Supreme Court Review
2017-2018 Term

This panel will discuss and evaluate the decisions of the Supreme Court during the 2017-2018 Term. Issues involved in the decisions of and denials of certiorari by the Supreme Court include restrictions on medical abortion, political-based redistricting, voting roll purges, the fate of the travel ban, employee waivers of arbitration class actions, public employee union fees, cellphones and privacy, long-term jailing of immigrants fighting deportation, separation-of-powers concerns with the existing patent system, jurisdiction stripping, online merchants and sales taxes, sports betting, and the constitutionality of administrative law judges. Panel members will also discuss the implications of Justice Neil Gorsuch's first full Term on the Supreme Court.

Moderator: **Hon. Alexander Fernández,** *United States Department of Housing and Urban Development*

Speakers: **David B. Cruz**, *University of Southern California Gould School of Law*; **Jon Davidson,** *Freedom for All Americans*; **Ilana Eisenstein**, *DLA Piper*

Immigration [Jon Davidson]

Trump v. Hawaii, 138 S. Ct. 2392 (2018). The State of Hawaii, individual citizens and lawful permanent residents with relatives applying for visas, and nonprofit organization operating a mosque in Hawaii brought a pre-enforcement action against President Trump, seeking to bar enforcement of Presidential Proclamation No. 9645 to the extent that it barred entry by foreign nationals from predominantly Muslim countries. In response to earlier executive orders, several federal agencies conducted a review of information-sharing practices and national security concerns with foreign states, diplomatically encouraging each to improve deficient practices during a 50-day period. After the period expired, those foreign states that the Department of Homeland Security deemed continued to present an unacceptable security risk were added to the travel ban list.

Chief Justice Roberts, writing for the 5-4 majority, reversed the lower court's grant of a preliminary injunction against enforcement of the Proclamation and held: (1) that the President lawfully exercised the broad discretion granted to him to suspend the entry of aliens under 8 U.S.C. § 1182(f) (whose sole prerequisite is that the entry of the covered aliens "would be detrimental to the interests of the United States"), and (2) that plaintiffs cannot show a likelihood of success on the merits of their claim that the Proclamation violates the Establishment Clause. Applying a deferential "rational basis" standard of review to matters of immigration entry and national security that is satisfied if the policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes, the majority disregarded the President's multiple anti-Muslim statements as evidencing impermissible religious bias behind the Proclamation. Instead, the majority concluded that the continuing review of foreign states, evidenced by the removal of Chad, Iraq, and Sudan from the list, in addition to the existence of a waiver process, was sufficient to undercut Hawai'i's argument that the Proclamation was based on religious animus rather than legitimate national security concerns.

In addition, in response to the comparison of the ruling to *Korematsu v. United States*, 323 U.S. 214 (1944), in Justice Sotomayor's dissent, the majority also unequivocally stated that the forcible relocation of U.S. citizens to concentration camps, solely and explicitly on basis of race, is objectively unlawful and outside the scope of Presidential authority, abrogating *Korematsu*.

Jennings v. Rodriguez, 138 S. Ct. 830 (2018). After a 2004 conviction of a drug offense and theft of a vehicle, Rodriguez, a Mexican citizen and lawful permanent resident, was detained pursuant to 8 U.S.C. § 1226 while the U.S. government sought to remove him. In 2007, after having been detained for nearly three years, he sought a writ of habeas corpus while still litigating his removal. Representing a class of non-citizens who had been detained longer than six months pending completion of removal proceedings, had not been detained pursuant to a national security detention statute, and had not been afforded a hearing to determine whether their detention was justified, he argued that the Immigration and Naturalization Act's general detention provisions (8 U.S.C. §§ 1225(b), 1226(a), and 1226(c)) do not authorize "prolonged" detention in the absence of an individualized bond hearing where the Government must prove that continued detention is justified. Lower courts agreed, entering a permanent injunction imposing an implicit 6-month time limit, concluding that reading the detention statutes to contain such a limit was necessary to avoid the constitutional due process problem that would otherwise be presented.

Justice Alito, writing for the 5-3 majority (Justice Kagan having recused herself), held that the plain text of the statutes imposes no such limitations. Rejecting the lower court's reliance on the canon of constitutional avoidance, the majority held that that canon is only applicable to resolve statutory ambiguities when there is more than one plausible construction. The majority concluded that there is only one plausible reading of the INA's statutory detention provisions—that they generally mandate detention of applicants for admission until asylum or removal proceedings have concluded, with no requirement for periodic bond hearings during detention—and that the canon accordingly is inapplicable. The Court did not reach whether prolonged detention without a bond hearing violates due process. It remanded the case for consideration of that issue, after the lower court reconsiders whether standing exists for such a claim and whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for addressing those claims.

