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Manhattan Community Access Corp. v. Halleck (17-1702)

Oral argument: Jan. 25, 2019

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

Questions as Framed for the Court by the Parties

Whether the U.S. Court of Appeals for the Second Circuit:

- Erred in rejecting the Supreme Court's state actor tests and instead created a per se rule that private operators of public access channels are state actors subject to constitutional liability; and
- Erred in holding—contrary to the U.S. Courts of Appeals for the Sixth Circuit and District of Columbia Circuit—that private entities operating public access television stations are state actors for constitutional purposes where the state has no control over the private entity's board or operations.

Facts

New York City awarded Time Warner Entertainment Co. L.P. cable franchises for Manhattan and required Time Warner to provide four public access channels for public use, in accordance with New York state regulations. Public access channels are defined in the regulation as channels "designated for noncommercial use by the public on a first-come, first-served … basis." The franchise agreement between New York City and Time Warner identified a private not-for-profit corporation, petitioner Manhattan Neighborhood Network (MNN), to oversee and administer the public access channels.

Respondents Deedee Halleck and Jesus Papoleto Melendez produced public access programming in Manhattan. In July 2012, MNN inaugurated a community media center in Manhattan. Halleck and Melendez conducted interviews of invitees and filmed the event, later submitting a video to MNN entitled "The 1% Visits the Barrio." The video presented the view that MNN was only catering to the programming needs of certain elite sections of the community.

Subsequently, MNN's programming director suspended Halleck from airing videos on MNN's public access channels for a period of three months. MNN's executive director suspended Melendez indefinitely from MNN services and facilities and suspended Halleck from MNN services and facilities for a period of one year. Even after Halleck's suspension ended, she was not permitted to air the 1% video on public access channels.

Following this, Halleck and Melendez sued MNN, three MNN employees involved in approving their suspensions, and New York City in the U.S. District Court for the Southern District of New York. Halleck and Melendez alleged, among other things, a claim under 42 U.S.C. § 1983 for a violation of their First Amendment free speech rights. The district court dismissed the claims against MNN and its employees, holding that MNN was a private entity whose conduct did not constitute governmental action and that public access channels were not a public forum where First Amendment protections applied.

On appeal, the Court of Appeals for the Second Circuit affirmed the dismissal of the claim against New York City and reversed the dismissal of the claims against MNN and its employees, holding that public access TV channels in Manhattan were public forums and that the employees of MNN were state actors whose acts violated the First Amendment free speech rights of Halleck and Melendez.

Legal Analysis

Determining Whether a Public Forum Exists

MNN argues that the Second Circuit contradicted Supreme Court precedent by first determining that MNN's public access channels were constitutional public forums, and then finding that MNN was a state actor. MNN asserts that the Second Circuit erroneously skipped the state action inquiry before determining whether there was a public forum at hand. MNN adds that the Sixth and D.C. Circuits considered the same issue, and both applied the state action analysis first. Additionally, MNN maintains that district courts across the country also follow the same structure of analysis, ordinarily conducting the state action inquiry first. Even when courts deemed public access channels constitutional public forums, MNN contends that courts only determined this after having conducted a state action test and on evidence that the government had direct control of the public access channel.

MNN then argues that public access channels cannot be considered constitutional public forums because it is neither a government-owned nor government-controlled property and, therefore, not subject to constitutional restrictions. MNN asserts that the only Supreme Court case to hold that First Amendment protections applied to privately owned and controlled property, *Marsh v. Alabama*, is limited to its unique facts in which a private corporation had taken on the role of building and running a town, which was an exclusively government function. MNN also maintains that the Second Circuit's opinion creates a per se rule that would make almost all public access channels constitutional public forums and that such a rule would violate all state actor test precedents requiring a precedent state action.

Halleck and Melendez counter that New York's free, first-come, first-served system for its public access channels was a conscious choice to create a public forum that should be respected by the courts. Thus, Halleck and Melendez argue that the structure of New York's laws was designed to open the state's public access channels to members

of the public without allowing MNN to filter the content that aired on the public access channels. Halleck and Melendez point out that MNN previously admitted that the New York statute precluded them from engaging in viewpoint-based discrimination or preventing content that was critical of them from airing. Halleck and Melendez assert that these qualities indicated that public access channels are a public forum.

Additionally, Halleck and Melendez maintain that there is no support for the proposition that public access channels are privately owned and controlled forums. Rather, Halleck and Melendez contend that the city retains total discretion to remove and replace MNN as administrator and, thus, own the rights involved here. Halleck and Melendez note that the city had the option to run the public access channels itself or to assign the task to a third party—if it had decided to run the channels itself, they would clearly be public forums. Halleck and Melendez argue that the city's choice to delegate its administrative function to MNN does not affect the court's analysis because the city did not transfer ownership rights of the public access channels to MNN.

The Public Function Test and State Action Analysis

MNN argues that none of the state actor tests articulated by the Supreme Court would lead to the conclusion that MNN was a state actor subject to constitutional claims. First, MNN asserts that it would not be a state actor under the *Lebron* test because the government did not have the requisite control over the corporation's board of directors (i.e., MNN did not have the power to nominate a majority of the board of directors). MNN also maintains that it is not a state actor under the public function test—which the Second Circuit's concurrence misapplied—because providing public access channels is not a function that the government traditionally and exclusively performs, which is a very narrow and strict inquiry. Further, MNN contends that the city has never controlled Manhattan's public access channels and that even if the city failed to designate a private nonprofit entity to operate the channel, the responsibility would still fall to the cable franchisee. MNN argues that this demonstrates a great deal of separation, supporting their contention that running public access channels are not a traditional or exclusive government function.

Halleck and Melendez counter that administering a public forum constitutes a public function, meaning that constitutional protections apply. Further, Halleck and Melendez argue that the government cannot circumvent the First Amendment's requirements simply by delegating a public function to a private organization, as the city has here. Halleck and Melendez assert that Supreme Court precedent supports the proposition that the administration of a public forum is a traditional and exclusive state function. More specifically, Halleck and Melendez maintain that only a state has the power to create a public forum and administer it because this power is tied to the state's sovereign authority, absent the state delegating such authority to a private party. Halleck and Melendez note that lower courts also agree with the proposition that the administration of a public forum constitutes a public function. Additionally, Halleck and Melendez contend that the "direct and indispensable participation" test demonstrates that state action is present in this case because New York City created MNN, appointed its initial board, and designated MNN as administrator of the public access channels.

