

2018-19 Wrap-Up

# PREVIEW

OF UNITED STATES SUPREME COURT CASES



AMERICAN BAR ASSOCIATION

Division for Public Education

# U.S. SUPREME COURT October 2019 CALENDAR

## MONDAY

### OCTOBER 7

*Kahler v. Kansas*  
*Peter v. Nantkwest, Inc.*  
*Ramos v. Louisiana*

### OCTOBER 14

*Legal Holiday*

## TUESDAY

### OCTOBER 8

*Bostock v. Clayton Cty., Ga and Altitude Express, Inc. v. Zarda*  
*(Consolidated 1 hr. for argument)*  
*R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*

### OCTOBER 15

*Financial Oversight Bd. v. Aurelius Investment*  
*Aurelius Investment v. Puerto Rico*  
*Official Committee of Debtors v. Aurelius Investment*  
*United States v. Aurelius Investment*  
*Utier v. Financial Oversight Bd.*

## WEDNESDAY

### OCTOBER 9

*No Arguments*

### OCTOBER 16

*Kansas v. Garcia*  
*Rotkiske v. Klemm*  
*Mathena v. Malvo*

## STANDING COMMITTEE ON PUBLIC EDUCATION

### Chair

Ruthe Catolico Ashley  
Vallejo, CA

### Chair, Gavel Awards

Stephen Edds  
Ridgeland, MS

### Chair, Law Day

Lucian T. Pera  
Memphis, TN

Alice A. Bruno  
New Britain, CT

Karl Camillucci  
Chicago, IL

Stephen E. Chappellear  
Columbus, OH

Sumbal Mahmud  
St. Paul, MN

Adrienne Nelson  
Portland, OR

Rachel Paulose  
Minneapolis, MN

Steven Schwinn  
Chicago, IL

Michelle Silverthorn  
Chicago, IL

Carl DeMouy Smallwood  
Columbus, OH

Daiquiri Steele  
Tuscaloosa, AL

G. Michael Witte  
Indianapolis, IN

### Board of Governors Liaison

David W. Clark  
Jackson, MS

### Law Student Liaison

Clay Leland  
Spokane, WA

### Young Lawyers Liaison

Jennifer Rodriguez  
Northfield, NJ

## ADVISORY COMMISSION ON PUBLIC EDUCATION

Kimberly Atkins  
Boston, MA

Dietrich Matthew von Biedenfeld  
West Columbia, TX

Anita Casey  
Charleston, WV

Lisa M. Curtis  
Washington, DC

Louise Pomeroy Dempsey  
Cleveland, OH

Michael D. Goler  
Cleveland, OH

Leslie Ann Hayashi  
Honolulu, HI

Shawn Healy  
Chicago, IL

Sebastian Kaplan  
San Francisco, CA

Kei Kawashima-Ginsberg  
Medford, MA

Averill Kelley  
Las Vegas, NV

Barbara Kerr Howe  
Towson, MD

David Morrow II  
Mebane, NC



# CONTENTS

Issue No. **8** | Volume 46

August 7, 2019

## PREVIEW STAFF

Frank Valadez  
Director  
Division for Public Education

Catherine Hawke  
Editor

Marcheta Ward  
Business Specialist

© 2019 American Bar Association

ISSN 0363-0048

A one-year subscription to *PREVIEW of United States Supreme Court Cases* consists of seven issues, published September through April, that concisely and clearly analyze all cases given plenary review by the Court during the present Term, as well as briefly summarize decisions as they are reached. A special eighth issue offers a perspective on the newly completed Term.

For information on subscribing to *PREVIEW* or purchasing year-end compilations, please contact HeinOnline at 800.277.6995 (M–F, 8:30 a.m.–5:00 p.m. Eastern) or [holsupport@wshein.com](mailto:holsupport@wshein.com).

FOR CUSTOMER SERVICE, CALL  
800.277.6995.

All rights reserved.

Printed in the United States of America.  
The American Bar Association is a  
not-for-profit corporation.

AMERICAN BAR ASSOCIATION  
Mail Station 17.2  
321 N. Clark Street  
Chicago, IL 60654-7598  
[www.americanbar.org/publiced](http://www.americanbar.org/publiced)  
312.988.5773  
Email: [publiced@americanbar.org](mailto:publiced@americanbar.org)



AMERICAN **BAR** ASSOCIATION

Division for Public Education

LETTER FROM THE EDITOR	2
THE FIRST AMENDMENT DOCKET: AN OPPORTUNITY TO ADDRESS RARE CHALLENGES	4
THE CRIMINAL LAW DOCKET: A TERM OF MODEST CHANGES	7
THE CENSUS CASE: AN ORDINARY RULING IN AN EXTRAORDINARY CASE	13
CASE SUMMARIES 2018–2019 TERM	22

## Letter from the Editor

At the end of last year, we noted that “the near future of the Court remains wide open and unknown”—and, as the 2018–19 term draws to a close, we can all but copy and paste that same phrase. Since the official close of the term through today, much continues to develop and the Court remains in the news and political debates. When the Court issued its final decisions in late June, many issues remained far from settled. Most obviously is the case of *Dept of Commerce v. New York*, or the “Census Case,” challenging the Trump administration’s plan to put a citizenship question on the 2020 census. On June 27, the Court issued a highly fractured opinion, in the end, holding that although the Secretary of Commerce *could* add the question to the census, the particular justifications given in this instance were pretextual. The Court effectively put the ball back in the administration’s court to find a plausible non-pretextual justification, all before the Department’s July 1 printing deadline. What followed was a flurry of activity, including tweets and emergency court hearings. When the dust settled, it seemed the case was moot, although there is still certainly a chance that this issue will bubble up again. (See Steve Schwinn’s article on page 13 for a more detailed review of the case itself and the postdecision confusion.)

Moreover, one of the looming cases throughout the term actually remains undecided and its future unknown. *Carpenter v. Murphy* involves the seemingly technical question of “whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an ‘Indian reservation’ today under 18 U.S.C. § 1151(a).” However, this question belies a much larger, more consequential question and debate regarding the status of nearly half the land in Oklahoma and the future of five Native American tribes. The Court received initial briefing on the issue and heard argument in November 2018. It then asked for supplemental briefing in January, but the term closed without a decision. Instead, the Court has set *Carpenter* for reargument in the upcoming term, and the issue remains unresolved.

In a larger sense, the Supreme Court judicial philosophies of the two most junior justices on the Court, Justices Neil Gorsuch and Brett Kavanaugh, are still revealing themselves. After his controversial and contentious nomination process, Justice Kavanaugh took his seat on the bench and then seemed to remain out of the limelight, joining the majority more than any other justice this term. Only time will tell whether this was a first-term exception or, rather, part of his overall judicial disposition.

So what *do* we know from this term? The main takeaway from this term is most certainly the role of Chief Justice Roberts, both as the new “swing” justice and also as the leading protector of the Court’s institutional role in our democracy. From issues dealing with the First Amendment (*American Legion v. Humanist* and *Maryland-National Capital Park and Planning Commission v. American Humanist*) to the Census case to political gerrymandering (*Lamone v. Benisek* and *Rucho v. Common Cause*), the Chief appears to try to find as much common ground as possible and draft narrow, consensus-based decisions.

Of course, we cannot reflect on the last few months at the Court without noting the passing of retired justice John Paul Stevens in July. Justice Stevens left an indelible mark on the history of the Court and the legal profession, and the words of his former colleagues are perhaps the best testimony to his compassion, intelligence, and judicial integrity. Justice Ruth Bader Ginsburg wrote of the late justice: “Quick as his bright mind was, Justice Stevens remained a genuinely gentle and modest man. No jurist with whom I have served was more dedicated to the judicial craft, more open to what he called ‘learning on the job,’ more sensitive to the well-being of the community law exists (or should exist) to serve.” And, said Justice Anthony Kennedy, “He was emphatic always in asking this question: Is what the Court about to do fair to the injured party? He was brilliant at interpreting the law in a way to reach what he considered to be the fair result.”

Of course, beyond the headlines, the business of the Court proceeded throughout the term, with the justices addressing a variety of topics. Our wrap-up issue features some of our frequent *PREVIEW* authors providing insightful analysis on these and other trends and developments from this term, including the Court’s approach to criminal law issues, the always interesting First Amendment doctrine, an in-depth analysis of the Census case, and a look at how this Court is attempting to apply constitutional norms to an abnormal political time. We hope you enjoy this issue and, if you are not already, will become a regular *PREVIEW* subscriber! The term ahead has all the makings of a blockbuster packed with hot-button topics like immigration, LGBTQ rights, guns, and health care. Stay tuned!



Sincerely,  
Catherine Hawke  
Editor, *ABA PREVIEW of United States Supreme Court Cases*

## Circuit Scorecard—Federal and State Courts

Court	Reversed and Remanded	Vacated and Remanded	Reversed	Affirmed	Dismissed	Other
First Circuit	1			1		
Second Circuit	2			1		Reversed in part and Remanded in part – 1 Affirmed in part; Vacated in part; Remanded – 1
Third Circuit		2		1		
Fourth Circuit	1	1		2		
Fifth Circuit		2		1		Affirmed in part; Vacated in part; Remanded
Sixth Circuit	1	1	1	4		
Seventh Circuit			1			
Eighth Circuit	2	1	1			
Ninth Circuit	7	4		2	1	Reversed in part; Vacated in part; Remanded
Tenth Circuit		1		1		
Eleventh Circuit	3			4		
DC Circuit	1			2		
Federal Circuit	1	1		2		
Supreme Court of Idaho	1					
Supreme Court of Indiana		1				
Supreme Court of Nevada	1					
Supreme Court of Mississippi	1					
Supreme Court of North Carolina				1		
Supreme Court of Washington				1		
Supreme Court of West Virginia	1					
Supreme Court of Wisconsin		1				
Eastern District of Virginia					1	
District Court of Wyoming, Sheridan County		1				
Circuit Court of Alabama, Mobile County		1				
Middle District of North Carolina		1				
District of Maryland		1				
Texas Court of Criminal Appeals	1					
<b>Total</b>	<b>24</b>	<b>19</b>	<b>3</b>	<b>23</b>	<b>2</b>	<b>4</b>



# The First Amendment Docket: An Opportunity to Address Rare Challenges

by David L. Hudson Jr.

The Supreme Court 2018–19 term resulted in meaningful developments for First Amendment jurisprudence, as the justices grappled with a significant church-state case, a trademark law barring “immoral or scandalous” marks, the difficult area of retaliatory arrests, and the state action doctrine.

## Establishment Clause—Keeping the Latin Cross

Arguably the most high-profile of the Court’s First Amendment cases was *The American Legion v. American Humanist Association* (17-1717, 17-1718), involving a challenge to a large Latin cross conceived in 1918 and displayed prominently on public land in Bladensburg, Maryland. Opponents, including the American Humanist Association, contended the large Latin Cross represented the advancement, promotion, and endorsement of Christianity.

Supporters, including the intervening American Legion, countered that the cross served the secular purpose of honoring slain World War I veterans from the area. They argued that while there is religious significance to the monument, it had acquired different meanings and uses to people through the past 100 years.

In a 7–2 vote, the Supreme Court ruled that the monument, or cross, did not violate the Establishment Clause. Justice Samuel Alito authored the main opinion for the Court and emphasized the cross’s different meanings. “With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity,” he wrote. “The community may come to value them without necessarily embracing their religious roots.”

He relied more on a history and tradition analysis than an application of the much-maligned *Lemon* test—created by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Chief Justice Warren Burger articulated a three-part analysis in *Lemon* to determine when a state statute dealing with religion would survive an Establishment Clause challenge: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. Finally, the statute must not foster an excessive government entanglement with religion.” The test has remained the dominant test in the lower courts even as it received more scathing criticism from justices through the years.

Ultimately, Justice Alito determined the *Lemon* test was inapplicable for religious display cases and focused on the cross’s “special significance in commemorating World War I” and its “historical

importance.” He concluded: “The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent.”

The decision featured six other opinions: five concurrences and a dissent. Several of the concurring justices—most notably Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh—took shots at the *Lemon* test. Justice Gorsuch called the *Lemon* test a “misadventure” and noted its lack of defense among the justices. Justice Kavanaugh was blunter, writing: “And the court’s decisions over the span of several decades demonstrate that the *Lemon* test is not good law and does not apply to Establishment Clause cases in any of the five categories.” Finally, Justice Thomas, who believes the Court erred years ago in even incorporating the Establishment Clause, called for *Lemon* to be overruled: “I would take the logical next step and overrule the *Lemon* test in all contexts.” See David L. Hudson Jr. “The Fate of the *Lemon* Test: D.O.A. or Barely Surviving?,” Freedom Forum Institute, July 8, 2019.

Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented. She emphasized the clear religious significance of the “immense” Latin cross and explained: “By maintaining the Peace Cross on

a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion.”

## “Immoral or Scandalous” Trademarks

This term, the Court invalidated another part of the federal trademark law, the Lanham Act, which prohibits “immoral or scandalous” marks, in *Iancu v. Brunetti* (18-302). The decision came on the heels of the Court’s decision two years ago in *Matal v. Tam*, 582 U.S. \_\_\_ (2017), invalidating another provision of the law that prohibits “disparaging” trademarks.

The Court’s recent case involved a challenge by Erick Brunetti, an artist and entrepreneur who markets a clothing line with the trademark “FUCT”—a term obviously closely connected to the four-letter word immortalized in the Court’s celebrated free-speech decision *Cohen v. California*, 403 U.S. 15 (1971).

Brunetti sought the additional benefits of federal registration of the trademark. He was rebuffed by the Patent and Trademark Office’s (PTO) examining attorney and Trial and Appeal Board. These officials determined the proposed mark was either “a total vulgar” mark or had “decidedly negative sexual connotations.”

Brunetti then challenged the law in the Federal Circuit on First

Justice Samuel Alito authored the *American Legion* opinion and emphasized the cross’s different meanings. “With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity,” he wrote.

Amendment grounds. The appeals court agreed with Brunetti. The Court also agreed by a 6–3 vote. Writing for the majority, Justice Elena Kagan determined the law violated the core free-speech principle that the government should not engage in viewpoint discrimination.

“The facial viewpoint bias in the law results in viewpoint discriminatory application,” she wrote, citing a laundry list of different marks either accepted or rejected by the PTO. She also relied on another core constitutional law principle, the overbreadth doctrine. “But in any event, the ‘immoral or scandalous’ bar is substantially overbroad,” Justice Kagan wrote. “There are a great many immoral and scandalous ideas in the world (even more than there are swearwords) and the Lanham Act covers them all. It therefore violates the First Amendment.”

Justice Alito concurred and waxed eloquently about the dangers of viewpoint discrimination, as he did in his dissenting opinion in the specialty license plate decision, *Walker v. Sons of Confederate Veterans*, 576 U.S. \_\_\_\_ (2015). He penned a memorable line: “Viewpoint discrimination is poison to a free society.”

Three justices, Chief Justice John G. Roberts and Justices Stephen Breyer and Sonia Sotomayor, all wrote opinions concurring in part and dissenting in part.

They generally agreed that the part of the provision banning “immoral” marks was viewpoint discriminatory. However, they believed the Court could narrowly construe the “scandalous” portion of the law. For example, in the most comprehensive of the dissents, Justice Sotomayor opined that one could read the bar on registering “scandalous” marks to “address only obscenity, vulgarity, and profanity.”

### The Thorny Problem of Retaliatory Arrests

The U.S. Supreme Court once again waded into the troubled waters of retaliatory arrests in *Nieves v. Bartlett* (2019), a topic the Court addressed the previous term in *Lozman v. City of Riviera Beach*, 585 U.S. \_\_\_\_ (2018).

The case arose from a dispute at a winter sports festival called Arctic Man in the Hoodoo Mountains near Paxson, Alaska. Festival attendee Russell Bartlett verbally and physically tangled with two law enforcement officers, Sergeant Luis Nieves and Trooper Bryce Weight.

Ultimately after a kerfuffle, the officers arrested Bartlett for resisting arrest and disorderly conduct. After the charges were dismissed, Bartlett sued the officers for retaliating against him for his critical speech.

The Supreme Court ruled 6–3 in favor of the officers, finding that they had probable cause to arrest Nieves. Chief Justice Roberts wrote that “the presence of probable cause should generally defeat a First Amendment retaliatory arrest claim.”

Chief Justice Roberts said this general rule would not apply in those cases in which civil rights plaintiffs could show that they were

treated differently than similarly situated individuals who did not utter the same protected speech. This exception appears similar to a selective prosecution claim.

Justice Thomas wrote a concurring opinion emphasizing that there should be no exception from the rule that probable cause defeats a retaliatory arrest claim. In other words, if the government official had probable cause for the arrest, the retaliation claim automatically fails.

Justices Gorsuch and Ginsburg concurred in part and dissented in part. For his part, Justice Gorsuch wrote that the Court has “no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim.” Justice Ginsburg emphasized the proper standard for retaliatory arrest cases should be the Court’s decision in the public employee decision *Mt. Healthy City Bd. v. Doyle*, 429 U.S. 274 (1977). Under this standard, a civil rights plaintiff must show that an unconstitutional animus was a motivating factor. If so, the burden then shifts to the defendants to show that they would have made the same decision in the absence of the protected activity.

Justice Sotomayor dissented. She agreed with Justice Ginsburg that the proper standard comes from *Mt. Healthy*. She lauded the

majority for rejecting Justice Thomas’s absolute rule but questioned the efficacy of the Court’s exception, noting that it will be “vexing” to apply. She wrote that the majority’s approach will yield arbitrary results and shield willful

**In the *lanu* opinion, Justice Kagan concluded:  
“There are a great many immoral and scandalous ideas in the world (even more than there are swearwords) and the Lanham Act covers them all.  
It therefore violates the First Amendment.”**

misconduct from accountability.

### State Action

Finally, the Court addressed a concept quite familiar to first-year constitutional law students—the state action doctrine. The freedoms in the Bill of Rights, including the First Amendment, protect individuals only from governmental—not private—interference with liberty.

However, there are exceptions to the state action doctrine when there is a close enough connection or nexus between a state actor and a private entity.

This formed the legal backdrop to *Manhattan Community Access Corporation v. Halleck* (17-1702), a case in which two documentary producers accused Manhattan Neighborhood Network (MNN) of viewpoint discrimination.

DeeDee Halleck and Jesus Papoieto Melendez produced a documentary about MNN that depicted the private company as being neglectful of the East Harlem community. MNN refused to air the film.

In response, Halleck and Melendez sued MNN, alleging that the company violated their First Amendment free-speech rights by restricting their access to the public access channels. A federal district court dismissed the lawsuit, finding that MNN is not a state actor.

On appeal, the Second U.S. Circuit Court of Appeals reversed, finding that MNN qualified as a state actor because it performed a traditional public function in regulating speech on the public access channels.

The Court ruled 5–4 that the private corporation that oversees public access channels in Manhattan is not a state, or governmental actor, subject to First Amendment constraints. Writing for the majority, Justice Kavanaugh noted a “threshold problem” with the lawsuit—“MNN is a private entity.”

“The relevant function in this case is operation of public access channels on a cable system,” wrote Justice Kavanaugh. “That function has not traditionally and exclusively been performed by government.”

Justice Kavanaugh rejected the idea that MNN created a public forum and opened itself up to these claims of viewpoint discrimination under the First Amendment.

“Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed,” he wrote. “Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor.”

Justice Sotomayor dissented. “If New York’s public-access channels are a public forum, it follows that New York cannot evade the First Amendment by contracting out administration of that forum to a private agent,” she wrote. “The First Amendment does not fall silent simply because a government hands off the administration of its constitutional duties to a private actor.”

## Conclusion

The Court’s First Amendment term was significant. It was the first time this collection of nine jurists addressed the meaning and reach of the Establishment Clause. An interesting question concerns the fate of the *Lemon* test, as several justices vigorously attacked it. The decision likely will not end all challenges to religious displays but certainly will give defenders of historical monuments with religious significance a powerful precedent.

The Court continued its commitment to viewpoint discrimination in another trademark decision, likely sending legislators scrambling to come up with narrower wording.

The question of retaliation frequently arises in the First Amendment. People in power often don’t like to be questioned or criticized and sometimes they retaliate. The law on retaliatory arrests is less than pellucid, and the Court’s recent decision may not offer much clarity. The meaning of its exception likely will require much litigation to unpack.

Finally, the Court’s state action decision does not bode well for those committed to battling censorship in a variety of contexts.

That decision split along classic conservative-liberal lines.

As for the individual justices, Chief Justice Roberts once again authored another majority opinion in a First Amendment case—a significant trend in his tenure. Justice Alito wrote quite powerfully against viewpoint

discrimination and also offered the Court’s main opinion in the church-state case. Justice Thomas once again was not afraid to stand on his own in First Amendment jurisprudence with his views that the Establishment Clause should not be incorporated and that probable cause should always bar a retaliatory arrest claim. And Justice Sotomayor at times was the Court’s most forceful defender of free speech. See David L. Hudson Jr. “Justice Sonia Sotomayor Once Again Is the Most Speech Protective Justice,” Freedom Forum Institute, May 30, 2019.

**An interesting question concerns the fate of the *Lemon* test, as several justices vigorously attacked it. The decision likely will not end all challenges to religious displays but certainly will give defenders of historical monuments with religious significance a powerful precedent.**



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). He can be reached at davidlhudsonjr@gmail.com.

*PREVIEW of United States Supreme Court Cases* 46, no. 8 (August 7, 2019): 4–6. © 2019 American Bar Association



# The Criminal Law Docket: A Term of Modest Changes

by Alan Raphael

The Supreme Court's most significant decisions regarding criminal procedure in the current term concerned double jeopardy, the bar on racial discrimination in jury selection, the excessive fines clause of the Eighth Amendment, and the right to counsel on appeal. Most of this article discusses the first two of those decisions. The Court decided only one case regarding the Fourth Amendment prohibition on unreasonable searches and seizures, and none interpreting the Fifth and Sixth Amendment restrictions on admission of confessions against defendants.

## Double Jeopardy

In *United States v. Gamble*, 588 U.S. \_\_\_\_ (2019), the Court reaffirmed the dual-sovereigns (or separate-sovereigns) exception to the Double Jeopardy Clause. The double jeopardy doctrine announced in the Fifth Amendment prohibits a second prosecution of a defendant for the same offense. Under the dual-sovereigns exception, double jeopardy does not bar successive prosecutions by different governments, federal or state. Neither a state nor the federal government may prosecute or punish a defendant a second time for the same offense. A prosecution in a federal court does not bar the bringing of charges in a state court; similarly, a prosecution in a state court does not bar the bringing of charges or imposition of punishment subsequently in a federal court or in another state court.

Terence Martin Gamble was convicted of felony second-degree robbery in Mobile County, Alabama, in 2008 and two domestic violence charges in 2013. Under both Alabama and federal law, it is a crime for a convicted felon to possess a firearm. While driving his vehicle in 2015, Gamble was lawfully stopped for a traffic violation, and a lawful search turned up a weapon, marijuana, and a digital scale. Charged under Alabama law with being a felon in possession of a weapon, Ala. Code 12-25-32(15), Gamble pleaded guilty, was convicted, and served one year in prison. While the state prosecution was proceeding, the United States charged Gamble with violating the federal law prohibiting a felon from possessing a weapon, 18 U.S.C. 922(g), based on the same weapon which led to the state charges. Prior to seeking the federal indictment, the federal prosecutor in Alabama obtained permission from the Department of Justice to bring the charge as being consistent with the Petite Policy, which allows federal prosecutions following state prosecutions in specified circumstances.

Gamble moved to dismiss the federal charge as violating his Fifth Amendment right against being twice placed in jeopardy for the same crime. The district court denied his motion on the basis of the separate-sovereigns exception to the Double Jeopardy Clause,

which the Supreme Court has recognized as allowing successive prosecutions by separate sovereigns, such as the federal and state governments, even though the subsequent charge would be barred if both were brought by the same government. Gamble entered a plea to the federal charge, was convicted, and received a 46-month sentence, to be served concurrently with the state sentence. The total time served by Gamble was the amount he would have served had he been convicted only in federal court.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the conviction in an unpublished ruling. It reasoned: "The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns." The appellate court's ruling cited as authority *Abbate v. United States*, 359 U.S. 187 (1959), which first

clearly announced the exception, Eleventh Circuit cases from 1979 and 2004, which applied *Abbate*, and the most recent Supreme Court case applying it, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016). In *Sanchez Valle*, two concurring justices, Justices Clarence Thomas and Ruth Bader

All the justices in *Gamble* focused on two issues:  
1) the intent of the framers of the clause and early 19th century treatises and precedents and  
2) the question of when it is appropriate for the Court to reverse existing precedents.

Ginsburg, urged the Supreme Court to reconsider whether there should be a separate-sovereigns exception to the double jeopardy rules.

The Supreme Court granted a writ of *certiorari* in Gamble's case to decide whether to follow or overrule the separate-sovereigns exception. By a 7–2 vote, the Court reaffirmed that the separate-sovereigns rule is consistent with the text, history, and intent of the Double Jeopardy Clause and thus found no reason to reverse Gamble's conviction. Justice Samuel Alito wrote the opinion for the Court, and Justice Clarence Thomas wrote a concurring opinion. Justices Ruth Bader Ginsburg and Neil Gorsuch dissented. All the justices focused on two issues: 1) the intent of the framers of the clause and early 19th century treatises and precedents and 2) the question of when it is appropriate for the Court to reverse existing precedents.

Gamble argued that two developments since *Abbate*, when the Supreme Court last addressed the issue of the separate-sovereigns exception to the Double Jeopardy Clause in 1949, eroded the Court's basis for the ruling. First, *Abbate* was decided in 1949, years before the Double Jeopardy Clause was held to apply to the states by *Benton v. Maryland*, 395 U.S. 784 (1969). Second, in the last half century, the scope of federal criminal law has increased greatly so that instances of overlapping state and federal jurisdiction are much more common, and thus possible instances of dual prosecutions for the same offense are much greater than had formerly been true.

As to the first, the Court stated that incorporation of the Double Jeopardy Clause as applied to the states included all aspects of the jurisprudence regarding the clause, including the dual-sovereigns exception. As to the second, the Court acknowledged the increased possibility of federal and state prosecutions for the same offense but saw the development as harmful only if the dual-sovereigns doctrine is legal error. Because the Court found no error in applying the dual-sovereigns rule, the possibly greater frequency of dual prosecutions does not provide any reason to abandon the doctrine.

