not willing to impute to Congress…such [a] contradictory and absurd purpose,”…particularly where doing so has no basis in the statutory text.

Concurring: Justice Kennedy

Dissenting: Justice Alito

Immigration Law

Sessions v. Dimaya
Docket No. 15-1498

Affirmed: The Ninth Circuit

Argued: January 17, 2017, Reargued: October 2, 2017
Decided: April 17, 2018
Analysis: ABA PREVIEW 33, Issue 1

Overview: Aliens convicted of an aggravated felony can be removed from the country in deportation proceedings. Federal law allows such deportations if aliens have engaged in felonies in which there is “substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” The problem is in determining when an offense entails such “significant risk.” Take the crime of burglary. Some burglaries involve physical force, but many burglaries involve no physical force or are committed when the owners are not present. The key question for the Court was whether this law is unconstitutionally vague.

Issue: Is 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act’s provisions governing an alien’s removal from the United States, unconstitutionally vague?

Yes. Section 16’s residual clause is unconstitutionally vague.

From the opinion of the Court by Justice Kagan with respect to Parts I, III, IV-B and V (joined by Justices Ginsburg, Breyer, Sotomayor, and Gorsuch; and an opinion with respects to Parts II and IV-A joined by Justices Ginsburg, Breyer, and Sotomayor): Nothing in § 16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in Johnson: How does one go about divining the conduct entailed in a crime’s ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct? See Johnson, 576 U. S., at ___ (slip op., at 5); supra, at 7; post, at 16–17 (GORSUCH, J., concurring in part and concurring in judgment). And we can as well reiterate Johnson’s example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell? See post, at 16 (opinion of GORSUCH, J.) (offering other knotty examples). Once again, the questions have no good answers; the “ordinary case” remains, as Johnson described it, an excessively “speculative,” essentially inscrutable thing. 576 U. S., at ___ (slip op., at 5); accord post, at 27 (THOMAS, J., dissenting).

Concurring in part and in judgment: Justice Gorsuch

Dissenting: Chief Justice Roberts (joined by Justice Kennedy, Thomas, and Alito)

Dissenting: Justice Thomas (joined by Justice Alito as to Parts I-C-2, II-A-1, and II-B)

Immigration Law

Trump v. Hawaii
Docket No. 17-586 and 17-626

Reversed and Remanded: The Ninth Circuit

Argued: April 25, 2018
Decided: June 26, 2018
Analysis: ABA PREVIEW 225, Issue 7
Overview: President Trump issued a Proclamation that restricted entry of aliens from eight identified countries to the United States. Hawaii, three individuals, and a nonprofit organization sued, arguing that the travel ban violated the Immigration and Naturalization Act (INA) and the Establishment Clause. The government argued that the case was nonjusticiable, because it involved the exclusion of aliens abroad and because it did not violate the plaintiffs' constitutional rights. It also argued that President Trump had full authority to take this action. The lower court rejected the government’s arguments, agreed with the plaintiffs that the Proclamation violated the INA, and upheld a nationwide injunction against the enforcement of the ban. (In a related case, the United States Court of Appeals for the Fourth Circuit ruled that the Proclamation discriminated by religion in violation of the Establishment Clause.)

Issue: Can the federal courts hear the plaintiffs' case, given that it involves the denial of entry of aliens abroad?
Yes. The Court assumes without deciding that plaintiffs’ statutory claims are reviewable.

Issue: Did the president act within his authority under the INA in issuing the Proclamation?
Yes. The president has lawfully exercised the broad discretion granted to him to suspend the entry of aliens into the United States.

Issue: Did the lower courts err in ordering a nationwide injunction against enforcement of the Proclamation?
Yes. Plaintiffs have not demonstrated a likelihood of success on the merits of their claim that the Proclamation violates the Establishment Clause.

From the opinion by Chief Justice Roberts (joined by Justices Kennedy, Thomas, Alito, and Gorsuch): The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world’s Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks…The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review’s baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it “stands apart…in the degree to which [it] lacks command and control of its territory.” Proclamation § 2(h) (i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U. S. and Iraqi Governments and the country's key role in combating terrorism in the region. § 1(g). It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

Concurring: Justice Kennedy

Concurring: Justice Thomas

Dissenting: Justice Breyer (joined by Justice Kagan)

Dissenting: Justice Sotomayor (joined by Justice Ginsburg)

International Civil Procedure

Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd
Docket No. 16-1220

Vacated and Remanded: The Second Circuit

Argued: April 24, 2018
Decided: June 14, 2018
Analysis: ABA PREVIEW 221, Issue 7

Overview: The Supreme Court was asked to determine what level of deference a U.S. court must accord a foreign sovereign’s opinion of its own law when faced with the procedural issue of determining the content of foreign law to apply to a substantive issue in a lawsuit—in this case, whether Chinese law requires price-fixing and output limitations. The district court’s careful and thorough treatment was reversed by the Second Circuit, which held that when a foreign government appears before a court and gives a reasonable and official statement about its own laws, the court is “bound to defer.” Given the increasing number of transnational cases in U.S. courts, whether there is a conclusive presumption whenever a foreign sovereign proffers testimony about the meaning of its laws raises serious issues of interpretation of Fed. R. Civ. Pro. 44.1, as well as issues for global trade and foreign policy.

Issue: Is a federal court determining foreign law required to accept as conclusive, and “bound to defer” to, an appearing foreign sovereign’s interpretation of its own domestic law?

No. A federal court determining federal law under Federal Rule of Civil Procedure 44.1 should accord respectful consideration to a foreign government’s submission, but the court is not bound to accord conclusive effect to the foreign government’s statement.

From the unanimous opinion by Justice Ginsburg: Federal courts deciding questions of foreign law under Rule 44.1 are sometimes provided with the views of the relevant foreign government, as they were in this case through the amicus brief of the Ministry…As the Court of Appeals correctly observed, Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government…Nor does any other rule or statute. In the spirit of “international comity,”…a federal court should carefully consider a foreign state’s views about the meaning of its own laws…But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government’s characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements,…or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government’s submission.
Interstate Water Rights

Florida v. Georgia
Docket No. 142, Orig.