Pereira v. Sessions, 138 S. Ct. 2105 (2018). Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") nonpermanent residents who are subject to removal proceedings may be eligible for the discretionary relief of cancellation of removal if, *inter alia*, they have been present in the U.S. for a continuous period of ten years immediately preceding the date of an application for cancellation. 8 U.S.C. § 1229(b)(1)(A). However, under the "stop time rule," the period of continuous presence is deemed to end when the nonpermanent resident is served with a notice to appear under §1229(a), which among other things, must include the time and place where the hearing will take place. Pereira, a citizen of Brazil, arrived in the U.S. in 2000 and remained after his visa expired. After he was arrested for a DUI in 2006, the Department of Homeland Security served Pereira with a "notice to appear" for an initial hearing that did not specify a time or date.

Justice Sotomayor, writing for the 8-1 majority, held that a putative "notice to appear" that fails to designate the specific time or place of a noncitizen's removal proceedings is not a "notice to appear under section 1229(a)" of the IIRIRA, and therefore does not trigger the Act's stop-time rule ending the noncitizen's period of continuous presence in the United States necessary for possible cancellation of the individual's removal.

Sessions v. Dimaya, 138 S. Ct. 1204 (2018). The Immigration and Nationality Act ("INA") virtually guarantees that any alien convicted of an "aggravated felony," including "crime[s] of violence (as defined in 18 U.S.C. § 16) for which the term of imprisonment is at least one year," after entering the U.S. will be deported no matter how long they have lived in the U.S. Section 16(b), otherwise known as the residual clause, defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Dimaya, who has been a lawful resident of the U.S. since 1992, has twice been convicted of first-degree burglary in California. Upon his second conviction, the Government sought to deport him as an "aggravated felon."

Justice Kagan, writing for the 5-4 majority, held that the residual clause definition of "violent felony" for purposes of INA removal provisions is unconstitutionally vague due to its unpredictability and the arbitrariness it permits through its definition of the risk threshold.

Criminal Law [Ilana Eisenstein]

McCoy v. Louisiana, 138 S. Ct. 1500 (2018). McCoy was charged with murdering his estranged wife's mother, stepfather, and son. He maintained his innocence and adamantly opposed any admission of guilt; however, the trial court permitted his counsel to admit his guilt during the trial, as part of a defense theory that he lacked the specific intent required for a first-degree murder conviction, and again during the sentencing phase, where counsel sought mercy in light of McCoy's mental and emotional issues. The jury convicted McCoy of all three counts of first degree murder and sentenced him to death. Petitioner retained new counsel and unsuccessfully moved for a new trial.

Justice Ginsburg, for the majority, wrote that defendant had the right under the Sixth Amendment to insist that his prior counsel refrain from conceding culpability during guilt phase of capital trial, even though counsel reasonably believed that admitting guilt afforded defendant the best chance to avoid death sentence. The Court further concluded that prior counsel's refusal to maintain defendant's innocence was not necessitated by Louisiana's professional conduct rule, which prohibited lawyers from assisting clients in criminal conduct. The Court found that trial court's error, in allowing prior counsel's admission of defendant's guilt against defendant's will, was structural, and thus, defendant would be accorded new trial without any need to show prejudice.

Class v. United States, 138 S. Ct. 798 (2018). Class entered a guilty plea as part of a plea agreement for possessing firearms in his locked jeep, which was parked on the grounds of the U.S. Capitol in Washington D.C. Pursuant to the plea agreement, he agreed to waive several

categories of rights, but the agreement said nothing about the right to challenge on direct appeal the constitutionality of the statute of conviction.

Justice Breyer, for the majority, wrote that a guilty plea does not, by itself, bar a defendant from challenging the constitutionality of the statute of conviction on direct appeal.

Plain Error [Ilana Eisenstein]

Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018). Petitioner pleaded guilty to illegal reentry into the US and was sentenced to 78 months imprisonment based on a Sentencing Guidelines range of 77-96 months. The Probation Office miscalculated the guideline range, which should have been 70-87 months. Petitioner did not object at sentencing, but raised the guidelines error on appeal. Federal Rule of Criminal Procedure 52 allows for correction of errors not raised at trial if: (1) the error was not "intentionally relinquished or abandoned," (2) the error is plain, (3) the error "affected the defendant's substantial rights," and (4) if 1-3 are met, the court of appeals should exercise its discretion to correct the otherwise waived error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings."

Justice Sotomayor, for the majority, wrote that a miscalculation of a Guidelines sentencing range that is plain and affects a defendant's substantial rights also meets prong four of the plain-error test because miscalculations of the guideline ranges seriously affect the fairness, integrity, or public reputation of judicial proceedings, undercut the Sentencing Commission's goals of uniformity and proportionality in sentencing.

Federal Sentencing Decisions [Ilana Eisenstein]

Chavez-Meza v. United States, 138 S. Ct. 1959 (2018). Petitioner pleaded guilty to possession of methamphetamine with intent to distribute. After reviewing the Federal Sentencing Guidelines, the judge determined the range to be between 135-168 months of imprisonment and imposed a sentence at the bottom of the range. Subsequently, the Sentencing Commission lowered the relevant range to 108-135 months. Petitioner moved for a sentence reduction at the bottom of the new range, but the judge reduced the sentence to 114 months instead.

