The previews are contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School. The previews include an in-depth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

Star Athletica LLC v. Varsity Brands Inc., et al. (15-866)

Court below: *U.S. Court of Appeals for the Sixth Circuit*
Oral argument: Oct. 31, 2016

Question as Framed for the Court by the Parties

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

Facts

Varsity Brands Inc. designs and manufactures cheerleading uniforms and accessories. Varsity's designers first create "design concepts," which illustrate and arrange different patterns of chevrons, stripes, and other shapes (design features); the designers do not consider the uniform's functionality or production. If the design is selected, Varsity's production crew uses the design to create a cheerleading uniform through one of four techniques: "cutting and sewing panels of fabric and braid together; sublimation; embroidery; or screen painting." These uniforms are then advertised in catalogs and online, and customers choose a design concept and customize the uniforms they order. Varsity has copyrighted some of its design features as "two-dimensional artwork," including five design features that are at issue here.

Star Athletica LLC also sells athletic uniforms and accessories, including cheerleading uniforms. Varsity believed that several of Star Athletica's advertised cheerleading uniforms are similar to their copyrighted designs and brought suit against Star Athletica.

Varsity alleges five claims of copyright infringement in violation of the Copyright Act, 17 U.S.C. § 101 *et seq.* Varsity also brought trademark claims and Tennessee state law claims, including "unfair competition, inducement of breach of contract, inducement of breach of fiduciary duty, and civil conspiracy." In response, Star Athletica asserted a counterclaim alleging that Varsity made fraudulent representations in their filings to the Copyright Office.

Both parties cross-filed for summary judgment. Since Varsity did not oppose Star Athletica's motion for summary judgment on the trademark claim, the court granted partial summary judgment in favor of Star Athletica. The court also granted partial summary judgment in favor of Star Athletica on Varsity's copyright claims, finding that the design features in question could not be separated from the utilitarian aspects of a cheerleading uniform and, thus, were not protectable under copyright law. The court found that the design features on the uniforms indicated that the garment was a cheerleading uniform and performed a utilitarian function. Finally, the district court declined to exercise supplemental jurisdiction and dismissed the state law claims without prejudice.

Varsity then appealed this decision to the Sixth Circuit. The Sixth Circuit concluded that Varsity's design features could be separated from the utility of the uniforms, so they were protected "as pictorial, graphic, or sculptural works." The case was remanded to the district court for further proceedings. On May 2, 2016, the U.S. Supreme Court granted certiorari.

Analysis

What is the Correct Approach to Determine Whether a Design is a Protectable Pictorial, Graphic, or Sculptural Work Separable From the Utilitarian Aspects of the Article?

Congress defines a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." Both Star Athletica and Varsity agree that copyright law protects parts of the design of a "useful article" as original "pictorial, graphic, and sculptural works" if the design incorporates design features that are capable of being identified separately from and can exist independently of the article's "utilitarian" features.

Star Athletica proposes a new, two-part test to determine if an article's design features may be copyrighted. First, Star Athletica argues that the article's design feature must be able to be identified separately from its utilitarian aspects. This "identified-separately" test questions whether an article's design feature is artistic, utilitarian, or both. If an article's design feature is solely artistic, it can be copyrighted; if the design feature is even slightly utilitarian or both utilitarian and artistic, it cannot be copyrighted. Recognizing that the identified-separately test may not be determinative in many cases, Star Athletica then advocates for a second inquiry—the "independent-existence" test. Under this second inquiry, the design feature and the utilitarian article must be able to exist side-by-side as fully realized, separate works. Again, Star Athletica argues that only a solely artistic design feature would be protectable. Star Athletica notes three distinct "conceptual-separability" approaches courts and the Copyright Office have used to assist with this independent-existence analysis; the approaches include considering (1) whether the design feature could be physically removed without altering the utilitarian aspects of the article ("physical-separability" approach), (2) whether the designer intended to produce a useful design feature ("design-process" approach), and (3) whether the design feature would still be marketable to some significant segment of the community without its utilitarian function ("marketability" approach).