Remanded: Exceptions to Report of Special Master

Argued: January 8, 2018
Decided: June 27, 2018
Analysis: ABA PREVIEW 225, Issue 7

Overview: This episode in decades-long Water Wars over the Apalachicola-Chattahoochee-Flint River Basin (ACF) found the most downstream state, Florida, trying to wrest a more equitable sharing of the basin’s waters from Georgia. Complicating the case, the United States Army Corps of Engineers (USACE) operates a series of dams on the Chattahoochee River that are the principal control structures affecting river flows. The USACE, however, was not a party to this lawsuit and operates its dams under preexisting mandates issued by Congress.

Issue: Is Florida entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin (ACF) and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region?

Yes. Florida has made an initial showing that the Court can eventually fashion an effective equitable decree.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, and Sotomayor): To require more definite proof at the outset may well (at least on some occasions) make little sense. Suppose, for example, downstream State A claims that upstream State B wastes at least 10,000 cubic feet per second (cfs) of water. And suppose further that no decree could enforce a 10,000 cfs consumption cap but that it may well prove possible to enforce a lesser requirement. If so, we would have to know at least approximately how much water will significantly ameliorate State A’s water problem before we could know whether it is possible to shape a workable decree. And the workability of decrees themselves, approximate as they may be, may depend upon more precise findings in respect to the nature and scope of the range of likely harms and likely benefits that a Special Master finds are actually likely to exist. To require “clear and convincing evidence” about the workability of a decree before the Court or a Special Master has a view about likely harms and likely amelioration is, at least in this case, to put the cart before the horse. And that, we fear, is what the Master’s statements, with their apparent references to a “clear and convincing” evidence standard in respect to “redressability” (where that refers to the availability of an eventual decree) have done here…That is also why our cases, while referring to the use of a “clear and convincing” evidentiary standard in respect to an initial showing of “invasion of rights” and “substantial injury,” have never referred to that standard in respect to a showing of “remedy” or “redressability.”

Dissenting: Justice Thomas (joined by Justices Alito, Kagan, and Gorsuch)

Jurisdiction

Cyan, Inc. v. Beaver County Employees Retirement Fund
Docket No. 15-1439

Affirmed: The Court of Appeal of California, First Appellate District

Argued: November 28, 2017
Decided: March 20, 2018
Analysis: ABA PREVIEW 80, Issue 3

Overview: This case is about the history and context of securities litigation and the federalism-generated concerns about federal and state court jurisdiction. It is also about the perceived need to control class action abuse. At issue was the Securities Act of 1933, modified by the Private Securities Litigation Reform Act in 1995 and the Securities Litigation Uniform Standard Act (SLUSA) in 1998. Cyan, Inc., argued that SLUSA divested state courts of jurisdiction over “covered class actions,” as defined therein, such as this one. The Beaver County Employees Retirement Fund (Beaver County) disagreed.

Issue: Do state courts lack subject-matter jurisdiction over “covered class actions” that allege only claims under the Securities Act of 1933?

No. The Securities Litigation Uniform Standard Act does nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions brought under the 1933 Act.

From the unanimous opinion by Justice Kagan: By its terms, § 77v(a)’s “except clause” does nothing to deprive state courts of their jurisdiction to decide class actions brought under the 1933 Act. And Cyan’s various appeals to SLUSA’s purposes and legislative history fail to overcome the clear statutory language. The statute says what it says—or perhaps better put here, does not say what it does not say. State-court jurisdiction over 1933 Act claims thus continues undisturbed.

Jurisdiction

Hall v. Hall
Docket No. 16-1150

Reversed and Remanded: The Third Circuit

Argued: January 16, 2018
Decided: March 27, 2018
Analysis: ABA PREVIEW 127, Issue 4

Overview: Two intrafamily tort cases in the Virgin Islands were consolidated to handle claims between a mother (personally, and as trustee of an inter vivos trust) and her son, which arose before her death, with claims between brother and sister (as successor trustee and estate administrator). After a trial in which the son/brother, Samuel H. Hall Jr., prevailed, the court entered separate judgments in each case. The daughter/trustee/administrator, Elsa Hall, filed a motion for a new trial in one and an appeal in the other. The Third District dismissed the appeal for lack of jurisdiction.

Issue: Does the entry of a final judgment in one of two cases that were consolidated in a single district trigger the appeal clock under 28 U.S.C. § 1291?

Yes. When one of several cases consolidated under Rule 42(a) is finally decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases remain pending.

From the unanimous opinion by Chief Justice Roberts: [This case] is instead about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813…Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the com-
complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of “consolidate” in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

Military Offices

**Cox v. United States**
Docket No. 16-1017

**Affirmed:** The Court of Appeals for the Armed Forces

Argued: January 16, 2018  
Decided: June 22, 2018  
Analysis: ABA PREVIEW 120, Issue 4

**Overview:** Federal law generally prohibits military officers from holding “a civil office in the Government of the United States.” Moreover, a military officer’s concurrent service as an “inferior” officer and a “principal” officer could raise problems under the Appointments Clause and the Commander-in-Chief Clause. In this case, military officers and service members were convicted of various offenses and sentenced by courts-martial. They appealed their convictions to the Court of Criminal Appeals (CCA), an intermediate appeals courts that, in each case, included a judge who was also nominated or commissioned to the Court of Military Commission Review (CMCR). The defendants argue that their Court of Criminal Appeals panels were unlawfully constituted because the judges’ dual appointments violated a federal ban on military officers serving in civilian roles and the Constitution’s Appointments Clause.

**Issue:** Does the Court have jurisdiction under 28 U.S.C. § 1259(3)?

**Yes.** The Court has jurisdiction to review the Court of Appeals for the Armed Forces’s (CAAF’s) decisions; the judicial character and constitutional pedigree of the court-martial system enable the Supreme Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex.

**Issue:** Did the judges’ simultaneous appointments to the CCA and the CMCR violate the federal ban on military officers holding a civil office of the United States or the Appointments Clause?

