



A LOOK AHEAD

Supreme Court of the United States October Term 2021

SUPREME COURT INSTITUTE
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2021 PREVIEW

September 2021
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Supreme Court Institute Preview Report

Supreme Court October Term 2021

This report previews the Supreme Court’s argument docket for October Term 2021 (OT 21). The Court has thus far accepted 29 cases for review.¹ The Court has calendared nine arguments to be heard in the October Sitting and eight in the November Sitting.

Section I of the report highlights some especially noteworthy cases the Court will hear. Section II organizes the cases accepted for review by subject matter and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

Carrying Firearms in Public and the Second Amendment *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843

In *District of Columbia v. Heller*, the Supreme Court interpreted the Second Amendment to guarantee individuals a right to possess and carry weapons for the purposes of self-defense. The particular law at issue in *Heller* prohibited handgun possession in the home, and the Court directed its holding of unconstitutionality to that prohibition. The Court also appeared to endorse some limitations on carrying a weapon outside the home: It noted the historical basis for a prohibition on carrying a concealed weapon as long as a state allows open carry. And it said it was not foreclosing laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. In *McDonald v. City of Chicago*, the Court held that the Second Amendment right established in *Heller* applies to the states. But it did not go beyond *Heller* in elaborating on what the right entails or what limitations may be placed on it.

In the years since *Heller*, the Court has not seen fit to address the extent to which states may regulate the carrying of firearms outside the home—until now. New York requires a special license to carry a weapon for self-defense outside the home. Certain classes of people, such as merchants, bank messengers, and prison employees may carry a handgun in their place of business or employment. All others may obtain a self-defense license only if they can demonstrate a “proper cause.”

The Second Circuit upheld the proper cause requirement. The court viewed *Heller* as suggesting that the Second Amendment has “some” application to public possession of firearms. The court therefore held that New York’s substantial limitation on public possession triggered heightened scrutiny. The court rejected application of strict scrutiny, however, reasoning that *Heller* had limited the core of the Second Amendment to possession in the home. The court also viewed history and tradition as supporting more flexibility for states in addressing the greater dangers to the public associated with public possession. Applying intermediate scrutiny, the court concluded that New York’s restriction was substantially related to the State’s interest in public safety and crime prevention.

¹ This report does not include two cases that were granted on August 23, 2021: *Johnson v. Arteaga-Martinez*, No. 19-896, and *Garland v. Gonzalez*, No. 20-322.

Petitioners argue that the Second Amendment gives full protection to the right to carry firearms outside the home for self-protection. They argue: (1) The term “bear” is interchangeable with carry and typically refers to conduct outside the home; (2) the need for self-protection arises outside the home, not just inside; and (3) history and tradition confirm that the Second Amendment enshrines a right to carry outside the home, with an exception for unusual and dangerous weapons intended to terrorize the public. Once the right to carry outside the home for self-protection is understood to be fully protected by the Second Amendment, petitioners argue, New York’s law cannot survive. Critically, while the Second Amendment extends the right to carry outside the home to the “people,” petitioners contend, New York limits the right to carry to the few who can establish a proper cause.

The resolution of this case likely comes down to whether the Court views the right to carry firearms in public for purposes of self-protection as a fundamental component of the Second Amendment, subject to a few exceptions, or whether it accepts the Second Circuit’s view that the right to carry lies outside the Second Amendment’s core and is therefore subject to more extensive regulation than the right to keep and bear arms in the home. If it views the right to carry as a core component of the Second Amendment, it is hard to see how it could sustain the New York law. *Heller* made clear that the Court is prepared to recognize that some restrictions on carrying guns in public are consistent with the Second Amendment. But the limitation at issue here is far more restrictive than the examples identified in *Heller*. The New York law limits any right to carry handguns, not just concealed carry. And it applies throughout the State, not just in “sensitive” locations. On the other hand, the law does not erect a categorical prohibition: Those who can establish a proper cause may obtain a license to carry. And limiting the right to carry weapons that pose a danger to the public to those who can establish a proper cause can be viewed as striking a sensible balance. Still, it is difficult to envision a Court that views the right to carry as a fundamental component of the Second Amendment accepting that the right belongs only to those persons who can establish a proper cause, rather than to members of the general public who are otherwise qualified to bear arms.

Prohibitions on Pre-Viability Abortions

***Dobbs v. Jackson Women’s Health Organization*, No. 19-1392**

In *Roe v. Wade*, the Supreme Court held that a state may not prohibit a woman from deciding to terminate her pregnancy before a fetus is viable. In *Planned Parenthood v. Casey*, the Court reaffirmed that holding. The Court has also held in *Casey* that states have an interest from the outset of pregnancy in protecting a fetus and a woman’s health, and may therefore impose certain restrictions on pre-viability abortions as long as they do not result in an undue burden on a woman’s right to choose. In the years following *Casey*, numerous states sought to test the limits of the authority to regulate abortions, placing restrictions on pre-viability abortions that made them more inconvenient, expensive, or otherwise burdensome. More recently, states have begun to enact laws that, with limited exceptions, prohibit abortions after the fetus reaches a particular gestational age before viability.

Mississippi enacted such a law. It prohibits all abortions when the gestational age of a fetus exceeds 15 weeks except in a medical emergency or in the case of a severe fetal abnormality. The Fifth Circuit unanimously held that the Mississippi statute was unconstitutional under *Roe* and *Casey* because it prohibited pre-viability abortions. The Supreme Court granted

certiorari to decide whether all pre-viability prohibitions on elective abortions are unconstitutional.

At the petition stage, Mississippi told the Court the question presented did not require the Court to overturn *Roe* or *Casey*. According to Mississippi, the question (which the Court granted) “merely ask[s] the Court to reconcile a conflict in its own precedents.” As Mississippi saw it, the conflict was “between this Court’s suggestion that states cannot prohibit pre-viability abortions . . . and the Court’s repeated admonition that states have legitimate interests from the outset of the pregnancy in protecting the health of the mother and the life of the fetus that may become a child.” The closest Mississippi got in the petition to a request to overrule *Roe* and *Casey* was in a footnote stating that “if the Court determines that it cannot reconcile *Roe* and *Casey* with other precedents or scientific advancements showing a compelling state interest in fetal life far earlier in pregnancy than these cases contemplate, the Court should not retain erroneous precedent.”

Mississippi’s brief on the merits, by contrast, is a direct assault on *Roe* and *Casey*, and its frontline argument is that they should be overruled. The brief argues that the Constitution does not protect a right to an abortion, and that *Roe* and *Casey* should be overruled because they are grievously wrong, unworkable, damaging, and outmoded. Tucked into the back end of the brief is a narrower argument that the Court should reject a viability rule and uphold the Mississippi statute, either on the theory that the State has a compelling interest at 15 weeks gestation, or on the theory that the statute does not impose an undue burden on abortion under *Casey* because women can choose to obtain an abortion any time before 15 weeks gestation.

How the Court will react to the metamorphosis in the State’s approach is anyone’s guess. It seems likely that a majority of the Court may be inclined to overrule *Roe* and *Casey* at some point. But it also remains quite possible that there are not five Justices who are prepared to do so in this case. So it is worthwhile to explore the options available to the Court other than overruling *Roe* and *Casey*.

One is to dismiss as improvidently granted. It would not be the first time the Court has done so when a party has so dramatically changed its approach between the petition and the merits brief. Another is to take the case on the terms the State initially presented it and decide the case based solely on existing precedent. That should result in an affirmance for the reasons given by the court of appeals. But it could also result in a reversal on the theory that *Casey* is inherently self-contradictory, insofar as it imposes an across-the-board undue burden standard and yet rules out any prohibition on pre-viability abortions. That contradiction could then be resolved in favor the undue burden standard. And with that tension resolved, Mississippi’s statute might be upheld because 15 weeks of choice is sufficient to avoid imposition of an undue burden on women seeking an abortion. Finally, the Court could choose to lay the groundwork for a future challenge to *Roe* and *Casey* by vacating and remanding for an evidentiary hearing on the medical and science issues that could potentially affect a decision on whether they should be overruled. As Judge James Ho explained in his opinion concurring in the judgment of the Fifth Circuit, the Federal Rules of Civil Procedure seem to contemplate that course of action when a party seeks to overrule a decision.

The Court’s recent refusal to enjoin enforcement of Texas’s prohibition on abortions after six weeks has been thought by some to signal the Court’s intention to overrule *Roe* and *Casey* in this case. Because the Court rested its decision on “complex and novel antecedent procedural questions,” however, the decision provides little or no new insight into how the Court might decide this case. Just as before the Texas decision, it seems likely that a majority of the Court

may be inclined to overrule *Roe* and *Casey* at some point, but it remains quite possible that there are not five Justices who are prepared to do so in this case.

Free Exercise and Funding for Religious Instruction ***Carson v. Makin*, No. 20-1088**

It is not news that the Supreme Court has become increasingly sympathetic to claims of religious liberty. That trend has been particularly pronounced in the area of funding of religious educational institutions. From a world in which any funding of religious institutions was viewed with suspicion under the Establishment Clause, we are now in a world in which religious institutions are entitled under the Free Exercise Clause to participate on equal terms with nonreligious institutions in obtaining access government funds.

The rule that emerges from the nondiscrimination line of cases is that that disqualifying otherwise eligible recipients from a public benefit solely because of their religious status imposes a penalty on religion in violation of the First Amendment's Free Exercise Clause. Applying that principle, the Court held in *Trinity Lutheran v. Comer* that a state violated the Free Exercise Clause when it provided grants to nonprofit organizations to pay for playground resurfacing, but disqualified any organization owned or controlled by a religious entity. And in *Espinoza v. Montana*, the Court held that the Free Exercise Clause prohibits a state that offers tuition assistance to attend private schools from declining to provide assistance based on a school's religious status.

In both cases, the Court reserved the question whether disqualifying religious uses of government aid also violates the Free Exercise Clause. That is the question on which the Court granted certiorari in this case. Under Maine law, students whose school districts do not operate public high schools may receive financial assistance to attend a private school that meets certain requirements. A school that is operated by a religious entity is not disqualified from participating in the program as long as it uses the money to afford secular rather than religious instruction. But if a school, whether operated by a religious entity or not, will use the funds for religious instruction, it is disqualified from the program. In short, the exclusion is based on the use to which assistance will be put, not on the religious status of the school.

The First Circuit upheld the Maine program. The court reasoned that in evaluating a restriction on religious use, the relevant question is whether a program is penalizing religion by excluding those who seek the very same benefit as everyone else, or whether it is simply refusing to subsidize religion by excluding only those who are seeking a distinct benefit. The court concluded that Maine's program constitutes a refusal to subsidize, rather than a penalty, because the relevant benefit that Maine offers is the rough equivalent of a public secular education, and schools that offer religious instruction do not afford that benefit. Just as a state may exclude religious instruction from its public schools, the court reasoned, it may similarly exclude religious instruction from the schools that it subsidizes in their place.