The Court concluded that the historical evidence asserted by Gamble was “feeble” and that the text of the Clause, historical evidence, and 170 years of precedent justified retaining the rule allowing successive prosecutions for the same offense by different sovereigns.

In her *Gamble* dissent, Justice Ginsburg rejected the view that the federal and state governments are separate sovereigns and would have overruled the Court’s decisions regarding the dual-sovereigns exception. In her view, incorporation of the Double Jeopardy Clause as a protection against state governments meant that, like the federal government, states could not prosecute a person twice for the same offense. She saw no reason “why each of two governments within the United States should be permitted to try a person once for the same offense when neither could try him or her twice.” Further, Justice Ginsburg viewed the expansion of federal criminal law as increasing the likelihood of dual prosecutions for the same offense, which would have been rare when federal criminal law’s scope was more limited. She pointed out that Gamble’s case was not an unusual or extraordinary one but, instead, a run-of-the-mill felon-in-possession charge.

What is probably more important than the fate of Gamble’s conviction or the retention of the dual-sovereigns rule are the justices’ differing views on the question of when the Court should follow existing precedent and when the Court should be willing to overturn well-established Court rulings. In the current term, the Court reversed long-established decisions in two cases, *Franchise Tax Board of Cal. v. Hyatt*, 587 U.S. \_\_\_\_ (2019), and *Knick v. Township of Scott*, 588 U.S. \_\_\_\_ (2019). The Supreme Court has been closely divided on numerous constitutional issues in recent years, and recent appointments to the Court have altered that balance so the majority may now favor positions on numerous issues previously articulated by dissenting opinions. The willingness of justices to overturn precedents may be crucial in determining constitutional law in numerous areas, such as abortion, affirmative action, deference to administrative agencies, death penalty jurisprudence, racial and political gerrymandering, rights of gay people, determinations of what unenumerated rights are protected by the federal constitution, and the scope of the Commerce Clause.

In *Hyatt*, dissenting Justice Stephen Breyer wrote of the dangers of reversing legal course “only because five Members of a later Court” decide that an earlier ruling was incorrect. He then concluded: “Today’s decision can only cause one to wonder which cases the

Court will overrule next.” In *Knick*, dissenting Justice Elena Kagan quoted Breyer’s words in *Hyatt* a month earlier and observed: “Well, that did not take long. Now one may wonder yet again.”

The Alito majority opinion in *Gamble* concluded that Gamble had failed to show that the exception was inconsistent with the original understanding of the Double Jeopardy Clause or that there was a good reason to reject the principle of *stare decisis*, the application of existing precedent. The Court recognized that *stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process” (quoting from *Payne v. Tennessee*, 501 U.S. 808 (1991)). Although recognizing that *stare decisis* is less binding in constitutional adjudication when compared to statutory interpretation because in the former Congress cannot overturn decisions by ordinary legislation, the Court held that “even in constitutional cases, a departure from precedent ‘demands special justification.’”

In his concurring opinion, Justice Clarence Thomas concluded that his initial skepticism about the dual-sovereigns doctrine was not supported by the historical record. His concurrence expressed a very different view of the role of *stare decisis* in constitutional adjudication than that expressed by the Court in this case. He asserts that the Court should decide constitutional issues “through adherence to the correct, original meaning of the laws we are charged with applying.” For any decision that was “demonstrably erroneous—one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent.” Thus, the majority’s consideration of stability of the law, preservation of reliance interests, or judicial humility, in Justice Thomas’s view, improperly interfere with the duty to decide based on the original understanding of the constitutional provision. According to Justice Thomas, precedent may be relevant when it is not demonstrably erroneous, “when there is room for honest disagreement.” Applying those tests in this case led Justice Thomas to concur with the Court’s decision, concluding that “I am not persuaded that our precedent is incorrect as an original matter, much less demonstrably erroneous.”

Dissenting in *Gamble*, Justice Gorsuch asserted that “the [constitutional] text, principles of federalism, and history” demonstrate that the dual-sovereigns doctrine should be abandoned. Justice Gorsuch noted that the Court has always taken care in applying *stare decisis* in constitutional decisions because judges swear to protect and defend the Constitution. He pointed out that “blind obedience to *stare decisis* should leave this Court still abiding grotesque errors like *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*.” Unlike Justice Thomas, Justice Gorsuch asserted that whether to apply *stare decisis* requires consideration of various factors—“the quality of the decision’s reasoning, its consistency with related decisions, legal developments since the

What is probably more important than the fate of Gamble’s conviction or the retention of the dual-sovereigns rule are the justices’ differing views on the question of when the Court should follow existing precedent and when the Court should be willing to overturn well-established Court rulings.

decision, and reliance on the decision.” He then applied each of these factors and concluded they supported an overruling of the separate-sovereigns exception.

### Racial Discrimination in Jury Selection

In another case that received a great deal of popular attention because of a much-publicized podcast, the Court in *Flowers v. Mississippi*, 588 U.S. \_\_\_\_ (2019), reversed the convictions and death sentence of Curtis Giovanni Flowers for four murders in 1996 at a furniture company in Winona, Mississippi. The Court concluded that the prosecutor had engaged in racial discrimination by the use of peremptory challenges during jury selection in the trial. The prosecutor in the case was white, the African-American defendant had faced six trials for murder. The Supreme Court’s reversal of the conviction does not prevent the state from trying him again. Although the opinion strongly reiterated that courts must vigorously prevent racial discrimination in jury selection, the *Flowers* Court made clear that it was making no new law and that the facts of the case were so unusual that the decision has little precedential value.

The Sixth Amendment guarantees criminal defendants the right to a jury trial in criminal cases, applicable to state trials through the Fourteenth Amendment Due Process Clause, *Duncan v. Louisiana*, 391 U.S. 145 (1968). To select a jury, a random venire of prospective jurors is summoned. The potential jurors fill out questionnaires, and both parties and/or the court ask further questions to determine their fitness to serve on the jury. Then either party may challenge venire members for bias or other cause, and attorneys may strike a set number of them by peremptory challenges. A party usually does not have to disclose its reasons for exercising peremptory challenges. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court ruled that equal protection is violated by the exercise of peremptory challenges used intentionally for racially discriminatory purposes. Although *Batson* involved the actions of a prosecutor, subsequent decisions have extended its reach to all trials, civil or criminal, and all parties, and have also barred use of peremptory challenges for intentional gender discrimination.

To determine whether *Batson* has been violated, courts apply a three-part test. A party arguing that peremptory challenges were employed discriminatorily has the burden to prove a *prima facie* case of discrimination. If that standard is met, the court orders the party who used the challenges to provide nondiscriminatory reasons for each peremptory. The burden then shifts back to the objecting party to convince the court that purposeful discrimination has been shown. If the trial court determines that even one prospective juror was removed with discriminatory intent, then the defendant has met his burden of persuasion under *Batson*. In reviewing a *Batson* challenge, the appellate court must show deference to the trial court’s reasoning and will reverse only if it finds that the decision was clearly erroneous.

Initially, the prosecution tried Flowers for two of the murders in separate trials. During jury selection in the second trial, the judge found that the prosecutor had committed a *Batson* violation

in removing one person from the jury and reinstated the juror to the panel. Both those trials resulted in convictions, but both convictions were reversed because of numerous instances of prosecutorial misconduct. Flowers’s subsequent trials were for all four killings. At the third trial, the judge rejected a *Batson* claim of racial discrimination. On appeal, the Mississippi Supreme Court reversed the conviction after finding *Batson* violations regarding the challenges to two potential jurors. The Mississippi Supreme Court indicated that the prosecutor’s actions demonstrated the most egregious instance of a *prima facie* case of discrimination that it had seen. The next two trials resulted in mistrials because the juries could not reach unanimous verdicts.

The case before the Supreme Court involved the sixth trial. The same prosecutor acted for Mississippi in all six trials. The venire consisted of 26 people. There were 6 African-American venire persons; the prosecutor challenged 5 and allowed 1 to serve on the jury. Flowers challenged each of the strikes; the trial court found a *prima facie* showing of racial discrimination and ordered the

**The Mississippi Supreme Court indicated that the *Flowers* prosecutor’s actions demonstrated the most egregious instance of a *prima facie* case of discrimination that it had seen.**

prosecutor to present race-neutral justifications for the peremptory challenges. The prosecutor did so, and the trial court found that Flowers had failed to meet his burden of showing that the challenges were intentionally

racially discriminatory. Flowers was convicted and sentenced to death. The Mississippi Supreme Court affirmed the convictions, rejecting the *Batson* claim. After remand from the United States Supreme Court for reconsideration, the state supreme court again affirmed by a narrow margin.

In ruling for Flowers on this appeal, the Supreme Court, in an opinion by Justice Brett Kavanaugh, found that the totality of the circumstances demonstrated that the trial court erred in denying the *Batson* claim. The Court concluded that four facts led to this conclusion. First, the state in the repeated trials used its peremptory challenges to remove 41 of the 42 black prospective jurors it could have struck. (Data is lacking regarding the fifth trial, so these statistics include only the first four trials and the present, sixth, trial.) Second, the prosecutor removed 5 of the 6 potential jurors in the sixth trial. Third, in questioning potential jurors, the prosecutor asked far more questions of the black jurors before striking them compared to the white jurors who were not struck; the Court saw this disparity in questioning as an apparent attempt to find pretextual reasons to strike black prospective jurors. Fourth, the state’s expressed reasons for striking one juror, Carolyn Wright, were equally relevant to a white juror who was not challenged. She was the only juror whose strike was found to be intentionally discriminatory. The Supreme Court opinion stated clearly that it was not deciding that any one of these four facts alone would require reversal of the conviction. Rather, it concluded that “all the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State’s peremptory strike of black prospective juror Carolyn Wright was not ‘motivated in substantial part by discriminatory intent.’” The Court clearly stated that “we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.”



Obviously, this decision is important to Flowers, whose four murder convictions and death sentence have been struck down. The state is free to retry Flowers again. The Court did not bar the same prosecutor from bringing the prosecution of Flowers or requiring the trial to be held in another county, although either would, if the next trial resulted in a conviction and a *Batson* claim were made, weaken the argument that there is a pattern of discrimination by the prosecutor in the numerous trials.

When the Supreme Court decided *Batson*, Justice Thurgood Marshall concurred. He applauded the Court for announcing that racially discriminatory use of peremptory challenges violates the Equal Protection Clause and for reversing contrary precedent. Nevertheless, Justice Marshall also indicated a belief that *Batson* would not eliminate impermissible racial discrimination and argued that the only remedy to do so was ending the practice of peremptory challenges entirely. Some critics of *Batson* believe that Justice Marshall was correct in his doubts about the effectiveness of the remedy the Court provided. Because the second step in *Batson*, requiring the challenged party to offer a nondiscriminatory reason for the challenge, is easily met, and because of the deference given by appellate courts to the determinations made by trial courts as to the third step in *Batson*, the procedures in fact often allow the continued use of peremptory challenges for racial or gender discrimination despite the decision's strong condemnation of the biased use of peremptory challenges.

### Ineffective Assistance of Counsel

The Sixth Amendment guarantees criminal defendants the right to counsel and includes the right to “effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court held that ineffective assistance of counsel was determined by applying a two-part test: first, a defendant must demonstrate that counsel's performance was deficient; and second, a defendant must show that the deficient performance was prejudicial to his case. The *Strickland* requirement applies to trials as well as appeals.

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court held that prejudice would be presumed, and thus need not be demonstrated, when an attorney's deficient performance denied the defendant an appeal he otherwise would have pursued. This year, in *Garza v. Idaho*, 586 U.S. \_\_\_\_ (2019), the Supreme Court held that the presumption of prejudice recognized in *Flores-Ortega* applies when a defendant signs a waiver of appeal in the course of pleading guilty but then insists on filing an appeal, which his attorney fails to do.

In 2015, Gilberto Garza Jr. entered into two plea agreements arising from criminal charges brought by the state of Idaho. The agreements each contained a clause stating that Garza waived his right to appeal. Shortly after he was sentenced, Garza informed his trial counsel that he wished to appeal. According to Garza, he repeatedly attempted to notify counsel of his request, and the attorney later stated that he was aware of Garza's wish to appeal. Nevertheless, counsel did not file a notice of appeal and informed Garza, after the time for filing an appeal had passed, that his appeals would be “problematic” because of the waiver clause contained in the plea agreements.

Four months after being sentenced, Garza sought post-conviction relief in Idaho state court, alleging his attorney's ineffective assistance of counsel for failing to file a notice of appeal despite Garza's repeated requests. The Idaho trial court denied relief, and the Idaho Court of Appeals and the Idaho Supreme Court affirmed the decision. The Idaho Supreme Court held that Garza could not show deficient performance by counsel and the resulting prejudice, as required by *Strickland*. The Idaho court concluded that the presumption of prejudice recognized in *Flores-Ortega* does not apply when the defendant has agreed to an appeal waiver. In a 6–3 decision, the Supreme Court reversed, holding that *Flores-Ortega*'s presumption of prejudice for failing to file an appeal as sought by the client applies regardless of whether the defendant has signed an appeal waiver.

The *Garza* Court explained that “no appeal waiver serves as an absolute bar to appellate claims.” Some waiver clauses may leave certain claims unwaived, and some claims cannot be waived. Thus, an attorney's refusal to follow the client's direction to file an appeal is always prejudicial. According to the Court in *Flores-Ortega*, filing a notice of appeal is a “purely ministerial task.” Ultimately, the decision to take an appeal is the defendant's choice to make alone.

Ultimately, as *Garza* shows, the decision to take an appeal is the defendant's choice to make alone.

### Excessive Fines Clause

In *Timbs v. Indiana*, 586 U.S. \_\_\_\_ (2019), the Court held that the Eighth Amendment's Excessive Fines Clause is applicable to the states under the

Fourteenth Amendment's Due Process Clause. Under the Eighth Amendment, “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Excessive Fines Clause, the Court reasoned, is a safeguard for defendants against abuses of the government's power to punish.

After pleading guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft, Tyson Timbs was sentenced to one year of home detention and five years of probation, including a requirement for Timbs to participate in a substance abuse treatment program. Additionally, Timbs was required to pay fees and costs totaling \$1,203. The state then brought a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle was used to transport heroin. The vehicle, which Timbs had recently purchased for \$42,000 using money from insurance proceeds and not from drug sales, was seized at the time of Timbs's arrest.

Although the trial court found that the vehicle had been used to transport heroin, it denied the forfeiture because the purchase price of the vehicle was more than four times the maximum \$10,000 monetary fine that could have been assessed against Timbs in his criminal case. Because of this disproportionality, the trial court determined that the forfeiture was unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed the trial court's determination, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause is applicable only to federal action, but not to state action. The Indiana Supreme Court did not decide the question of whether the forfeiture in this case was excessive.



The Supreme Court granted a writ of *certiorari* to decide whether the Eighth Amendment's Excessive Fines Clause is applicable to the states under the Due Process Clause of the Fourteenth Amendment. In a 9–0 vote, the Court reversed the Indiana Supreme Court's decision and held that the Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth Amendment. Justice Ruth Bader Ginsburg wrote for the Court, and Justices Clarence Thomas and Neil Gorsuch wrote concurring opinions. The concurring justices agreed as to the result, but would find the incorporation under the Fourteenth Amendment Privileges or Immunities Clause rather than under the Due Process Clause.

The Court's opinion focused on the history of incorporating Bill of Rights protections to the states, as well as the application of the Excessive Fines Clause to state civil *in rem* forfeitures (the forfeiture of property used in the commission of an offense). Justice Ginsburg noted that the history of the Clause dated back to the Magna Carta and that, at the time of the ratification of the Fourteenth Amendment, 35 of the 37 states expressly prohibited excessive fines. The protections found in the Bill of Rights are enforceable against state action under the Fourteenth Amendment, Justice Ginsburg explained, if the protection is “fundamental to our scheme of ordered liberty” or “deeply rooted in this Nation's history and tradition.” *McDonald v. Chicago*, 561 U.S. 742 (2010). The Court found those tests met and thus concluded that the Indiana Supreme Court erred in holding that the Clause did not apply to the state court's forfeiture of Timbs's vehicle.

Indiana argued that the Excessive Fines Clause “does not apply to its use of civil *in rem* forfeitures because...the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted.” In responding to this argument, the Court reiterated its opinion in *Austin v. United States*, 509 U.S. 602 (1993), which held that civil *in rem* forfeitures are fines that fall within the protection of the Excessive Fines Clause when they are at least partially punitive. To succeed in its argument, the Court contended, the state would have to convince the Court to overrule *Austin*, or to hold that the Excessive Fines Clause is not incorporated because its application to civil *in rem* forfeitures is neither “fundamental nor deeply rooted.”

The Supreme Court refused to consider the question of whether the Court should overrule *Austin* because the state did not make that argument in the Indiana Supreme Court. In the Indiana Supreme Court, the state had argued that the forfeiture of Timbs's SUV was not excessive; that court in no way addressed the Clause's application to civil *in rem* forfeitures. Thus, the Court declined to reconsider *Austin* or to decide whether civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are partially punitive.

Indiana's final argument posited that application of the Excessive Fines Clause to the states cannot be incorporated even if it does apply to civil *in rem* forfeitures. The Court reasoned that, once a Bill of Rights protection is incorporated, there is no difference between

application of that right to conduct by the federal government and conduct by the states. It acknowledged one exception to this rule, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which held that jury unanimity is required in federal, but not state, criminal proceedings, but indicated that the exception reflected an unusual judicial disagreement and it is unclear if the Court would continue or overrule that exception if it were challenged.

Accordingly, the Supreme Court vacated the Indiana decision and remanded the case for further proceedings.

## Searches and Seizures

For the third time in recent years, the Court addressed warrantless searches for blood alcohol concentration (BAC) in the bodies of allegedly impaired drivers, in *Mitchell v. Wisconsin*, 588 U.S. \_\_\_\_ (2019). The Fourth Amendment has two clauses, one setting the requirements for issuance of warrants by judges and one prohibiting unreasonable searches and seizures. Warrants are not always required, but there is a preference for having judicial authorization before a police officer carries out a search or seizure. In numerous circumstances, court decisions have approved exceptions to the warrant procedure, finding good reason for dispensing with a warrant and declaring the searches to be reasonable.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court recognized that forcing people to have blood taken from their body is a search, but upheld the warrantless blood draw of an

apparently intoxicated driver involved in an automobile accident as reasonable under the exigent, or emergency, circumstances exception to the warrant requirement. The presence of alcohol in blood diminishes once the person stops drinking, so the Court concluded it is important to have the test done quickly in order to obtain a proper reading to be used in evidence.

In *Missouri v. McNeely*, 569 U.S. 141 (2013), the Supreme Court clarified that *Schmerber* did not hold that all nonconsensual blood tests were allowed in evidence without warrants but rather that the further delays caused by police dealing with an automobile accident, combined with the natural decrease over time in BAC, created an exigent circumstance allowing the warrantless search.

*Birchfield v. North Dakota*, 579 U.S. \_\_\_\_ (2016), applied the search incident to arrest exception to the warrant requirement to justify warrantless breath tests of persons arrested for drunk driving but not warrantless blood tests, because the breath tests are less intrusive, equally trustworthy, and readily able to be performed. This term, the Court addressed whether a warrantless blood test should be allowed to be admitted in evidence when the person in custody was unconscious or otherwise physically unable to participate in the breath test.

Like all states, Wisconsin law provides that a driver, by obtaining a license, has given implied consent to submit to a BAC test when there is probable cause to believe that the person was driving while impaired by alcohol. Although drivers can withdraw the consent

**The protections found in the Bill of Rights are enforceable against state action under the Fourteenth Amendment, Justice Ginsburg explained in *Timbs*, if the protection is “fundamental to our scheme of ordered liberty” or “deeply rooted in this Nation's history and tradition.”**

and refuse the test, their license may then be revoked and their refusal used against them in court to show that they were driving over the legal alcohol limit. Gerald Mitchell was stopped lawfully while driving and arrested for driving while intoxicated. Police took him to the station for the breath test, but he was too lethargic to perform the test and then became unconscious. He was taken to the hospital, whose personnel performed a blood test on him while he was unconscious. His BAC was substantially over the legal limit. His conviction on the drunk driving charges was affirmed by the state courts on two grounds: first, that the implied consent laws mean that Mitchell consented to the blood test, thus satisfying the Fourth Amendment, and second, that it is reasonable to perform a warrantless blood test on an unconscious person because the less intrusive breath test is not available.

Most of the briefing and argument before the Supreme Court concerned whether implied consent laws indicated consent to taking the BAC test, but the Court did not decide that question. Instead, it concluded that Mitchell's inability to undergo the breath test due to his lethargy and unconsciousness, combined with the natural diminution of alcohol in his blood over time, almost certainly created an exigent circumstance that justified performing the BAC test without a judge first issuing a warrant for it. The exigency was established because the officer could reasonably believe that the delay necessary to obtain a warrant threatened the destruction of the blood content evidence of driving while intoxicated. The Court recognized that in unusual cases the defendant could rebut the finding of exigent circumstances and remanded the case to the Wisconsin courts.

Charges of driving while intoxicated are numerous, so any decision regarding BAC testing is important. Such searches comply with the Fourth Amendment if a warrant is issued before the test is performed, or if the arrestee voluntarily consents to the test. A BAC

test is not allowed simply because the person has been lawfully arrested, but a breath test may be carried out without a warrant allowing it. The tests are allowed without a warrant if there is an exigent circumstance, an emergency, or a similar necessary situation, including situations in which a police officer is dealing with a vehicle accident and, almost always, a situation in which the condition of the suspect precludes carrying out the less intrusive breath test. The Court has not decided whether the existence of an implied consent law makes any BAC test reasonable or whether an unconscious person has given a

voluntary consent if, at the time of the test, the person was unable to revoke the implied consent to the blood draw.

This term, the Court's opinions regarding criminal procedure were more modest in scope than in recent terms, which applied the Fourth Amendment to new technologies and limited the scope of the exclusionary rule. *Gamble* and *Flowers* received the most media attention, but neither made any change in existing legal doctrine. *Timbs* did change the law by holding that the Excessive Fines Clause applied to the states, but the decision is not surprising in light of the reasoning of *McDonald v. Chicago*, 561 U.S.742 (2010), applying the second amendment to the states. Similarly, *Garza* and *Mitchell* do not represent surprising changes from recently decided cases.

**This term, the Court's opinions regarding criminal procedure were more modest in scope than in recent terms, which applied the Fourth Amendment to new technologies and limited the scope of the exclusionary rule.**



Alan Raphael is a member of the faculty of Loyola University Chicago School of Law and teaches criminal procedure and constitutional law. He can be reached at [Araphae@luc.edu](mailto:Araphae@luc.edu). In writing this article, he worked with Sarah Sewell, a 3L at Loyola University Chicago School of Law.

*PREVIEW of United States Supreme Court Cases* 46, no. 8 (August 7, 2019): 7–12. © 2019 American Bar Association

# The Census Case: An Ordinary Ruling in an Extraordinary Case

by Steven D. Schwinn

In March 2018, Secretary of Commerce Wilbur Ross announced that he would add a citizenship question to the 2020 census. The Secretary said that his decision came at the request of the Department of Justice (DOJ) for better citizenship data to enhance enforcement of the Voting Rights Act. The explanation struck many as suspect: the DOJ had plenty of citizenship data from already-existing administrative records, and, in any event, it did not seem particularly eager to enforce the Voting Rights Act (VRA). (Under President Trump, the DOJ had not brought a single enforcement action under the VRA.) Moreover, many thought that a citizenship question would depress the census count, because noncitizens, and households associated with them, would decline to complete the census questionnaire out of fear that the government would use the information to enforce immigration laws against them. So states, local governments, and non-governmental organizations sued to stop the Secretary from adding the question.

Soon into the litigation, Secretary Ross's explanation for the question quickly unraveled. The administrative record revealed that the Secretary had considered adding a citizenship question long before the DOJ asked for it; that he had shopped around to different agencies for a request for the citizenship question, without success; and that he only persuaded the DOJ to ask for it after he intervened personally with the Attorney General. Later findings, outside of the court case, revealed earlier work by a Republican operative that concluded that adding a citizenship question to the census would benefit "Republicans and non-Hispanic whites." Portions of the DOJ letter asking for the question tracked some of that work, word for word.

Ultimately, the Supreme Court ruled against Secretary Ross. The Court concluded that his explanation for the citizenship question was pretextual. The Court, however, gave Secretary Ross at least a theoretical second chance to develop a non-pretextual reason for the question. In the whirlwind aftermath, the government scrambled to come up with a new reason, or to find another way to get the citizenship question on the census. But given the quick timing between the Court's ruling and census printing and preparation deadlines, Secretary Ross was unable to come back with a new reason, and the government couldn't identify any other way to include the question. In the end, the question will not appear on the 2020 census (at least so far as we know).

The ruling saved the census from a significant undercount. As a result, it also saved several states and local governments from losses

in political representation and population-tied federal funds. At the same time, it prompted President Trump to order the Department of Commerce to compile citizenship data from existing administrative records. While by law the Department can, and must, do this anyway, President Trump's order clarifies that the government will obtain citizenship data, one way or the other.

Stepping back, the ruling is a second major test (after the travel ban case, *Trump v. Hawaii*, 585 U.S. \_\_\_\_ (2018), from last Term) for the Court in its treatment of extraordinary executive decision-making in an extraordinary presidency. The Court has already agreed to a third test—the DACA case, set for next Term—and will undoubtedly hear others. For the Court, there's a critical common question that runs across all of these cases: How should it set and apply ordinary law to extraordinary decision-making in these extraordinary cases?

**The ruling saved the census from a significant undercount. As a result, it also saved several states and local governments from losses in political representation and population-tied federal funds. At the same time, it prompted President Trump to order the Department of Commerce to compile citizenship data from existing administrative records.**

## I. Background

### A. An Overview of the Census

Article I, Section 2 of the Constitution, the Enumeration Clause, requires the government to conduct a head count of the "whole number of persons in each State" (including citizens and noncitizens) every ten years.

The government uses this information to apportion seats in the House of Representatives and to allocate certain federal funds to the states. It also uses this information to collect certain demographic statistics about the population, including, for example, race, age, sex, health, education level, occupation, housing, and military service, which it then uses for a variety of other purposes. State and local governments use this information to draw electoral districts and for some of the same purposes as the federal government. The Clause gives wide berth to Congress in designing the form of the census: it orders the count "in such Manner" as Congress "shall by Law direct."

Congress "directed" the decennial count through the Census Act. The Act delegates to the Secretary of Commerce the job of conducting the census, with the help of the Census Bureau, a statistical agency within the Department of Commerce. Like the Enumeration Clause, the Act gives wide berth to the Secretary: it says that the Secretary shall conduct the census "in such form and content as he may determine." 13 U.S.C. § 141(a).

