This Report summarizes opinions issued on January 8 and 22, 2018 (Part I); and cases granted review on January 12, 19, and 22, 2017 (Part II).

I. Opinions

- **National Ass’n of Manufacturers v. Department of Defense**, 16-299. The Court unanimously held that challenges to EPA’s Waters of the United States (WOTUS) Rule must be brought in federal district court, not directly to the courts of appeals. The WOTUS Rule was an Obama-era effort to define the Clean Water Act’s geographic scope. By defining the key statutory term “waters of the United States,” the rule sought to determine, among other things, which water bodies are subject to the Act’s discharge limitations and permitting requirements. This case examined in which federal court parties must file challenges to the WOTUS Rule. Generally, parties may file APA challenges to final EPA actions in federal district courts. But the Clean Water Act lists seven categories of EPA actions for which review lies directly and exclusively in the federal courts of appeals. See 33 U.S.C. §1369(b)(1). Under subsection (b)(2), any action reviewable directly in the courts of appeals must be asserted within 120 days of an EPA action, and litigants may not later challenge the EPA’s decision if review could have been obtained within that 120-day period. Soon after EPA promulgated the WOTUS Rule, various parties—including the National Association of Manufacturers, states, environmental groups, electric utilities, and agricultural companies—challenged it in district courts across the nation. Because of uncertainty over whether challenges needed to go straight to federal courts of appeals, many parties also filed “protective” petitions for review in various courts of appeals. The Judicial Panel on Multidistrict Litigation consolidated those appellate-court actions and transferred them to the Sixth Circuit. The Government argued that the WOTUS Rule fell within subparagraphs (E) and (F) of §1369(b)(1). A fractured panel agreed with the Government that the WOTUS Rule fell within §1369(b)(1). Through an opinion by Justice Sotomayor, the Court reversed.

The Court first addressed §1369(b)(1)(E), which empowers courts of appeals to review EPA actions “approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345.” All parties agreed that the Rule is not an “effluent limitation,” which is a restriction “on quantities, rates, and concentrations” of certain pollutants that “are discharged from point sources into navigable waters.” The Government instead argued that the Rule is an “other limitation.” The Court disagreed for multiple reasons. First, the phrase “effluent limitation or other limitation” “suggests that an ‘other limitation’ must be similar in kind to an ‘effluent limitation’: that is, a limitation related to the discharge of pollutants.” The Court found that reading reinforced by (E)’s cross-references to §§1311, 1312, 1316, and 1345, provisions whose “unifying feature . . . is that they impose restrictions on the discharge of certain pollutants.” Next, the Court concluded that even if the WOTUS Rule were an “other limitation,” it was not promulgated “under section 1311,” as the Government contended. In context, the phrase “under section 1311” “is most naturally read to mean . . . promulgated ‘pursuant to’ or ‘by reason of the authority of’ §1311” Yet §1311 nowhere “authorize[s] the EPA to define a statutory phrase appearing elsewhere in the Act. . . . Rather, the WOTUS Rule was promulgated or approved under §1361(a), which grants the EPA general rulemaking authority. . . .” Finally, the Court rejected the Government’s “practical effects” test, which posited that the WOTUS Rule was adopted “under section 1311” because its “legal and
practical effect is to make effluent and other limitations under Section 1311 applicable to the waters that the Rule covers.” The Court concluded that this “practical effects test” found no support in the statutory text, would “render[] other statutory language superfluous,” and would undermine Congress’s effort to “grant appellate courts exclusive jurisdiction only over seven enumerated types of EPA actions set forth in §1369(b)(1).”

The Court next held that the WOTUS Rule does not fall within §1369(b)(1)(F), which grants courts of appeals exclusive jurisdiction over any EPA action “in issuing or denying any permit under section 1342.” Simply put, found the Court, “[t]he WOTUS Rule neither issues nor denies a permit under the NPDES permitting program.” The Court rejected the Government’s proposed “functional interpretive approach” that it based on Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980) (per curiam). In Crown Simpson, the Court merely held that EPA’s veto of a state-issued permit had the same effect as the denial of a permit and therefore fell under subparagraph (F). The WOTUS Rule, found the Court, is far different and “makes no decision whatsoever on individual permit applications.” Finally, the Court ruled that the Government’s practical-consequences arguments “provide no basis to depart from the statute’s plain language.” Specifically, the Government contended that it would be “irrational” for federal courts of appeals to “review individual actions issuing or denying permits, whereas district courts would review broader regulations governing those actions.” Whether or not that was so, held the Court, “Congress made clear that rules like the WOTUS Rule must be reviewed first in federal district courts.” And although exclusive appellate court review would lead to quicker resolution of challenges to the Rule, and might promote greater uniformity, Congress sought neither efficiency nor uniformity “at all costs.”

**Artis v. District of Columbia, 16-460.** Federal law authorizes district courts to exercise supplemental jurisdiction over state-law claims, but provides that “[t]he period of limitations for any [such] claim . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer period.” 28 U.S.C. §1367(d). This prevents plaintiffs from losing the opportunity to litigate state-law claims in state court if the federal district court declines to exercise supplemental jurisdiction after the limitations period expires. By a 5-4 vote, the Court held that under §1367(d) “the state limitations period is suspended during the pendency of the federal suit.” The Court rejected the District of Columbia’s contention that the state limitations period continues to run while the state-law claims are pending in federal court and that §1367(d) merely gives plaintiffs a 30-day “grace period” to refile in state court post-dismissal.

Petitioner Stephanie Artis sued her former employer, the District of Columbia, alleging employment discrimination in violation of federal and D.C. law. When Artis filed suit in federal court nearly two years remained on the limitations period applicable to her state-law claims. More than two years later, the district court rejected her federal claim and declined to exercise supplemental jurisdiction over her remaining state-law claims. Fifty-nine days later, Artis refiled her state-law claims in D.C. Superior Court. The court held that her claims were time-barred. The D.C. Court of Appeals affirmed, adopting the grace-period reading of §1367(d), under which Artis refiled in state court 29 days too late. Artis advocated a “stop the clock” reading of §1367(d), under which the state limitations period is suspended while the claims are pending in federal court. Under that approach, she had nearly two years plus 30 days in which to refile in state court. In an opinion by Justice Ginsburg, the Court reversed and adopted the stop-the-clock reading of §1367(d).
The Court observed that legislatures have long protected limitations periods while claims are pending in another forum by two different means: suspending them (pausing their progression) and providing a grace period for refiling after the (non-suspended) limitations period expires. It found that the language of §1367(d)—which says that the state limitations period “shall be tolled”—was the key to determining which type of tolling it employs. “Tellingly,” stated the Court, “the District has not identified any federal statute in which a grace-period meaning has been ascribed to the word ‘toll’ or any word similarly rooted.” And only one of its opinions “employ[ed] tolling language to describe a grace period”—a “feather on the scale against the weight of decisions” interpreting “tolling” as stopping the clock. The Court discounted the District’s reliance on dictionary definitions of “tolling” as meaning to “remove or take away an effect.” The object of §1367(d) tolling is the “period of limitations”; yet no one is suggesting that the “period of limitations” be “remove[d] or taken away.” The District’s interpretation therefore reads “period of limitations” as meaning the effect of the period of limitations as a time bar.” After finding the legislative history inconclusive, the Court then rejected the District’s contention that “the inclusion of 30 days within the tolling period would be relegated to insignificance in the mine-run of cases.” The Court noted that it is common for Congress to add “a brief span of days” to tolling periods “in stop-the-clock statutes,” which “accounts for cases in which a federal action is commenced close to the expiration date of the relevant state statute of limitations.”