While the Supreme Court has formally reserved the question whether discrimination against religious use violates the Free Exercise Clause, it hardly seems possible that the current Court would uphold such discrimination. At the same time it was reserving the question, the Court noted in *Espinoza* that its decision in *Church of Lukumi Babalu Aye v. City of Hialeah* struck down a law designed to ban a religious practice (involving alleged animal cruelty) while allowing comparable non-religious practices, on the ground that a law that targets religious conduct for distinctive treatment generally violates the Free Exercise Clause. And it further

referenced Justice Gorsuch's opinion that there is no meaningful distinction between discrimination based on use and discrimination based on status. It is true that the Court distinguished its prior decision in *Locke v. Davey*, on the ground that the refusal to fund training for clergy was based on use religious use rather than religious status. But is also distinguished *Locke* on the ground that it involved a historic and substantial state interest in not funding the training of clergy. It seems likely that, if *Locke* survives, it will be on that *sui generis* ground.

Adopting a rule that a state may not discriminate against religious use, however, may not be a complete answer to the court of appeals' analysis. The nondiscrimination rule is premised on the idea that a state is erecting a penalty on religion, not simply failing to subsidize religion, and it is at least arguable that Maine's program constitutes a failure to subsidize. Moreover, there is some intuitive appeal to the court of appeals' view that when a state is only assisting schools that substitute for public education, it should be free to match the instruction it funds to that available at public schools. Petitioners have attacked the premise of that defense. They say that, by the terms of the funding statute, private schools are not substitutes but alternatives to public school. And they say the assisted private schools are nothing like public schools: They charge admission and they do not admit all comers. It remains to be seen whether the State can mount an adequate response to that line of attack.

Boston Marathon Bombing ***United States v. Tsarnaev*, No. 20-443**

In 2013, Dzhokhar Tsarnaev and his older brother Tamerlan detonated bombs at the Boston Marathon, killing three and wounding more than 200 others, all in the name of jihad. The bomb detonated by Dzhokhar killed two people. While attempting to escape, Dzhokhar ran over his brother and killed him. Dzhokhar was eventually captured and charged with 30 crimes, 17 of which were capital offenses. At trial, Dzhokhar's counsel admitted that Dzhokhar committed the charged acts, but asserted that he had been under the influence of his older brother. The jury found Dzhokhar guilty on all counts. The jury recommended capital punishment for six of the 17 capital counts (the ones relating to the bomb that killed two), and the district court imposed the death penalty on those counts.

The questions presented in this case relate to the court's questioning of prospective jurors and to mitigating evidence that Dzhokhar sought to introduce to avoid capital punishment. As to the first, Dzhokhar wanted the district court to ask all prospective jurors what they knew about the case, but the district court denied the request. As to the second, to support his claim that his brother influenced him and played the lead role in the Boston Marathon bombing, Dzhokhar sought to introduce evidence that his brother had been involved in a triple murder in Waltham. The evidence was this: Tamerlan's friend Ibragim Todashev told FBI investigators that he and Tamerlan participated in robbing the victims, but that Tamerlan alone killed them to avoid leaving any witnesses. After giving the statement, Todashev attacked the agents, who shot and killed him. Also, one of Dzhokhar's friends told the government that Dzhokhar knew Tamerlan was involved in the Waltham murders and committed jihad there. The district court excluded the evidence, stating that there was insufficient evidence of what role Tamerlan played in the Waltham murders, and that the evidence would therefore be confusing to the jury, a waste of time, and without any probative value.

The First Circuit vacated the death penalty and remanded for a new sentencing hearing on both issues. It held that its own supervisory-power precedent required the district court to ask all

prospective jurors what they knew about the case. And it held that the Waltham murder evidence should have been admitted because it was highly probative of Tamerlan's ability to influence his younger brother and made it more likely that Tamerlan played the lead role in the offenses.

The government argues that the Court's decision in *Mu'Min v. Virginia* effectively disposes of the argument that the district court was required to ask prospective jurors what they knew about the case. In *Mu'Min*, the Court held that such content-based questions are not constitutionally required. *Mu'Min* rested on the Court's view that trial judges are in the best position to determine what questions to ask, and that individualized judgments on what to ask during voir dire, rather than inflexible rules, are sufficient to safeguard juror impartiality. Those same considerations, the government argues, rule out an inflexible supervisory rule. The government also argues that the district court acted within its discretion in excluding evidence of the Waltham murders both because Todashev's self-serving account was not credible, and because, even if credited, it did not show that Tamerlan intimidated his brother into joining him. Any error in failing to admit that evidence, the government adds, is harmless beyond a reasonable doubt, because the record demonstrates that Dzhokhar was eager to commit his crimes and was proud of what he had done.

The Court may well think it is often a good idea to ask questions about what jurors know in cases with a vast amount of pretrial publicity. But the Court seems far less likely to accept that a court of appeals may require district courts to do so in every high-profile case. Asking content questions has potential downsides, including the risk that it might exacerbate the prejudicial effect of pretrial publicity. The Court is apt to think district courts are in the best position to determine when the advantages of asking such questions outweigh their potential downsides. *Mu'Min* is not directly controlling since it is a constitutional decision, and there is precedent that allows appellate courts to exercise supervisory power to impose additional protection to ensure an impartial jury. But the days when the Court would approve such mandatory prophylactic rules, rather than entrust the issue to trial court discretion, are probably over. The Court might be more receptive to a narrower argument that the district court abused its discretion in failing to ask content questions given the nature of the pretrial publicity in this case. But establishing that a district court abused its discretion in its conduct of voir dire is almost always an uphill battle.

The court of appeals was on firmer ground in holding that evidence of the Waltham murders should have been admitted. On its face, evidence that Tamerlan was already sufficiently radicalized to engage in murder before the Marathon bombings helps to show that Dzhokhar may have been subject to his older brother's influence and was less culpable. Particularly given the Eighth Amendment right to present mitigating evidence, it is somewhat hard to understand why the district court would not have allowed the evidence to be admitted, leaving it to the jury to sort out the credibility of the statement, whether Tamerlan's previous involvement in murder made it more likely that he influenced his younger brother, and whether the rest of the evidence showed that Dzhokhar was still deserving of the death penalty.

The government's best answer is that Todashev's blame-shifting statement to government agents lacks any credibility. But the government has a hard time explaining why, if that is so, it relied on the statement in establishing probable cause. The Court is also likely to think that Dzhokhar's own culpability is so high that it could not have mattered to the jury that his brother was even more culpable. But it is difficult to be confident on a cold record that any error in the admission of mitigating evidence is harmless beyond a reasonable doubt. When the question is whether the Court is going to overturn a death penalty on a crime as horrific as this one, it is

usually safe to predict that the answer is no. But there really is something troubling about effectively taking away the only argument a defendant has against being sentenced to death.

The Use of Race in Higher Education Admissions ***Students for Fair Admissions v. Harvard College*, No. 20-1199**

In *Grutter v. Bollinger*, the Supreme Court held that universities may use race as a factor in admissions to achieve the educational benefits of diversity. In *Fisher v. University of Texas*, the Court upheld Texas' use of race in admissions as narrowly tailored to various educational benefits of diversity.

The composition of the Court has changed dramatically since those two decisions. It is therefore not surprising that litigants believe now is the time to get the Court to overrule *Grutter*. This case is a product of that thinking. Two questions are presented. The first asks the Court to overrule *Grutter* and hold that race cannot be used as a factor in higher education admissions. The second challenges Harvard's admission process as inconsistent with existing precedent because it penalizes Asian American applicants, engages in racial balancing, overemphasizes race, and rejects race-neutral alternatives. The claim of discrimination against Asian American applicants based on Harvard's evaluation of personal factors is the one that has gained public attention. The petition is currently pending in the Court, awaiting a response from the Solicitor General on whether certiorari should be granted. That response is likely to come sometime before the end of the year.

On one level, this case seems like a sure-fire grant. We know or suspect that a majority of the Justices on the current Court are not fans of *Grutter*. And a majority is likely to suspect that Asian Americans are the victims of race-conscious programs, no matter what the courts below found on that issue. On another level, the Court may not view this as the ideal case to revisit its precedents. For one thing, the case arises under Title VI and affects private universities; it does not involve state universities subject to the Constitution's Equal Protection Clause. The Court may view a case involving a state university as presenting a better vehicle for reconsidering its equal protection precedents. For another, the district court and court of appeals have made factual findings that may limit the Court's options in a way that some other case might not.

Uncertainty about whether to take the case may explain why the Court has called for the views of the Solicitor General on whether to grant certiorari. Other explanations, however, are more likely. Perhaps the Court viewed this term's calendar as already overloaded with controversial cases and wished to push this case on to the next term. Or perhaps it wanted to push this case well into the second half of this term.

If the Court does grant for either this term or next, what it will do with the case is not clear. The Chief Justice has famously stated: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." The most direct path to that outcome is to say that the educational benefits of diversity are not sufficiently compelling to justify the use of race. But in this environment, it is hard to see a majority of the Court saying that. It seems far more likely that the Court will prefer some other seemingly more narrow and less provocative way(s) to make it exceptionally difficult, if not impossible, to justify the use of race in admissions. All this speculation, however, is somewhat premature. The first step is to see whether the Court grants certiorari, and we will not know that for a while.

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Civil Rights

Section 1983 – Favorable-Termination Rule

Thompson v. Clark, No. 20-659

Question Presented:

Whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has “formally ended in a manner not inconsistent with his innocence,” [the 11th Circuit’s rule] or that the proceeding “ended in a manner that affirmatively indicates his innocence,” [the Second Circuit’s rule].

Summary:

The seizure of a person pursuant to legal process without probable cause violates the Fourth Amendment. Appellate courts have held that a plaintiff bringing a Section 1983 claim for such a violation must show that the criminal proceeding against him has terminated in his favor. The question presented in this case is whether the dismissal of charges is sufficient to satisfy the favorable-termination requirement or whether a plaintiff must also show the dismissal indicates his innocence.

Four NYPD officers, including respondent Pagiel Clark, went to the home of petitioner Larry Thompson to investigate a complaint of child abuse. After an altercation between petitioner and the officers, petitioner was arrested, and respondent charged him with obstructing a police investigation. Petitioner was held in custody for two days until he was released pending trial. On the prosecutor’s motion, the state court later dismissed the charges. Petitioner thereafter filed a 1983 claim alleging that he was seized without probable cause in violation of the Fourth Amendment. After finding that the dismissal of criminal charges did not indicate petitioner’s innocence, the district court entered judgment for respondent.

The Second Circuit affirmed. Relying on a prior decision, the court held that to satisfy the Section 1983 favorable-termination requirement, a plaintiff must show that a dismissal of charges indicates innocence. That decision rested on the court’s view that the common law favorable-termination rule required indications of innocence. The court also reasoned that its rule would serve Fourth Amendment values since dismissal without indications of innocence does not imply a lack of reasonable grounds for prosecution.

Petitioner argues that the dismissal of charges is sufficient to satisfy the favorable-termination requirement, regardless of whether the dismissal indicates innocence. Petitioner contends that the favorable-termination requirement is grounded in the need to avoid parallel criminal and civil litigation and collateral attacks on criminal judgments, and that neither concern is implicated when criminal charges have been dismissed. Petitioner also contends that at the time of Section 1983’s enactment, the common law favorable-termination rule required dismissal of charges, not indications of innocence. Finally, petitioner argues that the Fourth Amendment requires a plaintiff to show the absence of probable cause for the seizure, not that he is innocent of criminal charges.

