A LOOK AHEAD

Supreme Court of the United States October Term 2024

GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2024 PREVIEW

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A LOOK AHEAD AT OCTOBER TERM 2024

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Supreme Court Institute Preview Report
Supreme Court October Term 2024

This report previews the Supreme Court's argument docket for October Term 2024 (OT 24). The Court has thus far accepted 28 cases for review. The Court has calendared nine arguments to be heard in the October Sitting and seven 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

***United States v. Skrmetti*, No. 23-477**

Tennessee Senate Bill 1 (SB1) prohibits healthcare providers from prescribing puberty blockers or hormones to allow a minor to identify with or live as an identity inconsistent with the minor's sex assigned at birth, or to treat discomfort or distress from a discordance between the minor's sex assigned at birth and gender identity. The question presented is whether SB1 violates the Equal Protection Clause.

The Supreme Court has held that laws that classify based on sex are subject to heightened scrutiny. Such laws violate the Equal Protection Clause, unless substantially related to achieving an important state objective. The United States argues that SB1 is unconstitutional under that line of precedent because it classifies based on sex and is not substantially related to achieving an important objective. The United States alternatively argues that SB1 also triggers heightened scrutiny because it classifies based on transgender status.

The Court has not added to the list of classifications triggering heightened scrutiny in decades. The odds of this Court doing so now are less than zero. The Court will apply heightened scrutiny in this case only if it concludes that SB1 classifies based on sex.

The United States says there are three features of SB1 that render it a sex-based classification. First, SB1 directly refers to an individual's sex: its prohibitions apply only when treatments are for incongruity between a minor's sex assigned at birth and gender identity. Second, the text draws sex-based distinctions on who may receive medical treatments. For example, a minor assigned female at birth cannot receive testosterone to live and present as a male, but an adolescent assigned male at birth can. In that way, a minor's sex assigned at birth determines whether a particular minor may receive a particular treatment. Under the Court's decision in *Bostock v. Clayton County,* the United States argues, that is sex discrimination. Finally, sex-based line drawing is the law's purpose. By its terms, SB1 is designed in part to enforce the State's purported "compelling interest in encouraging minors to appreciate their sex," and in "prohibiting medical care that might encourage minors to become disdainful of their sex." The law therefore reflects the sex-based stereotype that minors assigned male at birth should identify as boys, and minors assigned female should identify as girls.

The State responds that SB1 classifies based on age and medical condition, not sex. It contends that a law classifies based on sex only if it treats males and females who are similarly

situated differently, and SB1 does not do that. For example, a minor assigned male at birth who suffers from testosterone deficiency, the State argues, is not similarly situated to a minor assigned female at birth suffering from gender dysphoria. The difference between them is that they have different medical conditions whose treatments present different risk-benefit profiles. The State argues that *Bostock* supports its position because it held that sex discrimination under Title VII exists only when similarly situated males and females are treated differently, a requirement that SB1 does not satisfy. The State further argues that SB1's reference to sex does not mean it embodies a sex classification. The medical condition that SB1 regulates—gender dysphoria—cannot be described without such a reference, and a medical condition classification does not become a sex classification simply because the condition is itself sex-based. If a reference to sex were sufficient to transform a medical classification into a sex classification, the State argues, all abortion laws would require heightened review. Yet, *Dobbs v. Jackson Women's Health Organization* expressly held that abortion laws do not classify based on sex.

The parties also offer opposing positions on the State's justifications for its prohibition. The United States argues that medical treatment of gender dysphoria is most critically needed for minors whose gender dysphoria has made them suicidal. Even when suicide is not an immediate risk, gender dysphoria can cause debilitating anxiety and depression. While treatment of gender dysphoria carries some risks, the United States argues, none justifies an outright ban on medical treatments. Beyond that, the United States argues that SB1 is not tailored to preventing the risks it identifies. It is severely underinclusive because it allows the banned treatments for conditions besides gender dysphoria, even though those treatments entail comparable risks. And it is severely overinclusive because it categorically bans treatments for gender dysphoria, rather than establishing guardrails to ensure the treatments are limited to those who need them.

The State argues that treatments for gender dysphoria create serious risks, including loss of fertility. It argues that there is an unexplained upsurge in treatment of minors for gender dysphoria. And it argues that the benefits of the medical treatments are unknown because they are not supported by high quality medical studies. The State argues there is no underinclusion because minors who can receive the treatments are not similarly situated to minors who are treated for gender dysphoria. And it argues there is no overinclusion because a categorical prohibition reflects the seriousness of the risks and the uncertainty of the benefits.

The Court will likely rule for the State on the question whether SB1 triggers strict scrutiny. That is not because the argument that SB1 classifies based on age and medical condition is any better than the argument that SB1 classifies based on sex. Instead, it is because the Court will likely think the issue of what treatments minors should be able to get for gender dysphoria ought to be resolved by the democratic process, rather than by courts. That is one of the principal reasons that Sixth Circuit Judge Sutton gave for ruling for the State in this case. And it's hard to think of another judge who is a better proxy for how the center block of conservatives on the Court will react to the issue in this case.

The categorical nature of the State's ban and its admitted preference for minors to identify with their sex assigned at birth will give the center block of conservative Justices pause. It just seems downright cruel to enforce a state's preference for a minor to identify with their sex assigned at birth when the minor is suicidal, and the minor, the minor's parents, and the minor's doctor all agree on the appropriate medical treatment. But a Court that sees travel to a more hospitable state as the answer to harsh abortion laws, as it did in *Dobbs*, will likely see travel to a more hospitable state as the answer to harsh gender dysphoria laws. It is also possible that the

Court that gave transgender individuals a surprise victory in *Bostock* will deliver a similar surprise in this. But there are too many ways to get around *Bostock* to expect that outcome.

***Garland v. VanDerStock*, No. 23-852**

The Gun Control Act imposes certain requirements on manufacturers and sellers of "firearms," such as the placement of serial numbers on firearms. The Act's definition of firearm includes "any weapon" that "may readily be converted to expel a projectile by the action of an explosive." It separately includes "the frame or receiver of any such weapon."

Without complying with the Act's requirements, certain companies sell part kits that can be assembled into functioning firearms, often in under 30 minutes. Companies also sell partially completed frames and receivers, some of which can be completed by drilling a few holes or removing temporary plastic rails. It is common to refer to these companies as selling ghost guns, because the absence of serialization makes them difficult to trace.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) issued a Rule that addresses parts kits and partially completed frames and receivers. Relying on the "weapon" component of the firearms definition, the Rule defines a firearm to include a weapons parts kit that can be readily converted to expel a projectile by the action of an explosive. Relying on the "frame or receiver" component of the definition, the Rule specifies that those terms include "a frame or receiver parts kit that may readily be converted to function as a frame or receiver." The question is whether those two components of the Rule validly implement the Act's definition of firearm.

The government contends that the Rule's coverage of parts kits follows from the ordinary understanding of the term firearm, as well as from the Act's definition of that term. The government says that IKEA could not avoid paying a tax on bookshelves by claiming it sells bookshelf parts kits, rather than bookshelves, and the same is true of firearms dealers who sell firearms parts kits. The definition of firearms as including any weapon that can be readily converted into a functional firearm confirms that understanding. If, for example, a parts kit can be converted into a functioning firearm in 20 minutes using tools that most people are familiar with, it would be natural to say that the kit can readily be converted into a functioning firearm.

Respondents answer that the firearms definition does not include just any item that can be readily converted into a functioning firearm. Before it is converted, the item must already be a "weapon," a requirement that a parts kit does not satisfy. Respondents further argue that when Congress wants parts to be regulated, it expressly says so, as it did in defining both a destructive device and a machinegun. In contrast, Congress removed the phrase any part of a firearm from the definition of firearm, and chose instead to cover only two parts: the frame and receiver. Finally, respondents argue that because parts kits that have a frame or receiver are already covered as frames or receivers, ATF's parts kits Rule has significance only when a kit lacks a frame and receiver. And because the Act requires all firearms to have a serial number on the frame or receiver, that means that ATF's parts kits Rule extends coverage to parts kits only when they are not firearms.

The government offers the following answers. First, the definition reflects an understanding that the term "weapon" does not bear its ordinary meaning because it encompasses products that do not yet function as a weapon. For example, the Act identifies a starter gun as a weapon even though it does not function as one. And everyone agrees that a disassembled weapon is still a weapon within the meaning of the definition. A weapon parts kit

is no different. Second, while Congress specifically referenced parts in its definition of destructive device and machinegun, Congress was not precluded from using different language to achieve the same objective. So too, Congress's deletion of language covering any part of a firearm is not inconsistent with the Rule's far narrower coverage of aggregations of parts that can be readily converted into a functioning firearm. Finally, while weapons parts kits typically have partially completed frames or receivers that can readily be converted into functioning ones and are therefore covered by the second component of the Rule, there is nothing unusual about statutory overlap. Moreover, if frames or receivers were interpreted more narrowly to exclude ready conversions, the two components would not entirely overlap. As for the serialization requirement, it does not limit the definition of firearms to weapons that include a traditional frame or receiver.

The parties also offer conflicting textual and structural arguments on the second component of the rule. The government argues that the ordinary understanding of frame is that it is the principal component of a firearm, and the ordinary understanding of receiver is that it is the part of the gun that houses the breech action and firing mechanism. Nothing about those definitions, the government argues, requires a frame or receiver to be complete or functional. For example, a product does not cease to be a frame because it is missing a single hole or it has a small piece of plastic that needs to be removed. Just as a bicycle is still a bicycle if it is missing pedals, and a tennis racquet is still a tennis racquet if it is sold without strings, a frame is still a frame even if something minor needs to be done to make it complete or functional.

Respondents counter that because Congress expressly included ready conversion into the weapon component of the definition, there is no basis for adding that phrase into the frame or receiver component. They further argue that a part cannot be both not yet a receiver and a receiver at the same time. And they argue that if anything that can be readily converted into a frame or receiver is a frame or receiver, AR-15 rifles could be viewed as machineguns because it may be possible to convert AR-15 receivers into machinegun receivers by drilling a single hole.

The government answers that because Congress defined weapon to encompass functionality, adding ready conversion was necessary to give the term its ordinary meaning. By contrast, because Congress did not define frame or receiver in terms of functionality, and ready conversion to functionality is inherent in the ordinary understanding of the terms, there was no need to add ready conversion to ensure that those terms would receive their ordinary meaning. The government further argues that the Rule does not say that an incomplete receiver that can be readily converted to a completed one is both not yet a receiver and a receiver at the same time. Instead, it says that the term receiver includes both ones that are completed and ones that are incomplete but can be readily completed.