Finally, the Court rejected the District’s constitutional-doubt argument. The District maintained that a stop-the-clock interpretation of §1367(d) raises a significant question: “Does the statute exceed Congress’ authority under the Necessary and Proper Clause, Art. I, §8, cl. 18, because its connection to Congress’ enumerated powers is too attenuated or because it is too great an incursion on the States’ domain?” The Court emphasized that in Jinks v. Richland County, 538 U. S. 456 (2003), it “unanimously rejected an argument that §1367(d) impermissibly exceeds Congress’ enumerated powers.” Jinks explained that the provision was “plainly adapted” to help Congress carry out its express power to constitute the lower federal courts. Section 1367(d) does this by alleviating federal judges’ concerns about retaining jurisdiction over pendent state claims that would otherwise be time-barred and eliminating an impediment to the federal courts. Jinks also rejected the contention that §1367(d) impermissibly “prescribe[ed] a procedural rule for state courts’ adjudication of state-law claims,” holding that the tolling provision is “substantive” in nature. Nor, held the Court here, does the Constitution care which type of protection Congress offered plaintiffs: “Both devices are standard, off-the-shelf means of accounting for the fact that a claim was timely pressed in another forum.”

Justice Gorsuch filed a dissenting opinion, which Justices Kennedy, Thomas, and Alito joined. The dissent emphasized that, historically, the stop-the-clock approach was used when “the plaintiff was prevented from coming to court due to some disability,” whereas “the grace period approach was commonly used in cases where, as here, the plaintiff made it to court in time but arrived in the wrong court and had to refile in the right one.” Textually, the dissent honed in on §1367(d)’s use of both “tolled” and “tolling”—the limitations period “shall be tolled” for a specified period “unless State law provides for a longer tolling period.” Critically, at the time of §1367(d)’s enactment the state-law “tolling periods” were “grace periods allowing parties a specified number of days or months after dismissal to refile in the proper court.” “And,” concluded the dissent, “the
fact that Congress used a variant of the word ‘toll’ in the second half of the sentence to refer to grace periods strongly suggests it did so in the first half of the sentence too.” The dissent also embraced the District’s constitutional-doubt argument. “The necessary and proper federal interest Jinks recognized is fully discharged by a grace period.” It could find no federal interest “even plausibly serve[d]” by tacking on additional “months or years onto state law limitations periods.”

- **District of Columbia v. Wesby, 15-1485.** Without dissent, the Court held that police officers had probable cause under the Fourth Amendment to arrest for trespassing a group of individuals who were partying in a vacant house. The Court further held that the officers were protected by qualified immunity from a §1983 action brought by the partygoers. D.C. police officers responded to a late-night noise complaint at a residence. Both the caller and neighbors reported the house had been vacant for several months. Officers knocked on the door and one of the partygoers opened for them. As they entered, they smelled marijuana; the house appeared vacant and “was in disarray”; there was no furniture except for a few metal chairs; the living room had been converted into a “makeshift strip club” where several scantily-dressed women were giving lap dances; and the partygoers scattered. After the officers managed to detain 21 of them, they gave vague and inconsistent accounts about who invited them. Some said they were there for a bachelor party but could not say who the bachelor was. Two women “working the party” said a woman they knew as “Peaches” or “Tasty” was renting the house and had given them permission to be there. One of these women telephoned Peaches so an officer could speak with her. Peaches said she had just left the party for the store, but refused to return for fear of being arrested. She initially claimed to be renting the house and was in the process of moving in, but officers saw no boxes in the house. Peaches eventually admitted she lacked permission to be in the house. This was confirmed by the owner, who said Peaches had discussed renting the property but had not signed an agreement. At that point, the officers arrested the partygoers. The charges were later dropped. Sixteen of the arrested partygoers then brought a §1983 action against the District of Columbia and five officers alleging false arrest under the Fourth Amendment. The district court concluded that the officers lacked probable cause to arrest the partygoers for unlawful entry, and a jury awarded them $680,000 in damages. A divided panel of the D.C. Circuit affirmed, finding no probable cause and rejecting qualified immunity. The Court reversed in an opinion by Justice Thomas.

No one disputed that the partygoers were in the house against the will of the owner. The only issue, then, was whether the officers had reason to suspect (as required by D.C. trespass law) that the partygoers themselves “knew or should have known” that their “entry was unwanted.” The Court concluded that, under the “totality of the circumstances,” the officers “made an entirely reasonable inference” that the partygoers knew they did not have permission to hold a party at the house. The Court found that the condition of the house and the conduct of the partygoers allowed the officers to make “several common sense conclusions about human behavior”: “Most homeowners do not live in near-barren houses” and “most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floor filthy.” This was confirmed by the partygoers’ scattering upon seeing police and giving “vague and implausible responses” to the question of who invited them. Only two partygoers knew Peaches and they were not guests, but were instead “working the party.” And Peaches herself gave inconsistent and unconvincing answers to questions. As a result, found the Court, the officers could reasonably have disbelieved any claims by the partygoers, workers, or Peaches that they had
the owner’s permission to be there. The Court stated that the D.C. Circuit erred by placing too much weight on Peaches’ statements and by engaging in “an excessively technical dissection of the facts supporting probable cause” that did not consider the “whole picture” and that dismissed outright “any circumstances that were susceptible to innocent explanation.”

The Court then addressed the question of qualified immunity “because the D.C. Circuit’s analysis, if followed elsewhere, would undermine the values qualified immunity seeks to promote” (internal quotation marks omitted). The Court reaffirmed that the “clearly established law” necessary to lift qualified immunity must be “sufficiently clear” and “settled law,” and must clearly prohibit “the officer’s conduct in the particular circumstances before him.” The Court took issue with the D.C. Circuit’s reliance on Smith v. United States, 281 A.2d 438 (D.C. 1971), which held that an accused trespasser was entitled to a jury instruction that his “good purpose and bona fide belief of [a] right to enter” meant he lacked the mens rea to commit unlawful entry. Smith did not “say anything about whether the officers here could infer from all the evidence that the partygoers knew they were trespassing.” In fact, noted the Court, the D.C. Court of Appeals had “held that officers are not required to take a suspect’s innocent explanation at face value.” In the absence of controlling authority, “a reasonable officer, looking at the entire legal landscape at the time of the arrests, could have interpreted the law as permitting the arrest here.”

Justice Sotomayor concurred in the qualified immunity holding, but found it unnecessary to resolve the underlying Fourth Amendment probable-cause issue. Justice Ginsberg also concurred in the qualified immunity holding. On the Fourth Amendment issue, she expressed a willingness to revisit the Court’s precedents—such as Whren v. United States, 517 U.S. 806 (1996)—holding that police officers’ subjective motivations are irrelevant to “the Fourth Amendment inquiry.”