No. The judges’ simultaneous service on the CCA and the CMCR violated neither Section 973(b)(2)A nor the Appointments Clause.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, and Sotomayor): This Court has never read the Appointments Clause to impose rules about dual service, separate and distinct from methods of appointment. Nor has it ever recognized principles of “incongruity” or “incompatibility” to test the permissibility of holding two offices. As Ortiz himself acknowledges, he can “cite no authority holding that the Appointments Clause prohibits this sort of simultaneous service.”

**Concurring:** Justice Thomas

**Dissenting:** Justice Alito (joined by Justice Gorsuch)
**Patent Law**

*SAS Institute, Inc. v. Iancu*  
Docket No. 16-969  
**Reversed and Remanded:** The Federal Circuit

Argued: November 27, 2017  
Decided: April 24, 2018  
Analysis: ABA PREVIEW 100, Issue 3

**Overview:** The Court was asked to consider whether the text of 35 U.S.C. § 318(a), which requires a final written decision with respect to “any patent claim challenged by the petitioner,” is materially different from the language of 35 U.S.C. § 314(a), which allows institution of an *inter partes* review where there is a reasonable likelihood that the petitioner would prevail with respect to “at least 1 of the claims challenged in the petition.” Petitioner SAS Institute, Inc., filed a petition with the U.S. Patent and Trademark Office to institute an *inter partes* review of claims 1–16 of Patent 7,110,936, owned by ComplementSoft, LLC, pursuant to 35 U.S.C. § 311 et seq. Upon appeal, and with respect to the question of whether the “final written decision” issued by the Patent Trial and Appeal Board had to address the patentability of all of the claims challenged by SAS under Section 318(a), the panel of the U.S. Court of Appeals for the Federal Circuit, in a divided 2–1 opinion, held that the Patent Trial and Appeal Board was authorized to adopt a partial-final-written-decision regime under its rulemaking authority. The panel majority viewed SAS’s argument that the Patent Trial and Appeal Board must address all claims from the *inter partes* review petition in the final written decision as foreclosed by the Federal Circuit’s previously issued decision in *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309 (Fed. Cir. 2016). The Supreme Court was asked to consider whether the Federal Circuit’s adoption of a partial-final-written-decision regime was proper under the statute.

**Issue:** Does 35 U.S.C. § 318(a), which provides that the Patent Trial and Appeal Board in an *inter partes* review “shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner,” require the Board to issue a final written decision as to every claim challenged by the petitioner?

**Yes.** When the Patent Office institutes an *inter partes* review, it must decide the patentability of all of the claims the petitioner has challenged.

**From the opinion by Justice Gorsuch** (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito): It’s telling, too, to compare this structure with what came before. In the ex parte reexamination statute, Congress embraced an inquisitorial approach, authorizing the Director to investigate a question of patentability “[o]n his own initiative, and at any time.” § 303(a). If Congress had wanted to give the Director similar authority over the institution of *inter partes* review, it knew exactly how to do so—it could have simply borrowed from the statute next door. But rather than create (another) agency-led, inquisitorial process for reconsidering patents, Congress opted for a party-directed, adversarial process. Congress’s choice to depart from the model of a closely related statute is a choice neither we nor the agency may disregard.

**Dissenting:** Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan)

**Dissenting:** Justice Breyer (joined by Justices Ginsburg and Sotomayor and joined by Justice Kagan except as to Part III-A)

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**Patent Law**

*WesternGeco LLC v. ION Geophysical Corp.*  
Docket No. 16-1011  
**Reversed and Remanded:** The Federal Circuit

Argued: April 16, 2018  
Decided: June 22, 2018  
Analysis: ABA PREVIEW 247, Issue 7

**Overview:** The Court was asked to consider whether the text of 35 U.S.C. § 271(f) imposes liability on those supplying from the United States components of a patented invention “in such a manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States,” and whether that liability also relates to the issuance of full compensatory damages where such infringement is found. Section 271(f) specifically targets domestic conduct (supplying components in or from the United States) with an intent that the components will be assembled abroad. The jury here found that respondents violated Section 271(f) by shipping components of petitioners’ patented invention for assembly and use abroad. Because the intended foreign combination occurred and caused petitioners reasonably foreseeable harms, the jury awarded over $93 million in lost profits. The Federal Circuit, however, through application of the presumption against extraterritoriality, reversed the award of lost profits that would have been earned abroad. The Supreme Court was asked to consider whether the Federal Circuit’s holding that lost profits arising from prohibited combinations occurring outside of the United States are unavailable in cases in which patent infringement is proven under Section 271(f) is proper under the statute.

**Issue:** Did the Federal Circuit err in holding that lost profits arising from prohibited combinations occurring outside of the United States are categorically unavailable in cases in which patent infringement is proven under 35 U.S.C. § 271(f)?

**Yes.** WesternGeco’s award for lost profits was a permissible domestic application of Section 284 of the Patent Act.

**From the opinion by Justice Thomas** (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Alito, Sotomayor, and Kagan): [T]he focus of § 284, in a case involving infringement under § 271(f)(2), is on the act of exporting components from the United States. In other words, the domestic infringement is “the objec[t] of the statute’s solicitude” in this context…The conduct in this case that is relevant to that focus clearly occurred in the United States, as it was ION’s domestic act of supplying the components that infringed WesternGeco’s patents. Thus, the lost-profits damages that were awarded to WesternGeco were a domestic application of § 284.

**Dissenting:** Justice Gorsuch (joined by Justice Breyer)

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**Political Gerrymandering**

*Benisek v. Lamone*  
Docket No. 17-333  
**Affirmed:** The District of Maryland

Argued: March 28, 2018
Decided: June 18, 2018
Analysis: ABA PREVIEW 169, Issue 5

**Overview:** The federal courts have traditionally declined to hear challenges to political gerrymandering, because the courts lack a determinate legal standard to apply to those challenges. This case tested whether the First Amendment provides such a standard, and, if so, whether the plaintiffs are likely to succeed in their challenge (and thus should get a preliminary injunction). Maryland redrew its Sixth Congressional District in 2011 and shifted the political balance in the district from Republican to Democrat. Republican voters in the district sued, arguing that the state diluted their right to vote as retaliation for their political affiliation, in violation of the First Amendment.

