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.

Apple Inc. v. Pepper (17-204)

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

Question as Framed for the Court by the Parties

Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense.

Facts

In 2008, Apple launched their "App Store" marketplace, where iPhone users can purchase and download iPhone applications, or apps. Although Apple develops some of the applications sold in the App Store, most applications are developed by third-party developers. Every time a user purchases a third-party application, Apple keeps 30 percent of the purchase price while the remaining 70 percent goes to the app's developer. Since the App Store's launch, Apple works hard to preserve the "closed system" of the App Store by prohibiting developers from selling iPhone applications outside of the App Store. It also threatens to void iPhone warranties of users who download non-App Store applications.

On Dec. 29, 2011, Robert Pepper and three others brought a putative antitrust class action in the U.S. District Court for the Northern District of California on behalf of everyone in the United States who had purchased an iPhone app. The litigants alleged that Apple had monopolized the market for iPhone applications through the App Store's closed system policy. By controlling 100 percent of the distribution market for applications and taking 30 percent of the sales price, Pepper alleged that Apple overcharged customers and forced Pepper and other iPhone customers to pay more for their apps than they would have in a competitive market.

Apple moved to dismiss the case, relying on the Supreme Court case *Illinois Brick Co. v. Illinois*. In *Illinois Brick*, the Supreme Court held that only direct purchasers of goods or services have standing to bring suit, meaning that the plaintiff must be the first link in the defendant's distribution chain. Pepper's theory of antitrust injury alleges that Apple is imposing a 30 percent overcharge, which it adds to the developer's competitive price when it sells an app directly to consumers through the App Store. Apple construed its collection of the 30 percent as a fee imposed on developers rather than on consumers, and therefore only app developers had a claim to antitrust injury. The district court found that the 30 percent was a fee passed on to consumers by developers, and therefore Pepper was an indirect consumer without standing.

Pepper appealed the dismissal to the Ninth Circuit. After examining *Illinois Brick*, the Ninth Circuit reversed the district court and found that Pepper was a direct purchaser with standing and injury to sue. The Ninth Circuit remanded the case to proceed on the merits. Apple petitioned for a writ of certiorari, which the U.S. Supreme Court granted on June 18, 2018.

Legal Analysis

Are App Store Consumers Direct or Indirect Purchasers?

Apple argues that the Ninth Circuit's finding that Apple is a distributor of iPhone apps incorrectly relies on a formalistic analysis. The market reality here, according to Apple, is that the App Store is merely a two-sided platform that connects and provides a service to both app developers and iPhone owners. They assert that their 30 percent commission is merely a charge for providing a distribution service that is placed solely on developers and point to how they are not in charge of the price of apps. Rather, Apple states, they only take their commission from whatever price the *developer* sets. Therefore, they argue, this means they are merely an agent for developers and are not responsible for the sales made to consumers. This distinction, they say, demonstrates that the app developers—not consumers like Pepper—are the direct purchasers of their distribution services.

Pepper, on the other hand, argues that the Ninth Circuit correctly found that app consumers are direct purchasers from Apple. Pepper maintains that Apple not only delivers apps directly to consumers, it also influences the price of the apps and controls the terms that regulate the sale of the apps. Pepper asserts that Apple limits the pricing of apps to $1 increments, which greatly constrains the app developer's flexibility to set prices. Moreover, Pepper contends, Apple asserts strong control over the sale of apps in its store because app developers must accept terms and conditions that shift control to Apple. Accordingly, Pepper states, app purchasers are the first to suffer harm from Apple's alleged monopoly and are, therefore, the direct consumers of Apple's services.

Pass-Through Theory of Harm

Apple argues that the Court's holding in *Illinois Brick* only allows direct consumers to institute antitrust litigation against an alleged monopolist. Thus, Apple asks the Court to read *Illinois Brick* and its predecessors to prohibit a pass-through theory of harm—a theory of harm that tracks how an overcharge is passed through bodies involved in the transaction—and limit antitrust standing to direct purchasers only. Apple claims that Pepper's suit relies on a pass-through theory of harm, as they are indirect purchasers. If Pepper is allowed to bring a claim despite his indirect purchaser status, Apple asserts, Apple will be illegitimately subjected to duplicative damage claims from both direct purchasers—the application developers who allegedly experienced overcharges—and indirect purchasers, who had the overcharges passed on to them.

Pepper counters that his theory of harm does not depend on whether the overcharge price was passed on on Apple consumers. Rather, Pepper argues that the Apple consumers are actually the *first* consumers to bear the cost of Apple's alleged monopoly because the developers do not actually sell their applications to Apple. Moreover, Pepper asserts that the Ninth Circuit's decision does not actually allow for duplicative damage. They maintain that, if the app developers had a damage claim, it would only be a claim on the same 30 percent commission that the app customers would claim. Therefore, Pepper maintains, both the app purchaser and app developers would have to share the 30 percent commission fee as damages. Additionally, Pepper states, the app developers likely would not have a basis to bring an antitrust suit against Apple because knowingly consenting to antitrust conduct, as the app developers did here, bars them from bringing an antitrust suit.

Discussion

Duplicative Damages and Excessive Litigation?

The Computer & Communications Industry Association (CCIA) argues that because app developers clearly have standing to sue, allowing purchasers to sue would expose Apple and companies in similar positions to duplicative damages. CCIA contends that if the Supreme Court sides with Pepper, the Court would effectively transform the App Store from a platform that "foster[s] an efficient market for buyers and sellers to interact" into an antitrust liability that would outweigh its potential benefits. BSA, the Software Alliance, asserts that this threat of excessive lawsuits would deter companies from providing platforms like the App Store, threatening the viability of many innovations in the information sector. BSA also points out that current antitrust laws allow for plaintiffs to recover three times the amount of their damages. According to BSA, permitting both developers and purchasers to sue Apple would expose the company to sextupled damages—allowing for outrageous recoveries that far exceed what Congress mandated.

The American Antitrust Institute argues that there cannot be any duplicative damages in Pepper's antitrust suit against Apple because iPhone customers and app developers would be suing for different things—while Pepper would sue for Apple's excessive markup on app prices, app developers would sue for how much more profit they would earn if not for Apple's monopolization of the market. Thirty-one states also contend that Apple's fears of duplicative recovery are unwarranted because most state antitrust laws already allow indirect purchasers to sue for the same conduct as direct purchasers, yet there has not been even a single instance of duplicative recovery since the Supreme Court decided *Illinois Brick*. The institute adds that developers are almost certain not to sue anyway out of fear that Apple would retaliate and remove their access to the App Store.

Department of Justice's Antitrust Enforcement Versus Private Enforcement

The antitrust scholars argue that the Department of Justice's Antitrust Division cannot handle all of the antitrust work on its own and that private enforcement of antitrust laws—as Pepper attempts here—is actually necessary to deter monopolies and monopolistic practices. Private parties, the scholars maintain, are more likely than the government to have information on antitrust violations, so any constraint on their abilities to bring such lawsuits would go against the goal of a competitive marketplace. In agreement, the institute contends that when private citizens bring antitrust claims on their own, they help offset the Antitrust Division's limited resources for doing so.

