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This *Report* summarizes cases granted review on October 2 and 13, 2020 (Part I).

I. Cases Granted Review

● *Brnovich v. Democratic National Committee*, 19-1257; *Arizona Republican Party v. Democratic National Committee*, 19-1258. The Court will review an en banc Ninth Circuit decision invalidating two election-related rules adopted by Arizona. First, Arizona has an "out-of-precinct policy," under which provisional ballots cast in person on Election Day are not counted if cast outside the voter's designated precinct. Second, Arizona has a "ballot-collection law" that permits only certain persons (family and household members, caregivers, mail carriers, and elections officials) to handle another person's completed early ballot. Many other states have similar laws. Several arms of the Democratic party challenged the provisions, alleging (as relevant here) that both laws violate Section 2 of the Voting Rights Act "by adversely and disparately impacting the electoral opportunities of Hispanic, African American, and Native American Arizonans"; and alleging that the ballot-collection law also violates Section 2 and the Fifteenth Amendment "because it was enacted with the intent to suppress voting by Hispanic and Native American voters." After a 10-day trial, the district court rejected those claims. A divided panel of the Ninth Circuit affirmed, but the en banc Ninth Circuit reversed. 948 F.3d 989.

By a 7-4 vote, the en banc Ninth Circuit held that both provisions violate Section 2's results test, ruling that Section 2 is implicated where "more than a de minimis number of minority voters" "are disparately affected" by a voting policy. As to the out-of-precinct policy, the court found that standard met because "[u]ncontested evidence in the district court established that minority voters in Arizona cast OOP ballots at twice the rate of white voters." Then applying the second part of the *Gingles* test, the court concluded that the "discriminatory burden imposed by the OOP policy is in part caused by or linked to 'social and historical conditions' that have or currently produce 'an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives' and to participate in the political process." As to the ballot-collection law, the Ninth Circuit found that minority voters in Arizona are far more likely than white voters to rely on third-party ballot collection prohibited by the law. On the second part of the *Gingles* test, it ruled (among other things) that the state's justification for the law was "tenuous" because "no direct evidence that the type of ballot collection fraud the law is intended to prevent or deter has occurred" in Arizona. By a 6-5 vote, the court also held that the ballot-collection law violates Section 2 and the Fifteenth Amendment because it was passed with discriminatory intent. The court relied heavily on two actions: (1) State Senator Don Shooter, who led efforts to enact a predecessor bill, made "'demonstrably false' allegations of ballot collection fraud" in order "'to eliminate' the increasingly effective efforts to ensure that Hispanic votes in his district were collected, delivered, and counted"; and (2) a racially charged video created by Maricopa County Republican Chair A.J. LaFaro. The Ninth Circuit acknowledged "that some members of the legislature who voted for H.B. 2023 had a sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed. However, . . . that sincere belief had been fraudulently created by Senator Shooter's false allegations and the 'racially-tinged' LaFaro video."

In his petition, Arizona Attorney General Mark Brnovich notes that the "Court has never applied Section 2's results language to a vote-denial claim, and thus has never articulated the test that governs such claims." This has led to a circuit split on the issue. Brnovich notes that the "result" that amended Section 2 prohibits is "less opportunity than other members of the electorate," viewing the State's "political processes" as a whole. He maintains that "[t]he new language was crafted as a compromise designed to eliminate the need for direct evidence of discriminatory intent, which is often difficult to obtain, but without embracing an unqualified 'disparate impact' test that would invalidate many legitimate voting procedures." Yet here, the Ninth Circuit found that the out-of-precinct law violated Section 2 based on the smallest of disparate impacts: "roughly 99 percent of minorities and 99.5 percent of non-minorities voted in the correct precinct." As to the ballot-collection law, Brnovich points out that "it 'follows precisely' the bipartisan Carter–Baker Commission's recommendation," which "urged States to 'reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots.'" And he pointed to "ample evidence [of] voter fraud in the collecting of absentee ballots" outside Arizona. Brnovich argues that if anything more than a de minimis racial disparity "were enough to prove a discriminatory burden under Section 2, the law would dismantle every state's voting apparatus, including almost all registration and voting rules." (Internal quotation marks omitted.) Brnovich faults the Ninth Circuit's discriminatory intent ruling on multiple grounds, including its conflation of racial motives and partisan motives and its failure to recognize that each legislator is an independent actor; what motivates one legislator isn't necessarily what motivated others.

