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.

Benisek v. Lamone (17-333)

Court below: *U.S. District Court for the District of Maryland*

Oral argument: Mar. 28, 2018

Questions as Framed for the Court by the Parties

(1) Whether the majority of the three-judge district court erred in holding that, to establish an actual, concrete injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must prove that the gerrymander has dictated and will continue to dictate the outcome of every election held in the district under the gerrymandered map; (2) whether the majority erred in holding that the *Mt. Healthy City Board of Education v. Doyle* burden-shifting framework is inapplicable to First Amendment retaliation challenges to partisan gerrymanders; and (3) whether, regardless of the applicable legal standards, the majority erred in holding that the present record does not permit a finding that the 2011 gerrymander was a but-for cause of the Democratic victories in the district in 2012, 2014, or 2016.

Facts

Before 1991, the Sixth Congressional District of Maryland had more registered Democrats than registered Republicans. However, in 1991, the district lines were redrawn, leaving registered Republicans outnumbering registered Democrats. In 2011, the district lines were redrawn again to comply with a one-person-one-vote rule. This move drew 66,417 registered Republicans out of the Sixth District and drew 24,460 registered Democrats in. This produced a 90,000-voter swing in favor of the registered Democrats. For context, Maryland's Sixth Congressional District typically has 230,000 voters in mid-term elections.

The 2011 redistricting effort was led by the Governor's Redistricting Advisory Committee (GRAC). GRAC was made up of five members—four Democratic members and one Republican member. During the summer of 2011, GRAC held 12 public hearings on the redistricting efforts around the state of Maryland, which were attended by approximately 1,000 members of the public. The actual drafting of the map, however, was done by NCEC Services.

NCEC Services, which provides electoral analysis, political targeting, and map drawing services, used the software program Maptitude to draw Maryland's district lines. Maptitude allows users to input and use political data and election results to predict election outcomes under proposed districting schemes. NCEC used Maryland citizens' voting histories, party affiliations, registrations, turnout levels, and election results, as well as the company's Democratic Performance Index (DPI), to draw the district lines.

After making more than 10 possible congressional maps and comparing them to proposals submitted by third-party drafters, NCEC proposed two redistricting plans: Congressional Option 1 and Congressional Option 2. Maryland officials chose Congressional Option 2, which had a stronger prediction for Democrats to win the Maryland Sixth Congressional District. The plan was formally submitted to then-Maryland Gov. Martin O'Malley on Oct. 4, 2011. After introducing to the Maryland Senate, the bill was passed on Oct. 20, 2011 despite having no Republican support. The bill was petitioned to referendum and passed with 64.1 percent of the vote.

O. John Benisek and the other appellants, who are supporters of Maryland Republicans, appealed this case directly from the U.S. District Court for the District of Maryland. Benisek filed the original action in November 2013 against Maryland and its administrator of elections, Linda Lamone. In 2015, the U.S. Supreme Court reversed the lower court's dismissal and remanded the case. Benisek and the other appellants filed an amended complaint in 2016. A three-judge panel later entered a "stay pending further guidance" from the Supreme Court's disposition of *Gil v. Whitford*.

Benisek claims the Supreme Court has jurisdiction over this matter under 28 U.S.C. § 1253 and motioned the Court to expedite consideration of the jurisdictional statement. The Court denied the motion and postponed further consideration of jurisdiction until the hearing of the case on the merits. Benisek claims the redistricting was done via backdoor meetings in an attempt to dilute Republican votes in Maryland's Sixth Congressional District. However, Lamone claims the 2011 redistricting did not dilute Republican voters, but rather created a political composition similar to the pre-1991 district lines, thus making both parties more competitive.

Analysis

Is the Issue Justiciable?

Benisek argues that, to establish a justiciable First Amendment claim of retaliation in the context of gerrymandering, the Court should examine whether the state has imposed a real and practical burden on a group of voters in retaliation for that group's historical support of a particular political party. Instead of relying on a substantive definition of fairness or a statistical measure of severity, Benisek asserts, the Court's inquiry should focus on why and how the redistricting map was drawn and whether there was a practical burden—such as vote dilution—on voters as assessed by a pragmatic and functional review of the state's conduct. Under this standard, Benisek asserts, the appellant's claim is justiciable.