The R Street Institute counters by arguing that the DOJ is perfectly capable of handling antitrust violations. R Street claims that the plaintiffs' complaints would have been answered if they had simply gone to the DOJ with their claims. R Street asserts that a case from 2013 shows that the DOJ can successfully bring antitrust claims against Apple and win millions of dollars for purchasers like the plaintiffs here. Were the DOJ ever to need any help, R Street contends, the Federal Trade Commission and state attorneys general could provide it. ⊙

Written by Basem Baseda and Isaac Idicula. Edited by Connor O'Neill.

Timbs v. Indiana (17-1091)

Court below: *Indiana Supreme Court*
Oral argument: Nov. 28, 2018

Question as Framed for the Court by the Parties

Whether the Eighth Amendment's excessive fines clause is incorporated against the states under the Fourteenth Amendment.

Facts

In January 2013, Tyson Timbs purchased a Land Rover with $42,058.30 in life-insurance proceeds after his father's death. Timbs then regularly used the Land Rover to buy and transport heroin in the state of Indiana. The police learned of Timbs' drug trafficking, however, and set up three controlled heroin buys. During the first buy, the police bought two grams of heroin for $225; during the second buy, they bought two more grams of heroin for $160. The third buy was not completed because Timbs was arrested during a traffic stop on his way to the transaction.

In June 2013, Indiana charged Timbs with two counts of dealing in a controlled substance and one count of conspiracy to commit theft. Timbs pled guilty to one count of dealing in a controlled substance and to the count of conspiracy to commit theft, in exchange for the dismissal of the second count of dealing. The trial court sentenced Timbs to six years—one year in the community corrections and five years on probation—and assessed against him police costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50, and a fee of $400 for undergoing a drug-and-alcohol assessment with the probation department.

A few months later, Indiana sought the forfeiture of Timbs' Land Rover. The trial court held an evidentiary hearing and denied the forfeiture, finding that it would violate the Eighth Amendment's Excessive Fines Clause because it would be "grossly disproportionate to the gravity of [Timbs'] offense." In support of its finding, the court noted that the vehicle was worth approximately four times the maximum monetary fine for Timbs' felony.

The Indiana Court of Appeals affirmed this decision, concluding that, although the U.S. Supreme Court has not yet held that the Excessive Fines Clause applies to the states, the clause does apply in Indiana under state precedent. The court found that, because the record showed only that Timbs had sold heroin twice as a result of controlled buys, forfeiture of the Land Rover in addition to the financial burdens imposed on him when he pleaded guilty would be grossly disproportionate to the gravity of his offense.

However, the Indiana Supreme Court reversed the Court of Appeals' opinion, concluding that as the U.S. Supreme Court has never enforced the Excessive Fines Clause against the states, they should decline to find or assume incorporation.

Legal Analysis

Applying the Excessive Fines Clause Against the States Through the Due Process Clause

Tyson Timbs contends that the Excessive Fines Clause, which prohibits the government from imposing excessive fines on criminal offenders, applies to the states through the Fourteenth Amendment's Due Process Clause. According to Timbs, the Excessive Fines Clause applies against the states because it is fundamental and "deeply rooted in the nation's history and tradition." Timbs argues that the freedom from excessive fines enshrined in the clause has been closely linked to securing life, liberty, and property in both American jurisprudence and other countries' legal systems that predated it. Timbs asserts that concerns about excessive fines date back to as early as the Magna Carta (1215), which imposed a check on the king's power to fine subjects. Timbs notes that 400 years later, English kings used fines to attack critics and outsourced fining power to allies of the crown. Timbs states that Parliament responded to these tactics by devoting a portion of the English Bill of Rights (1688) to abusive fines. Timbs argues that England's history with abusive fines also shaped the American colonists' view of freedom from excessive fines as a fundamental right. Timbs contends that the historical mistrust of the government's power to punish prompted multiple states to include protections against excessive fines in their constitutions and inspired ratification of the Eighth Amendment in 1791. Timbs adds that the Excessive Fines Clause in particular was designed to limit the sovereign's power to collect fines for improper ends.

Additionally, Timbs contends that the ratification of the Fourteenth Amendment in 1866 reaffirmed the significance of freedom from excessive fines in America's legal system. Timbs points out that fines and forfeitures were a prominent feature of the "Black Codes," which were used to subjugate African-Americans in Southern states; the majority of these states also allowed the hiring-out of individuals who were unable to pay their fines. Timbs states that members of Congress viewed such economic sanctions as a serious threat to personal liberty when they were debating the passage of the Fourteenth Amendment. Timbs further notes that all but two states had an Excessive Fines Clause in their constitutions by the time the Fourteenth Amendment was ratified. Timbs argues that the history of the Eighth and Fourteenth Amendments demonstrates that freedom from excessive fines is fundamental to the American legal system.

Timbs also argues that freedom from excessive fines remains fundamental today because excessive fines continue to threaten personal liberty and are sometimes abused by the government. Moreover, Timbs contends that fines are uniquely prone to abuse since, unlike other methods of punishment, they raise revenue and the government often uses them unfairly to that end. Timbs also notes that Indiana is the only state that allows state prosecutors to outsource civil forfeiture cases to private lawyers, who in turn collect a percentage of the revenue from the forfeited property. Timbs says that this system amplifies the risk of abuse by incentivizing private lawyers to perpetuate the system of civil forfeitures.

The state of Indiana counters that the issue is not whether the Excessive Fines Clause is incorporated against the states through the Fourteenth Amendment as a general matter, but rather whether the clause requires that a civil forfeiture be proportional to the conduct authorizing it. Accordingly, Indiana contends that the Court should look at the history of in rem forfeitures specifically to determine whether it is a fundamental right because that is the precise right being asserted. Indiana therefore argues that Timbs errs by presenting almost exclusively historical evidence relating to criminal fines rather than in rem forfeitures. Indiana continues that protection from disproportionate in rem forfeitures through the Excessive Fines Clause is not fundamental or deeply rooted in the American tradition. Indiana notes that no court even suggested a proportionality requirement for in rem forfeitures until the late 20th century, despite other constitutional challenges brought against in rem forfeitures and the invocation of the proportionality requirement against in personam fines during the same period.

Indiana continues that no court held that an in rem forfeiture was subject to a proportionality requirement by a federal or state Excessive Fines Clause until the late 20th century; the five state courts to consider the argument ultimately dismissed it. Indiana argues that the dearth of proportionality challenges to in rem proceedings is surprising given that litigants had many opportunities to raise such challenges and consequently demonstrates a widespread understanding that the Excessive Fines Clause does not impose a proportionality requirement on in rem forfeitures. Indiana asserts that the absence of such challenges weighs heavily against a finding that the proportionality requirement is fundamental because there were no significant political concerns pressuring judges, lawmakers, or litigants to ignore the right. According to Indiana, the proportionality protection was rarely invoked because it was not understood as a fundamental right. Indiana maintains that disproportionate in rem forfeitures do not violate Due Process, and therefore a protection against disproportionate in rem forfeitures is not applicable to the states through the Due Process Clause of the Fourteenth Amendment.