Decision Below:

794 F. App'x 140 (2nd Cir. 2020)

Petitioner's Counsel of Record:

Amir H. Ali, MacArthur Justice Center

Respondent's Counsel of Record:

Richard P. Dearing, New York City Law Department

Title VI – Remedies***Cummings v. Premier Rehab Keller, P.L.L.C., No. 20-219*****Question Presented:**

Whether the compensatory damages available under Title VI [of the Civil Rights Act of 1964] and the statutes that incorporate its remedies include compensation for emotional distress.

Summary:

Under Title VI of the Civil Rights Act of 1964, recipients of federal funds are prohibited from discriminating based on race. The remedies available under Title VI have been incorporated into other federal anti-discrimination laws, including the Rehabilitation Act and the Affordable Care Act (ACA). The question presented in this case is whether the remedies available under Title VI and the statutes that incorporate its remedies include damages for emotional distress.

Petitioner Jane Cummings, who is deaf and legally blind, primarily communicates through American Sign Language (ASL). Petitioner contacted respondent Premier Rehab for physical therapy services three times, each time requesting an ASL interpreter. Respondent refused each request, and petitioner eventually sought services at another facility. Petitioner sued respondent, alleging discrimination on the basis of her disability in violation of the Rehabilitation Act and the ACA. Petitioner sought damages for emotional distress. The district court dismissed petitioner's claim.

The Fifth Circuit affirmed. The court held that damages for emotional distress are not available for violations of Title VI or other federal anti-discrimination laws that incorporate its remedies. The court reasoned that the Supreme Court had analogized actions under Spending Clause statutes like Title VI to breach of contract actions, but that the fundamental question is whether recipients are on notice that they face a particular form of liability. Applying that framework, the court concluded that recipients are not on notice that they are liable for emotional distress damages because such damages are not generally available for breach of contract.

Petitioner argues that recipients of federal funds can be liable for emotional distress damages under Title VI and other federal anti-discrimination laws that incorporate its remedies. Petitioner contends that the Supreme Court has held that Title VI allows victims to recover compensatory damages, and that emotional distress damages are a form of compensatory damages. Petitioner further argues that contract law puts recipients on notice that they may be liable for emotional distress damages when serious emotional distress is a particular likely result of a breach. Breaches of the duty to refrain from discrimination, petitioner contends, fit that description. Finally, petitioner argues that barring emotional distress damages would leave many victims of discrimination without any remedy for a violation of their rights.

Decision Below:

948 F.3d 673 (5th Cir. 2020)

Petitioner's Counsel of Record:

Andrew Rozynski, Eisenberg & Baum, LLP

Respondent's Counsel of Record:

Kannon K. Shanmugam, Paul, Weis, Rifkind, Wharton & Garrison LLP

Constitutional Law**First Amendment – Censure of a Public Official*****Houston Community College System v. Wilson, No. 20-804*****Question Presented:**

Does the First Amendment restrict the authority of an elected body to issue a censure resolution in response to a member's speech?

Summary:

An elected body's censure of a member constitutes an official reprimand or an authoritative expression of disapproval. The question presented in this case is whether an elected body's censure of one of its members for his speech on a matter of public concern abridges the freedom of speech protected by the First Amendment.

Respondent David Wilson is a former elected member of the Houston Community College Board, the governing body of petitioner Houston Community College System. During his tenure on the Board, respondent publicly criticized other Board members for their positions on issues and filed lawsuits challenging Board actions. The Board responded by voting to censure him. Respondent filed an amended complaint in a pending state court case against petitioner, claiming that the censure violated his First Amendment rights. Petitioner removed the case to federal court, where the district court dismissed it.

The Fifth Circuit reversed and remanded, holding that an elected body's censure of one of its members for speech addressing a matter of public concern violates the First Amendment. The court reasoned that a censure constitutes a form of punishment that goes beyond mere criticism and therefore imposes a cognizable First Amendment injury.

Petitioner argues that an elected body's censure of one of its members for his speech does not violate the First Amendment. Petitioner contends that the practice of censure predated the Constitution and has continued to the present, triggering a strong presumption in favor of its constitutionality. Petitioner further argues that censure is a form of government speech to which the First Amendment does not apply. Finally, petitioner argues that because censure is simply the expression of an opinion, it does not impose any cognizable First Amendment injury.

Decision Below:

955 F.3d 490 (5th Cir. 2020)

Petitioner's Counsel of Record:

Richard A. Morris, Rogers, Morris & Grover L.L.P.

Respondent's Counsel of Record:

Michael B. Kimberly, McDermott Will & Emery LLP

First Amendment – Content-Based Restrictions

City of Austin, Texas v. Reagan Nat'l Advertising of Texas, No. 20-1029

Question Presented:

Is the city code's distinction between on- and off-premise signs a facially unconstitutional content-based regulation under *Reed [v. Town of Gilbert]*?

Summary:

The City of Austin's sign code distinguishes between on-premises and off-premises signs, with off-premises signs defined as signs that advertise a business or service not located at the site. Digitized signs are permitted for on-premises but not off-premises signs. In *Reed v. Town of Gilbert*, the Supreme Court held that a sign ordinance that restricts speech based on content is subject to strict scrutiny under the First Amendment, a form of scrutiny that usually results in a law's invalidation. The question in this case is whether the City of Austin's distinction between on-premises and off-premises signs is content-based under *Reed*.

Two Austin advertising companies (respondents) applied to petitioner, the City of Austin, for permits to digitize their off-premises billboards. Petitioner denied the applications based on its code's disallowance of digital off-premises signs. Respondents sued, alleging that the city code's distinction between off-premises and on-premises signs violates the First Amendment. The district court ruled for petitioner.

The Fifth Circuit reversed, holding that petitioner's distinction between on-premises and off-premises signs is content-based under *Reed*. The court concluded that under *Reed*, a sign law is content-based when applying it requires the government to read the sign and determine its function or purpose. Here, the court concluded, the city's law requires just that: The government must read the sign to determine whether its purpose is to advertise a business or service located at a different location. The sign's location alone does not determine its regulatory category.

Petitioner argues that its distinction between on-premises and off-premises signs is not content-based under *Reed*. Petitioner contends that under *Reed*, a sign regulation is content-based only when it is based on the message or topic discussed on the sign, not simply when the sign has to be read to determine its regulatory category. Under that standard, petitioner argues, its code is not content-based because it is indifferent to the message or topic discussed. While petitioner must read the sign to determine its regulatory category, all it must know is *where* a billboard directs its viewers.

Decision Below:

972 F.3d 696 (5th Cir. 2020)

Petitioner's Counsel of Record:

Renea Hicks, Law Office of Max Renea Hicks

Respondent's Counsel of Record:

Kannon K. Shanmugam, Paul, Weis, Rifkind, Wharton & Garrison LLP

First Amendment – Free Exercise

***Carson v. Makin*, No. 20-1088**

Question Presented:

Does a state violate the Religion Clauses or Equal Protection Clause of the U.S. Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or “sectarian,” instruction?

Summary:

Under Maine law, students whose school districts do not operate public high schools may receive financial assistance to attend a private school that meets certain requirements, if the school does not provide religious instruction. In *Espinoza v. Montana Department of Revenue*, the Supreme Court held that the Free Exercise Clause of the First Amendment prohibits a state that offers tuition assistance to attend private schools from declining to provide assistance based on a school’s religious status. The question presented is whether Maine’s refusal to afford assistance to attend schools that provide religious instruction violates the Free Exercise Clause.

Petitioners live in school districts that do not operate public high schools, making them eligible for tuition assistance to attend a private school. They each would like assistance for their children to attend schools that provide religious instruction. Petitioners filed suit in federal court, claiming that Maine’s failure to afford assistance for attendance at schools that provide religious instruction violates the Free Exercise Clause. The district court ruled against petitioner.

The First Circuit affirmed, holding that Maine’s refusal to afford aid for attendance at schools that provide religious instruction does not violate the Free Exercise Clause. The court first concluded that *Espinoza* did not resolve that question because it struck down discrimination based on religious status, not a refusal to fund religious instruction. For a religious-use restriction, the court concluded, the relevant inquiry is whether a program is penalizing religion or simply refusing to subsidize it. Here, the court concluded that Maine’s program falls into the latter category because the relevant benefit that Maine offers is the rough equivalent of a public secular education, and schools that offer religious instruction do not afford that benefit.

Petitioners argue that Maine’s prohibition on the use of student aid for religious instruction violates the Free Exercise Clause. Petitioner contends that there is no relevant distinction between religious status and religious use. Not only can the same facts often be described either way, but for petitioners and others, their desire for religious instruction is inextricably intertwined with their religious status. Finally, petitioners argue that Maine’s program cannot be justified on the theory that the assisted private schools are substitutes for public schools because Maine allows private schools to charge tuition and to refuse to accept all comers, the very antithesis of a public school.

Decision Below:

979 F.3d 21 (1st Cir. 2020)

Petitioner’s Counsel of Record:

Michael E. Bindas, Institute for Justice

Respondent’s Counsel of Record:

Sarah Forster, Maine Office of the Attorney General

Second Amendment – Concealed Carry Licenses

***New York State Rifle & Pistol Association v. Bruen*, No. 20-843**

Question Presented:

Whether the State’s denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment.

Summary:

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees individuals a right to possess and carry weapons in case of confrontation, that the right is not unlimited, and that a law that absolutely prohibits handgun possession in the home violates that right. In *McDonald v. City of Chicago*, the Court held that the Second Amendment right established in *Heller* applies to the States. Under New York law, an applicant for a license to carry a firearm outside the home for self-defense must demonstrate “proper cause,” judicially defined as “a special need for self-protection distinguishable from that of the general community.” The question presented in this case is whether New York’s proper cause requirement violates the Second Amendment.

Petitioners Brendan Koch and Robert Nash applied for a license to carry a firearm for self-defense in public. A New York licensing officer denied their requests for failure to satisfy the proper cause requirement. Koch, Nash, and petitioner New York State Rifle and Pistol Association filed suit in federal court, challenging the proper cause requirement as a violation of the Second Amendment. The district court dismissed the complaint.

The Second Circuit affirmed, holding, in reliance on a prior decision, that New York’s proper cause requirement does not violate the Second Amendment. In that prior decision, the court held that restrictions on carrying firearms outside the home are subject to intermediate scrutiny, *i.e.*, they must be substantially related to the achievement of an important public purpose. It further held that the proper cause requirement satisfies that standard. The court reasoned that New York reasonably concluded that, given the dangers that firearms pose to public safety, only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere.