**Issue:** Did the three-judge district court err in ruling that the plaintiffs failed to show that they were likely to succeed on the merits?

No. Because the balance of equities and the public interest tilt against the preliminary injunction motion of plaintiffs claiming that a Maryland congressional district was gerrymandered to retaliate against them for their political views, the district court did not abuse its discretion in denying the motion.

From the *per curiam* opinion: We now note our jurisdiction and review the District Court’s decision for an abuse of discretion, keeping in mind that a preliminary injunction is “an extraordinary remedy never awarded as of right.”...As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff’s showing of a likelihood of success on the merits....Rather, a court must also consider whether the movant has shown “that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”... Plaintiffs made no such showing below. Even if we assume—contrary to the findings of the District Court—that plaintiffs were likely to succeed on the merits of their claims, the balance of equities and the public interest tilted against their request for a preliminary injunction.

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**Prisoners’ Rights**

*Murphy v. Smith*

Docket No. 16-1067

**Affirmed:** The Seventh Circuit

Argued: December 6, 2017
Decided: February 21, 2018
Analysis: ABA PREVIEW 108, Issue 3

**Overview:** An attorney fee provision in the Prison Litigation Reform Act (PLRA) provides that when a prisoner is awarded a judgment in a civil rights action, a portion of the judgment “not to exceed 25 percent” shall be applied to pay the prisoner’s attorney’s fees. The question was whether this provision means that a district judge can require any percentage up to 25 percent or that a district judge must set the amount at exactly 25 percent.

**Issue:** Does the statutory language in the Prison Litigation Reform Act that reads “not to exceed 25 percent” mean exactly 25 percent?

No. In cases governed by the Prison Litigation Reform Act, district courts must apply as much of the judgment as necessary, up to 25 percent, to satisfy an award of attorney’s fees.

From the opinion by Justice Gorsuch (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito):

As always, we start with the specific statutory language in dispute. That language (again) says “a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded”.... And we think this much tells us a few things. First, the word “shall” usually creates a mandate, not a liberty, so the verb phrase “shall be applied” tells us that the district court has some nondiscretionary duty to perform.... Second, immediately following the verb, we find an infinitival phrase (“to satisfy the amount of attorney’s fees awarded”) that specifies the purpose or aim of the verb’s non-discretionary duty....Third, we know that when you purposefully seek or aim “to satisfy” an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full. Together, then, these three clues suggest that the court (1) must apply judgment funds toward the fee award (2) with the purpose of (3) fully discharging the fee award. And to meet that duty, a district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap.

**Dissenting:** Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan)

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**Qualified Immunity**

*Kisela v. Hughes*

Docket No. 16-11362

**Reversed and Remanded:** The Ninth Circuit

Argued: N/A
Decided: April 2, 2018
Analysis: N/A

**Overview:** Police officers, including Andrew Kisela, arrived on the scene after a report that a woman with a knife was acting erratically. Within minutes, Kisela shot Amy Hughes, who was holding a knife, after she took steps toward another woman and refused to drop the knife. Hughes sued Kisela under Section 1983, alleging excessive force in violation of the Fourth Amendment.

**Issue:** Did the officer’s actions in shooting the petitioner violate clearly established law at the time such that the officer was not entitled to qualified immunity?

No. The qualified immunity standard requires violation of a right that has counters which are sufficiently definite such that any reasonable official would understand he is violating it.

From the *per curiam* opinion: Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official would understand he is violating it.”

**Dissenting:** Justice Sotomayor (joined by Justice Ginsburg)
Qualified Immunity

Sause v. Bauer
Docket No. 17-742

Reversed and Remanded:
The Tenth Circuit

Argued: N/A
Decided: June 28, 2018
Analysis: N/A

Overview: Mary Anne Sause filed a Section 1983 claim alleging that members of the Louisburg, Kansas, police department visited her apartment under the guise of a noise complaint and then engaged in a strange and abusive conduct. Sause alleged the actions violated her First and Fourth Amendment rights. The district dismissed her claim and the Tenth Circuit affirmed, finding that the officers were entitled to qualified immunity.

Issue: Did the Tenth Circuit err when it ruled that the officers were entitled to qualified immunity?

Yes. The Tenth Circuit erred when it ruled that the officers were entitled to qualified immunity without considering the legitimacy of the officers’ presence in the petitioner’s home or the justification for their actions.

From the per curiam opinion: As the case comes before us, it is unclear whether the police officers were in petitioner’s apartment at the time in question based on her consent, whether they had some other ground consistent with the Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. Petitioner’s complaint contains no express allegations on these matters. Nor does her complaint state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. Without knowing the answers to these questions, it is impossible to analyze petitioner’s free exercise claim.

Securities Law

Digital Realty Trust, Inc. v. Somers
Docket No. 16-1276

Reversed and Remanded:
The Ninth Circuit

Argued: November 28, 2017
Decided: February 21, 2018

Analysis: ABA PREVIEW 87, Issue 3

Overview: Paul Somers reported alleged securities violations to senior management of his then-employer, Digital Realty Trust, Inc. (DRT). Before Somers could report the violations to the United States Securities and Exchange Commission (SEC), DRT fired Somers. Somers sued DRT, claiming a violation of the anti-retaliation protection of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). DRT filed a motion to dismiss and asserted Somers did not qualify as a whistleblower since he failed to report his concerns to the SEC. The district court denied DRT’s motion to dismiss. The Ninth Circuit affirmed. There was a circuit split on the issue. The Ninth Circuit joined the Second Circuit in interpreting the statute as ambiguous, applying Chevron deference to the SEC’s interpretation, and expanding whistleblower protection. The Fifth Circuit strictly interpreted the statute.

Issue: Should the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 be broadly construed to protect complainants who have failed to report alleged securities violations directly to the United States Securities and Exchange Commission?