However, Indiana also contends that, even if the Court decides to evaluate whether the Excessive Fines Clause as a whole applies to the states, the Court should still take into account the history of all of the Clause's protections, including the protection against disproportionate in rem forfeitures. Indiana notes that the Clause does not apply against the states merely because its restriction against disproportionate criminal penalties is fundamental. Instead, Indiana says that there is no precedent for applying a clause from the Bill of Rights against the states unless all of the protections in that clause have a fundamental grounding in American history and jurisprudence. Accordingly, Indiana claims that the Excessive Fines Clause does not apply against the states because in rem forfeitures have been common throughout American history, and courts have not recognized a proportionality requirement for state in rem forfeitures until the end of the 20th century.

Applying the Excessive Fines Clause Against the States Through the Privileges and Immunities Clause

Timbs argues that the Fourteenth Amendment's Privileges and Immunities Clause, which protects citizens' fundamental rights, provides an alternative framework for applying the Excessive Fines Clause against the states. Timbs notes that the Privileges and Immunities Clause was understood at the time of the Fourteenth Amendment's ratification to apply fundamental rights enumerated in the Constitution against the states. Timbs contends that freedom from excessive fines fits within the Privileges and Immunities Clause because it is enumerated in the Constitution and was regarded as fundamental long before the Constitution's ratification.

In contrast, Indiana maintains that the Court should not consider whether the Excessive Fines Clause applies through the Fourteenth Amendment's Privileges and Immunities Clause because the Court has long used the Due Process framework to decide whether certain rights and protections were incorporated against the states. Indiana notes that the analysis under the Privileges and Immunities Clause would largely be the same—namely, analyzing the historical evidence to determine whether the right at issue is fundamental and deeply rooted in the American legal system. Indiana also points out that changing the doctrinal basis of applying constitutional rights against the states would create unpredictable consequences and confuse lower courts and state and local governments. For example, Indiana emphasizes that the Privileges and Immunities Clause protects "citizens of the United States," while the Due Process Clause applies to "any person." Indiana contends that changing the doctrinal basis of incorporation from the Due Process Clause to the Privileges and Immunities Clause would lead people to wonder which constitutional rights apply only to citizens.

Discussion

Balancing Economic Interests and Individual Rights

Judicial Watch Inc. and Allied Educational Foundation argue in support of Timbs that, unless the Excessive Fines Clause is applied to the states, state and local governments will improperly use forfeiture laws to raise revenue without raising taxes. They assert that by using forfeiture laws liberally in an attempt to fill state coffers, the government risks punishing innocent people—particularly where forfeitures are applied to individuals who have not been criminally convicted. The Pacific Legal Foundation, in support of Timbs, similarly maintains that if the Excessive Fines Clause is not incorporated against the states, state and local governments will push the boundaries of forfeiture law and take individuals' property as a forfeiture even where it is neither an instrumentality nor a product of criminal activity. The American Civil Liberties Union (ACLU) and other non-profit organizations further claim that state and local governments' increased reliance on fines, fees, and forfeitures as a revenue source disparately affects society's most vulnerable populations—impoverished, low-income individuals—by imposing upon them an unmanageable financial burden. When poor Americans are unable to pay excessive fines and fees, the ACLU contends, they fall deeper into debt and face harsh consequences such as driver's license suspension, denial of occupational licenses, and even incarceration.

Indiana counters that in rem forfeitures of property are different than in personam fines because forfeitures are not penalties. In fact, Indiana contends, courts have routinely imposed forfeitures against innocent property owners who had no involvement or even awareness of the criminal activity justifying the forfeiture. Indiana also argues that property forfeiture does not deprive individuals of their liberty or cause people to be incarcerated because they cannot pay the fines assessed against them. Moreover, the state emphasizes that property forfeitures differ from fines because forfeitures, by definition, target property already seized and do not allow the government to demand additional payments from individuals. Thus, Indiana reasons that the worst possible consequence of a property forfeiture proceeding is simply that the property owner loses his property. This loss of property, Indiana maintains, is not problematic because the Excessive Fines Clause is centrally concerned with preventing judges from incarcerating individuals because of unpayable discretionary fines.

Impact on the Justice System

Nonprofit organizations dedicated to protecting individual liberties, in support of Timbs, argue that allowing state and local governments to seize assets—and to profit from that seizure—creates a perverse incentive for the government to "err on the side of seizure." This incentive structure, they maintain, causes police officers to enforce the law in a way that is most likely to yield a profit for the government, even if doing so is against the community's best interest. The ACLU similarly asserts that unchecked fines, fees, and forfeitures directly impede the community's interests in reducing criminal recidivism and in promoting public safety.

The National Association of Counties and similar organization (NACo), in support of Indiana, argue that property forfeiture advances legitimate governmental objectives and the community's interest in deterring illegal activity. First, the NACo asserts that by seizing property that was used in connection with illegal activity, the government can prevent other illicit use of that particular property. Second, the NACo contends that through property forfeiture, the government renders future illegal behavior unprofitable because of the associated economic penalty. NACo further argues that it is in the community's interest for the government to impose substantial financial penalties on individuals who engage in illegal conduct, such as drug trafficking, that poses a significant threat to public health and welfare. This is particularly in the community's interest, NACo maintains, because many states and localities lack the financial resources to imprison individuals who engage in this type of criminal behavior. ⦿

Written by Julia Hollreiser and Benjamin Rodd. Edited by Hillary Rich.

Nieves v. Bartlett (17-1174)

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

The Supreme Court will determine whether probable cause can function as a defense for police officers facing a retaliatory arrest claim under 42 U.S.C. § 1983. Petitioners Luis Nieves and Bryce Weight (Nieves) contend that Supreme Court precedent requires plaintiffs to plead and prove the absence of probable cause in order to bring a retaliatory arrest claim. Additionally, Nieves argues that a probable cause requirement conforms with common law authority and accords with the First Amendment's purposes and values. Respondent Russell Bartlett counters that Supreme Court precedent and the common law actually do not support a probable cause requirement for retaliatory arrest claims. Further, Bartlett asserts that the text of 42 U.S.C. § 1983 itself cannot support a probable cause requirement. From a policy perspective, this case is important because it asks the Court to balance a plaintiff's First Amendment right to free speech with the ability of police officers to make arrests without fear of a lawsuit. Full text available at https://www.law.cornell.edu/supct/cert/17-1174. ⊙

Nutraceutical Corp. v. Lambert (17-1094)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral Argument: Nov. 27, 2018

This case asks the Supreme Court to consider whether courts may apply equitable exceptions to Federal Rule of Civil Procedure 23(f)'s 14-day deadline to petition for permission to appeal. After the district court decertified the consumer class suing Nutraceutical and denied Lambert's motion for reconsideration, Lambert filed a petition for permission to appeal under Rule 23(f) in June 2015. The Ninth Circuit held that the petition was proper because equitable exceptions applied. Nutraceutical now argues that the petition was not timely because it was filed well beyond the 14-day deadline and that equitable exceptions do not apply to Rule 23(f). Lambert, on the other hand, contends that the petition was filed in a timely manner and that equitable exceptions make the petition proper even if the filing was not timely. This case will have implications for protecting unsophisticated litigants in class action suits as well as for judicial economy and resources. Full text available at https://www.law.cornell.edu/supct/cert/17-1094. ⊙