Justice Breyer, for the majority, wrote that the district court judge must adequately explain the chosen sentence to allow for meaningful appellate review of sentence modification proceedings. Here, the record as a whole demonstrates that the judge had a reasoned basis for his decision to impose a 114–month sentence.

Hughes v. United States, 138 S. Ct. 1765 (2018). This case concerns the issue whether a defendant may seek relief under 18 U.S.C. § 3582(c)(2) if he entered a plea agreement under FRCP 11(c)(1)(C) (Type-C agreement), which permits the defendant and the Government to "agree that a specific sentence of sentencing range is the appropriate disposition of the case," and "binds the court [to the agreed-upon sentence] once [it] accepts the plea agreement." In making its decision, the district court must consider the Sentencing Guidelines and may not accept a plea agreement unless the sentence falls within the applicable Guidelines range or falls outside that range for explicitly stated justifiable reasons.

Justice Kennedy, for the majority, wrote that a C plea agreement is based on Sentencing Guidelines range, as required for sentence reduction eligibility, if that range was part of framework district court relied on in imposing sentence. Since the Guidelines are a district court's starting point, when the Commission lowers the applicable sentencing range, the defendant will be eligible for relief under § 3582(c)(2) absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines. Hughes was accordingly eligible for relief under Section 3582(c)(2).

Koons v. United States, 138 S. Ct. 1783 (2018). Petitioners were convicted of drug conspiracy offenses which subjected them to federal mandatory minimum sentences (under 21 U.S.C. § 841(b)(1)) exceeding the top end of their Sentencing Guidelines range. The trial court departed downward from the mandatory minimums based on the substantial assistance petitioners afforded the Government under 18 U.S.C. § 3553(e). After a retroactive change in the Sentencing Guidelines reducing the sentencing range for their convictions, Petitioners moved for sentence reductions.

Justice Alito, for a unanimous Court, held that petitioners do not qualify for sentence reductions under 18 U.S.C. § 3582(c)(2) because their sentences were "based on" their mandatory minimums and substantial assistance to the Government, rather than their retroactively lowered Guidelines ranges.

First Amendment [David B. Cruz]

Janus v. American Federation of State, County, & Municipal Employees, Council 31, 138 S. Ct. 2448 (2018). Janus, a non-union-member public employee, intervened in an action seeking a declaration that the Illinois statute authorizing public-sector unions to assess "agency fees," that is, a charge for the proportionate share of union dues attributable to collective-bargaining activities, from non-member public employees on whose behalf the union negotiated, violated the First Amendment.

Justice Alito, writing for a 5-4 majority, held that the State's extraction of agency fees from non-consenting public employees violates the First Amendment, overruling Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).

National Institute of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018). An organization comprised of crisis pregnancy centers (NIFLA), and two such centers, one licensed and one unlicensed, brought this action alleging that a California law mandating that licensed pregnancy-related clinics disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortions, and requiring unlicensed pregnancy-related clinics to disseminate a notice stating that they were not licensed, violated their First Amendment rights to free speech.

Justice Thomas, writing for a 5-4 majority, held that both notice dissemination requirements likely violated the First Amendment. The licensed notice is a content-based regulation which fails strict scrutiny, and "professional speech" is not a category of speech otherwise subject to different rules, and the unlicensed notice unduly burdens protected speech, because California has not advanced a harm this disclosure purports to remedy that is not "purely

hypothetical."

Lozman v. City of Riviera Beach, Florida, 138 S. Ct. 1945 (2018). Lozman owned a floating home docked in a marina owned by the City of Riviera Beach. Upon learning of the City's intentions to exercise eminent domain to seize floating homes to clear the way for private development, he became an outspoken critic of both the plan and local officials, particularly during city council meetings. In 2006, Lozman sued the City alleging that the plan violated Florida's open-meetings laws. During the public-comment period of a subsequent City Council meeting, Lozman refused to yield the podium and was arrested at the behest of a councilmember. The prosecutor determined there was probable cause for the arrest but declined to press charges. Lozman then filed a suit under 42 U.S.C. § 1983 alleging that the City had initiated a retaliatory campaign of harassment against him, including the arrest, in response to his criticism.

Justice Kennedy, writing for the 8-1 majority, held that under the circumstances of this case, the existence of probable cause did not bar owner's First Amendment retaliatory arrest claim.

Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018). A political organization (MVA), a registered voter, and a county election judge brought a § 1983 action asserting facial and as-applied First Amendment challenges to a Minnesota statute prohibiting any person from wearing a political badge, political button, or other political insignia inside a polling place on election day. Both challenges were dismissed and MVA appealed the facial challenge only.

Chief Justice Roberts, writing for the majority, held that Minnesota's political apparel ban violates the Free Speech Clause of the First Amendment. As a non-public forum, the polling station may be subject to content-based restrictions that are reasonable in light of the purpose of the forum: voting. While the apparel ban furthers a permissible objective, promoting an "island of calm" in and around the polling place, Minnesota must be able to articulate a sensible basis for what may come in and what must stay out. The statute's unmoored use of the word "political" in conjunction with haphazard state attempts at clarification in official guidance cause the apparel ban to violate the First Amendment.

