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This *Report* summarizes opinions issued on May 20, 2019 (Part I); and cases granted review on May 28, 2019 (Part II).

I. Opinions

● *Herrera v. Wyoming*, 17-532. In a 5-4 decision, the Court held that the Crow Tribe's treaty right to hunt on unoccupied lands did not expire upon Wyoming's statehood, and that the creation of a national forest did not render all the land therein occupied such that the treaty rights expired. Wyoming prosecuted Clayvin Herrera for off-season hunting in the Bighorn National Forest. Herrera, a member of the Crow Tribe, argued that his prosecution was barred by the hunting rights granted the tribe in its 1868 treaty with the United States. That treaty provided: "The Indians . . . shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." The state trial court rejected this defense, and Herrera was convicted. Wyoming's appellate court affirmed, holding that the tribe's hunting rights had expired with statehood and that Herrera was barred by issue preclusion from arguing otherwise by the Crow Tribe's loss in an earlier, Tenth Circuit case. The Wyoming court also held that even if the tribe's hunting rights survived statehood, the creation of the Bighorn National Forest rendered the land where Herrera was hunting "occupied" so that the treaty rights did not apply. After the Wyoming Supreme Court denied review, the U.S. Supreme Court granted certiorari. In an opinion by Justice Sotomayor, the Court vacated and remanded.

The Court framed the case as turning on which of two precedents governed. In *Ward v. Race Horse*, 163 U.S. 504 (1896), the Court held that the Shoshone and Bannock Tribes' hunting rights, deriving from a treaty with identical language to that here, expired when Wyoming was admitted to the Union. But in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Court held that a tribe's hunting rights survived Minnesota's admission to the Union, repudiating some of the reasoning in *Race Horse*. The Court concluded that "this case is controlled by *Mille Lacs*, not *Race Horse*." It identified "two lines of reasoning" on which *Race Horse* relied. First, *Race Horse* determined that the "equal footing" doctrine meant that Wyoming's statehood resulted in the repeal of tribes' hunting rights, because the rights were "'irreconcilably in conflict' with the power—'vested in all other states of the Union' and newly shared by Wyoming—'to regulate the killing of game within their borders.'" Second, *Race Horse* concluded that the treaty hunting rights were a "temporary and precarious" privilege because the conditions on which the rights were predicated could disappear. *Mille Lacs*, in the Court's view, "undercut both pillars of *Race Horse*'s reasoning."

The Court explained that, "[a]lthough *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it methodically repudiated that decision's logic." It rejected the "equal footing" rationale by determining that "treaty rights are reconcilable with state sovereignty over natural resources." "[T]he Court instead drew on numerous decisions issued since *Race Horse* to explain that Congress 'must clearly express' any intent to abrogate Indian treaty rights." The Court also viewed *Mille Lacs* as rejecting *Race Horse*'s reliance on a description of the treaty rights as "temporary and precarious"; rather, the relevant inquiry is "whether the Senate 'intended the rights secured by the . . . Treaty to survive statehood.'" *Mille Lacs*, said the Court here, "established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether

a termination point identified in the treaty itself has been satisfied." To the extent that *Race Horse* "held that treaty rights can be impliedly extinguished at statehood," it "is repudiated." The Court therefore concluded that Herrera's defense was not barred by the Tenth Circuit's ruling that the Crow Tribe's hunting rights expired upon Wyoming's statehood, as "*Mille Lacs* repudiated the reasoning on which the Tenth Circuit relied." This ruling justified applying the exception to issue preclusion for where there "has been an intervening change in the applicable legal context."

Next, applying *Mille Lacs*, the Court ruled that Wyoming's admission to the Union did not abrogate the Crow Tribe's hunting rights. It noted that the Wyoming Statehood Act "'makes no mention of Indian treaty rights' and 'provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act.'" "Nor is there any evidence in the treaty itself," the Court observed, "that Congress intended the hunting right to expire at statehood . . . ." So too with the historical record, "which contains no evidence that the federal negotiators ever proposed that the right would end at statehood." The Court rejected Wyoming's arguments that statehood "marked the arrival of 'civilization' . . . and thus rendered all the lands in the State occupied." These "arguments boil down to an attempt to read the treaty impliedly to terminate at statehood, precisely as *Mille Lacs* forbids."