No. Dodd-Frank’s anti-retaliation provision does not extend to an individual, like Somers, who has not reported a violation of the securities laws to the SEC.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan): Financial inducements alone, Congress recognized, may be insufficient to encourage certain employees, fearful of employer retaliation, to come forward with evidence of wrongdoing. Congress therefore complemented the Dodd-Frank monetary incentives for SEC reporting by heightening protection against retaliation. While Sarbanes-Oxley contains an administrative-exhaustion requirement, a 180-day administrative-complaint-filing deadline, and a remedial scheme limited to actual damages, Dodd-Frank provides for immediate access to federal court, a generous statute of limitations (at least six years), and the opportunity to recover double backpay…Dodd-Frank’s award program and anti-retaliation provision thus work synchronously to motivate individuals with knowledge of illegal activity to “tell the SEC.”

Sentencing Guidelines

Chavez-Meza v. United States
Docket No. 17-5639

Affirmed: The Eleventh Circuit

Argued: April 23, 2018
Decided: June 18, 2018
Analysis: ABA PREVIEW 208, Issue 7

Overview: Federal law, under 18 U.S.C. § 3582(c)(2), authorizes a sentence reduction when the Sentencing Guidelines range has subsequently been lowered and the district court considers applicable sentencing factors and policy statements. The Court was asked to decide if partial reductions under Section 3582(c)(2) can be ordered on a court-issued form that states, without additional explanation, that the applicable factors and policy statements were considered.

Issue: Did the Tenth Circuit abuse its discretion when, using a court-issued form stating it had taken “into account the policy statement in USSG § 1B1.10 and the sentencing factors in 18 U.S.C. § 3553(a),” it partially granted the defendant’s request for a reduced sentence under 18 U.S.C. 3582(c) (2) that allows for sentence reductions when a sentencing range has subsequently been lowered by the Sentencing Commission?

No. Because the record as a whole demonstrates the judge had a reasoned basis for his decision, the judge’s explanation for the petitioner’s sentence reduction was adequate.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Thomas, Ginsburg, and Alito): More importantly, the Guidelines ranges reflect to some degree what many, perhaps most, judges believed in the pre-Guidelines era was a proper sentence based upon the criminal behavior at issue and the characteristics of the offender. Thus, a judge’s choice among points on a range will often simply reflect the judge’s belief that the chosen sentence is the “right” sentence (or as close as possible to the “right” sentence) based on various factors, including those found in
§ 3553(a). Insofar as that is so, it is unsurprising that changing the applicable range may lead a judge to choose a nonproportional point on the new range. We see nothing that favors the one or the other. So, as is true of most Guidelines sentences, the judge need not provide a lengthy explanation if the “context and the record” make clear that the judge had “a reasoned basis” for reducing the defendant’s sentence.

**Dissenting:** Justice Kennedy (joined by Justices Sotomayor and Kagan)

**Taking no part:** Justice Gorsuch

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**Sentencing Guidelines**

**Hughes v. United States**
Docket No. 17-155

**Reversed and Remanded:**
The Eleventh Circuit

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**Overview:** Petitioner Erik Hughes pleaded guilty to drug and firearm offenses and entered into a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C) that recommended 180 months of imprisonment. At the sentencing hearing, the court determined Hughes’s Sentencing Guidelines range was 188–235 months of imprisonment. The court accepted the plea agreement and sentenced Hughes to 180 months in prison. Subsequently, the Sentencing Commission adopted Amendment 782 to the Guidelines, which reduced the relevant offense level for various drug offenses by two levels. The Commission applied the amendment retroactively. Hughes filed a motion to reduce his sentence under 18 U.S.C. § 3582(c)(2), which permits defendants who have been “sentenced to a term of imprisonment based on a sentencing range that has subsequently been reduced by the Sentencing Commission to seek a reduction in sentencing.” The court denied the motion after concluding Hughes’s sentence was “based on” the plea agreement, not the Sentencing Guidelines, as required by Section 3582(c)(2) as interpreted by Justice Sonia Sotomayor’s concurrence in Freeman v. United States, 564 U.S. 522 (2011). On appeal, the Eleventh Circuit affirmed the district court’s ruling that Hughes was not eligible for a sentence reduction based on Justice Sotomayor’s Freeman concurrence.

The appeals court gave controlling weight to Justice Sotomayor’s Freeman concurrence because of Marks v. United States, 430 U.S. 188 (1977), which established rules for determining the holding of a Supreme Court opinion, like Freeman, where no single rationale has the assent of five justices. The Supreme Court was asked to decide if Hughes was eligible for a sentence reduction under Section 3582(c)(2).

**Issue:** Is a sentence imposed pursuant to a Type-C agreement “based on” the defendant’s Sentencing Guidelines range?

**Yes.** A sentence imposed pursuant to a Type-C agreement is “based on” the defendant’s Sentencing Guidelines range so long as that range was part of the framework the district court relied on when imposing the sentence or accepting the agreement; Hughes is eligible for relief under Section 3582(c)(2).

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, Kagan, and Gorsuch): A sentence imposed pursuant to a Type-C agreement is no exception to the general rule that a defendant’s Guidelines range is both the starting point and a basis for his ultimate sentence. Although in a Type-C agreement the Government and the defendant may agree to a specific sentence, that bargain is contingent on the district court accepting the agreement and its stipulated sentence...The Sentencing Guidelines prohibit district courts from accepting Type-C agreements without first evaluating the recommended sentence in light of the defendant’s Guidelines range. USSG § 6B1.2(c). So in the usual case the court’s acceptance of a Type-C agreement and the sentence to be imposed pursuant to that agreement are “based on” the defendant’s Guidelines range.