Discussion

Consequential Effects on Cable Operators and Social Media Platforms

The Chicago Access Corporation (CAC), in support of MNN, asserts that not permitting MNN and other public access channel operators to exercise editorial discretion will hinder the ability of these channels to enhance the viewing experience of their audience by ensuring that the programs they air are appropriate. The CAC warns that imposing First Amendment restrictions on MNN and other public access channel operators would expose decisions they made about when and where to air programs to potential lawsuits, and this threat of costly litigation would deter their channels from functioning effectively. The Cato Institute in support of MNN, argues that imposing the First Amendment restrictions on private parties, like MNN, could have consequences that endanger other platforms, including social media and other digital platforms. Cato maintains that creating constitutional liability for these actors could potentially stifle their innovative process and threaten their business model, which thrives on allowing users to individualize content relevant to them—by implication, this process excludes a vast array of speech.

The American Civil Liberties Union and other nonprofit organizations that work to protect First Amendment rights (collectively, "ACLU et al."), in support of Halleck and Melendez, rebuff the arguments that a determination by the Supreme Court that public access channels are public forums would have any consequences for social media companies. ACLU et al. asserts that it is only because MNN owes its very existence to federal, state, and local laws—which dictate that it shall have no editorial control over the content aired—that makes MNN a state actor. Moreover, ACLU et al. maintains that social media platforms are not created by government fiat and will continue to retain their ability to exercise editorial discretion over content hosted on their platforms—merely allowing public use of their forums will not transform them into public forums.

Protecting the Marketplace of Ideas

The Chamber of Commerce of the United States of America, in support of neither party, argues that placing restrictions on the editorial powers of private entities would force them to publish views they and their customers are opposed to, which may ultimately cause them reputational and monetary losses. The Chamber describes a catastrophic future where companies may hesitate to even operate spaces for speech comparable to public fora, thus causing the "marketplace of ideas" that the First Amendment was designed to protect, to shrink.

The New York County Lawyers, in support of Halleck and Melendez, contend that limiting First Amendment protections in the way that MNN is advocating for, only to public forums under state control, will have the effect of inhibiting free speech. The county lawyers argue that if courts recognized nontraditional forums, such as public access channels where state entities partner with private entities, as public forums, this will create more speech. Further, the county lawyers contend that this increase in speech will result in diverse viewpoints because more state and local governments will be encouraged to expand public access programming. ⊙

Written by Lauren Kloss and Nayanthika Ramakrishnan. Edited by Larry Blocho.

Mission Product Holdings Inc. v. Tempnology LLC (17-1657)

Oral argument: Feb. 20, 2019

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

Question as Framed for the Court by the Parties

Whether, under § 365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. § 365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law.

Facts

Respondent Tempnology LLC designs and manufactures accessories—such as towels, socks, and headbands—that remain cool while a user exercises. In connection with these products, Tempnology owns a significant amount of intellectual property. On Nov. 21, 2012, Tempnology entered into an executory contract agreement with Petitioner Mission Product Holdings Inc., which provided Mission with three distinct rights relating to distribution and intellectual property.

First, Tempnology granted Mission both exclusive and nonexclusive distribution rights to Tempnology's "Cooling Accessories." Second, the agreement provided Mission with a nonexclusive, irrevocable license to Tempnology's intellectual property, apart from Tempnology's trademarks. Third, Tempnology granted Mission a limited license to Tempnology's trademark and logo for the sole purpose of using the trademark and logo in conjunction with Mission's other rights under the agreement. According to the agreement, Mission could not use Tempnology's trademark or logo in any way that hurt Tempnology, and Mission had to comply with trademark guidelines. Tempnology retained the right to "review and approve" of most uses of its trademark or logo.

On June 30, 2014, Mission exercised its right to end this agreement without cause, which began a "wind-down period" of two years during which the companies planned to end the agreement. On July 22, 2014, however, Tempnology sought to terminate the agreement for cause, claiming that Mission violated an employment restriction in the agreement. The case went before an arbitrator who determined that the wind-down period would continue until July 1, 2016, at which time Mission would give up its distribution and trademark rights but would retain its other intellectual property rights permanently.

Unfortunately, in both 2013 and 2014, Tempnology suffered multimillion-dollar net operating losses. On Sept. 1, 2015, Tempnology filed a petition for bankruptcy and moved to reject the agreement with Mission under § 365(a) of the Bankruptcy Code. Mission opposed this rejection motion, asserting that Mission was entitled to keep its intellectual property licenses and distribution rights under § 365(n). The bankruptcy court granted Tempnology's motion to reject the agreement, but held that Mission retained some rights from the agreement under § 365(n). After a hearing to determine these rights, the bankruptcy court ruled that § 365(n) protected only Mission's intellectual property rights; therefore, Mission would have to relinquish its distribution rights and trademark license.

Mission appealed this decision to the Bankruptcy Appellate Panel (BAP) for the First Circuit, which affirmed the bankruptcy court's ruling that Mission's exclusive distribution rights had been extinguished. The BAP, however, reversed the bankruptcy court's ruling that Mission had relinquished its trademark rights. Instead, following the Seventh Circuit, the BAP held that because a licensor's breach of a trademark agreement outside of bankruptcy law does not always terminate the licensee's rights, and because § 365(g) treats a rejection of an agreement as a breach of contract, this type of rejection may not terminate Mission's trademark license.

On appeal, the First Circuit affirmed the bankruptcy court's decision that Mission's exclusive distribution rights and trademark license were not preserved under § 365(n). But the First Circuit disagreed with the BAP and the Seventh Circuit, instead holding that Mission did not retain its trademark rights after the agreement's rejection. The First Circuit reasoned that because trademark owners—such as Tempnology—have the obligation to maintain the quality of the goods sold under their trademark, allowing Mission to continue using these trademarks would put Tempnology in the unfair position of having to continue maintaining the trademark or lose the trademark altogether.