Carpenter v. Murphy (17-1107)

Court below: *U.S. Court of Appeals for the Tenth Circuit*
Oral Argument: Nov. 27, 2018

After Patrick Murphy was convicted of a murder that occurred on disputed tribal land, he asks the Supreme Court to determine if the 1866 territorial boundaries of the Creek Nation tribal land are still in effect today. If the boundaries are in effect, Murphy asserts that his murder conviction must be overturned because it was committed within the Creek Nation boundaries, meaning the Oklahoma state court that convicted him did not have jurisdiction to hear the case. Oklahoma State Penitentiary Interim Warden Mark Carpenter counters that the Creek Nation reservation has been disestablished and is no longer in effect, arguing that Oklahoma state courts indeed had jurisdiction to prosecute Murphy for the murder. From a policy perspective, Carpenter contends that giving effect to the territorial boundaries would create taxation and regulatory problems, while Murphy counters that granting territorial effect would lead to mutually profitable tax agreements and other community benefits such as increased job opportunities and more effective law enforcement. Full text available at https://www.law.cornell.edu/supct/cert/17-1107. ⊙

Dawson v. Steager (17-419)

Court below: *West Virginia Supreme Court of Appeals*
Oral Argument: Dec. 3, 2018

This case asks the Supreme Court to examine § 11-21-12(c)(6) of the West Virginia Code, which grants an income tax exemption for the retirement compensation of state retirees, but not of federal retirees. Petitioner James Dawson contends that § 12(c)(6) violates federal law 4 U.S.C. § 111, which prohibits discriminatory tax treatment against federal employees by state governments. Under the Supreme Court's *Davis* test, according to Dawson, a state law violates § 111 by imposing higher taxes on income from the federal government than income from the state government when there are no significant differences between the two to justify the heavier tax burden placed on federal income. Respondent Dale Steager, the state tax commissioner of West Virginia, counters that § 12(c)(6) does not discriminate against federal retirees because § 12(c)(6) applies in very narrow cases. Steager further argues that West Virginia treats federal employees the same as state employees, and Dawson is not similarly situated to state retirees that are eligible for this tax exemption. The outcome of this case will affect state-level taxing policy and tax exemptions afforded only to state employees. Full text available at https://www.law.cornell.edu/supct/cert/17-419. ⊙

Lorenzo v. SEC (17-1077)

Court below: *U.S. Court of Appeals for the District of Columbia Circuit*
Oral Argument: Dec. 3, 2018

This case asks the Supreme Court to determine the scope of *Janus Capital Group Inc. v. First Derivative Traders*, as well as the extent of liability for securities professionals who play a supportive role in fraudulent-scheme claims. Francis Lorenzo contends that the Supreme Court should apply a narrow definition of primary liability to Rule 10b-5 securities actions. Lorenzo argues that he is not culpable for securities fraud under Rules 10b-5(a) and (c) because, in forwarding emails that were written by his superior, he did nothing more than provide "substantial assistance" to those who defrauded investors with misleading financial statements. The Securities and Exchange Commission (SEC) counters that Lorenzo played a primary role in advancing the fraud because he signed the emails as the director of investment banking, and he told the potential investors to contact him for information about the financial health of his brokerage firm's clients. This case will determine the ease with which the SEC can bring claims against securities professionals accused of fraud. Full text available at https://www.law.cornell.edu/supct/cert/17-1077. ⊙

Biestek v. Berryhill (17-1184)

Court below: *U.S. Court of Appeals for the Sixth*
Oral Argument: Dec. 4, 2018

This case asks the Supreme Court to decide whether a vocational expert's testimony can constitute substantial evidence of job availability when a Social Security disability claimant requests but is not supplied with the data underlying that expert's testimony. Petitioner Michael J. Biestek contends that the substantial evidence standard requires vocational experts to produce the underlying data upon an applicant's request; otherwise, the expert's testimony is unverifiable and allows the expert's word to be unlawfully substituted for actual substantial evidence. Respondent Nancy A. Berryhill, the acting Commissioner of Social Security, counters that the substantial evidence standard focuses on the contents of the hearing record, not the procedure used to make that record. Additionally, Berryhill responds that plaintiffs already effectively undercut a vocational expert's testimony on cross-examination and thus do not need to review the expert's data. The outcome of this case will have large implications on litigation strategy in Social Security disability claims, for both claimants and the government. Full text available at https://www.law.cornell.edu/supct/cert/17-1184. ⊙

Helsinn Healthcare v. Teva Pharmaceuticals (17-1229)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral Argument: Dec. 4, 2018

Helsinn Healthcare S.A. sought and received four patents, beginning in 2003, for a drug developed pursuant to a licensing agreement with another pharmaceutical company. Though the drug's formula remained confidential, the news of the deal was made public. In 2011, Teva Pharmaceuticals USA Inc. applied to the Food and Drug Administration for approval of a generic version of the drug, and—within that application—certified that Helsinn's patents were invalid. Helsinn sued for patent infringement, arguing that the on-sale bar provision of the America Invents Act (AIA) does not apply to licensing agreements like the one Helsinn entered because the confidentiality agreement in place meant that the invention was not publicly available. Helsinn then argues that adopting a different interpretation would conflict with the AIA's two goals of aligning U.S. patent law with international standards and incentivizing prompt filing under the first-to-file standard. On the other hand, Teva asserts that the AIA's on-sale bar provision does apply based on the plain meaning of "on sale" as illustrated by 200 years' worth of statutory interpretation. Teva additionally counters that Helsinn's interpretation would invite the secret-commercialization tactics that extend a company's monopoly over inventions and that the AIA sought to eliminate. The Supreme Court's decision has vast implications for patent-holders in the United States, may chill biotechnological innovation, and may adversely affect the public by extending monopolies over certain drugs and thus undermine the development of competition in the biotechnical market. Full text available at https://www.law.cornell.edu/supct/cert/17-1229. ⊙

Gamble v. United States (17-646)

Court below: *U.S. Court of Appeals for the Eleventh Circuit*
Oral Argument: Nov. 6, 2018

The Supreme Court will rule on the separate-sovereigns doctrine, an exception to the Double Jeopardy Clause that permits both state and federal governments to prosecute an individual for offenses arising from the same conduct. Terance Gamble was prosecuted under both state and federal law for possession of a firearm after being convicted of a violent crime. Gamble argues that an exception for successive prosecutions by separate sovereigns is incompatible with the text of the clause and the framers' intent, and that the Court should overrule contrary precedent. The government counters that the text of the Constitution, historical context, and a long line of affirmative precedent support preservation of the exception. The Court's decision in this case will have implications for double jeopardy protections, state and federal criminal law, and competition in criminal prosecutions between sovereigns. Full text available at https://www.law.cornell.edu/supct/cert/17-646. ⊙

Franchise Tax Board of California v. Hyatt (17-1299)

Court below: *Supreme Court of Nevada*
Oral argument: Jan. 9, 2019

Question as Framed for the Court by the Parties

Whether *Nevada v. Hall*, which permits a sovereign state to be hailed into another state's courts without its consent, should be overruled.