To the extent the Court does not think either side's textual and structural arguments are decisive, each side has something more to say. The government contends that excluding weapons parts kits that can be readily converted into functioning firearms from the Act's coverage would allow circumvention of the Act, opening up a ready path for criminals to buy untraceable guns. Respondents answer that criminals prefer manufactured guns, and Congress has never wanted to interfere with individual hobbyists who make their own guns.

Respondents say that extending ready conversion beyond starter pistols and disassembled guns would render the statute unconstitutionally vague: there is simply no way for the average person to assess when a kit can be readily converted into a functioning firearm or a completed frame or receiver. The government answers that what can be readily converted will be clear in most cases, and close cases at the margins do not make a statute vague.

This case is reminiscent of last term's decision in *Garland v. Cargill* that bump stock rifles are not machineguns even though they possess the same destructive capacity and failure to cover them would allow ready circumvention of the Act's prohibition on machineguns. The Court thought the ordinary understanding of the statutory terms excluded bump stocks, and the statute would not be completely ineffective if bump stocks were not covered. You can easily see the Court saying almost the same thing here. But the government has at least a fighting chance to persuade the Court that it has a better textual argument in this case than it did in the bump stock case. If it does, the alarming rise in criminals' use of ghost guns might be enough to persuade the Court that the government has the better argument overall.

***Free Speech Coalition, Inc. v. Paxton*, No. 23-1122**

A Texas statute imposes certain obligations on commercial websites when a third of what they publish is sexual material that is harmful to minors. The statute defines material harmful to minors as material that appeals to the prurient interest of minors, depicts sex in a way that is patently offensive with respect to minors, and lacks serious value for minors. The statute requires covered websites to verify that an individual attempting to access the material is 18 years of age or older. The Act permits various forms of verification, including digital identification, government-issued identification, and other commercially reasonable methods. The question in the case is whether the Texas verification requirement is subject to strict scrutiny or rational basis review.

The First Amendment gives adults a right to view a broad range of sexual material, provided it is not obscene. The Supreme Court has narrowly defined obscenity to include only material that appeals to the prurient interest of the average person, depicts sexual acts in a patently offensive way, and lacks serious value. In *Ginsberg v. New York*, however, the Court held that states may restrict minors' access to sexual materials that are harmful to minors, even though they are not obscene for adults. The New York statute defined harmful to minors in a way that is not materially different from the Texas statute, keying each of the three obscenity factors to minors. In upholding New York's prohibition of minors' access to harmful sexual materials, the Court applied rational basis review, rather than strict scrutiny.

On the other hand, in a series of cases, the Court has applied strict scrutiny to laws that seek to protect minors from the harmful effects of sexual material, but burden adult access to material they have a right to view. For example, in *Ashcroft v. ACLU*, the last in that line of cases, the Court applied strict scrutiny, rather than rational basis review, to a federal statute that prohibited commercial websites from posting harmful-to-minors material but provided an affirmative defense to websites that use reasonable age verification methods.

The resolution of the question presented in this case is largely a matter of how to reconcile *Ginsberg* with *Ashcroft v. ACLU*. Petitioners argue that *Ginsberg's* holding is solely about limiting minors' access to harmful material and has nothing to do with adult access. They further argue that the line of cases that ends with *Ashcroft v. ACLU* require strict scrutiny for laws that impose burdens on adult access. Because the Texas statute's identification requirement burdens adult access to material that is harmful to minors, petitioners argue, strict scrutiny applies.

Texas views the matter differently. It argues that *Ginsberg's* holding that minors may be denied access to harmful materials necessarily implies that states may enforce that limitation through an age verification requirement that applies to adults. For example, *Ginsberg* has to

mean that a state could require a retail store selling harmful materials to verify the purchaser's age. Otherwise, a harmful-to-minors law would be meaningless. Texas further argues that *Ashcraft v. ACLU* does not hold that age verification requirements are subject to strict scrutiny. Because the federal government conceded that strict scrutiny applied, Texas argues, the Court had no occasion to decide whether strict scrutiny or rational basis review applied. Texas also argues that whatever the burdens that age verification imposed on adults at the time of *Ashcroft v. ACLU*, technological changes have made it possible for adults to readily verify their age when seeking material on the internet.

Petitioners offer the following responses. First, they argue that the Court in *Ashcroft v. ACLU* independently decided that strict scrutiny applies. Second, they argue that technological changes have only increased the deterrent effect of age verification requirements. Third, they argue that online age verification requirements impose a far greater deterrent effect than in person ones.

Petitioners' account of *Ginsberg* and *Ashcroft v. ACLU* is more persuasive than Texas's. *Ginsberg* did not address the level of scrutiny that applies to laws that burden adult access to harmful to minors material, while the *Ashcroft* line of cases did. That does not mean that petitioners are necessarily home free. The Court that decided *Ashcroft v. ACLU* is not the Court of today. It seems possible that Texas could find an audience for the argument that a state statute does not end up subject to strict scrutiny review just because adults must verify their age to obtain material that is harmful to minors. For example, it seems unlikely that the Court would think that an in-person adult identification requirement would trigger strict scrutiny. Now that age verification is quite common on the internet, it is at least possible that a majority may think that online identification should not be treated differently. The safer bet is still that the Court will stick with its strict scrutiny precedents. But a Texas victory is by no means out of the question.

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Administrative Law

Denial of Marketing Application for E-Cigarettes

***Food and Drug Administration v. Wages and White Lion Investments, L.L.C. dba Triton Distributions, et. al.*, No. 23-1038**

Question Presented:

Whether the court of appeals erred in setting aside the Food and Drug Administration's orders as arbitrary and capricious.

Summary:

The Family Smoking Prevention and Tobacco Control Act prohibits the marketing of new tobacco products, including e-cigarettes and e-liquids, without approval from the Food and Drug Administration (FDA). The Act requires applicants to show that marketing a new product would be "appropriate for the protection of public health." The FDA found that two applicants seeking to market e-cigarette products failed to satisfy that standard and denied their applications. The question is whether FDA's orders denying respondents' applications for authorization to market new e-cigarette products were arbitrary and capricious.

Triton Distribution and Vapetasia (respondents) produce flavored e-liquids for use in e-cigarettes. Respondents filed nearly identical applications seeking marketing authorization for their products. The FDA denied both applications. It found that respondents offered insufficient evidence that their products offered greater benefit to adults than tobacco flavored e-cigarettes. It further found that respondents' products posed a substantial health risk to youth. The FDA refused to evaluate respondents' marketing plans, because it was unaware of any plans that could sufficiently mitigate the health risk. Based on those findings, the FDA concluded that respondents failed to show that marketing their products would be appropriate for the protection of public health. A panel of the Fifth Circuit denied the petitions for review.

The Fifth Circuit, sitting en banc, set aside the FDA's denials as arbitrary and capricious. The court concluded that the FDA unfairly surprised respondents in two ways: First, the FDA announced that scientific studies were not required for approval of flavored e-liquids, and then disapproved respondents' applications because they failed to offer such studies. Second, the FDA announced that applicants could rely on studies involving unflavored products, and then categorically rejected respondents' reliance on such evidence. The court also concluded that the FDA's failure to consider respondents' marketing plans could not be dismissed as a harmless error. The court reasoned that harmless error analysis does not apply to discretionary decisions.

The government argues that the FDA's denials of respondents' applications were not arbitrary or capricious. It contends that because the FDA's guidance informed applicants that their applications would have to be supported by either well-controlled investigations or other valid scientific evidence, the application of that standard in denying respondents' applications did not constitute unfair surprise. The government similarly argues that the FDA's rejection of respondents' evidence related to nonflavored products did not constitute unfair surprise because the FDA's guidance informed applicants that they should submit scientific reviews of flavors. Finally, the government contends that harmless error analysis is applicable to the FDA's failure to consider respondents' marketing plans, because the FDA had already considered and rejected plans that were not materially different.

Decision Below:
90 F.4th 357 (5th Cir. 2024)
Petitioner's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice
Respondents' Counsel of Record:
Eric N. Heyer, Thompson Hine LLP

Environmental Statutes

***City and County of San Francisco v. Environmental Protection Agency*, No. 23-753**

Questions Presented:

> Whether the Clean Water Act allows the Environmental Protection Agency or an authorized state to impose generic prohibitions on [federal pollutant discharge] permits that subject their holders to narrative water quality standards without identifying specific limits to which their discharges must conform.

Summary:

The Clean Water Act requires operators of combined service overflow systems that discharge pollutants into United States waters to obtain a permit issued by the Environmental Protection Agency (EPA). The Act authorizes the EPA to impose permit conditions, including "effluent limitations for point sources," and "any more stringent limitation, including those necessary to meet water quality standards." The question presented is whether the Act authorizes the EPA to impose on permit holders a general obligation to satisfy a narrative limit on the overall water quality standards for the receiving waters, or whether the EPA must instead set specific limits on what may be discharged from a particular point source.

Petitioner San Francisco operates a combined overflow system that emits pollutants into the navigable waters of the United States. The EPA imposed two permit conditions for those emissions that are at issue here. One mandates that the system's discharge shall not cause violations of "any applicable water quality standard." The other prohibits any discharge from creating "pollution, contamination, or nuisance as defined by [the] California Water Code." Petitioner challenged those limitations as inconsistent with the Act, but the EPA Appeals Board rejected that challenge.

The Ninth Circuit denied a petition for review, holding that the Act authorizes the EPA to impose on permit holders a general obligation to satisfy narrative water quality standards. The court noted that the Act not only gives the EPA authority to impose "effluent limitations for point sources," but also provides the EPA with additional authority to adopt any "more stringent limitation" when "necessary to meet water quality standards." The latter grant of authority, the court concluded, readily encompasses the authority to require permit holders to satisfy narrative water quality standards. The court also relied on an EPA regulation that Congress adopted requiring compliance with narrative water quality standards.

Petitioner argues that the Act does not give the EPA authority to impose permit conditions that measure compliance based on whether the receiving waters meet applicable water quality standards. Instead, petitioner argues that the EPA must set specific limitations on what may be discharged from a point source. Petitioner argues that the text of the Act draws a

fundamental distinction between overall "water quality standards" for the receiving waters and specific "limitations" that the EPA may impose on particular point sources to achieve those overall standards. Petitioner further contends that the EPA's adoption of overall water quality standards themselves as the applicable limit on an individual discharger ignores that distinction. Petitioner argues that the EPA's approach deprives permit holders of the guidance they need to control their own discharges, resurrecting the very problem that Congress sought to remedy when it adopted the Act.

Decision Below:
75 F.4th 1074 (9th Cir. 2023)
Petitioner's Counsel of Record:
Andrew C. Silton, Beveridge & Diamond, P.C.
Respondent's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice

***Seven County Infrastructure Coalition, et al., v. Eagle County, Colorado,* No. 23-975**

Question Presented:

Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.