Lamone counters that, because the impact of partisan gerrymandering cannot be

identified using principled judicial standards, Benisek's First Amendment retaliation claim is non-justiciable under the Political Question Doctrine. Lamone contends that Benisek has failed to offer a clear, applicable, and neutral standard by which to determine what constitutes a real and practical burden. Furthermore, Lamone asserts, judicial outcomes for challenges to partisan gerrymandering risk being "disparate and inconsistent." Further, according to Lamone, Benisek's proposed standard would prohibit all schemes of political and partisan classification except those with only *de minimis* effects. This standard, Lamone claims, cannot be correct as redistrict plans do not inherently impose a tangible restricting on voting—they do not have an inherent impact on what candidates on a ballot, what citizens can cast a vote, and when votes may be cast.

What Are Actionable Burdens in Political Gerrymandering?

Benisek asserts that the actionable burden requirement has been met, as the redistricting efforts affected election outcomes and placed targeted Republican voters in Maryland's Sixth Congressional District at a concrete disadvantage. Benisek contends that NCEC Service's DPI technology, which was used to create the new districts in Maryland, imposed a real and practical disadvantage on Republican voters in Maryland's Sixth Congressional District. This political disadvantage, Benisek asserts, is enough to demonstrate a justiciable burden. Furthermore, Benisek claims, the discouragement of citizens from participation in the political process and pressure to join the dominant party as a result of the redrawn lines are actionable burdens, provable using ordinary evidence and analysis.

Lamone contends that the lower court correctly applied the standard for injury in the present case. This standard, according to Lamone, requires Benisek to show that the redistricting was for purposeful dilution in Maryland's Sixth Congressional District and that the redistricting was the but-for cause of Republican Representative Roscoe Bartlett's loss in 2012 and for Republican losses in 2014 and 2016. The losses must be directly attributable to the gerrymandering, Lamone asserts, because otherwise they would be the result of democracy—not constitutional injury. Further, Lamone argues, use of predictive evidence, such as NCEC Service's DPI, is not determinative of but-for causation and thus cannot be used to satisfy Benisek's burden.

Does Mt. Healthy's Burden-Shifting Framework Apply?

Benisek claims that *Mt. Healthy City School District Board of Education v. Doyle* held that when plaintiffs in First Amendment retaliation claims make a prima facie showing of retaliatory harm, the burden shifts to the defendants to show that they would still take the same actions without the motivation of retaliation, and that this holding applies to the case at hand. Benisek contends that the appellants have met their two burdens: first, by showing that that the district drawers intended to dilute Republican votes by relying on voters' political affiliation and second, by showing that there was a concrete and practical injury, as the redistricting efforts succeeded in diluting Republican votes. Therefore, according to Benisek, the burden, rather than remaining with the appellants to show that the redistricting maps would not have been drawn how they were without retaliatory motivations, shifts to the state to show that the maps would have been drawn how they were, even without retaliatory motivations.

Lamone responds that the lower court correctly refused to apply *Mt. Healthy's* burden-shifting framework, as traditional First Amendment retaliation claims are not analogous to claims of partisan gerrymandering. Lamone contends that, in traditional first Amendment claims, the defendant's actions *are* the injury—for example, a refusal to renew a teacher's contract. Here, however, claims Lamone, the state's actions are only injurious if they alter the outcome of an election, which Lamone contends they did not. Therefore, Lamone contends, Benisek cannot meet the burden of making a prima facie showing of retaliatory harm.

Even if the burden-shifting framework is applied, however, Lamone alleges that the Court should depart from it, as it did in *Moore v. Hartman,* because the alleged causation between the action and injury more attenuated and complex than that found in typical retaliation claims, the identity of the injured parties and injuring parties is unclear, and there is a rebuttable presumption of validity in gerrymandering barring invidious discrimination based on racial criteria or "other immutable human attributes."