Abortion [Jon Davidson]

Azar v. Garza, 138 S. Ct. 1790 (2018). Jane Doe was eight weeks pregnant when she unlawfully crossed the border. Upon being detained, she was placed in the custody of the Office of Refugee Resettlement ("ORR") in Texas. Pursuant to a Department of Health and Human Services policy that abortions of those in ORR custody must have approval from the Director of ORR absent an emergency medical situation, her request for an abortion was denied. Garza, Doe's guardian ad litem, filed a putative class action in federal district court on behalf of Doe and all other pregnant unaccompanied minors in ORR custody challenging the constitutionality of ORR's policy, and obtained a temporary restraining order which allowed Doe to obtain an abortion immediately. The next day, Doe attended pre-abortion counseling, as required by Texas law to occur a minimum of 24 hours prior to the procedure. After various expedited legal proceedings, including a panel of the D.C. Circuit vacating the TRO and then the D.C. Circuit sitting en banc vacating the panel decision and remanding the case back to the district court, Doe

received court approval to obtain the abortion and her attorneys arranged for an appointment at 7:30 am the next day to obtain counseling again because the doctor she previously had seen was unavailable. Because the original doctor became available again and Doe already had completed the required counseling with him, the appointment was subsequently moved to 4:15 am for the abortion itself, without notice to Garza's attorneys. The procedure was completed before Garza's attorneys filed an emergency application with the Supreme Court to stay the en banc order. They instead simply filed a cert. petition, which was granted.

In a per curiam opinion, the Court vacated and remanded the case with instructions to dismiss Doe's individual claim as moot because she has now had the abortion. Vacatur was appropriate because "mootness occur[ed] through the unilateral action of a party who prevailed in the lower court." The Court declined to address Department of Justice allegations of material misrepresentations on the part of Doe's attorneys.

Planned Parenthood v. Jegley, 864 F.3d 953 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2573 (2018). The Court unanimously denied review of the 8th Circuit's reversal of a district court preliminary injunction preventing the enforcement, pending resolution of the case, of an Arkansas statute requiring medication-abortion providers to contract with a physician who has hospital admitting and surgical/gynecological privileges. Planned Parenthood, which runs reproductive-health clinics in Arkansas that provide medication abortions, contended that it could not find a doctor willing to enter such a contract and that, if the law was allowed to go into effect, Planned Parenthood would no longer be able to provide medication abortions at its clinics and Arkansas would only have one remaining abortion provider, which would result in numerous women in the state having to make two, 380-mile round trips to obtain a surgical abortion, leading some to postpone the procedure (with resulting increased risks of complications), and others to forego having an abortion altogether.

The 8th Circuit ruled that the statute could not be blocked without "concrete district court findings estimating the number of women" who would either postpone the procedure or pass it up. Planned Parenthood asked the Court to intervene, asserting that the Supreme Court's "undue burden" cases do not require that kind of showing. Planned Parenthood also suggested that the 8th Circuit's decision was so plainly wrong that the Supreme Court could reverse it without additional briefing or oral argument on the merits. Nonetheless, the Supreme Court declined to consider the case at this stage.

Separation of Powers/ALJs [Ilana Eisenstein]

Lucia v. S.E.C., 138 S. Ct. 2044 (2018). A Securities & Exchange Commission (SEC) Administrative Law Judge (ALJ) imposed a lifetime ban on Lucia for violations of the anti-fraud provisions of the Investment Advisers Act. Lucia challenged the constitutionality of the administrative proceedings by arguing that the ALJ who handed down the initial decision was a constitutional Officer who had not been appointed pursuant to the Appointments Clause under Article II, Section 2, Clause 2 of the Constitution.

Justice Kagan, for the majority wrote that ALJs, to whom SEC could delegate the task of presiding over enforcement proceedings, were "Officers of the United States," within meaning of Appointments Clause, because ALJs function like "autonomous" trial judges and exercise

"significant authority" in applying the law. Accordingly, the Court held that the ALJ's appointment was invalid. The Court ordered a new hearing before the SEC or another constitutionally appointed ALJ.

Whistleblowers (And a Nod to Plain Text) [Ilana Eisenstein]

Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018). Somers alleged that his employer terminated him shortly after he reported suspected securities violations to senior management. Somers did not report those violations, however, to the Securities and Exchange Commission. Somers sued, alleging, *inter alia*, a Dodd-Frank whistleblower retaliation claim. The Dodd-Frank statute defines a "whistleblower" as "any individual who *provides . . . information* relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." See 15 U.S.C. § 78u-6(h) (emphasis added). The SEC regulations implementing Dodd-Frank, however, employ two definitions for "whistleblower," one which required the submission of information to the SEC for a *monetary award*, and another which did not require submission of information to receive enhanced anti-retaliatory protection.

Justice Ginsburg, for the majority, wrote that Dodd–Frank's anti-retaliation provision does not extend to an individual, like Somers, who did not provide information relating to a securities violation to the SEC. The Court found the scope of the retaliation provision was clear based on its analysis of Dodd-Frank statute's plain text, structure, purpose and design, which includes the "core objective" of promoting "prompt reporting to the SEC." Because the statute was clear, the Court declined to "accord deference to the contrary view advanced by the SEC" in its regulations.