Summary:

The National Environmental Policy Act (the Act) requires federal agencies to examine the environmental impact of proposed federal action. In *Department of Transportation v. Public Citizen*, the Supreme Court held that when "an agency has no ability to prevent" an environmental effect "due to its limited statutory authority over the relevant actions," the Act does not require the agency to study that effect. The question presented is whether the Act requires a federal agency to study environmental impacts beyond the proximate effects over which the agency has regulatory authority.

Petitioners, the Seven County Infrastructure Coalition and Uinta Basin Railway, sought authorization from the Surface Transportation Board (Board) to build a railway line. The line would connect the Uinta Basin in Utah to the national rail network and transport the basin's waxy crude oil. The Board approved petitioners' proposal. The Board did not consider the upstream or downstream environmental impacts of increased oil development, stating that it lacked authority to regulate those impacts. Eagle County, Colorado and environmental groups (respondents) sought review.

The D.C. Circuit vacated and remanded. The court held that an agency may not refuse to consider environmental impacts on the ground that it lacks authority to regulate them when, as here, the agency has authority to weigh those environmental impacts in deciding whether to approve a project. The court further held that an agency's authority to consider environmental effects extends to all reasonably foreseeable effects of its actions.

Petitioners contend that the Act does not require an agency to consider environmental impacts beyond the proximate effects over which the agency has regulatory authority. Petitioners argue that *Public Citizen* compels that conclusion. Petitioners further argue that any more expansive reading of *Public Citizen* would turn federal agencies into "environmental-policy

czars," authorizing them to deny permits on grounds outside their expertise and authority. Finally, petitioners argue that reasonable foreseeability is an unmanageable line.

Decision Below:

82 F.4th 1152 (D.C. Cir. 2023)

Petitioner's Counsel of Record:

Jay C. Johnson, Venable LLP

Respondent's Counsel of Record:

Nathaniel H. Hunt, Kaplan Kirsch & Rockwell LLP

Armed Services

Veterans Claims

Bufkin v. McDonough, No. 23-713

Question Presented:

> Must the Veterans Court ensure that the benefit-of-the-doubt rule was properly applied during the claims process in order to satisfy 38 U.S.C. § 7261(b)(1), which directs the Veterans Court to "take due account" of [the Department of Veterans Affairs'] application of that rule?

Summary:

Federal law requires the Department of Veterans Affairs (VA) to give "the benefit of the doubt" to a veteran claiming disability benefits when there is "an approximate balance of positive and negative evidence." In reviewing a VA benefits determination, the Veterans Court must "take due account" of the VA's application of the benefit-of-the-doubt rule. The question presented is whether the "due account" provision requires the Veterans Court to independently assess whether the VA correctly applied the benefit-of-the-doubt rule, or it instead authorizes only clear error review. While this summary focuses on petitioner Bufkin, the same issue is presented by his co-petitioner, Thornton.

Petitioner Joshua Bufkin, a veteran, made a disability claim for service-related Post-Traumatic Stress Disorder (PTSD). After receiving conflicting evidence on that issue, the VA denied petitioner's claim. On appeal, the Board of Veterans' Appeals similarly ruled against petitioner. Applying clear error review, the Veterans Court affirmed.

The Federal Circuit affirmed. In reliance on a prior decision, the court held that the "due account" provision does not require the Veterans Court to independently assess whether the VA correctly applied the benefit-of-the-doubt rule. In the prior decision, the court reasoned that the "due account" provision is subject to two other review provisions that preclude such an independent assessment: one expressly prohibits de novo review of the facts, and the other permits review of the facts under the clearly erroneous standard.

Petitioner contends that the "due account" provision requires the Veterans Court to independently assess whether the VA correctly applied the benefit-of-the-doubt rule. Petitioner argues that the ordinary meaning of the phrase "take due account" requires an independent

assessment, not clear error review. Petitioner further argues that de novo review is required because the question whether the VA properly applied the benefit-of-the-doubt rule presents a legal, rather than a factual issue. Finally, petitioner contends that Congress added the "due account" provision as a separate ground for appeal and did so to remedy the failure of clear error review to provide sufficient protection for veterans. For that reason, petitioner argues, a holding that clear error review satisfies the "due account" provision would violate the canon against interpreting a provision of a statute as meaningless surplusage.

Decision Below:
75 F.4th 1368 (Fed. Cir. 2023)
Petitioners' Counsel of Record:
Melanie L. Bostwick, Orrick, Herrington & Sutcliffe LLP
Respondent's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice

Civilian Employees

***Feliciano v. Department of Transportation*, No. 23-861**

Questions Presented:

Whether a federal civilian employee called or ordered to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

Summary:

Federal civilian employees who are also reservists may be entitled to the difference between their lower military pay and their civilian salaries (differential pay) when they are called to active duty. Under 10 U.S.C. Section 101(a)(13)(B) the employing agency must provide differential pay when the employee-reservist is called to active duty under one of several listed provisions, or under "any other provision of law… during a national emergency declared by the President or Congress." The question presented is whether federal civilian employees who are called to active duty during a declared national emergency pursuant to a provision not identified in Section 101(a)(13)(B) are entitled to differential pay when their service was not connected to the national emergency.

Petitioner Nick Feliciano was a federal air traffic controller for the Federal Aviation Administration (FAA). Petitioner simultaneously served as a Coast Guard reserve officer. Petitioner was called to active duty during a declared national emergency pursuant to a provision of law not listed in Section 101(a)(13)(B), and his duties were not connected to the national emergency. The FAA did not provide petitioner with differential pay, and the Merits System Protection Board denied petitioner's claim for such pay.

In reliance on a prior precedent, the Federal Circuit affirmed. That precedent held that civilian employees called to service during a national emergency pursuant to a provision of law not listed in Section 101(a)(13)(B) are not entitled to differential pay when their service was not connected to the national emergency. The court reasoned that it was implausible that Congress intended to award differential pay for service unrelated to a national emergency simply because the service occurred during a national emergency.

Petitioner argues that a reservist in federal civilian service called to active duty during a national emergency pursuant to any provision of law is entitled to differential pay even when their service was not connected to the national emergency. Petitioner contends that the plain meaning of the term "during" requires only a temporal link between a reservist's service and a national emergency. Nothing in the text, petitioner argues, imposes a requirement that service during a national emergency must relate to that emergency. Petitioner further contends that requiring only a temporal connection between service and a national emergency is not implausible, but instead leads to the sensible result that reservists suffer no financial harm for performing active duty in times of greatest need.

Decision Below:
2023 WL 3449138 (Fed. Cir. 2023)
Petitioner's Counsel of Record:
Andrew T. Tutt, Arnold & Porter Kaye Scholer LLP
Respondent's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice

Bankruptcy

Abrogation of Sovereign Immunity

***United States v. Miller*, No. 23-824**

Questions Presented:

Whether a bankruptcy trustee may avoid a debtor's tax payment to the United States under Section 544(b) when no actual creditor could have obtained relief under the applicable state fraudulent-transfer law outside of bankruptcy.

Summary:

Under 11 U.S.C. § 544(b), a bankruptcy trustee may avoid a previous transfer if it is "voidable under applicable law by a creditor holding an unsecured claim." The "applicable law" may include a state law authorizing creditors to avoid fraudulent transfers. Section 106 of the Bankruptcy Code abrogates the sovereign immunity of the United States "with respect to" Section 544(b). The question presented is whether the trustee may a avoid a debtor's tax payment to the United States under Section 544(b) when sovereign immunity would have barred the applicable state law fraudulent transfer action against the United States outside bankruptcy.

All Resort Group, Inc. (ARC) paid money to the Internal Revenue Service to satisfy the tax obligations of two of its principals. It subsequently filed for bankruptcy. The trustee in bankruptcy filed an adversary proceeding against the United States to recover the tax payments. The trustee relied on a state fraudulent transfer statute as the applicable law providing a cause of action to avoid the transfer. The government asserted as a defense that the debt was not voidable under state law because sovereign immunity would bar such a suit outside bankruptcy. The Bankruptcy Court ruled for the trustee, and the district court affirmed.

The Tenth Circuit affirmed. It held that a trustee may avoid a debtor's tax payment to the United States under Section 544(b) even though sovereign immunity would have barred the applicable state law fraudulent transfer action against the United States outside bankruptcy. The

court reasoned that Section 106's use of the phrase "with respect to" is expansive and necessarily encompasses an abrogation of immunity from the underlying state law cause of action that Section 544(b) incorporates.

The government contends that a trustee may not avoid a debtor's tax payment to the United States under Section 544(b) when sovereign immunity would have barred the applicable state law fraudulent transfer action against the United States outside bankruptcy. The government argues that Section 106 does not suggest otherwise because it addresses only the government's immunity from suit, not the analytically distinct merits question whether state substantive law provides an avenue for relief. Any broader interpretation of Section 106, the government argues, would violate Section 106's statement that "[n]othing in this section shall create any substantive claim for relief or cause of action."

Decision Below:
71 F.4th 1247 (10th Cir. 2023)
Petitioner's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice
Respondent's Counsel of Record:
Lisa S. Blatt, Williams & Connolly LLP

Civil Rights

Attorney Fees

***Lackey v. Stinnie*, No. 23-621**

Questions Presented:

1. Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988.
2. Whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under 42 U.S.C. § 1988.

Summary:

Under 42 U.S.C. § 1988, a "prevailing party" is eligible to recover attorney's fees. In *Sole v. Wyner*, the Supreme Court held that a party "prevails" if it secures judicial relief "on the merits" that is "enduring." A plaintiff does not meet that standard when the defendant changes its conduct in response to the lawsuit itself, rather than a binding judicial order, or if it obtains a preliminary injunction, but a court later issues an adverse final judgment. The first question presented is whether a plaintiff prevails "on the merits" when a court grants a preliminary injunction based on likely success. The second question is whether a preliminary injunction provides "enduring" relief when the case becomes moot before a final judgment is entered.

Respondents, including Damian Stinnie, failed to pay their court debts, and a state court ordered the suspension of their driver's licenses as required by a Virginia statute. Respondents filed suit, challenging the statute as unconstitutional. The district court entered a preliminary injunction against enforcement of the statute and ordered the State to restore respondents'

licenses. After the Virginia legislature repealed the challenged statute, the district court dismissed the case as moot. Respondents sought attorney's fees, but the district court denied the request.

The Fourth Circuit vacated and remanded. The court first held that a preliminary injunction that alters the legal relationship of the parties constitutes judicially sanctioned relief "on the merits." The court reasoned that such preliminary injunctions are merits based because they can be issued only upon a clear showing that the plaintiff's claim was likely meritorious. The court further held that a preliminary injunction provides "enduring" relief when it provides all the relief the plaintiff needs, and subsequent events moot the case before a final judgment is issued. The court reasoned that a finding of mootness, unlike an adverse final judgment, does not negate the premise on which the preliminary injunction was granted.