● *United States v. Arthrex, Inc*., 19-1434; *Smith & Nephew, Inc. v Arthrex, Inc*., 19-1452; *Arthrex, Inc. v. Smith & Nephew, Inc*., 19-1458. The Court will address two questions: (1) "Whether, for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the Senate's advice and consent, or 'inferior Officers' whose appointment Congress has permissibly vested in a department head." (2) "Whether, if administrative patent judges are principal officers, the court of appeals properly cured any Appointments Clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. 7513(a)"—which imposes statutory restrictions on the removal of federal officials—"to those judges."

The case involves a patent obtained by Arthrex for a surgical device for reattaching soft tissue to bone. It sued Smith & Nephew for infringement. The jury returned a verdict for Arthrex, finding the claims valid and infringed, after which the parties then settled the case. Smith & Nephew then instituted inter partes review, which allows any person to seek to invalidate a previously issued patent on the ground that the invention was anticipated or obvious in light of a prior-art patent or printed publication. Inter partes review is a trial-like procedure conducted before a panel of the Patent Trial and Appeal Board, which consists of about 260 administrative patent judges (APJs) as well as the Patent Office's Director, Deputy Director, and two Commissioners. The Director is the only Board member appointed by the President and confirmed by the Senate. The Secretary of Commerce, in consultation with the Director, appoints the APJs. A panel of the Board ruled for Smith & Nephew. Arthrex appealed to the Federal Circuit, arguing (among other things) "that the APJs who presided over its case were appointed in violation of the Appointments Clause. APJs, it urged, are principal officers who must be

appointed by the President and confirmed by the Senate, rather than inferior officers who may be appointed by the Secretary of Commerce."

The Federal Circuit agreed with Arthrex that APJs of the Board are principal officers and thus the statutorily prescribed method of appointing them violates the Appointments Clause. The Court recognized that, under *Edmond v. United States*, 520 U.S. 651 (1997), inferior officers are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." It then stated that *Edmond* established three non-exclusive factors for determining whether a sufficient degree of direction and supervision exists: "(1) whether an appointed official has the power to review and reverse the officers' decision; (2) the level of supervision and oversight an appointed official has over the officers; and (3) the appointed official's power to remove the officers." The Federal Circuit found that the first factor supported finding that administrative patent judges are principal officers, because "[n]o presidentially-appointed officer has independent statutory authority to review a final written decision by the [judges] before the decision issues on behalf of the United States." Losing parties appeal directly to the Federal Circuit or seek rehearing by the Board itself. The court found that the second factor pointed the opposite direction because the Director is empowered to "provide instructions that include exemplary applications of patent laws to fact patterns"; has the authority to "designate[] or de-designate[]" panel decisions as "precedential decisions of the Board [that] are binding on future panels"; and may determine which judges will decide each inter partes review. Finally, the court found that the third factor "weighed in favor of viewing administrative patent judges as principal officers, because neither the Secretary nor the Director has 'unfettered' authority to remove those judges from federal service. The court concluded that the Secretary's authority to remove administrative patent judges from federal service for 'such cause as will promote the efficiency of the service,' 5 U.S.C. 7513(a), was insufficient because those judges cannot be 'remov[ed] without cause.'" Taking the three factors together, the Federal Circuit concluded that APJs are principal officers whose appointment by the Secretary of Commerce violates the Appointments Clause. "The court of appeals determined that it could cure the Appointments Clause violation going forward by 'sever[ing] the application of Title 5's [efficiency-of-the service] removal restrictions'" to administrative patent judges. The court concluded that making administrative patent judges removable at will by the Secretary would 'render[] them inferior rather than principal officers,' and that doing so is the 'narrowest viable approach to remedying the [constitutional] violation.'" (Citations omitted.)

The United States argues in its petition that the Federal Circuit erred in ruling that APJs are principal officers. The United States maintains that under *Edmond* the "key inquiry is whether the officer's 'work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate'"—such as the Secretary of Commerce and the Patent Office's Director. It then pointed to various ways by which the Director directs and supervises APJs: "An administrative patent judge decides only those Board cases, if any, that the Director assigns him. In deciding those cases, the judge must apply the patent laws in accordance with regulations, policies, and guidance the Director has issued, and with past decisions the Director has designated as precedential. Once the Board issues its final written decision, that decision can be deemed precedential (or not) by the Director, countermanded prospectively by further guidance he issues, or both.

And any proceeding in which the judge participates may always be reheard de novo by a review panel whose members the Director also selects—a panel that typically includes the Director himself and two other particular senior Executive officials."