Discussion

Electoral Accountability And Incumbent Entrenchment

The American Civil Liberties Union (ACLU), in support of Benisek, argues that partisan gerrymandering entrenches incumbents at the statewide level and reduces citizens' ability to cast meaningful votes. Current and former state governors Hogan, Schwarzenegger, Davis, and Kasich, in support of Benisek, argue that if Maryland's redistricting decision is upheld, governors and legislatures will be tempted to pass redistricting maps favorable to their own reelections. Excessive gerrymandering, the governors argue, creates "safe districts" where elected officials need only protect against extreme political positions.

Freedom Partners Chamber of Commerce, in support of Lamone, counters that redistricting actually weakens legislative majorities and thus risks losing elections, which can be exacerbated by backlash over perceptions of gamesmanship. Freedom Partners argues that there are many examples in which attempts at entrenching incumbents through gerrymandering have resulted in lost elections. Thus, Freedom Partners asserts, citizens are in the best position to police gerrymandering by voting in candidates who will pass state laws regulating the redistricting process. Furthermore, Freedom Partners contends, lawsuits like Benisek's arise every 10 years, when redistricting occurs, leading to concerns regarding judicial economy.

Speech and Civic Engagement

Professor Michael Kang, in support of Benisek, argues that an electoral map based on partisanship burdens citizens' First Amendment rights, and thus cannot serve a valid government interest. Similarly, a group of bipartisan members of Congress contend that political gerrymandering violates the First Amendment by suppressing disapproving minority speech.

Several states, including Michigan and Arkansas, contend that creating a judicial rule for gerrymandering based on the First Amendment would bar consideration of politics in redistricting, when in reality, the two are inseparable. Moreover, the states assert, attempting to apply a First Amendment standard to redistricting would risk distorting First Amendment principles and could potentially allow for some level of viewpoint discrimination to be acceptable. ☉

Written by Axel Schamis and Katherine Van Bramer. Edited by Rachael E. Hancock.

National Institute of Family and Life Advocates v. Becerra (16-1140)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Mar. 20, 2018

Question as Framed for the Court by the Parties

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the states through the Fourteenth Amendment.

Facts

In 2015, the California Legislature passed the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act into law, declaring in the bill's text that "all California women, regardless of income, should have access to reproductive health services." According to the legislature, California women's access to information was limited by crisis pregnancy centers (CPCs), which held themselves out as reproductive health centers and disseminated misinformation or employed intimidation tactics in discouraging abortions. The act required all licensed clinics to provide clients with a notice reading, "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Additionally, the act required unlicensed medical clinics to provide clients with written notice of their unlicensed status.

National Institute of Family and Life Advocates and two other religiously-affiliated nonprofit corporations (collectively NIFLA) are opposed to abortion and provide neither abortions nor referrals for abortions. In October 2015, NIFLA sued California Attorney General Kamala Harris in federal district court, alleging that the Reproductive FACT Act violated its First Amendment rights to free speech and free exercise. NIFLA argued that, given its anti-abortion stance, requiring its clinics to disseminate information regarding state-sponsored abortion services violated its First Amendment rights. NIFLA thus requested that the district court issue a preliminary injunction that would prevent California from enforcing the act during the course of the litigation. The district court denied the motion for a preliminary injunction, determining that the act withstood various levels of judicial scrutiny.

A year later, in October 2016, NIFLA appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the decision of the district court, finding that the Act "does not discriminate based on viewpoint," and pointed out that lower levels of scrutiny had previously been applied to similar claims. Additionally, the Ninth Circuit concluded that the Act's licensed notice, which would compel NIFLA's clinicians to inform their clients of the state-sponsored abortion resources, survived the appropriate level of review. With respect to NIFLA's free-speech argument concerning the unlicensed notice, which would require some of its clinics to disclose their unlicensed status to patients, the Ninth Circuit held that the notice would survive any level of scrutiny. The court reasoned, "California has a compelling interest in informing pregnant women when they are using the … services of a facility that has not satisfied licensing standards set by the state." Finally, the Ninth Circuit subjected the act to rational basis review, a level of scrutiny that it withstood. The Ninth Circuit affirmed the judgement of the lower court.