Petitioner argues that New York’s proper cause requirement violates the Second Amendment. Petitioner contends that the Second Amendment’s reference to “bear” is most naturally read to guarantee a right to carry arms outside the home. Petitioner further argues that the historical right to carry arms for self-defense was always understood to apply outside the home. Petitioner also contends that since *Heller* held that the Second Amendment protects an individual’s right to possess and carry weapons in case of confrontation, and conflict often arises in public, the right to bear arms necessarily includes public spaces. Because New York’s proper cause requirement curtails the right to carry firearms outside the home for self-defense, petitioner maintains, it is categorically unconstitutional.

Decision Below:

818 Fed.Appx. 99 (2d Cir. 2020)

Petitioners’ Counsel of Record:

Paul D. Clement, Kirkland & Ellis LLP

Respondents' Counsel of Record:

Barbara D. Underwood, Solicitor General of New York

Fifth Amendment – Equal Protection***United States v. Vaello-Madero, No. 20-303*****Question Presented:**

Whether Congress violated the equal-protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income—a program that provides benefits to needy, aged, blind, and disabled individuals—in the 50 States and the District of Columbia, but not extending it to Puerto Rico.

Summary:

The Social Security Income Program (SSI) provides benefits to needy aged, blind, and disabled residents of the United States. Congress has defined the United States to include the 50 States, the District of Columbia, and the Northern Mariana Islands, but not Puerto Rico or other Territories. The question in this case is whether excluding residents of Puerto Rico from eligibility for SSI benefits violates the equal protection component of the Fifth Amendment Due Process Clause.

Respondent Jose Luis Vaello-Madero is a U.S. citizen who once lived in New York. Due to health problems, he began receiving SSI benefits. When he moved to Puerto Rico, respondent lost SSI eligibility. The government continued to make SSI payments until it learned of his loss of eligibility, then sued respondent for the money it incorrectly paid him. In his answer, respondent challenged the constitutionality of excluding Puerto Rican residents from the SSI program. The district court agreed with respondent's challenge and granted summary judgment in his favor.

The First Circuit affirmed, holding that the exclusion of residents of Puerto Rico from the SSI program violates the equal protection component of the Due Process Clause. The court concluded that neither Puerto Rico's tax status, nor the costs associated with extending the program to Puerto Rican residents, affords a rational basis for the SSI exclusion. The court distinguished two Supreme Court decisions recognizing Puerto Rico's unique tax status—one because it involved a right-to-travel claim, the other because it involved a different program. The court also reasoned that the exemption of Puerto Rican residents from most federal income taxes does not afford a rational basis for the SSI exclusion, because the populations that receive SSI generally do not pay federal income tax. And it concluded that cost alone can never provide a justification for differential treatment. The court added that extending SSI to the Northern Mariana Islands further undercuts the rationality of excluding Puerto Rico, since their residents also generally do not pay federal income taxes.

The government argues that the exclusion of residents of Puerto Rico from the SSI program does not violate the equal protection component of the Due Process Clause. The government argues that the two Supreme Court decisions identified by the First Circuit establish that Puerto Rico's unique tax status provides a rational basis for excluding its residents from federal benefit programs. Apart from those precedents, the government contends that Congress could rationally conclude that a jurisdiction that makes a reduced contribution to the federal

treasury should receive a reduced share of benefits funded by the treasury—a consideration that carries added weight because of the tremendous cost of including Puerto Rico in the SSI program. The government also argues that the fact that individuals who receive federal benefits do not pay income taxes does not undermine the rationality of Congress’s judgment because Congress could rationally focus on the benefits to the residents as a whole. In any event, the government asserts that even those who do not pay income taxes are exempt from other taxes and benefit from the ability of Puerto Rico to increase its own taxes to fund its own benefit programs. Finally, the government contends that it was rational to distinguish between Puerto Rico and the Northern Mariana Islands because the latter receives benefits through a negotiated covenant, and there is no equal footing doctrine for the Territories.

Decision Below:

956 F.3d 12 (1st Cir. 2020)

Petitioner’s Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Respondent’s Counsel of Record:

Hermann Ferré, Curtis, Mallet-Prevost, Colt & Mosle LLP

Sixth Amendment – Confrontation Clause

***Hemphill v. New York*, No. 20-637**

Question Presented:

Whether, or under what circumstances, a criminal defendant who opens the door to responsive evidence also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause.

Summary:

The Confrontation Clause of the Sixth Amendment generally prohibits admission of out-of-court statements against a criminal defendant unless they were subject to cross-examination. State evidentiary rules generally permit introduction of evidence that is not otherwise admissible if the defendant introduces selective evidence and thereby “opens the door.” The question in this case is whether, or under what circumstances, a state may apply its open-the-door rule to admit out-of-court statements that would otherwise be excluded by the Confrontation Clause.

A child in the Bronx was fatally shot with a 9mm cartridge. The State of New York initially charged Nicholas Morris with the shooting. After Morris pleaded guilty to possession of a .357 revolver, the State charged petitioner Darrell Hemphill with the shooting. At trial, petitioner sought to show that Morris was the shooter through testimony that the police found a 9mm cartridge at his apartment. In response, the State moved to introduce Morris’ plea allocution that he possessed a .357 revolver, which could not chamber a 9mm cartridge. The court overruled petitioner’s Confrontation Clause objection to admitting that evidence. Based on the jury’s verdict, the trial court entered a judgment of guilt, and the New York Appellate Division affirmed.

The New York Court of Appeals affirmed, holding that the trial court acted within its discretion in admitting Morris’s plea allocution. The court rested that conclusion on a prior

decision holding that a criminal defendant who opens the door loses his right to exclude evidence otherwise barred by the Confrontation Clause. In that decision, the court reasoned that this result avoids the unfairness of allowing the defendant to selectively present favorable testimony while concealing from the jury evidence that would undercut it.

Petitioner argues that a state may not apply its open-the-door rule to admit out-of-court statements that would otherwise be excluded by the Confrontation Clause. Petitioner relies on the fundamental principle that federal constitutional rules preempt state evidentiary rules. Petitioner further contends that allowing the open-the-door rule to supersede Confrontation Clause protection would resurrect the very abuses that led to the Confrontation Clause, such as the admission of an alleged accomplice's out-of-court statement in the trial of Sir Walter Raleigh. Finally, petitioner argues that fairness concerns provide no justification for an open-the-door exception to the Confrontation Clause because courts have no authority to set aside the Confrontation Clause based on their own views of fairness. In any event, petitioner argues, there is nothing unfair about allowing a defendant to elicit favorable evidence while still preserving his right to object to testimony that is inadmissible under the Confrontation Clause.

Decision Below:

150 N.E.3d 356 (N.Y. 2020)

Petitioner's Counsel of Record:

Jeffrey L. Fisher, Stanford Law School Supreme Court Clinic

Respondent's Counsel of Record:

Noah J. Chamoy, Office of the Bronx District Attorney

Fourteenth Amendment – Abortion

***Dobbs v. Jackson Women's Health Organization*, No. 19-1392**

Question Presented:

Whether all pre-viability prohibitions on elective abortions are unconstitutional.

Summary:

In *Roe v. Wade*, the Supreme Court held that a state may not prohibit any woman from deciding to terminate her pregnancy before a fetus is viable. In *Planned Parenthood v. Casey*, the Court reaffirmed that holding. The Court has also held in *Casey* that states have an interest from the outset of pregnancy in protecting a fetus and a woman's health, and may therefore impose certain restrictions on pre-viability abortions as long as they do not result in an undue burden on a woman's right to choose. A Mississippi statute prohibits all abortions when the gestational age of a fetus exceeds 15 weeks except in a medical emergency or in the case of a severe fetal abnormality. The question presented in this case is whether all pre-viability prohibitions on elective abortions are unconstitutional.

Respondent Jackson Women's Health Organization is the only licensed abortion facility in Mississippi and respondent Dr. Sacheen Carr-Ellis is one of its doctors. They filed suit in federal court, challenging Mississippi's post-15-week restriction on abortions as an unconstitutional prohibition on pre-viability abortions. The district court granted summary judgment in favor of respondents.

The Fifth Circuit affirmed, holding that all pre-viability prohibitions on elective abortions are unconstitutional. The Court reasoned that *Roe* and *Casey* establish that a state may not prohibit any woman from deciding to terminate her pregnancy before a fetus is viable. Because the Mississippi statute prohibits some pre-viability abortions, the court concluded, the statute is unconstitutional under those decisions.

The State argues that not all pre-viability prohibitions on abortion are unconstitutional. Instead, the State argues, such restrictions should be reviewed under the *Casey* undue burden standard. The State contends that a bright-line viability rule is inconsistent with the Court's recognition in *Casey* and subsequent cases that a state's interests in protecting a fetus and a woman's health exist throughout a woman's pregnancy. The State further contends that the Mississippi law is more appropriately analyzed as a restriction on abortion than a ban because it allows a woman to have an elective abortion when the gestational age of the fetus is 15 weeks or less and permits abortions thereafter in a medical emergency or in the case of a severe fetal abnormality.

Decision Below:

945 F.3d 265 (5th Cir. 2019)

Petitioner's Counsel of Record:

Paul E. Barnes, Mississippi Attorney General's Office

Respondent's Counsel of Record:

Hillary A. Schneller, Center for Reproductive Rights

Criminal Law

Armed Career Criminal Act (ACCA)

Wooden v. United States, No. 20-5279

Question Presented:

Did the Sixth Circuit err by expanding the scope of 18 U.S.C. § 924(e)(1) in the absence of clear statutory definition with regard to the vague term “committed on occasions different from one another”?

Summary:

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence on a defendant who illegally possesses a firearm and has three previous convictions for a violent felony “committed on occasions different from one another.” The question presented is whether offenses are “committed on occasions different from one another” when they are committed sequentially in time but arise from the same criminal opportunity.

Petitioner William Dale Wooden was convicted of possessing a firearm as a felon. Petitioner had previously been convicted of ten counts of burglary for breaking into a warehouse and burglarizing ten different storage units. The district court determined that each of the ten

burglaries was committed on a different occasion and that petitioner therefore qualified for an ACCA mandatory minimum sentence.

The Sixth Circuit affirmed. The court held that offenses are committed on different occasions when it is possible to discern the point at which one offense ends and the next begins; when the defendant could withdraw after the first offense; and when the offenses are committed in different locations. The court concluded that by each of these measures, petitioner's ten burglaries were committed on different occasions.

Petitioner contends that offenses are committed on different occasions when they arise from a distinct criminal opportunity, not when they are committed sequentially in the same episode. In support of that interpretation, petitioner relies on the ordinary meaning of "occasion" as a juncture of circumstances or a common opportunity. Petitioner further contends that the statute's structure, history, and purpose confirm that Congress targeted career criminals, not someone who commits multiple offenses in a single episode. Because petitioner's ten burglaries all arose from a single criminal opportunity, petitioner argues, they were all committed on the same occasion.

Decision Below:

945 F.3d 498 (6th Cir. 2019)

Petitioner's Counsel of Record:

Allon Kedem, Arnold & Porter Kaye Scholer LLP

Respondent Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Capital Punishment – Voir Dire and Exclusion of Evidence

***U.S. v. Tsarnaev*, No. 20-443**

Questions Presented:

- (1) Whether the court of appeals erred in concluding that respondent's capital sentences must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard, or seen about respondent's case.
- (2) Whether the district court committed reversible error at the penalty phase of respondent's trial by excluding evidence that respondent's older brother was allegedly involved in different crimes two years before the offenses for which respondent was convicted.