The U.S. Supreme Court granted certiorari on Oct. 26, 2018.

Legal Analysis

Effect of Rejection on Contractual Rights

Mission points out that, under the plain text of § 365(g) of the bankruptcy code, rejection of an executory contract constitutes a breach of that contract. While acknowledging that such rejection releases the bankruptcy estate from future performance, Mission argues that rejection does not eliminate every contractual obligation or the nonbreaching party's contractual rights. Because § 365(g) treats the contractual breach as occurring prior to the petition for bankruptcy, Mission claims that a breach arising from rejection is no different than a contractual breach outside of the bankruptcy context. Mission therefore concludes that rejection does not alter the parties' "nonbankruptcy rights." Mission accordingly argues that, because a licensor's breach in a nonbankruptcy setting does not eliminate a licensee's entitlement to use licensed intellectual property, Mission's right to use Tempnology's intellectual property here is not affected by Tempnology's rejection of the parties' license agreement.

In response, Tempnology argues that rejection of an executory contract renders the entire contract unenforceable, leaving the counterparty with only a pre-bankruptcy petition claim for damages. Tempnology states that a rejection is not piecemeal—no contractual provisions survive rejection. It is improper to equate rejection with the general concept of contractual breach outside the bankruptcy setting, Tempnology claims, because rejection is a power unique to bankruptcy that is only available to a bankrupt party. Tempnology therefore concludes that rejection does change the other party's "nonbankruptcy" rights by converting them into a claim for monetary damages. This claim for monetary damages, Tempnology contends, is the only right available to the counterparty unless there is an express statutory exception. Tempnology argues that § 101(5) of the code defines "claim" so broadly that it covers "any conceivable" contractual damages, even damages that are "unmatured" or difficult to quantify. This broad definition, Tempnology maintains, indicates that monetary damages are the sole remedy for rejection.

A Statutory Exception for Trademark Licenses?

Mission claims that the code's § 365(n) safe harbor, which specifically protects a licensee's rights to use intellectual property

post-rejection, can include licenses to use trademarks. Although Mission concedes that "intellectual property," as defined in § 101(35A), does not expressly mention trademarks, Mission contends that this omission does not mean that trademark licensees find no protection under § 365(n). According to Mission, the legislative history behind § 365(n) merely indicates that Congress was unsure of whether to include trademark licenses within the § 365(n) safe harbor. The purpose of a safe harbor provision, Mission continues, is to address a specific ambiguity in the law; a safe harbor is not meant to "rewrite the entire statute." Mission thus argues that it would be inappropriate to draw the "negative inference" that a trademark licensee's rights terminate with rejection. If this were the case, Mission claims, then a trademark licensor's rejection of a license agreement would be tantamount to avoidance. Endowing rejection with this avoidance power, Mission states, is simply too far a leap.

Tempnology counters that a contractual right survives rejection only if there is an express statutory exception to the general rule of §§ 365(a) and 365(g) that rejection terminates all contractual rights. While acknowledging that Congress has created more statutory exceptions over time, Tempnology argues that these exceptions have always been narrowly tailored. Moreover, Tempnology states that Congress has enacted these exceptions by creating new subsections to § 365—not by altering the general rule. Tempnology asserts that this method of legislative action reinforces the general rule that rejection renders a contract unenforceable. Furthermore, Tempnology argues that the § 365(n) exception for intellectual property is not applicable to trademark licenses. According to Tempnology, the legislative history indicates that Congress intentionally excluded trademark licenses from protection under § 365(n). Tempnology thus concludes that there is no exception for trademark licenses. Moreover, Tempnology contends, it is not the court's place to recognize new exceptions absent congressional approval. Doing so, Tempnology states, would upset the "carefully balanced" scheme of § 365.

Discussion

Effect on Trademark Licensors and Licensees

The International Trademark Association (INTA), in support of Mission, notes that trademark owners have the right to license out the use of their trademarks to licensees and that these licenses help promote the licensor's business and increase profits. INTA further asserts that if the court accepts the First Circuit's ruling that a rejected contract discontinues a licensee's trademark license, uncertainty will arise for both trademark licensors and licensees, who will not know whether the trademark license will survive a licensor's potential bankruptcy. This uncertainty, INTA argues, will dissuade future parties from entering into trademark licensing agreements, particularly due to the increased financial risks of these agreements under the First Circuit's ruling. Moreover, INTA contends that licensors will have to decrease the prices of their trademark licenses to account for the licensee's future potential loss of rights due to the licensor's bankruptcy. Similarly, INTA emphasizes that a licensee's loss of a trademark can devastate the licensee's business—to protect itself, a licensee who could lose licenses through bankruptcy may not invest in, and thus fully profit from, this trademark license.

Tempnology counters that the Seventh Circuit's rule that Mission and its amici advocate could seriously hinder trademark licensors from reorganizing their companies to attempt to survive bankruptcy. Tempnology notes that trademark owners in bankruptcy often rely on rejecting trademark licenses and repossessing these licenses to maintain the value of their trademarks. Therefore, Tempnology argues that without the ability to repossess these trademarks, these bankrupt companies may be unable to reorganize and restructure their finances. Furthermore, Tempnology contends that this rule will be especially burdensome to hotel and restaurant franchisors who will be unable to redesign their brands if they are unable to reject trademark licenses. Additionally, Tempnology agrees with the First Circuit that applying the Seventh Circuit's rule will place trademark owners in the unfair and difficult position of having to maintain the quality of their trademarks through bankruptcy or risk losing their trademarks altogether.

Effect on Contract Parties and Future Bankrupt Companies

In support of Mission, the INTA asserts that any fear that the quality of a trademark will decrease when the licensor enters bankruptcy is unfounded because the licensee will have the incentive to maintain consumer quality to continue profiting from the trademark. Additionally, the United States, in support of Mission, argues that the First Circuit's interpretation of licenses granted in executory contracts could apply not just to trademark licenses, but to executory contracts in general. Therefore, the United States contends that the First Circuit's ruling could have far-reaching, negative consequences for contract parties because the First Circuit interpreted the statutory language in § 365 to mean that a contracting party can reject a contract and, in doing so, repossess property and extinguish another contracting party's rights.