The Court turned "next to the question of whether the 1868 Treaty right . . . does not protect hunting in Bighorn National Forest because the forest lands are 'occupied.'" Answering "no," the Court concluded that the creation of a national forest does not categorically make that land "occupied." Because the "Crow Tribe would have understood the word 'unoccupied' to denote an area free of residence or settlement by non-Indians," the "proclamation creating Bighorn National Forest did not 'occupy' that area within the treaty's meaning." Federal regulation of the land or mining and logging of the forest were insufficient to render the land occupied. Finally, the Court "note[d] two ways in which [its] decision is limited." First, it was holding only "that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied." And second, it was "not pass[ing] on the viability" of Wyoming's argument that it could regulate tribal hunting rights in the interest of conservation, because the Wyoming appellate court did not reach those arguments. The Court added that the state courts could also assess on remand Wyoming's argument that Herrera is precluded by the prior Tenth Circuit judgment from disputing that the creation of the Bighorn National Forest "occupied" the lands.

Justice Alito wrote a dissent, which Chief Justice Roberts and Justices Thomas and Kavanaugh joined. The dissent contended that the Court's "interpretation of the [1868] treaty is debatable and is plainly contrary to the decision in . . . *Race Horse*." But regardless of the treaty's interpretation, Justice Alito wrote, the Court's decision "will have no effect if the members of the Crow Tribe are bound under . . . issue preclusion," which the majority decided only in part. In his view, "the Court's decision to plow ahead on the treaty-interpretation issue is hard to understand, and . . . likely, in the end, to be so much wasted ink." The dissent described Herrera as "assert[ing] the same hunting right that was actually litigated and decided against his Tribe." The majority was wrong, Justice Alito argued, to find an exception to issue preclusion based on "an intervening 'change in the applicable legal context.'" He noted that "we have never actually held that a prior judgment lacked preclusive effect on this ground." And in the dissent's view, *Mille Lacs* "held back from actually overruling *Race Horse*." The dissent continued that, regardless of whether this exception applies, the Tenth Circuit's

ruling against the Crow Tribe is still binding because it "was based on a second, independently sufficient ground that has nothing to do with *Race Horse*, namely, that the Bighorn National Forest is not 'unoccupied.'" The dissent disagreed with the majority's decision to remand on that preclusion issue. In the course of that discussion, the dissenters expressed their view that the First Restatement of Judgments was correct, and the Second Restatement incorrect, on the preclusive effect of a judgment that rests on two, independently-sufficient grounds. In their view, both alternative grounds can be preclusive.

● *Merck Sharp & Dohme Corp. v. Albrecht,* 17-290. In a 6-3 decision (and unanimous judgment), the Court held that a judge, rather than the jury, should decide whether an FDA decision regarding the warnings that must appear on a particular drug's label preempts state laws requiring that the label warn of a particular risk. The Court further clarified the nature of the "clear evidence" required to find impossibility preemption under *Wyeth v. Levine*, 555 U.S. 555 (2009). Petitioner Merck Sharp & Dohme manufactures Fosamax, a drug that treats and prevents osteoporosis in postmenopausal women, but which may increase the risk that ordinary stress fractures will develop into atypical femoral fractures. In 2008, after finding additional evidence of this risk, Merck applied to the FDA for preapproval to add a warning to Fosamax's label. The FDA rejected the proposed warning as inadequate, but invited Merck to resubmit a revised warning addressing the identified deficiencies in the proposed warning. Merck did not resubmit, and a warning about atypical femoral fractures did not appear on Fosamax labels until 2011, when the FDA ordered the change based on its own analyses. More than 500 people who took Fosamax and suffered atypical femoral fractures between 1999 and 2010 sued Merck for tort damages on the ground that it violated state-law warning requirements. Merck argued, based on the FDA's 2008 rejection of its proposed warning, that the state-law requirements were preempted because the FDA would not have approved the warning. The district court granted summary judgment in favor of Merck, but the Third Circuit vacated and remanded, holding that whether the FDA would have rejected a proposed label change is a question of fact that must be answered by a jury. In an opinion by Justice Breyer, the Court vacated and remanded.

The Court previously held in *Wyeth* that a drug manufacturer's preemption defense premised on the alleged impossibility of complying with both state and FDA labeling requirements fails "absent clear evidence that the FDA would not have approved a change to [the drug's] label." The Court now articulated the question at the core of such impossibility preemption defenses as "whether federal law (including appropriate FDA actions) prohibited the drug manufacturer from adding any and all warnings to the drug label that would satisfy state law." The Court then described the relevant inquiry as follows: "[S]howing that federal law prohibited the drug manufacturer from adding a warning that would satisfy state law requires the drug manufacturer to show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include the warning." The Court noted that because the FDA's regulations permit drug manufacturers to add or strengthen a label warning to reflect newly acquired information without prior FDA approval, "a drug manufacturer will not ordinarily be able to show that there is an actual conflict between state and federal law such that it was impossible to comply with both."