Facts

Respondent Gilbert P. Hyatt filed suit against Petitioner Franchise Tax Board of California in 1998, alleging that it had committed certain intentional torts while auditing Hyatt's 1991 and 1992 state tax returns. In 1993, Franchise Tax Board opened an audit into Hyatt's finances in 1991 after discovering discrepancies related to his taxable income from patent licensing payments and moving expenses.

Based on its investigation, Franchise Tax Board determined at the conclusion of the audit that Hyatt had staged his move from California to Nevada in order to avoid state income tax liability and that the sale of his house in California was also a sham. As a result, Franchise Tax Board concluded that Hyatt owed $4.5 million in delinquent taxes, interest, and penalties to California.

These findings led to Franchise Tax Board filing a second audit for Hyatt's 1992 taxes, which ultimately resulted in a finding that Hyatt owed California over $6 million in taxes for that year. Hyatt formally challenged the audits through Franchise Tax Board's internal dispute process. This process lasted over 11 years, and Hyatt filed suit against Franchise Tax Board in both California and Nevada after Franchise Tax Board upheld the validity of the audits.

Franchise Tax Board initially argued that it was owed the same total immunity from suit in Nevada that it would be given if it were sued in California. The Nevada trial court ruled that Franchise Tax Board was not owed total immunity on this basis. Franchise Tax Board then petitioned the Nevada Supreme Court for a writ of mandamus.

The Nevada Supreme Court rejected Franchise Tax Board's argument, holding that it was only entitled to the partial immunity that a Nevada agency would be entitled to. Franchise Tax Board then petitioned the U.S. Supreme Court for certiorari and the Court granted certiorari. The U.S. Supreme Court affirmed the Nevada Supreme Court and the case was remanded for trial.

After trial in Nevada state court, the jury awarded Hyatt $139 million for his tort claims and $250 million in putative damages. Franchise Tax Board appealed to the Supreme Court of Nevada, which held that Franchise Tax Board was not entitled to the cap on damages that a Nevada agency would be entitled to under similar circumstances. Subsequently, Franchise Tax Board petitioned the Supreme Court for certiorari. The Court first affirmed the Supreme Court of Nevada's jurisdiction over Franchise Tax Board, despite the fact that Franchise Tax Board was a California state agency. But the Court later held that refusing to afford Franchise Tax Board the same damages cap that a Nevada agency would be entitled to violated the Constitution's Full Faith and Credit Clause. The Court then remanded the case back to the Supreme Court of Nevada for further consideration in light of the Court's decision.

The Supreme Court of Nevada reissued its original opinion, amending the damages portion to afford Franchise Tax Board the damages cap in accordance with the U.S. Supreme Court's ruling. Franchise Tax Board again filed a petition for certiorari with the U.S. Supreme Court, asking it to overrule its prior decision in *Nevada v. Hall*. The U.S. Supreme Court granted certiorari on June 28, 2018.

Legal Analysis

State Sovereign Immunity From Suit in the Courts of Their Sister States

Franchise Tax Board contends that *Hall* is inconsistent with sovereign immunity as understood when the framers ratified the Constitution and the Court's subsequent sovereign immunity jurisprudence. Although the Constitution does not explicitly provide for state sovereign immunity in this context, the Board argues that it is possible to infer such principles from the historical background surrounding the Constitution's ratification—as the Court has done in sovereign immunity cases post-*Hall*. Franchise Tax Board further asserts that *Hall* addressed the wrong question—that is, the question is not whether the Constitution explicitly provides for interstate sovereign immunity, but whether the Constitution changed or eliminated the such immunity as it existed prior to the ratification of the Constitution. Based on the historical record, Franchise Tax Board maintains that the Constitution neither changed nor eliminated the such immunity.

First, Franchise Tax Board contends that states enjoyed immunity in each other's courts before the framers ratified the Constitution. Indeed, Franchise Tax Board argues that states were treated like foreign sovereigns and thus immune from suit in each other's courts before the Constitution was ratified, as demonstrated by case law from that time period. Second, Franchise Tax Board asserts that there was consensus at the Constitutional Convention—as evidenced by statements made by central historical figures—that states would retain their sovereign immunity under the Constitution and would remain immune from suit in their sister states' courts without their consent. While much of the debate centered on whether the states would be able amenable before federal courts, Franchise Tax Board contends that the debate implicitly assumed that federal courts were the only remaining forum that states might be subject to suit in. Third, Franchise Tax Board argues that the history surrounding the Eleventh Amendment supports its assertion that there was a consensus that states enjoyed interstate sovereignty. Indeed, as Franchise Tax Board explains, the Eleventh Amendment was adopted in reaction to the Court's *Chisholm* decision, which held that states were amenable before federal courts by other states' citizens. The Eleventh Amendment therefore proves that there was a common understanding that individuals could not sue states without their consent.

Hyatt counters that *Hall* should not be overruled because it is consistent with the Constitution-era understanding that sovereigns could be sued in another sovereign's court. Since *Hall* was decided, Hyatt argues that there has been no new historical evidence suggesting that is understanding is incorrect. In fact, according to Hyatt, *Hall* was grounded in a "careful historical analysis." Hyatt contends that there is a key difference between a state's immunity in its own courts and its immunity in another sovereign's courts. Specifically, Hyatt asserts that sovereign immunity is not supposed to protect a sovereign in another sovereign's courts—rather, whether a sovereign receives such immunity is in the discretion of the other sovereign. Hyatt posits that the Court established this principle in *The Schooner Exchange v. McFaddon*—namely, that a sovereign has no obligation to grant immunity to another sovereign in its courts.

Additionally, Hyatt contends that *Hall* is premised on three historic basic principles which still stand. First, Hyatt argues, states were independent sovereigns before the Union was created and they enjoyed immunity as foreign sovereigns in each other's courts. Second, Hyatt maintains that at that time, sovereigns only enjoyed immunity in a foreign state's court if that state voluntarily granted such immunity. Third, according to Hyatt, neither the Articles of Confederation nor the Constitution changed the nature of sovereign immunity among the ratifying states. Hyatt further asserts that the Tenth Amendment allows states to act unless the Constitution prevents them from doing so—that is, because the Constitution does not explicitly prohibit states from allowing other states to be sued in their courts, courts can hear such cases. In fact, Hyatt continues, the Court's post-*Hall* cases discussed the federal courts' jurisdiction and the states' amenability before federal courts. Furthermore, Hyatt argues, the Eleventh Amendment remains silent on the amenability of states before their sister states' courts, while it expressly limits federal courts' jurisdictions. Finally, Hyatt notes that nowhere in the text of the Constitution is there a limit on a states' ability to allow their citizens to bring suit against another state in its courts when wronged by the sister state.