Tempnology, on the other hand, focuses on the possible effects that the adoption of the Seventh Circuit's rule could have on companies entering bankruptcy in the future. To maintain the rehabilitative effect of bankruptcy law, Tempnology argues, it is essential that the bankrupt company's future obligations to a party be consolidated into one claim—which the First Circuit's ruling allows them to be. Otherwise, Tempnology asserts, these obligations linger and have the potential to hurt the bankrupt company in the future. Tempnology further contends that leaving a failing contract in effect during bankruptcy would likely hinder a bankrupt company's ability to pay wages and "attract new capital," which is essential for the recovery of a bankrupt business. ⊙

Written by Cecilia Bruni and Brady Plastaras. Edited by Leonardo Mangat.

Editor's Update: On May 20, 2019, the Supreme Court held that a debtor's rejection of a contract is a breach of contract but does not allow the debtor to rescind the contract and, thus, all rights that would ordinarily survive a contract breach remain in place. Mission Product Holdings Inc. v. Tempnology Inc.*, 2019 WL 2166392 (May 20, 2019).*

Return Mail Inc. v. United States Postal Service (17-1594)

Oral argument: Feb. 19, 2019

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

The Supreme Court will determine whether the government is a "person" for the purposes of post-issuance review proceedings under the Leahy-Smith America Invents Act (AIA). Return Mail Inc., the owner of a pat-

ent for processing undeliverable mail items, argues that Congress intended the AIA to incorporate a specific meaning of the term "person," supported by statute and judicial precedent, that excluded the government and would thus prohibit government agencies from initiating AIA review proceedings. The U.S. Postal Service counters that the statutory context, as supported by historical evidence and statements made by the Supreme Court, reveals Congress' intent to include government agencies in the term "person" for the purposes of the AIA. The U.S. Court of Appeals for the Federal Circuit ruled that the term "person" in the AIA did not exclude the government and that the government could petition for patent review under the AIA. Return Mail is now appealing that decision in a case that will have implications for patent litigation, the estoppel doctrine, and executive agencies. Full text available at www.law.cornell.edu/supct/cert/17-1594. ☉

United States v. Haymond (17-1672)

Oral argument: Feb. 26, 2019

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

This case asks the Supreme Court to consider the constitutionality of the sentencing requirements under 18 U.S.C. § 3583(k), which imposes a mandatory resentencing requirement for individuals who violate a condition of their supervised release. Specifically, the Court will consider whether § 3583(k) denies criminal defendants their right to a jury trial under the Sixth Amendment. The United States argues that the mandatory sentencing is constitutional because the jury right only applies to the imposition of a sentence, while § 3583(k) merely administers a sentence that had already been imposed. Haymond contends that § 3583(k) imposes a new sentence for the conduct found to be a violation of the conditions of supervised release. The outcome in this case may have a meaningful impact on the interpretation of the Sixth Amendment and influence how courts determine which punishment to impose after a defendant violates conditions of probation or parole. Full text available at www.law.cornell.edu/supct/cert/17-1672. ☉

The American Legion v. American Humanist Association (17-1717)

Oral argument: Feb. 27, 2019

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

This case asks the Supreme Court to resolve whether the state's ownership and maintenance of a 40-foot-tall World War I memorial shaped like a Latin cross violates the Establishment Clause of the First Amendment. Petitioner American Legion proposes that the Court adopt a standard for Establishment Clause violations that focuses on coercion, or whether the government compelled citizens to participate in religion. Under this standard, the American Legion contends that the memorial is constitutional because it is a passive display. Alternatively, co-Petitioner Maryland-National Capital Park and Planning Commission argues that the memorial is constitutional because its purpose and meaning are secular. On the other hand, Respondent American Humanist Association asserts that the Supreme Court's existing Establishment Clause jurisprudence already establishes a clear standard—the *Lemon* endorsement test—and maintains that the memorial is unconstitutional under that test. They advance that the use of a Latin cross reflects a sympathetic preference for Christian soldiers and claim that the size and permanency of the memorial adds to the monument's endorsement of Christianity. The outcome of this case has grave implications for other existing monuments and memorials that incorporate religious symbols and whether they will be allowed to stand. Full text available at www.law.cornell.edu/supct/cert/17-1717. ☉

Mont v. United States (17-8995)

Oral argument: Feb. 26, 2019

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

This case asks the Supreme Court to interpret 18 U.S.C. § 3624(e), which provides that a defendant's term of supervised release is tolled when the defendant is convicted of a crime. Jason Mont contends that his pre-trial detention from an unrelated crime did not toll his supervised release. Instead, he claims that his supervised release expired during his pre-trial detention period and, thus, that the district court did not have proper jurisdiction over his case. The United States, on the other hand, argues that confinement in the form of pre-trial detention is equivalent to a conviction for purposes of § 3624(e) and that the statute tolls a defendant's term of supervised release to avoid allowing a defendant to serve his term of supervised release while imprisoned. The outcome of this case has implications for understanding the connection between conviction, pre-trial detention, and when a defendant's supervised release is tolled. Full text available at www.law.cornell.edu/supct/cert/17-8995. ☉

Rucho v. Common Cause (18-422)

Oral argument: March 26, 2019

Court below: *U.S. District Court for the Middle District of North Carolina*

Questions as Framed for the Court by the Parties

- Whether plaintiffs have standing to press their partisan gerrymandering claims.
- Whether plaintiffs' partisan gerrymandering claims are justiciable.
- Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

Facts

North Carolina's congressional redistricting takes place every 10 years in a process overseen by both chambers of the state's General Assembly. In 2010, North Carolina voters elected Republican majorities to both the North Carolina State Senate and House of Representatives, giving the party complete control over the upcoming congressional redistricting. The Republican State Leadership Committee established the Redistricting Majority Project with an objective to elect Republican candidates and "maintain a Republican stronghold in the U.S. House of Representatives."