In response, Varsity argues that Star Ath-

letica mixes and matches various lower court approaches to create a new, multipart test that would "merely sow confusion." First, Varsity argues that Star Athletica's sharp distinction between artistic design features and utilitarian features is fundamentally inconsistent with the Copyright Act's protection of "applied art," which, by definition, has both artistic and "practical, utilitarian elements." Varsity further notes that the Copyright Office should not have to "play the role of art theorist" that would be required of it to distinctly separate aesthetics and utility. Varsity also takes issue with Star Athletica's independent-existence inquiry. Varsity argues that each of the three conceptual-separability approaches advocated by Star Athletica is inconsistent with the Copyright Act's text, history, and purpose. For example, Varsity argues that the design-process approach depends on the designer's state of mind and thus could produce inconsistent results—clearly not what Congress intended. Similarly, Varsity notes that the marketability approach has drawn heavy criticism for, among other reasons, privileging "popular art" over more unfamiliar art forms.

Can Varsity's Design Features be Separated From the Uniform's Utilitarian Aspects?

Star Athletica notes that a cheerleader uniform has a number of inherently utilitarian functions, such as identifying that the wearer is a cheerleader and member of a particular team. Thus, a cheerleader uniform fails the identified-separately requirement because the uniform's stripes, chevrons, zigzags, and color blocks cannot be recognized apart from a cheerleader uniform's utilitarian aspects but are essential to the uniform's use or purpose. What's more, Star Athletica notes, the Copyright Office initially rejected many of Varsity's cheerleading uniform designs.

Although Varsity argues that its designs are copyrightable without any need for separability analysis, it contends that even under separability analysis, the design features are easily separable from the utilitarian aspects of cheerleading uniforms—wicking away moisture and permitting the wearer to "cheer, jump, kick, and flip"—and therefore are copyright-eligible. Varsity maintains that a design that merely provides identification or "portraying appearance," such as conveying that a person is a cheerleader, is not a utilitarian function. Varsity argues that cheerleading uniforms can exist without any designs on their surfaces and, thus, its designs satisfy the Copyright Office's test because the design and the utilitarian article on which they appear (cheerleading uniforms) can exist side-by-side. Varsity further argues that its designs are clearly separately identifiable from and capable of existing independently of the utilitarian aspects of cheerleading uniforms because the designs have been reproduced on other garments such as warm-up suits and jackets. Varsity asserts that the particular design does not affect the garment itself, whatever it may be, because the garment has a "standard base" that does not vary with the design placed on it—thus further supporting the separability of the garment's design and utilitarian functions.

Are Varsity's Design Features Copyrightable as a Matter of Law?

Star Athletica posits Varsity's garment design features are not copyrightable as a matter of law. Star Athletica argues that the courts should defer to Congress' long-standing rule that garment designs cannot be copyrighted because they are useful articles and extend this rule to garment design features. Star Athletica notes not only the purpose of the Copyright Clause to encourage the development of artistic works but also Congress' continued refusal to expand protection of useful articles' designs, including garment designs. Thus, Star Athletica argues, courts are properly reluctant "to expand the protections afforded by the copyright without explicit legislative guidance."

In response, Varsity argues that as a threshold matter, its graphic designs are two-dimensional graphic designs that appear *on* useful articles, rather than designs of useful articles, and so can be copyrighted as "applied art." Varsity maintains that the Copyright Office consistently registers two-dimensional artwork that appeared on the surface of useful articles, such as "artwork printed on a T-shirt, beach towel, or carpet." Thus, while copyright laws usually do not protect the overall design of a garment, "the fashioning of … fabric into an article of clothing" does not "cancel out the copyright of the design imprinted thereon."

Discussion

Whether Expanding Copyright Protection Would Negatively Impact Market Competition

Public Knowledge et al. argues in support of Star Athletica that copyrighting a useful article's design features without a stringent inquiry into separability will stifle individual creativity. Public Knowledge also claims that although maintaining current copyright limitations will advance market competition, extending copyright protections will not provide any benefits. It notes that the fashion industry has been fine thus far without extended garment design feature protection and in fact demonstrates a "pirate paradox," where rampant copying facilitated creativity. Public Knowledge also points to other industries that have flourished without broad copyright protection, such as the cuisine and comedy industries. Furthermore, two law school professors, Christopher Buccafusco and Jeanne Fromer, argue that allowing Varsity to copyright these designs will work against competition by allowing Varsity to create a monopoly.