Notwithstanding that broad delegation, however, the Act also imposes certain requirements on the Secretary. For example, Section 6(c) of the Act requires the Secretary, "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required," to "acquire and use information

available from” other federal agencies. 13 U.S.C. § 6(c). Moreover, Section 195 requires the Secretary, “if he considers it feasible,” to use statistical “sampling” in collecting demographic information. And Section 141(f) requires the Secretary to submit a report to Congress “containing the Secretary’s determination of the subjects, types of information, or questions as proposed to be modified” on the census.

But that’s not all. The Secretary’s decisions about the census, like most administrative agency decisions, are subject to the requirements of the Administrative Procedure Act (APA). The APA prohibits the Secretary from making decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

According to the Court, this means that an agency must “examine the relevant data and articulate a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made.’”

*Motor Vehicle Manufacturers Association v. State Farm Insurance*, 463 U.S. 29 (1983). An agency fails to meet this standard if it has “failed to consider an important aspect of the problem,

offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Courts reviewing an agency decision must determine “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). While these are loose and deferential standards, to be sure, they are not toothless.

### ***B. A Brief History of the Citizenship Question***

Although Secretary Ross’s decision to add the citizenship question to the 2020 census was a bold and controversial act, this wouldn’t have been the first time that the Census Bureau asked about citizenship. Indeed, every decennial census between 1820 and 1950, save one, in 1840, asked some form of a citizenship question to all households.

But that changed with the 1960 census. In that census, the Bureau asked the citizenship question to just a fraction of total households. The Bureau moved the question off the “short form,” which goes to all households, and onto the “long form,” which went only to about one-fourth to one-sixth of the population. The Bureau made this change as part of a larger effort to simplify the short form by asking only basic demographic questions (like sex, race, age, and marital status), and leaving more detailed demographic questions to the long form. At the time, the Bureau explained that “general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory requirements for annual alien registration that could provide the Immigration and Naturalization Service, the principal user of such data, with the

information it needed.” (In other words, the Bureau could obtain citizenship information from other administrative records.) The Bureau used statistical techniques to extrapolate the results from the long-form questions to estimate the demographics, including citizenship, of the general population.

In 2010, the Bureau changed the format and distribution of the long form. The Bureau asked the same detailed demographic questions, including the citizenship question, on the new American Community Survey (ACS). The Bureau distributed the ACS annually to a rotating sample of about 2.6 percent of the total population. Like the long form, the ACS includes more questions seeking more detailed demographic information. As it did with the earlier long

form, the Bureau used statistical techniques to extrapolate the results to estimate the demographics of the general population.

In sum, then, the Bureau asked some form of a citizenship question in every decennial census from 1820 to 1950, except for 1840. It asked a citizenship question to only a fraction of the population on the long form with every decennial census from 1960

to 2000. And it asked a citizenship question to an even smaller (and rotating) fraction of the population on a new form, the ACS, every year starting in 2010.

### ***C. The Secretary’s Decision to Add the Citizenship Question and His Initial Explanation***

In March 2019, Secretary Ross announced in a memo that he would add, or re-add, a citizenship question to the regular, short-form 2020 census. This meant that every household would have to answer a question about its members’ citizenship. (I say “have to,” because the Census Act requires recipients, that is, everyone, to respond to the census.)

Secretary Ross’s memo explained that he was adding the question at the request of the DOJ, in a December 2017 letter, which sought improved data about citizen voting-age population (CVAP) in order to enforce the VRA. According to this explanation, the DOJ thought that a direct question on the census could provide it with block-level CVAP data, a benchmark in determining whether and when a state unlawfully dilutes the influence of racial minority voters by depriving them of single-member districts in which they can elect their preferred candidates. The DOJ explained that citizenship data from the ACS was not ideal for this purpose, because it was not reported at the level of the census block (which is the basic element of legislative districting plans); it had a substantial margin of error (because it estimated citizenship based on statistical sampling); and it did not align with the decennial census’s total population counts (because the ACS is administered every year, while the census is administered only every ten years).

Secretary Ross’s memo further explained that he considered three options for gathering the requested citizenship data. Under the first

**The Bureau asked some form of a citizenship question in every decennial census from 1820 to 1950, except for 1840. It asked a citizenship question to only a fraction of the population on the long form with every decennial census from 1960 to 2000. And it asked a citizenship question to an even smaller (and rotating) fraction of the population on a new form, the ACS, every year starting in 2010.**



option, the Bureau would continue to collect citizenship data in the ACS and develop a model that would more accurately estimate citizenship at the block level. Under the second, the Bureau would add a citizenship question to the short-form decennial census. Under the third, the Bureau would use data from existing administrative records from other agencies (like the Social Security Administration and Citizenship and Immigration Services) to provide the DOJ with citizenship data.

According to Secretary Ross, each option had a drawback. As to the first, Secretary Ross argued that the Bureau “did not assert and could not confirm” that it could develop a model “with a sufficient degree of accuracy.” As to the second, the Bureau itself predicted that a citizenship question would result in less accurate responses, because some households would respond inaccurately, or decline to respond altogether. Even using the Bureau’s “non-response follow up” procedures to count people who failed to respond to the census, the Bureau anticipated that the second alternative would result in less accurate citizenship data. Finally, as to the third option, the Secretary concluded that administrative records from other agencies were missing for more than 10 percent of the population.

So Secretary Ross asked the Bureau to work up a fourth option. This new option combined the second and third original options,

so that the Bureau would add a citizenship question to the census *and* draw on existing citizenship data from other agencies. The Secretary said that he “carefully considered” the Bureau’s prediction that adding a citizenship question would depress the response rate, but that it was not possible to

“determine definitively” that it would. (He noted that there was “limited empirical evidence” on the question, based on the Bureau’s past experience asking it.) He also noted the Bureau’s long history of asking the question; that other democracies (Australia, Canada, France, Indonesia, Ireland, Germany, Mexico, Spain, and the United Kingdom) ask a citizenship question; and that the United Nations recommends that a country collect citizenship information on its population. In all, he argued that “the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate,” and that this fourth option would provide the DOJ with the “most complete and accurate” CVAP data in response to its request.

#### ***D. The Lawsuits and the Secretary’s Further Explanation***

Two groups of plaintiffs immediately brought two separate suits against the Secretary in the United States District Court for the Southern District of New York. (The first group included 18 states, the District of Columbia, several counties and cities, and the United States Conference of Mayors. The second included several nongovernmental organizations that work with immigrant and racial minority communities.) The first group argued that the Secretary violated the Emoluments Clause and the APA; the second group argued that the Secretary violated the equal protection component of the Fifth Amendment. At the core of their complaints,

the plaintiffs argued that a citizenship question would cause an undercount in the census, because noncitizen households would decline to respond out of fear that the government would use the information to enforce immigration laws against them. The district court consolidated the cases and moved forward.

In June 2018, the government filed the Department of Commerce’s “administrative record,” which included the materials that Secretary Ross relied upon in making his decision. The record included the December 2017 DOJ letter and several memos from the Bureau analyzing the effects of adding the citizenship question to the census. Soon after, the government supplemented the record with a new memo from Secretary Ross that was “intended to provide further background and context regarding” the March 2018 memo. This new memo revealed that the Secretary started to consider the citizenship question in early 2017, much earlier than he originally suggested. It also revealed that the Secretary himself asked the DOJ whether it “would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act,” and not the other way around, as the Secretary earlier suggested.

Based on this new information, the plaintiffs rightly guessed that the government submitted an incomplete administrative record. They

moved the district court to compel the government to complete the administrative record; the court granted the motion; and the parties jointly agreed to include an additional 12,000 pages of administrative record. This new information revealed that Secretary Ross and his staff asked other agencies for requests to

include a citizenship question before they asked the DOJ, that those other agencies declined, and that the DOJ finally capitulated.

The plaintiffs also asked for additional discovery outside the administrative record, including depositions of Secretary Ross and DOJ and Commerce officials. The district court granted those requests. The Supreme Court stayed the order for Secretary Ross’s deposition, but it allowed the other extra-record discovery to move forward.

The district court held a trial on the plaintiffs’ APA and equal protection arguments. (It earlier dismissed the plaintiffs’ Emoluments Clause claim.) The court found that Secretary Ross’s decision would result in a census undercount of 5.8 percent, based on nonresponses by noncitizen households. The court ruled that Secretary Ross’s decision was arbitrary and capricious in violation of the APA. But as to the equal protection claim, the court ruled in favor of the government, concluding that the plaintiffs failed to show that Secretary Ross was motivated by discriminatory animus. *New York v. United States Department of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019).

The government appealed to the Second Circuit and simultaneously filed a petition for writ before judgment at the Supreme Court. The Court granted the writ, thus bypassing the Second Circuit, and agreed to hear the case.

**At the core of their complaints, the plaintiffs argued that a citizenship question would cause an undercount in the census, because noncitizen households would decline to respond out of fear that the government would use the information to enforce immigration laws against them.**

Shortly before oral argument, the estranged daughter of Dr. Thomas Hofeller, a deceased Republican redistricting specialist, discovered additional relevant material on her father's computer hard drive. In particular, this new material revealed that Dr. Hofeller concluded in a 2015 study that adding a citizenship question to the 2020 census "would clearly be a disadvantage to the Democrats" and "advantageous to Republicans and non-Hispanic Whites" in redistricting. It also revealed that in August 2017 Dr. Hofeller helped ghostwrite a draft DOJ letter to the Department of Commerce requesting a citizenship question to aid with VRA enforcement. This draft adopted the same VRA rationale as the December 2017 DOJ letter and bore striking similarities to Dr. Hofeller's 2015 study. The plaintiffs brought this material to the attention of both the Supreme Court and the district court. The Supreme Court did not add the material to the record, and there is no direct evidence that the Court considered it.

## II. The Court's Ruling

On June 27, a sharply divided Supreme Court ruled against the Secretary. *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). But at the same time, the Court gave the Secretary at least a theoretical shot at coming up with a new, non-pretexual explanation for the citizenship question that might (again, in theory) allow the government to add the question to the census. Chief Justice John Roberts wrote the majority opinion. But the alignments are sometimes complicated, and I indicate below which justices joined which portions of the Chief's majority.

As an initial matter, the Court ruled that the plaintiffs had standing. (This portion of the opinion was unanimous.) In particular, the Court held that the plaintiffs sufficiently pleaded that Secretary Ross's decision would result in a depressed head count in certain areas of the country, because noncitizen households would decline to respond to the census. The Court held that the state plaintiffs sufficiently demonstrated that a depressed head count would cause them to lose representation in the House of Representatives and federal funding that is tied to population. The Court said that the state plaintiffs showed that if the census undercounted noncitizen households even as little as 2 percent, they would lose federal funding that is tied to state population. (Recall that the district court found that the citizenship question would result in a 5.8 percent undercount.)

Notably, the Court rejected the government's argument that the plaintiffs' theory of standing rested on the impermissible assumptions that third parties (noncitizen households) would violate their legal obligation under the Census Act to respond to the census and that the government would violate its legal obligation under the Act not to use census information for law-enforcement purposes. (The plaintiffs argued that noncitizen households would decline to respond out of fear that the government would use citizenship information to enforce immigration law against them.) The Court wrote that the plaintiffs showed "that third parties will likely react in predictable ways to the citizenship question, even

if they do so unlawfully and despite the requirement that the Government keep individual answers confidential":

The evidence at trial established that noncitizen households have historically responded to the census at lower rates than other groups, and the District Court did not clearly err in crediting the Census Bureau's theory that the discrepancy is likely attributable at least in part to noncitizens' reluctance to answer a citizenship question. Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effects of Government action on the decisions of third parties.

*Department of Commerce*, 139 S. Ct. at 2566.

The Court next detailed what the government did *not* violate. (Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh joined these portions of the opinion.) First: the Enumeration Clause. The Court held that Secretary Ross's decision did not violate the Enumeration Clause of the Constitution,

**The Court held that Secretary Ross's decision did not violate the Enumeration Clause of the Constitution, because that Clause grants the government extremely broad authority to conduct the census and to collect related information, and because the government has consistently asked at least some demographic questions on the census since its inception in 1790.**

because that Clause grants the government extremely broad authority to conduct the census and to collect related information, and because the government has consistently asked at least some demographic questions on the census since its inception in 1790. According to the Court, the Secretary's 2018 decision to include a citizenship question falls squarely within this "open, widespread, and

unchallenged practice" of collecting demographic information:

All three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population. Since 1790, Congress has sought, or permitted the Secretary to seek, information about matters as varied as age, sex, marital status, health, trade, profession, literacy, and value of real estate owned. Since 1820, it has sought, or permitted the Secretary to seek, information about citizenship in particular. Federal courts have approved the practice of collecting demographic data in the census. While we have never faced the question directly, we have assumed that Congress has the power to use the census for information-gathering purposes, and we have recognized the role of the census as a "linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country."

*Department of Commerce*, 139 S. Ct. at 2567.

In sum, "[i]n light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire."

Next: the Census Act. The Court ruled, contrary to the district court, that the Secretary's decision did not violate two provisions of the Census Act, Sections 6(c) and 141(f). Recall that Section 6(c) requires the Secretary, "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required," to "acquire and use information available" from other federal agencies and state and local governments. The Court noted at the outset that this Section might not even apply to Secretary Ross's decision, because by its plain terms, it might only refer to other statistics that the Census Act requires the Secretary to collect and publish, and not to "census-related data that the Secretary wishes to acquire." But even if the provision applied, the Court ruled that the Secretary did not violate it; instead, he complied with it, because he reasonably concluded that existing administrative records did not include "the more complete and accurate data that DOJ sought."

As to Section 141(f), which requires the Secretary to report to Congress on his plans for the census, the Court ruled that Secretary Ross complied. The Court noted that the Secretary failed to mention the citizenship question in his initial report to Congress in March 2017. But it held that he included it in a subsequent report in March 2018. "The Secretary's March 2018 report satisfied the requirements of [Section 141(f)(3)]: By informing Congress that he proposed to include a citizenship question, the Secretary necessarily also informed Congress that he proposed to modify the original list of subjects that he submitted in the March 2017 report." The Court held that even if Secretary Ross technically violated Section 141(f), his March 2018 report rendered his error harmless.

Third: the APA's requirement that the Secretary's decision be supported by the evidence. The Court ruled that the Secretary's decision was, indeed, supported by the evidence in front of him. The Court explained that there were no existing administrative records for about 10 percent of the population and that the Bureau would have to estimate citizenship for this population. According to the Court, Secretary Ross reasonably determined that a direct citizenship question would fill this gap. Here's why:

As the Bureau acknowledged, each approach—using administrative records alone or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau's estimates. With a citizenship question, there would also be some erroneous self-responses (about 500,000) and some conflicts between responses and administrative record data (about 9.5 million).

Against this backdrop of missing, incomplete, and inaccurate data on citizenship, the Court noted that the Bureau had not yet developed a model for estimating citizenship when Secretary Ross made his decision, and even if it had, "there was no way to gauge its

relative accuracy." So the Court ruled that Secretary Ross reasonably "opted instead for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people." The Court thus held that the Secretary's decision was based on the available evidence, in compliance with the APA, and that "the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make."

Having detailed what the Secretary did *not* violate, the Court then took a sharp turn and ruled what the Secretary *did* violate: the APA's requirement that the Secretary state the real reason for his decision. (Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined this portion of the opinion.) Recall that in addition to requiring that the Secretary's decision be based on evidence, the APA also requires that the Secretary state a true, non-pretextual reason for his decision. According to the Court, this is where Secretary Ross failed.

The Court noted that the Secretary "began taking steps to reinstate a citizenship question about a week into his tenure," without a clear reason why; that he sought a request for a citizenship question from the Department of Homeland Security and the DOJ's

Executive Office for Immigration Review, even though neither agency has responsibility for enforcing the VRA; that he asked Commerce staff if he could add the citizenship question without a request from another agency; that Commerce staff eventually

proposed the idea of asking the DOJ's Civil Rights Division for the request; and that the Civil Rights Division complied only after Secretary Ross contacted the Attorney General directly to ask for the request. Even then, the Court noted that the DOJ was more interested in helping the Department of Commerce put a citizenship question on the census than actually obtaining the data: the DOJ's letter "drew heavily on the contributions from Commerce staff and advisors"; it bizarrely contained a specific request for a citizenship question (instead of a more natural, and more general, request for better citizenship data); and DOJ staff declined to meet with the Bureau to discuss other ways to meet the DOJ's stated need for better citizenship data. The Court summed it up:

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

*Department of Commerce*, 139 S. Ct. at 2575.

The Court remanded the case to the Department of Commerce to give it another chance to come up with a non-pretextual reason for adding the question.



Justice Thomas wrote separately in an opinion joined by Justices Gorsuch and Kavanaugh. Justice Thomas argued that the Court had no business second-guessing the Secretary's decision "solely because it questions the sincerity of the agency's otherwise adequate rationale." He claimed that "this Court has never held an agency decision arbitrary and capricious on the ground that its supporting rationale was 'pretextual,'" and that the Court in taking this extraordinary action "[e]cho[ed] the din of suspicion and distrust that seems to typify modern discourse." In other words, he claimed that the Court applied especial scrutiny to *this* Secretary's (and perhaps *this* administration's) decision. He contended that the Court instead should have applied its usual "presumption of regularity" to the Secretary's decision. Applying that presumption, he claimed that the record evidence "falls far short of establishing that the VRA rationale did not factor at all into the Secretary's decision," even if other reasons supported the decision, too.

Justice Thomas concluded by warning that the Court's decision opened up a new line of attack on executive decisions that would encourage opponents to "craft narratives that would derail them." At the very least, he warned, the ruling "enables partisans to use the courts to harangue executive officers through depositions, discovery, delay and distraction." He concluded with a hope that the decision "comes to be understood as an aberration—a ticket good for this day and this train only."

Justice Alito, writing for himself alone, went a step further and argued that the Court entirely lacked authority to review Secretary Ross's decision. Justice Alito argued that the Secretary's decision was "committed to agency discretion under law," and therefore constitutes a nonreviewable agency decision under the APA.

Justice Breyer wrote separately, too, in an opinion joined by Justices Ginsburg, Sotomayor, and Kagan. Justice Breyer agreed with the Court that Secretary Ross offered only a pretextual explanation for his decision, but Justice Breyer also argued that Secretary Ross's decision was arbitrary and capricious in that he "did not make reasonable decisions about [the] potential costs and benefits in light of the administrative record." Justice Breyer pointed out that Secretary Ross knew well how adding a citizenship question would impact census response rates: the Bureau itself gave him an estimate, based on its own statistical analyses of response rates on its own instruments, that the question would result in 630,000 additional nonresponding households, or more than 1 million additional people. He argued that other outside sources supported the Bureau's general conclusion that a citizenship question would depress the response rate and that no evidence in the record supported the contrary.

Justice Breyer also argued that the record evidence showed that Secretary Ross wrongly concluded that even if a citizenship question would depress the count, "the value of more complete and accurate data derived from surveying the entire population outweighs... this concern." Justice Breyer noted that the Bureau had "high confidence" that it could model citizenship data for the 10 percent of the population not covered in existing administrative records,

and that for those already in the administrative records, about one-third of noncitizens (or 9.5 million) would answer the question incorrectly. Justice Breyer concluded that the question would not add anything to the Bureau's citizenship data: "If [the Bureau] accepts the answer to the citizenship question as determinative, it will have less accurate data [because one-third of those already in other administrative records would answer incorrectly]. If it accepts the citizenship data from administrative records as determinative, asking the question will have served no purpose." Because the record evidence showed that the Secretary had all this information when he made his decision to add the citizenship question, and because the Secretary's stated reasons for rejecting the evidence made no sense, Justice Breyer concluded that Secretary Ross's substantive decision was not supported by the record and thus arbitrary and capricious under the APA.

### III. The Aftermath

The Court's ruling effectively sent the case back to the Department of Commerce to come up with a new, non-pretextual reason for adding a citizenship question. But as a practical matter, the timing made this difficult. That's because the Bureau had to physically print the census forms—with or without the question—before it could distribute them. That's no small task: the government contracted with R.R. Donnelley to print over one

billion questionnaires, postcards, letters, envelopes, and inserts for the 2020 census. The sheer size of the job caused the Bureau to set a July 1, 2019, deadline to begin printing, so that it could meet its other, later deadlines in conducting the 2020 census. But this left the Department only four

calendar days from the Court's ruling (on June 27) to develop a new, non-pretextual reason, and then to convince the courts that its new reason was legally sufficient. (And the Secretary's new reason would undoubtedly be challenged in the district court, the Second Circuit, and ultimately, again, in the Supreme Court.)

It wasn't a huge surprise, then, that the DOJ and the Department of Commerce announced that the Bureau would start printing census forms without a citizenship question. It also wasn't a surprise that a government attorney, Joshua Gardner, special counsel at the DOJ, told a lower court the same thing.

But President Trump threw a wrench into the business when he tweeted on July 3 that "[t]he News Reports about the Department of Commerce dropping its request to put the Citizenship Question on the Census is incorrect or, to state it differently, FAKE! We are absolutely moving forward, as we must, because of the importance of the answer to this question." (After the district court read the tweet and called a special hearing, Gardner had to scramble to answer for the apparent inconsistency. He told the district court, "What I told the Court yesterday was absolutely my best understanding of the state of affairs... The tweet this morning was the first I had heard of the President's position on this issue.... I am doing my absolute best to figure out what's going on." The full transcript is available here, <https://www.documentcloud.org/documents/6182391-July-3-2019-Transcript-of-Hearing-Before-U-S>.)

**The Court's ruling effectively sent the case back to the Department of Commerce to come up with a new, non-pretextual reason for adding a citizenship question. But as a practical matter, the timing made this difficult.**



html.) President Trump then ordered the DOJ “to examine whether there is a path forward consistent with the Supreme Court’s decision that would allow us to include the citizenship question on the census.” He publicly represented that the government would find a new, non-pretextual reason for adding the citizenship question that would satisfy the courts.

But President Trump didn’t stop there; he threw two more wrenches into the mix. First, he publicly claimed that he would order the Department to add the citizenship question by executive order. Next, he publicly floated the idea of delaying the 2020 census to give the government more time to develop a reason for the citizenship question that would satisfy the courts.

Ultimately, none of these orders, threats, or trial balloons panned out. Instead, for all the bluster, the issue ended with a whimper: On July 11, President Trump issued an executive order that directed the Department of Commerce to obtain citizenship data through existing records in other agencies—exactly the solution that the Bureau argued for in the first place and exactly what the Census Act requires.

(There is still some confusion about the government’s intentions with regard to the citizenship question. For example, as this piece goes to print, there are reports that at least one household received a “Census Test” with a citizenship question on it. The Census Test is a ten-question survey that goes to 480,000 households to test the “operational effects of including a citizenship question on the 2020 Census.” It’s not at all clear why a Census Test for the 2020 census would include such a question, especially now that the litigation is over.)

On July 16, back at the district court, the plaintiffs filed a formal request for sanctions against government officials for providing false or misleading statements to the court about the reasons and origins of the citizenship question. The plaintiffs based this motion on the new information in Dr. Hofeller’s files. They also opposed the government’s motion to switch out the government attorneys on the case. As of this writing, the court is still considering the motion for sanctions, but it rejected the government’s motion to change attorneys. The court ultimately entered an order that permanently prohibits the government from adding a citizenship question to next year’s census. (The United States District Court for the District of Maryland is considering a similar order proposed by the government and the plaintiffs in a different challenge to the census.)

At the same time, the House Oversight Committee has been conducting its own investigation into the citizenship question. In April, the Committee authorized its chair to issue subpoenas for a deposition of Principal Deputy Assistant Attorney General John Gore and for documents related to Secretary’s Ross’s decision held by Attorney General William Barr and Secretary Ross. The DOJ announced that it would not comply with the subpoena for Gore, and Barr and Ross declined to turn over the requested documents. The House voted on July 17 to hold Barr and Ross in contempt for

failing to respond. The Committee’s requests, the government’s response, and the Committee’s subpoenas are part of a larger pattern in the many disputes between the House of Representatives and the White House over the House’s investigatory authority over the administration. Ultimately, the courts, and perhaps even the Supreme Court, may have to resolve these disputes.

#### IV. Significance

This ruling is important for at least four reasons. First, and most directly, the ruling and subsequent events mean that the government will not ask a citizenship question on the census (at least so far as we know, and at least so far as the law allows). That could prevent a significant undercount of about 630,000 households, or 1 million individuals, disproportionately noncitizens and Hispanic households. This could have resulted in states losing congressional representation, local communities losing representation in their state and local governments, and states and local governments losing substantial census-tied federal funding. For example, one recent study indicated that a citizenship question could have cost Texas and California one representative each in Congress.

Second, and relatedly, the ruling is important for electoral politics. It’s not news that both parties have been engaged in efforts to tilt

the field in politics in their favor. Indeed, the Court just this Term reviewed two cases in which the Republicans (in one case) and the Democrats (in the other) tried to rig their state’s congressional map in their favor. The Supreme Court rejected the challenges to the maps, ruling that the issue, political gerrymandering, was a

nonjusticiable political question. That ruling leaves one of these tools on the table. But the ruling in the census case takes another one off. That’s because it was widely understood that a depressed count would disproportionately disadvantage Democrats and racial minorities. Indeed, Dr. Hofeller’s work said exactly that. (Even though the ruling took the citizenship question off the table, given the administration’s actions and equivocations after the ruling, there is some speculation that the government is now trying to depress the count by simply scaring or confusing noncitizens.)

Next, the ruling is notable for its push-back against a government action at the highest levels for failing to comply with basic administrative procedures, in particular, failing to provide a non-pretextual reason for its decision over a hotly contested political issue. Importantly, a unanimous Court ruled that the plaintiffs had standing; seven justices (all but Justices Alito and Gorsuch) agreed that the Court could review the Secretary’s action under the APA; and five justices (all but Justices Thomas, Alito, Gorsuch, and Kavanaugh) agreed that the Secretary failed to provide an adequate reason under the APA for his decision. The ruling means that even for this Court there is an outer boundary to its deference to this administration—and to what Justice Thomas called the “presumption of regularity.”