Dr. Thomas Hofeller, the former redistricting coordinator for the Republic National Committee, was hired "to create as many districts as possible in which GOP candidates would be able to successfully compete for office." He later testified that he tried "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." Working closely with elected Republicans, Hofeller accomplished this by using past election data to draw congressional districts that concentrated Democratic voting strength in fewer districts and by creating more competitive Republican

districts. His redistricting plan was enacted on July 28, 2011. In the 2012 election cycle, Republican candidates received 49 percent of the statewide vote, but won nine of the 13 congressional seats. Then in the 2014 election cycle, Republican candidates received 54 percent of the statewide vote while winning 10 congressional seats.

In 2016, a three-judge panel presiding in the U.S. District Court for the Middle District of North Carolina enjoined further use of the 2011 redistricting plan after finding that the map made use of unconstitutional racial gerrymandering. Hofeller again used past election data to draw a map (hereinafter, "2016 Plan") in which precinct-level voting data from the past seven election cycles predicted that Republicans would likely defeat Democrats in most of the districts. The remedial 2016 Plan was approved on Feb. 19, 2016. In the 2016 election cycle, Republican candidates received 53 percent of the statewide vote and won 10 of the 13 congressional seats.

On Aug. 5, 2016, Common Cause, the North Carolina Democratic Party, and 14 North Carolina voters (collectively, "Common Cause") filed a complaint against Robert Rucho, the then-chairman of the North Carolina Senate Redistricting Committee, alleging that the 2016 Plan constituted a partisan gerrymander. Common Cause claimed that the 2016 Plan violated the Equal Protection Clause by intentionally diluting the electoral strength of individuals opposing Republican candidates. Common Cause also claimed that the 2016 Plan violated the First Amendment by retaliating against voters based on their political beliefs and associations, as well as provisions of Article I of the Constitution. Common Cause's empirical analysis of the 2016 Plan was based on showing that Hofeller had either "cracked" Democratic strongholds by splitting them into multiple districts that would vote Republican, as seen with the city of Asheville, or that Democrats had been "packed" into a few districts that were conceded by Republicans in favor of less competition in other districts.

In 2018, another three-judge panel presiding in the U.S. District Court for the Middle District of North Carolina ruled in favor of Common Cause. The court first determined that Common Cause had standing because the 2016 Plan caused cognizable injuries including the dilution of votes by non-Republican voters. The court then held that the political question doctrine did not preclude justiciability of the claims under Supreme Court precedent because "partisan gerrymanders are incompatible with democratic principles" by undermining individual rights and delegitimizing elected representatives, a fear that traces back to the framers of the Constitution. According to the district court, empirical analyses of "packing" and "cracking" solved past problems with finding a judicially manageable standard for adjudicating partisan gerrymander claims. The court then decided in favor of Common Cause on all constitutional claims, finding violations of the Equal Protection Clause, the First Amendment, and Article I, calling the 2016 Plan "a successful effort … to disfavor a class of candidates and dictate electoral outcomes."

The Middle District of North Carolina enjoined use of the 2016 Plan in any future elections and ordered a new district map, which would be approved by the court after hearing objections from both sides. The court then denied Rucho's motion for an emergency stay of the injunction, filed while appealing the lower court's finding and awaiting the outcome of two cases before the Supreme Court with the potential to change the lower court's standing analysis. However, the Supreme Court granted the stay two days later. Several months later, the case was remanded by the Supreme Court for reconsideration after its decision in *Gill v. Whitford*, a recently decided standing case concerning redistricting in Wisconsin. The Middle District of North Carolina made the same findings in its second decision, which came eight months after the first. The case was again appealed directly to the Supreme Court, which agreed to review the decision.

Legal Analysis

Who Has Standing to Bring a Claim of Partisan Gerrymandering?

Rucho argues that Common Cause lacks standing to bring gerrymandering claims because the claimed injury is not sufficiently concrete and particularized. According to Rucho, the lower court incorrectly found a "dilutionary" injury where individual voters would have had their preferred candidate win by a larger margin, or lose by a smaller margin, using a neutral district map. Rucho maintains that the decision in *Gill v. Whitford* limits such a "dilutionary" injury to situations where a voter's preferred candidate lost but would have been likely to win under a neutral district map. Even in the three districts where a neutral map might have yielded a different result, Rucho asserts that the voters are not complaining that their votes carry less weight, only that they would prefer a map that would make it easier for them to elect their preferred candidate. But as Rucho argues, the Court held in *Gill* that supporters of the Democratic Party and its policies do not experience an injury merely because an opposing party is elected and its policies enacted if their votes are not diluted. Rucho also claims that the 2016 Plan did not cause a cognizable "non-dilutionary" injury by depressing voter turnout. Rucho posits that a generic interest in representation and influence over policy-making is a general interest common to all members of the public, and therefore not a valid injury to find standing.

Common Cause argues that the lower court correctly found a "dilutionary" injury to individual voters in the 12 districts that were "packed" or "cracked." Common Cause disagrees with Rucho's characterization of *Gill* regarding "dilutionary" injury and need for a different outcome under a neutral district map, arguing instead that *Gill* allows a finding of an injury where the composition of district causes a vote to carry less weight. Contrasting *Gill* to the present case, Common Cause notes the decision in *Gill* recognized the injury of vote dilution as a result of partisan gerrymandering, but the plaintiffs were unable to prove that they lived in "packed" or "cracked" districts. But Common Cause claims the evidence here, including testimony by Hofeller and the analyses of expert witnesses, proves that the 2016 Plan intentionally "packed" and "cracked" districts.

The Public Function Test and State Action Analysis

Rucho maintains that gerrymandering claims are not justiciable under the political question doctrine because the Constitution delegates oversight of congressional districting to Congress, not the courts, and because there are no judicially manageable standards for resolving such a claim. Rucho argues that the Elections Clause of Article I reflects a compromise among the framers of the Constitution in which Congress alone had the power to override districting laws by state legislatures. According to Rucho, the framers never considered giving this dis-

tricting power to a nonpolitical entity such as the courts, in part because delegation of districting power to the courts is antithetical to the independence of Article III courts. Rucho asserts that oversight is therefore textually committed to the legislative branch, and that the Court should decline to reassign this authority to itself.

Rucho further argues that even if courts did assume oversight of congressional districting, they would be without manageable standards by which to judge whether a given map was the result of impermissible partisan gerrymandering. Rucho cites several recent cases, demonstrating that courts are unable to agree on a single standard. According to Rucho, this difficulty results from the fundamentally political nature of gerrymandering and an inability to determine when some political involvement becomes too much.