In response, the Council of Fashion Designers of America Inc. (CFDA) contends that broader copyright protection is necessary for the fashion industry to grow. CFDA argues that advancing technology has allowed people to copy fashion designs at a higher rate and with reduced costs. CFDA maintains that these factors may contribute to a decrease in fashion innovation. The Fashion Law Institute also asserts that many other countries with successful fashion industries throughout the world have greater copyright protections. The Institute contends that the structure in the United States incentivizes companies to reduce their own risk within the business by copying the successful work of others, rather than innovate. Finally, the United States argues that holding for Varsity and expanding copyright protection will not result in an exclusive monopoly for Varsity. Rather, the United States contends that not all design features fulfill the creativity requirement of copyright protection: Copyright protects only expression and not ideas, so if a protected design was truly the only way to create cheerleading uniforms, copying would be allowed.

The Effect of Star Athletica's Proposed Test on Copyright Law

Star Athletica advocates for a new separability test. Star Athletica suggests this test is an improvement over the alternatives, which are vague, hard to apply, or consider subjective intent. Star Athletica contends that its proposed test will bring cohesion to copyright law by combining several existing tests into one comprehensive framework.

Further, Star Athletica argues that its test follows the Supreme Court's previous advice that caution should be exercised in this field in order to protect against monopolies. Star Athletica asserts that if greater protection is to be afforded to garment design features, it must be done through the legislature, rather than through the courts.

In response, the United States argues that Star Athletica's new test will lead to inconsistencies that would undermine the copyright process. The United States contends that Congress did not intend to consider certain factors included within the Star Athletica test, such as an item's design process and marketability, and that their inclusion would work against the Copyright Act's registration scheme. The United States further argues that the inclusion of these two external elements would make the process burdensome and lead to overly extensive discovery in copyright litigation. Full text available at: https://www.law.cornell.edu/supct/cert/15-866. ⊙

Written by Weiru Fang and Cassandra Desjourdy. Edited by Jessica S. Kim.

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

Court below: *U.S. Court of Appeals for the D.C. Circuit*
Oral argument: Nov. 7, 2016

Question as Framed for the Court by the Parties

Many important government posts must be filled by people who are nominated by the president and confirmed by the Senate. The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345, provides that when such an office is vacant, its functions and duties may be performed temporarily in an acting capacity by either the first assistant to the vacant post, as designated under § 3345(a)(1); a Senate-confirmed official occupying another office in the executive branch who is designated by the president under § 3345(a)(2); or a senior official in the same agency designated by the president under § 3345(a)(3).

Section 3345(b) of the FVRA provides as a general rule that "notwithstanding subsection (a)(1)," a person who is nominated to fill a vacant office that is subject to the FVRA may not perform the office's functions and duties in an acting capacity unless the person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy.

The question presented is whether the precondition in § 3345(b)(1) on service in an acting capacity by a person nominated by the president to fill the office on a permanent basis applies only to first assistants who take office under § 3345(a)(1), or whether it also limits acting service by officials who assume acting responsibilities under §§ 3345(a)(2) and 3345(a)(3).

Facts

The general counsel position of the National Labor Relations Board (NLRB) requires appointment by the president with the advice and consent of the Senate. The protocol for dealing with vacancies in such offices is governed by 5 U.S.C. § 3345, which sets out three different classes of individuals who may serve in offices that require Senate approval on an acting basis.

In June 2010, Ronald Meisburg resigned as NLRB general counsel. Following his resignation, President Barack Obama directed Lafe Solomon to serve as acting general counsel pursuant to § 3345(a)(3). Solomon had served as director of the NLRB's Office of Representation Appeals for the previous 10 years. Six months later, in January 2011, President Obama nominated Solomon to serve as NLRB general counsel on a permanent basis. The Senate did not act upon the Solomon nomination, so the nomination was returned to the president. After resubmitting the nomination and ultimately withdrawing it, President Obama then nominated Richard Griffin to the general counsel position. The Senate confirmed Griffin on Oct. 29, 2013.