To be sure, there were serious doubts. After the Court upheld President Trump’s travel ban last Term, many thought that this

**The ruling is notable for its push-back against a government action at the highest levels for failing to comply with basic administrative procedures, in particular, failing to provide a non-pretextual reason for its decision over a hotly contested political issue.**

Court would accept any explanation, even a pretextual one, for controversial government decisions. Recall that the Court in *Trump v. Hawaii* upheld the travel ban based on its deference to the government's evolving religious-neutral explanation. Strikingly, the Court deferred to the government's religious-neutral explanation even though candidate Trump repeatedly referred to the ban as a "Muslim ban," even though members of the Trump Administration similarly referred to it as a Muslim ban, and even though the government took three separate cracks at crafting a ban that would pass judicial scrutiny. For many, the Court's deference in that case foretold a similar deference here: the Court seemed likely to defer to Secretary Ross's VRA explanation, without scrutinizing the decision further. (Justice Kavanaugh's replacement of Justice Kennedy seemed to make this even all the more likely—if that were possible, given that Justice Kennedy voted to uphold the travel ban in *Trump v. Hawaii*.)

But Chief Justice Roberts switched his alignment in this case and ruled with the progressive wing of the Court. (Chief Justice Roberts aligned with the conservative wing in *Trump v. Hawaii*.) And he did so in a way that underscored his commitment to challenge the administration when it goes awry. In particular, he ruled that the Secretary's decision violated the APA, not because the Secretary's decision was not based on evidence before him (which may have been the cleaner path to finding an APA violation), but because the Secretary failed to offer an adequate and non-pretextual explanation for his decision. This holding came under intense fire from the conservative wing: Justices Thomas, Gorsuch, and Kavanaugh argued that giving a non-pretextual reason wasn't even a requirement under the APA and that the Court's contrary ruling failed to respect the "presumption of regularity" that the Court owed the executive branch; Justice Alito went even further, arguing that nothing about the Secretary's decision was reviewable under the APA. In short, those on the conservative wing offered strong and forceful arguments, and Chief Justice Roberts could easily have gone the other way.

So what explains Chief Justice Roberts's opinion? One theory is that Chief Justice Roberts, the institutionalist, was concerned about the Court's integrity and reputation. By this reckoning, faced with the mounds of evidence that Secretary Ross's explanation was pretextual—and more, that the Secretary and the Department actively tried to conceal the real reason for the question and their behind-the-scenes shenanigans to engineer it—Chief Justice Roberts simply couldn't let the Court turn a blind eye. To do so would have traded on the institutional integrity of the Court. (The late revelation of Dr. Hofeller's materials supports this theory, even though it was not formally part of the record before the Court.)

Another theory is that Chief Justice Roberts, the Court's new swing vote, will simply side with the progressive wing from time to time, either because he agrees with that wing on the merits, or because he is brokering a compromise. Proponents of this theory may find support in Chief Justice Roberts's opinion in *NFIB v. Sebelius*, 567 U.S. 519 (2012), the "Obamacare" case. In that case, recall that the

Chief sided with the Court's progressives to uphold the Affordable Care Act's "individual mandate" as an exercise of Congress's taxing power, even as he sided with the conservative wing to hold that it was not supported by Congress's authority under the Commerce Clause. Chief Justice Roberts's opinion in the census case represents a similar split (siding with the progressives on one issue, even while siding with the conservatives on others), but, because of the nature of the case, his opinion that Secretary Ross's explanation was pretextual was enough to rule against the government. (Of course, this theory hinges on the Court's split along ideological lines. The Court did split along ideological lines on these issues, to be sure, and sharply. But it's important to remember that in most cases alignments on the Court are not partisan or ideological.)

Whatever the explanation for Chief Justice Roberts's opinion, the upshot is that even this Court has an outer boundary to its deference to high-level and controversial decisions by this administration—and that the Court will push back when the administration goes too far.

Finally, the ruling is important in the broader context of administrative governance. Opponents of a strong administrative state have long been challenging aspects of the Court's traditional support of the administrative state. That work has gained some traction. Two parts of it are relevant here.

**The census case is not a *Chevron* case. But it shares the question of just how much the courts should defer to agency decision-making.**

First, this case raises the question of how much the courts should defer to agency decision-making—a question that touches more generally on the

Court's long-standing and deferential approach under the *Chevron* doctrine (after *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984)). Stated simply, under that approach, courts defer to an agency's interpretation of federal law, when the law is ambiguous. The *Chevron* doctrine has been sharply criticized as putting too much power in the hands of unaccountable agencies, and the Supreme Court sent a signal this Term that it may be willing to reconsider that approach. See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (upholding a related administrative law doctrine, but with several justices suggesting that they may be willing to reconsider the *Chevron* doctrine). Just to be clear: the census case is not a *Chevron* case. But it shares the question of just how much the courts should defer to agency decision-making.

Next, this case also raises a question of how loosely Congress may delegate authority to an executive agency—a question that touches on the Court's nondelegation doctrine. Under that doctrine, Congress cannot delegate too broadly—and thus cede too much of its lawmaking authority—without violating the separation of powers. The Court has not applied the doctrine to overturn a congressional act since the 1930s. But, as it did with the *Chevron* doctrine, the Court sent a signal this Term that it may revisit that nondelegation doctrine approach. Again, just to be clear: the census case is not a nondelegation case. But it involves an act, the Census Act, that grants very broad authority to the Secretary to determine what goes on the census.

While the census case doesn't directly implicate either doctrine, it raises the broader questions: How much should the courts defer to

agency decision-making? And how broadly may Congress delegate authority to executive agencies? It also illustrates that executive decisions by this administration can (and likely will) test the boundaries of the Court's—and the individual justices'—positions on these questions.

In other words, the Court will have to address these important questions in the context of executive decision-making that, by historical standards, is, well, unusual, and often sharply politically divisive. As the Court considers others administrative law and separation-of-powers cases growing out of executive decision-making in this administration (think the DACA case now slated for next Term)—and as it potentially reconsiders the *Chevron* doctrine and its approach to the nondelegation doctrine—it'll likely do so in a way that tests a commitment to Justice Thomas's "presumption of regularity." To put a finer point on it: As the Court considers other actions coming out of this administration, and as it potentially

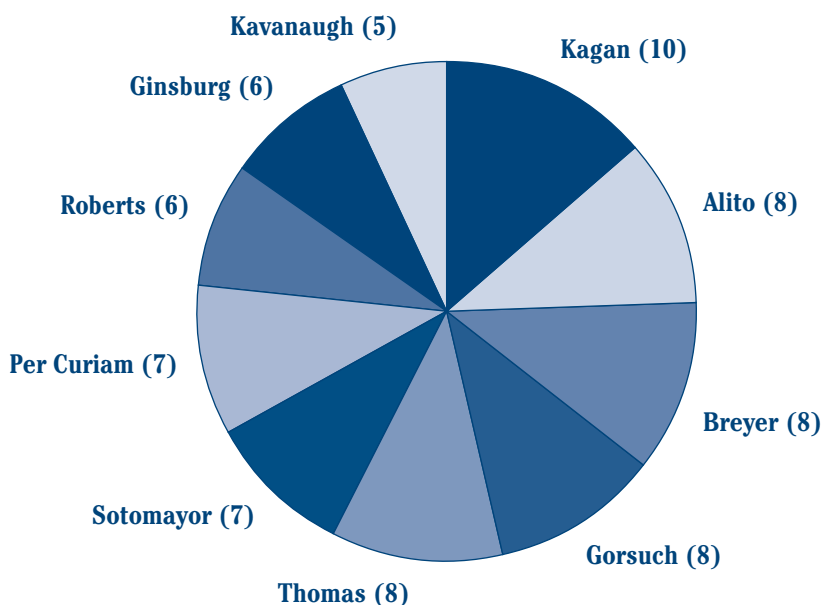
reconsiders its own long-standing approaches to administrative law and the separation of powers, we'll want to keep a close eye on whether and how it adjusts for the extraordinary nature of executive decision-making in the Trump presidency, always remembering that the decisions it writes for this administration will also apply to future presidencies.



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](mailto:sschwinn@jmls.edu) or 312.386.2865.

*PREVIEW* of United States Supreme Court Cases 46, no. 8 (August 7, 2019): 13–21. © 2019 American Bar Association

## Opinion Authorship



This chart shows the breakdown of majority opinion authorship by justice.

## CASE SUMMARIES

### Abortion

#### *Box v. Planned Parenthood of Indiana and Kentucky*

Docket No. 18-483

**Reversed:** The Seventh Circuit

Argued: N/A

Decided: May 28, 2019

Analysis: N/A

**Overview:** Indiana passed a new law with two provisions at issue here: the first relating to the disposition of fetal remains by abortion providers, and the second barring the knowing provision of sex-, race-, or disability-selective abortions by abortion providers. These laws were not challenged as violating a woman's right to obtain an abortion; instead, challengers litigated this case on the assumption that the law does not implicate a fundamental right and is therefore subject only to ordinary rational basis review.

**Issue:** Was the Seventh Circuit correct in invalidating an Indiana state law relating to the disposition of fetal remains by abortion providers?

**No.** The Seventh Circuit clearly erred in failing to recognize a state's interest in proper disposal of fetal remains as a permissible basis for Indiana's disposition law.

**From the *per curiam* opinion:** We reiterate that, in challenging this provision, respondents have never argued that Indiana's law imposes an undue burden on a woman's right to obtain an abortion. This case, as litigated, therefore does not implicate our cases applying the undue burden test to abortion regulations. Other courts have analyzed challenges to similar disposition laws under the undue burden...Our opinion expresses no view on the merits of those challenges.

**Concurring:** Justice Thomas

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

### Administrative Law

#### *Biestek v. Berryhill*

Docket No. 17-1184

**Affirmed:** The Sixth Circuit

Argued: December 4, 2018

Decided: April 1, 2019

Analysis: ABA *PREVIEW* 28, Issue 3

**Overview:** An applicant for social security disability benefits must follow a five-step process to demonstrate eligibility. The applicant has the burden of proof in the first four steps. If the applicant makes it to the fifth step, the burden shifts to the Social Security Administration to demonstrate, based on substantial evidence, that the applicant can find work. Not all courts have required that the underlying data giving rise to expert testimony that there are jobs available be part of the record.

**Issue:** Does "substantial evidence" necessarily include the data supporting an expert opinion?

**No.** A vocational expert's refusal to provide private market-survey data upon the applicant's request does not categorically preclude the testimony from counting as "substantial evidence."

**From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Thomas, Breyer, Alito, and Kavanaugh):** [W]hy should one additional fact—a refusal to a request for that data—make a vocational expert's testimony categorically inadequate? Assume that an applicant challenges our hypothetical expert to turn over her supporting data; and assume the expert declines because the data reveals private information about her clients and making careful redactions will take a fair bit of time. Nothing in the expert's refusal changes her testimony (as described above) about job availability. Nor does it alter any other material in the record. So if our expert's opinion was sufficient—i.e., qualified as substantial evidence—before the refusal, it is hard to see why the opinion has to be insufficient afterward.

**Dissenting:** Justice Sotomayor

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

### Administrative Law

#### *Kisor v. Wilkie*

Docket No. 18-15

**Vacated and Remanded:**  
The Federal Circuit

Argued: March 27, 2019

Decided: June 26, 2019

Analysis: ABA *PREVIEW* 37, Issue 6

**Overview:** In 1945, the Supreme Court held that an agency's interpretation of its own regulation was entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Today, this substantial level of deference is generally known as either *Seminole Rock* or *Auer* deference. The latter term refers to the Supreme Court case of *Auer v. Robbins*, 519 U.S. 452 (1997), which came after *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Court deferred to the Department of Labor's interpretation of its regulation. Formalists have attacked *Auer* deference for some time. They argue that the doctrine violates separation of powers and the Administrative Procedures Act. In *Kisor v. Wilkie*, the Supreme Court was asked to decide whether it agreed with these criticisms.

**Issue:** Should the Supreme Court overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation?

**No.** The judgment is vacated and remanded.

**From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor with respect to Parts I, II-B, III-B, and IV and joined by Justices Ginsburg, Breyer, and Sotomayor as to Parts II-A and III-A):** When it applies,



*Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase “when it applies” is important—because it often doesn’t. As described above, this Court has cabined *Auer’s* scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.

**Concurring in part:** Chief Justice Roberts

**Concurring in judgment:** Justice Gorsuch (joined by Justice Thomas and joined by Justice Kavanaugh as to Parts I, II, III, IV, and V and joined by Justice Alito as to Parts I, II, and III)

**Concurring in judgment:** Justice Kavanaugh (joined by Justice Alito)

---

## Administrative Law

### *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*

Docket No. 17-1705

**Vacated and Remanded:**  
The Fourth Circuit

Argued: March 25, 2019

Decided: June 20, 2019

Analysis: ABA *PREVIEW* 23, Issue 6

**Overview:** Carlton & Harris Chiropractic, Inc., sued PDR Network, LLC, in federal court for violating the Telephone Consumer Protection Act. Carlton & Harris alleged that PDR sent a fax promoting an electronic version of PDR’s Physicians’ Desk Reference in violation of the Act. PDR moved to dismiss, arguing that its fax violated neither the Act nor a 2006 Federal Communications Commission Order interpreting the Act. The district court, relying principally on the Act (and not the Order), agreed and dismissed the case.

**Issue:** Because the Hobbs Act provides for judicial review of the Federal Communications Commission Order, does it therefore require the district court in an enforcement action between two private parties to treat the Order as a definitive interpretation of the Telephone Consumer Protection Act?

**Yes.** The extent to which the 2006 FCC Order binds the lower courts may depend on the resolution of two preliminary sets of questions that were not aired before the court of appeals.

**From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, and Kagan):** As we have said many times before, we are a court of “review,” not of “first view.”...Because the Court of Appeals has not yet addressed the preliminary issues we have described, we vacate the judgment of the Court of Appeals and remand this case so that the Court of Appeals may consider these preliminary issues, as well as any other related issues that may arise in the course of resolving this case.

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

**Concurring:** Justice Kavanaugh (joined by Justices Thomas, Alito, and Gorsuch)

---

## Administrative Law

### *Smith v. Berryhill*

Docket No. 17-1606

**Reversed and Remanded:**  
The Sixth Circuit

Argued: March 18, 2019

Decided: May 28, 2019

Analysis: ABA *PREVIEW* 23, Issue 4

**Overview:** The petitioner appealed a denial of Supplemental Security Income benefits through the administrative process. Obtaining social security benefits is a four-step process consisting of an initial determination, a reconsideration, a hearing before an administrative law judge (ALJ), and then a review at the Appeals Council. In this case, the Appeals Council rejected the petitioner’s request for review as untimely. Either his attorney did not file a request for review at the Appeals Council, although he told the court that he did, or the request was lost, because the Social Security Administration (SSA) did not have it. The Court was asked to determine whether that dismissal was a “final decision.”

**Issue:** Was the Appeals Council dismissal of petitioner’s appeal a final decision subject to judicial review under 42 U.S.C. § 405(g)?

**Yes.** An Appeals Council dismissal on time-

liness grounds after a claimant has had an ALJ hearing on the merits qualifies as a “final decision...made after a hearing” for purposes of allowing judicial review under Section 405(g).

**From the unanimous opinion by Justice Sotomayor:** Indeed, roughly six years after *Chevron* was decided, the Court declined to give *Chevron* deference to the Secretary of Labor’s interpretation of a federal statute that would have foreclosed private rights of action under certain circumstances....As the Court explained, Congress’ having created “a role for the Department of Labor in administering the statute” did “not empower the Secretary to regulate the scope of the judicial power vested by the statute.”...Rather, “[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental ‘that an agency may not bootstrap itself into an area in which it has no jurisdiction.’”...Here, too, while Congress has empowered the SSA to create a scheme of administrative exhaustion,...Congress did not delegate to the SSA the power to determine “the scope of the judicial power vested by” § 405(g) or to determine conclusively when its dictates are satisfied...Consequently, having concluded that Smith and the Government have the better reading of § 405(g), we need go no further.

---

## Administrative Law

### *Weyerhaeuser Co. v. Fish and Wildlife Service*

Docket No. 17-71

**Vacated and Remanded:**  
The Fifth Circuit

Argued: October 1, 2018

Decided: November 27, 2018

Analysis: ABA *PREVIEW* 4, Issue 1

**Overview:** At a glance, this case was about preserving the habitat of an endangered species, the dusky gopher frog, by a federal designation of 1,544 acres in Louisiana as a critical habitat and essential to the conservation of the species. The land, referred to as Unit 1, is owned by the plaintiffs below, Markle Interests, P&F Lumber Company, and PF Monroe Properties. Petitioner Weyerhaeuser is a paper manufacturing company that owns part of the land and leases the rest to grow and harvest timber.

Its lease will be up in 2043. The land is very attractive to developers, and the landowners claim the designation of the habitat will cost them as much \$30 million and United States Fish and Wildlife Service (FWS) didn't consider that. The federal courts' very jurisdiction to review the case was at issue. At its core, this case was about who gets to decide whether the property is critical habitat for the dusky gopher frog and whether the economic consequences of the designation are unreasonable: the FWS or a federal court.

**Issue:** Does the Endangered Species Act, 16 U.S. Code § 1533, prohibit designation of private land as unoccupied critical habitat when the species does not inhabit the land?

**Yes.** An area is eligible for designation as a critical habitat under Section 1533(a)(3)(A)(i) only if it is a habitat for the species.

**Issue:** Is the agency decision not to exclude the land from critical-habitat status subject to judicial review?

**Yes.** The Secretary's decision not to exclude an area from critical habitat under Section 1533(b)(2) is subject to judicial review.

**From the opinion by Chief Justice Roberts (joined by all members of the Court except for Justice Kavanaugh who took no part in the consideration or decision):** Section 4(b)(2) requires the Secretary to consider economic impact and relative benefits before deciding whether to exclude an area from critical habitat or to proceed with the designation. The statute is, therefore, not "drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion" not to exclude.

---

## Admiralty

### *Dutra Group v. Batterton*

Docket No. 18-266

### Reversed and Remanded: The Ninth Circuit

Argued: March 25, 2019

Decided: June 24, 2019

Analysis: ABA *PREVIEW* 26, Issue 6

**Overview:** Seamen who are injured or the estate of a seaman killed on the job typically file a three-count complaint against their employers for maintenance and cure, Jones Act negligence, and unseaworthiness of a

ship. The Supreme Court has held that punitive damages can be awarded for maintenance and cure but not for Jones Act negligence. Here, the Court was asked to decide where unseaworthiness falls within this system.

**Issue:** Can a court award punitive damages to a seaman who is injured or killed due to a ship's unseaworthiness?

**No.** A plaintiff may not recover punitive damages on a claim of unseaworthiness.

**From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Thomas, Kagan, Gorsuch, and Kavanaugh):** The lack of punitive damages in traditional maritime law cases is practically dispositive. By the time the claim of unseaworthiness evolved to remedy personal injury, punitive damages were a well-established part of the law...American courts had awarded punitive (or exemplary) damages from the Republic's earliest days...And yet, beyond the decisions discussed above, *Batterton* presents no decisions from the formative years of the personal injury unseaworthiness claim in which exemplary damages were awarded. From this we conclude that, unlike maintenance and cure, unseaworthiness did not traditionally allow recovery of punitive damages.

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

---

## Antitrust Law

### *Apple, Inc. v. Pepper*

Docket No. 17-204

### Affirmed: The Ninth Circuit

Argued: November 26, 2018

Decided: May 13, 2019

Analysis: ABA *PREVIEW* 4, Issue 3

**Overview:** Antitrust damages are available only to the first "buyer" from the party violating the law. The developers of iPhone applications (apps) set the price based on Apple's rules. Apple is the exclusive distributor collecting payments and taking a commission. Apple contends that consumers "buy" from the developers while the plaintiffs maintain that Apple is the retailer with whom customers deal. The parties asked the Court to determine if customers are the "first buyer" in such distribution systems.

**Issue:** May consumers sue for antitrust

damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense?

**Yes.** Under *Illinois Brick*, iPhone owners are direct purchasers who may sue Apple for alleged monopolization.

**From the opinion by Justice Kavanaugh (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan):** That straightforward conclusion follows from the text of the antitrust laws and from our precedents. First is text: Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."...Section 4 of the Clayton Act in turn provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue...the defendant...and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."...The broad text of § 4—"any person" who has been "injured" by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. Second is precedent: Applying § 4, we have consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators....At the same time, incorporating principles of proximate cause into § 4, we have ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers.

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

---

## Appellate Procedure

### *Yovino v. Rizo*

Docket No. 18-272

### Vacated and Remanded: The Ninth Circuit

Argued: N/A  
Decided: February 25, 2019  
Analysis: N/A

**Overview:** Honorable Stephen Reinhardt, a judge on the United States Court of Appeals for the Ninth Circuit, died on March 29, 2018, but the Ninth Circuit counted his vote in cases decided after that date, including the current case where Judge Reinhardt was counted in the majority.

**Issue:** Did the Ninth Circuit err in allowing a deceased judge to count in the majority in an *en banc* decision?

**Yes.** A deceased judge cannot count as a member of the majority of an *en banc* decision.

**From the *per curiam* opinion:** Because Judge Reinhardt was no longer a judge at the time when the *en banc* decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.

**Concurring:** Justice Sotomayor

## Arbitration

### *New Prime v. Oliveira*

Docket No. 17-340

**Affirmed:** The First Circuit

Argued: October 3, 2018  
Decided: January 15, 2019  
Analysis: ABA *PREVIEW* 21, Issue 1

**Overview:** The Supreme Court was asked to resolve a circuit split and determine whether, under the Federal Arbitration Act (FAA), exemptions for employment contracts for workers engaged in interstate commerce permit a district court to compel arbitration.

**Issue:** Is a dispute over applicability of the FAA's Section 1 exemption an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause?

**No.** A court should determine whether a Section 1 exemption applies before ordering arbitration.

**Issue:** Is the FAA's Section 1 exemption, which applies on its face only to *contracts of employment*, inapplicable to independent contractor agreements?

**No.** Because the Act's term *contract of employment* refers to any agreement to perform work, Mr. Oliveira's agreement with New Prime falls within Section 1's exemption.

**From the opinion by Justice Gorsuch (joined by all members of the Court except for Justice Kavanaugh who took no part in the consideration or decision):** What the dictionaries suggest, legal authorities confirm. This Court's early 20th-century cases used the phrase "contract of employment" to describe work agreements involving independent contractors. Many state court cases did the same. So did a variety of federal statutes. And state statutes too. We see here no evidence that a "contract of employment" necessarily signaled a formal employer-employee or master-servant relationship.

**Concurring:** Justice Ginsburg

## Attorney's Fees

### *Culbertson v. Berryhill*

Docket No. 17-773

**Reversed and Remanded:**  
The Eleventh Circuit

Argued: November 7, 2018  
Decided: January 9, 2019  
Analysis: ABA *PREVIEW* 51, Issue 2

**Overview:** This case came to the Supreme Court at the behest of both the petitioner, an attorney representing social security claimants in several consolidated cases, and the United States. The circuits were split on whether federal law limits the aggregate award for all work on a social security denial case to 25 percent of the back-pay award, as the Eleventh Circuit held, or whether it caps only fees for representation in a court proceeding. The United States agreed that the circuit split over the fee question should be resolved. In the *certiorari* petition process, the United States changed its stance to align with the petitioner, with a little tweak to say that the court or the social security agency should have the discretion to impose a cap based on reasonableness. In its *certiorari* brief, the United States suggested that the Court appoint an amicus to argue for affirmation of the Eleventh Circuit opinion, which called for a fee cap of 25 percent of a back-pay award. Amicus was appointed.

**Issue:** Do fees subject to 42 U.S.C. § 406(b)'s

25 percent cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court?

**Yes.** Section 406(b)(1)(A)'s 25 percent cap applies only to fees for court representation and not to aggregate fees awarded under Sections 406(a) and (b).

**From the unanimous opinion by Justice Thomas:** In short, despite the force of Amicus' arguments, the statute does not bear her reading. Any concerns about a shortage of withheld benefits for direct payment and the consequences of such a shortage are best addressed to the agency, Congress, or the attorney's good judgment.

## Bankruptcy

### *Mission Product Holdings, Inc. v. Tempnology, LLC*

Docket No. 17-1657

**Reversed and Remanded:**  
The First Circuit

Argued: February 20, 2019  
Decided: May 20, 2019  
Analysis: ABA *PREVIEW* 7, Issue 5

**Overview:** Tempnology LLC granted Mission Product Holdings Inc. a nonexclusive trademark license. Tempnology filed bankruptcy and rejected the parties' agreement. The First Circuit held that rejection terminated Mission's trademark license, leaving it with only a prepetition damages claim. Tempnology's breach would not have terminated Mission's license rights outside of bankruptcy, and Mission asked the Court to hold that rejection constitutes a breach that only relieves Tempnology from future affirmative performance obligations but does not revoke Mission's license rights.

**Issue:** Under Section 365 of the Bankruptcy Code, does a debtor-licensor's rejection of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. § 365(g)—terminate rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law?

**Yes.** A debtor's rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as a breach of that contract outside bankruptcy; such an act cannot rescind rights that the contract previously granted.



**From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Thomas, Ginsburg, Breyer, Alito, Sotomayor, and Kavanaugh):** The parties and courts of appeals have offered us two starkly different answers. According to one view, a rejection has the same consequence as a contract breach outside bankruptcy: It gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under the contract. According to the other view, a rejection (except in a few spheres) has more the effect of a contract rescission in the non-bankruptcy world: Though also allowing a damages claim, the rejection terminates the whole agreement along with all rights it conferred. Today, we hold that both Section 365's text and fundamental principles of bankruptcy law command the first, rejection-as-breach approach. We reject the competing claim that by specifically enabling the counterparties in some contracts to retain rights after rejection, Congress showed that it wanted the counterparties in all other contracts to lose their rights. And we reject an argument for the rescission approach turning on the distinctive features of trademark licenses. Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.

**Concurring:** Justice Sotomayor

**Dissenting:** Justice Gorsuch

## Bankruptcy

### *Taggart v. Lorenzen*

Docket No. 18-489

### **Vacated and Remanded: The Ninth Circuit**

Argued: April 24, 2019

Decided: June 3, 2019

Analysis: ABA *PREVIEW* 50, Issue 7

**Overview:** Let's say you sue a defendant in state court for injunctive relief. The defendant then files bankruptcy and receives a discharge. Then, the state court says you can proceed, despite the discharge. And so you do. Then, the defendant seeks contempt sanctions in bankruptcy court for a discharge injunction violation. Can you be sanctioned, if the state court was wrong? Such is the essence of what was before the Court in *Taggart v. Lorenzen*.

**Issue:** Under the Bankruptcy Code, does a

creditor's good-faith belief that the discharge injunction does not apply preclude a finding of civil contempt?