On March 20, 2017, NIFLA petitioned the Supreme Court of the United States for a writ of certiorari, which the Court granted.

Analysis

Does the Act Regulate Commercial or Professional Speech?

NIFLA argues that the clinics to which the Act applies engage in fully protected, pro-life speech. In this vein, NIFLA denies that the clinics' speech should receive lesser scrutiny because it is either commercial or professional in nature. First, NIFLA points out that pro-life clinics are non-profit organizations that do not charge for the services they provide and exist to propagate their pro-life views, making them expressive rather than economic entities. Even if the clinics' speech could be characterized as commercial to some extent, NIFLA notes that the Court has declined to recognize speech as commercial in nature when it is "otherwise inextricably intertwined with fully protected speech." In terms of professional speech, NIFLA emphasizes that the Supreme Court has never recognized such a category for First Amendment purposes. Moreover, NIFLA challenges the Ninth Circuit's finding that the Act regulates speech within the professional relationship at all, observing that the act compels speech between the clinics and visitors before any real professional relationship commences. Finally, NIFLA refutes the notion that the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* established a lower standard of scrutiny for speech regulations in abortion cases, claiming that this decision simply acknowledged that the government may impose minimal informed disclosure requirements on medical professionals performing serious procedures. Because pro-life clinics do not offer abortions, NIFLA contends that *Casey* is irrelevant.

California replies that whether pro-life clinics charge for services is irrelevant under the Supreme Court's free speech precedents. According to California, in prior cases involving the free provision of legal services, the Court focused on whether the government improperly interfered with the plaintiffs' associational rights, not on whether the plaintiffs demanded payment. California further contends that the Supreme Court has implicitly recognized a category of professional speech based on the notion that the government can regulate the practice of licensed professions. California observes that licensed clinics claim to exercise professional judgments on behalf of their clients and should therefore be subject to regulation as part of the medical profession. California cites *Casey* in support of this proposition, claiming that it upheld abortion disclosure requirements "in light of [their] professional character and context." Moreover, California asserts that the Act's notice provisions for licensed clinics are less burdensome than the disclosures that the Court sustained in *Casey*. Finally, California contends that Act's notice provisions for unlicensed clinics fall squarely within a long line of cases permitting the government to ask that organizations clarify their professional status to the public.

Does the Act Compel Speech or Regulate It Based on Its Content?

NIFLA contends that the Act must be subjected to strict scrutiny because it compels

pro-life clinics to relay the government's pro-choice message in violation of the First Amendment's embedded guarantee of a right to remain silent, though it maintains the Act would fail to survive any level of scrutiny. NIFLA asserts that this is true even if the Court accepts that the Act requires purely factual disclosures given that "either form of compulsion burdens protected speech." Because the Act compels speech, NIFLA adds that it constitutes a "presumptively unconstitutional" content-based speech regulation under the Supreme Court's 2015 decision in *Reed v. Town of Gilbert*. NIFLA alleges that the Ninth Circuit erred in finding that historical "exceptions" to *Reed*'s strict scrutiny rule led a new professional speech doctrine because these exceptions cover only content-based regulations of unprotected speech and do not extend to regulations of protected speech like the Act. NIFLA stresses that the Act's specific dissemination requirements will crowd out the affected clinics' attempts to espouse their pro-life viewpoints because the notice confronts clients the moment they enter and must be printed in multiple languages with a large font. Thus, NIFLA concludes that the Act simultaneously suppresses and forces speech.