Qualified Immunity [David B. Cruz]

Sause v. Bauer, 138 S. Ct. 2561 (2018). Sause brought a pro se § 1983 action, alleging violations of her First Amendment free exercise rights and her Fourth Amendment right to be free of unreasonable searches or seizures during an investigation of a noise complaint at her residence. In particular, she claimed that she knelt and began to pray but that one of the officers unconstitutionally ordered her to stop. On appeal from the district court's dismissal of her suit on qualified immunity grounds, Sause pursued only her free exercise claim, but the Court of Appeals affirmed nonetheless.

In a per curiam opinion without dissent, the Court held that the Tenth Circuit Court of Appeals erred in holding that the police officers were entitled to qualified immunity without considering the legitimacy of the grounds on which they were present in the plaintiff's home and the nature of any legitimate law enforcement interests that may have justified the order to stop praying at that specific time.

Kisela v. Hughes, 138 S. Ct. 1148 (2018). Hughes was shot four times by Officer Kisela, who had responded to a 911 call that a woman was hacking a tree and acting erratically with a large knife. The responding officers were separated from Hughes and her roommate by a chain-link fence. Hughes disregarded a minimum of two commands to put down the knife and had moved to within a few feet of her roommate. Hughes filed a § 1983 action against Kisela, alleging he used excessive force under the Fourth Amendment. The district court dismissed the

suit on qualified immunity grounds, but the Court of Appeals for the Ninth Circuit reversed, holding Hughes right to be clearly established.

In a per curiam opinion critical of the Court of Appeals' breadth of reasoning, the Supreme Court held over two Justices' dissent that Officer Kisela was entitled to qualified immunity because his actions did not violate clearly established statutory or constitutional rights of which any competent officer in that situation would have known.

D.C. v. Wesby, 138 S. Ct. 577 (2018). District of Columbia police officers responded to a complaint about loud music and illegal activities in a vacant house. Inside, they found the house dirty and virtually devoid of furnishings. Officers observed beer bottles and liquor and smelled marijuana. Many partygoers scattered or hid upon sighting the officers, and those they questioned gave conflicting stories. They spoke to the purported tenant over the phone and she confirmed that neither she nor the partygoers had permission to be on the premises. The officers then arrested the remaining partygoers for unlawful entry. Several partygoers sued for false arrest under the Fourth Amendment and District law.

Justice Thomas, writing for a unanimous Court, held that the officers had probable cause to make arrests for unlawful entry, and that even if the officers lacked probable cause, they had qualified immunity from the arrestees' § 1983 false arrest claims. Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several "common-sense conclusions about human behavior," including that the partygoers had entered the house unlawfully. The D.C. Circuit erred when it held that a suspect's bona-fide belief of a right to enter vitiates probable cause for unlawful entry, particularly in the absence of precedent.

Employment and Labor Law [Jon Davidson]

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (consolidated with Ernst & Young LLP v. Morris and NLRB v. Murphy Oil USA, Inc.). In each of these cases, an employer required its employees, as a condition of employment, to agree to individualized arbitration proceedings to resolve employment disputes. Complaining that they were underpaid in violation of the wage and hour prescriptions of the Fair Labor Standards Act and state law, each employee brought suit in federal court and sought to proceed as a class or collective action. The employers moved to compel individual arbitration. The employees argued that class and collective actions are "concerted activities" protected by §7 of the National Labor Relations Act ("NLRA") and are not subject to the Federal Arbitration Act ("FAA") because the FAA's "saving clause" removes the judicial obligation to enforce terms of an agreement to arbitrate that are illegal, which the employees argued waiver of class and collective actions are because of §7 of the NLRA.

Justice Gorsuch, writing for a 5-4 majority, ruled for the employers and held the forced waivers of collective and class action procedures in arbitration proceedings are enforceable. The majority held that the FAA's "saving clause"—which allows courts to refuse to enforce terms of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract"—only recognizes generally applicable contract defenses (*e.g.* fraud, duress, or unconscionability) and does not allow courts to refuse to enforce an agreement specifying how the arbitration will be conducted on the ground that it illegally transgresses another federal law. The majority also held that the employees needed to show a "clear and manifest" Congressional intent in §7 of the NLRA to displace the FAA. The employees failed this test because, in the

majority's view, "concerted activities" protected by §7 of the NLRA only encompass things employees "just decide to do for themselves in the course of exercising their right to free association in the workplace, rather than the highly regulated, courtroom-bound activities of class and joint litigation." 138 S. Ct. at 1625 (citation and quotation marks deleted). Finally, the majority refused to afford *Chevron* deference to the contrary position of the National Labor Relations Board because that agency only enforces the NLRA and not the FAA as well and because the Trump administration's Department of Justice disagreed with the agency's position.