Meanwhile, Arthrex's petition challenges the Federal Circuit's attempt to cure the constitutional defect by severing the application of 5 U.S.C. §7513(a)—which permits removal only for "such cause as will promote the efficiency of the service"—to APJs. Arthrex argues that "[b]edrock due process principles prohibit the government from revoking [patents] except through fair procedures administered by neutral decisionmakers. Since the dawn of the modern administrative state, Congress has insisted on tenure protections for administrative judges to ensure that impartiality. The court of appeals eliminated those protections for APJs. Under the court's new regime, APJs revoke valuable property rights under the omnipresent specter of termination for policy disagreements, political reasons, or no reason at all. Congress would not have left patents to the mercy of subordinates more concerned about pleasing their superiors and saving their jobs than about fair and impartial adjudication." Further, says Arthrex, the Federal Circuit's remedy doesn't cure the problem. "Even without tenure protections, there is still no principal executive officer who can review APJ decisions. That alone makes APJs principal officers."

● *FCC v. Prometheus Radio Project*, 19-1231; *National Ass'n of Broadcasters v. Prometheus Radio Project*, 19-1241. At issue is whether the Third Circuit erred in vacating an FCC rule relaxing the agency's cross-ownership restrictions on the ground that the agency had not adequately analyzed the potential effect of the changes on female and minority ownership of broadcast stations. The FCC has long exercised its statutory authority to regulate broadcasters in the public interest by limiting common ownership of multiple media outlets in a single market. For example, the Commission limited the number of broadcast stations a single entity could own, and banned common ownership of a daily newspaper and broadcast station. The seeds of change to this policy were planted in Section 202(h) of the Telecommunications Act of 1996, which directs the FCC to review its ownership rules every four years to determine whether they remain "necessary in the public interest as the result of competition." If the Commission determines that any of these rules are "no longer in the public interest," it "shall repeal or modify" them. Section 202(h) requires the Commission to evaluate the continuing need for existing ownership rules in light of both "competition" and the "public interest." In applying the public-interest criterion, the FCC has historically considered the values of localism and five different types of diversity: "viewpoint, outlet, program, source, and minority and female ownership diversity."

In 2002, in conducting its Section 202(h) review, the FCC confronted a media landscape in which "[t]here [were] far more types of media available," "far more outlets per-type of media," and "far more news and public interest programming options available to the public . . . than ever before." In light of this changed environment, the FCC eliminated its ban on common ownership of daily newspapers and broadcast stations in a single market and repealed the Failed Station Solicitation Rule, which had required certain owners of failed television stations to attempt to secure out-of-market buyers for their stations before selling to in-market buyers. A divided panel of the Third Circuit vacated the FCC's order in substantial part, even though it acknowledged that "reasoned analysis supports

the Commission's determination that the blanket ban on newspaper/ broadcast cross-ownership was no longer in the public interest." In 2006, the FCC again sought to relax the newspaper/broadcast cross-ownership ban and again the Third Circuit vacated the order. Most recently, and at issue here, the FCC in 2016 again sought to loosen the newspaper/broadcast cross-ownership restrictions. Specifically, it repealed its newspaper/broadcast cross-ownership rule (as well as a similar rule limiting radio and television cross-ownership) and modified the rules limiting ownership of multiple television stations in a single market. The FCC concluded that prior relaxations of media ownership restrictions had not led to an overall decline in minority-owned stations, and further observed that no commenter had produced meaningful evidence showing a likely negative impact on minority and female ownership. A divided panel of the Third Circuit again vacated the FCC order. 939 F.3d 567. As before, the court did not dispute "the FCC's core determination that the ownership rules have ceased to serve the 'public interest.'" But the court faulted the Commission for failing to "adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities," finding that the FCC's determination that the revised rules would "have minimal effect on female and minority ownership" was "not adequately supported by the record." [Note: Some of the language in the prior two paragraphs was taken directly from the FCC's petition.]

The FCC argues in its petition that "[t]he panel's rulings have saddled broadcast markets nationwide with outdated rules that the FCC has repeatedly concluded—and that the panel has acknowledged—are preventing struggling traditional outlets from entering transactions that would allow them to retain economic vitality. The panel's vacaturs have also had the perverse consequence of preventing the agency from studying the effects of its revised ownership rules on women and minorities, thereby gathering the very data the panel insists are necessary for informed rulemaking." (Citation omitted.) The FCC maintains that, under bedrock administrative law principles, because it "addressed the relevant 'issue[s] seriously and carefully, providing reasons in support of its position and responding to the principal alternative[s] advanced,' its judgment merits deference." The FCC notes that "Section 202(h) does not even mention gender and racial diversity, which the FCC historically has treated as simply one part of a multifactor inquiry to assess and promote the public interest. The FCC's authority to regulate in the public interest includes 'broad discretion in determining how much weight should be given to' subsidiary goals like gender and racial diversity 'and what policies should be pursued in promoting' those goals." And the FCC maintains that "[t]he APA does not require perfect data, especially on points ancillary to an agency's primary task. Instead, when 'the available data do not settle a regulatory issue,' an agency may 'exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.'"