The State argues that a preliminary injunction that is based on a finding of likely success is not a decision "on the merits." The State contends that a decision "on the merits" necessarily means a final decision on the merits, not a prediction of future success. The contrary view, the State argues, would allow fees to be awarded based on erroneous predictions, punishing defendants for lawful conduct. The State further argues that a preliminary injunction does not provide "enduring" relief when a case is mooted before final judgment. In that circumstance, the State argues, enduring relief is not achieved by a judicial act, but by the event that mooted the case.

Decision Below:
77 F.4th 200 (4th Cir. 2023)
Petitioner's Counsel of Record:
Andrew N. Ferguson, Solicitor General, Office of the Virginia Attorney General
Respondent's Counsel of Record:
Matthew A. Fitzgerald, McGuireWoods LLP

Exhaustion of State Remedies

***Williams v. Washington,* No. 23-191**

Questions Presented:

Whether exhaustion of state administrative remedies is required to bring claims under 42U.S.C.§ 1983 in state court.

Summary:

Section 1983 gives individuals a cause of action to sue state officials who violate their constitutional or federal statutory rights. In *Patsy v. Board of Regents,* a case brought in federal court, the Supreme Court held that exhaustion of state administrative remedies is not a prerequisite to an action under Section 1983. The question presented is whether plaintiffs must exhaust state administrative remedies before bringing a Section 1983 suit in state court.

Petitioners are individuals who applied for unemployment compensation benefits in Alabama. After experiencing long delays in the processing of their claims, petitioners filed suit in state court, alleging violations of their constitutional and federal statutory rights. Petitioners did not exhaust their state administrative remedies before filing suit as required by state law. The district court dismissed the complaint for failure to exhaust.

The Alabama Supreme Court affirmed, holding that Section 1983 does not preclude a state from requiring a plaintiff to exhaust state administrative remedies before bringing a Section 1983 claim in state court. The court reasoned that *Patsy* held only that Section 1983 does not contain an exhaustion requirement, not that it precludes a state from enforcing its own exhaustion requirement. The court further concluded that even if Section 1983 precludes a State from enforcing an exhaustion requirement, the sole remedy would be to allow plaintiffs to bring their unexhausted claims in federal court. The court reasoned that Congress may not compel state courts to exercise jurisdiction in contravention of their own laws.

Petitioners argue that a state may not require plaintiffs to exhaust state administrative remedies before bringing a Section 1983 claim in state court. Petitioners contend that while *Patsy* involved a federal court suit, its no-exhaustion holding was categorical, and its reasoning that Congress mistrusted state fact finders applies equally to claims brought in state court. Petitioners also contend that *Felder v. Casey* confirms that *Patsy*'s no-exhaustion rule applies to 1983 actions brought in state court, preempting any state exhaustion requirement regardless of the forum. Petitioners argue that *Patsy* invalidated a state notice-of-claim requirement precisely because it operated as an exhaustion requirement. Finally, petitioners argue that a state may not avoid the holdings in *Patsy* and *Felder* by treating an exhaustion requirement as jurisdictional. A contrary conclusion, petitioners argue, would allow a state to refuse to entertain any federal cause of action that it objected to on policy grounds by labeling its disagreement as a jurisdictional rule.

Decision Below:
2023 WL 4281620 (Alabama, 2023)
Petitioner's Counsel of Record:
Adam G. Unikowsky, Jenner & Block LLP
Respondents' Counsel of Record:
Edmund G. LaCour Jr., Solicitor General, Office of the Alabama Attorney General

Constitutional Law

Equal Protection Clause

***United States v. Skrmetti*, No. 23-477**

Question Presented:

Whether Tennessee Senate Bill 1, which prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity," violates the Equal Protection Clause of the Fourteenth Amendment.

Summary:

Tennessee Senate Bill 1 (SB1) prohibits healthcare providers from prescribing puberty blockers or hormones for the purpose of allowing a minor to live in conformity with a gender identity that is inconsistent with their sex assigned at birth. SB1 does not prohibit prescribing

puberty blockers or hormones to minors for any other medical purpose. The question presented is whether SB1 violates the Equal Protection Clause.

Private respondents are three transgender minors who receive gender affirming medical care, their parents, and a doctor who treats adolescents with gender dysphoria. They filed suit in district court against Tennessee state officials (public respondents) alleging that SB1 violates the Equal Protection Clause. The United States (government) intervened. The district court granted a preliminary injunction against enforcement of SB1.

The Sixth Circuit reversed, holding that SB1 does not violate the Equal Protection Clause. The court first concluded that SB1 does not impose a sex classification because it regulates sex transition treatments for all minors, regardless of sex. While SB1 refers to sex, the court acknowledged, it does so solely to identify the prohibited medical procedures, not to prefer one sex over the other. The court next concluded that classifications based on transgender status do not trigger heightened scrutiny, but instead trigger only rational basis review. Applying rational basis review, the court concluded that SB1 is a rational response to the perceived risks and uncertainties associated with gender-affirming medical treatments.

The government argues that SB1 violates the Equal Protection Clause. The government contends that SB1 imposes a sex-based classification triggering heightened scrutiny because it defines the prohibited procedures based on a minor's sex assigned at birth. The government further argues that SB1 operates as a sex classification because a minor assigned female at birth can receive puberty blockers or hormones to live as a female, while a minor assigned male at birth cannot, and vice versa. The government alternatively contends that SB1's disfavoring of transgender minors itself triggers heightened scrutiny because transgender individuals constitute a semi-suspect class. Finally, the government argues that SB1 does not survive heightened scrutiny because the record does not support Tennessee's asserted interest in protecting transgender minors, and the prohibitions are not substantially related to that interest.

Decision Below:
83 F.4th 460 (6th Cir. 2023)
Petitioner's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice
Respondent's Counsel of Record:
Cameron T. Norris, Consovoy McCarthy PLLC

First Amendment

***Free Speech Coalition, Inc. v. Paxton*, No. 23-1122**

Question Presented:

Whether the court of appeals erred as a matter of law in applying rational-basis review to a law burdening adults' access to protected speech, instead of strict scrutiny as this Court and other circuits have consistently done.

Summary:

In *Ginsberg v. New York,* the Supreme Court held that states may restrict minors' access to sexual materials that are obscene with respect to minors, but not obscene with respect to adults if the restrictions satisfy rational-basis review. In *Ashcroft v. ACLU,* the Court applied strict

scrutiny to a law that prohibited commercial websites from posting material that is obscene with respect to minors but provided an affirmative defense to those who used reasonable age verification methods to restrict minors from gaining access to the materials. A Texas law requires certain commercial entities that publish materials that are obscene with respect to minors to use reasonable age verification methods to prevent minors from gaining access to the materials. The question presented is whether the age-verification requirement is subject to strict scrutiny or rational-basis review.

Petitioners Free Speech Coalition and others are in the business of distributing sexual material on the internet. Petitioners sued the Texas Attorney General, alleging that the Texas statute violates the First Amendment by burdening the right of adults to access sexual materials that are constitutionally protected for adults. The district court issued a preliminary injunction against enforcement of the statute.

The Fifth Circuit reversed, holding that the age verification requirement is subject to rational-basis review. The court reasoned that *Ginsberg* required application of rational-basis review. The court concluded that *Ginsberg* cannot be distinguished on the ground that the statute's age verification requirement burdens adult access to constitutionally protected speech. The court reasoned that the privacy concerns relating to age verification on the internet are not categorically different from the privacy concerns raised by the law at issue in *Ginsberg*, and that, even if they were, *Ginsberg* would still be controlling. The court acknowledged that the Court applied strict scrutiny in *Ashcroft* to a similar statute. But it concluded that *Ashcroft* did not definitively rule on the appropriate level of scrutiny, leaving *Ginsberg* as controlling.

Petitioners contend that strict scrutiny applies to the Texas statute's age verification requirement. Petitioners argue that *Ashcroft* and several other Supreme Court decisions definitively establish that restrictions on minors' access to sexual material that burden the First Amendment rights of adults are subject to strict scrutiny. Because the Texas statute's requirement that adults furnish verification of their age raises unique security and privacy concerns on the internet, petitioners argue, the statute burdens the First Amendment rights of adults, triggering strict scrutiny. Petitioners distinguish *Ginsberg* on the ground that the law at issue in that case did not burden the First Amendment rights of adults.

Decision Below:
95 F.4th 263 (5th Cir. 2024)
Petitioner's Counsel of Record:
Derek L. Shaffer, Quinn Emanuel Urquhart & Sullivan, LLP
Respondent's Counsel of Record:
Aaron L. Nielson, Office of the Texas Attorney General

Criminal Law

First Step Act

***Hewitt v United States*, No. 23-1002**
***Duffey v. United States,* No. 21-1150**

Question Presented:

Whether the First Step Act's sentencing reduction provisions apply to a defendant originally sentenced before the FSA's enactment when that original sentence is judicially vacated and the defendant is resentenced to a new term of imprisonment after the FSA's enactment.

Summary:

The First Step Act reduces the mandatory minimum sentence for using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). The Act applies not only to offenses committed after its enactment but also to "any offense committed before the date of enactment … if a sentence for the offense has not been imposed as of such date." The question is whether the Act applies to a defendant originally sentenced before the Act when the sentence is vacated, and the defendant is resentenced after the Act's enactment. The same question is presented in *Duffey v. United States,* No. 23-1150 (consolidated for argument).

Petitioner Tony Hewitt was convicted of a series of bank robbery-related offenses and corresponding 924(c) offenses. His sentence occurred before enactment of the First Step Act, and the bulk of his sentence was attributable to mandatory minimums on the 924(c) counts. Petitioner's original sentence was reversed, and a second sentence was vacated. The First Step Act was enacted before petitioner's next resentencing, and petitioner asked for its application. The district court denied the request and sentenced petitioner without regard to the First Step Act.

The Fifth Circuit affirmed. The court held that the First Step Act does not apply to a defendant originally sentenced before the Act's enactment when the original sentence is vacated, and the defendant is resentenced after the Act's enactment. The court reasoned that a sentence is "imposed" when the district court pronounces it, putting the focus on the historical fact of a sentence's imposition. The court further concluded that a vacatur does not erase a prior sentence from history. Finally, the court concluded that the phrase "a sentence" is broad enough to refer to any sentence previously imposed, including one subsequently vacated.

Petitioner argues that the First Step Act applies to a defendant originally sentenced before the Act when the sentence is vacated, and the defendant is resentenced after the Act's enactment. Petitioner contends that the use of the present-perfect tense "has not been imposed" supports that conclusion. It would be ungrammatical, petitioner argues, to say that a sentence has been imposed if the sentence has since been vacated. An ordinary speaker would instead say that a since-vacated sentence *had* been imposed. Petitioner also relies on the ordinary understanding that a vacated order is treated as if it never happened. Finally, petitioner argues that the Act's reference to the imposition of "a" sentence indicates that the set of sentences to which the Act does not apply should be construed more narrowly than if Congress had referred to "any" sentence.