Tharpe v. Sellers, 17-6075. In a 6-3 per curiam decision, the Court summarily reversed an Eleventh Circuit decision that had denied a death row inmate’s Rule 60(b) motion to reopen his federal habeas case based on an affidavit signed by a juror indicating that the inmate’s race played a part in the jury’s sentencing decision. Petitioner Keith Tharpe was convicted and sentenced to death in George for a murder committed in 1990. Following an unsuccessful appeal, Tharpe claimed in a state collateral review proceeding that his verdict unconstitutionally resulted from racial animus. In support of this claim, he presented the sworn affidavit of a juror, Barney Gattie, who expressed the view that Tharpe was a “[n]igger” and not a “good black”; that “some of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks”; and that upon studying the Bible, Gattie “wondered if black people even have souls.” The state superior court ruled that the affidavit was inadmissible under the rule barring impeachment of jury verdicts with post-trial testimony from jurors and held that Tharpe had procedurally defaulted the juror-misconduct claim by not raising it on direct appeal. The court also ruled that Tharpe’s claim of ineffective assistance of appellate counsel would not excuse the default because Tharpe failed to show prejudice—that Gattie’s racial views affected Tharpe’s guilty verdict.

Tharpe then filed a federal habeas petition that raised a number of issues, including the juror-misconduct claim. The district court denied the petition, rejecting the juror-misconduct claim as procedurally defaulted and finding no prejudice to support ineffective assistance of appellate counsel as an excuse. Tharpe appealed on other grounds. Meanwhile, the Supreme Court held in
Pena-Rodriguez v. Colorado, 136 S. Ct. 855 (2017), that “the Constitution requires an exception to the no-impeachment rule when a juror’s statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.” Tharpe then filed a motion under Federal Rule of Civil Procedure 60(b), arguing thatGattie’s now-admissible testimony proved that Tharpe’s verdict resulted from racial animus. The district court denied both the motion and a request for a Certificate of Appealability (COA). The Eleventh Circuit affirmed both the denial of the Rule 60(b) motion and the COA, holding that Tharpe could not present clear and convincing evidence to show the state court erred when finding a lack of prejudice to support a cause-and-prejudice exception to the procedural default. Through a short per curiam opinion, the Court vacated and remanded.

The Court held thatGattie’s “remarkable affidavit...presents a strong factual basis for the argument thatTharpe’s race affectedGattie’s vote for a death verdict.” At the very least, the Eleventh Circuit should have issued a COA because “jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court[]” erred when finding no prejudice. The Court expressed no views on the other grounds on which the district court denied Tharpe’s Rule 60(b) motion, noting that “[i]t may be that, at the end of the day, Tharpe should not receive a COA.”

Justice Thomas dissented in an opinion in which Justices Alito and Gorsuch joined. The dissent criticized the Court for ordering “a useless do-over”—useless because Tharpe’s claim must fail for several reasons the Court did not reach. First, “no reasonable jurist could argue thatPena-Rodriguez applies retroactively on collateral review.” Under the analysis inTeague v. Lane, 489 U.S. 288 (1989), it established a “new rule” that was neither substantive nor watershed. Second, stated the dissent, “no reasonable jurist could argue that Tharpe demonstrated cause for his procedural default.” The state court rejected Tharpe’s ineffective-assistance-of-counsel claim, his asserted cause, because he “presented only a conclusory allegation to support it. No reasonable jurist could debate that decision.” Finally, the dissent also disagreed that jurists of reason could debate prejudice in light of the deference owed to state court factual determinations under AEDPA and to federal district courts’ decisions under Rule 60(b).

II. Cases Granted Review

- Trump v. Hawaii, 17-965. The Court agreed to address the validity of the latest version of President Trump’s so-called “travel ban.” In late September 2017, the President issued Proclamation No. 9645, the third iteration of the travel ban (and therefore referred to as EO-3). EO-3 indefinitely suspends immigration by nationals of seven countries (Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen) and imposes restrictions on certain nonimmigrant visas for nationals of eight countries (the already listed countries and Venezuela). Hawaii, three individuals, and the Muslim Association of Hawaii (Hawaii for short) challenged EO-3 in district court, arguing that it violated federal statutes and the Constitution. The district court issued a nationwide temporary restraining order, which the parties agreed to convert into a preliminary injunction. The Ninth Circuit affirmed the preliminary the injunction, holding that EO-3 exceeded the President’s authority under the Immigration and Nationality Act (INA). (The court therefore did not reach the plaintiffs’ Establishment Clause argument.) Acknowledging the U.S. Supreme Court’s preliminary ruling concerning the second version of the travel ban,Trump v. IRAP, 137 S. Ct. 2080 (2017), the Ninth Circuit
limited the scope of the injunction to foreign nationals who “have a bona fide relationship with a person or entity in the United States.”

The Ninth Circuit first rejected a bevy of arguments put forth by the President for why the matter is nonjusticiable. On the merits, the court held that EO-3 likely contravenes 8 U.S.C. §1182(f), which authorizes the President “to suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants” “[w]henever the President finds that” such entry “would be detrimental to the interests of the United States.” The court concluded that §1182(f) does not permit the President to “impose entry suspensions of unlimited and indefinite duration,” and that the Proclamation’s stated objectives—“to prevent entry of terrorists and persons posing a threat to public safety” and “to enhance vetting capabilities and processes to achieve that goal”—“conflict” with other INA provisions addressing those concerns. The court added that it was necessary to “read[] meaningful limitations into §1182(f)” to prevent the provision from violating the separation of powers. The court also found that EO-3 likely violates 8 U.S.C. §1152(a)(1)(A), which bars discriminating on the basis of an alien’s “nationality” in the “issuance of an immigrant visa.” Finally, because the Constitution and Congress require that nationalization and immigration laws be “uniform,” the court ruled that the district court properly made the injunction nationwide.

In its petition, the Solicitor General renews its argument that the statutory challenge is not justiciable under “the doctrine of consular nonreviewability, which bars review by ‘any court, unless expressly authorized by law,’ of ‘the determination of the political branch of the Government to exclude a given alien,’ [United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)].” Because Congress has not expressly authorized judicial review of visa denials, argues the SG, the separation of powers commands that courts step aside here. The SG also argues that Hawaii’s statutory challenges are not reviewable under the APA because the INA commits visa denials to “agency discretion,” there is no final agency action, the issue is not ripe, and §1182(f) does not create a private cause of action. On the merits, the SG argues that EO-3 comports with §1182(f), which grants the President broad discretion to suspend the entry of aliens “[w]henever he “finds” that their entry would be “detrimental to the interests of the United States.” The President’s specified reasons why the entry restrictions are needed are “far more elaborate as a matter of both process and substance than other recent orders issued by past Presidents.” The SG criticizes the Ninth Circuit for reading limitations into §1182(f) that do not exist. And he asserts that the Ninth Circuit erred when it held that EO-3 violates §1152 because “[t]hat provision addresses the issuance of immigrant visas by State Department consular officers to aliens who are otherwise eligible for visas. It has no effect on aliens who are not permitted to enter the United States because of some provision of the INA, including a Presidential suspension under 8 U.S.C. 1182(f) . . . .”