● *BP P.L.C. v. Mayor and City Council of Baltimore*, 19-1189. Although 28 U.S.C. §1447(d) generally precludes appellate review of an order remanding a removed case to state court, it expressly provides that an "order remanding a case . . . removed pursuant to" the federal-officer removal statute, 28 U.S.C. §1442, or the civil-rights removal statute, 28 U.S.C. §1443, "shall be reviewable by appeal or otherwise." The question presented is "[w]hether 28 U.S.C. §1447(d) permits a court of appeals to review *any* issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal

statute . . . or the civil-rights removal statute" or whether appellate review is limited to the federal-officer or civil-rights ground for removal.

Petitioners are 21 domestic and foreign energy companies who were sued in 2018 in state court by respondent, the mayor and city counsel of Baltimore, who alleged that petitioners have contributed to global climate change, which has caused or will cause harm in Baltimore. The complaint pleads a number of state-law causes of action. Petitioners removed the case to federal district court. They contended that "the allegations in the complaints pertain to actions petitioners took at the direction of federal officers, see 28 U.S.C. 1442; that respondent's climate-change claims necessarily arise under federal common law, cf. *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 420-423 (2011); *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); and that federal-question jurisdiction was otherwise present under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and under the doctrine of complete preemption." Respondent moved to remand the case to state court based on a lack of subject-matter jurisdiction, and the district court granted the motion. Petitioners appealed. The Fourth Circuit "dismiss[ed] th[e] appeal for lack of jurisdiction insofar as it seeks to challenge the district court's determination" on any ground other than federal-officer removal. The court then held that the federal-officer removal statute did not permit removal of the case.

Petitioners assert that the circuits are divided 6-3 on the question presented, with the majority agreeing with the Fourth Circuit but with the trend toward the minority position. On the merits, petitioners make a plain-language argument: "Section 1447(d) provides that 'an order remanding a case to the [s]tate court from which it was removed pursuant to [S]ection 1442 or 1443 of this title shall be reviewable by appeal or otherwise.' As the Seventh Circuit explained in construing that provision, '[t]o say that a district court's 'order' is reviewable is to allow appellate review of the whole order, not just of particular issues or reasons.'" They rely on *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), "which addressed whether, in an interlocutory appeal under 28 U.S.C. 1292(b), a court of appeals could review only the particular question certified by a district court or could instead address any issue encompassed in the order being certified." *Yamaha* held that "the appellate court may address any issue fairly included within the certified order," not just the particular question certified. Petitioners maintain that "[p]recisely the same reasoning applies here." They add that Section 1447(d)'s purpose is to avoid "prolonged litigation of questions of jurisdiction" after removal—"[b]ut once appellate review of a remand order is permitted, there is very little to be gained by limiting review to a ruling on a particular issue underlying the order." (Quotation marks omitted.)

Respondent counters that the plain language supports it: Section 1447(d) contains an "except that" clause strictly "to make an exception to the general statutory prohibition against appellate review of remand orders 'pursuant to Section 1442 or 1443.'" In respondent's view, to "make every issue addressed in a remand order reviewable so long as either Section 1442 or Section 1443 were included among the jurisdictional grounds for removal, [would] enabl[e] the exception to swallow the rule and encourag[e] meritless assertions of civil-rights or federal-officer jurisdiction as a device to obtain appellate review of otherwise non-reviewable jurisdictional grounds for removal." And respond-

ent agrees with the Fourth Circuit's reason for distinguishing *Yamaha*: "interpreting 'order' to authorize plenary review may be appropriate under Section 1292(b), as that statute affects only the timing of review for issues that would otherwise be appealable as of right after a final decision. But giving the word 'order' the same meaning in the §1447(d) context would mandate review of issues that are ordinarily unreviewable, period—even following a final judgment." (Citation omitted.)

● *Barr v. Dai*, 19-1155; *Barr v. Alcaraz-Enriquez*, 19-1156. In both cases, the Court will review a Ninth Circuit rule under which "a court appeals may conclusively presume that an asylum applicant's testimony is credible and true whenever an immigration judge or the Board of Immigration Appeals adjudicates an application without making an explicit adverse credibility determination." In *Dai*, the Court will also review whether the Ninth Circuit "violated the remand rule as set forth in *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), when it determined in the first instance that respondent was eligible for asylum and entitled to withholding or removal." The REAL ID Act of 2005 amended the Immigration and Nationality Act to provide that the trier of fact of an asylum application should consider the "totality of the circumstances" in making a credibility determination, and that "[t]here is no presumption of credibility," with one exception: "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. §1158(b)(1)(B)(iii). This case will resolve how that provision applies to petitions for review to courts of appeal following a Board of Immigration Appeals affirmance of an immigration judge's (IJ's) denial of the asylum request.