Discussion

State Interests in Sovereignty and in Providing a Forum for Suit

The state of Indiana and 43 other states, in support of Franchise Tax Board, argue that *Hall's* central holding—allowing states to be sued in the courts of other states—offends the status of states as sovereign entities. The states reason that because the Eleventh Amendment prevents suits against states in federal court against their will, allowing states to be sued in the courts of another state would be an insult to state sovereignty. Therefore, the states posit, *Hall* cannot have been correctly decided. Further, the states assert that federal courts were specifically designed to provide a neutral forum to hear matters where state courts might have a bias favoring their own citizens over citizens of other states—it makes no sense to not allow such cases to be heard in a neutral federal court but allow them to be heard in a biased state court.

Additionally, the states also contend that not overruling *Hall* allows states to dictate how other states allocate resources in furtherance of their policy goals because lawsuits awarding damages reduce the amount of resources available to allot to those policy goals. The states insist that this puts a strain on the democratic process because the allocation of resources by a state government, in accordance with the will of its citizens, is central to the political process. And by awarding damages against a state-defendant, according to the states, another state's court would force the state-defendant to allocate resources away from a policy goal, contravening the will of the state-defendant's citizens. Suits regarding a state's taxing power are uniquely important, the states argue, because the taxing power is central to sovereignty, as evidenced by federal legislation limiting federal courts jurisdiction over state taxing power.

Hyatt counters that while states have an interest in not being sued in the courts of other states, they also have a vested interest in both protecting their own citizens and providing them a forum for suit of other states—especially if no other suitable forum exists. Hyatt maintains that the Supreme Court has repeatedly recognized that states do have a legitimate interest in providing remedies for their citizens who have been wronged and that Hall recognized this state interest in permitting suit against one state in another state's courts. Further, Hyatt argues that Franchise Tax Board and its amici focus on the insult to a state's sovereignty in being sued in another state's courts, but they fail to recognize the insult to a state's sovereignty in being unable to protect its citizens from intentional torts—including the ones that occurred in this case.

Countering the states' concern that *Hall* strains the democratic process by allowing states to impact how other states allocate their resources, Hyatt notes the importance of citizens' ability to protect the interests of those injured within the state by ensuring that there is forum in which to bring suit. Hyatt further argues that suits against a state in another state's court are remarkably rare and that there has only been a scattering of cases since *Hall* was decided in 1979. This demonstrates, Hyatt asserts, that *Hall* is functioning exactly as it should be—allowing the meritorious claims to go forward in situations where a state's citizens are injured by another state. ⦿

Written by Clotilde Le Roy and Jarrett Field. Edited by Larry Blocho.

Azar v. Allina Health Service (17-1484)

Court below: *U.S. Court of Appeals for the District of Columbia Circuit*
Oral argument: Jan. 15, 2019

Question as Framed for the Court by the Parties

Whether 42 U.S.C. § 1395hh(a)(2) or § 1395hh(a)(4) required the Department of Health & Human Services (HHS) to conduct notice-and-comment rulemaking before providing the challenged instructions to a Medicare administrative contractor making initial determinations of payments due under Medicare.

Facts

The federal government via the HHS provides Americans who are at least 65 years old or disabled with health insurance through the multipart Medicare program. Through Medicare Part A, the federal government directly administers health insurance to enrollees, paying hospitals directly for treating Part A Medicare enrollees. Under Part C of Medicare, the government subsidizes Medicare enrollment in private insurance plans.

To reimburse hospitals for treatments provided to Part A enrollees, HHS first makes initial payments, through "fiscal intermediaries," to each hospital based on an estimate of each hospital's actual costs incurred for treating Part A patients in a given fiscal year. Later, as authorized by the Medicare Act, HHS adjusts the original payment for any hospital that treated a disproportionate amount of Part A patients based on each hospital's yearly actual costs report. Each year, HHS requires its fiscal intermediaries to calculate this adjustment payment for every hospital in the country by using a formula that adds together two fractions—one of which is called the "Medicare fraction"—to estimate how many low-income patients each hospital treated. Each hospital's Medicare fraction is determined, in part, by "the number of each hospital's patient days for patients 'entitled to benefits under Part A' of Medicare."

In 2004, HHS promulgated a new rule to begin treating Part C Medicare enrollees as patients "entitled to benefits under Part A." Due to Part C enrollees' generally higher incomes, the 2004 rule generally resulted in lower hospital reimbursement payments. Ultimately, though, the U.S. Court of Appeals for the District of Columbia Circuit vacated HHS's 2004 rule because "it was not a logical outgrowth of the proposed rule and had therefore been improperly issued without notice and opportunity for comment."

Nonetheless, in 2013, HHS yet again promulgated another rule to start treating Part C enrollees as patients "entitled to benefits under Part A," beginning in fiscal year 2014. In June 2014, however, HHS published its 2012 Medicare fractions, which included Part C patient days. Respondents Allina Health Services et al. then challenged the 2012 fractions by first seeking review, as required, by HHS's Provider Reimbursement Review Board. Because "the Board does not have the authority to declare statutes or regulations invalid," though, the Board certified that it could not resolve Allina's issue, allowing Allina to bring suit in the U.S. District Court for the District of Columbia.

The court rejected Allina's argument that the Administrative Procedure Act (APA) and the Medicare Act required HHS to go through the notice-and-comment procedure before it could use Part C patient days in determining the 2012 Medicare fractions. Instead, the court held that HHS's inclusion of Part C patient days constituted an "interpretive rule," exempting it from notice-and-comment procedures under both acts.

Allina appealed to the U.S. Court of Appeals for the District of Columbia Circuit, which reversed the district court's decision. The court of appeals held that § 1395hh(a)(2) of the Medicare Act required notice-and-comment procedure for the HHS's inclusion of Part C days in the 2012 fractions because HHS's 2013 announcement was a "(1) 'rule, requirement, or other statement of policy' that (2) 'establishe[d] or change[d]' (3) a 'substantive legal standard' that (4) govern[ed] 'payment for services.'" Alternatively, the court of appeals held that § 1395hh(a)(4) of the Medicare Act independently required the notice-and-comment procedure because the 2013 rule mirrored the 2004 rule, which was not a "logical outgrowth" of the proposed rule, meaning that HHS had to provide an opportunity for notice and comment before reissuing the same rule again.

Analysis

What Triggers the Notice-and-Comment Requirements in § 1395hh(a)(2)?

Alex M. Azar II, acting in his official capacity as HHS secretary, argues that § 1395hh(a)(2) of the Medicare Act does not require public notice and the opportunity for public comment when the secretary issues a nonbinding statutory interpretation upon which an agency within HHS relies. To justify this assertion, Azar points to the language of (a)(2) which only requires the secretary to provide notice and an opportunity for comment when the agency issues a "rule, requirement, or other statement of policy" that substantively changes or establishes the Medicare Act's substantive legal standards. Azar contends that the language of the Medicare Act itself provides a legal standard, so (a)(2) does not reach nonbinding interpretations of the Medicare Act that do not affect the Medicare Act's substantive legal standards. Azar further contends that the issuance of a nonbinding interpretation of the Medicare act is incapable of substantively changing or establishing the act's legal standards.