Decision Below:
92 F.4th 304 (5th Cir. 2024)
Petitioner's Counsel of Record:
Michael B. Kimberly, McDermott Will & Emery LLP
Respondents' Counsel of Record:
Elizabeth B. Prelogar, Solicitor General
Court-Appointed Amicus in Support of the Judgement:
Michael H. McGinley, Dechert LLP

Crime of Violence

***Delligatti v. United States*, No. 23-825**

Question Presented:

Whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force.

Summary:

Section 924(c) of Title 18 imposes a mandatory minimum sentence for using or carrying a firearm during and in relation to a "crime of violence." A felony qualifies as a "crime of violence" if it categorically "has as an element the use, attempted use, or threatened use of physical force." A conviction for attempted murder requires proof of an intent to cause bodily injury or death. But that crime may be committed through inaction, as when a doctor fails to provide medication to a patient, or a parent neglects their child. The question presented is whether a crime, such as attempted murder, that requires an intent to cause bodily injury or death, but can be committed by failing to take action, categorically has as an element the use, attempted use, or threatened use of physical force, and therefore qualifies as a crime of violence.

Petitioner Salvatore Delligatti organized a plot to murder Joseph Bonelli, but law enforcement intervention prevented the murder from occurring. Petitioner was convicted of attempted murder, and that conviction served as the predicate for a conviction for using or carrying a firearm during and in relation to a crime a violence. The district court sentenced petitioner to 300 months of imprisonment for those offenses.

The Second Circuit affirmed, holding that a crime, such as attempted murder, that requires proof of an intent to cause bodily injury or death, but that can be committed by failing to take action, categorically has as an element the use, attempted use, or threatened use of physical force. The court reasoned, in reliance on a prior decision, that an intent to cause bodily injury or death, by definition, necessarily involves the use, attempted use, or threatened use of physical force. That is true, the court concluded, even when the crime may be committed by omission.

Petitioner argues that a crime that can be committed through inaction does not have "as an element the use, attempted use, or threatened use of physical force." Petitioner contends that the ordinary meaning of "use" refers to an affirmative physical act, and doing nothing does not qualify as an affirmative act. Petitioner further contends that phrase "physical force" means force exerted on a person, and crimes committed through inaction do not involve any such force.

Decision Below:
83 F.4th 113 (2d Cir. 2023)
Petitioner's Counsel of Record:
Allon Kedem, Arnold & Porter Kaye Scholer LLP
Respondent's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice

Suppression of Evidence

***Glossip v. Oklahoma,* No. 22-7466**

Questions Presented:

1. a. Whether a state's suppression of potentially exculpatory evidence, as well as a prosecutor's failure to correct a witness's false testimony violates due process of law.

b. Whether the entirety of suppressed evidence must be considered when assessing the materiality of [*Maryland v.*] *Brady* and *Napue* [*v. Illinois*] claims.

2. Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

Summary:

In *Brady v. Maryland,* the Court held that the prosecutor has a duty to disclose exculpatory information when there is a reasonable likelihood that it could affect the outcome. The first question presented is whether the prosecution's failure to disclose that a psychiatrist treated the prosecution's star witness with lithium violated *Brady.* In *Napue v. Illinois,* the Court held that a prosecutor has a duty to correct testimony known to be false. The second question is whether the prosecution's failure to correct its star witness's testimony that he never received psychiatric treatment violated *Napue.* The Supreme Court may not review a state court decision that is supported by an independent and adequate state ground. The Oklahoma Post-Conviction Procedure Act precludes the state from examining claims of error unless the claims could not have been presented previously, and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that no reasonable jury would have found the defendant guilty. The third question is whether that Act constitutes an independent and adequate state ground for the state court's decision. Petitioner also raises a question concerning cumulative error, but it will not be discussed here.

Justin Sneed murdered Barry Van Treese. Sneed told police that petitioner Richard Glossip paid him to kill Treese. Based on Sneed's testimony, petitioner was convicted of capital murder. At trial, Sneed testified that he had not received psychiatric treatment and was given lithium by mistake. Years later, the prosecution released evidence from its files that a psychiatrist treated Sneed with lithium. Petitioner moved for post-conviction relief, asserting that the prosecution's failure to disclose that Sneed received psychiatric treatment violated *Brady* and that the prosecution's failure to correct Sneed's testimony that he did not receive psychiatric treatment violated *Napue*.

The Oklahoma Court of Criminal Appeals denied petitioner's application for relief. The court first held that, even assuming petitioner could overcome the procedural bar, there was no *Brady* violation. The court next held that that petitioner's claim was procedurally barred because he could have presented the issue earlier, and he failed to show that, but for any error, no reasonable jury could have convicted him. The court reasoned that petitioner's counsel knew that Sneed was treated with lithium, alerting him to the mental health issue. The court further concluded that petitioner should have raised the issue long before his fifth application for post-conviction relief. The court next held that the prosecution's failure to correct Sneed's testimony did not violate *Napue.* The court reasoned that Sneed's evaluation and testimony revealed that he was under the care of a doctor who prescribed lithium. The court also concluded that Sneed's

testimony was not clearly false because he was likely in denial about his mental health disorders. Finally, the court concluded that the mental health treatment evidence did not create a reasonable probability that the result of the proceeding would have been different.

Petitioner first contends that the prosecution's failure to correct Sneed's false testimony that he never received psychiatric care violated *Napue.* Petitioner argues that a prosecutor's duty under *Napue* does not depend on whether the witness intended to lie but on whether the testimony is false. Petitioner argues that it is irrelevant that defense counsel knew that Sneed had taken lithium because the duty to correct false testimony rests with the prosecution, not the defense, and because the defense did not have any basis to question Sneed's testimony that he had been given lithium by mistake. Petitioner also argues that the *Napue* violation was material because the prosecution's case depended on Sneed's credibility, and correcting Sneed's testimony would have undermined it. For substantially the same reasons, petitioner contends that the prosecution's failure to disclose that Sneed had a serious psychiatric disorder violated *Brady.* Had that information been disclosed, petitioner argues, defense counsel would have been in a position to give the jury a strong reason to doubt Sneed's version of events. Finally, petitioner contends that the state court's reliance on the Oklahoma Post-Conviction Procedure Act was neither an independent nor an adequate state-law ground for decision. The state court's ruling was not independent of federal law because it depended on the court's analysis of *Brady* and *Napue.* And the court's holdings that the State could not waive the Act's procedural bar and that petitioner failed to exercise due diligence were not adequate because they were wholly unsupported by prior state court precedent.

Decision Below:
529 P.3d 218
Petitioner's Counsel of Record:
Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP
Respondent's Counsel of Record:
Paul D. Clement, Clement & Murphy, PLLC
Court-Appointed Amicus in Support of the Judgment:
Christopher G. Michel, Quinn Emanuel Urguhart & Sullivan, LLP

Wire Fraud

***Kousisis v. United States*, No. 23-909**

Questions Presented:

1. Whether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme.
2. Whether a sovereign's statutory, regulatory, or policy interest is a property interest when compliance is a material term of payment for goods or services.
3. Whether all contract rights are "property."

Summary:

The federal wire fraud statute criminalizes schemes to obtain money or property by false representations. To support a conviction of wire fraud, the object of a fraudulent scheme must be to deprive the victim of property. The question presented is whether falsely representing

compliance with a non-economic contract term to induce the victim to part with money is sufficient to establish a scheme to deprive the victim of property.

PennDOT awarded contracts worth millions of dollars to petitioner Alpha Painting and Construction, a company managed by petitioner Stamatios Kousisis. As a condition of the contracts, petitioners agreed to buy paint from a Disadvantaged Business Enterprise (DBE). PennDOT subsequently paid petitioners based on their false certification that they fulfilled their DBE commitment. A jury found petitioners guilty of wire fraud and conspiracy to commit wire fraud.

The Third Circuit affirmed. The court held that falsely representing compliance with a non-economic contract term to induce the victim to part with money is sufficient to establish a scheme to deprive the victim of property. The court reasoned that the money the defendant seeks to obtain in such a scheme is itself property, even though the victim's intangible interest in compliance with a non-economic contract term is not. In concrete terms, the millions of dollars that petitioners sought to obtain through misrepresentations was property, even though PennDOT's intangible interest in DBE participation was not.

Petitioner argues that falsely representing compliance with a non-economic contract term to induce the victim to part with money is not sufficient to establish a scheme to deprive the victim of property. Petitioner contends that there must be proof of an intent to harm the victim's economic interests. Petitioner further contends that when deception concerning compliance with a non-economic contract term induces an exchange of money for services of equal or greater value, the victim only loses its intangible right to control its property and its intangible interest in advancing its policy goals. Under controlling Supreme Court precedent, petitioner argues, neither is a form of property.

Decision Below:
82 F.4th 230 (3d Cir. 2023)
Petitioners' Counsel of Record:
Lisa A. Mathewson, Mathewson Law LLC
Respondent's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice

Employment

Americans with Disabilities Act

***Stanley v. City of Sanford, Florida*, No. 23-997**

Question Presented:

> Whether, under the Americans with Disabilities Act, a former employee — who was qualified to perform her job and who earned post-employment benefits while employed — loses her right to sue over discrimination with respect to those benefits solely because she no longer holds her job.

Summary:

The Americans with Disabilities Act (ADA) prohibits employers from discriminating "against a qualified individual" based on disability. A "qualified individual" is a person who

"can perform the essential functions of employment that such individual holds or desires." The ADA's enforcement provision authorizes "any person" alleging discrimination on the basis of disability to sue through the "full powers, remedies, and procedures" of Title VII. One incorporated procedure specifies that an individual can sue when they are "affected by" a discriminatory benefits policy. The question presented is whether a former employee has a right to sue under the ADA for discrimination on the basis of disability in the provision of post-employment benefits.

Petitioner Karyn Stanley worked as a firefighter for the City of Sanford, Florida. During petitioner's tenure, the City changed its benefit plan from one that provided health benefit subsidies to disability retirees until age 65 to one that terminated subsidies two years after retirement. Petitioner later developed Parkinson's disease and retired. Two years later, the City discontinued her health insurance subsidy. Petitioner sued the City, alleging that its termination of her health subsidy discriminated against her based on her disability, in violation of the ADA. The district court ruled for the City.

The Eleventh Circuit affirmed. It held that a former employee does not have a right under the ADA to sue for discrimination in the provision of post-employment benefits. The court reasoned that the ADA's present tense definition of a qualified individual as a person who "holds" or "desires" a position imposes a temporal qualification: a person must hold or desire a position when the discrimination occurs. The court concluded that the provision specifying that a person may sue whenever the person is "affected by" a discriminatory benefits policy does not suggest differently because it applies only when a person otherwise has a valid claim for discrimination, and a former employee does not otherwise have a valid claim for post-employment benefits.