In January 2013, while Solomon was serving as acting general counsel, an NLRB regional director acting on his behalf filed a complaint on behalf of SW General employees alleging that SW General Inc. had engaged in unfair labor practices. After a hearing, an administrative law judge determined that SW General *had* engaged in unfair labor practices. SW General filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit and alleged that the complaint the NLRB had filed against it was unlawful, arguing that Solomon had been impermissibly serving as acting general counsel because he had been nominated to fill the position permanently but had never served as first assistant to the office.

The D.C. Court of Appeals agreed with SW General's interpretation of § 3345(b)(1) and held that the NLRB's complaint against SW General was invalid. The NLRB appealed to the Supreme Court of the United States and was granted certiorari on June 20, 2016.

Analysis

Interpreting FVRA § 3345(b)(1)

The NLRB argues that the text and structure of FVRA's § 3345(b)(1) demonstrate that the limitations contained within apply only to first assistants taking office under § 3345(a)(1), but not to officials who assume acting responsibilities under §§ 3345(a)(2) and (a)(3). The NLRB claims that because § 3345(b)(1) begins with "notwithstanding subsection (a)(1)," the limitation contained within § 3345(b)(1) applies *only* to § 3345(a)(1). The NLRB contends that if Congress had intended for the limitation to apply to §§ 3345(a)(2) and (a)(3), Congress would have written that the rule applies "notwithstanding" all of the provisions, not just § 3345(a)(1). Moreover, the NLRB maintains that although § 3345(b)(1) uses the terms "person" and "this section," the limitations still only apply to § 3345(a)(1), noting that Congress later in the same section referred to a "person" when only discussing first assistants.

SW General, however, contends that the language of the FVRA clearly demonstrates that the limitations of FVRA § 3345(b)(1) must apply to *all* acting officials serving under § 3345(a), not just those serving under § 3345(a)(1). SW General argues that the phrase "notwithstanding subsection (a)(1)" does not narrow the scope of § 3345(b)(1) but instead illustrates the expansive reach of the subsection. Further, SW General argues that because § 3345(b)(1) contains the term "a person," the subsection must apply not only to first assistants but also to officials who assume acting responsibility under §§ 3345(a)(2) and (a)(3). SW General contends that Congress would have substituted "first assistant" for "person" if it wanted § 3345(b)(1) to apply only to § 3345(a)(1). Lastly, SW General asserts that § 3345(b)(1) must apply to all acting officers because the NLRB's interpretation would make other provisions of the FVRA unnecessary—an assertion the NLRB disputes.

Fulfilling the FVRA's Objectives

The NLRB argues that SW General's reading of FVRA § 3345(b)(1) would undermine the

objectives of the FVRA. The NLRB contends that one goal of the FVRA and of §§ 3345 (a)(2) and (a)(3) was to give the president more flexibility in choosing an acting official to fill a vacancy. The NLRB contends that SW General's reading of § 3345(b)(1) would revoke the president's authority to designate presidentially appointed, Senate-approved officials to serve in an acting capacity under § 3345(a)(2) nearly every time the president also nominates that same official to the permanent position. The NLRB argues that SW General's reading would have the same effect on § 3345(a)(3), a provision they contend was also included to give the president greater latitude.

SW General, on the other hand, maintains that the purpose and objectives of the FVRA prove that the limitations of § 3345(b)(1) apply to all acting officers. SW General contends that the FVRA's primary purpose was *not* providing the president more flexibility in selecting acting officers. SW General argues that the primary objective of the FVRA was, instead, to limit the president's power when selecting acting officers to salvage the Senate's responsibility within the Constitution's Appointments Clause. In support of this claim, SW General notes that prior to the passage of the FVRA, presidents used acting service status to dodge restrictions on officials requiring confirmation, allowing acting officials to work for long periods of time without obtaining Senate approval.

The Significance of Historical Practice

The NLRB claims that the way the FVRA has been applied and interpreted by both the executive branch and Congress shows that FVRA § 3345(b)(1) only applies to first assistants. According to the NLRB, the Supreme Court places great emphasis on historical practice when interpreting constitutional provisions involving the distribution of power between the executive and legislative branches. The NLRB argues that both the Office of Legal Counsel (OLC) and Government Accountability Office (GAO) have issued written guidance that demonstrates that the limitations of § 3345(b)(1) only apply to first assistants.

