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Supreme Court Report

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This *Report* summarizes opinions issued on May 28 and June 3, 2019 (Part I); and cases granted review on June 3, 2019 (Part II).

I. Opinions

● *Box v. Planned Parenthood of Indiana & Kentucky, Inc.,* 18-483. In a *per curiam* decision, the Court summarily held that Indiana's statute regulating abortion providers' disposal of fetal remains was constitutional. Indiana law prohibits abortion providers from incinerating fetal remains along with surgical byproducts, while authorizing mass cremation of fetal remains and leaving undisturbed women's rights to dispose of aborted fetuses how they liked. A second provision of Indiana law prohibited abortion providers from knowingly providing sex-, race-, or disability-selective abortions. The Seventh Circuit held that the fetal-remains-disposition provision was not rationally related to a legitimate government interest because Indiana's stated interest in "the 'humane and dignified disposal of human remains'" was not a legitimate government interest. Even if it was, the Seventh Circuit held there was no rational relationship between that interest and the law as written, which allowed mass cremation by abortion providers and any means of disposal by women. The Seventh Circuit also held that the selective abortion provision violated the Fourteenth Amendment as an absolute prohibition on abortions prior to viability. Indiana petitioned for certiorari on two questions: (1) whether the state may regulate abortion providers' disposal of fetal remains and (2) whether the state may prohibit abortions motivated by the race, sex, or disability of the fetus. The Court granted certiorari and reversed on the Seventh Circuit's judgment with respect to the first question, and denied certiorari with respect to the second question.

The Court explained that it had previously held that a state has a "legitimate interest in the proper disposal of fetal remains." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 n.4 (1983). The Court concluded that Indiana's law is rationally related to achieving that interest, "even if it is not perfectly tailored to that end." The Court emphasized that it did not address whether the provision could withstand challenge under the undue burden standard of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion), noting that Planned Parenthood argued only that the provision is unconstitutional under the rational-basis test. The Court denied the petition with respect to the question regarding the provision barring sex-, race-, and disability-selective abortions because only the Seventh Circuit thus far had addressed this kind of law, and it is the Court's "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." The Court expressed no view on the merits of the challenge to the selective abortion provision.

Justice Sotomayor would have denied the petition as to both questions. Justice Thomas concurred, writing separately to express his view that the provision barring sex-, race-, and disability-motivated abortions and others like it "promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." Justice Thomas stated that *Casey* "did not decide whether the Constitution requires States to allow eugenic abortions" and that the Court "will soon need to confront the constitutionality of laws like Indiana's." But he agreed that "further percolation may assist [the Court's] review of this issue of first impression."

Justice Ginsburg concurred in part and dissented in part because she would have denied the petition in its entirety. Justice Ginsburg would not have summarily reversed the Seventh Circuit's judgment with respect to the disposition provision "when application of the proper standard would likely yield restoration of the judgment." She stated that it wasted the Court's resources "to take up a case simply to say we are bound by a party's 'strategic litigation choice' to invoke rational-basis review alone, but 'everything might be different' under the close review instructed by the Court's precedent."

● *Nieves v. Bartlett,* 17-1174. In a 6-3 vote, the Court held that (with one exception) a First Amendment retaliatory arrest claim fails as a matter of law if the arresting officer had probable cause. After he was arrested and charged with disorderly conduct and resisting arrest, respondent Russell Bartlett sued the two arresting officers under 42 U.S.C. §1983, claiming they violated his First Amendment rights by arresting him in retaliation for his refusal to speak with one of the officers earlier in the day. Bartlett alleged that he had refused to speak with one of the officers, causing the officer to become aggressive. When the first officer arrested Bartlett a few minutes later in connection with Bartlett's interactions with the second officer, he allegedly told Bartlett, "[B]et you wish you would have talked to me now." The district court granted summary judgment for the officers because they had probable cause to arrest. The Ninth Circuit reversed, holding that probable cause to arrest does not preclude a retaliatory arrest claim where the plaintiff offered evidence that the officers would not have arrested him but for their desire to chill his speech. In an opinion by Chief Justice Roberts, the Court reversed and remanded.