**No.** A court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct.

**From the unanimous opinion by Justice Breyer:** Taggart's proposal would thereby risk additional federal litigation, additional costs, and additional delays. That result would interfere with "a chief purpose of the bankruptcy laws": "to secure a prompt and effectual" resolution of bankruptcy cases "within a limited period."...These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors.

## Census

### *Department of Commerce*

#### *v. New York*

Docket No. 18-966

### **Affirmed in part, Reversed in part, and Remanded: The Second Circuit**

Argued: April 23, 2019

Decided: June 27, 2019

Analysis: ABA *PREVIEW* 32, Issue 7

**Overview:** Secretary of Commerce Wilbur L. Ross Jr. decided to include a citizenship question on the 2020 census questionnaire. He claimed this was in response to a request by the Department of Justice (DOJ) for citizenship data in order to better enforce the Voting Rights Act. But a Census Bureau analysis showed that the question would depress the census response rate for noncitizen and Hispanic households, resulting in lower-quality census data, and that there were better ways to provide the DOJ with the information that it sought. Moreover, evidence provided by the Department revealed that Ross had considered the question long before the DOJ request, had consulted with others in the administration about it, and had engineered the DOJ request. The Court was asked to determine whether this addition violates the Administrative Procedure Act (APA) or the Enumeration Clause of the U.S. Constitution.

**Issue:** Was the secretary's decision to add a citizenship question to the 2020 decennial census questionnaire arbitrary and

capricious and contrary to law, in violation of the Administrative Procedure Act or the Enumeration Clause of the U.S. Constitution?

**No.** The secretary's decision to add a citizenship question to the 2020 decennial census questionnaire did not violate the APA or the Enumeration Clause.

**Issue:** Did the district court properly authorize discovery beyond the administrative record?

**Yes.** The district court was correct in authorizing discovery beyond the administrative record given the unusual circumstances.

**From the unanimous opinion by Chief Justice Roberts as to Parts I and II and the opinion of the Court as to Parts III, IV-B and IV-C (joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh; and with respect to Part IV-A, joined by Justices Thomas, Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh; and with respect to Part V, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan):** We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decision-making process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free."...The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

**Concurring in part and dissenting in part:** Justice Thomas (joined by Justices Gorsuch and Kavanaugh)

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

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



## Civil Procedure

### *Frank v. Gaos*

Docket No. 17-961

#### Vacated and Remanded: The Ninth Circuit

Argued: October 31, 2018

Decided: March 20, 2019

Analysis: ABA *PREVIEW* 24, Issue 2

**Overview:** This appeal involved a class action settlement with Google, where the 129 million class members received no compensation, the class action attorneys received \$2.125 million in attorney's fees, and Google and the class counsel agreed to contribute \$6.5 million to be distributed to seven charitable and nonprofit organizations as a *cy pres* resolution of the litigation. The Court was asked to decide whether such *cy pres*-only awards in settlement classes comport with the requirement that such settlements be "fair, adequate, and reasonable."

**Issue:** Do *cy pres*-only awards in class action settlements, where the class members receive no compensation, charitable and nonprofit entities receive settlement funds, and class counsel are awarded significant attorney's fees, comport with the Federal Rule of Civil Procedure 23(e) requirement that class settlements must be adjudged as "fair, adequate, and reasonable"?

#### Vacated and Remanded.

**From the *per curiam* opinion:** After reviewing the supplemental briefs, we conclude that the case should be remanded for the courts below to address the plaintiffs' standing in light of *Spokeo*. The supplemental briefs filed in response to our order raise a wide variety of legal and factual issues not addressed in the merits briefing before us or at oral argument. We "are a court of review, not of first view."...Resolution of the standing question should take place in the District Court or the Ninth Circuit in the first instance. We therefore vacate and remand for further proceedings. Nothing in our opinion should be interpreted as expressing a view on any particular resolution of the standing question.

## Civil Procedure

### *Home Depot U.S.A., Inc. v. Jackson*

Docket No. 17-1471

#### Affirmed: The Fourth Circuit

Argued: January 15, 2019

Decided: May 28, 2019

Analysis: ABA *PREVIEW* 33, Issue 4

**Overview:** This case involved the right of a third-party defendant to remove a case from state court to federal court when an original defendant sues a third-party defendant in an existing lawsuit, based on assertion of a counterclaim. In the original lawsuit, plaintiff Citibank sued defendant George W. Jackson in a state debt collection action. Jackson then asserted a counterclaim against Citibank under state consumer laws and counterclaimed against Home Depot as an additional third-party defendant. Under existing precedent, the Fourth Circuit declined to permit Home Depot's removal petition based on the defendant's counterclaim. The Court was asked to determine the extent and limits of third-party removal rights when a defendant asserts a counterclaim under the general removal and Class Action Fairness Act removal statutes.

**Issue:** Do the general removal statutes or the Class Action Fairness Act removal provisions permit or deny an involuntary third-party defendant, who is sued in a state class action counterclaim, the right to remove the case from state court to federal court?

**No.** Sections 1441(a) and 1453(b) do not permit removal by a third-party counterclaim defendant.

**From the opinion by Justice Thomas (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan):** [T]he dissent argues that our interpretation allows defendants to use the statute as a "tactic" to prevent removal,...but that result is a consequence of the statute Congress wrote. Of course, if Congress shares the dissent's disapproval of certain litigation "tactics," it certainly has the authority to amend the statute. But we do not.

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

## Civil Procedure

### *McDonough v. Smith*

Docket No. 18-485

#### Reversed and Remanded: The Second Circuit

Argued: April 17, 2019

Decided: June 20, 2019

Analysis: ABA *PREVIEW* 22, Issue 7

**Overview:** An election commissioner, Edward McDonough, acquitted of various crimes related to forged absentee ballots sued the prosecutor, who allegedly fabricated evidence. After McDonough was found not guilty in the second trial (the first ended in a mistrial), he filed for malicious prosecution and fabrication of evidence. The malicious prosecution claim was dismissed based on prosecutorial immunity and the fabrication of evidence claim was deemed time-barred. This case gave the Court the chance to resolve a circuit split over when a fabrication of evidence claim begins to accrue: when a claimant first learned of the fabricated evidence or when the claimant prevails in the underlying criminal case.

**Issue:** Does the statute of limitations for a 42 U.S.C. § 1983 claim based on fabrication of evidence in criminal proceedings begin to run when those proceedings terminate in the defendant's favor?

**Yes.** The statute of limitations for McDonough's Section 1983 fabricated evidence claim began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial.

**From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, and Kavanaugh):** The proper approach in our federal system generally is for a criminal defendant who believes that the criminal proceedings against him rest on knowingly fabricated evidence to defend himself at trial and, if necessary, then to attack any resulting conviction through collateral review proceedings. McDonough therefore had a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor.

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

## Civil Procedure

### *Nutraceutical Corp. v. Lambert*

Docket No. 17-1094

#### Reversed and Remanded: The Ninth Circuit

Argued: November 27, 2018  
Decided: February 26, 2019  
Analysis: ABA *PREVIEW* 11, Issue 3

**Overview:** This case involved a technical issue relating to the timing requirement that a party file a notice of appeal of a judge's class certification order within 14 days of the order's issuance, pursuant to Federal Rule of Civil Procedure 23(f). A plaintiff allegedly failed to file for permission to appeal a certification order within the 14-day limitation. Nevertheless, the appellate court accepted the petition, and the Ninth Circuit affirmed, applying equitable principles to relieve the plaintiff of the Rule 23(f) timing requirement. The defendant contended that the Ninth Circuit erred in applying equitable principles to relieve the plaintiff's alleged noncompliance with Rule 23(f).

**Issue:** Does Federal Rule of Civil Procedure 23(f) set forth a strict, mandatory timing provision for appeal of class certification orders?

**Yes.** Rule 23(f) is not subject to equitable tolling.

**From the unanimous opinion by Justice Sotomayor:** [T]he Federal Rules of Appellate Procedure single out Civil Rule 23(f) for inflexible treatment. While Appellate Rule 2 authorizes a court of appeals for good cause to "suspend any provision of these rules in a particular case," it does so with a conspicuous caveat: "except as otherwise provided in Rule 26(b)." Appellate Rule 26(b), which generally authorizes extensions of time, in turn includes this express carveout: A court of appeals "may not extend the time to file...a petition for permission to appeal." Fed. Rule App. Proc. 26(b)(1). In other words, Appellate Rule 26(b) says that the deadline for the precise type of filing at issue here may not be extended. The Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist.

## Copyright Act

### *Rimini Street, Inc. v. Oracle USA, Inc.*

Docket No. 17-1625

#### Reversed and Remanded: The Ninth Circuit

Argued: January 14, 2019  
Decided: March 4, 2019  
Analysis: ABA *PREVIEW* 30, Issue 4

**Overview:** Statutory interpretation rarely begins with a clean slate. The focus here was whether the Copyright Act's allowance of "full costs" to the prevailing party includes typically nontaxable costs, such as expert witness fees and e-discovery costs. After winning its copyright infringement case, Oracle was awarded \$13 million in nontaxable costs that were affirmed on appeal by the Ninth Circuit. The question before the Supreme Court focused solely on that issue—whether the Copyright Act empowers a lower court to award those nontaxable costs.

**Issue:** May an award of "full costs" under the statute include "nontaxable" costs, such as expert fees, beyond the \$40 per day limit of 28 U.S.C. § 1821?

**No.** The term "full costs" in Section 505 of the Copyright Act means the costs specified in the general costs statute codified at Sections 1821 and 1920.

**From the unanimous opinion by Justice Kavanaugh:** Our cases, in sum, establish a clear rule: A statute awarding "costs" will not be construed as authorizing an award of litigation expenses beyond the six categories listed in §§ 1821 and 1920, absent an explicit statutory instruction to that effect.

## Copyright Law

### *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*

Docket No. 17-571

#### Affirmed: The Eleventh Circuit

Argued: January 8, 2019  
Decided: March 4, 2019  
Analysis: ABA *PREVIEW* 15, Issue 4

**Overview:** The Copyright Act of 1976, 17 U.S.C. § 411(a), provides that no civil action for infringement of a copyright in any United States work "shall be instituted until pre-

registration or registration of the copyright claim has been made in accordance with this title." The court was asked whether the text of the Copyright Act considers a copyright claim registration to have been properly made within the meaning of Section 411(a) when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, as the Fifth and Ninth Circuits have held, or only once the Copyright Office has acted on the application and registered (or refused to register) the copyright claim, as the Tenth and Eleventh Circuits, in the underlying case, have held. The Court was also asked to consider the propriety of the Eleventh Circuit's unanimous holding that the plain language of Section 411(a) of the Copyright Act was unambiguous and requires that the Register of Copyright must act on a copyright holder's application before suit may be properly filed.

**Issue:** Does a copyright holder's delivery of the required application, deposit, and fee to the Copyright Office satisfy Section 411(a) of the Copyright Act, which states that "no civil action for infringement of [a] copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made"?

**No.** Registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright; upon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration.

**From the unanimous opinion by Justice Ginsburg:** True, the statutory scheme has not worked as Congress likely envisioned. Registration processing times have increased from one or two weeks in 1956 to many months today...Delays in Copyright Office processing of applications, it appears, are attributable, in large measure, to staffing and budgetary shortages that Congress can alleviate, but courts cannot cure... Unfortunate as the current administrative lag may be, that factor does not allow us to revise § 411(a)'s congressionally composed text.

## Criminal Law

### *Quarles v. United States*

Docket No. 17-778

#### Affirmed: The Sixth Circuit

Argued: April 24, 2019  
Decided: June 10, 2019  
Analysis: ABA *PREVIEW* 46, Issue 7

**Overview:** Petitioner James Quarles pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). This crime is usually punishable by up to 10 years imprisonment. But if the defendant has three or more prior convictions for a “serious drug offense” or a “violent felony,” the Armed Career Criminal Act (ACCA) increases a defendant’s punishment to a minimum of 15 years and a maximum of life. At his initial sentencing, the district court held that Quarles’s conviction for third-degree home invasion in Michigan was a violent felony under the residual clause of the ACCA. Finding the home invasion was Quarles’s third violent felony, the court sentenced him to 204 months incarceration. The court of appeals vacated the sentence in light of *Johnson v. United States*, 135 S.Ct. 2551 (holding ACCA’s residual clause unconstitutionally vague) and remanded for resentencing. At resentencing, Quarles objected to his Michigan home invasion conviction being considered a “violent felony” because the state statute does not require proof of intent to commit a crime at the moment the defendant entered or first unlawfully remained inside a building, as he says is required by the generic definition of burglary in *Taylor v. United States*, 495 U.S. 575 (1990). The district court concluded a Michigan third-degree home invasion constituted generic burglary under ACCA and reimposed a 204-month term of imprisonment. The court of appeals affirmed, holding that ACCA’s “generic burglary...does not require intent at entry.” The Court was asked to decide whether *Taylor*’s definition of generic burglary requires proof that intent to commit a crime was present at the moment of unlawful entry or unlawful remaining.

**Issue:** Does the definition of generic burglary in *Taylor v. United States*, 495 U.S. 575 (1990), require proof that intent to commit a crime was present at the time of unlawful entry or from the first moment of unlawfully remaining, as two circuits hold?

**No.** Generic remaining-in burglary occurs under Section 924(e) when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.

**From the unanimous opinion by Justice Kavanaugh:** [T]o interpret remaining-in

burglary narrowly, as Quarles advocates, would thwart the stated goals of the Armed Career Criminal Act. After all, most burglaries involve unlawful entry, not unlawful remaining in. Yet if we were to narrowly interpret the remaining-in category of generic burglary so as to require that the defendant have the intent to commit a crime at the exact moment he or she first unlawfully remains, then many States’ burglary statutes would be broader than generic burglary. As a result, under our precedents, many States’ burglary statutes would presumably be eliminated as predicate offenses under § 924(e). That result not only would defy common sense, but also would defeat Congress’ stated objective of imposing enhanced punishment on armed career criminals who have three prior convictions for burglary or other violent felonies. We should not lightly conclude that Congress enacted a self-defeating statute.

**Concurring:** Justice Thomas

---

## Criminal Law

### *Rehaif v. United States*

Docket No. 17-9560

### Reversed and Remanded: The Eleventh Circuit

Argued: April 23, 2019  
Decided: June 21, 2019  
Analysis: ABA *PREVIEW* 42, Issue 7

**Overview:** Petitioner Hamid Mohamed Ahmed Ali Rehaif was indicted on two counts of possession of a firearm or ammunition by an alien unlawfully in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). The Indictment alleged that Rehaif’s student visa terminated before his possession of a firearm and ammunition, rendering him an alien “illegally or unlawfully in the United States.” Section 924(a)(2) provides that “[w]hoever knowingly violates” Section 922(g) shall be fined or “imprisoned not more than 10 years, or both.” Before trial, the government asked the district court to instruct the jury that “[t]he United States is not required to prove that [Rehaif] knew he was illegally or unlawfully in the United States.” Rehaif objected and asserted the government was required to prove both that he knowingly (1) possessed the firearm and ammunition and (2), at the time of possession, was aware of his unlawful immigration status. The court

overruled Rehaif’s objection and instructed the jury that “[t]he United States is not required to prove [Rehaif] knew that he was illegally or unlawfully in the United States.” The jury found Rehaif guilty on both counts, and the court sentenced him to 18 months of imprisonment. The Eleventh Circuit Court of Appeals affirmed. The Court was asked to decide whether the “knowingly” provision of Section 924(a)(2) applies to both the possession and status elements of a Section 922(g) offense, or whether it applies only to the possession element.

**Issue:** Does the “knowingly” provision of 18 U.S.C. § 924(a)(2) apply to both the possession and status elements of an 18 U.S.C. § 922(g) crime?

**Yes.** In a prosecution under Section 922(g) and Section 924(a)(2), the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

**From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, Gorsuch, and Kavanaugh):** Beyond the text, our reading of § 922(g) and § 924(a)(2) is consistent with a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called “a vicious will.”...As this Court has explained, the understanding that an injury is criminal only if inflicted knowingly “is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”...Scienter requirements advance this basic principle of criminal law by helping to “separate those who understand the wrongful nature of their act from those who do not.”

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

---

## Criminal Law

### *United States v. Davis*

Docket No. 18-431

### Affirmed in part, Vacated in part, and Remanded: The Fifth Circuit

Argued: April 17, 2019  
Decided: June 24, 2019  
Analysis: ABA *PREVIEW* 17, Issue 7



**Overview:** Respondents Maurice Davis and Andre Glover were each convicted after jury trial on one count of conspiracy to commit Hobbs Act robbery, three counts of Hobbs Act robbery, and two counts of brandishing a firearm during a “crime of violence,” a violation of 18 U.S.C. § 924(c)(1)(B)(i). Prior to trial, respondents moved to dismiss their Section 924(c) counts. They argued that Hobbs Act robbery and conspiracy to commit Hobbs Act robbery did not qualify as crimes of violence under Section 924(c)(3)(A)’s elements clause definition of “crime of violence” and that Section 924(c)(3)(B)’s residual clause definition of “crime of violence” is unconstitutionally vague. The district court denied the motions. The court imposed a consecutive term of 120 months imprisonment on the first count and a consecutive term of 300 months on the second count, to run consecutive to each respondent’s term of imprisonment for the other counts. After the court of appeals affirmed, the Supreme Court decided *Sessions v. Dimaya*, which held unconstitutionally vague the residual clause of “crime of violence” definition in 18 U.S.C. § 16(b). The Court granted respondents’ then-pending petitions for *certiorari*, vacated the judgments of the court of appeals, and remanded for further consideration in light of *Dimaya*. The court of appeals struck down Section 924(c)(3)(B) as unconstitutionally vague and concluded that conspiracy to commit Hobbs Act robbery could only qualify as a “crime of violence” under Section 924(c)(3)(B). The Supreme Court was asked to decide whether Section 924(c)(3)(B)—the residual clause of the statute’s definition of “crime of violence”—is unconstitutionally vague.

**Issue:** Is the subsection-specific definition of “crime of violence” in 18 U.S.C. § 924(c)(3)(B), which applies in the context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, unconstitutionally vague?

**Yes.** Section 924(c)(3)(B) is unconstitutionally vague.

**From the opinion by Justice Gorsuch (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan):** Once again, the government asks us to overlook this obvious reading of the text in favor of a strained one. It suggests that the statute might be referring to the “nature” of the defendant’s conduct on a particular occasion. But while this reading may be linguistically feasible,

we struggle to see why, if it had intended this meaning, Congress would have used the phrase “by its nature” at all. The government suggests that “by its nature” keeps the focus on the offender’s conduct and excludes evidence about his personality, such as whether he has violent tendencies. But even without the words “by its nature,” nothing in the statute remotely suggests that courts are allowed to consider character evidence—a type of evidence usually off-limits during the guilt phase of a criminal trial.

**Dissenting:** Justice Kavanaugh (joined by Justices Thomas and Alito and joined by Chief Justice Roberts as to all but Part II-C)

## Criminal Law

### *United States v. Haymond*

Docket No. 17-1672

### Vacated and Remanded: The Tenth Circuit

Argued: February 26, 2019

Decided: June 26, 2019

Analysis: ABA *PREVIEW* 17, Issue 5

**Overview:** Respondent Andre Haymond was convicted of both possession and attempted possession of child pornography and was sentenced to 38 months incarceration and a period of 10 years of supervised release. While on release, Haymond was found to have again possessed child pornography and was sentenced to a requisite 5 years reimprisonment under 18 U.S.C. § 3583(k). The Tenth Circuit vacated his sentence on the grounds that Section 3583(k) infringes the Fifth and Sixth Amendments of the United States Constitution. The Supreme Court was asked to consider the constitutionality of Section 3583(k).

**Issue:** Did the court of appeals err in holding “unconstitutional and unenforceable” the portions of 18 U.S.C. § 3583(k) that required the district court to revoke respondent’s 10-year term of supervised release, and to impose 5 years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by knowingly possessing child pornography?

**Yes.** The judgment is vacated and the case is remanded.

**From the opinion by Justice Gorsuch**

**(joined by Justices Ginsburg, Sotomayor, and Kagan):** [T]he lesson for our case is clear. Based on the facts reflected in the jury’s verdict, Mr. Haymond faced a lawful prison term of between zero and 10 years under § 2252(b)(2). But then a judge—acting without a jury and based only on a preponderance of the evidence—found that Mr. Haymond had engaged in additional conduct in violation of the terms of his supervised release. Under § 3583(k), that judicial fact-finding triggered a new punishment in the form of a prison term of at least five years and up to life. So just like the facts the judge found at the defendant’s sentencing hearing in *Alleyne*, the facts the judge found here increased “the legally prescribed range of allowable sentences” in violation of the Fifth and Sixth Amendments...In this case, that meant Mr. Haymond faced a minimum of five years in prison instead of as little as none. Nor did the absence of a jury’s finding beyond a reasonable doubt only infringe the rights of the accused; it also divested the “people at large”—the men and women who make up a jury of a defendant’s peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments.

**Concurring in judgment:** Justice Breyer

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

## Criminal Law

### *United States v. Stitt* and *United States v. Sims*

Docket No. 17-765 and 17-766

### Reversed; Vacated and Remanded: The Sixth and Eighth Circuits

Argued: October 9, 2018

Decided: December 10, 2018

Analysis: ABA *PREVIEW* 30, Issue 1

**Overview:** Respondents Victor Stitt II and Jason Sims were convicted in separate federal cases of possessing a firearm as a convicted felon. In each case, the district court sentenced respondent under the Armed Career Criminal Act (ACCA) because both respondents had been convicted of multiple burglaries under state law. Respondents appealed, and each court of appeals reversed, holding that burglary of a vehicle does not



constitute a violent felony offense under the ACCA even if the state's definition of burglary requires that the vehicle be designed or used for overnight accommodation. The government then appealed to the Supreme Court.

**Issue:** Does burglary of a vehicle or other mobile structure qualify as a violent felony under the Armed Career Criminal Act (ACCA) if the definition of burglary requires that the mobile structure be designed or used for overnight accommodation?

**Yes.** The term *burglary* in the Armed Career Criminal Act includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation.

**From the unanimous opinion by Justice Breyer:** For another thing, Congress, as we said in *Taylor*, viewed burglary as an inherently dangerous crime because burglary “creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.” 495 U. S., at 588; see also *James v. United States*, 550 U. S. 192, 203 (2007). An offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a similar or greater risk of violent confrontation. See *Spring*, 80 F. 3d, at 1462 (noting the greater risk of confrontation in a mobile home or camper, where “it is more difficult for the burglar to enter or escape unnoticed”). Although, as respondents point out, the risk of violence is diminished if, for example, a vehicle is only used for lodging part of the time, we have no reason to believe that Congress intended to make a part-time/full-time distinction. After all, a burglary is no less a burglary because it took place at a summer home during the winter, or a commercial building during a holiday.

---

## Criminal Procedure

### *Flowers v. Mississippi*

Docket No. 17-9572

### Reversed and Remanded: The Supreme Court of Mississippi

Argued: March 20, 2019

Decided: June 21, 2019

Analysis: ABA *PREVIEW* 16, Issue 6

**Overview:** In selecting a jury for trial, each

party may make a set number of peremptory challenges against potential jurors. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), using those challenges intentionally to discriminate against jurors based on race or gender is a violation of the Equal Protection Clause of the Fourteenth Amendment. In this case, defendant Curtis Giovanni Flowers alleges the prosecutor violated *Batson* in jury selection. He sought to have his conviction and death sentence for four murders reversed. Flowers argued that the Mississippi Supreme Court failed to consider the adjudicated history of *Batson* violations by the prosecutor in his case in considering the totality of the circumstances surrounding jury selection.

**Issue:** Must a prosecutor's history of adjudicated purposeful race discrimination be considered by a court assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?

**Yes.** All of the relevant facts and circumstances taken together establish that the trial court at Flowers's sixth trial committed clear error in concluding that the state's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent.

**From the opinion by Justice Kavanaugh (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan):** Four critical facts, taken together, require reversal. First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court...Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State. We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike

of black prospective juror Carolyn Wright was not “motivated in substantial part by discriminatory intent.”...In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.

**Concurring:** Justice Alito

**Dissenting:** Justice Thomas (joined by Justice Gorsuch as to Parts I, II, and III)

---

## Criminal Procedure

### *Garza v. Idaho*

Docket No. 17-1026

### Reversed and Remanded: The Supreme Court of Idaho

Argued: October 30, 2018

Decided: February 27, 2019

Analysis: ABA *PREVIEW* 14, Issue 2

**Overview:** *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), establishes that attorneys' failure to appeal when their clients expressly instruct them to file an appeal is presumptively prejudicial. In other words, it is presumed that the attorney provided ineffective assistance of counsel. This case presented a different spin, because the petitioner in this case signed an appeal waiver. The question was whether the presumption of prejudice still applies when the petitioner signed such a waiver.

**Issue:** Is prejudice presumed when attorneys fail to follow their clients' express instructions to appeal because the clients' plea agreements contain an appeal waiver?

**Yes.** *Flores-Ortega's* presumption of prejudice applies regardless of whether a defendant has signed an appeal waiver.

**From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Kagan, and Kavanaugh):** *Flores-Ortega* states, in one sentence, that the loss of the “entire [appellate] proceeding itself, which a defendant wanted at the time and to which he had a right,...demands a presumption of prejudice.”...Idaho and the U. S. Government, participating as an amicus on Idaho's behalf, seize on this language, asserting that Garza never “had a right” to his appeal and thus that any deficient performance by counsel could not have caused the loss of any such appeal....These arguments miss the point. Garza did retain a right to his appeal; he

simply had fewer possible claims than some other appellants. Especially because so much is unknown at the notice-of-appeal stage,... it is wholly speculative to say that counsel's deficiency forfeits no proceeding to which a defendant like Garza has a right.

**Dissenting:** Justice Thomas (joined by Justice Gorsuch and Justice Alito as to Parts I and II)

---

## Death Penalty

### *Bucklew v. Precythe*

Docket No. 17-8151

#### Affirmed: The Eighth Circuit

Argued: November 6, 2018

Decided: April 1, 2019

Analysis: ABA *PREVIEW* 41, Issue 2

**Overview:** In 1998, Russell Bucklew was convicted of first-degree murder, kidnapping, burglary, forcible rape, and armed criminal conduct, and was sentenced to death in Missouri. While Bucklew did not challenge his conviction, sentence, or the death penalty in general, he did challenge Missouri's method of execution (a single-drug lethal injection) as applied to him. More particularly, Bucklew argued that lethal injection would create an unacceptably high risk of extreme pain, given his exceedingly rare medical condition, and that a known and available alternative method of execution (lethal gas) exists.