In granting certiorari, the Court agreed not only to review the Ninth Circuit’s holdings, but also to address whether EO-3 violates the Establishment Clause. On that score, Hawaii argues that the third version is a “direct descendant” of the earlier versions, and continues to ban immigration from overwhelmingly Muslim countries and imposes only “token restrictions” on non-Muslim-majority countries. This contravenes the Establishment Clause, says Hawaii, because it was promulgated with the unconstitutional purpose of preventing Muslim immigration. Hawaii bolsters its argument with the President’s statements in the days leading up to the release of EO-3, including an acknowledged commitment to the “travel ban” even though it is not “politically correct.” The SG
responds that EO-3 responds to “specific findings that a handful of countries have deficient information-sharing practices or other factors that prevent the government from assessing the risk their nationals pose to the United States.” This provides a “facially legitimate and bona fide reason for the exclusion of the covered aliens” as required by Kleindienst v. Mandel, 408 U.S. 753 (1972). And it “confirm[s] that [EO-3’s] purpose was to achieve national security and foreign-policy goals, not to impose anti-Muslim bias.”

- South Dakota v. Wayfair, Inc., 17-494. The Court will decide whether to overrule Quill Corp. v. North Dakota, 504 U.S. 298 (1992), which held that the dormant Commerce Clause forbids a state from requiring a retailer to collect sales taxes on sales into the state unless the retailer is “physically present there.” South Dakota has no state income tax and relies on sales and use taxes for much of its revenue. South Dakota enacted a law requiring out-of-state, internet retailers to collect and remit sales tax based on their economic connection to the state, even if they have no physical presence there. The state sued a handful of large online retailers that failed to comply with the new law, seeking a declaratory judgment affirming the law’s validity and applicability to the retailers. The retailers prevailed on summary judgment, in light of Quill’s holding. Because it was “duty bound to follow applicable precedent of the United States Supreme Court,” the state court ruled for the retailers, and the South Dakota Supreme Court affirmed.

South Dakota asks the Court to eliminate the physical-presence requirement. The state emphasizes that Quill relied on stare decisis for its holding, and acknowledged that “contemporary Commerce Clause jurisprudence might not dictate the same result.” In the state’s view, whether or not adhering to Nat’l Bellas Hess, Inc. v. Dep’t of Revenue, 386 U.S. 753 (1967), was right when the Court decided Quill in 1992, it cannot be defended today given the enormous impact of internet sales. The state argues that Quill gives interstate, internet sellers an unfair advantage over their brick-and-mortar competitors. And from a federalism perspective, Quill deprives states and local governments not only of critical revenue, but also of taxing power that the Constitution and Tenth Amendment reserve to them. The state also points to Justice Kennedy’s concurrence in Direct Mktg. Ass’n v. Brohl, 135 S. Ct. 1124 (2015), which opined that, with online shopping becoming ubiquitous, “a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.” He invited the legal system to find an “appropriate case for this Court to reexamine Quill and Bellas Hess.” This case provides such a vehicle.

Respondents argue that the Congress is working “diligently and assiduously” on remote sales-tax legislation, which will address the issue in due course; the Court should therefore not intervene. On the merits, respondents argue that the traditional factors supporting stare decisis justify not overruling Quill: remoter sellers have long relied on it; “[n]o post-Quill decision of this Court has undermined its holding”; and Quill correctly concluded that “the burdens of nationwide use tax collection would . . . unduly burden [out-of-state] sellers and hinder interstate commerce.” Respondents also note that “[a] ruling by the Court that the Quill rule is invalid will expose all remote sellers that have relied on the rule to retroactive liability in dozens, if not hundreds, or even thousands of jurisdictions.”
Abbott v. Perez, 17-586; Abbott v. Perez, 17-626. Texas asks the Court to reverse rulings by three-judge district courts holding that the state engaged in intentional vote dilution and racial gerrymandering in drawing its congressional and state House of Representative redistricting maps—maps that had been imposed by district courts earlier in the litigation. Plaintiffs filed challenges under the Fourteenth Amendment and the Voting Right Act to Texas’s 2011 redistricting plans for (as relevant here) congressional districts and the state house. With the 2012 elections approaching, the three-judge district court ordered adoption of interim plans; the Supreme Court vacated the orders; and the district court then adopted and imposed new interim plans. The interim plans were used in the 2012 election. In 2013, the Texas Legislature repealed the 2011 plans and formally adopted the interim plans as permanent (with slight modifications to the interim state house plan). The state then moved to dismiss the claims against the 2011 plans. The district court denied the motion and then granted the plaintiffs leave to amend their complaints to challenge the 2013 plan as well. In the spring of 2017, following trials, the district court held in two separate rulings that many of the claims against the repealed 2011 plans were not moot, that the Legislature had engaged in intentional vote dilution against minority voters in certain districts, and that certain districts were unconstitutional racial gerrymanders. The court then held trials on the 2013 plans, resulting in two rulings finding intentional vote dilution and racial gerrymandering in both plans.

In finding purposeful discrimination, the court held that it was not limited to considering the intent of the 2013 enactment alone and could also ask whether the Legislature “adopted,” “maintained,” or “furthered” pre-existing intentional discrimination. The court held that Texas had done just that, because it was on notice that there were Voting Rights Act issues with its 2011 plans, but did not engage in a deliberative process to determine whether the portions of the interim plans that it incorporated into the 2013 plans remedied those concerns. From this, the court concluded that the adoption of the 2013 plans were not a “change of heart,” but instead a “litigation strategy.” Based on that reasoning, the court invalidated two congressional districts (one for intentional vote dilution, one as a racial gerrymander) and seven state house districts (all for intentional vote dilution, one as a racial gerrymander as well). The court gave the Governor three days to convene the Legislature to draw a new map or to appear at a hearing for the court to do so. Texas instead appealed under 28 U.S.C. §1253, which permits direct appeals to the Supreme Court from “interlocutory or permanent injunctions” of three-judge district court panels.

In its jurisdictional statement, Texas argues that the Court has jurisdiction over the district court’s order because it is in substance an interlocutory injunction. On the merits, Texas insists that its Legislature could not possibly have “engaged in intentional discrimination by enacting into law a congressional districting map that the district court itself had ordered the State to use.” Texas continues: “Even accepting the court’s fundamentally flawed premise that a Legislature must ‘cleanse’ past legislation of the ‘taint’ of a previous Legislature’s ‘discriminatory intent’ before adopting it, the Legislature plainly did not act with unlawful purpose when it took the district court at its word that the court’s own remedial map did indeed remedy the potential constitutional and VRA violations that the court identified.” Texas further argues that the original 2011 plans could not “taint” the 2013 plans because they did not dilute minority votes (intentionally or otherwise) in the districts at issue and did not contain racial gerrymanders. Of particular note, Texas argues that “[i]ntentional vote dilution requires proof of both vote-dilutive effect and discriminatory intent”; the latter alone is not enough. As to the one state house district at issue actually changed by the
Legislature in 2013, Texas argues that the district court placed it in a “no-win situation” by requiring it to consider race when creating majority-minority districts but then finding that Texas’s Voting Rights Act-avoidance rationale was insufficient to satisfy strict scrutiny.