Azar purports that his reading of 13955hh(a)(2) accurately reflects legislative intent, as Congress wrote (a)(2)'s notice-and-comment requirements to reflect the APA' s notice-and-comment requirements. At the time in which Congress wrote (a)(2), Azar notes, the APA was approximately 40 years old and thus provided the writers of (a)(2) with a substantial framework to determine what triggers a notice-and-comment requirement. To support this claim, Azar notes that HHS issued notice of a public proposal in 1982 that suggested that HHS did not need to import the APA's rulemaking practices to its Medicare operations. Azar states that Congress responded to the 1982 proposal by enacting amendments in 1987 and 1988 that clarified that Congress intended HHS to import the APA's rulemaking practices into HHS's interpretation of the Medicare Act. The APA, Azar claims, has a long history of separating substantive and interpretative rules, and requires that agencies provide an opportunity for public notice and comment only for substantive rules. Azar purports, with jurisprudence surrounding the APA as a model, that the writers of (a)(2) did not intend to require public notice-and-comment requirements for interpretive rulings that merely reflect an agency's understanding of the rules that the agency is required to execute.

In opposition, Allina contends that HHS's 2014 issuance of its statutory interpretation impacted the treatment of low-income patients across the country and therefore required notice and an opportunity for public comment under § 1395hh(a)(2). To support this assertion, the parties point to 1395hh(a)(2)'s language that includes "statements of policy" in its requirement of HHS actions that trigger the notice-and-comment requirement. In essence, Allina rejects Azar's argument that the interpretation was nonbinding and therefore did not trigger (a)(2)'s requirements, because hospitals were required to incorporate HHS's issuance into their calculations for Medicare payments. Additionally, Allina notes that (a)(2) includes a "rule, requirement, or other statement of policy" in its consideration of what triggers the notice-and-comment requirement and characterizes HHS's issuance as a requirement given hospitals' obligation to follow it for the calculation of Medicare fractions. Allina further contends that HHS's issuance can also be characterized as a "statement of policy" that (a)(2)'s language reaches. Allina invokes the APA to contend that, under the APA's standards, HHS's issuance can also be considered a rule under (a)(2).

Allina also counters that Congress did not intend for the APA to be a framework for the Medicare Act's rulemaking procedures. Pointing to case law, Allina contends that HHS's issuance is a statement of policy because it advised the public on its adjudicatory approach. Rejecting Azar's central argument, Allina asserts that Azar is misguided in claiming that the legally nonbinding nature of HHS's issuance prevents the issuance from triggering (a)(2)'s requirements, as even under the APA statements of policy are considered nonbinding. Moreover, Allina notes that HHS's issuance was in fact binding on hospitals and agency contractors. Allina contends that (a)(2)'s inclusion of "statements of policy" in its list of issuances that may trigger (a)(2)'s requirements clearly demonstrates that Congress did not intend to limit (a)(2)'s requirements to issuances that are as binding or have an identical effect as the law. Lastly, Allina rejects Azar's argument that the drafting history points in Azar's favor. In contrast, Allina asserts that the drafting history of the Medicare Act reveals that Congress intended the act to have different notice-and-comment requirements than the those under the APA.

Discussion

The Effect on the Administration of the Medicare Program

HHS Secretary Azar argues that interpreting § 1395hh of the Medicare Act to require HHS to commence the notice-and-comment procedure for its decision to include Part C patient days in the 2012 Medicare fractions "would substantially undermine HHS's ability to administer Medicare in a workable manner." As Azar notes, the Medicare program's sheer size and complexity have contributed to numerous ambiguities regarding the "substantive legal standards for reimbursement" of hospitals. To resolve those ambiguities, HHS makes nonbinding interpretations of the legal standards for reimbursement, which Azar states "have long been held exempt from notice-and-comment rulemaking." Azar contends that these interpretations, including the ones in the HHS's Provider Reimbursement Manual, benefit hospitals by promoting a uniform standard through which fiscal intermediaries determine hospital reimbursement payments. To convert the HHS's interpretations into regulations—as Azar argues the D.C. Circuit's interpretation of § 1395hh of the Medicare Act would do—would, according to Azar, destroy HHS's ability to respond to the Medicare program's frequent changes. This is because, Azar contends, the D.C. Circuit's reasoning will require every single HHS interpretive manual to go through the lengthy notice-and-comment process just because the agency requires its contractors to follow them. As Azar states, this will have a "disruptive effect" on the administration of the Medicare program.

Allina counters that interpreting § 1395hh of the Medicare Act as the D.C. Circuit did will benefit the Medicare program—not hurt it—because the notice-and-comment procedure will make the administration of the program smoother. Moreover, Allina maintains that requiring the HHS to use the notice-and-comment procedure for interpretations related to the reimbursement of hospitals is a benefit to the Medicare program because it will force HHS to consider the financial impact of its decisions. Using this case as an example, Allina asserts that an HHS decision to change payment standards, such as including Part C patient days in the Medicare fractions, has an extraordinary impact on hospital reimbursement payments. Thus, by requiring HHS to commence notice-and-comment rulemaking, Allina argues that hospitals can better predict their reimbursement payments and, in turn, better serve Medicare patients. Allina also asserts that affirming the D.C. Circuit's ruling will have no impact on typical HHS contractor instructions. This is because, according to Allina, the Medicare fractions are not merely an instruction, but rather a binding policy, and because the D.C. Circuit has already had the opportunity to require notice-and-comment procedure for manual instructions and declined to do so. Lastly, Allina disputes the impact of the length of the notice-and-comment procedure, arguing that it only takes a few months to complete. ⊙

Written by Lauren Devendorf and Tyler Schmitt. Edited by Marissa Rivera.

Fourth Estate Public Benefit Corp. v. Wall-Street.com LLC (17-571)

Court below: *U.S. Court of Appeals for the Eleventh Circuit*
Oral argument: Jan. 8, 2019

This case asks the Supreme Court to determine the prerequisites for suing to enforce a copyright and asks whether a copyright owner can sue after submitting the registration application to the Copyright Office, or whether they must wait until after the Copyright Office acts on the application. Fourth Estate Public Benefit Corp. argues that the language, structure, and history of the Copyright Act require only that the copyright owner submit a registration application, deposit, and fee before suing for copyright infringement. Wall-Street.com, however, maintains that the Copyright Act unambiguously requires that the Copyright Office act on the registration application before the copyright owner can sue, and that a change in this law should be made by Congress rather than the Court. The outcome of this case will affect the ability of authors, artists, and other creators to protect their original works against copying, the means by which Congress obtains works and makes them publicly accessible, and the methods used by courts and litigants to resolve copyright infringement disputes. Full text available at https://www.law.cornell.edu/supct/cert/17-571. ⊙

Herrera v. Wyoming (17-532)

Court below: *Wyoming District Court*
Oral argument: Jan. 8, 2019

In this case, the Supreme Court will decide whether members of the Crow Tribe of Indians retain a right to hunt outside of the Crow Reservation on "unoccupied lands of the United States," a right which was originally established in an 1868 federal treaty. Clayvin Herrera argues that because Congress has not specifically abrogated this hunting right and because Bighorn National Forest qualifies as unoccupied land which once belonged to the Crow Tribe, the treaty-based hunting right should be upheld. Wyoming, on the other hand, asserts that the establishment of Wyoming as a state and the creation of the Bighorn National Forest extinguished this off-reservation hunting right. The outcome in this case will determine the scope of the 1868 treaty and will clarify the hunting rights afforded to present-day Crow tribal members. Full text available at https://www.law.cornell.edu/supct/cert/17-532. ⊙