Summary:

In *Mu'Min v. Virginia*, the Supreme Court held that trial courts are not bound by the Constitution to ask jurors questions about the content of news reports to which they were exposed. The first question in this case is whether a court of appeals has supervisory authority to require trial courts to ask such content-specific questions in highly publicized cases. Under the Federal Death Penalty Act of 1994 (FDPA), a district court has discretion to exclude evidence from a capital sentencing proceeding when its probative value is outweighed by the danger of unfair prejudice, confusing the jury, or misleading the jury. The second question in this case is whether the district court abused its discretion under the FDPA by excluding from the

defendant's penalty-phase proceeding evidence that his brother had previously committed murder.

Respondent Dzhokhar Tsarnaev and his brother Tamerlan detonated bombs at the Boston Marathon, killing three and wounding more than 200. While attempting to evade capture, respondent ran over his brother, resulting in his brother's death. Respondent was charged with 30 crimes, 17 of which were capital offenses. In light of the massive publicity the case received, respondent asked the district court to ask all prospective jurors what they had heard or read about the case. The district court denied the request. The jury convicted respondent on all counts. At the penalty phase, the court granted the government's motion to exclude evidence that respondent's brother, with the help of a friend, had committed a triple homicide. At the jury's recommendation, the court imposed the death penalty on six of the capital convictions.

The First Circuit reversed and remanded. Relying on its prior decision in *Patriarca v. United States*, the court first held that the district court erred in failing to ask each prospective juror what they had heard or read about the case. The court reasoned that *Mu'Min*'s holding that such content-specific questions are not constitutionally required did not overrule *Patriarca*'s holding that such questioning is required in highly publicized cases because *Patriarca* was based on the court's supervisory power. Second, the court held that the district court abused its discretion by excluding evidence that respondent's brother was previously involved in a triple-murder. The court reasoned that the evidence was mitigating because it showed that respondent's brother had the capacity to influence someone who had not previously signaled willingness to be involved in murder. Citing the government's reliance on the evidence in seeking a search warrant, the court also discounted any concern that the evidence was too unreliable for the jury to consider.

The government argues that an appellate court does not have supervisory authority to mandate that trial courts ask every prospective juror in a highly publicized case what they have read or heard about the case. The government contends that such a mandate impermissibly interferes with the trial court's discretion to tailor voir dire to the circumstances of each case, ignores the reality that prospective jurors in this case were unlikely to accurately recall all that they had heard and read, and would constitute an end-run around the holding in *Mu'Min*. The government also argues that the district court did not abuse its discretion in excluding evidence relating to the triple murders. The government contends that the evidence had minimal probative value because it involved a different kind of crime with a different accomplice and a different motive. It also argues that the credibility of the evidence could not be meaningfully tested because both people involved in the previous murders are dead.

Decision Below:

968 F.3d 24 (1st Cir. 2020)

Petitioner's Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Respondent's Counsel of Record:

Ginger D. Anders, Munger, Tolles & Olson LLP

Antiterrorism and Effective Death Penalty Act (AEDPA)

***Brown v. Davenport*, No. 20-826**

Question Presented:

May a federal habeas court grant relief based *solely* on its conclusion that the *Brecht* test is satisfied, as the Sixth Circuit held, or must the court also find that the state court's *Chapman* application was unreasonable under § 2254(d)(1), as the Second, Third, Seventh, Ninth, and Tenth Circuits have held?

Summary:

In *Chapman v. California*, the Supreme Court held that a state court may discount a constitutional error in a state criminal proceeding only if the error is harmless beyond a reasonable doubt. In *Brecht v. Abrahamson*, the Court held that a federal court may grant relief on habeas only when a constitutional error had a substantial and injurious effect in determining the jury's verdict. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas court may not grant habeas relief unless the state court's decision reflects an unreasonable application of clearly established federal law. The question presented is whether a federal habeas court may grant relief upon a finding of actual prejudice under *Brecht*, or whether the court must additionally find that the state court unreasonably applied *Chapman*'s harmless error standard under AEDPA.

Respondent Ervine Davenport killed a woman during a struggle and was charged with and convicted of first-degree murder. During his trial, respondent was shackled in violation of due process. The Michigan Court of Appeals affirmed his conviction, holding that the shackling was harmless error, and the Michigan Supreme Court denied review. Respondent filed a petition for habeas corpus in federal court, asserting that the shackling had a prejudicial effect. The district court denied the petition.

The Sixth Circuit reversed and remanded, holding that a finding of prejudice under *Brecht* is sufficient to afford habeas relief and that no separate AEDPA inquiry into whether the state court unreasonably applied *Chapman* is required. Relying on the Supreme Court's decision in *Davis v. Ayala*, the court reasoned that the *Brecht* test subsumes the AEDPA test because if a defendant demonstrates that an error caused actual prejudice under *Brecht*, it necessarily means that the state court's application of *Chapman* is unreasonable.

The State argues that a federal court can grant review under AEDPA only if it finds that a state court unreasonably applied *Chapman*, and that it is insufficient to find only that an error is prejudicial under *Brecht*. A finding of prejudice under *Brecht* does not satisfy the AEDPA standard, the State argues, because the *Brecht* standard is *de novo*, while the AEDPA standard is deferential. The State further contends that language in *Ayala* suggesting that a finding of prejudice under *Brecht* subsumes the requirements of AEDPA, should not be understood to obviate the need for a separate finding that the state court unreasonably applied *Chapman*.

Decision Below:

975 F.3d 537 (6th Cir. 2020)

Petitioner's Counsel of Record:

Fadwa A. Hammoud, Michigan Department of Attorney General

Respondent's Counsel of Record:

Tasha J. Bahal, Wilmer Cutler Pickering Hale and Dorr LLP

Shinn v. Ramirez*, No. 20-1009*Question Presented:**

Does application of the equitable rule [the Supreme Court] announced in *Martinez v. Ryan* render 28 U.S.C. § 2254(e)(2) inapplicable to a federal court's merits review of a claim for habeas relief?

Summary:

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), if a federal habeas petitioner fails to develop the factual basis of a claim in state court, the federal habeas court generally may not hold an evidentiary hearing on the claim. There are exceptions, but none are applicable here. Under the judge-made procedural default rule, a federal habeas petitioner may not pursue a claim that was procedurally defaulted in state court unless there is cause for the default. In *Martinez v. Ryan*, the Court held that state habeas counsel's ineffectiveness in failing to raise a claim that state trial counsel was ineffective is cause for defaulting that claim. The question presented with respect to respondent David Martinez Ramirez is whether AEDPA's new-hearing limitation precludes a new hearing on an ineffectiveness claim when petitioner has satisfied the *Martinez* cause standard. The question presented with respect to respondent Barry Lee Jones is whether AEDPA's new-hearing limitation precludes new evidence considered on the *Martinez* cause question from being considered on the underlying ineffectiveness claim.

Respondent Ramirez was convicted of murder. He filed an unsuccessful state habeas petition in which he did not raise trial counsel's ineffectiveness. He subsequently filed a federal habeas petition, asserting that trial counsel was ineffective, and asked for an evidentiary hearing. The district court denied the request for a hearing and denied the petition. The Ninth Circuit reversed and remanded, holding that Ramirez established habeas counsel's ineffectiveness, providing cause for the procedural default of his underlying ineffectiveness claim. Without expressly addressing AEDPA's new-hearing limitation, it further held that Ramirez was entitled to an evidentiary hearing on that claim.

Respondent Jones was also convicted of murder. He filed an unsuccessful state habeas petition, alleging ineffectiveness of trial counsel. He then filed a federal habeas claim alleging new claims involving trial counsel's ineffectiveness. Based on the evidence compiled in the evidentiary hearing, the court found cause for the default and merit in the underlying ineffectiveness claim. The Ninth Circuit affirmed, holding that new evidence developed to establish cause under *Martinez* may also be considered when evaluating the merits of an underlying ineffectiveness claim. The court reasoned that it would be illogical to hear evidence on procedural default and then ignore the evidence when addressing the merits. The court also concluded that *Martinez* would be a dead letter if the only opportunity to develop a record of trial counsel's ineffectiveness was a proceeding in which habeas counsel was ineffective.

The State argues that AEDPA precludes a new hearing on an ineffectiveness claim even when the habeas petitioner satisfies the *Martinez* cause standard. The State also argues that AEDPA precludes consideration of evidence developed to satisfy *Martinez* in deciding the merits of the underlying ineffectiveness claim. The State contends that *Martinez* does not provide a path around those limitations because it is an equitable exception to the judge-made

doctrine of procedural default, and a court-created equitable rule cannot negate AEDPA's statutory restrictions. The State also argues that there is no anomaly in enforcing AEDPA's limitations in cases in which a habeas petitioner can satisfy the *Martinez* cause standard. Some claims that clear procedural default based on *Martinez* can be successful on the merits based on the state record, the State acknowledges, but to the extent that such claims cannot be successful, it is because AEDPA imposes a more stringent limitation than the judge-made doctrine of procedural default.

Decisions Below:

Ramirez v. Ryan, 937 F.3d 1230 (9th Cir. 2019)

Jones v. Shinn, 943 F.3d 1211 (9th Cir. 2019)

Petitioner's Counsel of Record:

Lacey S. Gard, Office of the Attorney General of Arizona

Respondents' Counsel of Record:

Robert M. Loeb, Orrick, Herrington & Sutcliffe LLP

Timothy M. Gabrielsen, Federal Public Defender's Office of Arizona

Hobbs Act

***United States v. Taylor*, No. 20-1459**

Question Presented:

Whether 18 U.S.C. 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

Summary:

Federal law makes it a crime to use or carry a firearm in relation to a crime of violence. A crime of violence is defined as a felony that "has as an element the use, attempted use, or threatened use of physical force." To prove attempted Hobbs Act robbery, the government must establish that the defendant intended to commit robbery by means of the actual or threatened use of physical force, and that he took a substantial step towards completion of the robbery. The question presented by this case is whether attempted Hobbs Act robbery is a crime of violence.

Respondent Justin Taylor pleaded guilty to using and carrying a firearm during and in relation to a crime of violence. The predicate crime of violence for that conviction was attempted Hobbs Act robbery. Respondent filed a motion to vacate his conviction on the ground that attempted Hobbs Act robbery is not a crime of violence. The district court denied respondent's motion.

The Fourth Circuit reversed, holding that attempted Hobbs Act robbery does not qualify as a crime of violence. The court reasoned that an attempted Hobbs Act robbery does not invariably require the use, attempted use, or threatened use of physical force. For example, the court stated, a defendant who has taken a substantial nonviolent step towards the commission of Hobbs Act robbery, but has not yet passed a threatening note, has not used, attempted to use, or threatened to use, physical force.