Plaintiffs assert that the Court lacks jurisdiction over the appeal because the district court’s order is not a true injunction, as required under §1253. Although the district court held that the plans violate federal law, “the court has not yet granted or denied injunctive relief.” On the merits, they maintain that the district court “was right to consider both the legislature’s intent in enacting [the original plans] and its intent in carrying those districts unchanged into the [2013 plans].” They emphasize that when the district court ordered the interim plans it “noted that its analysis had been expedited and curtailed and that it had been able to make only preliminary conclusions that might be revised upon full analysis.” The court “warned repeatedly that its determinations could change after a full trial on the merits.” Plaintiffs insist that the challenged districts were all drawn by the Legislature—and retained without change in the interim plans—and therefore “reflect” the Legislature’s “policy choices.” Plaintiffs further assert that the district court’s finding of intentional vote dilution is entitled to deference and is correct; that the court’s finding of several racial gerrymanders is correct; and that once they proved discriminatory intent they did not also have to “show the level of ‘vote-dilutive effect’ required to establish liability under Section 2’s ‘results’ test.”

- **Washington v. United States**, 17-269. The Court will review a Ninth Circuit decision holding that, to comply with a series of treaties promising Indian tribes “[t]he right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens,” the State of Washington must replace culverts under state roads that restrict salmon passage. In 1854 and 1855, the United States negotiated 11 treaties with Indian tribes in what are now the States of Idaho, Montana, Oregon, and Washington. In the treaties, the tribes ceded their rights and title to the lands they had occupied, but reserved their right of taking fish at their traditional locations. In 2001, the federal government and 21 tribes filed a lawsuit against Washington alleging that these treaties promised the tribes they would always retain the ability to earn a “moderate living” from fishing. They asserted that culverts under state roads that impede fish passage violate that promise, and sought declaratory and injunctive relief. The state denied that the treaties imposed the asserted duty and argued that the United States and the tribes were equitably barred from seeking relief related to culverts the state designed in accordance with “federal design standards, guidance, and permit conditions.” The plaintiffs successfully struck those defenses, and the district court ordered the state to replace any state-owned barrier culvert that “has 200 lineal meters or more of salmon habitat upstream to the first natural passage barrier.” The Ninth Circuit affirmed. 853 F.3d 946. The court found a treaty right to culvert removal based on statements of the United States’ lead treaty negotiator, indicating that the United States intended to secure the tribes’ access to food forever. It also affirmed the district court’s rulings striking the state’s equitable defenses and imposing an injunction. Over a nine-judge dissent, the Ninth Circuit denied rehearing en banc.

Washington presents three questions for review. The first is “[w]hether the treaty ‘right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens’ guaranteed ‘that the number of fish would always be sufficient to provide a ‘moderate living’ to the Tribes.’” Washington maintains that the Ninth Circuit’s ruling that it does conflicts with **Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n**, 443 U.S. 658 (1979), and im-
properly “infer[s] a massive commitment nowhere mentioned in the treaties, never contemplated by the parties, and never recognized by the parties during the decades after the treaties.” The second question is “[w]hether the district court erred in dismissing the State’s equitable defenses against the federal government where the federal government signed these treaties in the 1850’s, for decades told the State to design culverts a particular way, and then filed suit in 2001 claiming that the culvert design it provided violated the treaties it signed.” Washington argues that the Ninth Circuit’s refusal to consider the state’s equitable defenses conflicts with City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), which “held that equitable doctrines such as laches defeated the tribe’s attempt” to enforce treaty rights. Lastly, the third question is “[w]hether the district court’s injunction violates federalism and comity principles by requiring Washington to replace hundreds of culverts, at a cost of several billion dollars, when many of the replacements will have no impact on salmon and Plaintiffs showed no clear connection between culvert replacement and tribal fisheries.” Washington contends that the Ninth Circuit erred by failing to adhere to the Supreme Court’s directives “to limit any injunction to the narrowest needed, to carefully avoid imposing unnecessary costs on the State, and to consider the equities in fashioning relief.”

- Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, 17-71. The petition challenges the U.S. Fish and Wildlife Service’s designation “as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival.” The Endangered Species Act (ESA) requires the Service to identify endangered species and then to designate their “critical habitat.” 16 U.S.C. §§1533(a)(1), (a)(3)(A)(i). The ESA further describes two categories of critical habitats: land occupied by the species and land not currently occupied by the species. For the latter, the Service must determine “that such areas are essential for the conservation of the species.” 16 U.S.C. §1532(5)(A)(i), (ii). To designate unoccupied land, a Service regulation further requires that the species’ “present range would be inadequate to ensure the conservation of the species.” 50 C.F.R. §424.12. Upon making these findings, the Service “may exclude” an area from designation if it determines that the benefits of exclusion outweigh the benefits to conserving the endangered species. 16 U.S.C. §1533(b)(2).

The Service designated the dusky gopher frog as an endangered species in 2001. The frog currently exists only in Mississippi, but historically had a broader range. The Service initially designated a small critical habitat in Mississippi, but later expanded the area to a single parish in Louisiana following a scientific peer-review process. The 1,544 acres in Louisiana (Unit 1) was within the frogs’ historical range but is currently unoccupied. Although Unit 1 lacks some of the features necessary to support the frogs’ habitat, including certain forest growth, it does contain one unique element necessary to their survival: “ephemeral ponds” that are only seasonally filled with water and allow the frogs to breed away from predators. Because the ephemeral ponds do not exist anywhere else, the Service concluded that designating Unit 1 was essential for the conservation of the frogs. Unit 1 is privately owned and leased by petitioners (Landowners), who currently use it for timber harvesting and plan to eventually use it for residential and commercial development. The Landowners sued a number of federal entities, including the Service, challenging the designation of Unit 1 as a critical habitat. The district court granted summary judgment in favor of the Service, and a divided panel of the Fifth Circuit affirmed. 827 F.3d 452.
The Fifth Circuit first noted that the word “essential”—the key term in §1532(5)(A)(ii)—was undefined in the ESA, meaning that the Service’s interpretation was entitled to Chevron deference and its application was valid unless arbitrary and capricious. The court deferred to the “consensus expert conclusion” that the frogs’ current habitat was insufficient for conservation and that the rarity and presence of ephemeral ponds made Unit 1’s designation essential for conservation. The court rejected the Landowners’ argument that Unit 1 could not be a critical habitat because it could not support the frogs absent modification. The court found no habitability requirement in the ESA and deferred to the Service’s “reasonable” conclusion that land possessing a rare feature of the frogs’ habitat was essential to conservation even if it lacked other, more common, features that could be added by modification. The court further refused to hear the Landowners’ contention that the costs of designating Unit 1 as a critical habitat ($34 million) far outweigh the uncertain and unquantified benefits, holding that §1533 commits such a cost-benefit analysis to the Service’s discretion. The Fifth Circuit denied rehearing en banc over the dissent of six judges.