**Concurring:** Justice Sotomayor

**Dissenting:** Chief Justice Roberts (joined by Justices Thomas and Alito)

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**Sentencing Guidelines**

**Koons v. United States**
Docket No. 17-5716

**Affirmed:** The Eighth Circuit

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**Analysis:** ABA PREVIEW 195, Issue 6

**Overview:** Petitioners Timothy Koons, Randy Feauto, Jose Manuel Gardea, Esequeil Gutierrez, and Kenneth Putensen pleaded guilty to methamphetamine conspiracy offenses. All five petitioners were subject to statutory mandatory minimum sentences. All five petitioners initial advisory Sentencing Guidelines ranges were below the mandatory minimum. All petitioners were sentenced below their mandatory minimum sentence after the district court granted the government’s motions under 18 U.S.C. § 3553(e) for substantial assistance departures. Subsequently, the Sentencing Commission adopted Amendment 782, which lowered the offense level for most drug offenses by two levels. The district court initiated proceedings pursuant to 18 U.S.C. § 3582(c)(2) to determine whether Feauto was eligible for a sentence reduction. Section 3582(c)(2) allows a district court to reduce the sentence of “a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been reduced by the Sentencing Commission.” The district court concluded Feauto was not eligible for a sentence reduction under Section 3582(c)(2) sentence reduction because his statutory mandatory minimum sentence exceeded his original and amended Guidelines range. Relying on its ruling in Feauto’s case, the district court denied Section 3582(c)(2) sentencing reductions to Gardea, Gutierrez, Koons, and Putensen. In a consolidated appeal, the Eighth Circuit affirmed, holding that the petitioners were ineligible for sentence reductions because their sentences were “based on” their statutory mandatory minimum and substantial assistance, not their advisory Guidelines range. The Supreme Court was asked to decide if petitioners were eligible for a sentence reduction under Section 3582(c)(2).

**Issue:** Did the Eighth Circuit Court of Appeals err in holding, contrary to the opinion of the Fourth Circuit Court of Appeals, that defendants whose initial advisory Guidelines sentencing range was below a statutory mandatory minimum and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance, pursuant to 18 U.S.C. § 3553(e), are not eligible for further reduction in sentence under 18 U.S.C. § 3582(c)(2) and retroactive Sentencing Guidelines Amendment 782, which lowered the base offense levels assigned to most drug quantities?
No. Petitioners do not qualify for sentence reduction under Section 3582(c)(2) because their sentences were not “based on” their lowered Guidelines ranges but, instead, were “based on” their mandatory minimums and on their substantial assistance to the government.

From the unanimous opinion by Justice Alito: Their sentences were not “based on” the lowered Guidelines ranges because the District Court did not consider those ranges in imposing its ultimate sentences. On the contrary, the court scrapped the ranges in favor of the mandatory minimums, and never considered the ranges again; as the court explained, the ranges dropped out of the case…And once out of the case, the ranges could not come close to forming the “basis for the sentence that the District Court imposed,”…and petitioners thus could not receive § 3582(c)(2) sentence reductions.

Sentencing Guidelines
Rosales-Mireles v. United States
Docket No. 16-9493
Reversed and Remanded: The Fifth Circuit

Argued: February 21, 2018
Decided: June 18, 2018
Analysis: ABA PREVIEW 169, Issue 5

Overview: This case was about an erroneous criminal history score that resulted in a sentence within the Federal Sentencing Guidelines, although seven months longer than it would have been had the calculations of the score been correct. One of the defendant’s offenses was double-counted, moving his case to a more substantial sentencing overview of United States Supreme Court Cases
Separation of Powers
Oil States Energy Services, LLC v. Greene’s Energy Group, LLC
Docket No. 16-712
Affirmed: The Federal Circuit

Argued: November 27, 2017
Decided: April 24, 2018
Analysis: ABA PREVIEW 83, Issue 3

Overview: The U.S. Patent and Trademark Office uses a process called “inter partes review” to reevaluate an earlier decision by the Office to grant a patent. Inter partes review permits a non-patent-holder to challenge a patent based on its nonconformity with certain patent requirements. The process incorporates many, but not all, features of adversarial litigation and offers a right of appeal to a federal appeals court. Greene’s Energy Group, LLC, filed for inter partes review against a patent owned by Oil States Energy Services, LLC. The U.S. Patent and Trademark Office’s Patent Trial and Appeal Board accepted the petition, conducted inter partes review of the challenged claims, and determined that the challenged claims were not patentable. Oil States appealed, challenging the Board’s decision and arguing that inter partes review violated the separation of powers and the Seventh Amendment.

Issue: Does “inter partes review” impermissibly encroach upon the judicial role of the courts and deprive a party of the Seventh Amendment guarantee of a jury trial?

No. Inter partes review does not violate either Article III or the Seventh Amendment.

From the opinion by Justice Thomas (joined by Justice Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan): The Patent Clause in our Constitution “was written against the backdrop” of the English system. …Based on the practice of the Privy Council, it was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council. The parties have cited nothing in the text or history of the Patent Clause or Article III to suggest that the Framers were not aware of this common practice. Nor is there any reason to think they excluded this practice during their deliberations. And this Court has recognized that, “[w]ithin the scope established by the Constitution, Congress may set out condi-
Concurring: Justice Breyer (joined by Justices Ginsburg and Sotomayor)

Dissenting: Justice Gorsuch (joined by Chief Justice Roberts)

**Separation of Powers**

**Patchak v. Zinke**
Docket No. 16–498

**Affirmed: The District of Columbia Circuit**

Argued: November 7, 2017
Decided: February 27, 2018
Analysis: ABA PREVIEW 63, Issue 2

**Overview:** David Patchak brought a case to halt the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians’ casino development in his rural Michigan community. After the Supreme Court remanded the case for further proceedings, Congress enacted legislation that directed the courts to “promptly dismiss” any pending lawsuits over the property at issue in Patchak’s case. The lower courts therefore dismissed his case, and he appealed (again) to the Supreme Court.

**Issue:** Does a congressional act that directs the courts to “promptly dismiss” a pending lawsuit encroach upon the role of the judiciary and thus violate the separation of powers?

No. The Gun Lake Act does not violate the U.S. Constitution.

From the opinion by Justice Thomas (joined by Justices Breyer, Alito, and Kagan): Section 2(b) changes the law. Specifically, it strips federal courts of jurisdiction over actions “relating to” the Bradley Property. Before the Gun Lake Act, federal courts had jurisdiction to hear these actions…Now they do not. This kind of legal change is well within Congress’ authority and does not violate Article III.