The Court declined to define *Wyeth*'s "clear evidence" requirement in terms of evidentiary standards because the question whether a drug manufacturer has established impossibility—

whether federal and state laws irreconcilably conflict—should be treated "not as a matter of fact for a jury but as a matter of law for the judge to decide." This question is properly posed to a judge rather than a jury because the question "often involves the use of legal skills to determine whether agency disapproval fits facts that are not in dispute." Moreover, "judges, rather than lay juries, are better equipped to evaluate the nature and scope of an agency's determinations" and to "understand and interpret agency decisions in light of the governing statutory and regulatory context." Although "sometimes contested brute facts will prove relevant to a court's legal determination about the meaning and effect of an agency decision," the Court "consider[ed] these factual questions to be subsumed within an already tightly circumscribed legal analysis" and "d[id] not believe that they warrant submission alone or together with the larger pre-emption question to a jury." The Court vacated the Third Circuit judgment because it treated the preemption issue "as one of fact, not law," and so that the court of appeals could apply the standards described in the Court's opinion.

Justice Thomas joined the Court's opinion, but wrote a separate concurrence to express his skepticism that "physical impossibility" of compliance with both federal and state requirements is the "proper test" for preemption. Justice Thomas noted that "[e]vidence from the founding suggests that, under the original meaning of the Supremacy Clause, federal law pre-empts state law only if the two are in logical contradiction," such as where federal law gives the right to engage in behavior that state law prohibits. But Justice Thomas found it "doubtful" that Merck could succeed under a logical-contradiction theory of preemption because FDA approval of a label does not represent a finding that the label may not subsequently be deemed inadequate under state law. Justice Thomas further found Merck's preemption argument meritless as matter of law under the Court's impossibility precedents "[b]ecause Merck point[ed] to no statute, regulation, or other agency action with the force of law that would have prohibited it from complying with its alleged state-law duties." Although Merck argued that the FDA's 2008 rejection of the proposed label change pre-empted state law, that rejection "was not a final agency action with the force of law, so it cannot be 'Law' with pre-emptive effect." Nor was Justice Thomas persuaded by Merck's argument that the FDA "would have rejected a hypothetical labeling change" because "neither agency musings nor hypothetical future rejections constitute pre-emptive 'Laws' under the Supremacy Clause."

Justice Alito, joined by Chief Justice Roberts and Justice Kavanaugh, concurred in the judgment alone. This concurrence agreed that the question of preemption "is a question of law to be decided by the courts, not a question of fact," but was "concerned that [the Court's] discussion of the law and the facts may be misleading on remand." Justice Alito noted that 21 U.S.C. §3355(o)(4)(A), enacted in 2007, imposed a duty on the FDA to initiate a label change if it became aware of new information that should be included. Although this duty "does not relieve drug manufacturers of their own responsibility to maintain their drug labels," he believed that the FDA's actions "taken pursuant to this duty arguably affect the pre-emption analysis" because "if the FDA declines to require a label change despite having received and considered information regarding a new risk, the logical conclusion is that the FDA determined that a label change was unjustified." The concurrence also noted that shortly after the FDA rejected Merck's proposed warning, it issued a statement that the data it had reviewed did not show a clear connection between Fosamax and atypical femoral fractures and admonished physicians to continue following the recommendations on the drug label and patients to continue taking their medication as prescribed.