California repudiates the claim that the Act unconstitutionally suppresses speech, observing that pro-life clinics remain free to promote their views on family planning independent of the required notices. California further claims that NIFLA never raised its objections to the Act's multiple language and font conditions before the district court and that the record does not support these contentions. Turning to compelled speech, California asserts that the Act does not run afoul any precedent because the Act, rather than demanding that the clinics endorse any belief, asks them to post neutral facts regarding state-funded programs or their own licensing qualifications. California also questions whether the Act compels speech at all, suggesting instead that it enforces "expressive conduct," which is subject only to intermediate scrutiny under existing First Amendment jurisprudence. As for the contention that *Reed* mandates strict scrutiny for all content-based regulations of speech, California highlights how such an interpretation would threaten innumerable longstanding laws which the Supreme Court has never understood to be invalid under the First Amendment.

Does the Act Discriminate Based on Viewpoint?

NIFLA alleges that the Act is unconstitutional because it impermissibly discriminates based on viewpoint. NIFLA underscores two aspects of the statute to support this argument: its legislative history and practical effect. According to NIFLA, the Act's exemptions for clinics that are already enrolled in California's state-funded medical programs—and thus already provide abortions—combined with its failure to cover doctors in private practice and licensed general practice clinics indicates that it was intended to target only pro-life clinics. As NIFLA points out, the First Amendment bans such targeting if it is based on opinions that the government dislikes. NIFLA further asserts that this dislike is apparent from statements that the Act's legislative sponsor made noting the "unfortunate" number of crisis pregnancy centers in California. Ultimately, NIFLA urges the Supreme Court to adopt a rule that viewpoint discrimination against private speakers is *per se* unconstitutional.

California rejects the assertion that the Act discriminates against clinics based on their pro-life stance. In terms of the Act's applicability, California observes that it would not make sense to ask clinics that are enrolled in state-funded medical programs to disclose a list of services they already provide. Moreover, California asserts that NIFLA misreads the Act's legislative history—the bill's sponsor was expressing dismay over the alleged deceptive practices that crisis pregnancy centers often deploy, not over their opinion about abortion. Thus, California maintains that the Act should not be subjected to heightened scrutiny because it is not viewpoint-discriminatory.

Discussion

Are Free Speech Rights Secondary to Ensuring the Efficacy of Medical Providers?

Numerous organizations supporting NIFLA, including the Cato Institute and Massachusetts Citizens for Life, assert that the freedom of speech cannot allow the government to compel the speech it wants. The Cato Institute further points out that as a consequence of California's position, a state could require a doctor to urge a woman to vote for Obama to receive low-cost health insurance. Similarly, 23 Illinois pregnancy centers, also supporting NIFLA, suggest that California's position would allow a state to force anti-euthanasia centers to disseminate information about the availability of euthanasia services. The Institute of Justice, in turn, suggests that the threat to free speech is real: states have already used California's position to silence tour guides, fortunetellers, and advice columnists. For these reasons, Jews for Religious Liberty conclude that the freedom of speech cannot allow the FACT Act.

Writing in support of California, Compassion & Choice responds that NIFLA's interpretation of the relationship between First Amendment rights and state-mandated disclosures would undermine medical patients' rights to meaningful treatment options. In particular, Compassion & Choice explains, healthcare professionals who provide end-of-life care to patients are often obligated, under various state or federal laws, to inform patients of their rights to make end-of-life decisions. Compassion & Choice suggests that NIFLA equates mentioning a treatment option with endorsing that treatment, or alternatively, that a healthcare provider may refuse to provide information about treatment methods the provider does not approve of. Compassion & Choice says that, for example, a ruling for NIFLA may mean that a health care provider who morally objects to a do-not-resuscitate order would be legally shielded from refusing to honor the order. Accordingly, Compassion & Choice claims, a patient's lawful treatment choice could be undermined by her health care provider's personal viewpoint.

Does the FACT Act Harm or Benefit Women?

Writing in support of NIFLA, the Charlotte Lozier Institute argues that the FACT Act undermines the mission of the pregnancy centers and threatens their existence. The institute argues that this is an unacceptable result considering that the pregnancy centers serve over 2.3 million people and reduce community costs by over $100 million. The Illinois pregnancy centers echo this concern, maintaining that the Act potentially forecloses women's access to the CPCs' alternative pregnancy services. Moreover, numerous health organizations supporting NIFLA, including the American Association of Pro-Life Obstetricians and Gynecologists and the American College of Pediatrics, assert that the pregnancy centers provide a high quality of care and do not have an obligation to refer patients for abortions, except in emergency circumstances.