Respondent Ming Dai is a native and citizen of China who entered the United States on a tourist visa in 2012. He filed an application for asylum, contending that he had been persecuted for his opposition to China's coercive population control program followed his wife's forced abortion. His application and response to an asylum officer's interview questions failed to mention, however, that his wife and daughter, who had both traveled to the United States with him in January 2012, returned to China the following month. The asylum officer denied Dai's application. The Department of Homeland Security thereafter initiated removal proceedings. "During cross-examination before an IJ, respondent 'hesitated at some length' when asked about why he had not disclosed that his wife and daughter had joined him in the United States, and 'appeared nervous and at a loss for words.' He eventually conceded that he had been 'afraid to answer why his wife and daughter had gone back,' and confirmed that the 'real story as to why his family travelled to the United States and returned to China' was that 'it was because he wanted a good environment for his child and because his wife had a job and he did not, and that that is why he stayed here.'" The IJ found Dai removable and denied his applications for asylum and withholding of removal. In so holding, the IJ found significant Dai's answers (and long pause) to questions about his wife and daughter. The Board of Immigration Appeals adopted and affirmed the IJ's ruling. Dai filed a petition for review in the Ninth Circuit, which a divided panel granted. 884 F.3d 858.

The Ninth Circuit held that neither the IJ nor the BIA had made an explicit finding that Dai's testimony was not credible, and that "in the absence of an explicit adverse credibility finding by the IJ or the BIA," an asylum applicant's testimony must be "deemed credible." The court relied on circuit precedent pre-dating the REAL ID Act. The court acknowledged that the REAL ID Act provided for a

"rebuttable presumption of credibility on appeal" when "no adverse credibility determination is explicitly made," but the court concluded that this rebuttable presumption applies only "on appeal" to the Board, and does not apply on petition for review in the court of appeals. The court therefore concluded that the REAL ID Act provision did not override circuit precedent requiring the court to accept the facts to which respondent had testified. The court then held that Dai's testimony was sufficient to carry his burden because he "testified to sufficient facts to demonstrate his eligibility for asylum." The court ruled that Dai is eligible for asylum, and remanded to the Board for the discretionary determination of whether to grant asylum; and it held that Dai was entitled to withholding of removal.

The United States argues in its petition that "[t]he most straightforward flaw in the court of appeals' decision is that the use of a presumption of credibility by a court of appeals is inconsistent with the express terms of the INA. Section 1158(b)(1)(B)(iii) states that, with one exception inapplicable here, '[t]here is no presumption of credibility' in assessing an alien's eligibility for asylum. 8 U.S.C. 1158(b)(1)(B)(iii); see 8 U.S.C. 1231(b)(3)(C) (making same provision applicable to determinations about withholding of removal). That statutory rule forecloses the Ninth Circuit's use of a presumption of credibility." Indeed, says the United States, Congress added that provision through the REAL ID Act precisely to overrule the Ninth Circuit precedent upon which that court relied in this case. The United States asserts that the Ninth Circuit "was correct that the statutory 'rebuttable presumption' applies only on appeal to the Board, but it drew the wrong conclusion from that predicate holding. The *general rule* following enactment of the REAL ID Act is that '[t]here is *no presumption of credibility*' in evaluating an alien's testimony. 8 U.S.C. 1158(b)(1)(B)(iii) (emphasis added). The 'rebuttable presumption,' *ibid*., represents a limited exception to that general rule. But where that exception is inapplicable (as the court of appeals correctly held here), it is the statutory rule of no presumption that governs—not some extra-statutory, judge-made irrebuttable presumption of credibility." The United States also criticizes the Ninth Circuit for its "belie[f] that in the absence of an express adverse credibility finding by the IJ or the Board, it must treat respondent's testimony as truthful in its entirety. When the statutory presumption applies, however, it pertains only to the 'credibility' of an alien's testimony, not its underlying truthfulness or ultimate persuasiveness." Says the United States, "[t]here is a meaningful difference between those concepts." Finally, the United States faults the Ninth Circuit for deeming Dai's "testimony actually true and ultimately persuasive, and order[ing] relief accordingly—determining in the first instance that respondent had carried his burden of proving eligibility for asylum and entitlement to withholding of removal." Instead, under *INS v. Ventura*, the Ninth Circuit should have "remand[ed] to the agency for additional investigation or explanation."

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