**Issue:** Does the Eighth Amendment require an inmate to establish a known and available alternative method of execution when raising an as-applied challenge?

**Yes.** *Baze* and *Glossip* govern all Eighth Amendment challenges, whether facial or as-applied, alleging that a method of execution inflicts unconstitutionally cruel pain.

**Issue:** Did Bucklew meet his burden to establish a known and available alternative method of execution that would be less painful than the planned method of execution?

**No.** Bucklew has failed to satisfy the *Baze-Glossip* test.

**From the opinion by Justice Gorsuch (joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh):** And despite all this, his suit in the end amounts to little more than an attack on settled precedent, lacking enough evidence

even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law and required by the Constitution's original meaning. The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better. Even the principal dissent acknowledges that "the long delays that now typically occur between the time an offender is sentenced to death and his execution" are "excessive."...The answer is not, as the dissent incongruously suggests, to reward those who interpose delay with a decree ending capital punishment by judicial fiat....Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve. The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and "the last-minute nature of an application" that "could have been brought" earlier, or "an applicant's attempt at manipulation," "may be grounds for denial of a stay."

**Concurring:** Justice Thomas

**Concurring:** Justice Kavanaugh

**Dissenting:** Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan as to all but Part III)

**Dissenting:** Justice Sotomayor

---

## Death Penalty

### *Madison v. Alabama*

Docket No. 17-7505

#### Vacated and Remanded: The Circuit Court of Alabama, Mobile County

Argued: October 2, 2018

Decided: February 27, 2019

Analysis: ABA *PREVIEW* 15, Issue 1

**Overview:** Vernon Madison was convicted of murdering a police officer and sentenced to death. While he was in prison, he suffered several strokes, which left him with significant cognitive impairments, including dementia. As a result, he currently cannot remember committing the crime. The Court was asked to determine whether the Eighth Amendment prohibits a state from executing

a person whose medical condition prevents him from remembering his conviction.

**Issue:** May a state, consistent with *Panetti*, execute a prisoner whose dementia and cognitive impairment leaves him without memory of the crime?

**No.** Under *Ford* and *Panetti*, the Eighth Amendment may permit executing a prisoner even if he cannot remember committing his crime; however, the Eighth Amendment may also prohibit executing a prisoner even though he suffers dementia or another disorder rather than psychotic delusions; this case must be remanded for further consideration of the defendant's competency.

**From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor):** First, a person lacking memory of his crime may yet rationally understand why the State seeks to execute him; if so, the Eighth Amendment poses no bar to his execution. Second, a person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution. What matters is whether a person has the "rational understanding" *Panetti* requires—not whether he has any particular memory or any particular mental illness.

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

**Taking no part:** Justice Kavanaugh

---

## Double Jeopardy

### *Gamble v. United States*

Docket No. 17-646

#### Affirmed: The Eleventh Circuit

Argued: December 6, 2018

Decided: June 17, 2019

Analysis: ABA *PREVIEW* 40, Issue 3

**Overview:** The Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution or punishment for the same offense. The Court has long made an exception, allowing prosecutions and punishments for the identical offense, if the charges are brought by a state and the federal government, even though the second prosecution would be barred if brought by the same government that brought the initial prosecution. In this case, defendant Terance Martez

Gamble asked the Court to reverse his federal conviction for being a felon in possession of a weapon, the identical crime for which he was convicted and sentenced by an Alabama court. He sought to have the Supreme Court end the separate sovereigns exception to the Double Jeopardy Clause, so that a prosecution by any government would bar a subsequent prosecution for the same offense.

**Issue:** Should the Supreme Court end the separate sovereigns exception to the Double Jeopardy Clause, which allows successive prosecutions and punishment of the identical crime in cases filed in federal and state courts, although the second prosecution would be barred if both were brought in either federal or state court?

**No.** The Court declines to overturn the long-standing dual-sovereignty doctrine.

**From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Thomas, Breyer, Sotomayor, Kagan, and Kavanaugh):** Gamble's historical arguments must overcome numerous "major decisions of this Court" spanning 170 years. In light of these factors, Gamble's historical evidence must, at a minimum, be better than middling. And it is not. The English cases are a muddle. Treatises offer spotty support. And early state and federal cases are by turns equivocal and downright harmful to Gamble's position. All told, this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.

**Concurring:** Justice Thomas

**Dissenting:** Justice Ginsburg

**Dissenting:** Justice Gorsuch

---

## Due Process

### *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*

Docket No. 18-457

**Affirmed:** The Supreme Court of North Carolina

Argued: April 16, 2019  
Decided: June 21, 2019  
Analysis: ABA *PREVIEW* 14, Issue 7

**Overview:** North Carolina sought to tax The Kimberley Rice Kaestner 1992 Family Trust for income that the Trust earned from 2005 to 2008. The state claimed that it had authority to tax the trust based on the fact that the Trust beneficiaries, Kaestner and her children, lived in North Carolina during that time. No income was distributed from the trust to the beneficiaries. The beneficiaries' residency in North Carolina was the only connection between the Trust and the state: the Trust itself was established in New York, and the trustee lived in Connecticut.

**Issue:** May a state tax an out-of-state trust based on the beneficiary's in-state residency, consistent with the Due Process Clause?

**No.** The presence of in-state beneficiaries alone does not empower a state to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain to receive it.

**From the unanimous opinion by Justice Sotomayor:** In sum, when assessing a state tax premised on the in-state residency of a constituent of a trust—whether beneficiary, settlor, or trustee—the Due Process Clause demands attention to the particular relationship between the resident and the trust assets that the State seeks to tax. Because each individual fulfills different functions in the creation and continuation of the trust, the specific features of that relationship sufficient to sustain a tax may vary depending on whether the resident is a settlor, beneficiary, or trustee. When a tax is premised on the in-state residence of a beneficiary, the Constitution requires that the resident have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset...Otherwise, the State's relationship to the object of its tax is too attenuated to create the "minimum connection" that the Constitution requires.

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

---

## Eighth Amendment

### *Moore v. Texas*

Docket No. 18-443

**Reversed and Remanded:** The Texas Court of Criminal Appeals

Argued: N/A  
Decided: February 19, 2019  
Analysis: N/A

**Overview:** Bobby James Moore's appeal of his death penalty sentence was before the Supreme Court for a second time; his previous sentence had been vacated after a determination that the state court's conclusion that Moore did *not* have an intellectual disability was unlawful. On remand, the state court came to the same conclusion.

**Issue:** Did the state appellate court err in finding that the defendant did not have an intellectual disability and was therefore eligible for the death penalty?

**Yes.** The state appellate court erred in reviewing the evidence of Moore's disability in a number of ways, including his ability to communicate, read, and write; the record indicates that Moore has an intellectual disability.

**From the *per curiam* opinion:** We conclude that the appeals court's opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court. We consequently agree with Moore and the prosecutor that, on the basis of the trial court record, Moore has shown he is a person with intellectual disability.

**Concurring:** Chief Justice Roberts

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

---

## Eighth Amendment

### *Timbs v. Indiana*

Docket No. 17-1091

**Vacated and Remanded:** The Supreme Court of Indiana

Argued: November 28, 2018  
Decided: February 20, 2019  
Analysis: ABA *PREVIEW* 18, Issue 3

**Overview:** Tyson Timbs was convicted of dealing in a controlled substance and conspiracy to commit theft. The state filed a civil case to forfeit his vehicle, which he purchased for \$42,000. This is more than four



times the amount of the maximum monetary fine for Timbs's conduct. Timbs argued that forfeiture therefore violated the Eighth Amendment ban on excessive fines; the state countered that the Eighth Amendment doesn't apply to the states.

**Issue:** Is the Eighth Amendment's Excessive Fines Clause "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," so that it applies through the Fourteenth Amendment to the states?

**Yes.** The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the states under the Fourteenth Amendment's Due Process Clause.

**From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh):** In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."

**Concurring:** Justice Gorsuch

**Concurring:** Justice Thomas

---

## Employment Discrimination

### *Fort Bend County, Texas v. Davis*

Docket No. 18-525

**Affirmed:** The Fifth Circuit

Argued: April 22, 2019

Decided: June 3, 2019

Analysis: ABA *PREVIEW* 23, Issue 4

**Overview:** Fort Bend County allegedly retaliated against employee Lois Davis for filing an internal sexual harassment complaint with human resources and then discharged her because she requested a religious accommodation. The Fifth Circuit upheld the district court's grant of summary judgment to Fort Bend on the gender-retaliation claim but reversed on the religious-discrimination claim. On remand, the district court once again granted Fort Bend's motion for summary judgment, this time on newly minted grounds that Davis failed to exhaust administrative procedures. It is in this context that

the Court was asked to consider whether district courts may assert jurisdiction over Title VII claims before administrative exhaustion or whether the failure to exhaust is a waivable claim-processing rule, thereby resolving an 8–3 circuit split.

**Issue:** Is Section 706e–5(b) and (f)(1)'s requirement—that plaintiffs must administratively exhaust employment discrimination claims with the Equal Employment Opportunity Commission (EEOC) before filing suit in federal court—a nonwaivable jurisdictional rule?

**No.** Title VII's charge-filing requirement is not jurisdictional.

**From the unanimous opinion by Justice Ginsburg:** Title VII's charge-filing requirement is not of jurisdictional cast. Federal courts exercise jurisdiction over Title VII actions pursuant to 28 U.S.C. § 1331's grant of general federal-question jurisdiction, and Title VII's own jurisdictional provision. Separate provisions of Title VII, § 2000e–5(e)(1) and (f)(1), contain the Act's charge-filing requirement. Those provisions "d[o] not speak to a court's authority,"...or "refer in any way to the jurisdiction of the district courts,"...Instead, Title VII's charge-filing provisions "speak to...a party's procedural obligations."...They require complainants to submit information to the EEOC and to wait a specified period before commencing a civil action. Like kindred provisions directing parties to raise objections in agency rulemaking, follow procedures governing copyright registration, or attempt settlement, Title VII's charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts.

---

## Employment Law

### *Mount Lemmon Fire District v. Guido*

Docket No. 17-587

**Affirmed:** The Ninth Circuit

Argued: October 1, 2018

Decided: November 6, 2018

Analysis: ABA *PREVIEW* 8, Issue 1

**Overview:** Following the approach long endorsed by the Equal Employment Opportunity Commission (EEOC), the Ninth Circuit held that the Age Discrimination in Employment Act of 1967 (ADEA) governs

the employment practices of states and their political subdivisions, regardless of size. This approach differed, however, from four other courts of appeal, which held that the ADEA's exclusion of small employers (defined as employers with fewer than 20 employees) applies not only to private companies, but also to state agencies and political subdivisions.

**Issue:** Must state agencies and political subdivisions with fewer than 20 employees comply with the Age Discrimination in Employment Act of 1967 (ADEA)?

**Yes.** The ADEA's definitional provision indicates that the act applies to states and political subdivisions regardless of size.

**From the opinion by Justice Ginsburg (joined by all members of the Court except for Justice Kavanaugh who took no part in the consideration or decision):** In short, the text of the ADEA's definitional provision, also its kinship to the FLSA and differences from Title VII, leave scant room for doubt that state and local governments are "employer[s]" covered by the ADEA regardless of their size.

---

## Fair Debt Collection Practices Act

### *Obduskey v. McCarthy & Holthus LLP*

Docket No. 17-1307

**Affirmed:** The Tenth Circuit

Argued: January 7, 2019

Decided: March 20, 2019

Analysis: ABA *PREVIEW* 31, Issue 3

**Overview:** Petitioner's mortgage was acquired by Wells Fargo Bank, and, of course, in 2008 the mortgage market crashed. In 2009, the petitioner defaulted. The respondent, a law firm, sent the petitioner a letter identifying itself as a debt collector and saying it intended to seek a nonjudicial foreclosure on behalf of Wells Fargo. The petitioner asserted his rights under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq., which resulted in a new foreclosure action. The petitioner eventually sued, but the case was dismissed by the district court and the Tenth Circuit affirmed. The court of appeals said that the FDCPA does not apply to nonjudicial foreclosures.

**Issue:** Does the Fair Debt Collection Practices Act apply to nonjudicial foreclosure proceedings?



**No.** A business engaged in no more than nonjudicial foreclosure proceedings is not a “debt collector” under the FDCPA, except for the limited purpose of Section 1692f(6).

**From the unanimous opinion by Justice Breyer:** Obduskey fears that our decision will open a loophole, permitting creditors and their agents to engage in a host of abusive practices forbidden by the Act. States, however, can and do guard against such practices, for example, by requiring notices, review by state officials such as the public trustee, and limited court supervision.... Congress may think these state protections adequate, or it may choose to expand the reach of the FDCPA. Regardless, for the reasons we have given, we believe that the statute exempts entities engaged in no more than the “enforcement of security interests” from the lion’s share of its prohibitions. And we must enforce the statute that Congress enacted.

**Concurring:** Justice Sotomayor

## False Claims Act

### *Cochise Consultancy, Inc. v. United States ex rel. Hunt*

Docket No. 18-315

**Affirmed:** The Eleventh Circuit

Argued: March 19, 2019

Decided: May 13, 2019

Analysis: ABA *PREVIEW* 11, Issue 6

**Overview:** This case involved accusations by Billy Joe Hunt of private defense contractors Cochise and Parsons engaging in a number of offenses: bribery of an Army Corps of Engineers officer; security services for a munitions cleanup effort in Iraq that Hunt maintains cost the United States government nearly \$10 million more due to the bribery and other fraud; charges for services not provided at all; a forgery that Hunt says only he witnessed that directed the security services work to Cochise; a legally blind contracting officer victimized by Cochise’s deception; an FBI interview of Hunt regarding \$300,000 in kickbacks Hunt reported he received from another contractor, which led to ten months in prison for Hunt but also may be the event that saves his lawsuit; Hunt’s post-imprisonment federal False Claims Act lawsuit against Cochise and Hunt’s former employer, the Parsons Corporation, that Hunt filed some

seven years after the violations he alleges; and a statute of limitations dispute. Cochise and Parsons asserted a six-year statute of limitations should have resulted in the dismissal of Hunt’s lawsuit. Hunt sought to take advantage of a government discovery-based limitations period that he maintains only began to run from his November 2010 interview by the FBI when he says he disclosed the bribery and fraud claims against Cochise and Parsons to the FBI. He argued that his suit, filed in 2013, was within three years of the interview, thus within the three-to-ten-year window allowed under the False Claims Act for federal officials to act on information. The federal government did not act on Hunt’s disclosure, however, so Hunt asserted his status and action as a relator on behalf of the United States under the False Claims Act.

**Issue:** May a relator in a False Claims Act *qui tam* action rely on the statute of limitations of 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene, and, if so, does the relator constitute an “official of the United States” for purposes of Section 3731(b)(2)?

**Yes.** The limitations of Section 3731(b)(2) apply in relator-initiated suits; however, the relator in a nonintervened suit is not the “official of the United States” whose knowledge triggers the three-year limitations period.

**From the unanimous opinion by Justice**

**Thomas:** First, a private relator is not an “official of the United States” in the ordinary sense of that phrase. A relator is neither appointed as an officer of the United States...nor employed by the United States. Indeed, the provision that authorizes *qui tam* suits is entitled “Actions by Private Persons.” 31 U.S.C. § 3730(b). Although that provision explains that the action is brought “for the person and for the United States Government” and “in the name of the Government,”...it does not make the relator anything other than a private person, much less “the official of the United States” referenced by the statute.

## Federal Arbitration Act

### *Henry Schein, Inc. v. Archer & White Sales, Inc.*

Docket No. 17-1272

**Vacated and Remanded:**  
The Fifth Circuit

Argued: October 29, 2018

Decided: January 8, 2019

Analysis: ABA *PREVIEW* 4, Issue 2

**Overview:** The Federal Arbitration Act requires courts to enforce agreements to arbitrate, including agreements allowing an arbitrator, rather than a court, to decide the gateway question of whether the parties have agreed to arbitrate in the first place. The Supreme Court was asked to decide whether the Act includes an exception allowing courts to decline to send the arbitrability question to an arbitrator when the demand for arbitration is “wholly groundless.”

**Issue:** Does the Federal Arbitration Act permit a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes that the demand for arbitration is “wholly groundless”?

**No.** The “wholly groundless” exception to arbitrability is inconsistent with the Federal Arbitration Act and the Supreme Court’s precedent.

**From the unanimous opinion by Justice**

**Kavanaugh:** The Act does not contain a “wholly groundless” exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.

## Federal Arbitration Act

### *Lamps Plus, Inc. v. Varela*

Docket No. 17-988

**Reversed and Remanded:**  
The Ninth Circuit

Argued: October 29, 2018

Decided: April 24, 2019

Analysis: ABA *PREVIEW* 31, Issue 3

**Overview:** The Supreme Court has held that

a court cannot order arbitration to proceed using class procedures unless there is a “contractual basis” for concluding that the parties “agreed to” class arbitration. *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010). In this case, the parties’ agreement was silent as to class arbitration, but the lower courts sent the case to arbitration based on the state-law rule that any ambiguity in an agreement must be construed against the drafter. The Supreme Court was asked to decide whether a state-law rule of contract interpretation can provide the necessary “contractual basis” for concluding that the parties agreed to class arbitration.

**Issue:** Can a state-law rule of contract interpretation for resolving ambiguity supply the contractual basis that the Federal Arbitration Act (FAA) requires before a court may conclude that the parties have authorized class arbitration?

**No.** Under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration.

**From the opinion by Chief Justice Roberts (joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh):** “[C]lass arbitration, to the extent it is manufactured by [state law] rather than consen[t], is inconsistent with the FAA.”...We recently reiterated that courts may not rely on state contract principles to “reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent.”...But that is precisely what the court below did, requiring class arbitration on the basis of a doctrine that “does not help to determine the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have given to the language used.”...Such an approach is flatly inconsistent with “the foundational FAA principle that arbitration is a matter of consent.”

**Concurring:** Justice Thomas

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

**Dissenting:** Justice Breyer

**Dissenting:** Justice Sotomayor

**Dissenting:** Justice Kagan (joined by Justices Ginsburg and Breyer and Justice Sotomayor as to Part II)

## Federalism

### *Parker Drilling Management Services, LTD v. Newton*

Docket No. 18-389

#### Vacated and Remanded: The Ninth Circuit

Argued: April 16, 2019

Decided: June 10, 2019

Analysis: ABA *PREVIEW* 23, Issue 4

**Overview:** Newton worked for Parker Drilling Management Services (Parker) on its drilling platforms in the Santa Barbara Channel. He filed a lawsuit against Parker for violating California’s wage-and-hour laws. Parker moved to dismiss the case, arguing that California law did not apply to operations on the Outer Continental Shelf (OCS). The federal Outer Continental Shelf Lands Act (OCSLA) says that federal law applies to operations on the Outer Continental Shelf. But it also says that the law of the adjacent state will apply to those operations when that state law is “applicable and not inconsistent with” federal laws. Here, the federal Fair Labor Standards Act (FLSA) sets a federal standard. But at the same time the FLSA allows states to set more protective standards. That’s exactly what California did here.

**Issue:** Does California law apply to drilling operations on the Outer Continental Shelf, where the federal Outer Continental Shelf Lands Act borrows from state law that is “applicable and not inconsistent with” federal law, and where the federal FLSA sets a federal standard?

**No.** Where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS.

**From the unanimous opinion by Justice Thomas:** Our consistent understanding of the OCSLA remains: All law on the OCS is federal, and state law serves a supporting role, to be adopted only where there is a gap in federal law’s coverage.

## Federal Preemption

### *Virginia Uranium, Inc. v. Warren*

Docket No. 16-1275

#### Affirmed: The Fourth Circuit

Argued: November 5, 2018

Decided: June 17, 2019

Analysis: ABA *PREVIEW* 37, Issue 2

**Overview:** The Atomic Energy Act (AEA), signed into law in 1954, grants exclusive authority to the Nuclear Regulatory Commission (NRC) to regulate the safety of post-extraction uranium refining and radioactive waste management. The AEA also allows states to regulate uranium extraction. The Commonwealth of Virginia issued a moratorium on uranium mining in the late 1970s and banned uranium mining in 1981. The largest known deposit of uranium in the United States was discovered at Coles Hill, Virginia, in 1982. Virginia Uranium, Inc., which owns the site deposit at Coles Hill, and recently completed a state-approved exploration of the site that began in 2007, sued the Commonwealth, arguing that the federal Atomic Energy Act (AEA) preempts Virginia’s ban. On its face, Virginia’s ban on uranium mining seems to fall within the states’ authority under the AEA to regulate extraction. If so, the AEA does not preempt. But some evidence suggests that Virginia only enacted its ban out of radiological safety concerns over post-extraction management of the radioactive byproduct of uranium production and that the ban would have this effect. If so, the AEA may preempt.

**Issue:** Does the Court look beyond the face of Virginia’s ban on uranium mining to the ban’s purpose and effect, in order to determine whether it is preempted under the AEA?

**Yes.** The judgment is affirmed.

**From the opinion by Justice Gorsuch (joined by Justices Thomas and Kavanaugh):** Just consider what would follow from Virginia Uranium’s interpretation. Not only would States be prohibited from regulating uranium mining to protect against radiation hazards; the federal government likely would be barred from doing so as well. After all, the NRC has long believed, and still maintains, that the AEA affords it no authority to regulate uranium mining on private land. Nor does Virginia Uranium dispute the federal government’s understanding. Admittedly, if Virginia Uranium were to prevail here, the NRC might respond by changing course and seeking to regulate uranium mining for the first time. But given the statute’s terms, the prospects that it might do so successfully in the face of a legal challenge appear gloomy. Admittedly, as well, federal air and water and other regulations might apply at a uranium

mine much as at any other workplace. But the possibility that both state and federal authorities would be left unable to regulate the unique risks posed by an activity as potentially hazardous as uranium mining seems more than a little unlikely, and quite a lot to find buried deep in subsection (k). Talk about squeezing elephants into mouseholes.

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

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

---

## Federal Sentencing

### *Stokeling v. United States*

Docket No. 17-554

**Affirmed:** The Eleventh Circuit

Argued: October 9, 2018

Decided: January 15, 2019

Analysis: ABA *PREVIEW* 26, Issue 1

**Overview:** The Armed Career Criminal Act (ACCA) imposes an elevated mandatory minimum sentence for unlawful firearm possession by a defendant who has three prior violent felony convictions. Robbery per se is not a “violent felony” under the ACCA; however, robbery may qualify under the elements clause of the ACCA, which defines a “violent felony” as any offense committed with “physical force.” The Court was asked to decide whether a 1997 Florida robbery conviction included enough “physical force” to qualify as a “violent felony” under the elements clause.

**Issue:** Is a 1997 Florida robbery conviction enough “physical force” to qualify as a “violent felony” under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(i), for purposes of imposing an enhanced sentence?

**Yes.** The ACCA’s elements clause encompasses a robbery offense that requires the defendant to overcome the victim’s resistance; as such, Florida’s robbery law qualifies as an ACCA-predicate offense under the elements clause.

**From the opinion by Justice Thomas (joined by Justices Breyer, Alito, Gorsuch, and Kavanaugh):** “[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”... That principle supports our interpretation

of the term “force” here. By retaining the term “force” in the 1986 version of ACCA and otherwise “[e]xpand[ing]” the predicate offenses under ACCA, Congress made clear that the “force” required for common-law robbery would be sufficient to justify an enhanced sentence under the new elements clause. We can think of no reason to read “force” in the revised statute to require anything more than the degree of “force” required in the 1984 statute. And it would be anomalous to read “force” as excluding the quintessential ACCA-predicate crime of robbery, despite the amendment’s retention of the term “force” and its stated intent to expand the number of qualifying offenses.

**Dissenting:** Justice Sotomayor (joined by Chief Justice Roberts and Justices Ginsburg and Kagan)

---

## First Amendment

### *American Legion v. American Humanist Assn. and Maryland-National Capital Park and Planning Commission v. American Humanist Assn.*

Docket No. 17-1717 and 18-18

**Reversed and Remanded:**  
The Fourth Circuit

Argued: February 27, 2019

Decided: June 20, 2019

Analysis: ABA *PREVIEW* 24, Issue 5

**Overview:** The Establishment Clause of the First Amendment, “Congress shall make no law respecting an establishment of religion,” prohibits the creation of a national church and the government favoring certain religious sects over others. But that is where general agreement of these ten words ends. In this case, the Court had an opportunity to clarify the meaning of the Establishment Clause in the context of a 40-foot cross erected as a memorial to fallen World War I soldiers. The Supreme Court was asked to determine whether the monument is a permissible civic recognition of fallen war veterans or an impermissible advancement and promotion of Christianity.

**Issue:** Does the Establishment Clause require the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross?

**No.** The judgment is reversed and remanded.

**From the opinion by Justice Alito (with respect to Parts I, II-B, II-C, III, and IV and joined by Chief Justice Roberts and Justices Breyer and Kavanaugh):** This is not to say that the cross’s association with the war was the sole or dominant motivation for the inclusion of the symbol in every World War I memorial that features it. But today, it is all but impossible to tell whether that was so. The passage of time means that testimony from those actually involved in the decision making process is generally unavailable, and attempting to uncover their motivations invites rampant speculation. And no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different reasons, such as the historic preservation and traffic safety concerns the Commission has pressed here. In addition, the passage of time may have altered the area surrounding a monument in ways that change its meaning and provide new reasons for its preservation. Such changes are relevant here, since the Bladensburg Cross now sits at a busy traffic intersection, and numerous additional monuments are located nearby.

**Concurring:** Justice Breyer (joined by Justice Kagan)

**Concurring:** Justice Kavanaugh

**Concurring in part:** Justice Kagan

**Concurring in judgment:** Justice Thomas

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

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

---

## First Amendment

### *Iancu v. Brunetti*

Docket No. 18-302

**Affirmed:** The Federal Circuit

Argued: April 15, 2019

Decided: June 24, 2019

Analysis: ABA *PREVIEW* 4, Issue 7

**Overview:** As a general matter, the First Amendment prohibits the government from imposing restrictions on speech based on the content or viewpoint of the speech. This case tested whether and how this general principle applies when the government provides



a benefit, trademark protection, but only on the condition that the speaker not engage in “scandalous” speech. In 2011, Erik Brunetti filed a petition with the United States Patent and Trademark Office (USPTO) to register a trademark for his clothing line, called “fuct.” The USPTO refused to register the mark, citing a provision in federal trademark law that directs the USPTO to refuse registration of any mark that consists of “immoral” or “scandalous” material. Brunetti claimed that this violates his right to free speech.