In support of California, social science researchers write that CPCs exist primarily

to discourage women from having abortions. The researchers point to studies suggesting that CPCs mislead clients regarding the nature of services available regarding reproductive medicine. For example, the researchers point out that CPCs warn clients of correlations between abortion and breast cancer, and abortion and infertility, both of which have been debunked by the scientific community. Finally, the researchers contend that California CPCs often fail to provide pregnant women with time-sensitive prenatal care, and that the Act provides a necessary corrective by informing women where and how they can access prenatal services. ⊙

Written by Madelaine Horn and Conley Wouters. Edited by Eugene Temchenko.

EXECUTIVE SUMMARIES

Sveen v. Melin (16-1432)

Court below: *U.S. Court of Appeals for the Eighth Circuit*
Oral argument: Mar. 19, 2018

The Supreme Court will decide whether the application of a revocation-upon-divorce statute—a state law that automatically revokes the beneficiary status of a policyholder's former spouse after a divorce—to a contract signed prior to the enactment of the statute violates the Contracts Clause. The Contracts Clause of the U.S. Constitution states that "[n]o state shall . . . pass any . . . law impairing the Obligation of Contracts." Petitioners Ashley and Antone Sveen argue that the application of Minnesota's revocation-upon-divorce statute to a life insurance policy that the decedent, Mark Sveen, purchased before the enactment of the statute is a valid exercise of the State's authority to regulate divorce. The Sveens claim that the Minnesota statute does not violate the Contracts Clause because it serves a legitimate public interest and does not substantially impair contractual obligations. Respondent Kaye Melin counters that the original purpose of the Contracts Clause was to prevent legislative interference with private contracts and that modern courts should interpret it as such. Melin argues that the retroactive application of the Minnesota statute would not survive under the original meaning of the Contracts Clause and that the application also violates the Contracts Clause as it is currently understood. This case will provide clarity regarding courts' disagreement as to the appropriate interpretation of the Contracts Clause and will affect the way in which estates are settled. Full text available at https://www.law.cornell.edu/supct/cert/16-1432. ⊙

Upper Skagit Indian Tribe v. Lundgren (17-387)

Court below: *Washington Supreme Court*
Oral argument: Mar. 21, 2018

The Supreme Court will decide whether there will be an exception to the rule of tribal sovereign immunity when a tribe is sued in an *in rem* proceeding. Petitioner Upper Skagit Indian Tribe argues that there should not be an exception for *in rem* proceedings because actions against a tribe's land challenge its sovereignty and cannot be distinguished from *in personam* actions in the way they affect a tribe's personal interests. The Upper Skagit Indian Tribe asserts that because the Court has never recognized this exception it is up to Congress instead to weigh the policy considerations at issue and create new legislation if necessary. Respondents Sharline and Ray Lundgren argue that the Upper Skagit Indian Tribe does not have sovereignty over the land at issue because it lost title to the land in 1855 and cannot regain sovereignty through a commercial purchase, which is how it got the land back in 2013. Furthermore, the Lundgrens argue that there should be an exception to tribal sovereign immunity for cases of *in rem* jurisdiction because of the state interest in regulating the conditions of title to property within its territory. This case will determine whether there will be a new class of cases in which a private individual can subject an Indian tribe to a lawsuit. Full text available at https://www.law.cornell.edu/supct/cert/17-387. ⊙

United States v. Sanchez-Gomez (17-312)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Mar. 26, 2018