● *Mission Products Holdings, Inc. v. Tempnology, LLC,* 17-1657. In an 8-1 decision, the Court held that a debtor who rejects an executory contract under 11 U.S.C. §365 breaches rather than rescinds that contract, such that all rights already granted remain in place. Section 365(a) provides that a bankruptcy trustee or debtor "may assume or reject any executory contract" (that is, a contract that neither party has finished performing). Under §365(g), "the rejection of an executory contract[ ] constitutes a breach of such contract," which is deemed to occur "immediately before the date of the filing of the petition," giving the counterparty a pre-petition claim for breach of contract and placing it on the same footing as other unsecured creditors. In this case, respondent Tempnology rejected an executory contract licensing its trademarks to Mission Products Holdings. No one disputed that this meant Tempnology could stop performing under the contract and Mission could assert a pre-petition claim for damages resulting from Tempnology's non-performance. In dispute was Tempnology's additional contention that "its rejection of the contract also terminated the rights it had granted Mission to use the [ ] trademarks." The bankruptcy court granted declaratory judgment in favor of Tempnology, holding that rejection of the contract terminated Mission's contractual rights to use the trademarks. The bankruptcy appellate panel reversed based on §365(g), but the First Circuit reinstated the bankruptcy court's decision. It reasoned that were a licensee permitted to continue to market goods using the debtor's trademarks, the debtor would incur the burdensome obligation of monitoring and exercising quality control over the goods as necessary to maintain the validity of the marks. In an opinion by Justice Kagan, the Court reversed and remanded.

After quickly rejecting Tempnology's argument that the case was moot, the Court turned to the merits. It began by considering the terms of §365(b)'s provision that rejection constitutes a "breach of contract." Because "'breach' is neither a defined nor specialized bankruptcy term," it "means in the Code what it means in contract law outside bankruptcy." Ordinarily, when a party breaches an executory contract, the choice to terminate the agreement belongs to the counterparty alone; the breaching party "has no ability, based on its own breach, to terminate the agreement." The Court therefore concluded that when a debtor breaches an executory contract by rejecting it under §365(a), it is similarly the counterparty's choice whether to terminate or continue the contract. Because §§365(a) and (g) apply to "any executory contract," this is true for trademark licensing agreements. Although rejection under §365(a) lets a debtor "stop performing its remaining obligations under the agreement," it "cannot rescind the license already conveyed." The Court found that this "rejection-as-breach rule (but not the rejection-as-rescission rule)" is consistent with the general bankruptcy principle that "[t]he estate cannot possess anything more than the debtor itself did outside bankruptcy": "[b]y insisting that the same counterparty rights survive rejection as survive breach, the rule prevents a debtor in bankruptcy from recapturing interests it had given up." By contrast, "the rejection-as-rescission approach would circumvent the Code's stringent limits on 'avoidance' actions"—actions to unwind pre-bankruptcy transfers—by treating rejection as "functionally equivalent to avoidance."

Tempnology's principal argument to the contrary relied on certain provisions of §365 which provide that rights conveyed under specific types of contracts may be exercised "notwithstanding rejection." Tempnology emphasized the absence of a similar provision governing trademark licensing agreements, and urged that rejection therefore extinguishes rights conveyed under such agreements. The Court rejected this argument, explaining that the provisions upon which Tempnology's negative inference relied were enacted at different times over the course of many decades, and that "each

responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges." The Court found that the absence of a trademark-specific provision supported a contrary conclusion: that trademark licensing agreements are treated like any other executory contract under §365(g), with rejection deemed a pre-petition breach. Although the Court recognized that the burden of monitoring a licensee's use of its trademarks may sometimes impede a debtor's reorganization, this was the balance Congress struck between facilitating reorganizations and protecting "the legitimate interests and expectations of the debtor's counterparties."

Justice Sotomayor joined the Court's opinion in full, but concurred "to highlight two potentially significant features" of the Court's holding. First, the Court held only that rejection does not terminate rights of the licensee that would survive breach under applicable nonbankruptcy law; special terms in a licensing contract or state law still may operate to terminate rights upon rejection. Second, the Court's holding "confirms that trademark licensees' post-rejection rights and remedies are more expansive in some respects than those possessed by licensees of other types of intellectual property," which are "governed by different rules than trademark licenses" under §365(n). Justice Gorsuch dissented because he would have found the case moot. The rejected license agreement had expired by its own terms, and "nothing [the Court] might say here could restore Mission's ability to use Tempnology's trademarks."

II. Cases Granted Review

● *Hernandez v. Mesa,* 17-1678. At issue is whether damages are available under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for a claim that a Border Patrol agent exercised excessive force in violation of a Mexican boy's Fourth and Fifth Amendment rights when, while standing in the United States, he shot and killed the boy just across the border. The Border Patrol agent allegedly shot and killed Sergio Hernandez while Hernandez was playing a game with his friends in which they ran back and forth across a cement culvert separating El Paso, Texas, from Ciudad Juarez, Mexico. Petitioners, Hernandez's parents and successors-in-interest to his estate, sued the agent for violating Hernandez's Fourth and Fifth Amendment rights; they sought damages under *Bivens*. The district court dismissed the claims, and the en banc Fifth Circuit affirmed, holding that Hernandez failed to allege a Fourth Amendment violation because he was a Mexican citizen who was in Mexico when he was shot. The Fifth Circuit further held that the agent was entitled to qualified immunity on the Fifth Amendment claim. The Supreme Court vacated and remanded to the Fifth Circuit to address the "antecedent" question whether a *Bivens* remedy was available at all in light of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). 137 S. Ct. 2003. On remand, the en banc Fifth Circuit again affirmed by a 13-2 vote. 885 F.3d 811.