Petitioner contends that a former employee has a right under the ADA to sue for discrimination in the provision of post-employment benefits. Petitioner argues that the ADA's definition of qualified individual as a person who "holds" or "desires" a position governs only what conduct counts as discrimination, whereas the ADA's enforcement provision directly governs who may sue and when. Petitioner further argues that the enforcement provision establishes that "any person," including a former employee, may sue whenever that person is "affected by" a discriminatory benefits policy, including when the policy affects her benefits after her employment.

Decision Below:
83 F.4th 1333 (11th Cir. 2023)
Petitioner's Counsel of Record:
Deepak Gupta, Gupta Wessler LLP
Respondent's Counsel of Record:
Jessica C. Conner, Dean, Ringers, Morgan & Lawton, P.A.

Fair Labor Standards Act

***E.M.D. Sales, Inc. v. Carrera,* No. 23-217**

Question Presented:

Whether the burden of proof that employers must satisfy to demonstrate the applicability of a [Fair Labor Standards Act] exemption is a mere preponderance of the evidence—as six circuits hold—or clear and convincing evidence, as the Fourth Circuit alone holds.

Summary:

The Fair Labor Standards Act (FLSA) generally requires covered employers to pay their employees a minimum wage and premium pay for overtime. The FLSA contains multiple exemptions from those requirements. The question presented is whether the standard of proof that employers must satisfy to demonstrate the applicability of an FLSA exemption is a preponderance of the evidence or clear and convincing evidence.

Respondents Carrera, Gervacio, and Muro worked as sales representatives for petitioner EMD. Respondents sued petitioner in federal district court, alleging that they were denied overtime pay in violation of the FLSA. Petitioner offered as a defense that respondents fell within the FLSA exemption for outside salesmen. Applying the clear and convincing evidence standard for exemptions, the district court found in favor of respondents.

The Fourth Circuit affirmed. Based on its prior precedent, the court held that the standard of proof required to demonstrate an FLSA exemption is clear and convincing evidence. The court concluded that the Supreme Court's holding in *Encino Motorcars* that FLSA exemptions should be read fairly, rather than narrowly, did not supersede its clear and convincing evidence precedent. The court reasoned that *Encino Motorcars* presented a question of statutory interpretation that was distinct from the question of the evidentiary burden on a factual issue.

Petitioner argues that the standard of proof employers must satisfy to demonstrate the applicability of an FLSA exemption is a preponderance of the evidence, rather than clear and convincing evidence. Petitioner contends that, under controlling Supreme Court precedent, there is a presumption that the preponderance of the evidence standard applies in civil litigation. Petitioner further argues that nothing in the FLSA indicates that Congress intended to depart from the usual standard. Finally, petitioner argues that the *Encino Motorcars* holding that exemptions must be given a fair, rather than narrow, reading applies as much to the standard of proof to satisfy an exemption as it does to the scope of the exemption.

Decision Below:
75 F.4th 345 (4th Cir. 2023)
Petitioner's Counsel of Record:
Lisa S. Blatt, Williams & Connolly LLP
Respondent's Counsel of Record:
Lauren E. Bateman, Public Citizen Litigation Group

Federal Courts

Amendment of Pleadings Post-Removal

***Royal Canin U.S.A., Inc. v. Wullschleger*, No. 23-677**

Questions Presented:

1. Whether . . . a post-removal amendment of [the plaintiff's] complaint [to omit federal questions] defeats federal-question subject-matter jurisdiction.
2. Whether such a post-removal amendment precludes a federal district court from exercising supplemental jurisdiction over the plaintiff's remaining state-law claims pursuant to 28 U.S.C. § 1367.

Summary:

A defendant may remove a civil action from state court to federal court if the plaintiff's complaint raises a federal question. Upon removal, the federal court may also exercise supplemental jurisdiction over related state law claims. The first question presented is whether a plaintiff's post-removal amendment of their complaint to remove any federal question eliminates the federal court's federal-question jurisdiction. The second question is whether such an amendment precludes the federal court from exercising supplemental jurisdiction over related state-law claims.

Respondent Anastasia Wullschleger purchased prescription pet food for her dog. After learning that the pet food did not contain any medication, she filed a suit in state court against its manufacturers, petitioners Royal Canin and Nestle Purina. Petitioners removed the action to federal court, asserting that the complaint contained claims raising federal questions. Respondent then amended her complaint to remove all federal questions. The district court nonetheless retained jurisdiction and dismissed respondent's complaint on the merits.

The Eighth Circuit vacated and remanded with instructions to remand the case to state court. It held that an amended complaint that removes all federal questions eliminates the court's federal-question jurisdiction. The court reasoned that a court's jurisdiction always depends on the allegations in the operative complaint, not the original complaint. The court also held that an amended complaint that removes any federal question also deprives the court of supplemental jurisdiction. The court reasoned that the possibility of supplemental jurisdiction vanishes at the same time that a court loses federal-question jurisdiction.

Petitioners contend that a plaintiff's post-removal amendment to their complaint to remove any federal questions does not eliminate federal-question jurisdiction. Petitioners argue that, in removed cases, the original complaint, rather than the amended complaint, determines whether the court has jurisdiction. Otherwise, petitioners argue, a plaintiff would be able to destroy a defendant's removal rights by removing any federal questions from their complaint after removal. For the same reasons, petitioners also contend that an amendment to a complaint that removes all federal questions does not preclude a federal court from exercising supplemental jurisdiction over related state-law claims.

Decision Below:
75 F.4th 918 (8th Cir. 2023)
Petitioner's Counsel of Record:

Christopher M. Curran, White & Case LLP
Respondent's Counsel of Record:
Ashley Keller, Keller Postman LLC

Immigration

Judicial Review

***Bouarfa v. Mayorkas, No*. 23-583**

Question Presented:

Whether a visa petitioner may obtain judicial review when an approved petition is revoked on the basis of nondiscretionary criteria.

Summary:

The Immigration and Naturalization Act mandates denial of a visa application when certain nondiscretionary criteria are present, such as the existence of a fraudulent marriage. The INA authorizes judicial review of such nondiscretionary denials. In contrast, the Act precludes judicial review of any discretionary decision. When a visa petition has been approved, the Secretary of Homeland Security "may" revoke that approval "at any time" for "what he deems" to be "good and sufficient cause." The question presented is whether a visa petitioner may obtain judicial review of a revocation decision when the underlying basis of the revocation would have been reviewable as a nondiscretionary decision had it been the basis for denying a visa in the first place.

Petitioner Amina Bouarfa, a United States citizen, filed a visa petition on behalf of her husband, a non-citizen. The U.S. Citizenship and Immigration Service (USCIS), acting on behalf of the Secretary, approved the petition. The USCIS later revoked that approval based on a finding that petitioner's husband had previously entered into a different marriage for fraudulent purposes. Petitioner filed a complaint in district court seeking review of the marriage-fraud determination. The district court dismissed the complaint on the ground that the revocation was an exercise of unreviewable discretion.

The Eleventh Circuit affirmed. The court held that a visa petitioner may not obtain judicial review of a revocation decision even when the underlying basis for the revocation, if it had been the initial basis for denying a visa, would have been a reviewable, nondiscretionary decision. The court reasoned that the terms "may," "at any time," and "what he deems to be good and sufficient cause" unambiguously make a revocation decision discretionary. The court concluded that nothing in the text makes good-cause revocation decisions any less discretionary when the underlying basis would have been a nondiscretionary ground for originally denying a visa.

Petitioner argues that a visa petitioner may obtain judicial review of a revocation decision when the basis for the decision would have been reviewable as a nondiscretionary decision if it had been the basis for denying a visa in the first place. Petitioner contends the language conferring discretion on the Secretary to make revocation decisions applies to the ultimate revocation decision, not to an underlying nondiscretionary basis for that decision. Petitioner further argues that it would make no sense for Congress to authorize a petitioner to obtain review

of a nondiscretionary determination when it is the basis to deny a visa but foreclose review when that same ground is relied on to revoke a visa.

Decision Below:
75 F.4th 1157 (11th Cir. 2023)
Petitioner's Counsel of Record:
Samir Ibrahim Deger-Sen, Latham & Watkins LLP
Respondent's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice

Removal

***Velazquez v. Garland*, No. 23-929**

Questions Presented:

When a noncitizen's voluntary-departure period ends on a weekend or public holiday, is a motion to reopen filed the next business day sufficient to avoid the penalties for failure to depart?

Summary:

Under the Immigration and Nationality Act, a citizen found removable may be permitted to depart voluntarily for a period not exceeding 60 days. Failure to depart within the 60-day period subjects a person to certain penalties. A motion to reopen a proceeding filed within the voluntary departure period terminates the penalties for failure to depart. If filed after the 60-day period, the motion to reopen has no impact on those penalties. The question presented is whether when the 60-day voluntary departure period ends on a weekend or holiday, a motion to reopen filed on the next business day is timely

Petitioner Velazquez was found removable and granted voluntary departure within 60-days. Petitioner subsequently filed a motion to reopen 62 days later, the next business day after the weekend on which the deadline fell. The Board of Immigration Appeals ruled that petitioner's motion was untimely.

The Tenth Circuit denied review, holding that when a voluntary departure period ends on a weekend or holiday, a filing on the next business day is untimely. The court reasoned that treating such a motion as timely would impermissibly extend the statutory voluntary departure period beyond 60 days.

Petitioner contends that when the 60-day voluntary departure period ends on a weekend or holiday, a motion to reopen filed on the next business day is timely. Petitioner relies on a background understanding that deadlines that land on a weekend or holiday are satisfied by a filing on the next business day. Because nothing in the text of the statute negates that background understanding, petitioner argues that background principle is incorporated into the statute.

Decision Below:
88 F.4th 1301 (10th Cir. 2023)
Petitioner's Counsel of Record:
Gerard J. Cedrone, Goodwin Procter LLP
Respondent's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice

International

Foreign Sovereign Immunities Act

***Republic of Hungary v. Simon*, No. 23-867**

Questions Presented:

1. Whether historical commingling of assets suffices to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.
2. Whether a plaintiff must make out a valid claim that an exception to the Foreign Sovereign Immunities Act applies at the pleading stage, rather than merely raising a plausible inference.
3. Whether a sovereign defendant bears the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.

Summary:

Foreign nations are generally immune from suit in American courts. The Foreign Sovereign Immunities Act (the Act) provides an expropriation exception in any case where property is taken in violation of international law and that property has an adequate commercial nexus to the United States. An adequate nexus exists when property exchanged for seized property is present in the United States. The principal question presented is whether to demonstrate an adequate nexus, a plaintiff must trace a foreign nation's property in the United States to proceeds of the sale of their property, or may instead rely on the historic commingling of the funds from the sale with the foreign nation's wealth. The second question is whether a plaintiff must make out a valid claim that the expropriation exception applies at the pleading stage, or merely raise a plausible inference. The third question is whether a sovereign defendant bears the burden of producing evidence to affirmatively prove that their property in the United States is not traceable to historically commingled assets.