In its petition, the Landowners assert that the Service erred in applying the ESA to designate an area that was not presently capable of supporting the frogs absent modification. The Landowners argue that the ESA imposes a “habitability” requirement, because an area cannot be a “habitat”—and thus a “critical habitat”—unless it can presently support the frogs without modification. Next, the Landowners assert that the requirement that occupied land must possess “physical or biological features essential to the conservation of the species” should also apply to unoccupied land. Otherwise, it would be easier to designate unoccupied areas than occupied ones and the Service would have unchecked authority to designate broad amounts of private land as critical habitats throughout the United States. The Landowners further maintain that a designation cannot be “essential” to conservation if its habitability depends on the voluntary modifications of private landowners. Finally, they claim that the Fifth Circuit’s refusal to take into account the economic impact of the designation contradicts the well-established presumption that agency actions are reviewable and with the Court’s recognition in Bennett v. Spear, 520 U.S. 154 (1997), “that a ‘primary’ ‘objective’ under the ESA ‘is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”

**Lucia v. Securities and Exchange Comm’n**, 17-130. The Court will resolve whether administrative law judges (ALJs) of the Securities and Exchange Commission are officers of the United States within the meaning of the Appointments Clause. Petitioner Raymond J. Lucia was an investment advisor who developed and marketed a slide-show presentation comparing his investment strategies against other strategies in hypothetical situations, based on market data and “assumptions.” The SEC charged Lucia with violating the anti-fraud provisions of the Investment Advisers Act of 1940 and SEC rules. An SEC ALJ presided over an adversarial hearing and found that Lucia’s presentations were fraudulent or misleading. The ALJ permanently barred Lucia from working as an investment advisor, revoked his company’s registration with the SEC, and assessed civil penalties. Lucia sought Commission review on the merits and to challenge the ALJ’s jurisdiction. The Commission concluded that SEC ALJs are not subject to the requirements of the Appointments Clause. On appeal, the D.C. Circuit ruled that SEC ALJs are mere employees who are not subject to the Appointments Clause. 832 F.3d 277. In Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016), the Tenth Circuit expressly disagreed with the D.C. Circuit’s decision. The D.C. Circuit granted en banc rehearing, which ended in 5-5 vote, leaving the panel decision and the circuit split intact.
Quoting circuit precedent, the D.C. Circuit explained that “the main criteria for drawing the line between inferior Officers and employees not covered by the [Appointments] Clause are (1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions.” The court concluded that SEC ALJs are employees, not officers, because they fail the third criterion: their decisions are non-final. As a consequence, found the court, “the Commission’s ALJs neither have been delegated sovereign authority to act independently of the Commission nor, by other means established by Congress, do they have the power to bind third parties, or the government itself, for the public benefit.”

Lucia asserts that SEC ALJs preside over trial-like hearings, during which they take testimony, rule on the admissibility of evidence, and enforce compliance with their orders. And in Freytag v. Commissioner, 501 U.S. 868 (1991), the Court held that non-Article III adjudicators who exercise such powers are Officers of the United States who must be appointed under the Appointments Clause. Lucia insists that the “Court has never held that a federal adjudicator is a mere employee, while holding that many quasi-judicial officials—including clerks, commissioners, and non-Article III judges—are Officers.” Given all that, argues Lucia, the process for appointing SEC ALJs is unconstitutional because they are not appointed by the Commission as a whole, but rather are selected by SEC staff from a pool of candidates identified by the Office of Personnel Management. The United States, through the Solicitor General, filed a brief for the SEC agreeing with Lucia that SEC ALJs are Officers of the United States and have therefore been improperly appointed. The Court appointed a private attorney to defend the D.C. Circuit ruling as amicus curiae.

Lagos v. United States, 16-1519, The Court will address whether the Mandatory Victims Restitution Act (MVRA) awards victims their expenses incurred for internal investigations and ancillary legal proceedings. Sergio Fernando Lagos pleaded guilty to five counts of wire fraud and one count of conspiracy to commit wire fraud. In addition to a 97-month prison sentence, Lagos was ordered to pay restitution under the MVRA, which requires courts to order reimbursement to the victim for “necessary expenses,” including lost income, necessary child care, transportation, “and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.” 18 U.S.C. §3663A(b)(4). The “victim” of Lagos’s fraud was General Electric Capital Corporation (GECC), which had provided Lagos and his co-conspirators with revolving and unsecured loans. GECC mounted an internal investigation when it discovered the fraud, and sought relief in Lagos’s bankruptcy action. The district court ordered Lagos to pay over $15 million in restitution, over $4.8 million of which represents GECC’s costs for its investigation and legal fees associated with the bankruptcy proceedings. The Fifth Circuit affirmed, finding its own precedent had upheld similar restitution orders.

Lagos argues that the Fifth Circuit’s decision “is incompatible with §3663A(b)(4)’s test, purpose, structure, and history.” He relies on the reasoning of the D.C. Circuit in United States v. Papagno, 639 F.3d 1093 (D.C. Cir. 2011) (Kavanaugh, J.), which held that §3663A(b)(4) does not “authorize restitution for the costs of an organization’s internal investigation, at least when (as here) the internal investigation was neither required nor requested by the criminal investigators or prosecutors.” Judge Kavanaugh reasoned that the provision’s text refers to “the investigation or prosecution of the offense”—a “singular” “offense” that necessarily is “the criminal investigation
and prosecution that is usually conducted by the FBI or other federal investigators.” Judge Kavanaugh added that §3663A(b)(4) covers only “necessary” costs, yet one cannot “argue that internal investigation neither required nor requested by criminal investigators was an expense necessary” for the FBI’s investigation or prosecution. The United States counters that, “[c]onsistent with the recognition that the MVRA’s ‘substantive purpose’ is ‘to ensure that victims of a crime receive full restitution,’ Dolan v. United States, 560 U.S. 605, 612 (2010), all but one of the courts of appeals to have addressed the issue have agreed that [§]3663A(b)(4) requires restitution for attorney’s fees and other internal investigation costs that a victim incurs as a result of the defendant’s offense.” It insists that “the ‘investigation . . . of the offense’ is not naturally limited solely to federal investigatory activities, but instead includes a broad range of inquiries into a defendant’s unlawful conduct.”

**Chavez-Meza v. United States, 17-5639.** Under 18 U.S.C. §3582(c)(2), a district court “may reduce” a defendant’s sentence “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. §994(o).” The provision permits a court to reduce a sentence in that situation “after considering” the statutory sentencing factors set out in §3553(a), and only “if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” At issue is whether, “when the new sentence is not proportional to where the prior sentence fell within the guidelines range,” the district court must explain its reasons on the record beyond signing a form order stating it had considered the §3553(a) factors and the Sentencing Commission policy statements.

Petitioner Adaucto Chavez-Meza pleaded guilty to possessing more than 500 grams of methamphetamine and conspiracy to do so in connection with his work for the Sinaloa Drug Cartel. The district court sentenced him to 135 months’ imprisonment—the minimum sentence under the applicable Sentencing Guidelines range of 135 to 168 months. The Sentencing Commission later retroactively reduced the relevant sentencing range, which lowered the applicable range for Chavez-Meza’s offenses to 108 to 135 months. Chavez-Meza moved the district court for a sentence reduction under §3582(c)(2) to the new minimum sentence, 108 months. The court agreed to modify the sentence, but only reduced it to 114 months. The court did not provide any explicit reasoning for its decision; it instead issued a form order with pre-printed language stating it had “tak[en] into account” the Sentencing Commission policy statements and the §3553(a) sentencing factors. Chavez-Meza appealed, arguing that the district court was required to explain how its consideration of the §3553(a) factors resulted in a reduced sentence to 114, rather than 108, months. The Tenth Circuit disagreed and affirmed. 854 F.3d 665.