CNH Indus. N.V. v. Reese, 138 S. Ct. 761 (2018). A class of retirees and surviving spouses brought suit against an employer seeking lifetime access to health care benefits under the collective bargaining agreement with the employer. Based on a line of precedent recently invalidated by *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, (2015), the Sixth Circuit concluded that the collective bargaining agreement was ambiguous and that extrinsic evidence showed that the agreement was intended to provide lifetime healthcare coverage.

In a per curiam decision, the Court held that *Tackett* controlled, and that "ordinary principles of contract law" therefore had to be applied to interpret the collective-bargaining agreement. The Court concluded that, under such principles, the contract was not ambiguous. Because it did not say the benefits were guaranteed for life, the Court concluded that the only reasonable interpretation of the agreement is that health care benefits expired simultaneously with the collective-bargaining agreement in May 2004.

Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018). (Encino II). Current and former employees, who were service advisors for an auto dealership, brought suit against the dealership, alleging that it violated the Fair Labor Standards Act ("FLSA") by failing to pay them overtime. The Ninth Circuit held that service advisors are not included in the overtime-pay exemption under 29 U.S.C. § 213(b)(10)(a), which applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles . . . ."

Justice Thomas, writing for a 5-4 majority, held that service advisors are exempt from the FLSA's overtime-pay requirement even though they do not sell automobiles or themselves service *(i.e.*, repair or maintain) them, because, in the majority's view, these advisors are "salesm[e]n . . . primarily engaged in . . . servicing automobiles." The majority overturned 50 years of precedent by expressly rejecting the principle that exemptions to the FLSA should be construed narrowly. It also found unpersuasive that the FLSA originally exempted all employees of car dealerships but then narrowly defined which employees were exempt and that, unlike others exempted, these service advisors were required to work regular, on-premise, 11-hour days, five days per week.

Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018). Three railroads sued the government seeking refunds for allegedly overpaid federal employment taxes under the Railroad Retirement Tax Act of 1937 ("RRTA"), which are used to fund pensions for railroad employees. At the time the RRTA was enacted, employees were compensated with in-kind benefits (*e.g.*, food, lodging, and railroad tickets) in addition to money. Congress chose not to tax in-kind benefits, instead limiting its levies on both employers and employees to employee "compensation," which was defined as any form of money remuneration."

Justice Gorsuch, writing for a 5-4 majority, held that employee stock options are not taxable "compensation" under the RRTA. Citing structural and textual evidence, the majority held that Congress intended a distinction between "money remuneration" and "all remuneration," and concluded that stock options are not money remuneration within the meaning of the RRTA, even though, as the dissenters point out, large numbers of railroad employees respond to stock options by checking a box on a form that asks the company's financial agents to buy the stock (at the option price) and then immediately sell the stock (at the higher market price) with the proceeds deposited into the employee's bank account—just like a deposited paycheck. 138 S. Ct. 17 2075. Importantly, the majority emphasized a particular approach to statutory interpretation that seeks to interpret the statute's words according to their "ordinary contemporary, common meaning . . . at the time Congress enacted the statute." *Id*. at 2074. The majority added that "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Id*.

Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018). Somers alleged that his employer terminated him shortly after he reported suspected securities violations to senior management. Somers did not report those violations, however, to the Securities and Exchange Commission. Somers sued, alleging, *inter alia*, whistleblower retaliation in violation of the Dodd-Frank statute. That statute defines a "whistleblower" as "any individual who *provides . . . information* relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(h) (emphasis added). The SEC regulations implementing Dodd-Frank, however, employ two definitions for "whistleblower," one which required the submission of information to the SEC in order to qualify for a monetary award, and another which did not require submission of information to the SEC to receive enhanced anti-retaliatory protection.

Justice Ginsburg, writing for a unanimous Court, held that Dodd–Frank's anti-retaliation provision does not extend to an individual, like Somers, who did not provide information relating to a securities violation to the SEC. The Court found the scope of the retaliation provision was clear based on its analysis of the plain text, structure, purpose and design of the Dodd-Frank statute, which includes the "core objective" of promoting "prompt reporting to the SEC." Because the Court found the statute unambiguous, it declined to accord *Chevron* deference to the contrary view advanced by the SEC in its regulations.

China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018) (not an employment or labor case, but relevant to employee class actions). This suit was the third class action brought on behalf of purchasers of China Agritech's commercial stock, alleging identical violations of the Securities Exchange Act of 1934. The earlier suits both failed to achieve class certification, were settled, and dismissed. Michael Resh initiated this class action in 2014, a year and a half after the statute of limitations expired.

Justice Ginsburg, writing for a unanimous Court, held that, upon denial of class certification, a putative class member may not commence a new class action beyond the time allowed by the applicable statute of limitations. Instead, the putative class member must join

another timely-filed existing suit or timely file an individual action. In other words, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action *individually* or file *individual* claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on *class action* past expiration of the statute of limitations.

Commerce Clause [David B. Cruz]

S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). South Dakota brought an action against internet sellers with a physical presence in the state, seeking a declaration that they must comply with a recently enacted South Dakota statute requiring internet sellers to collect and remit sales tax if they deliver more than $100,000 of goods or services in the state annually or engage in 200 or more separate transactions for the delivery of goods or services in the state.