**Concurring:** Justice Breyer

**Concurring in judgment:** Justice Ginsburg (joined by Justice Sotomayor)

**Concurring in judgment:** Justice Sotomayor

**Dissenting:** Chief Justice Roberts (joined by Justices Kennedy and Gorsuch)

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**Sherman Act**

**Ohio v. American Express Co.**
Docket No. 16–1454

**Affirmed: The Second Circuit**

Argued: February 26, 2018
Decided: June 25, 2018
Analysis: ABA PREVIEW 162, Issue 5

**Overview:** American Express (Amex) includes “non-discriminatory provisions” (NDPs) in its contracts with merchants. These NDPs prohibit merchants from expressing any preference for credit cards other than Amex cards. The federal government and several states filed suit against Amex, arguing that these NDPs violate Section 1 of the Sherman Act, unreasonably restraining trade. The critical question hinged on how courts should apply the burden-shifting “rule of reason” test in cases involving separate but interdependent markets, like the two-sided markets in credit-card transactions.

**Issue:** Under the “rule of reason,” did the government’s showing that Amex’s antisteering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?

No. Amex’s antisteering provisions do not violate federal antitrust law.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch): The plaintiffs also failed to prove that Amex’s antisteering provisions have stifled competition among credit-card companies. To the contrary, while these agreements have been in place, the credit-card market experienced expanding output and improved quality. Amex’s business model spurred Visa and MasterCard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served. Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%.

**Dissenting:** Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan)

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**Sixth Amendment**

**McCoy v. Louisiana**
Docket No. 16–8255

**Reversed and Remanded:** The Supreme Court of Louisiana

Argued: January 17, 2018
Decided: May 14, 2018
Analysis: ABA PREVIEW 135, Issue 4

**Overview:** Robert McCoy was indicted on three counts of first-degree murder, and the prosecution gave notice that it would seek the death penalty. McCoy’s attorney, Larry English, admitted McCoy’s guilt before the jury—against the express wishes of McCoy—because English thought this was the best way for McCoy to avoid a death sentence. McCoy was nevertheless convicted and sentenced to death. McCoy appealed, arguing that English’s actions, and the court’s approval of them, violated his Sixth Amendment rights.

**Issue:** Does the Constitution prohibit a defense attorney from admitting his client’s guilt to the jury as part of a “concession defense” over his client’s express objection?

Yes. The Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan): With individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

**Dissenting:** Justice Alito (joined by Justices Thomas and Gorsuch)
The PASPA provision at issue, 306 legislators from voting on any offending provisions. A more direct affront to state sovereignty is not easy to imagine.

**Concurring:** Justice Thomas

**Concurring in part and dissenting in part:** Justice Breyer

**Dissenting:** Justice Ginsburg (joined by Justice Sotomayor and joined in part by Justice Breyer)

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### Stored Communications Act

**United States v. Microsoft, Corp.**

Docket No. 17-2

Vacated and Remanded: The Second Circuit

**Overview:** Petitioner United States obtained a warrant under the Stored Communications Act (SCA) that required respondent Microsoft to disclose email information for a particular user’s email account that was the target of a drug investigation. Microsoft was served with the warrant at its headquarters in Redmond, Washington. In response, Microsoft disclosed account identification records that were stored in the United States. But Microsoft refused to disclose the contents of the emails because it was stored in a data center in Ireland. Microsoft moved to quash the warrant, arguing that the warrant would be an impermissible extraterritorial application of the SCA to require Microsoft to disclose information stored abroad. The magistrate judge denied the motion to quash, which the district court affirmed. Microsoft was served in civil contempt. On appeal, the Second Circuit Court of Appeals reversed the denial of the motion to quash and vacated the civil contempt finding. The court held that the SCA does not authorize courts to issue and enforce against U.S.-based service providers warrants for customer email content that is stored exclusively on foreign servers. The Supreme Court was asked to decide whether a warrant issued pursuant to the SCA requires an email service provider to disclose emails stored abroad.

**Issue:** Must a United States provider of email services comply with a probable-cause-based warrant issued under 18 U.S.C. § 2703 by making disclosure in the United States of electronic communications within that provider’s control, even if the provider has store that material abroad?

**Mooted.** After argument, Congress enacted and the president signed the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), requiring service providers to comply with certain obligations regardless of where information is located. The government subsequently obtained a new warrant.

From the per curiam opinion: No live dispute remains between the parties over the issue with respect to which certiorari was granted. See Department of Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto, 477 U. S. 556 (1986). Further, the parties agree that the new warrant has replaced the original warrant. This case, therefore, has become moot. Following the Court’s established practice in such cases, the judgment on review is accordingly vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit with instructions first to vacate the District Court’s contempt finding and its denial of Microsoft’s motion to quash, then to direct the District Court to dismiss the case as moot.

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### Tax Law

**Wisconsin Central, Ltd. v. United States**

Docket No. 17-530

Reversed and Remanded: The Seventh Circuit

**Overview:** Railroad employees are exempt from the social security system and instead receive retirement benefits under the Railroad Retirement Tax Act (RRTA), which is similar to the Federal Insurance Contributions Act (FICA) system but not identical. The RRTA requires a payroll tax on “compensation,” defined as any form of “money remuneration.” In recent years, some railroads, including petitioner’s, challenged their obligation to pay a payroll tax on nonqualified stock options that employees exercised, and sought refunds. The Internal Revenue Service disagreed, and the lower court agreed with the service, as did the Seventh Circuit.
Ultimately, the addressed a question common with all citizens. At the time, to fish “at all usual and accustomed grounds” under the 1855 treaties granted to the tribes the right to fish the tribes are entitled to—and that remains the question today. The Supreme Court said at the outset of the case that the tribes were entitled to a maximum of 50 percent, and remanded it. This culvert-focused sub-proceeding began in 2001. In 2017, the Ninth Circuit issued a final, amended order, reiterating that the tribes were entitled to enough fish to earn a “moderate” living and ordered the state to replace its culverts to protect the salmon runs.

Issue: Did the Ninth Circuit err in interpreting the treaties?

Affirmed.

From the per curiam opinion: The judgement is affirmed by an equally divided Court.