Common Cause disagrees with both arguments. Common Cause first argues that the Supreme Court has twice ruled that the Elections Clause does not demonstrate a textual commitment precluding judicial review. Moreover, Common Cause posits, there are repeated examples of courts invalidating state regulations of congressional elections. Common Cause claims that accepting Rucho's argument would render several types of voting rights cases nonjusticiable, including racial gerrymandering and ballot-access laws. That the Founders did not foresee judicial review of districting litigation does not prove that it is unconstitutional, according to Common Cause, nor does the long history of partisan gerrymandering make it an acceptable practice. Common Cause contends that the case-by-case inquiry required by Supreme Court precedent reveals that the facts of the current case demonstrate an invidious intent and a facially discriminatory districting process. According to Common Cause, it is unwise for a court to bar all partisan gerrymandering cases just because some are less obvious than others.

Discussion

Flooding the Courts With Litigation

The American Civil Rights Union and Southeastern Legal Foundation (collectively, "ACRU"), in support of Rucho, argue that judicial recognition of political gerrymandering claims will result in an "intrusion into an inherently political thicket, committing courts to an unprecedented level of involvement with the political process. Moreover, Texas House Rep. Carl Isett, also in support of Rucho, claims that there would be an outpouring of political gerrymandering lawsuits if the lower court is upheld, casting doubt on a vast majority of congressional districts that would be subject to suit from disgruntled partisans.

Professor Eric S. Lander, in support of Common Cause, asserts that adopting the extreme outlier standard proposed by Common Cause would reduce litigation of partisan gerrymandering cases. Lander argues that by adopting a definitive standard, the Court would allow planners to evaluate their plans using the same method a court would use, thereby ensuring that litigation would be fruitless and reducing the overall number of claims. Twenty-two states and the District of Columbia, also in support of Common Cause, further claim that adoption of the proposed standard would not create too much litigation because many states have taken steps to prevent partisan influence in their districting process and will therefore fail on other proposed elements of a partisan gerrymandering claim. ⊙

Written by Connor O'Neill. Edited by Fredrick Titcomb Jr.

PDR Network LLC v. Carlton & Harris Chiropractic Inc. (17-1705)

Oral argument: March 25, 2019

Court below: U.S. Court of Appeals for the Fourth Circuit

Question as Framed for the Court by the Parties

Whether the Hobbs Act required the district court to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act.

Facts

Carlton & Harris Chiropractic is a West Virginia chiropractic office, while PDR Network sells health care products to doctors and other health care providers. PDR publishes the *Physicians' Desk Reference*, a popular almanac containing prescription drug information. In December 2013, PDR sent Carlton & Harris a fax that detailed how the chiropractors could access a free copy of the 2014 *Physicians' Desk Reference* e-book. In 2016, Carlton & Harris sued PDR in federal court in the Southern District of West Virginia for violating the Telephone Consumer Protection Act (TCPA), which prohibits "unsolicited advertisements" sent to fax machines. In response, PDR moved to dismiss the complaint, arguing that the fax did not constitute an "advertisement" as a matter of law since it did not offer a product or service for sale. The TCPA defines "unsolicited advertisement," in part, as any "material advertising the commercial availability or quality of any property, goods, or service to any person without that person's express … permission." The district court determined that the fax was not an advertisement because PDR, in offering the e-book for free, lacked a "commercial aim." Carlton & Harris protested, arguing that under the Hobbs Act, the district court must adopt the 2006 Order issued by the FCC, which offered interpretative guidance of the TCPA that would make "advertisements" encompass announcements of free products. The district court, following the *Chevron* framework for deferring to administrative agencies, refused to defer to the Federal Communication Commission's (FCC) interpretation of the TCPA since the TCPA's definition of "unsolicited advertising" was, according to the court, straightforward and unambiguous. While the Hobbs Act, the district court conceded, grants federal courts of appeals "exclusive jurisdiction" over challenges "to the validity of all final orders of the [FCC]," the court determined that neither party was challenging the validity of the FCC order, so the district court retained its jurisdiction. Ultimately, the district court found that while the plain meaning of the TCPA prohibits unsolicited faxes with a commercial purpose, it allows for the distribution of information regarding free goods or services. The district court thus granted PDR's motion to dismiss.

In 2017, Carlton & Harris appealed. Carlton & Harris again argued that (1) the Hobbs Act required the district court to defer to the FCC's interpretation of the TCPA and (2) the court erred when it held that a fax must contain a commercial aim in order to be considered an "advertisement" for the purposes of the TCPA. Under the Hobbs Act, Carlton & Harris contended, federal courts of appeals have exclusive jurisdiction over the validity of agency orders. As a result, the U.S. Court of Appeals for the Fourth Circuit held that the Hobbs Act limits district courts' jurisdiction and bars them from interpreting agency orders. Specifically, the Fourth Circuit held that

the district court should have deferred to the FCC's interpretation of the TCPA. As a result, the Fourth Circuit reversed the district court.

The Fourth Circuit denied PDR Network's request for further review. The U.S. Supreme Court granted PDR Network's petition for a writ of certiorari on Nov. 13, 2018.

Legal Analysis

The Scope of the Hobbs Act's 'Exclusive Jurisdiction' Clause

According to PDR Network, the relevant provision of the Hobbs Act does not prevent a district court from interpreting certain provisions of the TCPA. To the extent that the Hobbs Act limits district courts' jurisdiction, PDR argues, it does so only with respect to jurisdiction over determinations of the "final validity" of agency actions. The Hobbs Act does not, in PDR's view, undermine district courts' power to decide particular issues relating to the TCPA. PDR also posits that the Hobbs Act does not reserve jurisdiction to the federal courts of appeals over "private TCPA class action suit for monetary damages," such as the one Carlton & Harris brought against PDR. In PDR's view, the Fourth Circuit failed to analyze the text of the Hobbs Act properly because correctly interpreting the words at issue—"determine the validity of"—would mean reading them alongside the surrounding statutory text and with an eye toward Hobbs Act's underlying policy goals. The Fourth Circuit erred, according to PDR, when it took an expansive view of the phrase "exclusive jurisdiction" and failed to properly consider that phrase's "neighboring provisions," which, in totality, suggest that courts of appeals only retain exclusive jurisdiction over a narrow subset of proceedings.