The government argues that attempted Hobbs Act robbery is a crime of violence. The government contends that when a defendant intends to take the property of another through

actual or threatened violence, and then takes a substantial step toward completing the crime, the defendant has necessarily engaged in the attempted use or threatened use of physical force. The government argues that a person who has taken a substantial step towards completion of the crime, but is then captured before he passes a threatening note, has threatened the use of force in the ordinary sense because anyone who observed the offense to that point would describe it as threatening the use of force.

Decision Below:

978 F.3d 303 (4th Cir. 2020)

Petitioner’s Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Respondents’ Counsel of Record:

Frances H. Pratt, Office of the Federal Public Defender

Federal Practice and Procedure

Discovery – State-Secrets Privilege

United States v. Zubaydah, No. 20-827

Question Presented:

Whether the court of appeals erred when it rejected the United States’ assertion of the state-secrets privilege based on the court’s own assessment of potential harms to the national security, and required discovery to proceed further under 28 U.S.C. 1782(a) against former CIA contractors on matters concerning alleged clandestine CIA activities.

Summary:

A federal court may order a person to give testimony for use in a foreign proceeding provided it does not violate any legally applicable privilege. The state-secrets privilege applies when there is a reasonable danger that compulsion of the evidence will expose matters which, in the national interest, should not be disclosed. The question presented is whether an order requiring federal contractors to disclose whether the CIA operated a clandestine detention center in Poland would violate the state-secrets privilege.

Following 9/11, the United States captured respondent Abu Zubaydah, an ally of Osama Bin Laden. The CIA initially detained respondent abroad before bringing him to Guantanamo Bay. Respondent filed suit in federal court, seeking for use in a criminal proceeding in Poland the testimony of two former CIA contractors on whether the CIA operated a detention center in Poland. The government moved to block the testimony on state secret grounds. The district court granted the government’s motion.

The Ninth Circuit reversed and remanded, holding that information concerning whether the CIA operated a detention facility in Poland is not protected by the state-secrets privilege. Applying a “skeptical eye” to the government’s claim of privilege, the court reasoned that the contractors’ confirmation or denial of the information would not amount to confirmation or denial by the United States, and that this information is already in the public domain.

The government contends that the state-secrets privilege bars testimony on whether the CIA operated a clandestine detention facility in Poland. The government argues that the CIA's assertion that disclosure of such information would harm national security should be reviewed with a high degree of deference, not with a skeptical eye. It further argues that because federal contractors have firsthand knowledge and are associated with the United States, our foreign partners would view their disclosure of sensitive information as a breach of trust. Finally, the government contends that public information derived from private sources who are not affiliated with the government is inherently speculative and therefore does not undermine the government's ability to invoke the state-secrets privilege.

Decision Below:

938 F.3d 1123 (9th Cir. 2019)

Petitioner's Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Respondent's Counsel of Record:

David F. Klein, Pillsbury, Winthrop, Shaw, Pittman LLP

Intervention – State Official

Cameron v. EMW Women's Surgical Center, P.S.C., No. 20-601

Question Presented:

Whether a state attorney general vested with the power to defend state law should be permitted to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law.

Summary:

Under Federal Rule of Civil Procedure 24, motions to intervene must be timely. While Rule 24 is not directly applicable to intervention in appellate courts, the Supreme Court has viewed it as a helpful analogy. Under Kentucky law, the Attorney General (AG) has authority to represent the state's interests in federal court. The question presented in this case is whether the motion of an AG with authority to represent the state's interest in litigation is timely and should be granted when it is filed after the court of appeals invalidates a state statute and the sole state defendant decides not to seek further review.

Respondent EMW Women's Surgical Center sued the Secretary of Kentucky's Cabinet for Health and Family Services to enjoin a state statute prohibiting physicians from performing dilation and evacuation (D&E) abortions prior to fetal demise. After the district court granted respondent's request for a permanent injunction and the Sixth Circuit affirmed, the Secretary chose not to seek further review. At that point, Kentucky's AG filed a motion to intervene to seek further review.

The Sixth Circuit denied the AG's motion to intervene on the ground that it was untimely. The court gave four reasons for that conclusion: First, the AG filed the motion years into the litigation process. Second, the AG sought intervention to obtain en banc review or review on certiorari, the former of which is an extraordinary procedure and the latter of which is not a matter of right. Third, the AG had notice of his interest in the case no later than when the

court heard oral argument and should have prepared then for the possibility that the Secretary might not appeal an adverse decision. Lastly, granting the motion would prejudice respondent since the AG sought to pursue a new argument.

The AG argues that the motion of a state AG with authority to represent the state's interest in litigation is timely and should be granted when it is filed after a court of appeals decision invalidating a state law and the sole state defendant chooses not to seek further review. In support of that argument, the AG first contends that the state's sovereign interest in defending its laws is the most important factor in the timeliness analysis. Kentucky selected the AG to represent the state's interest in defending its laws in federal court and failing to permit his intervention would undercut that interest. Second, the AG argues he was entitled to intervene under ordinary timeliness standards: He moved to intervene within days of learning that the Secretary would not seek further review; he filed a petition for rehearing within the deadline; he sought to exhaust only the existing appellate options; and the assertedly new issue he sought to raise was one the court resolved against the Secretary.

Decision Below:

831 Fed.Appx. 748 (6th Cir. 2020)

Petitioner's Counsel of Record:

Matthew F. Kuhn, Office of Attorney General of Kentucky

Respondent's Counsel of Record:

Andrew D. Beck, American Civil Liberties Union Foundation

Jurisdiction – Federal Arbitration Act

***Badgerow v. Walters*, No. 20-1143**

Question Presented:

Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question.

Summary:

Actions brought under the Federal Arbitration Act (FAA) may be brought in federal court only if there is an independent basis for federal jurisdiction. In *Vaden v. Discover Bank*, the Supreme Court adopted a “look-through” analysis to determine whether there is jurisdiction over claims to compel arbitration under Section 4 of the FAA. Under *Vaden*, if the underlying claims could have been brought in federal court “save for the arbitration agreement,” as would be true for claims arising under federal law, a federal court has jurisdiction over a motion to compel arbitration under Section 4. The question presented is whether the same look-through analysis applies to motions to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA.

Petitioner Denise Badgerow worked as an associate financial advisor for respondents. Her employment agreement required her to arbitrate any disputes arising from her employment. After petitioner was terminated, she initiated an arbitration proceeding, but the arbitrator ruled for respondents. Petitioner thereafter filed an action in Louisiana state court to vacate the arbitration award on the ground that it was obtained through fraud. Respondents removed the

action to federal district court. The district court denied petitioners' motion to remand the proceeding for lack of jurisdiction and confirmed the arbitration award.

The Fifth Circuit affirmed, holding, in reliance on a prior decision, that *Vaden's* look-through analysis applies to motions to vacate or confirm an arbitration award. The prior decision reasoned that a uniform approach to jurisdiction under the FAA is necessary to avoid contravening *Vaden's* holding that the FAA is not an independent basis for jurisdiction because if the look-through analysis applied only to Section 4 motions, Section 4 would effectively serve as an independent basis for jurisdiction.

Petitioner contends that *Vaden's* "look-through" analysis does not apply to motions to confirm or vacate under Sections 9 and 10 of the FAA. While the petition does not make arguments in support of that conclusion, the lower courts adopting that position rely primarily on the absence in Sections 9 and 10 of the "save for" language the Court relied on in *Vaden*. Absent such language, those courts have concluded, there is no textual basis for a look-through analysis.

Decision Below:

975 F.3d 469 (5th Cir. 2020)

Petitioner's Counsel of Record:

Daniel L. Geysler, Alexander Dubose & Jefferson LLP

Respondent's Counsel of Record:

Lisa S. Blatt, Williams & Connolly LLP

Health Law

Medicare

American Hospital Association v. Becerra, No. 20-1114

Questions Presented:

- (1) Whether petitioner's suit challenging HHS's adjustments is precluded by 42 U.S.C. § 13951(t)(12).
- (2) Whether *Chevron* deference permits HHS to set reimbursement rates based on acquisition cost and vary such rates by hospital group if it has not collected adequate hospital acquisition cost survey data.

Summary:

A federal statute directs the Department of Health and Human Services (HHS) to set Medicare reimbursement rates that hospitals receive for outpatient drugs in one of two ways. If specified drug-acquisition cost data is available, HHS must base the payment on the drug's average "acquisition" cost, which it may then vary by hospital group. If the specified data is unavailable, HHS must base the payment on the average "sale" price. When using the second method, HHS may "adjust" the payment as necessary for the purposes of the statute. The first question presented is whether the statute precludes judicial review of such an adjustment. The second question presented is whether HHS has authority under *Chevron USA v. Natural Resources Defense Council* to adjust sales price rates downward to reflect acquisition costs and

vary them by hospital group when it lacks the data necessary to set rates based on acquisition costs.

Under the 340B program, hospitals serving underserved populations (340B hospitals) receive substantial discounts from drug manufactures. In a regulation applicable only to 340B hospitals, HHS adjusted their sales-price reimbursement rates downward to reflect their acquisition costs. It did so without using the data that would be necessary to set rates based on acquisition cost. Petitioner American Hospital Association and others filed suit, alleging that HHS lacked authority to make the adjustment without the statutorily specified acquisition data.

The district court determined that the statute did not preclude review and ruled for petitioners. The D.C. Circuit reversed. The court first held that the statute did not preclude preview of HHS's adjustment. Invoking the presumption in favor of judicial review, the court concluded that while the statute precludes review of other kinds of ratemaking decisions, HHS's specific authority to adjust drug reimbursement rates is freestanding and falls outside the statutory review bar. The court then held that HHS had authority under *Chevron* to adjust sales-price reimbursement rates downward to reflect acquisition costs and vary them by hospital group without using the data that would be necessary to set rates based on acquisition cost. The court reasoned that HHS reasonably determined that such an adjustment was necessary to achieve the statute's primary purpose of reimbursing hospitals based on acquisition cost.

Petitioners argue that the statute does not preclude judicial review of HHS's adjustments of drug reimbursement rates. Petitioners rely on the court of appeals' analysis of that issue. Petitioners further argue that HHS lacks authority under *Chevron* to adjust sales-price reimbursement rates downward to reflect acquisition costs and vary them by hospital group without the data that would be necessary to set rates based on acquisition costs. Petitioners contend that the statute unambiguously makes the collection of certain data a precondition for setting rates based on acquisition costs. Allowing HHS to use its adjustment authority to set rates based on acquisition costs without the statutorily prescribed data, petitioners argue, would render that statutory limitation meaningless.

Decision Below:

967 F.3d 818 (D.C. Cir. 2020)

Petitioner's Counsel of Record:

Donald B. Verrilli, Munger, Tolles & Olson LLP

Respondent's Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

***Becerra v. Empire Health Foundation*, No. 20-1312**

Question Presented:

Whether the Secretary [of Health and Human Services] has permissibly included in a hospital's Medicare fraction all of the hospital's patient days of individuals who satisfy the requirements to be entitled to Medicare Part A benefits, regardless of whether Medicare paid the hospital for those particular days.