**Issue:** Does the Lanham Act’s restriction on marks that contain “scandalous” matter violate the First Amendment?

**Yes.** The Lanham Act’s prohibition on registration of “immoral or scandalous” trademarks violates the First Amendment.

**From the opinion by Justice Kagan (joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh):** So the key question becomes: Is the “immoral or scandalous” criterion in the Lanham Act viewpoint-neutral or viewpoint-based? It is viewpoint-based. The meanings of “immoral” and “scandalous” are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material “immoral”? According to a standard definition, when it is “inconsistent with rectitude, purity, or good morals”; “wicked”; or “vicious.”...Or again, when it is “opposed to or violating morality”; or “morally evil.”...So the Lanham Act permits registration of marks that champion society’s sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material “scandalous”? Says a typical definition, when it “giv[es] offense to the conscience or moral feelings”; “excite[s] reprobation”; or “call[s] out condemnation.”...Or again, when it is “shocking to the sense of truth, decency, or propriety”; “disgraceful”; “offensive”; or “disreputable.”...So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. “Love rules”? “Always be good”? Registration follows. “Hate rules”? “Always

be cruel”? Not according to the Lanham Act’s “immoral or scandalous” bar.

**Concurring:** Justice Alito

**Concurring in part and dissenting in part:** Chief Justice Roberts

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

**Concurring in part and dissenting in part:** Justice Sotomayor (joined by Justice Breyer)

---

## First Amendment

### *Nieves v. Bartlett*

Docket No. 17-1174

### Reversed and Remanded: The Ninth Circuit

Argued: November 26, 2018

Decided: May 28, 2019

Analysis: ABA *PREVIEW* 8, Issue 3

**Overview:** In April 2014, at the “Arctic Man” event in the Hoodoo Mountains near Paxson, Alaska, Russell P. Bartlett declined to talk to Sergeant Luis Nieves when Nieves tried to ask Bartlett about underage drinking. Later, Bartlett had a tense exchange with Trooper Brice Weight, another officer at the event, and Nieves arrested Bartlett. The prosecutor dropped the charges, but Bartlett sued for, among other things, retaliatory arrest in violation of his First Amendment free speech right not to talk with Nieves.

**Issue:** Does a plaintiff have to show that arresting officers lack probable cause for an arrest in order to bring a claim against the officers for retaliatory arrest in violation of the plaintiff’s First Amendment free speech rights?

**Yes.** Because there was probably cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law.

**From the opinion by Chief Justice Roberts (joined by Justices Breyer, Alito, Kagan, and Kavanaugh and joined by Justice Thomas except as to Part II-D):** Because a state of mind is “easy to allege and hard to disprove,”...a subjective inquiry would threaten to set off “broad-ranging discovery” in which “there often is no clear end to the relevant evidence,”...As a result, policing certain events like an unruly protest would pose overwhelming litigation risks. Any inar-

eful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation. Bartlett’s standard would thus “dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.”...It would also compromise evenhanded application of the law by making the constitutionality of an arrest “vary from place to place and from time to time” depending on the personal motives of individual officers...Yet another “predictable consequence” of such a rule is that officers would simply minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off.

**Concurring in part and in judgment:** Justice Thomas

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

**Concurring in judgment in part and dissenting in part:** Justice Ginsburg

**Dissenting:** Justice Sotomayor

---

## Foreign Sovereign Immunity

### *Republic of Sudan v. Harrison*

Docket No. 16-1094

### Reversed and Remanded: The Second Circuit

Argued: November 7, 2018

Decided: March 26, 2019

Analysis: ABA *PREVIEW* 48, Issue 2

**Overview:** To serve a lawsuit on a foreign state, 28 U.S.C. § 1608(a)(3) of the Foreign Sovereign Immunities Act (FSIA) requires that a summons, complaint, and notice of suit be “addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” In a case arising out of the bombing of the USS *Cole*, the Republic of Sudan was served with process via a package sent to the foreign minister at the address of the Sudanese embassy in Washington, D.C. The question was whether service via a foreign embassy conforms with the FSIA’s statutory requirement and is permissible under the Vienna Convention on Diplomatic Relations, which provides that diplomatic missions are inviolable.

**Issue:** Does the mailing of service docu-



ments to a foreign minister via the foreign state's diplomatic mission in Washington, D.C., satisfy 28 U.S.C. § 1608(a)(3)'s requirement that the documents "be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned"?

**No.** Most naturally read, Section 1608(a)(3) requires a mailing to be sent directly to the foreign minister's office in the foreign state.

**From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, Kagan, Gorsuch, and Kavanaugh):** A key term in § 1608(a)(3) is the past participle "addressed." A letter or package is "addressed" to an intended recipient when his or her name and "address" is placed on the outside of the item to be sent. And the noun "address," in the sense relevant here, means "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." *Webster's Third New International Dictionary* 25 (1971) (*Webster's Third*); see also *Webster's Second New International Dictionary* 30 (1957) ("the name or description of a place of residence, business, etc., where a person may be found or communicated with"); *Random House Dictionary of the English Language* 17 (1966) ("the place or the name of the place where a person, organization, or the like is located or may be reached"); *American Heritage Dictionary* 15 (1969) ("[t]he location at which a particular organization or person may be found or reached"); *Oxford English Dictionary* 106 (1933) (*OED*) ("the name of the place to which any one's letters are directed"). Since a foreign nation's embassy in the United States is neither the residence nor the usual place of business of that nation's foreign minister and is not a place where the minister can customarily be found, the most common understanding of the minister's "address" is inconsistent with the interpretation of § 1608(a)(3) adopted by the court below and advanced by respondents.

**Dissenting:** Justice Thomas

---

## Fourth Amendment

### *Mitchell v. Wisconsin*

Docket No. 18-6210

**Vacated and Remanded: The Supreme Court of Wisconsin**

Argued: April 23, 2019  
Decided: June 27, 2019  
Analysis: ABA *PREVIEW* 39, Issue 7

**Overview:** In May 2013, police officers in Sheboygan, Wisconsin, found Gerald Mitchell apparently intoxicated near Lake Michigan. Mitchell's van was nearby. Officers administered a breath test on site and then drove Mitchell to the police station. Officers then drove Mitchell to the hospital for a blood draw. Although Mitchell was by that time unconscious, an officer read Mitchell a statement required by Wisconsin's "informed-consent" law and ordered hospital personnel to administer a blood draw. Results showed a blood-alcohol content (BAC) of .222. Based on this evidence, Mitchell was charged and convicted of driving while intoxicated.

**Issue:** May a state impute consent to a blood-alcohol test to any motorist on a public road, and thus allow officers to order a blood draw without a warrant of an unconscious person, consistent with the Fourth Amendment?

**Yes.** The judgment is vacated and the case is remanded.

**From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Breyer and Kavanaugh):** When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

**Concurring in judgment:** Justice Thomas

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

**Dissenting:** Justice Gorsuch

## Freedom of Information Act

### *Food Marketing Institute v. Argus Leader Media*

Docket No. 18-481

**Reversed and Remanded: The Eighth Circuit**

Argued: April 22, 2019  
Decided: June 24, 2019  
Analysis: ABA *PREVIEW* 25, Issue 7

**Overview:** The respondent, Argus Leader Media, a newspaper company in Sioux Falls, South Dakota, requested information about annual redemption amounts of Supplemental Nutrition Assistance Program (SNAP) purchases from each participating retailer nationwide. The United States Department of Agriculture (USDA) refused to disclose store-level sales data, and the newspaper filed suit. The district court granted the government summary judgment but the Eighth Circuit reversed and remanded. On remand, the USDA argued that Exemption 4 of the Freedom of Information Act (FOIA) protects the data as "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The district court again ruled for Argus Leader Media, saying that any consequences from the release of the data were speculative at best. The Eighth Circuit affirmed, requiring heightened proof under precedent from the D.C. Circuit. The USDA said it would not appeal, and petitioner Food Marketing Institute intervened to appeal the judgment. The Supreme Court granted the petitioner's motion to recall the Eighth Circuit mandate and stay judgment pending the Supreme Court ruling. The respondent asserted that Food Marketing Institute has no standing and that, without the USDA's participation, the "Court may want to consider whether this remains the proper case for examining Exemption 4."

**Issue:** Does the term *confidential* apply to information only if a party shows substantial competitive harm from its disclosure?

**Yes.** Where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is *confidential* within Exemption 4's meaning.

**From the opinion by Justice Gorsuch (joined by Chief Justice Roberts and**

**Justices Thomas, Alito, Kagan, and Kavanaugh):** In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself... Where, as here, that examination yields a clear answer, judges must stop... Even those of us who sometimes consult legislative history will never allow it to be used to "muddy" the meaning of "clear statutory language."... Indeed, this Court has repeatedly refused to alter FOIA's plain terms on the strength only of arguments from legislative history... *National Parks'* contrary approach is a relic from a "bygone era of statutory construction."... Not only did *National Parks* inappropriately resort to legislative history before consulting the statute's text and structure, once it did so it went even further astray. The court relied heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted into law... Yet we can all agree that "excerpts from committee hearings" are "among the least illuminating forms of legislative history."

**Concurring in part and dissenting in part:** Justice Breyer (joined by Justices Ginsburg and Sotomayor)

## Habeas Corpus

### *Shoop v. Hill*

Docket No. 18-56

**Vacated and Remanded:**  
The Sixth Circuit

Argued: N/A

Decided: January 22, 2018

Analysis: N/A

**Overview:** Danny Hill was convicted of the torture, rape, and murder of a 12-year-old and was subsequently sentenced to death. Hill claimed that his death sentence violated *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits the imposition of a death sentence on defendants who are "mentally retarded." On appeal from the state and district courts' denial of Hill's petition, the Sixth Circuit reversed and found that the state court decision was contrary to clearly established federal law. The court relied heavily on *Moore v. Texas*, 581 U.S. \_\_\_\_ (2017), which had been decided before the state court decisions. The Sixth Circuit justified this reliance on *Moore* by maintaining "that Moore's holding regard-

ing adaptive strengths [was] merely an application of what was clearly established by *Atkins*."

**Issue:** Did the Sixth Circuit err in finding that respondent was entitled to *habeas* relief on the basis that the Ohio courts' decisions that he was not intellectually disabled were contrary to clearly established Supreme Court precedent?

**Yes.** The court of appeals improperly relied on *Moore v. Texas*, which was not handed down until long after the state courts' decisions.

**From the *per curiam* opinion:** Although the Court of Appeals asserted that the holding in *Moore* was "merely an application of what was clearly established by *Atkins*,"... the court did not explain how the rule it applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed "mental retardation." While *Atkins* noted that standard definitions of mental retardation included as a necessary element "significant limitations in adaptive skills..." that became manifest before age 18,"... *Atkins* did not definitively resolve how that element was to be evaluated but instead left its application in the first instance to the States.

## Health-Care Law

### *Azar v. Allina Health Services*

Docket No. 17-1484

**Affirmed:** The District of  
Columbia Circuit

Argued: January 15, 2019

Decided: June 3, 2019

Analysis: ABA *PREVIEW* 38, Issue 4

**Overview:** When adopting "substantive legal standards" governing payment for Medicare services, the Center for Medicare and Medicaid Services (CMS) of the Department of Health and Human Services (HHS) is required to pursue notice and comment rule making. Allina Health Services operates a number of hospitals that serve a large cohort of low-income patients. In the process of adopting policies instructing its third-party contractors with regard to reimbursing hospitals serving this demographic, CMS computed a component of that reimbursement known as the Disproportionate Share Hospital adjustment without rule making for nine years from 2004 to 2013. (HHS adopted a new

prospective rule in 2013, thus cabining the impact of this litigation to the stated period.) Allina asserted that formal rule making with notice and comment by affected entities and the public is required. The district court disagreed, but the D.C. Circuit Court of Appeals reversed. The question for the Court was whether this policy was a "substantive legal standard."

**Issue:** Is notice and comment rule making required before the Center for Medicare and Medicaid Services (CMS) can adopt policies determining how it will compute a component of the disproportionate share reimbursement for hospitals that treat many low-income patients?

**Yes.** Because the government has not identified a lawful excuse for neglecting its statutory notice-and-comment obligations, its policy must be vacated.

**From the opinion by Justice Gorsuch (joined by Chief Justice Roberts and Justices Thomas, Ginsburg, Alito, Sotomayor, and Kagan):** In the end, all of the available evidence persuades us that the phrase "substantive legal standard," which appears in § 13955hh(a)(2) and apparently nowhere else in the U. S. Code, cannot bear the same construction as the term "substantive rule" in the APA. We need not, however, go so far as to say that the hospitals' interpretation, adopted by the court of appeals, is correct in every particular. To affirm the judgment before us, it is enough to say the government's arguments for reversal fail to withstand scrutiny. Other questions about the statute's meaning can await other cases. The dissent would like us to provide more guidance,...but the briefing before us focused on the issue whether the Medicare Act borrows the APA's interpretive-rule exception, and we limit our holding accordingly. In doing so, we follow the well-worn path of declining "to issue a sweeping ruling when a narrow one will do."

**Dissenting:** Justice Breyer

**Taking no part:** Justice Kavanaugh

## Immigration Law

### *Nielsen v. Preap*

Docket No. 16-1363

**Reversed and Remanded:**  
The Ninth Circuit

Argued: October 10, 2018  
Decided: March 19, 2019  
Analysis: ABA *PREVIEW* 31, Issue 3

**Overview:** Immigration law generally gives the U.S. Department of Homeland Security (DHS) discretion in determining whether to detain certain aliens who have been recently released from prison. The justification for such a policy is the belief that some aliens pose either a flight or danger risk to others. The traditional default section provides that the government has discretion on whether to institute removal proceedings against an alien who has committed certain crimes. Under this system, the alien is entitled to a bond hearing. However, another provision of the code provides for mandatory detention of certain aliens who are deemed dangerous. This provision provides that the government “shall” detain these individuals after the completion of their criminal sentences. This case dealt with the situation where aliens serve criminal sentences and qualify for mandatory deportation under the federal code. However, for unknown reasons, some individuals serve their criminal sentences and are then allowed to go back to their families and communities. Only then, years later, immigration officials show up and detain them for deportation.

**Issue:** Was the lower court correct to rule that a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately?

**No.** The lower court judgments are reversed and the cases were remanded.

**From the opinion by Justice Alito (as the judgment of the Court and joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh as to Parts I, III-A, III-B-A, and IV and an opinion with respect to Parts II and II-B-2 joined by Chief Justice Roberts and Justice Kavanaugh, concluding that the Ninth Circuit’s interpretation is contrary to the plain text and structure of the statute):** And here is the crucial point: The “when...released” clause could not possibly describe aliens in that sense; it plays no role in identifying for the Secretary which aliens she must immediately arrest. If it did, the directive in § 1226(c)(1) would be nonsense. It would be ridiculous to read paragraph (1) as saying: “The Secretary must arrest, upon

their release from jail, a particular subset of criminal aliens. Which ones? Only those who are arrested upon their release from jail.” Since it is the Secretary’s action that determines who is arrested upon release, “being arrested upon release” cannot be one of her criteria in figuring out whom to arrest. So it cannot “describe”—it cannot give the Secretary an “identifying featur[e]” of—the relevant class of aliens. On any other reading of paragraph (1), the command that paragraph (1) gives the Secretary would be downright incoherent.

**Concurring:** Justice Kavanaugh

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

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

## Immunity of International Organizations

*Jam v. International Finance Corp.*

Docket No. 17-1011

### Reversed and Remanded: The District of Columbia Circuit

Argued: October 31, 2018  
Decided: February 27, 2019  
Analysis: ABA *PREVIEW* 17, Issue 2

**Overview:** Indian fishermen sued International Finance Corporation (IFC), alleging harm caused by a coal-fired power plant partially financed by IFC. The lower courts found IFC immune from suit under 22 U.S.C. § 288a(b), which grants international organizations “the same immunity from suit...as is enjoyed by foreign governments.” The Court was asked to decide whether Section 288a(b) affords international organizations absolute immunity, or whether Section 288a(b) incorporates the “restrictive theory” codified in the Foreign Sovereign Immunities Act, including the “commercial activities” exception to immunity.

**Issue:** Does the International Organizations Immunities Act (IOIA), which affords international organizations the “same immunity” from suit that foreign governments have, 22 U.S.C. § 288a(b), confer the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602–11?

**Yes.** The IOIA affords international organizations the same immunity from suit that foreign governments enjoy today under the FSIA.

**From the opinion by Chief Justice Roberts (joined by Justices Thomas, Ginsburg, Alito, Sotomayor, Kagan, and Gorsuch):** The language of the IOIA more naturally lends itself to petitioners’ reading. In granting international organizations the “same immunity” from suit “as is enjoyed by foreign governments,” the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations “shall enjoy absolute immunity from suit,” or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations “immune from search,” use such noncomparative language to define immunities in a static way. 22 U.S.C. § 288a(c). Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date....Because the IOIA does neither of those things, we think the “same as” formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent.

**Dissenting:** Justice Breyer

**Taking no part:** Justice Kavanaugh

## Indian Law

*Washington State Department of Licensing v. Cougar Den, Inc.*

Docket No. 16-1498

### Affirmed: The Supreme Court of Washington

Argued: October 30, 2018  
Decided: March 19, 2019  
Analysis: ABA *PREVIEW* 10, Issue 2

**Overview:** This case examined whether the Yakama Treaty of 1855 allows Yakama tribal members and Yakama tribal businesses to be exempt from state-imposed taxes on the importation of motor vehicle fuel, where the conduct in question (1) occurs on land ceded by the Yakama Nation in the 1855 Yakama Treaty; (2) is performed by a tribal entity



acting as agent for the Yakama Nation tribal government; (3) is performed in order to bring fuel to the Yakama Reservation; and (4) occurs along traditional trading routes used by tribal ancestors.

**Issue:** Did the lower court correctly rule that the Yakama Treaty of 1855 provided a right for tribal members and entities to avoid state taxes on off-reservation commercial activities that make use of public highways?

**Yes.** The judgment is affirmed.

**From the opinion by Justice Breyer (joined by Justices Sotomayor and Kagan, concluding that the 1855 treaty between the United States and the Yakama Nation preempts Washington State's fuel tax as applied to Cougar Den's importation of fuel by public highway):** [O]ur holding rests upon three propositions: First, a state law that burdens a treaty-protected right is pre-empted by the treaty...Second, the treaty protects the Yakamas' right to travel on the public highway with goods for sale...Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway...For these three reasons, Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here.

**Concurring in judgment:** Justice Gorsuch (joined by Justice Ginsburg, concluding that the 1855 treaty guarantees tribal members the right to move their goods, including fuel, to and from market freely)

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

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

---

## Land Use

### *Sturgeon v. Frost*

Docket No. 17-949

### Reversed and Remanded: The Ninth Circuit

Argued: November 5, 2018

Decided: March 26, 2019

Analysis: ABA *PREVIEW* 32, Issue 2

**Overview:** For many years petitioner John Sturgeon used a small hovercraft to hunt moose in Alaska. One day, he was told by National Park Service (NPS) officials that

hovercrafts are not allowed inside the National Park System. Sturgeon's suit challenging the NPS hovercraft restriction was before the Court this term for a second time. This time, like the first time, the issue was whether the NPS's power to regulate boating in the National Park System is restricted in Alaska by Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA).

**Issue:** Does Section 103(c) of the Alaska National Interest Lands Conservation Act bar the National Park Service from banning hovercrafts in units of the National Park System in Alaska?

**Yes.** The Nation River is not public land for purposes of ANILCA, and nonpublic lands within Alaska's national parks are exempt from the Park Service's ordinary regulatory authority.

**From the unanimous opinion by Justice Kagan:** ANILCA, like much legislation, was a settlement. The statute set aside more than a hundred million acres of Alaska for conservation. In so doing, it enabled the Park Service to protect—if need be, through expansive regulation—"the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska."...But public lands (and waters) was where it drew the line—or, at any rate, the legal one. ANILCA changed nothing for all the state, Native, and private lands (and waters) swept within the new parks' boundaries. Those lands, of course, remain subject to all the regulatory powers they were before, exercised by the EPA, Coast Guard, and the like. But they did not become subject to new regulation by the happenstance of ending up within a national park. In those areas, Section 103(c) makes clear, Park Service administration does not replace local control. For that reason, park rangers cannot enforce the Service's hovercraft rule on the Nation River. And John Sturgeon can once again drive his hovercraft up that river to Moose Meadows.

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

---

## Liquor Regulation

### *Tennessee Wine and Spirits Retailers Assn. v. Thomas*

Docket No. 18-96

### Affirmed: The Sixth Circuit

Argued: January 16, 2019

Decided: June 26, 2019

Analysis: ABA *PREVIEW* 45, Issue 4

**Overview:** Under Tennessee law, an individual or corporate applicant for an alcohol retail license must have resided within the state for two years immediately prior to the application. The state adopted the measure to ensure greater oversight of liquor sales and, thus, to protect the health, safety, and welfare of its citizens. The Court was asked to determine whether a state can regulate liquor sales under the Twenty-first Amendment, but without violating the Dormant Commerce Clause, by granting sales licenses only to individuals or entities that have resided in-state for a specified time.

**Issue:** Does Tennessee's durational residency requirement for an alcohol-retail license violate the Dormant Commerce Clause?

**Yes.** Tennessee's two-year durational-residency requirement applicable to retail liquor store license applicants violates the Commerce Clause

**Issue:** If so, is the requirement nevertheless saved by the Twenty-first Amendment?

**No.** Tennessee's residency requirement is not saved by the Twenty-first Amendment.

**From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh):** Not only is the 2-year residency requirement ill-suited to promote responsible sales and consumption practices...but there are obvious alternatives that better serve that goal without discriminating against nonresidents. State law empowers the relevant authorities to limit both the number of retail licenses and the amount of alcohol that may be sold to an individual...The State could also mandate more extensive training for managers and employees and could even demand that they demonstrate an adequate connection with and knowledge of the local community...And the State of course remains free to monitor the practices of retailers and to take action against those who violate the law.

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

**Maritime Law**  
***Air & Liquid Systems***  
***Corp. v. Devries***  
Docket No. 17-1104

**Affirmed:** The Third Circuit

Argued: October 10, 2018  
Decided: March 19, 2019  
Analysis: ABA *PREVIEW* 37, Issue 1

**Overview:** This case pitted the surviving spouses and estates of two naval sailors against military contractors who manufactured and supplied shipboard equipment. The respondents alleged that both sailors, John DeVries and Kenneth McAfee, were injured by asbestos-containing materials added to the petitioners' equipment after it was delivered to the Navy. Petitioners said they did not make, sell, or deliver the later-added materials and the machines were "bare metal" when sold. Respondents argued that the machines incorporated asbestos parts and could not work without those parts and that petitioners had a duty to warn about the risks associated with third-party asbestos. Petitioners originally won both cases on summary judgment, but after an appeal and a remand, the Third Circuit reversed.

**Issue:** Are petitioners liable under maritime law for injuries caused by asbestos that was required to be added for the proper use and maintenance of their products after the sale to the Navy?

**Yes.** In the maritime tort context, a product manufacturer has a duty to warn when its product requires incorporation of a part that the manufacturer knows or has reason to know is likely to be dangerous for its intended, integrated uses, and the manufacturer has no reason to believe that the product's users will realize that danger.

**From the opinion by Justice Kavanaugh (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan):** Importantly, the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated product...The product manufacturer knows the nature of the ultimate integrated product and is typically more aware of the risks associated with that integrated product. By contrast, a parts manufacturer may be aware only that its part could conceivably be used in any number of ways in any number of products. A parts

manufacturer may not always be aware that its part will be used in a way that poses a risk of danger.

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

**Native American Treaty Rights**

***Herrera v. Wyoming***  
Docket No. 17-532

**Vacated and Remanded:** The District Court of Wyoming, Sheridan County

Argued: January 8, 2019  
Decided: May 20, 2019  
Analysis: ABA *PREVIEW* 11, Issue 4

**Overview:** An 1868 Treaty between the United States and the Crow Tribe set aside land in present-day Montana for the Tribe's Reservation and ceded Tribe land in present-day Wyoming to the United States. The treaty also expressly guaranteed hunting rights for the Tribe within and beyond the bounds of its Reservation. In particular, the treaty provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." In January 2014, Crow Tribe member Clayvin Herrera and other Tribe members went hunting on the Crow Reservation in Montana. The group pursued a small herd of elk into the Bighorn National Forest in Wyoming. The group shot and killed three elk in Bighorn and carried the meat back to the Tribe's Reservation in Montana. Wyoming authorities came to the Crow Reservation and cited Herrera for illegal hunting.

**Issue:** Can Crow Tribe members hunt in the Bighorn National Forest under the terms of the 1868 Treaty, in light of the subsequent admission of Wyoming to the United States and the subsequent designation of the Bighorn National Forest?

**Yes.** The Crow Tribe's hunting rights under the 1868 Treaty did not expire upon Wyoming's statehood, and Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created.

**From the opinion by Justice Sotomayor (joined by Justices Ginsburg, Breyer,**

**Kagan, and Gorsuch):** We now consider whether, applying *Mille Lacs*, Wyoming's admission to the Union abrogated the Crow Tribe's off-reservation treaty hunting right. It did not. First, the Wyoming Statehood Act does not show that Congress intended to end the 1868 Treaty hunting right. If Congress seeks to abrogate treaty rights, "it must clearly express its intent to do so."... "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'"... Like the Act discussed in *Mille Lacs*, the Wyoming Statehood Act "makes no mention of Indian treaty rights" and "provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act."... There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the "clear evidence" this Court's precedent requires.

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

**Partisan Gerrymandering**

***Rucho v. Common Cause***  
**and *Lamone v. Benisek***  
Docket No. 18-422 and 18-726

**Vacated and Remanded:** The Middle District of North Carolina and the District of Maryland

Argued: March 26, 2019  
Decided: June 27, 2019  
Analysis: ABA *PREVIEW* 30 and 34, Issue 6

**Overview for *Rucho*:** In 2016, North Carolina redrew its congressional districts in response to a court ruling that its then-existing map was an impermissible racial gerrymander. The General Assembly used an explicitly political criterion, along with traditional and race-neutral criteria, to ensure that ten of its congressional districts remained "Republican," while just three remained "Democratic." The Court was asked to determine both whether this was impermissible partisan gerrymandering and if courts can hear this kind of claim in the first place.