Justice Kennedy, writing for the 5-4 majority, held that an out-of-state seller's physical presence in a taxing state is not necessary for a state to require a seller to collect and remit its sales tax, overruling Quill Corp. v. North Dakota By and Through Heitkamp, 502 U.S. 808 (1991) and National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, 386 U.S. 753 (1967). The majority reasoned that stare decisis does not support the Court's continued adherence to *Quill*'s unsound and incorrect physical presence requirement, which becomes further removed from the realities of modern ecommerce each year; additionally, they believed that it would be inconsistent with the Court's proper role to require Congress to address a false constitutional promise of the Court's own creation. South Dakota's law was constitutional, the majority held, because the South Dakota statute satisfied a "substantial nexus" requirement for imposing on internet sellers a duty to collect and remit sales tax.

Privacy/Criminal Procedure [Ilana Eisenstein]

Byrd v. U.S., 138 S. Ct. 1518 (2018). After a routine traffic stop, Byrd was arrested after 49 bricks of heroin and body armor were found in the trunk. Police conducted the warrantless search after ascertaining that the car was a rental and Byrd was not a party listed on the rental agreement.

Justice Kennedy, for a unanimous Court, wrote that someone in otherwise lawful possession or control of a rental car has a reasonable expectation of privacy in it under the Fourth Amendment, even if the rental agreement does not list him or her as an authorized driver abrogating U.S. v. Kennedy, 638 F.3d 159, U.S. v. Seeley, 331 F.3d 471, U.S. v. Wellons, 32 F.3d 117, U.S. v. Roper, 918 F.2d 885. The court reasoned that Byrd retained a reasonable expectation of privacy notwithstanding any violation of the rental car agreement signed by a third party. The Court remanded to the court of appeals to address whether police had probable cause that justified their warrantless search of the car.

Carpenter v. U.S., 138 S. Ct. 2206 (2018). Based on information obtained from an alleged accomplice in several armed robberies, prosecutors were granted court orders to obtain cell-site location information (CLSI) from Carpenter's cell providers pursuant to the Stored Communications Act. The data revealed that Carpenter was in the vicinity of several robberies in multiple states while they occurred, and prosecutors relied on the data to obtain a conviction.

Chief Justice Roberts, for the majority, wrote that an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through CSLI, and that the government violated the Fourth Amendment by obtaining historical CSLI through a court order, rather than pursuant to a warrant supported by probable cause.

Collins v. Virginia, 138 S. Ct. 1663 (2018). While investigating two traffic incidents involving a customized motorcycle, an officer learned that it was stolen and likely in the possession of Collins. The officer drove to Collins's home and observed a motorcycle under a tarp next to the garage. Without a warrant, the officer walked up the driveway and confirmed it was the stolen motorcycle. Upon Collins's arrival at home, the officer arrested him.

Justice Sotomayor, for the majority, wrote that automobile exception to warrant requirement did not justify police officer's invasion of curtilage of home in order to search a vehicle therein.

U.S. v. Microsoft Corp., 138 S. Ct. 1186 (2018). U.S. served Microsoft --- a U.S. provider of email services --- with a search warrant. The warrant was issued under the Stored Communications Act (SCA), 18 U.S.C. § 2703, and targeted data that was stored exclusively on servers located in Ireland. Microsoft refused to comply, asserting that the SCA does not authorize search warrants to access data stored outside the United States.

In a per curiam decision the Court held that the underlying dispute was mooted, in light of the issuance of a new search warrant pursuant to the newly enacted Clarifying Lawful Overseas Use of Data Act (CLOUD Act). The CLOUD Act amended the SCA and clarified that service providers must disclose information pertaining to a customer or subscriber "within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States." *See* CLOUD Act § 103(a)(1)

Sports Betting/Noncommandeering [Ilana Eisenstein]

Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018). In 2014, the New Jersey Legislature enacted a law that repeals state-law provisions that prohibited sports gambling schemes. The NCAA argued that New Jersey's repeal of its state-law sports-betting prohibition violated the Professional and Amateur Sports Protection Act (PASPA), which prohibited states from authorizing and licensing sports gambling (other than states grandfathered to permit certain forms of sports betting).

Justice Alito, for the majority, held PASPA's provision that makes it unlawful for a State to authorize or license sports gambling violates the anticommandeering doctrine because it violates the basic principle that Congress cannot issue direct orders to state legislatures. PAPSA's anti-authorization provision is improper because it directly regulates States, and "dictates what a state legislature may and may not do." The Court reasoned that PAPSA was not a "preemption provision" because it does not confer federal rights or impose any restrictions on private actors --- it instead only makes a "direct command to the States." The Court further found that PASPA's other provisions were not severable. The Court concluded by noting that Congress "can regulate sports gambling directly," but "if it elects not to do so, each State is free to act on its own."