Summary:

The Medicare statute provides that hospitals that disproportionately serve low-income patients may receive an additional payment for treating Medicare patients. The statute directs

HHS to calculate the payment based on two proxies: the Medicaid fraction and the Medicare fraction. To calculate the Medicare fraction, HHS must determine how many days patients “entitled to benefits under Medicare” spent in the hospital. An HHS regulation implementing that directive includes in the Medicare fraction all days Medicare beneficiaries were patients, including days that Medicare did not pay the hospital because the beneficiaries had exhausted their coverage. The question presented is whether the regulation’s inclusion of days that Medicare did not pay the hospital is consistent with the Medicare statute.

Respondent Empire Health Foundation acquired a hospital’s right to Medicare payments. It filed suit in federal court challenging the HHS regulation’s inclusion in the Medicare fraction days that Medicare did not pay the hospital. The district court ruled for respondent.

The Ninth Circuit affirmed, holding that the HHS regulation impermissibly includes in the Medicare fraction days that Medicare did not pay the hospital. The court reasoned that the statute’s use of the phrase “entitled” to benefits, rather than “eligible” for benefits, limits HHS to counting only those days that it paid the hospital. When benefits have been exhausted, the court concluded, the patients are no longer “entitled” to benefits.

The government argues that HHS permissibly included in the Medicare fraction all patient days of Medicare beneficiaries. The government contends that the statute’s reference to persons “entitled” to benefits simply means that they meet all the requirements for Medicare benefits. Persons therefore remain “entitled” to benefits, the government argues, even after they have exhausted the full allotment of one specific type of service in a particular benefit period. The government contends that numerous provisions of the statute confirm that interpretation because they describe patients as entitled to benefits even when they have exhausted benefits for a particular service.

Decision Below:

958 F.3d 873 (9th Cir. 2020)

Petitioner’s Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Respondent’s Counsel of Record:

Daniel J. Hettich, King & Spalding LLP

Medicaid

***Gallardo v. Marsteller*, No. 20-1263**

Question Presented:

Whether the federal Medicaid Act provides for a state Medicaid program to recover reimbursement for Medicaid’s payment of a beneficiary’s past medical expenses by taking funds from the portion of the beneficiary’s tort recovery that compensates for future medical expenses.

Summary:

The Medicaid Act generally prohibits a state from imposing a lien on a plaintiff’s tort recovery “on account of medical assistance paid or to be paid” by Medicaid. The reimbursement provision establishes an exception that applies “to the extent that payment has been made ... for health care items or services furnished to the individual.” In that event, the state “is considered to

have acquired the rights of such individual to payment by any other party for such health care items or services.” The question presented in this case is whether a state may recover reimbursement for payment of past medical expenses by taking funds from the portion of a tort recovery that is allocated to future medical expenses.

Petitioner Gianinna Gallardo was struck by a truck after getting off a school bus and has since been in a persistent vegetative state. The State paid most of her medical expenses. Petitioner’s parents sued the truck driver and the school district, and they reached a settlement, a small portion of which was allocated to past medical expenses. As authorized by state law, the State sought to recover the expenses it paid from the amount the settlement allocated to both past and future medical expenses. Petitioner filed suit in federal court, alleging that the Medicaid Act bars a state recovering more than the amount a settlement allocates to past medical expenses. The district court granted summary judgment in petitioner’s favor.

The Eleventh Circuit reversed, holding that a state may recover its past medical expenses from any settlement money allocated to medical expenses, whether past or present. The court reasoned that the sole effect of the “has been made” language in the reimbursement provision is to limit the state to reimbursement for medical payments it has already made. That language, the court concluded, does not prohibit the state from recovering its past medical payments from settlement money allocated to future care.

Petitioner argues that the Medicaid Act limits a state’s recovery of its past medical expenses to the portion of a settlement allocated to past medical expenses. By specifying that the State has a right to reimbursement for “such health care items or services,” petitioner argues, the reimbursement provision plainly refers back to payments already made, not to payments for future medical expenses. Petitioner further contends that it is illogical to allow the State to share in damages for which it has provided no compensation.

Decision Below:

963 F.3d 1167 (11th Cir. 2020)

Petitioner’s Counsel of Record:

Bryan S. Gowdy, Creed & Gowdy, P.A.

Respondent’s Counsel of Record:

James H. Percival, Florida Office of the Attorney General

Miscellaneous Business

Copyright

Unicolors, Inc. v. H&M Hennes & Mauritz, LP, No. 20-915

Question Presented:

Did the Ninth Circuit err in breaking with its own prior precedent and the findings of other circuits and the Copyright Office in holding that 17 U.S.C. § 411 requires referral to the Copyright Office where there is no indicia of fraud or material error as to the work at issue in the subject copyright registration?

Summary:

Under the Copyright Act, a plaintiff must validly register a copyright claim with the Copyright Office before filing a claim for infringement. A certificate of registration issued by the Copyright Office satisfies that registration requirement unless the applicant included inaccurate information “with knowledge that it was inaccurate.” The question presented is whether the Copyright Act requires proof of intent to defraud to establish the invalidity of a registration certificate or whether proof of factual knowledge of inaccuracy is sufficient.

Petitioner Unicolors obtained a copyright registration for various designs in a single registration. The practice of registering multiple designs in a single registration is valid only if the designs are published in a single unit. After respondent H&M began selling items with a design that was similar to one of petitioner’s registered designs, petitioner sued respondent for copyright infringement. The jury found infringement. Respondent then contested the validity of the registration, asserting that it was knowingly inaccurate because petitioner collected in one registration multiple designs that were not published in a single unit. The district court entered judgment for petitioner, finding no intent to defraud.

The Ninth Circuit reversed and remanded, holding, in reliance on a prior decision, that the Copyright Act does not require proof of intent to defraud to establish the invalidity of a registration certificate. That prior decision reasoned that an intent-to-defraud requirement is inconsistent with the text of the statute, which requires only “knowledge” of inaccuracy, not intent to defraud. That decision also concluded that the relevant knowledge is knowledge of the underlying facts, not knowledge of the law. As in other federal statutes, the court reasoned, ignorance of the law is no excuse.

Petitioner contends that the Copyright Act requires proof of intent to defraud in order to establish the invalidity of a registration certificate. Petitioner argues that the textual reference to “knowledge” of inaccuracy is simply another way of describing an intent to defraud. Petitioner further argues that the statute was amended to codify the Copyright Office’s prior policy that required an intent to defraud. Finally, petitioner argues that the statute makes no textual distinction between factual knowledge and knowledge of the law. If an applicant submits inaccurate information based on a misunderstanding of either, petitioner contends, it lacks knowledge that the information was inaccurate.

Decision Below:

959 F.3d 1194 (9th Cir. 2020)

Petitioner’s Counsel of Record:

E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP

Respondent’s Counsel of Record:

Neal J. Gauger, Nixon Peabody LLP

Employee Retirement Income Security Act (ERISA)***Hughes v. Northwestern University, No. 19-1401*****Question Presented:**

Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are

sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA.

Summary:

Under the Employee Retirement Income Security Act (ERISA), a plan fiduciary administering a defined-contribution retirement plan must satisfy a standard of “prudence.” The question presented here is whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim for breach of the duty of prudence under ERISA.

Respondent Northwestern University offers defined-contribution plans to its employees. Petitioners are present or former employees of Northwestern who participate in one of Northwestern’s defined-contribution plans. They filed suit in federal court, alleging that Northwestern and affiliated others (respondents) breached their fiduciary duty to plan participants. They specifically alleged that respondents used multiple recordkeepers, resulting in higher fees, and included investments with excessive management fees. The district court dismissed petitioner’s claims.

The Seventh Circuit affirmed, holding that petitioners’ allegations of excessive recordkeeping and management fees were insufficient to state a claim of a breach of fiduciary duty. The court concluded that the allegations of excessive recordkeeping fees were insufficient because respondents offered a sufficient explanation for maintaining two recordkeepers. The court concluded that the allegations of excessive management fees were insufficient since the plan offered some funds with low fees, and plans are generally free to offer a wide range of investment options without breaching their fiduciary duty.

Petitioners argue that allegations that their plans paid or charged them fees that substantially exceeded fees for alternative investment products or services were sufficient to state a claim for breach of fiduciary duty. Petitioners contend that their allegations that the plans charged excessive recordkeeping fees were sufficient because they alleged specific actions the plans could have taken to reduce the fees without sacrificing quality. Petitioners further argue that they were not required at the pleading stage to negate respondents’ explanations for failing to undertake those actions. Petitioners also contend that their allegations of excessive management fees were sufficient because they alleged that the plans offered retail-class mutual funds when they could have obtained the same investment at a lower expense ratio with institutional-class shares. That respondents offered some funds with low fees, petitioners argue, does not relieve them of their duty to remove funds that charged excessive fees.

Decision Below:

953 F.3d 980 (7th Cir. 2020)

Petitioner’s Counsel of Record:

David C. Frederick, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.

Respondent’s Counsel of Record:

Craig C. Martin, Willkie Farr & Gallagher LLP

Other Public Law

Foreign Intelligence Surveillance Act

Federal Bureau of Investigation v. Fazaga, No. 20-828

Question Presented:

Whether Section 1806(f) [of the Foreign Intelligence Surveillance Act of 1978] displaces the state-secrets privilege and authorizes a district court to resolve, *in camera* and *ex parte*, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.

Summary:

Under the Foreign Intelligence Surveillance Act of 1978 (FISA), the government must notify any aggrieved person and the court whenever it “intends” to “use” foreign intelligence information collected through electronic surveillance. An aggrieved person may then move to “discover,” “obtain,” or “suppress” the evidence on the ground that it was unlawfully acquired. If the Attorney General files an affidavit that disclosure would harm national security, the court shall, “notwithstanding any other law,” review the surveillance material *in camera* and *ex parte*. The government has a common law state-secrets privilege to prevent a court from disclosing information that would harm national security. The question presented is whether FISA’s procedures displace that privilege. Subsidiary questions are whether FISA’s procedures are triggered either by the government’s invocation of the state-secrets privilege or by a plaintiff’s request for an injunction requiring return of information as a remedy for unlawful acquisition.

Respondents Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim are practicing Muslims. They filed suit alleging that the FBI enlisted a paid informant to use electronic surveillance to gather information on them based solely on their religion. As relief, they sought return of the information. After the government invoked the state-secrets privilege, the district court dismissed the action.

The Ninth Circuit reversed, holding that FISA displaces the state-secrets privilege. The court reasoned that the phrase “notwithstanding any other law” shows that Congress intended to make FISA’s procedures exclusive. The court further held that the government’s invocation of the state-secrets privilege and a plaintiff’s request for return of information as remedy for unlawful acquisition both trigger FISA’s procedures. The court reasoned that an invocation of the state-secrets privilege constitutes a notice of “intent to use” information and that a request for an injunction requiring return of information as a remedy for a violation constitutes a “request” to “obtain” such information.

The government argues that FISA does not displace the state-secrets privilege. It notes that nothing in the text of FISA expressly mentions the state-secrets privilege. The reference to the applicability of FISA procedures “notwithstanding any other law,” the government argues, addresses only the nature of the proceeding—it must be *in camera* and *ex parte*. The government further contends that neither the government’s invocation of the state-secrets privilege nor a plaintiff’s request for return of information as a remedy for unlawful acquisition triggers FISA’s procedures. The government argues that the invocation of the privilege manifests an intent to prevent the use of evidence, not an intent to use it. And it argues that a plaintiff’s substantive

request for relief on the merits is not the kind of procedural motion that triggers FISA’s procedures.