The Court explained that to prevail on a First Amendment claim that a government official took adverse action in retaliation for engaging in protected speech, the plaintiff must establish a but-for causal connection between the official's retaliatory animus and the plaintiff's injury. The Court found this causal connection particularly complex in retaliatory arrest claims because "protected speech is often a legitimate consideration when deciding whether to make an arrest." Accordingly, the Court looked to the standard governing retaliatory prosecution claims, which it viewed as presenting the same "causal complexity": determining "whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." Because prosecutors are generally immune from suit and their charging decisions receive a presumption of regularity, the Court held in *Hartman v. Moore*, 547 U.S. 250 (2006), that a plaintiff bringing a retaliatory prosecution case must plead and prove the absence of probable cause for the underlying criminal charge. Although retaliatory arrest does not, like retaliatory prosecution, involve the presumption of prosecutorial regularity, the Court reasoned that the two claims' "related causal challenge should lead to the same solution," and concluded that a "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest."

The Court found this approach consistent with its general approach of reviewing police conduct "under objective standards of reasonableness" to ensure that police officers who must routinely make arrests in tense, uncertain, and rapidly evolving circumstances "may go about their work without undue apprehension of being sued." Indeed, noted the Court, without the no-probable-cause rule, "policing certain events like an unruly protest would pose overwhelming litigation risks." Applying this standard, the Court concluded that Bartlett's retaliatory arrest claim fails as a matter of law because there was probable cause to arrest him. The Court found additional support for the no-probable-cause

requirement in the common law in effect when §1983 was enacted in 1871. There was no common law tort for retaliatory arrest based on protected speech, but the torts most closely analogous—false imprisonment and malicious prosecution—were defeated by the presence of probable cause.

The Court then created an exception to the no-probable-cause requirement "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." For example, "[i]f an individual who has been vocally complaining about police conduct is arrested for jaywalking at [ ] an intersection" where jaywalking is generally ignored, "it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest. In such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman*'s rule would come at the expense of *Hartman*'s logic." The Court therefore held that "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested where otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Such a showing establishes that non-retaliatory grounds were in fact insufficient to provoke the arrest and "provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard."

Justice Thomas concurred in part and concurred in the judgment, joining all of the Court's opinion but its exception for claims that a plaintiff was arrested where similarly situated people not engaged in protected speech were not. Justice Thomas asserted that the exception was unfounded in common law or the Court's First Amendment precedent. He viewed the exception as "likely to encourage protracted litigation" about whether individuals are similarly situated "while doing little to vindicate First Amendment rights" and "chilling law enforcement officers from making arrests for fear of liability, thereby flouting the reasoning behind the emphasis on probable cause in arrest-based torts at common law."

Justice Gorsuch concurred in part and dissented in part. He began by asserting that the precense of probable cause "does not undo" the First Amendment violation where an officer "arrests an individual in retaliation for his protected speech." Nor did he find anything in the language of §1983 or its common law backdrop that supports a no-probable-cause rule. And, he added, "[e]veryone accepts that a detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment's Equal Protection Clause." He could "think of no sound reason why the same shouldn't hold true here." Justice Gorsuch acknowledged, though, "that it may also be a mistake to assume probable cause is entirely irrelevant to the analysis." For example, probable cause may bear on causation. Courts might infer that an officer effected an arrest because of probable cause rather than retaliatory animus where the offense was a serious crime that would nearly always trigger arrest, and reach a contrary inference where the offense was a minor one that would not normally trigger arrest. In the end, he "would hold, as the majority does, that the absence of probable cause is not an absolute requirement of such a claim and its presence is not an absolute defense. At the same time, [he] would also acknowledge that this does not mean the presence of probable cause is categorically irrelevant: It may bear on causation, and it may play a role under [*United States v. Armstrong*, 517 U.S. 456 (1996)]," which set out the showing a plaintiff must make when asserting racially selective prosecutions in violation of the Equal Protection Clause.

Justice Ginsburg concurred in the judgment in part and dissented in part. Given the array of minor offenses like loitering and disorderly conduct that may support arrest, Justice Ginsburg stated that the Court's no-probable-cause requirement will check "only entirely baseless arrests" and "will leave press members and others exercising First Amendment rights with little protection against police suppression of their speech." Justice Ginsburg viewed *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), as "strik[ing] the right balance: The plaintiff bears the burden of demonstrating that unconstitutional animus was a motivating factor for an adverse action; the burden then shifts to the defendant to demonstrate that, even without any impetus to retaliate, the defendant would have taken the action complained of."