This case will have important repercussions for two seemingly disconnected areas of the law: the methods available for defendants to challenge courtroom procedures and the delineation of the jurisdictional boundaries of courts of appeals. The issue in this case is whether the Ninth Circuit had constitutional and statutory authority to hear an interlocutory appeal challenging a policy that all defendants appearing in pretrial proceedings must wear physical restraints. On the one hand, the United States argues that the Ninth Circuit lacked statutory authority because the appeal fell into neither the collateral-order exception nor the ambit of the All Writs Act, and lacked constitutional authority because the claims were moot. On the other hand, Sanchez-Gomez et al. contend that the Ninth Circuit had statutory authority under either the collateral-order exception or the All Writs Act, and had constitutional authority because their claims fell into the "capable of repetition, yet evading review" exception to mootness. The case will either open or close a novel avenue for criminal litigants to challenge courtroom policies. Full text available at https://www.law.cornell.edu/supct/cert/17-312. ⊙

China Agritech Inc. v. Resh (17-432)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Mar. 26, 2018

In *American Pipe*, the Court held that the statute of limitations is tolled for an individual that files an action after a related class action fails. This case asks the Court to decide whether *American Pipe* tolling also applies to subsequent class actions. China Agritech Inc. argues that *American Pipe* tolling should not apply to subsequent class actions, because such an extension would be inequitable and would conflict with the rationale surrounding current law on class action procedures. Michael Resh counters that *American Pipe* tolling should apply to subsequent class actions because such an extension would be both equitable and consistent with current law and precedent. The Supreme Court's ruling could potentially relax the urgency and attentiveness required of class action members, or emphasize the importance of awareness and involvement individuals must display to share in the judgment won by the asserted members of their class. The decision could also implicate burdens on the courts, separation of powers issues, and practical considerations for class action plaintiffs and defendants. Full text available at https://www.law.cornell.edu/supct/cert/17-432. ⊙

Hughes v. United States (17-155)

Court below: *U.S. Court of Appeals for the Eleventh Circuit*

Oral argument: Mar. 27, 2018

The Supreme Court will determine whether Erik Hughes is eligible for a sentence reduction even though he pled guilty with a binding sentence agreement. Hughes pled guilty to drug and firearm charges and received a 180-month sentence, which, at the time, was just below the range recommended by the Sentencing Guidelines of between 188 and 235 months. Since his sentencing, the Sentencing Commission amended the guidelines, reducing the sentencing range for Hughes's crime to between 151 and 188 months. Hughes sought to modify his sentence under 15 U.S.C. § 3582(c)(2), which requires a sentence to be based on the guidelines. The Eleventh Circuit denied modification based on *Freeman v. United States*, in which the Supreme Court held that sentences from plea deals are not based on the Guidelines, but Hughes contends that the circuit court incorrectly applied the 4-1-4 decision. Hughes also argues that he is eligible for a modification because his sentence is based on the guidelines under a tort theory of proximate cause. The United States responds that the connection between the guidelines, the plea agreement, and the sentencing is too tenuous. At stake are an important question of what portions of a plurality decision should bind lower courts, potential inequities regarding parties who may and may not have their sentences reduced, and a shift in power in plea negotiations. Full text available at https://www.law.cornell.edu/supct/cert/17-115. ⊙

Koons v. United States (17-5716)

Court below: *U.S. Court of Appeals for the Eighth Circuit*

Oral argument: Mar. 27, 2018

Timothy Koons and his co-petitioners were convicted of federal drug charges but received sentences below the statutory minimum because they "substantially assist[ed]" the government. The United States Sentencing Commission subsequently retroactively reduced the sentencing guidelines ranges for the crimes for which they were sentenced. Koons sought a further sentence reduction under 18 U.S.C. § 3582(c)(2), which provides for a sentence reduction when the initial sentencing was based on a sentencing range that had been subsequently lowered by the Sentencing Commission. Koons argues he is eligible for the sentence reduction because the Sentencing Guidelines were initially consulted in determining his sentencing range. The United States counters that he is ineligible for the sentence reduction because his sentence was ultimately based on the statutorily prescribed minimum sentence. The decision in this case has implications for sentencing disparities, the influence of mandatory minimums, and the power of the Sentencing Commission. Full text available at https://www.law.cornell.edu/supct/cert/17-5716. ⊙