Habeas Decisions [Ilana Eisenstein]

Wilson v. Sellers, 138 S. Ct. 1188 (2018). Wilson was convicted of murder and sentenced to death. The Georgia Supreme Court rejected his ineffective assistance of counsel argument and summarily denied his application for a certificate of probable cause to appeal, Wilson filed a federal habeas petition. The District Court assumed his counsel was ineffective, but deferred to the state habeas court's conclusion that any deficiencies were non-prejudicial. The Eleventh Circuit panel affirmed, but concluded that the District Court was wrong to "look through" the State Supreme Court's unexplained decision and assume that it rested on the same grounds as the state habeas court's decision, rather than asking what arguments "could have supported" the State Supreme Court's summary decision. The *en banc* court agreed with the panel's reasoning.

Justice Breyer, for the majority, held that the federal habeas court reviewing an unexplained state-court decision on the merits should "look through" that decision to the last related state-court decision that provides a relevant rationale and presume that the unexplained decision adopted the same reasoning. The Court noted that the state may rebut said presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision.

Sexton v. Beaudreaux, 138 S. Ct. 2555 (2018). Beaudreaux committed a murder with two eyewitnesses present. One eyewitness positively identified Respondent from a photo lineup. The other witness tentatively identified Respondent from two photo lineups and confirmed his identification upon seeing him in person. Respondent was convicted based on testimony from both witnesses. Respondent appealed citing ineffective assistance of counsel for his attorney's failure to file a motion to suppress the witness testimony, arguing the photo lineup process was unduly suggestive. His appeal reached the Ninth Circuit, which reversed on a divided panel. The panel conducted their ineffectiveness review *de novo*, finding Respondent's counsel was in fact ineffective and that the failure to file for suppression prejudiced the case, constituting reversible error because the lower courts' denial of his appeals was objectively unreasonable.

In a per curiam decision the Court held that the Ninth Circuit failed to accord the state court determination proper deference and fundamentally erred by evaluating the merits *de novo*, rather than considering the 'arguments or theories that could have supported' the state court's determination.

Kernan v. Cuero, 138 S. Ct. 4 (2017), reh'g denied, 138 S. Ct. 724 (2018). Cuero agreed to a plea deal, which was accepted by a California trial court, with a maximum penalty of 14 years, 4 months. Before the sentencing hearing took place, however, the prosecution determined that another of Cuero's four prior convictions qualified as a "strike" under California's three strikes law. This error meant that rather than a 14-year maximum sentence, he was subject to a mandatory minimum sentence of 25 years. The state court allowed prosecution to amend the plea bargain and Cuero was entitled to withdraw his guilty plea to avoid prejudice. The 9th Circuit overturned the state court's approval of the belated amendment and specifically enforced the original plea agreement.

In a per curiam, decision the court held that federal habeas relief was not warranted under Antiterrorism and Effective Death Penalty Act (AEDPA) because Supreme Court precedent does not clearly establish that prisoner was entitled to specific performance of lower sentence under the original plea deal had the State not made a sentence-raising amendment.

Tribal Rights [David B. Cruz]

Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018). The Upper Skagit Indian Tribe purchased a roughly 40-acre plot of land and commissioned a boundary survey. The survey convinced the tribe that nearly an acre of its newly acquired land lay across a fence on a plot claimed by the Lundgrens, who promptly filed a quiet title action, invoking adverse possession and mutual acquiescence. The Tribe moved to dismiss on grounds of sovereign immunity, and the Supreme Court of Washington ultimately rejected the Tribe's assertion.

Justice Gorsuch, writing for the 7-2 majority, distinguished the precedent the state supreme court relied upon in asserting that sovereign immunity was not applicable to in rem suits, and the majority refused to consider an alternative common-law ground for inapplicability of sovereign immunity because it was first raised before the U.S. Supreme Court. The majority remanded the litigation to the Washington Supreme Court for further consideration.

Patchak v. Zinke, 138 S. Ct. 897 (2018). Patchak filed suit challenging the authority of the Secretary of the Department of the Interior under the Indian Reorganization Act to take into trust a property (the "Bradley Property") on which the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians intended to build a casino. In an earlier appeal in the case, the Supreme Court remanded after holding that the Secretary lacked sovereign immunity and that Patchak had standing. Congress subsequently enacted the Gun Lake Act, § 2(a) of which "reaffirmed as trust land" the Bradley Property, and § 2(b) of which provided that "an action . . . relating to [that] land shall not be filed or maintained in a Federal court and shall be promptly dismissed." Accordingly, lower courts dismissed Patchak's lawsuit pursuant to the statute, and Zinke asked the Supreme Court to review his contention that § 2(b) of the Gun Lake Act was unconstitutional.

With no majority opinion, the Court affirmed the dismissal 6-3. Justice Thomas joined by three other Justices reasoned that § 2(b) should be viewed as a jurisdiction-stripping measure that does not violate the doctrine of separation of powers under Article III because it enacts "new law." Justice Ginsburg, joined by Justice Sotomayor, concurred in the judgment, reasoning that § 2(b) should be viewed as a revocation of the Administrative Procedure Act's waiver of immunity for suits against the United States — which initially enabled Patchak to launch this litigation — insofar as the Bradley Property is concerned.