During the Holocaust, the Republic of Hungary (petitioner) confiscated the property of most of its Jewish population. Petitioner then liquidated the property and commingled it with its national wealth. Petitioner recently issued bonds in the United States. Jewish survivors of the Hungarian Holocaust whose property had been seized (respondents) brought suit, asserting that the bonds satisfied the expropriation exception's commercial nexus requirement. The district court denied petitioner's motion to dismiss.

The D.C. Circuit largely affirmed but remanded for fact-finding. It first held that a plaintiff is not required to trace property in the United States to the sale of their property but may instead rely on the historical commingling of proceeds from the sale with a foreign nation's wealth. The court reasoned that a tracing requirement would render the expropriation exception a nullity for virtually all claims involving liquidation, in conflict with Congress's express inclusion of language providing for jurisdiction when property exchanged for seized property is present in the United States. For the same reason, the court held that when a plaintiff establishes that there has been a commingling of assets, the sovereign defendant bears the burden of producing evidence that their property in the United States does not trace back to seized property. For cases

in which a factual challenge is made to the sufficiency of a plaintiff's allegations, the court held that the normal plausible inference pleading standard established in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, is applicable. The court concluded that the valid claim standard established in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.* applies only to challenges to legal theories.

Petitioner first contends that a historical commingling theory does not satisfy the commercial nexus requirement. Petitioner argues that the commingling theory violates the expropriation exception's plain language because it rests on an illogical presumption that funds commingled long ago are connected to current property rather than having been depleted on other expenditures. Petitioner further argues that the commingling theory would allow the expropriation exception to swallow the general rule of foreign sovereign immunity. Petitioner next contends that the viable claim standard applies to all challenges to the sufficiency of the pleadings asserting jurisdiction based on the expropriation exception. Petitioner argues that *Helmerich*'s viable claim standard displaces the usual plausible inference standard in all jurisdictional disputes under the Act. Petitioner finally contends that in a case involving commingled assets, the plaintiff bears the burden to produce evidence that property in the United States can be traced to the seized property. Petitioner argues that requiring the plaintiff to bear the burden of production is consistent with the Act's legislative history, the general rule that the burden of proving an exception falls on the party claiming it, and the general rule that the party asserting jurisdiction must establish it.

Decision Below:
77 F.4th 1077 (D.C. Cir. 2023)
Petitioner's Counsel of Record:
Joshua Glasgow, Phillips Lytle LLP
Respondents' Counsel of Record:
Shay Dvoretzky, Skadden, Arps, Slate, Meagher & Flom LLP

Other Public Law

False Claims Act

***Wisconsin Bell, Inc. v. United States, ex rel. Todd Health*, No. 23-1127**

Question Presented:

Whether reimbursement requests submitted to the E-rate program are "claims" under the False Claims Act.

Summary:

The E-rate program created by the Federal Communications Commission (FCC) requires telecommunications carriers to provide services to schools and libraries at discounted rates. The carriers may then submit reimbursement claims to the Universal Service Administrative Company (USAC). The False Claims Act (the Act) imposes civil liability on anyone who knowingly presents a materially false "claim for payment or approval." The Act defines a "claim" to include a request for money if the government "provided or has provided any portion of the money." A claim also includes a request for money presented to "an agent of the United

States." The question presented is whether reimbursement requests for E-rate services are "claims" under the Act.

Petitioner Wisconsin Bell provides E-rate services to schools and libraries and submits requests for reimbursement. Respondent Todd Heath brought a *qui tam* action against petitioner under the Act, alleging that petitioner charged more for its services than allowed by the E-rate program and then submitted false claims for reimbursement. The district court granted summary judgment in favor of petitioner.

The Seventh Circuit reversed, holding that reimbursement requests for E-rate services are "claims" under the Act. The court reasoned that the U.S. Treasury directly provides money to the fund in the form of debt collections, civil settlements, and restitution payments. The court also concluded that USAC acts as an agent for the government, because it acts on behalf of, and is subject to the control of, the FCC. Finally, the court concluded that the government indirectly provides money to the fund by requiring carriers to contribute to it.

Petitioner contends that reimbursement requests are not "claims" under the Act. Petitioner argues that the ordinary meaning of the term "provides" is supply, and telecommunication companies, rather than the government, supply the E-rate reimbursement funds. Petitioner further contends that money from delinquent debts, civil settlements, and criminal restitution owed to the fund do not become government funds simply because they temporarily pass through the Treasury. Petitioner also argues that USAC is not an agent of the government because it has no authority to bind the government and because the FCC does not control USAC's administration of the fund. Finally, petitioner contends that the statutory requirement that private entities contribute money to the fund cannot transform privately provided money into government provided money.

Decision Below:
92 F.4th 654 (7th Cir. 2023)
Petitioner's Counsel of Record:
Helgi C. Walker, Gibson, Dunn, & Crutcher LLP
Respondent's Counsel of Record:
David J. Chizewer, Goldberg Kohn Ltd.

Gun Control Act

***Garland v. VanDerStock*, No. 23-852**

Questions Presented:

1. Whether "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive," 27 C.F.R. 478.11, is a "firearm" regulated by the [Gun Control] Act [of 1968].
2. Whether "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver," 27 C.F.R. 478.12(c), is a "frame or receiver" regulated by the Act.

Summary:

The Gun Control Act imposes certain requirements on manufacturers and sellers of firearms, such as the placement of serial numbers on firearms and background checks on purchasers. The Act defines a "firearm" to include any weapon that "may readily be converted to expel a projectile by the action of an explosive," as well as "the frame or receiver of any such weapon." The first question presented is whether a weapon parts kit that can readily be converted into an operational firearm is a firearm under the statute. The second question is whether a partially completed frame or receiver that can readily be converted to a functioning frame or receiver is a firearm under the statute.

Without complying with the Act's requirements, certain manufacturers sell part kits that can be assembled into functioning guns in under 30 minutes. Companies also sell partially completed receivers that can be completed by drilling a few holes or removing temporary plastic rails. The assembled guns are commonly known as ghost guns because they lack serial numbers that allow them to be traced. The Alcohol, Tobacco, Firearm, and Explosive Agency issued a Rule that defines the weapons kits and partially completed receivers as firearms subject to the Act's requirements. First, the Rule defines firearm to include any weapon parts kit that can readily be converted to expel a projectile by the action of an explosive. Second, the Rule defines frame or receiver to include a partially completed frame or receiver that can readily be converted into a functioning frame or receiver. Certain manufacturers of products covered by the Rule and others (respondents) challenged the Rule as inconsistent with the statute. The district court invalidated both provisions.

The Fifth Circuit affirmed. The court held that the Act's definition of firearm does not cover weapon parts. The court reasoned that Congress expressly removed the authority to regulate weapons parts when it enacted the Gun Control Act. The court also held that the term "firearm" does not include partially completed frames or receivers that can be readily converted into functioning frames or receivers. The court reasoned that Congress deliberately failed to include readily converted language in the part of the definition addressing frames and receivers.

The government contends that a weapon part kit that can be readily converted into a functioning firearm is a firearm within the meaning of the statute. The government argues that an ordinary English speaker would recognize that a company that sells kits that can be assembled into firearms in minutes is in the business of selling firearms. The government further argues that a partially completed frame that can readily be converted into a functioning frame falls within the ordinary meaning of a frame. A frame that is missing a single hole or that includes an unnecessary piece of plastic, the government argues, still fits the ordinary understanding of a frame. The government contends that any contrary view on either question would allow for easy evasion of the Act's requirements.

Decision Below:
86 F.4th 179 (5th Cir. 2023)
Petitioner's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice
Respondents' Counsel of Record:
David H. Thompson, Cooper & Kirk, PLLC

Lanham Act

***Dewberry Group, Inc. v. Dewberry Engineers, Inc*., No. 23-900**

Question Presented:

Whether an award of the "defendant's profits" under the Lanham Act, 15 U.S.C. § 1117(a), can include an order for the defendant to disgorge the distinct profits of legally separate non-party corporate affiliates.

Summary:

Under the Lanham Act (the Act), a plaintiff who prevails in a trademark infringement action may, "subject to the principles of equity, recover defendant's profits." The Act further provides that "if the court shall find the [profits award] inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just." The sum may not constitute a "penalty." The question presented is whether an award of the "defendant's profits" under the Act can include an order for the defendant to disgorge the distinct profits of legally separate non-party corporate affiliates.

Respondent Dewberry Engineers provides real-estate development services and owns a trademark in the Dewberry name. Petitioner Dewberry Group, formerly known as Dewberry Capital Corporation, provides real estate services to its separately incorporated affiliates. Pursuant to a settlement agreement, petitioner had generally agreed not to use the Dewberry mark. When petitioner later began using the Dewberry Group mark, respondent sued for trademark infringement and sought disgorgement as a remedy. While petitioner did not earn any profits, its affiliates did. The district court found infringement and ordered petitioner to disgorge $43 million of its affiliates' profits.

The Fourth Circuit affirmed, holding that an award of defendant's profits under the Act can include an order to a defendant to disgorge the distinct profits of legally separate non-party corporate affiliates. The court reasoned that such an award falls within the court's equitable discretion when the defendant is the common owner of the affiliates and benefits from its infringing relationship with them. Otherwise, the court concluded, infringers would have a blueprint for using corporate formalities to insulate them from the financial consequences of their infringement.

Petitioner contends that an award of defendant's profits cannot include an order to disgorge distinct profits of non-party corporate affiliates. Petitioner argues that there is a presumption that a federal statute does not impose liability on a defendant for the acts of its affiliates except under established veil-piercing principles. Petitioner further argues that nothing in the Act rebuts that presumption. Instead, petitioner contends, three textual features of the Act demonstrate that a defendant is not liable for the acts of its affiliates. First, the text limits awards to the "defendant's" profits. Second, the text incorporates "principles of equity," one of which is that a defendant cannot be ordered to disgorge someone else's profits. Third, the statute prohibits the imposition of a "penalty," and ordering a defendant to disgorge something that it never received is a penalty.

Decision Below:

77 F.4th 265 (4th Cir. 2023)

Petitioner's Counsel of Record:

Helgi C. Walker, Gibson, Dunn & Crutcher LLP
Respondent's Counsel of Record:
Elbert Lin, Hunton Andrews Kurth LLP

Medicare Act

Advocate Christ Medical Center v. Becerra, No. 23-715

Question Presented:

Does the phrase "entitled . . . to benefits," used twice in the same sentence of the Medicare Act, mean the same thing for Medicare part A and supplementary security income (SSI) benefits, such that it includes all who meet basic program eligibility criteria, whether or not benefits are actually received.