Applying *Abbasi*, the Fifth Circuit held that a *Bivens* remedy was unavailable to Hernandez because the "transnational aspect of the facts presents a 'new context' under *Bivens*." Under *Abbasi*, a *Bivens* remedy is disfavored where a case presents a "new context" that "is different in a meaningful way from previous *Bivens* cases decided by th[e] Court." One way a case may meaningfully differ from previous *Bivens* cases is by involving a previously unconsidered "special factor" that suggests the judiciary may not be "well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi* continued that if, after

analyzing any applicable special factors, the court determines it was for Congress, not the judiciary, to strike the balance between deterring constitutional violations and freeing officials to act, a *Bivens* remedy is precluded. The Fifth Circuit first found that this case differs from prior *Bivens* cases in terms of the "constitutional right at issue, the extent of judicial guidance as to how an officer should respond, and the risk of the judiciary's disruptive intrusion into the functioning of the federal government's coequal branches." Specifically, the Fifth Circuit found that "because Hernandez was a Mexican citizen with no ties to this country, and his death occurred on Mexican soil, the very existence of any 'constitutional' right benefitting him raises novel and disputed issues." The Fifth Circuit concluded that "[t]he newness of this 'new context' should alone require dismissal of the plaintiffs' damages claims."

The Fifth Circuit "nevertheless" proceeded to a "special factors" analysis, finding four special factors that precluded a *Bivens* remedy. First, it found that a *Bivens* remedy for cross-border shootings "threatens the political branches' supervision of national security" by potentially causing Border Patrol agents to hesitate in making split-second decisions. Second, extending *Bivens* risked interfering with foreign affairs and diplomacy because injury of foreign citizens on foreign soil by federal officials involves "delicate diplomatic matters" that are rarely proper subjects for judicial intervention. The Fifth Circuit noted that Mexico and the United States had engaged in diplomatic discussions about the shooting and that the United States had declined to extradite the agent. Third, Congress's "failure to provide a damages remedy in these circumstances" weighs against a judicial remedy. In response to *Abbasi*'s acknowledgment of concerns that officers will be insufficiently deterred from constitutional violations absent a *Bivens* remedy, the Fifth Circuit noted that "criminal investigations and prosecutions" and possible state-law tort liability were already a deterrent against cross-border shootings. Finally, the court said that "the extraterritorial aspect of this case is itself a special factor."

Hernandez argues that the Fifth Circuit wrongly held that the presence of a new context alone precludes a *Bivens* remedy. Rather, Hernandez says, *Abbasi* bars the extension of *Bivens* only where a case presents a new context *and* special factors counsel against judicial recognition of a damages remedy. Hernandez further argues that the Fifth Circuit erred in its special-factors analysis by finding that his Mexican citizenship and physical location on Mexican soil implicates national security, foreign policy, and extraterritoriality concerns that counseled against extending *Bivens*. Hernandez maintains that his citizenship and physical location should not preclude a remedy for excessive force exercised by a federal official inside the United States, and that diplomatic considerations actually weigh in favor of extending *Bivens* because the risk of international discord arises from the unavailability of a remedy under U.S. law. Hernandez also argues that congressional silence regarding a remedy for cross-border shootings does not preclude extending *Bivens* because if the mere absence of a legislative remedy was a special factor precluding a *Bivens* remedy, that factor would be present in every case because Congress has never "'provide[d] a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.'" Finally, Hernandez argues that the Fifth Circuit inadequately considered the absence of alternative legal remedies. Hernandez contends that criminal liability is an insufficient deterrent against constitutional violations because the Executive Branch has unreviewable authority over whether to bring a criminal prosecution against its own officers; not all constitutional violations give rise to criminal liability; and state-law tort liability is categorically unavailable for actions taken within the scope of a federal officer's employment under 28 U.S.C. §2679(b)(2)(A).

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