Carlton & Harris counter that when the district court failed to defer to a final ruling of the FCC, it did so in violation of the Hobbs Act. Carlton & Harris contend that the federal courts of appeals have held that district courts must defer to final orders of the FCC. By requesting that the district court ignore the 2006 FCC Order and apply its own interpretation of the TCPA under the *Chevron* framework, Carlton & Harris stress, PDR is effectively asking the district court to determine the order's final validity. Carlton & Harris further argue that the Hobbs Act does not refer to a particular type of proceeding, but instead affects a particular type of court—the courts of appeals. To support this argument, Carlton & Harris claim that PDR misreads §§ 2342 and 2349 of the Hobbs Act to limit federal courts of appeals' exclusive jurisdiction to certain kinds of "proceedings." But the word "proceeding," Carlton & Harris point out, does not appear in either of those sections. As a result, Carlton & Harris conclude, courts of appeals retain exclusive jurisdiction over all challenges to FCC orders, whether they arise in a private dispute over the TCPA or in an action against the government directly attacking the rule.

Discussion

Judicial Uniformity and the Scope of Agency Review

Various state and local government associations, writing in support of PDR Network, agree with PDR that the Hobbs Act grants federal courts of appeals exclusive jurisdiction only to determine the validity of agency orders. According to the government associations, Congress granted the courts of appeals such "direct review" power in order to facilitate agency efficiency. The government associations explain that this case, however, does not concern an application for direct review of the validity of an order, but rather a private, civil dispute between PDR and Carlton & Harris. The government associations therefore conclude that preventing PDR from arguing against the FCC interpretation of the statute would serve none of the Hobbs Act's efficiency interests. The Fourth Circuit's broad interpretation of the Hobbs Act, the government associations continue, effectively transfers legislative power from Congress to agencies, while at the same time severely restricting judicial power. Finally, the government associations argue that state governments lack the resources to keep track of newly issued agency orders, which causes judicial inefficiencies when these governments appeal. If such a government wants to challenge an order of which it only just learned, the government associations contend, the Fourth Circuit's holding would foreclose the government's ability to do so through a civil suit, since the holding prohibits district courts from adjudicating agency orders.

The United States, writing in support of Carlton & Harris, maintains that the Hobbs Act grants exclusive jurisdiction to the federal courts of appeals to resolve agency actions. Such exclusive jurisdiction, according to the United States, must be preserved to promote uniformity among the courts and maintain standardized interpretations of agency orders. The United States points to additional courts of appeals decisions to support its claim that the Hobbs Act's "jurisdiction-channeling provision" prohibits parties from collaterally attacking agency orders in private, two-party civil suits. The United States warns that allowing private litigants to collaterally attack agency orders in a civil suit, rather than by proceeding according to the 60-day judicial review period for which the Hobbs Act provides, would lead to excessive litigation and create administrative difficulties for organizations that rely on clear, uniform agency orders. To yield to PDR's limited reading of the courts of appeals' "exclusive jurisdiction," the United States implies, would be for the judiciary to overreach and intrude on the legislative branch.

Potential Impact of Judicial Deference to Agency Orders

Oklahoma and five other states, writing in support of PDR Network, maintain that the Hobbs Act improperly forces district courts to defer to the FCC's interpretation of agency orders. Such reflexive deference, the states argue, would help enable an unchecked administrative state. Additionally, the states contend, the Fourth Circuit's holding endangers state courts' abilities to interpret federal statutes such as the TCPA. State courts have "concurrent jurisdiction over private suits under the TCPA," and the states argue that the Fourth Circuit's holding threatens to cripple these state enforcement powers. Finally, the states point out that the deference mandated by the Fourth Circuit's holding is inconsistent with jurisdictional issues in other agency contexts, citing a line of cases in which the Supreme Court determined that courts were not bound to defer to agencies other than the FCC.

The American Bankers Association (ABA), writing in support of Carlton & Harris, argue that the Hobbs Act does not mandate blind judicial deference to agency orders but merely provides for streamlined review of agency orders by courts of appeals, which in turn results in "regulatory stability." For example, the ABA explains, to prevent fraud, banks rely on systems of identity verification via phone calls to their customers. Since these calls are regulated by the TCPA, bank customers benefit from a uniform system of agency order review, which the Fourth Circuit's holding properly preserves, according to the ABA. More broadly, the ABA argues, customers depend on systems of automated notifications from their banks, and the stabil-

ity of these regulated systems would be upended if "conflicting district court decisions" undermined agencies' interpretations of federal statutes like the TCPA. The Electronic Privacy Information Center, writing in support of Carlton & Harris, adds that since the FCC order was promulgated with the input of the public, permitting district courts to ignore the order could discourage citizens' participation in agency rulemaking.

Written by Luís L. Lozada and Isaac Syed. Edited by Conley Wouters.

Flowers v. Mississippi (17-9572)

Oral argument: March 20, 2019

Court below: *Supreme Court of Mississippi*

In this case, the Supreme Court will decide whether the Mississippi Supreme Court correctly held that the state prosecutor in Curtis Flowers' criminal jury trial did not violate *Batson v. Kentucky* when he struck black prospective jurors. Flowers argues that the state court failed to properly consider the prosecutor's history of *Batson* violations in his specific case, and that these violations—along with other indications of racial discrimination—demonstrate the prosecutor's purposeful racial discrimination against black prospective jurors. Conversely, Mississippi argues that the state court properly weighed the prosecutor's history of violations and correctly determined that the prosecutor's reasons for striking black jurors were legitimate. The outcome of this case will help further define the scope of the *Batson* doctrine and determine how heavily a court should weigh an attorney's history of *Batson* violations when assessing a *Batson* claim. Full text available at www.law.cornell.edu/supct/cert/17-9572. ⊙

Virginia House of Delegates v. Bethune-Hill (18-281)