Obduskey v. McCarthy & Holthus LLP (17-1307)

Court below: *U.S. Court of Appeals for the Tenth Circuit*
Oral argument: Jan. 7, 2019

This case asks the Supreme Court to decide whether the definition of "debt collection" in the Fair Debt Collection Practices Act (FDCPA) includes nonjudicial foreclosure proceedings and whether the act therefore applies to attorneys carrying out nonjudicial foreclosures. Respondent McCarthy & Holthus LLP pursued a nonjudicial foreclosure of property owned by Petitioner Dennis Obduskey, who defaulted on a loan secured by the property at issue in the foreclosure. Obduskey subsequently filed suit against McCarthy, challenging the foreclosure and citing the FDCPA. The Tenth Circuit held that the FDCPA did not apply because nonjudicial foreclosures do not qualify as a debt collection activity and are instead considered the enforcement of a security interest. Obduskey contends that nonjudicial foreclosure proceedings are attempts to collect a debt because they demand that the debtor pay by threatening to take away his home and, if foreclosure is completed, liquidate the debt by selling the home. The outcome of this case has significant implications on how protected borrowers are and how much liability attorneys, creditors, and trustees face. Full text available at https://www.law.cornell.edu/supct/cert/17-1307. ⊙

Merck Sharp & Dohme Corp. v. Albrecht (17-290)

Court below: *U.S. Court of Appeals for the Third Circuit*
Oral argument: Jan. 7, 2019

The Supreme Court will determine whether the Food and Drug Administration's (FDA) prior rejection of a drug manufacturer's proposed warning pre-empts a state law failure-to-warn claim against the same manufacturer. Merck Sharp & Dohme Corp., a corporation that manufactures the drug Fosamax, argues that under the Supremacy Clause, a state law claim for failing to warn about a link between a drug and abnormal femoral fractures is precluded by the FDA's rejection of a proposed warning about the fractures. Doris Albrecht, a consumer who took Fosamax and suffered atypical femoral fractures as a result, counters that the FDA's rejection of the warning is not dispositive and that evidence showing that the FDA would have approved an alternative warning should be considered by a jury. The Third Circuit ruled that whether the FDA would have approved an alternative warning is a question of fact that should go to the jury. Merck is now appealing that decision in a case that will have implications for drug warnings, FDA reporting, and public health. Full text available at https://www.law.cornell.edu/supct/cert/17-290. ⊙

Rimini Street Inc. v. Oracle USA Inc. (17-1625)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Jan. 14, 2019

This case asks the Supreme Court to interpret § 505 of the Copyright Act and to decide whether it authorizes courts to award litigation costs that are nontaxable as specified in 28 U.S.C. § 1920. Specifically, § 505 of the Copyright Act states that "the court in its discretion may allow the recovery of full costs," and the dispute hinges on the meaning of "full costs." Rimini Street Inc. and its CEO, Seth Ravin, were held to have infringed copyrights held by Oracle USA Inc., and the lower court ordered Rimini and Ravin to pay Oracle for certain litigation costs that are not taxable. The parties' arguments draw on the structure of the statutes and historical practice. The Supreme Court's decision could have a meaningful impact on future copyright infringement litigations because the available awards could alter parties' incentives to sue. Full text available at https://www.law.cornell.edu/supct/cert/17-1625. ⊙

Home Depot USA Inc. v. Jackson (17-1471)

Court below: *U.S. Court of Appeals for the Fourth Circuit*
Oral argument: Jan. 15, 2010

This case asks the Supreme Court whether a third-party defendant in a state court class action may remove a counterclaim to federal court. Home Depot U.S.A. Inc. argues that the Supreme Court's case *Shamrock Oil & Gas Co. v. Sheets*, which holds that an original plaintiff may not remove a counterclaim to federal court, does not apply to third-party defendants. Moreover, Home

Depot argues that the text of the Class Action Fairness Act (CAFA) allows for the removal of class action counterclaims by any defendant, including third-party ones. Conversely, George W. Jackson—a class action representative who counterclaimed against Home Depot—contends that *Shamrock Oil* actually bars third-party defendants from removing. Furthermore, Jackson contends that the CAFA's discussion of removal does not explicitly expand the term "defendant" to third-party defendants, and so should not be read to allow Home Depot to remove. This case has large implication for consumer class suits in state court as it will affect class action litigation strategy and forum selection in potentially hostile state courts. Full text available at https://www.law.cornell.edu/supct/cert/17-1471. ⊙

Tennessee Wine & Spirits Retailers Association v. Blair (18-96)

Court below: *U.S. Court of Appeals for the Sixth Circuit*
Oral argument: Jan. 16, 2019

This case asks the Supreme Court to determine the scope of power granted to the states under the Twenty-First Amendment and to explain when exercises of that power infringe upon the dormant Commerce Clause. Tennessee requires that a person must be a Tennessee resident for two years before they may receive a retail or wholesale liquor license and for 10 years before they may re-apply for a retail or liquor license. Clayton Byrd, Tennessee Fine Wines and Spirits LLC and Affluere Investments Inc. argue that Tennessee's requirements amount to discrimination against out-of-state economic interests in violation of the dormant Commerce Clause. Tennessee Wine and Spirits Retailers Association counters that the Twenty-First Amendment grants the States broad power to regulate the in-state distribution of alcohol, and that a state does not violate the dormant Commerce Clause if the state treats alcohol produced out-of-state the same as alcohol produced in-state. The outcome of this case will help determine how the power to regulate the sale, use, and distribution of alcohol is divided between the federal government and the states. Full text available at https://www.law.cornell.edu/supct/cert/18-96. ⊙

Thacker v. Tennessee Valley Authority (17-1201)

Court below: *U.S. Court of Appeals for the Eleventh Circuit*
Oral argument: Jan. 14, 2019

This case asks the Supreme Court to determine the scope of a federal agency's sovereign immunity to private lawsuits. The Tennessee Valley Authority (TVA), while attempting to raise a submerged power line in the river, injured Gary Thacker, who was participating in a fishing tournament. In their lawsuit against the TVA, Gary Thacker and his wife, Venida Thacker, contend that the TVA is not immune to their negligence claim because the TVA is not entitled to a discretionary-function exception—which immunizes a federal agency from private claims that arise from any of its discretionary governmental functions—and, therefore, the TVA may be sued under its statute's sue-or-to-be-sued clause. The TVA counters that, per separation-of-powers principles, the TVA Act in fact implies a discretionary-function exception, and, even if it does not, the Suits in Admiralty Act, which indisputably has a discretionary-function exception, would apply and thus immunize the TVA from the Thackers' suit. At stake here is the balance between a private citizen's right to sue and the extent that sovereign immunity covers discretionary decisions of administrators and legislators. Full text available at https://www.law.cornell.edu/supct/cert/17-1201. ⊙