That Tenth Circuit noted that unlike the first-instance sentencing statute (§3553(c)), the modified sentencing section (§3582(c)(2)) does not explicitly require the district court to state its reasoning on the record. The court also noted that even with first-instance sentencing, §3553(c) requires only “a general statement noting the appropriate guideline range and how it was calculated.” Assuming that the modified sentencing section requires something less than the first-instance sentencing, the court concluded that the form order’s statement that the court considered the sentencing factors was enough to comply with §3582(c)(2). This was especially so in light of the presumption that courts know and apply the law and in the absence of any evidence showing the
district court failed to consider the sentencing factors. Chavez-Meza’s petition embraces the analysis of the six circuits that require more explanation: that §3582(c)(2)’s requirement to consider sentencing factors also implicitly requires the court to state its reasons on the record. He argues that simply issuing a form order containing “boilerplate” effectively forecloses appellate review by making it “impossible for an appellate court to determine whether the district court properly exercised its discretion.”

- **Pereira v. Sessions**, 17-549. The Court will address what action by the Government triggers the so-called “stop-time rule,” which cuts off the eligibility period in which a non-permanent resident may seek to cancel a deportation order. The U.S. Attorney General may cancel removal proceedings, and grant a green card, to eligible non-permanent residents when their removal would cause “exceptional and extremely unusual hardship” to a spouse, parent, or child who is a United States citizen or lawful permanent resident. 8 U.S.C. §1229b(b). To be eligible for cancellation of removal, a non-permanent resident must have 10 years of continuous presence in the United States; a permanent resident must have seven years of continuous residence. Under the stop-time rule, the continuous-residence period in §1229b(b) ends when the government serves a “notice to appear under section 1229(a).” The statute defines a “notice to appear” as “written notice . . . specifying” certain information, including “[t]he time and place at which the proceedings will be held.” *Id.* §1229(a)(1). The circuits are divided over whether the stop-time rule is triggered when the Government serves a document labeled “notice to appear” but the document lacks the “time and place” information required by the definition.

Petitioner Wescley Pereira entered the U.S. on a tourist visa in 2000, when he was 19 years old. He is now married and the primary breadwinner for two young, U.S.-citizen children. In 2006, the Department of Homeland Security (DHS) served Pereira with a notice to appear, charging him as removable for overstaying his visa. The notice did not identify the date or time of an initial hearing. Over a year later, DHS filed a notice to appear with the immigration court, which mailed a notice of his initial hearing to the wrong address. The notice was returned as undeliverable. The court held a hearing in absentia and ordered Pereira removed. Following a traffic stop in 2013, DHS detained Pereira, and an Immigration Judge reopened the removal proceedings. Pereira applied for cancellation under §1229b(b), arguing that the 2006 notice did not stop the running of his continuous presence, which meant he failed to meet §1229b(b)’s continuous-presence requirement. The Bureau of Immigration Appeals affirmed, and the First Circuit denied Pereira’s petition for review. 866 F.3d 1.

The First Circuit found §1229(a)(1) ambiguous because the stop-time rule “does not explicitly state” that a notice to appear must satisfy the duty to inform the alien of the time-and-place information “in order to cut off an alien’s period of continuous physical presence.” The court then granted *Chevron* deference to the BIA’s interpretation of the provision, finding it a permissible one. Pereira argues that the First Circuit misinterpreted the plain language of §1229b(b) by relieving the government of its obligation to provide a notice containing all of the information required by law. In short, he says, “[r]egardless what label DHS places on a particular document, that document is only a ‘notice to appear under section 1229(a)’ if it includes the information listed in §1229(a)’s definition of a ‘notice to appear.’” He adds that the “BIA’s interpretation would lead to unreasonable
results that Congress could not have intended,” namely, that “any document DHS labeled a ‘notice to appear’ would trigger the stop-time rule, regardless whether that document provided any of the information listed in §1229(a)(1), or even any information at all.” The United States responds that “[a]n incomplete ‘notice to appear’ can still be a ‘notice to appear,’ just as an unsigned notice of appeal can still be a notice of appeal.” In its view, a notice that lacked time and place information was still a “notice to appear under section 1229(a)” — it was “subject to,” “governed by,” and “pursuant to” [§]1229(a)."

WesternGeco LLC v. Ion Geophysical Corp., 16-1011. At issue is whether a patent holder may recover damages from lost profits for foreign uses of the infringing invention by third parties operating outside the United States. Petitioner WesternGeco filed a patent infringement action in federal district court against respondent ION Geophysical Corp. alleging that ION had infringed several of WesternGeco’s patents related to seismic sensors used to search the ocean floor for oil. WesternGeco both designs the sensors and engages in contracts to use its sensors to search for oil. The jury found ION liable for infringement, found that the infringement was subjectively reckless, and awarded WesternGeco $93.4 million in lost profits and $12.5 million as reasonable royalties. The Federal Circuit affirmed the judgment that ION was liable for infringement, but reversed on the award for lost profits. 837 F.3d 1358. The court found that the contracts WesternGeco lost were for performing seismic surveys on the high seas. Awarding lost profits for those contracts, it held, would violate the presumption against the extraterritorial application of U.S. law. The court ruled that 35 U.S.C. §271(f)—upon which WesternGeco relied—merely created a “limited exception” that treats the export of components of a patented invention for combination abroad as infringement. But, it concluded, “[j]ust as the United States seller or exporter of a final product cannot be liable for use abroad, so too the United States exporter of the component parts cannot be liable for use of the infringing article abroad.” The Federal Circuit reinstated that ruling after the Supreme Court GVRed the case based on a recent decision that pertained to a different issue.

WesternGeco cites Microsoft v. AT&T Corp., 550 U.S. 437 (2007), for the proposition that §271(f) created a general exception to the presumption against extraterritoriality for the exporting of components. Further, it says, the presumption applies only to liability, not damages. Once ION exported the infringing components, WesternGeco was entitled to full compensation, including from foreign uses. WesternGeco argues that the Federal Circuit’s rule swallows the exception of §271(f) by allowing U.S. companies to escape liability by exporting their components for assembly, distribution, and use abroad. In an amicus brief filed at the invitation of the Court, the United States argues that the “court of appeals erred by precluding recovery of lost-profits damages necessary to provide full compensation solely because those profits would have been earned on contracts to perform services outside of the territorial jurisdiction of United States. The presumption against extraterritoriality does not bar courts from taking notice of foreign evidence or events in fashioning appropriate relief for a domestic act of patent infringement.” All told, it argues, the Federal Circuit’s decision “systematically undercompensates prevailing parties” when a domestic patent infringement results in financial harms outside the country.

Lamar, Archer & Cofrin, LLP v. Appling, 16-1215. Under §523(a)(2) of the Bankruptcy Code, debts from money or services obtained by fraud are not dischargeable, except for “statements respecting the debtor’s . . . financial condition” that are not in writing. At issue is whether a misrep-
representation about a single asset used to show the debtor’s supposed ability to pay off a debt is a “statement respecting the debtor’s . . . financial condition.” Respondent R. Scott Appling hired petitioner Lamar, Archer & Cofrin, LLP (Lamar) to represent him in litigation against the former owners of his business. When Appling’s unpaid fees to Lamar amounted to about $60,000, the firm threatened to terminate representation and place an attorney’s lien on its work product. Appling assured Lamar that he was about to receive a tax refund of $100,000, and the firm continued to represent him. Lamar did receive a refund, but for only $60,718, and spent the entirety of it on his business rather than on his legal fees. Five years later, Lamar sued Appling and obtained a judgment for $104,179.60. Appling filed for bankruptcy three months later. Lamar initiated an adversary proceeding, alleging that Appling’s debt to it was not dischargeable because it was obtained by fraud. Appling moved to dismiss the complaint on the ground (among other things) that the prohibition on discharging such debts did not apply because the alleged false statements about his tax refund were “statement[s] respecting [his] . . . financial condition.” The bankruptcy court denied Appling’s motion and then declined to discharge the debt. The district court affirmed, but the Eleventh Circuit reversed. 848 F.3d 953.