Oral argument: March 18, 2019

Court below: *U.S. District Court for the Eastern District of Virginia*

The Virginia House of Delegates argues that it not only has the proper standing to appeal the district court's decision rejecting its redistricting plan, but also that race did not impermissibly predominate in the redistricting process. But even if race did predominate, the Virginia House further contends that its redistricting plan satisfies strict scrutiny because it must consider race to comply with the Voting Rights Act of 1965. Golden Bethune-Hill and other Virginia voters as well as Virginia Attorney General Mark Herring respond that the state house does not have standing to appeal because it does not suffer a particularized and concrete injury. Furthermore, Bethune-Hill notes that even if the Virginia House has proper standing, race predominated in the redistricting process and the redistricting was not narrowly tailored enough to survive strict scrutiny. The outcome of this case has implications on future cases in which legislative bodies may wish to intervene, as well as on racial gerrymandering challenges. Full text available at www.law.cornell.edu/supct/cert/18-281. ⊙

Cochise Consultancy Inc. v. United States ex rel. Hunt (18-315)

Oral argument: March 19, 2019

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

This case asks whether relators can benefit from the longer of the False Claims Act's (FCA) two statutes of limitations; circuits are split as to whether both statutes of limitations apply to private individuals. Cochise Consultancy Inc. and the Parsons Corp. contend that, based on a contextual interpretation of the FCA, only the act's six-year statute of limitations, from when the cause of action occurs, should apply to relators. Billy Joe Hunt, the relator in this suit, counters that the plain language of the statute permits relators to benefit from the FCA's three-year statute of limitations, which begins when an official of the United States learns the material facts of the action, even when the United States is not a party. This case will likely impact the number and costs of suits brought under the FCA. Full text available at www.law.cornell.edu/supct/cert/18-315. ⊙

Editor's Update: On May 13, 2019, the Supreme Court held that the limitations period in § 3731(b)(2) applies in a relator-initiated suit in which the government has declined to intervene. Both government-initiated suits under § 3730(a) and relator-initiated suits under § 3730(b) are "civil action[s] under § 3730." Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits. Cochise Consultancy Inc. v. United States ex rel. Hunt, *2019 WL 2078086 (May 13, 2019).*

Smith v. Berryhill (17-1606)

Oral argument: March 18, 2019

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

The Supreme Court will determine whether a decision by the Social Security Administration's Appeals Council rejecting a claim for disability benefits on untimeliness grounds is a "final decision," and therefore subject to judicial review under § 405(g) of the Social Security Act. Petitioner Ricky Lee Smith, supported by Respondent Acting Commissioner Nancy A. Berryhill, contends that the plain text of § 405(g), as well as the Supreme Court's interpretation of other administrative decisions, demonstrate that a decision on untimeliness grounds is a final decision for the purposes of judicial review. Amicus Curiae Deepak Gupta, who was appointed by the Supreme Court to defend the Sixth Circuit's judgment that such a decision does not constitute a "final decision" under § 405(g), counters that § 405(g)'s specific statutory context mandates that final decisions be understood only as decisions on the merits, not decisions on procedural grounds. This case will have important implications for untimeliness determinations, courts' interpretations of final decisions, and social security litigation. Full text available at www.law.cornell.edu/supct/cert/17-1606. ⊙

The Dutra Group v. Batterton (18-266)

Oral argument: March 25, 2019

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

The Supreme Court will determine whether the Jones Act allows punitive damages to be awarded in a personal injury suit involving a breach of the general maritime duty to provide a seaworthy vessel. The Dutra Group contends that Supreme Court precedent supports the proposition that the Jones Act bars punitive damages in unseaworthiness cases because it does so in negligence cases, and they are simply alternative causes of actions for the same injury. The Dutra Group also argues that punitive damages were not historically awarded in pre-Jones Act unseaworthiness cases. Christopher Batterton counters that punitive damages have traditionally been available in general

maritime claims at common law and that the Jones Act did alter the remedies available in general maritime suits prior to its enactment. Additionally, Batterton asserts that the Jones Act allows for recovery of punitive damages under certain circumstances. From a policy perspective, this case is important because it has implications on the American maritime industry's ability to compete with the foreign maritime industry, as allowing recovery for punitive damages could increase the business costs and sales prices. Full text available at www.law.cornell.edu/supct/cert/18-266. ⊙

Lamone v. Benisek (18-726)

Oral argument: March 26, 2019
Court below: *U.S. District Court for the District of Maryland*

In this case, the Supreme Court will determine (1) whether Maryland's 2011 redistricting of the state's sixth congressional district constituted unlawful partisan gerrymander ing in violation of the First Amendment and (2) whether the First Amendment retaliation framework used by the district court provided manageable standards to decide this case. Specifically, the Court will consider whether legislators redrew electoral maps in retaliation for citizens' political affiliations and voting histories. Appellant Linda H. Lamone argues that although the redistricting process may be tainted by partisan bias, redistricting does not necessarily indicate an intent to punish citizens for their party affiliations and voting histories. Appellee O. John Benisek counters that the proper question is whether electoral maps were redrawn because of citizens' political affiliations and voting histories, irrespective of malicious retribution. This case could have a meaningful impact on the scope of lawful electoral redistricting and whether the Court should consider legislators' subjective intent when making this determination. Full text available at www.law.cornell.edu/supct/cert/18-726. ⊙

Kisor v. Wilkie (18-15)

Oral argument: March 27, 2019
Court below: *U.S. Court of Appeals for the Federal Circuit*

This case asks the Supreme Court to determine whether *Auer* deference—a rule that requires a court to defer to an agency's reasonable interpretation of its own ambiguous regulation—ought to be overruled. James Kisor contends that the *Auer* doctrine is not part of the lawmaking authority that Congress has delegated to agencies, but it instead circumvents the limits that Congress has placed on their authority, is inconsistent with the U.S. Constitution, and lacks any policy justification. Robert Wilkie, the secretary of Veterans Affairs, counters that, while there should be significant limitations on *Auer* deference, altogether discarding the doctrine would have heavy practical consequences for both agencies and regulated parties. The outcome of this case will affect the ability of regulated individuals and entities to comply with agency regulations and to challenge agency interpretations of their own regulations. Full text available at www.law.cornell.edu/supct/cert/18-15. ⊙