The NLRB contends that these interpretations are also reflected in practice. The NLRB claims that since the enactment of the FVRA, presidents have directed officials to serve in an acting capacity under FVRA §§ 3345(a)(2) or (a)(3) *and* nominated those same officials to the same office permanently more than 100 times, even where those officials were not serving as first assistants for at least 90 days prior to the vacancy. The NLRB notes that the Senate could have objected to these nominees if the Senate believed they were not serving lawfully.

In contrast, SW General places emphasis on long-standing constitutional principles in interpreting FVRA § 3345(b)(1). SW General argues that the constitutional safeguards subjecting officers of the United States to advice and consent by the Senate should direct the Court in interpreting the statute. Further, SW General disputes the NLRB's reliance on OLC and GAO documents, noting that, first, neither the OLC or GAO statements receive *Chevron* Deference. Moreover, SW General disagrees on the documents' relevance in this case.

SW General refutes the NLRB's assertion that Congress assented to the executive branch's reading by failing to object to nominees serving improperly and to enact legislation to override the executive branch's interpretation. First, SW General argues that the Senate may have been unaware that the executive branch's interpretation was flawed. SW General claims that even if the Senate knew of a nominee's "improper acting service," it was not required to reject the nominee, noting that the FVRA does not bar an acting officer serving improperly from holding the permanent office. Lastly, SW General argues that, just because the executive branch has "gotten away with" its interpretation for 18 years, it does not mean that the executive branch's interpretation is correct or entitled to deference.

Discussion

Objectives of the FVRA

The NLRB and supporting amici argue that their interpretation of FVRA § 3345 (b)(1) adequately responds to congressional concerns about presidents evading Senate approval while still preserving the president's ability to appoint the most qualified individuals to carry out the duties of executive branch offices. The NLRB points out that interpreting § 3345(b)(1) to apply only to § 3345(a)(1) effectively addresses the main concern that prompted Congress to enact the FVRA—presidents dodging the Senate's advice by concurrently appointing individuals who were neither high-ranking agency officials nor Senate-confirmed officers to serve as both first assistant and nominee. Further, the AFL-CIO argues that there is nothing to indicate that Congress intended to limit the ability of the president to appoint a high-ranking officer within the agency or a Senate-approved officer to serve as both the acting officer and nominee.

However, SW General and amici claim that *their* interpretation of FVRA § 3345 (b)(1) best accords with the separation of powers concerns that spurred Congress to enact the FVRA. They argue that since the impetus for enacting the FVRA was congressional concern over presidents appointing long-serving acting officials without Senate approval, § 3345(b)(1) should be read to limit the president's flexibility. The Cato Institute contends that the legislature must "clearly and unambiguously" indicate any intention to alter the fundamental balance of power between the three branches of the federal system. Therefore, since Congress was unclear in this instance as to its intentions, the court should interpret § 3345(b)(1) so as to best protect the framers' preference for Senate advice and consent as a check on executive power.

Presidential Discretion Versus State Interests

The Constitutional Accountability Center (CAC), in support of the NLRB, asserts that interpreting FVRA § 3345(b)(1) as SW General wishes would undermine the president's ability to appoint the most qualified individuals to fill executive branch vacancies. The CAC points out that in order to execute the nation's laws, the president must always have capable subordinate officers assisting him. While acknowledging that some restrictions on circumventing advice and consent are necessary, the CAC argues that the Court should interpret § 3345(b)(1) to allow the president the requisite flexibility to fill vacancies with the individuals he judges as best prepared to help him carry out his significant responsibilities.

West Virginia, Alabama, and 12 other states, however, urge the Court to adopt SW General's interpretation of § 3345 (b)(1). They argue that the Senate's advice and consent power is a critical way to maintain the balance between federal and state power. The appointment of an agency head can have a significant impact on state interests, so the advice and consent power allows the states to thoroughly question nominees. West Virginia and the others contend that adopting the NLRB's interpretation would give presidents too much latitude to install their desired nominees without giving due

regard to the state interests that the framers intended to protect. Full text available at: https://www.law.cornell.edu/supct/cert/15-1251. ⊙

Written by Emily Rector and Kimberly Petrick. Edited by Christopher Saki.