The Eleventh Circuit acknowledged that the ordinary meaning of “financial condition” means “one’s overall financial status.” But the court rejected the argument that a statement only “respects” one’s financial condition if it constitutes a “complete expression” of all the debtor’s assets and liabilities. Unlike a statement “revealing” or “disclosing” one’s financial condition, a statement “respecting” a financial condition need only “relate to” or “concern” it. The court added that its construction of the statute is “perfectly sensible” because it “gives creditors an incentive to create writings before the fact” and thus “promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose.” Lamar argues in its petition that “financial condition” means “the debtor’s financial health generally” and is necessarily narrower than “finances.” In his view, the Eleventh Circuit improperly read the word “respecting” to “render[] Congress’s use of ‘financial condition’ largely meaningless.” He add, quoting the Tenth Circuit, that the Eleventh Circuit’s “view of the ‘financial condition’ exception could ‘eliminate coverage for many misrepresentations’ at the very ‘heart’ of Section 523(a)(2)(A), because ‘virtually every statement by a debtor that induces the delivery of goods or services on credit relates to his ability to pay.’” Finally, Lamar insists that Congress enacted the exception to address a specific, narrow problem: “certain consumer-finance companies were deliberately encouraging their customers to ‘submit[] false financial statements . . . for the very purpose of insulating [the creditors’] own claims from discharge.’” Yet the Eleventh Circuit would expand the scope of the exception far beyond that.

● Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., 16-1220. The question presented is whether a federal court must, as a matter of international comity, give conclusive deference to a foreign sovereign’s interpretation of its own law. Petitioners brought a multidistrict antitrust class action against respondents, two Chinese manufacturers and exporters of Vitamin C, alleging price fixing of Vitamin C products in violation of the Sherman Act. Respondents filed a motion to dismiss, arguing (among other things) that petitioners’ claims are barred because respondents’ allegedly anticompetitive conduct was compelled by Chinese law. In support, the Ministry of Commerce of the People’s Republic of China (Ministry) filed an amicus brief and submitted a sworn statement attesting that it required respondents to coordinate with other Chinese vitamin C producers to coordinate prices and create a supply shortage. The district court denied the motion to
dismiss, and after discovery denied a motion for summary judgment on the same issue. The court credited contrary evidence in the record, including testimony by an expert in Chinese law, which showed that respondents’ conduct was voluntary. The case then went to trial, where a jury found for petitioners. The court awarded damages of $147 million and permanently enjoined respondents from further violating the Sherman Act. The Second Circuit reversed, holding that “international comity” required the district court to abstain from exercising jurisdiction. In the course of reaching that conclusion, the court held that the district court abused its discretion by not deferring to the Ministry’s “proffer regarding the construction and effect of its laws and regulations.” 837 F.3d 175.

The Second Circuit narrowed the abstention inquiry to whether the degree of conflict between the law of the United States and the law of the foreign sovereign amounted to a “true conflict” where “compliance with the laws of both countries must have been impossible.” The Second Circuit found such a true conflict because “Chinese law required Defendants to engage in activities in China that constituted antitrust violations here in the United States.” In so finding, the court relied exclusively on the Ministry’s statement because “[w]hen a foreign government . . . directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements.” The court derived this rule from United States v. Pink, 315 U.S. 203 (1942), its construction of Federal Rule of Civil Procedure 44.1, and its view that such deference to foreign sovereigns was necessary under principles of comity.

Petitioners argue that something short of conclusive deference was required under Pink and Rule 44.1 and to prevent sovereigns from protecting their corporations from liability in U.S. courts. The United States, in an amicus brief filed at the invitation of the Court, agrees with petitioners that the Second Circuit applied too deferential a standard, “under which a court is bound to accept a foreign government’s characterization—and may not consider other material—unless that characterization is facially unreasonable.” In its view, a foreign government’s views should “be afforded substantial weight,” but a court is not “bound to accept its characterizations or precluded from considering other relevant material.”

● Wisconsin Central Ltd. v. United States, 17-530. The Court will address whether stock that a railroad transfers to its employees is taxable under the Railroad Retirement Tax Act, 26 U.S.C. §3231(e)(1) (RRTA), which defines taxable “compensation” as “any form of money remuneration paid to an individual for services rendered as an employee” (emphasis added). Under the RRTA, railroads do not pay and withhold taxes under FICA; rather the RRTA imposes a payroll tax on employer and employee whose proceeds pay railroad workers’ retirement and disability benefits. “The RRTA requires railroads to pay an excise tax equal to a specified percentage of its employees’ ‘compensation,’ and also to withhold a specified percentage of that compensation as the employees’ share of the tax.” This case concerns railroads that are subsidiaries of Canadian National Railway Company (CN), which is a publicly-traded corporation. Since the mid-1990s, CN has offered its employees stock options. Each option gave the employee the right to purchase one share of CN stock at a fixed price equal to CN’s publicly traded stock price as of the date the option was granted. Thus, the value of an option depended on the future performance of the company. In 2014, CN filed suit “seeking refunds of approximately $13 million in taxes [it] had paid or withheld when nonqualified stock options were exercised between 2006 and 2013.” The “railway argue[d] that
income from the exercise of stock options that a railroad gives its employees is not a form of ‘money remuneration’ to them and is therefore not taxable to the railway as compensation under the [RRTA].” The district court sided with the Government and denied the refunds, finding that the statute was ambiguous and that the Government’s interpretation was entitled to Chevron deference. A divided panel of the Seventh Circuit affirmed. 856 F.3d 490.

The Seventh Circuit reasoned that even if stock “wasn’t a form of money remuneration” when Congress enacted the RRTA in 1935, “there is no reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash even if, as was eventually to happen, stock became its practical equivalent, just as today 100 dimes is the exact monetary equivalent of a $10 bill.” The court explained, “sheep may have once been a form of money; now stock is.” The court also pointed to a 2004 amendment to the RRTA that excluded qualified stock options from the definition of “compensation” in §3231(e)(1). That exception “supports an inference that non-qualified stock options”—at issue here—“are covered by the term ‘money remuneration’ and are therefore taxable.” CN insists that “[t]he plain meaning of ‘money’ is cash, or a recognized medium of exchange. Investment property, such as stock or real estate, can be bought and sold for money, but is not itself money, even when that property has a readily ascertainable market value. That was so in 1937—and it remains so today. Stock is not used as currency or as a medium of exchange.” CN adds that the government’s interpretation, “in which anything could be ‘money,’ even a birthday cake—has no limiting principle and reads the word ‘money’ out of the statute” (citation omitted).
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