Decision Below:

965 F.3d 1015 (9th Cir. 2019)

Petitioner’s Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Respondents’ Counsel of Record:

Ahilan T. Arulanantham, ACLU Foundation of Southern California

Respondents’ (Supporting Petitioner) Counsel of Record

Catherine M.A. Carroll, Wilmer Cutler Pickering Hale and Dorr

Alexander H. Cote, Winston & Strawn LLP

Immigration and Nationality Act

Patel v. Garland, No. 20-979

Question Presented:

Whether 8 U.S.C. § 1252(a)(2)(B)(i) preserves the jurisdiction of federal courts to review a non-discretionary determination that a noncitizen is ineligible for certain types of discretionary relief.

Summary:

The Immigration and Nationality Act (INA) grants the Attorney General discretion to adjust the removability status of noncitizens. To qualify for a discretionary adjustment of status, a noncitizen must meet certain statutory eligibility requirements. While a noncitizen generally may seek judicial review of a final removal order, the INA contains a jurisdictional bar that precludes a federal court from reviewing “any judgment” regarding five enumerated forms of discretionary relief, including adjustments of status. At issue here is whether the INA’s jurisdictional bar precludes judicial review of factual determinations that a noncitizen is ineligible for discretionary relief.

Petitioner Pankaikumar Patel entered the country unlawfully. When removal proceedings were commenced against him, petitioner applied for adjustment of status. The Immigration Judge (IJ) denied the application, finding that petitioner made a false statement to obtain a driver’s license and was therefore ineligible for relief. The IJ then ordered petitioner removed. The Board of Immigration Appeals upheld the decision.

The Eleventh Circuit denied petitioner’s appeal, holding that the INA’s jurisdictional bar precludes a court from reviewing factual determinations that a noncitizen is ineligible for discretionary relief. It reasoned that the term “any judgment” in the INA’s jurisdictional bar is best read to mean any decision bearing on the statutorily enumerated forms of relief, including any determinations regarding eligibility. While a separate INA provision restores a court’s authority to review questions of law and constitutional issues, the court concluded that provision leaves intact the prohibition on reviewing factual issues.

Petitioner argues that the INA’s jurisdictional bar does not preclude a court from reviewing factual determinations that a noncitizen is ineligible for discretionary relief. The term “judgment”, petitioner contends, is best read to refer to ultimate exercises of discretion, not to

the non-discretionary eligibility determinations that precede final discretionary decisions. Petitioner argues that the presumption in favor of judicial review and the principle that ambiguities are resolved in favor of noncitizens further support that interpretation. Finally, petitioner relies on the INA’s broader statutory context, arguing that whenever the term “judgment” appears in the INA, it refers to a formal order of a court or a discretionary determination, not to the threshold non-discretionary determinations that precede a final discretionary decision.

Decision Below:

917 F.3d 1319 (11th Cir. 2020)

Petitioner’s Counsel of Record:

Ira J. Kurzban, Kurzban Kurzban Tetzeli & Pratt P.A.

Respondent’s Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Rehabilitation Act

***CVS Pharmacy, Inc. v. Doe*, No. 20-1374**

Question Presented:

Whether section 504 of the Rehabilitation Act, and by extension the ACA, provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.

Summary:

The Rehabilitation Act prohibits recipients of federal funding from discriminating “solely by reason of” disability. The Affordable Care Act (ACA) incorporates the Rehabilitation Act’s prohibition and its enforcement mechanism. The question presented is whether the Rehabilitation Act and the ACA provide a cause of action for plaintiffs alleging that a practice has the disparate impact of denying persons with disabilities meaningful access to a benefit.

Respondents have HIV/AIDS and receive their medication for that condition through employer-sponsored health plans managed by subsidiaries of petitioner CVS Pharmacy. Under respondents’ benefit plans, they could obtain specialty drugs, such as HIV/AIDS drugs, at in-network prices only if they received their prescriptions by mail or through pickup at a CVS pharmacy. To obtain the prescriptions at a different pharmacy, respondents would have had to pay a higher price. Respondents filed suit in federal court, alleging that this delivery practice effectively denies individuals with a disability meaningful access to a benefit and therefore constitutes discrimination on the basis of disability in violation of the Rehabilitation Act and the ACA. The district court dismissed the complaint.

The Ninth Circuit vacated and remanded, holding that the Rehabilitation Act and the ACA provide a cause of action to plaintiffs alleging that a practice effectively denies persons with disabilities meaningful access to a benefit. The court reasoned that in *Choate v. Anderson*, the Supreme Court held that the Rehabilitation Act creates such a meaningful access claim.

Petitioner argues that the Rehabilitation Act and the ACA do not afford a cause of action to plaintiffs alleging that a practice has a disparate impact on individuals with a disability.

Petitioner contends that by using the terms “solely by reason of disability” and omitting terms like “otherwise adversely affects,” Congress ruled out any form of disparate impact liability, including a meaningful access claim. Petitioner further argues that *Choate* simply assumed without deciding that the Rehabilitation Act might reach denials of meaningful access. Since that time, petitioner notes, the Supreme Court held in *Alexander v. Sandoval* that Title VI of the Civil Rights Act of 1964 creates a cause of action only for intentional racial discrimination. Because the Rehabilitation Act has essentially the same text as Title VI, petitioner argues, it too authorizes only intentional discrimination claims.

Decision Below:

982 F.3d 1204 (9th Cir. 2020)

Petitioner’s Counsel of Record:

Lisa S. Blatt, Williams & Connolly LLP

Respondent’s Counsel of Record:

Gerald S. Flanagan, Consumer Watchdog

Social Security Act

***Babcock v. Kijakazi*, No. 20-480**

Question Presented:

Is a civil-service pension payment based on dual-status military technician service to the National Guard a payment based wholly on service as a member of a uniformed service?

Summary:

To eliminate windfalls, the Social Security Act reduces the amount of the benefit distributed when an individual receives a pension from a job for which he did not pay into Social Security. Under the uniformed-services exception, however, no such reduction is made if the individual is receiving “a payment based wholly on service as a member of a uniformed service.” Dual-status technicians in the National Guard are defined as civilian employees who are members of the National Guard, which is a uniformed service. They do not pay into Social Security, and they receive a pension from the Civil Service Retirement System (CSRS). The question presented in this case is whether CSRS payments to dual-status technicians in the National Guard fall within the uniformed-services exception.

Petitioner David Babcock served for many years as a dual-status technician in the Michigan National Guard. After retiring from that job, he began receiving a CSRS pension. He subsequently worked in a private sector job. Upon retirement from that job, he applied for Social Security benefits. The Social Security Administration (SSA) reduced his benefits because of his CSRS pension. Babcock sought review in federal court, asserting that his CSRS pension fell within the uniformed-services exception. The district court affirmed the SSA’s decision.

The Sixth Circuit affirmed, holding that a CSRS payment to a dual-status technician in the National Guard does not fall within the uniformed-services exception. The court reasoned that the terms “wholly” and “as” limit that exception to payments based exclusively on employment as a uniformed-services member. CSRS payments to dual-status technicians in the

National Guard do not satisfy that exclusivity requirement, the court concluded, since the only reason dual-status technicians receive a CSRS pension is that they are civilian employees.

Petitioner argues that CSRS payments to dual-status technicians in the National Guard fall within the uniformed-services exception. Petitioner contends that the text of the uniformed-services exception requires only that (i) the payment be based “on service as a member of a uniformed service” and (ii) the payment is based “wholly” on that service. CSRS payments to dual-status technicians meet both requirements, petitioner maintains, since dual-status technicians are members of the National Guard, a “uniformed service,” and the payments can be “wholly” traced to that service. Finally, petitioner argues that it makes no difference under the text of the statute whether a job is classified as civilian; what matters is that the work be performed as a member of a uniformed service, and dual-status technicians fit that bill.

Decision Below:

959 F.3d 210 (6th Cir. 2020)

Petitioner’s Counsel of Record:

Neal K. Katyal, Hogan Lovells US LLP

Respondents’ Counsel of Record:

Brian H. Fletcher, Acting Solicitor General, Department of Justice

Original Jurisdiction

Equitable Apportionment – Water Rights

Mississippi v. Tennessee, No. 22O143

Questions Presented:

- (1) Whether the Special Master correctly determined that Mississippi’s complaint should be dismissed because the groundwater at issue is an interstate resource subject to equitable apportionment and because Mississippi has disclaimed any request for an equitable apportionment.
- (2) Whether Mississippi should be granted leave to amend to allege an equitable apportionment claim.

Summary:

The groundwater in the Middle Claiborne Aquifer lies beneath portions of eight states, including Mississippi and Tennessee. The principal question presented in this case is whether the groundwater in the Aquifer, including the portion within Mississippi’s borders, is an interstate resource subject to equitable apportionment. This case also presents the question whether Mississippi should be granted leave to amend to allege an equitable apportionment claim.

Mississippi filed a motion for leave to file a complaint alleging that wells in Tennessee unlawfully took groundwater that would have otherwise remained under Mississippi, in violation of Mississippi’s sovereign rights. Mississippi sought damages equal to the value of the groundwater taken. Mississippi did not seek an equitable apportionment. The Supreme Court granted leave to file the complaint and appointed a Special Master. Following an evidentiary

hearing, the Special Master recommended that the Court dismiss Mississippi's complaint with leave to file an amended complaint seeking an equitable apportionment.

The Special Master determined that the groundwater in the Middle Claiborne Aquifer is an interstate resource subject to equitable apportionment. The Special Master gave four reasons for reaching that conclusion: (i) The aquifer, and the groundwater within it, is a single hydrogeological unit underneath several states; (ii) Tennessee's water pumping affected the groundwater beneath Mississippi, demonstrating interconnectedness; (iii) natural flow patterns show that water within the aquifer would flow across Mississippi's borders eventually; and (iv) the water within the aquifer interacts with, and flows into, interstate surface waters. The Special Master also concluded that Mississippi's sovereign authority over the groundwater within its borders did not render the doctrine of equitable apportionment inapplicable.

Mississippi contends that it has exclusive authority over the waters within its borders and that the remedy of equitable apportionment is inapplicable. Mississippi argues that the doctrine of equitable apportionment applies to interstate rivers and streams, not to groundwater that would remain in a single jurisdiction under natural conditions. Mississippi further argues that equitable apportionment cannot justify reaching into Mississippi to capture groundwater that is subject to Mississippi's exclusive authority.

Tennessee contends that Mississippi should not be granted leave to amend to raise an equitable apportionment claim. Tennessee argues that Mississippi purposefully disclaimed an equitable apportionment claim, and that Mississippi cannot make the showing of substantial injury that is necessary to support such a claim.

Decision Below:

Original No. 143

Plaintiff's Counsel of Record:

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Defendants' Counsel of Record:

Sohnia W. Hong, Senior Counsel

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