EXECUTIVE SUMMARIES

Fry v. Napoleon Community Schools (15-497)

Court below: *U.S. Court of Appeals for the Sixth Circuit*
Oral argument: Oct. 31, 2016

The Supreme Court will decide whether the Handicapped Children's Protection Act of 1986 exhaustion requirement applies when a party brings a suit under the American with Disabilities Act or the Rehabilitation Act if the plaintiff is seeking a remedy not contemplated by the Individuals with Disabilities Education Act (IDEA). The parties disagree on how to interpret § 1415(*l*) of the IDEA and whether the IDEA is even implicated here. Stacy and Brent Fry posit that the plain text and purpose of the IDEA make it so that monetary damages are not recoverable under the IDEA and thus neither exhaustion nor the IDEA should apply here. In response, Napoleon Community Schools et al. argues that the text and purpose of the IDEA's exhaustion requirement require that substantively-the-same claims be exhausted before going to court. Depending on the how the Court rules, the ease of access to courts could be altered, thus impacting the role of school-related administrative proceedings Full text available at: https://www.law.cornell.edu/supct/cert/15-497. ⊙

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

Court below: *U.S. Court of Appeals for the First Circuit*
Oral argument: Nov. 1, 2016

Cori and Kerri Rigsby sued State Farm Fire & Casualty Co. under the False Claims Act (FCA), alleging that State Farm defrauded the federal government while paying out claims related to the damage caused by Hurricane Katrina. The district court and the Fifth Circuit found that the Rigsbys' attorney violated the FCA's seal requirement by distributing documents to several news outlets, but declined to dismiss the Rigsbys' suit after applying a three-part balancing test to evaluate whether dismissal was warranted. The Supreme Court granted certiorari to resolve the circuit split over what standard governs the decision to dismiss a relator's claim for violation of the FCA's seal requirement. The United States, on behalf of the Rigsbys, points to the FCA's test, structure, legislative history, and purpose to argue that only discretionary sanctions apply to a violation of the seal requirement. State Farm maintains that a violation of the seal requirement must result in mandatory dismissal of the suit, rather than a discretionary balancing test. This decision may affect the prevalence of *qui tam* FCA suits and the government's ability to recover from defrauding parties. Full text available at: https://www.law.cornell.edu/supct/cert/15-513. ⊙

SCA Hygiene Products v. First Quality Baby Products (15-927)

Court below: *U.S. Court of Appeals for the Federal Circuit*
Oral argument: Nov. 1, 2016

This case presents the Supreme Court with the opportunity to review whether the defense of laches will remain available to bar a patent infringement claim within the statutory limitations period of six years. The 1952 Patent Act allowed laches as a defense for patents and was later re-codified by Congress. The U.S. Court of Appeals for the Federal Circuit reaffirmed this defense in *A.C. Auckerman Co. v. R. L. Chaides Construction Co.* in 1992. The Copyright Act did not codify a laches defense, however, and in 2014, the Supreme Court ruled against the use of laches in *Petrella v. Metro-Goldwyn-Mayer Inc*. SCA Hygiene Products Aktiebolag and SCA Personal Care Inc. argue that the *Petrella* decision is applicable to a patent infringement case and that laches should not be used to bar a patent-holder from enforcing its property rights through a legal damage claim. First Quality Baby Products LLC et al. seeks to distinguish the text, history, and purpose of the Patent Act from the Copyright Act, and argues that laches should remain a viable defense. The Supreme Court's holding may alter the relationship between patent and copyright law and change the pleading styles in a patent infringement case. Full text available at: https://www.law.cornell.edu/supct/cert/15-927. ⊙

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

Court below: *U.S. Court of Appeals for the D.C. Circuit*
Oral argument: Nov. 2, 2016