**Overview for Lamone:** In 2011, Maryland redrew its congressional districts based on the 2010 census. The state made several changes to its congressional map, including substantial changes to the Sixth District. These changes significantly altered the political composition of that district. Voters in the District sued, arguing that the changes violated their First Amendment rights to representation and association.

**Issue:** Can the courts hear a case challenging a state's congressional map as an extreme political gerrymander?

**No.** Partisan gerrymandering claims present political questions beyond the reach of the federal courts.

**From the opinion by Chief Justice Roberts (joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh):** Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.

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

---

## Patent Law

### *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*

Docket No. 17-1229

**Affirmed:** The Federal Circuit

Argued: December 4, 2018

Decided: January 22, 2019

Analysis: ABA *PREVIEW* 31, Issue 3

**Overview:** The Leahy-Smith America Invents Act (AIA) provides for an on-sale bar to the entitlement of a patent when the claimed invention was “in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.” The Court was asked to consider whether the text of 35 U.S.C. § 102(a), as modified by the AIA, allows for a confidential sale of the claimed invention when details of

the claimed invention were not made available to the public by the confidential sale parties. The district court held that, under the AIA, the on-sale bar applies only if a sale (or offer for sale) makes the claimed invention available to the public. The Federal Circuit, however, through application of the legislative record and historic on-sale bar jurisprudence, reversed the district court and held that the details of the invention need not be publicly disclosed in the sale terms for the on-sale bar to apply. The Supreme Court was asked to consider the propriety of the post-AIA Federal Circuit's holding that the existence of a sale is public and the details of the invention need not be publicly disclosed in the terms of sale in order for the patent bar embodied in Section 102(a)(1) to apply.

**Issue:** Does an inventor's sale of an invention to a third party that is obligated to keep the invention confidential qualify as prior art under the Leahy-Smith America Invents Act (AIA) for purposes of determining the patentability of the invention?

**Yes.** A commercial sale to a third party who is required to keep the invention confidential may place the invention “on sale” under Section 102(a).

**From the unanimous opinion by Justice Thomas:** *Helsinn* does not ask us to revisit our pre-AIA interpretation of the on-sale bar. Nor does it dispute the Federal Circuit's determination that the invention claimed in the '219 patent was “on sale” within the meaning of the pre-AIA statute. Because we determine that Congress did not alter the meaning of “on sale” when it enacted the AIA, we hold that an inventor's sale of an invention to a third party who is obligated to keep the invention confidential can qualify as prior art under § 102(a).

---

## Patent Law

### *Return Mail, Inc. v. United States Postal Service*

Docket No. 17-1594

**Reversed and Remanded:**  
The Federal Circuit

Argued: February 19, 2019

Decided: June 10, 2019

Analysis: ABA *PREVIEW* 5, Issue 4

**Overview:** In 2011, Congress enacted the Leahy-Smith America Invents Act (AIA),

which created several new quasi-judicial proceedings before the United States Patent and Trademark Office (USPTO) for challenging the patentability of issued patent claims. These proceedings include *inter partes* review (IPR), post-grant review (PGR), and review of covered business method patents (CBM review). Congress provided that a “person” can petition for institution of such reviews in defined circumstances. In this case, the Court was asked to decide whether the U.S. Postal Service, that is, the government, is a “person” authorized to petition for such AIA reviews.

**Issue:** Is the government a “person” who may petition to institute review proceedings under the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112–29, 125 Stat. 284 (2011)?

**No.** The government is not a “person” capable of instituting the three AIA review proceedings.

**From the opinion by Justice Sotomayor (Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh):** Given the presumption that a statutory reference to a “person” does not include the Government, the Postal Service must show that the AIA's context indicates otherwise. Although the Postal Service need not cite to “an express contrary definition,”...it must point to some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government...The Postal Service makes three arguments for displacing the presumption. First, the Postal Service argues that the statutory text and context offer sufficient evidence that the Government is a “person” with the power to petition for AIA review proceedings. Second, the Postal Service contends that federal agencies' long history of participation in the patent system suggests that Congress intended for the Government to participate in AIA review proceedings as well. Third, the Postal Service maintains that the statute must permit it to petition for AIA review because § 1498 subjects the Government to liability for infringement. None delivers.

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



## Prescription Drug Preemption

### *Merck Sharp & Dohme Corp. v. Albrecht*

Docket No. 17-290

#### **Vacated and Remanded: The Third Circuit**

Argued: January 7, 2019

Decided: May 20, 2019

Analysis: ABA *PREVIEW* 4, Issue 4

**Overview:** In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Court predicated branded-drug implied-preemption on “clear evidence” that the FDA would have rejected a plaintiff’s proposed warning. In *Merck v. Albrecht*, the FDA actually rejected a relevant warning, but plaintiffs disputed why and contended that the FDA would have approved their different language. The Court was asked to decide if the FDA rejection equals preemption or whether juries must resolve, possibly by “clear and convincing” evidence, issues regarding the FDA intent.

**Issue:** Is a state-law failure-to-warn claim preempted when the FDA rejected the drug manufacturer’s proposal to warn about the risk after being provided with the relevant scientific data?

**Yes.** “Clear evidence” is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug’s label to include that warning.

**From the opinion by Justice Breyer (joined by Justices Thomas, Ginsburg, Sotomayor, Kagan, and Gorsuch):** We stated in *Wyeth v. Levine* that state law failure-to-warn claims are pre-empted by the Federal Food, Drug, and Cosmetic Act and related labeling regulations when there is “clear evidence” that the FDA would not have approved the warning that state law requires. ...We here decide that a judge, not the jury, must decide the pre-emption question.

**Concurring:** Justice Thomas

**Concurring in judgment:** Justice Alito (joined by Chief Justice Roberts and Justice Kavanaugh)

## Qualified Immunity

### *Escondido v. Emmons*

Docket No. 17-1660

#### **Reversed in part, Vacated in part, and Remanded: The Ninth Circuit**

Argued: N/A

Decided: January 7, 2019

Analysis: N/A

**Overview:** Escondido (CA) police received a 911 call from Maggie Emmons about a domestic violence incident. Emmons’s husband was subsequently arrested and released. A few weeks later, the police received another call about a domestic disturbance, this time from the Emmons’s roommate’s mother who was not present at the apartment but on the phone with the roommate. Dispatch informed the two responding officers that calls to the apartment were going unanswered and it was believed that the Emmons’s two children could be in the home. Upon arrival at the home, and after a short interaction with Emmons and an unidentified man, the police took down and arrested the man, who was later identified as Emmons’s father, Marty Emmons. Marty Emmons later sued the Escondido police department under Section 1983 raising several claims, including excessive force in violation of the Fourth Amendment. The police department asserted claims of qualified immunity. The Ninth Circuit held that the right to be free of excessive force was clearly established at the time of the incident.

**Issue:** Was the Ninth Circuit correct in finding that two police officers violated clearly established law when they forcibly apprehended a man at the scene of a reported domestic violence incident?

**No.** The court of appeals failed to properly analyze whether clearly established law was violated with specificity by the officers’ actions.

**From the *per curiam* opinion:** In this case, the Court of Appeals contravened those settled principles. The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the “right to be free of excessive force” was clearly established. With the right defined at that high

level of generality, the Court of Appeals then denied qualified immunity to the officers and remanded the case for trial.

## Racial Gerrymandering

### *Virginia House of Delegates v. Bethune-Hill*

Docket No. 18-281

#### **Appeal Dismissed: The Eastern District of Virginia**

Argued: March 18, 2019

Decided: June 17, 2019

Analysis: ABA *PREVIEW* 4, Issue 6

**Overview:** In 2011, after the 2010 census, Virginia set out to redraw its state legislative districts. In drawing the new House districts, the legislature relied on traditional, race-neutral districting criteria; the one-person-one-vote rule; and a 55-percent target for the black voting age population in each district, in order to comply with the Voting Rights Act. Plaintiffs sued, arguing that the state violated the Equal Protection Clause. A three-judge district court agreed.

**Issue:** Does the Virginia House of Delegates have standing to appeal the lower court’s ruling to the Supreme Court?

**No.** The House lacks standing, either to represent the state’s interests or in its own right.

**From the opinion by Justice Ginsburg (joined by Justices Thomas, Sotomayor, Kagan, and Gorsuch):** Virginia has thus chosen to speak as a sovereign entity with a single voice. In this regard, the State has adopted an approach resembling that of the Federal Government, which “centraliz[es]” the decision whether to seek *certiorari* by “reserving litigation in this Court to the Attorney General and the Solicitor General.”...Virginia, had it so chosen, could have authorized the House to litigate on the State’s behalf, either generally or in a defined class of cases...Some States have done just that. Indiana, for example, empowers “[t]he House of Representatives and Senate of the Indiana General Assembly... to employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana.”...But the choice belongs to Virginia, and the House’s argument that it has authority to represent the State’s inter-

ests is foreclosed by the State's contrary decision.

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

## Ripeness in Takings Cases

### *Knick v. Township of Scott*

Docket No. 17-647

### Vacated and Remanded: The Third Circuit

Argued: October 3, 2018

Reargued: January 16, 2019

Decided: June 21, 2019

Analysis: ABA *PREVIEW* 18, Issue 1, and ABA *PREVIEW* 40, Issue 4

**Overview:** This case presented the issue of whether the Court should apply *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, to a facial takings case. For more than 30 years, land use lawyers have debated the role of *Williamson County* ripeness in takings law. While the roots of this case are more than a century old, there appears to be significant concern that a broad reading of *Williamson County* unduly discourages federal takings claims from being heard.

**Issue:** Should the *Williamson County* ripeness requirement relating to utilization of state just compensation procedures (i.e., the “state procedures prong”) continue to be applied in takings cases?

**No.** The state-litigation requirement of *Williamson County* is overruled.

**From the opinion by Chief Justice Roberts (joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh):** The state-litigation requirement relegates the Takings Clause “to the status of a poor relation” among the provisions of the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under § 1983, but the state-litigation requirement “hand[s] authority over federal takings claims to state courts.”...Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged

constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.

**Concurring:** Justice Thomas

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

## Securities Law

### *Emulex Corp. v. Varjabedian*

Docket No. 18-459

### Dismissed: The Ninth Circuit

Argued: April 15, 2019

Decided: April 23, 2019

Analysis: ABA *PREVIEW* 7, Issue 7

**Overview:** Codefendant Avago Technologies Wireless acquired codefendant Emulex Corporation in 2015 following a successful merger agreement, tender offer, and merger. Financial advisor Goldman Sachs had issued a report concluding that the proposed merger, which it asserted produced a 26.4 percent premium over Emulex's current share price, fairly compensated shareholders. Emulex shared the Goldman Sachs analysis with its shareholders but omitted a one-page chart which indicated the offer was below average, although within industry norms. Plaintiff Gary Varjabedian initiated a putative class action in federal court and alleged securities fraud under Section 14(e) of the Securities Exchange Act based on the chart's omission. The district court dismissed the complaint for plaintiff's failure to properly plead scienter. The Ninth Circuit reversed, holding that Section 14(e) requires a showing only of negligence, not scienter. A circuit split exists; the Ninth Circuit stands alone against the weight of authority in the Second, Third, Fifth, Sixth, and Eleventh Circuits in finding a negligence standard.

**Issue:** Does Section 14(e) of the Securities Exchange Act of 1934 support a private right of action based on the negligent misstatement or omission of a material fact made in connection with a tender offer?

**The writ is dismissed as improvidently granted.**

## Securities Law

### *Lorenzo v. Securities and Exchange Commission*

Docket No. 17-1077

### Affirmed: The District of Columbia Circuit

Argued: December 3, 2018

Decided: March 27, 2019

Analysis: ABA *PREVIEW* 25, Issue 3

**Overview:** Securities laws provide for actions against primary violators of the securities laws and secondary violators of the laws. In *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), the Supreme Court determined that a person makes a false statement punishable under Rule 10b-5(b) if the person has “ultimate authority” over the statement. In other words, a person who merely participates but doesn't make the statement is a primary violator, not a secondary violator. In this case, the Court examined whether a person can be a primary violator under the “fraudulent scheme” sections of Rule 10b and other securities laws when the person is not the drafter of the false statements but does send the emails out to investors.

**Issue:** Can a misstatement claim that does not meet the elements set forth in *Janus Capital Group, Inc. v. First Derivative Traders* be repackaged and pursued as a fraudulent scheme claim?

**Yes.** Dissemination of false or misleading statements with intent to defraud can fall within the scope of Rules 10b-5(a) and (c), as well as the relevant statutory provisions, even if the disseminator did not “make” the statements and consequently falls outside Rule 10b-5(b).

**From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Ginsburg, Alito, Sotomayor, and Kagan):** These provisions capture a wide range of conduct. Applying them may present difficult problems of scope in borderline cases. Purpose, precedent, and circumstance could lead to narrowing their reach in other contexts. But we see nothing borderline about this case, where the relevant conduct (as found by the Commission) consists of disseminating false or misleading information to prospective investors with the intent to defraud. And while one can readily imagine other actors tangentially involved in

dissemination—say, a mailroom clerk—for whom liability would typically be inappropriate, the petitioner in this case sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company.

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

**Taking no part:** Justice Kavanaugh

## Sentencing Law

### *Mont v. United States*

Docket No. 17-8995

**Affirmed:** The Sixth Circuit

Argued: February 26, 2019

Decided: June 3, 2019

Analysis: ABA *PREVIEW* 21, Issue 5

**Overview:** The district court sentenced Jason Mont for violating his supervised release conditions in connection with a state conviction and sentence that credited him with time served in pretrial detention while he was on supervised release. Mont challenged the court's exercise of jurisdiction, arguing that 18 U.S.C. § 3624(e) does not permit the court to reach backward to find that supervised release was tolled once he received credit for his pretrial detention at sentencing. Petitioner and respondent disagreed about the interpretation of the language and structure of Section 3624(e). While the government relied heavily on the purpose of supervised release, petitioner noted that the district court could have prevented its jurisdiction from lapsing had it issued a summons or warrant prior to the end of his supervised release, as indicated in 18 U.S.C. § 3583(i). Such summons or warrant would have allowed the court to hold the violations hearing even after supervised release ended.

**Issue:** Does 18 U.S.C. § 3624(e) toll a period of supervised release while petitioner is held in pretrial custody awaiting trial on a state offense when the time in detention is later credited to his sentence?

**Yes.** Pretrial detention later credited as time served for a new conviction is “imprison[ment] in connection with a conviction” and thus tolls the supervised-release term under Section 3624(e), even if the court must make the tolling calculation after learning whether the time will be credited.

**From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Ginsburg, Alito, and Kavanaugh):** This reading of “imprison[ment] in connection with a conviction” is buttressed by the fact that Congress, like most States, instructs courts calculating a term of imprisonment to credit pretrial detention as time served on a subsequent conviction...Thus, it makes sense that the phrase “imprison[ment] in connection with a conviction” would include pretrial detention later credited as time served, especially since both provisions were passed as part of the Sentencing Reform Act of 1984...If Congress intended a narrower interpretation, it could have easily used narrower language, such as “after a conviction” or “following a conviction.”...We cannot override Congress’ choice to employ the more capacious phrase “in connection with.”

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

## Separation of Powers

### *Gundy v. United States*

Docket No. 17-6086

**Affirmed:** The Second Circuit

Argued: October 2, 2018

Decided: June 20, 2019

Analysis: ABA *PREVIEW* 12, Issue 1

**Overview:** In 2005, Herman Avery Gundy pled guilty in Maryland to sexual assault of a minor. After he served his sentence in Maryland, Gundy was transferred by the Federal Bureau of Prisons to New York to serve a related federal sentence. After release, he was arrested and convicted of failure to register as a sex offender under the federal Sex Offender Registration and Notification Act (SORNA). He argued that SORNA, which was enacted in 2006 (after his conviction), could not constitutionally apply to him, because the Act delegated too much authority to the attorney general to determine whether it applied to pre-Act offenders.

**Issue:** Does SORNA's delegation to the attorney general to determine the retroactive application of the Act violate the Nondelegation Doctrine?

**Yes.** The judgment is affirmed.

**From the opinion by Justice Kagan (joined by Justices Ginsburg, Breyer,**

**and Sotomayor):** The Act's definition of “sex offender”...makes the same point. Under that definition, a “sex offender” is “an individual who was convicted of a sex offense.”...Note the tense: “was,” not “is.” This Court has often “looked to Congress’ choice of verb tense to ascertain a statute’s temporal reach,” including when interpreting other SORNA provisions...Here, Congress’s use of the past tense to define the term “sex offender” shows that SORNA was not merely forward looking. The word “is” would have taken care of all future offenders. The word “was” served to bring in the hundreds of thousands of persons previously found guilty of a sex offense, and thought to pose a current threat to the public. The tense of the “sex offender” definition thus confirms that the delegation allows only temporary exclusions, as necessary to address feasibility issues. Contra Gundy, it does not sweep so wide as to make a laughingstock of the statute’s core definition.

**Concurring in judgment:** Justice Alito

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

**Taking no part:** Justice Kavanaugh

## State Action Doctrine

### *Manhattan Community Access Corp. v. Halleck*

Docket No. 17-1702

**Reversed in part and Remanded:**  
The Second Circuit

Argued: February 25, 2019

Decided: June 17, 2019

Analysis: ABA *PREVIEW* 13, Issue 5

**Overview:** New York law requires local governments to establish public-access channels when issuing cable franchises to an operator with more than 36 channels. New York City assigns jurisdiction over public-access channels to the Manhattan Neighborhood Network (MNN), a private nonprofit corporation. DeeDee Halleck and Jesus Papoleto Melendez produced content for MNN's public-access channel. But after Halleck and Melendez produced a video critical of MNN, MNN barred them from the channel. Halleck and Melendez sued, arguing that MNN violated their First Amendment rights. MNN argued in response that the First Amendment did not apply, because it is not a state actor.



**Issue:** Is a private operator of public-access television channels a state actor and thus subject to the First Amendment, even though the state has no control over the operator or its programming?

**No.** MNN is not a state actor subject to the First Amendment.

**From the opinion by Justice Kavanaugh (joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch):** In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints. If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether. “The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.” . . . Benjamin Franklin did not have to operate his newspaper as “a stagecoach, with seats for everyone.” . . . That principle still holds true. As the Court said in *Hudgens*, to hold that private property owners providing a forum for speech are constrained by the First Amendment would be “to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.” . . . The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property

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

## State Immunity

### *Franchise Tax Board of California v. Hyatt*

Docket No. 17-1299

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

Argued: January 9, 2019

Decided: May 13, 2019

Analysis: ABA *PREVIEW* 23, Issue 4

**Overview:** Gilbert P. Hyatt lived in California

and earned income there based on technology patents. At some point he moved to Nevada and stopped paying California income tax on his earnings. The Franchise Board of California, which assesses state income taxes, conducted an audit. The Board determined that Hyatt moved after the date that he claimed and that he owed significant back taxes, interest, and penalties. Hyatt sued the Board in Nevada state courts, arguing that it committed a variety of torts during its audit, and won a monetary judgment against the Board. The Board contended, however, that it could not be sued in another state’s courts.

**Issue:** Should *Nevada v. Hall*, which permits a state to be sued in another state’s courts without its consent, be overruled?

**Yes.** *Nevada v. Hall* is overruled; states retain their sovereign immunity from private suits brought in courts of other states.

**From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh):** *Nevada v. Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution. *Stare decisis* does not compel continued adherence to this erroneous precedent.

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

## Tax Law

### *BNSF Railway Co. v. Loos*

Docket No. 17-1042

**Reversed and Remanded:** The Eighth Circuit

Argued: November 6, 2018

Decided: March 4, 2019

Analysis: ABA *PREVIEW* 45, Issue 2

**Overview:** This case dealt with the interpretation of the Railroad Retirement Tax Act (RRTA) and whether its language includes as compensation for tax purposes damages paid to injured railroad employees. Respondent Michael Loos, injured while working at petitioner’s railyard, filed suit against petitioner under the Federal Employers Liability Act (FELA) and was awarded damages. Petitioner sought an offset of the wage-loss portion of the judgment. The district court held that personal injury awards are exempt

income under IRS regulation 26 U.S.C. § 104. The Court of Appeals for the Eighth Circuit ultimately affirmed the district court’s ruling but on different grounds; it held that, under the IRS regulation, a personal injury award would count toward compensation but the RRTA unambiguously cannot be read to include a like provision in its own definition.

**Issue:** Did the Eighth Circuit err in holding that, under the RRTA, payment for lost wages due to personal injury does not count toward taxable compensation?

**Yes.** A railroad’s payment to an employee for working time lost due to an on-the-job injury is taxable “compensation” under the RRTA.

**From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, Kagan, and Kavanaugh):** In harmony with this Court’s decisions in *Nierotko* and *Quality Stores*, we hold that “compensation” for RRTA purposes includes an employer’s payments to an employee for active service and for periods of absence from active service. It is immaterial whether the employer chooses to make the payment or is legally required to do so. Either way, the payment is remitted to the recipient because of his status as a service-rendering employee.

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

## Tax Law

### *Dawson v. Steager*

Docket No. 17-419

**Reversed and Remanded:** The Supreme Court of West Virginia

Argued: December 3, 2018

Decided: February 20, 2019

Analysis: ABA *PREVIEW* 21, Issue 3

**Overview:** In October 2013, petitioner James Dawson, along with his wife (co-petitioner) Elaine Dawson, filed an amended tax return for 2010 and 2011. Petitioner claimed an adjustment exempting all of his Federal Employment Retirement System (FERS) benefits pursuant to Section 12(c)(6) of the West Virginia code, the provision that fully exempts from state taxation retirement benefits paid under the Municipal Police Officer and Firefighter Retirement System (MPFRS), the Deputy Sheriff Retirement

System (DSRS), Trooper Plan A, and Trooper Plan B. The West Virginia Office of Tax Appeals, respondent, rejected the appeal. Dawson sued, alleging that the West Virginia statute violates the intergovernmental tax immunity doctrine documented in 4 U.S.C. § 111. Under the statute, the United States consents to state taxation of federal employees' compensation so long as the state tax does not discriminate on the basis of the compensation source. While the circuit court reversed, the West Virginia Supreme Court of Appeals ultimately affirmed the ruling of the Office of Tax Appeals.

**Issue:** Did the West Virginia Supreme Court of Appeals err in holding that Section 12(c) (6) of the West Virginia code did not run afoul of 4 U.S.C. § 111?

**Yes.** The West Virginia statute unlawfully discriminates against Dawson as Section 111 forbids.

**From the unanimous opinion by Justice Gorsuch:** Section 111 disallows *any* state tax that discriminates against a federal officer or employee—not just those that seem to us especially cumbersome. Nor are we inclined to accept West Virginia's invitation to adorn § 111 with a new and judicially manufactured qualification that cannot be found in its text. In fact, we have already refused an almost identical request. In *Davis*, we rejected Michigan's suggestion that a discriminatory state income tax should be allowed to stand so long as it treats federal employees or retirees the same as "the vast majority of voters in the State."... We rejected, too, any suggestion that a discriminatory tax is permissible so long as it "does not interfere with the Federal Government's ability to perform its governmental functions."... In fact, as long ago as *McCulloch*, Chief Justice Marshall warned against enmeshing courts in the "perplexing" business, "so unfit for the judicial department," of attempting to delineate "what degree of taxation is the legitimate use, and what degree may amount to the abuse of power."

## Tort Law

### *Thacker v. Tennessee Valley Authority*

Docket No. 17-1201

### Reversed and Remanded: The Eleventh Circuit

Argued: January 14, 2019

Decided: April 29, 2019

Analysis: ABA *PREVIEW* 26, Issue 4

**Overview:** The federal government possesses sovereign immunity, meaning that it cannot be sued. The federal government can and does waive sovereign immunity, permitting suits against it in some circumstances. The government waived its sovereign immunity to tort damages actions, commonly referred to as personal injury suits, in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680. The FTCA's waiver of sovereign immunity was subject to listed exceptions specifying certain types of suits for which the government would retain immunity. 28 U.S.C. § 2680. One such exception, the discretionary function exception, covers policy decisions and the like. 28 U.S.C. § 2680(a). Congress frequently creates government entities in corporate form. By doing so, Congress seeks to create entities "clothed with the power of government but possessed of the flexibility and initiative of a private enterprise." The Second Bank of the United States, the subject of *McCulloch v. Maryland*, 17 U.S. 316 (1819), provides a historical example of such entities. Use of the government corporation saw a resurgence in the 1930s and has continued to the present. Generally, when Congress creates an independent entity, like the Tennessee Valley Authority (TVA), it allows the entity to "sue and be sued" in its own name. Sue-and-be-sued clauses serve as broad waivers of sovereign immunity.

**Issue:** Can the Tennessee Valley Authority, a government corporation entitled to sue and be sued, invoke an implied "discretionary

function" exception, akin to the discretionary function exception expressly set forth in the Federal Tort Claims Act?

**No.** The waiver of immunity in the TVA's sue-and-be-sued clause is not subject to a discretionary function exception of the kind in the FTCA.

**From the unanimous opinion by Justice Kagan:** *Burr* and its progeny thus require a far more refined analysis than the Government offers here. The reasons those decisions give to recognize a restriction on a sue-and-be-sued clause do not justify the wholesale incorporation of the discretionary function exception.... [T]he "constitutional scheme" has nothing to say about lawsuits challenging a public corporation's discretionary activity—except to leave their fate to Congress... For its part, Congress has not said in enacting sue-and-be-sued clauses that it wants to prohibit all such suits—quite the contrary. And no concern for "governmental functions" can immunize discretionary activities that are commercial in kind... When the TVA or similar body operates in the marketplace as private companies do, it is as liable as they are for choices and judgments. The possibility of immunity arises only when a suit challenges governmental activities—the kinds of functions private parties typically do not perform. And even then, an entity with a sue-and-be-sued clause may receive immunity only if it is "clearly shown" that prohibiting the "type[] of suit [at issue] is necessary to avoid grave interference" with a governmental function's performance.... That is a high bar. But it is no higher than appropriate given Congress's enactment of so broad an immunity waiver—which demands, as we have held, a "liberal construction."

American Bar Association Division for Public Education,  
321 N. Clark Street, Chicago, IL 60654-7598, 312.988.5773; [www.supremecourtpreview.org](http://www.supremecourtpreview.org); FAX 312.988.5494,  
Email: [publiced@americanbar.org](mailto:publiced@americanbar.org)

Funding for this issue has been provided by the American Bar Association Fund for Justice and Education; we are grateful for its support. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Standing Committee on Public Education.  
ISSN 0363-0048