Summary:

The Disproportionate Share Hospital (DSH) adjustment of the Medicare Act reimburses hospitals that treat a disproportionate share of low-income patients. A hospital qualifies for reimbursement based on the number of days a hospital provided inpatient care for patients who, for those days, "were entitled to benefits under part A of [Medicare] and were entitled to supplementary security income [SSI] benefits." In *Becerra v. Empire Health Foundation*, the Supreme Court held that the phrase "entitled to [Medicare part A] benefits" includes all patients who qualify for the Medicare program at the time of hospitalization, regardless of whether the patient was eligible to receive Medicare payments for that specific hospital stay. The question in this case is whether the phrase "entitled to [SSI] benefits" includes all patients enrolled in the SSI program at the time of their hospitalization, even if they did not then qualify for the monthly SSI cash payment.

Petitioners are a group of hospitals seeking additional Medicare reimbursement from the Department of Health and Human Services (HHS). The hospitals requested that the reimbursement calculation include all patients enrolled in the SSI program at the time of their hospitalization, even if the patients did not then qualify for the program's monthly cash payment. HHS denied relief. On judicial review, the district court ruled for the government.

The D.C. Circuit affirmed, holding that the phrase "entitled to [SSI] benefits" covers only those patients entitled to receive an SSI cash monthly payments at the time of their hospitalization, not all patients who were then enrolled in the SSI program. The court reasoned that because SSI is a cash benefit program in which eligibility for payment varies from month to month, a person is "entitled to [SSI] benefits' only in the months in which a cash payment is owed. The court concluded that there is no inconsistency between that interpretation and the Supreme Court's interpretation of the phrase "entitled to [Medicare] benefits" in *Empire Health* because Medicare is an insurance program in which a person remains eligible for benefits even when not eligible to receive payments for a particular hospital stay.

Petitioners contend that the phrase "entitled to [SSI] benefits" includes individuals enrolled in the SSI program at the time of hospitalization, even if they were not then eligible to receive an SSI cash payment that month. Petitioners argue that the Supreme Court has already interpreted the phrase "entitled to [Medicare] benefits" in *Empire Health* to include all patients who meet basic program eligibility requirements, and the normal rule of statutory interpretation is that identical words used in the same sentence are given the same meaning. Petitioners contend

that the general rule is applicable here because there is no relevant difference between eligibility for Medicare benefits and eligibility for SSI benefits. Just as a person remains eligible for Medicare benefits even when Medicare does not cover a particular hospital stay, petitioners argue, a person remains eligible for future SSI payments even when no payment is owed in a particular month.

Decision Below:
80 F.4th 346 (D.C. Cir. 2023)
Petitioner's Counsel of Record:
Hyland Hunt, Deutsch Hunt PLLC
Respondent's Counsel of Record:
Elizabeth B. Prelogar, Solicitor General, Department of Justice

Racketeer Influenced and Corrupt Organizations Act

***Medical Marijuana, Inc. v. Horn*, No. 23-365**

Question Presented:

Whether economic harms resulting from personal injuries are injuries to "business or property by reason of" the defendant's acts for purposes of civil [liability under the Racketeer Influenced and Corrupt Organizations Act].

Summary:

The Racketeer Influenced and Corrupt Organizations Act (RICO) gives private plaintiffs a cause of action to recover treble damages for injuries to their "business or property" when the injuries occur by reason of the defendant's commission of certain offenses. RICO's "business or property" limitation excludes recovery for personal injuries. The question presented is whether the "business or property" limitation similarly excludes recovery for economic harms that flow from antecedent personal injuries.

Respondent Douglas Horn, a commercial truck driver, consumed Dixie X, a product that Medical Marijuana, Inc. and its joint venturers (petitioners) advertised as THC-free. THC is the psychoactive compound in marijuana. A random drug test detected THC in respondent's system, and respondent's employer fired him. After discovering Dixie X contained THC, respondent brought a civil RICO action against petitioners, alleging that his lost wages constituted an injury to "business or property" caused by petitioners' RICO violations. The district court dismissed the action.

The Second Circuit reversed, holding that the RICO's "business or property" limitation does not exclude recovery for economic harms that flow from antecedent personal injuries. The court reasoned that an antecedent personal injury bar would substitute a more stringent attenuation requirement for RICO's proximate cause requirement, ignore RICO's focus on the nature—rather than the source—of the injury, and conflict with RICO's coverage of personal injury offenses that cause economic harms, such as murder and kidnapping.

Petitioners argue that civil RICO's "business or property" limitation excludes from recovery economic harms that flow from a plaintiff's antecedent personal injuries. Petitioners contend that permitting such suits would eviscerate RICO's "business or property" limitation because it would allow a plaintiff to replead virtually any barred personal injury claim as a

business or property claim. Petitioners further contend that RICO's separate proximate cause limitation is no reason to ignore its "business or property" limitation, that the harms that flow from an injury are inseparable from the injury itself, and that murder and kidnapping are listed as offenses only because they can be criminally prosecuted.

Decision Below:
80 F.4th 130 (2d Cir. 2023)
Petitioner's Counsel of Record:
Lisa S. Blatt, Williams & Connolly LLP
Respondent's Counsel of Record:
Jeffrey Benjamin, The Linden Law Group, P.C.

Securities

Failure to Disclose Past Risk

***Facebook, Inc. v. Amalgamated Bank*, No. 23-980**

Question Presented:

> Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm?

Summary:

The Securities Exchange Act prohibits making false or misleading statements in connection with the purchase or sale of a security. The Securities and Exchange Commission requires companies to disclose material factors that make an investment in the company risky. The question presented is whether a disclosure that certain prospective conduct could create a risk to the business is false or misleading when that conduct has already occurred.

Cambridge Analytica improperly acquired personal information of Facebook users and used the information for political advertising. In a later public filing, Facebook disclosed that the misuse of personal data could harm Facebook's business, but it did not disclose Cambridge Analytica's data breach. After media outlets reported Cambridge Analytica's misconduct, Facebook's stock price dropped significantly. Respondent Amalgamated Bank subsequently brought a class action securities fraud suit alleging that Facebook's risk statement was false and misleading. The district court dismissed the complaint.

The Ninth Circuit reversed, holding that a disclosure that certain prospective conduct could create a risk to the business is false or misleading when such conduct has already occurred. The court reasoned that such a statement misleadingly represents that only hypothetical future conduct could harm the business. The court also concluded that a plaintiff is not required to allege that the past conduct has already harmed the business. The court reasoned that a statement that conduct is hypothetical when it has already occurred is misleading even if the magnitude of the past conduct's harm is still unknown.

Petitioner contends that a disclosure that certain prospective conduct could create a risk to the business is not false or misleading simply because the conduct has already occurred. Petitioner argues that a reasonable investor understands the term "risk" to refer to harms that

may occur in the future, not to past events. Petitioner alternatively argues that, at a minimum, a risk disclosure that omits past events is not misleading when the past event poses no known risk of business harm.

Decision Below:
87 F.4th 934 (9th Cir. 2023)
Petitioner's Counsel of Record:
Joshua S. Lipshutz, Gibson, Dunn & Crutcher LLP
Respondent's Counsel of Record:
Kevin Russell, Goldstein, Russell & Woofter LLC

Sufficiency of Pleadings

***NVIDIA Corp. v. E. Ohman J:or Fonder AB,* No. 23-970**

Questions Presented:

1. Whether plaintiffs seeking to allege scienter under the [Private Securities Litigation Reform Act] based on allegations about internal company documents must plead with particularity the contents of those documents.
2. Whether plaintiffs can satisfy the Private Securities Litigation Reform Act falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact.

Summary:

The Private Securities Litigation Reform Act (the Act) requires plaintiffs alleging securities fraud to "state with particularity" all facts supporting their allegations of falsity. It also requires plaintiffs to allege facts "giving rise to a strong inference" that the defendant acted with the requisite scienter. The first question presented is whether plaintiffs alleging scienter based on internal company documents must plead with particularity the contents of the documents. The second question is whether plaintiffs can rely on expert opinion to satisfy the Act's falsity requirement.

Petitioner NVIDIA manufactures graphic processing units (GPUs). Petitioner's GeForce GPU is designed for video gaming but can also be used for crypto mining. Petitioner eventually launched Crypto Stock-Keeping Unit (SKU), a GPU designed for crypto mining. Many people nonetheless continued to purchase GeForce for mining. When petitioner reported a dramatic increase in GeForce revenues, investors asked whether crypto miners were driving the increase. Petitioner's executives denied that they were. When GeForce sales plummeted, one of petitioner's executives attributed the diminishing sales to a decline in the crypto market. Petitioner's stock price subsequently fell dramatically. Shareholders (respondents) sued petitioner, alleging that its public statements that miners were not driving demand for GeForce were knowingly false or misleading. The district court dismissed the complaint.

The Ninth Circuit reversed. Without adopting a requirement that plaintiffs relying on internal documents must allege the contents of the documents, the court held that respondents' scienter allegations were sufficient. The court relied on allegations that employees prepared reports on GeForce sales to crypto miners that were accessible to petitioner's CEO, that the CEO was a meticulous manager who closely monitored sales data, and that sales data would have

shown that a large portion of GPU sales were being used for crypto mining. The court further held that a plaintiff may rely on reputable experts to prove falsity when the plaintiff provides detailed information on the expert's methodology and a particularized recitation of facts on which the expert relied. The court reasoned that a rule precluding reliance on an expert report would place an undue pretrial burden on plaintiffs in security cases. The court concluded that, in any event, respondents' other allegations of falsity, when combined with respondents' expert report, satisfied the particularity requirement for allegations of falsity.

Petitioner contends that plaintiffs seeking to establish scienter using company documents must plead with particularity the actual contents of the documents. Petitioner argues that, absent such allegations, plaintiffs can only speculate that internal documents might have contradicted the public statements to investors. Such speculation, petitioner argues, satisfies neither the requirement to state with particularity what the reports contain nor the requirement to allege facts that support a "strong inference" of scienter. Petitioner also contends that a plaintiff may not rely on an expert opinion to establish falsity. Petitioner argues that an opinion is not a fact at all, much less a particularized fact. Petitioner further argues that an expert opinion cannot satisfy the falsity requirement when, as here, it is based on generic market research and questionable assumptions. Finally, petitioner contends that respondents' expert report did not merely corroborate other falsity allegations, but instead impermissibly served as the primary source for respondents' falsity allegations.

Decision Below:
81 F.4th 918 (9th Cir. 2023)
Petitioner's Counsel of Record:
Neal Kumar Katyal, Hogan Lovells US LLP
Respondents' Counsel of Record:
Deepak Gupta, Gupta Wessler LLP

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