This case will address what pleading standard a plaintiff attempting to use the Foreign Sovereign Immunities Act's (FSIA) expropriation exception is required to meet to establish jurisdiction. The Bolivarian Republic of Venezuela, Petroleos de Venezuela, and PDVSA Petroleo (Venezuela) argue that, in order for private American corporations like Helmerich & Payne International Drilling Co. and Helmerich & Payne Venezuela (H&P) to bring a claim against a foreign sovereign in U.S. courts, plaintiffs must meet the usual standards of subject matter jurisdiction under the FSIA. In contrast, H&P argues that the approach taken by the Court of Appeals for the D.C. Circuit, which only denies jurisdiction to "wholly insubstantial or frivolous" claims, is the appropriate standard under the expropriation exception. This case will impact the viability of future claims of expropriation against foreign sovereigns, especially within the context of private corporations seeking redress against foreign governments. Full text available at: https://www.law.cornell.edu/supct/cert/15-423. ⊙

Bank of America v. Miami (15-1111) and Wells Fargo Co. v. Miami (15-1112) (Consolidated)

Court below: *U.S. Court of Appeals for the Eleventh Circuit*
Oral argument: Nov. 8, 2016

In this consolidated action, the Supreme Court will decide whether a city can sue a bank under the Fair Housing Act for discriminatory lending practices and whether it can recover lost property tax revenues and funds spent addressing widespread foreclosures that the bank's discriminatory practices allegedly caused. The city of Miami alleges, based on statistical analyses, that loans by Bank of America and Wells Fargo & Co. to minority borrowers were more than five times as likely to result in foreclosures than loans to white borrowers. The banks argue that the city of Miami falls outside the zone of interests required to obtain standing under the Fair Housing Act, and that any alleged causal relationship between the city's

financial losses and the discriminatory housing practices of the banks is too far a stretch to support a valid lawsuit. The city responds that it meets the broad standing requirements of the Fair Housing Act and should recover for its injuries because they are foreseeably and directly linked to the discriminatory lending practices of the banks. A victory by Miami could potentially overburden the courts with similar lawsuits and overextend judicial power; however, Miami's defeat could leave the FHA under-enforced and cities underfunded to battle urban blight. Full text available at: https://www.law.cornell.edu/supct/cert/15-1111. ☉

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

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Nov. 8, 2016

The Supreme Court will decide whether the sue-and-be-sued clause in Fannie Mae's congressional charter under 12 U.S.C. § 1723a(a) confers original jurisdiction to federal district courts for cases to which Fannie Mae is a party. Petitioners Crystal Lightfoot and Beverly Hollis-Arrington argue that the clause is not sufficient to confer federal question jurisdiction. In doing so, they contend that the clause requires an independent determination of subject matter jurisdiction, and that the Court's decision in *Am. National Red Cross v. S.G.*, 505 U.S. 247 (1992), did not establish an "if federal, then jurisdiction" rule, which diverges from the Court's past methods of statutory interpretation and creates confusion. Respondent Fannie Mae argues that Lightfoot and Hollis-Arrington misconstrue *Red Cross* and asserts that the statutory language, legislative history, context, and purpose of Fannie Mae as a government-sponsored enterprise (GSE) confirm that Fannie Mae's charter confers federal question jurisdiction. This case will clarify the scope of jurisdiction for GSEs under Article III and will settle whether private individuals can file suit against GSEs in federal district court based on state-law causes of action. Full text available at: https://www.law.cornell.edu/supct/cert/14-1055. ☉

Lynch v. Morales-Santana (15-1191)

Court below: *U.S. Court of Appeals for the Second Circuit*
Oral argument: Nov. 9, 2016

When a child with one United States-citizen parent is born abroad and out of wedlock, that child may or may not inherit United States citizenship. One of the factors that determines the child's citizenship is whether the United States-citizen parent is the child's mother or father. In 1958, Congress passed a law that placed different physical-presence requirements on the father than on the mother, whereby the father must have lived in the United States for at least 10 years before the child's birth, while the mother must have lived in the United States for only one continuous year. Luis Ramon Morales-Santana argues that this distinction unjustifiably discriminates on the basis of gender and therefore violates the Fifth Amendment's Equal Protection Clause. Attorney General Loretta E. Lynch argued that this distinction is not actually based on gender, but on the legal realities inherent in out-of-wedlock births, and is constitutional. The outcome of this case will affect the legal criteria bearing upon a foreign-born child's ability to inherit United States citizenship. Full text available at: https://www.law.cornell.edu/supct/cert/15-1191. ☉