Taking no part: Justice Kennedy

Tribal Sovereign Immunity

Upper Skagit Indian Tribe v. Lundgren
Docket No. 17-387

Vacated and Remanded: The Supreme Court of Washington

Argued: March 21, 2018
Decided: May 21, 2018
Analysis: ABA PREVIEW 200, Issue 6

Overview: Respondents Sharline and Ray Lundgren initiated a quiet title action challenging petitioner Upper Skagit Indian Tribe’s title to a strip of land to which respondents claimed they had acquired title by adverse possession. The Washington state court denied petitioner’s motion to dismiss, concluding that the court could exercise jurisdiction in rem over the dispute despite petitioner’s assertion of tribal sovereign immunity. The Washington court further held that, because respondents proved title by adverse possession, petitioner did not have a protectable property interest and was thus not an indispensable party to the action. This appeal asked the Supreme Court to decide whether a federally recognized Indian tribe’s assertion of tribal sovereign immunity from suit precludes a state court from exercising in rem jurisdiction to quiet title to property within the forum state to which the Tribe claims an ownership interest.

Issue: Does a court’s exercise of in rem jurisdiction override the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

No. Yakima v. Confederated Tribes and Bands of Yakima Nation addressed a question of statutory interpretation and not the scope of tribal sovereign immunity; because the Lundgrens’ alternative argument did not emerge until later in the case, the Washington Supreme Court should address it first.

From the opinion by Justice Gorsuch (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan): Ultimately, the Supreme Court of Washington rejected the Tribe’s claim of immunity and ruled for the Lundgrens. The court reasoned that sovereign immunity does not apply to cases where a judge “exercis[es] in rem jurisdiction” to quiet title in a parcel of land owned by a Tribe, but only to cases where a judge seeks to exercise in personam jurisdiction over the Tribe itself…In coming to this conclusion, the court relied in part on our decision in Yakima. Like some courts before it, the Washington Supreme Court read Yakima as distinguishing in rem from in personam lawsuits and “establish[ing] the principle that…courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted.”…That was error. Yakima did not address the scope of tribal sovereign immunity. Instead, it involved only a much more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887.

Concurring: Chief Justice Roberts (joined by Justice Kennedy)

Dissenting: Justice Thomas (joined by Justice Alito)

Water Law

Montana v. Wyoming
Docket No. Wyoming

Received: The Special Master

Argued: N/A
Decided: February 20, 2018
Analysis: N/A

Overview: The Yellowstone River Compact (the Compact) protects appropriative rights
to the use of water in the Yellowstone River System in Montana from diversions and withdrawals in Wyoming.

**Judgment:** Awarded against Wyoming and in favor of Montana for violations of the Compact resulting from Wyoming's reduction of the volume of water available in the Tongue River.

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**Water Rights**

*Texas v. New Mexico*

Docket No. 141, Orig.

**Exception Sustained and Overruled:** The Special Master

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**Analysis:** The Special Master

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**Decided:** March 5, 2018

**Argued:** January 8, 2018

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**Overview:** The 1938 Rio Grande Compact allocates the river's water among the basin states. The Compact specifies the quantity of water that New Mexico is required to deliver to the Elephant Butte Dam, a key water storage feature of the federal Rio Grande Project. That project furnishes irrigation water to 178,000 acres in the Rio Grande Valley, serving users in south-central New Mexico, western Texas, and Mexico. New Mexico has allowed groundwater pumping below Elephant Butte Dam and surface diversions in excess of Rio Grande Project limits, which are alleged to deplete the compact entitlement of Texas and interfere with the operation of the Rio Grande Project.

**Issue:** Does the United States, although a nonparty to the Rio Grande Compact, have compact-protected enforceable rights in relation to waters delivered to the Elephant Butte Reservoir for use by the federal Rio Grande Project?

**Yes.** The United States may pursue the Compact claims it has pleaded in this original action.

**From the unanimous opinion by Justice Gorsuch:** [W]e have sometimes permitted the federal government to participate in compact suits to defend “distinctively federal interests” that a normal litigant might not be permitted to pursue in traditional litigation. *Maryland v. Louisiana*, 451 U. S. 725, 745 (1981). At the same time, our permission should not be confused for license. Viewed from some sufficiently abstract level of generality, almost any compact between the States will touch on some concern of the national government—foreign affairs, interstate commerce, taxing and spending. No doubt that is the very reason why the Constitution requires congressional ratification of state compacts. But just because Congress enjoys a special role in approving interstate agreements, it does not necessarily follow that the United States has blanket authority to intervene in cases concerning the construction of those agreements. Still, bearing in mind our unique authority to mold original actions, several considerations taken collectively persuade us that the United States may pursue the particular claims it has pleaded in this case[.]

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**White-Collar Criminal Law**

*Marinello v. United States*

Docket No. 16-1144

**Reversed and Remanded:** The Second Circuit

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**Decided:** March 21, 2018

**Argued:** December 6, 2017

**Analysis:** ABA *PREVIEW* 105, Issue 3

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**Overview:** Business owner Carlo J. Marinello II failed to file personal or business taxes or keep books and records. Years later and unbeknownst to Marinello, the Department of Justice (DOJ) worked with the Internal Revenue Service (IRS) and opened an investigation against Marinello. A federal jury in New York convicted Marinello of nine counts of tax fraud and obstruction. Marinello appealed his obstruction conviction, arguing that he could not have obstructed an investigation of which he had no knowledge. The district court rejected Marinello’s motions for acquittal and a new trial. The Second Circuit affirmed and denied a petition for rehearing *en banc*, holding that knowledge of a pending investigation is not an element of the offense of obstruction in tax cases. A circuit split existed; the Sixth Circuit held that knowledge of an existing investigation is an element of the offense.

**Issue:** Does 26 U.S.C. § 7212(a), the provision of the Internal Revenue Code which prohibits obstruction, include as an element of the offense the defendant’s awareness of a pending IRS audit, investigation, or case?

**Yes.** To convict a defendant under the Omnibus Clause, the government must prove the defendant was aware of a pending tax-related proceeding, such as a particular investigation or audit, or could have reasonably foreseen that such a proceeding would commence.

**From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Sotomayor, Kagan, and Gorsuch):** Interpreted broadly, the provision could apply to a person who pays a babysitter $41 per week in cash without withholding taxes…leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant. Such an individual may sometimes believe that, in doing so, he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in § 7212(a).

**Dissenting:** Justice Thomas (joined by Justice Alito)