Justice Sotomayor dissented. Although Justice Sotomayor agreed with the "correct and sensible bottom line" of the Court's decision—that probable cause alone does not always defeat a First Amendment retaliatory arrest claim under §1983—she saw "no basis in §1983 or in the Constitution to withhold a remedy for an arrest that violated the First Amendment solely because the officer could point to probable cause that some offense, no matter how trivial or obviously pretextual, has occurred." Justice Sotomayor understood the Court's rule to be "that a showing of probable cause will defeat a §1983 First Amendment retaliatory arrest claim unless the person arrested happens to be able to show that 'otherwise similarly situated individuals' whose speech differed were not arrested." "[B]y rejecting direct evidence of unconstitutional motive in favor of more convoluted comparative proof," Justice Sotomayor foresaw that this standard "will have the strange effect of requiring courts to blind themselves to smoking-gun evidence while simultaneously insisting upon an inferential sort of proof that, though potentially powerful, can be prohibitively difficult to obtain." Justice Sotomayor agreed with Justice Gorsuch regarding the lack of a statutory or constitutional basis for a no-probable-cause requirement and agreed with Justice Ginsburg that the proper framework for analyzing retaliatory arrest cases is the one in *Mt. Healthy City Bd. of Ed. v. Doyle*.

● *Taggart v. Lorenzen*, 18-489. At issue was when a bankruptcy court may hold a creditor in civil contempt for attempting to collect a debt in violation of the court's injunction discharging most pre-petition debts. The Court unanimously held that a bankruptcy court may do so only "if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful." Petitioner Bradley Taggart had owned an interest in a company, Sherwood Park Business Center. The company and two of its owners sued Taggart in Oregon state court alleging that he had breached the company's operating agreement. Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code. A federal bankruptcy court ultimately issued an order granting Taggart a discharge from his debts. Sometime later, the Oregon state court entered judgment against Taggart in the pre-bankruptcy suit; the company then filed a petition seeking attorney's fees that were incurred after Taggart filed for bankruptcy. Although the discharge order would normally discharge such post-petition attorney's fees, the company argued that Taggard had "returned to the fray" post-petition and was therefore liable for those fees. The state trial court agreed and held Taggart liable for about $45,000 in post-petition attorney's fees. Taggart then returned to the federal bankruptcy court, where he argued that he had not "returned to the fray" and that the discharge order therefore barred the company from collecting the post-petition attorney's fees. He also suggested that the bankruptcy court hold the company in contempt. The bankruptcy court ruled against Taggart. On appeal, a federal district court reversed. It agreed with Taggart, including his contention that the company violated the discharge order. On remand, the bankruptcy court held the company in civil contempt. In doing so, it

applied a strict liability standard under which contempt sanctions were appropriate because the company had been "aware of the discharge" order and "intended the actions which violate[d]" it. The court awarded Taggart about $105,000 in attorney's fees and costs, $5,000 in damages for emotional distress, and $2,000 in punitive damages. The Bankruptcy Appellate Panel vacated those sanctions, and the Ninth Circuit affirmed. The Ninth Circuit ruled that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." Because the company had a "good faith belief" that the discharge order did not apply to its claims, the Ninth Circuit held that civil contempt sanctions were improper. In an opinion by Justice Breyer, the Court vacated and remanded.

The Court focused on two provisions of the Bankruptcy Code. Section 524 provides that a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset" a discharged debt. 11 U.S.C. §524(a)(2). And §105 authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." §105(a). The Court concluded that "these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." That is so, the Court reasoned, because §§105(a) and 524(a)(2) speak in terms of enforcing injunctions and therefore "bring with them the 'old soil" that has long governed how courts enforce injunctions." And the Court has held outside the bankruptcy context that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co. v. Molitor*, 113 U. S. 609, 618 (1885) (emphasis added). The Court explained here that that is an objective standard; "a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable." That said, subjective intent is not entirely irrelevant. The Court pointed to its precedent holding "that civil contempt sanctions may be warranted when a party acts in bad faith. See *Chambers v. NASCO, Inc*., 501 U.S. 32, 50 (1991)." And "[o]n the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction."

The Court then addressed and rejected possible alternative standards. All parties and the United States as amicus curiae agreed that the Ninth Circuit's subjective good-faith-belief standard is wrong. The Court agreed as well, noting that it is not grounded in "traditional civil contempt principles," "relies too heavily on difficult-to-prove states of mind," and might overly encourage creditors to collect discharged debts. The Court next rejected the bankruptcy court's strict liability standard, which Taggart endorsed. Taggart suggested that such a standard would be fair to creditors because any creditor who is unsure whether a debt was discharged could seek an advance determination from the bankruptcy court. The Court "doubt[ed], however, that advance determinations would provide a workable solution to a creditor's potential dilemma." Given the "complex statutory backdrop" under which various debts are exempt from discharge, and discharge orders' general language, "there will often be at least some doubt as to the scope of such orders." That could "lead to frequent use of the advance determination procedure," which would contravene Congress' expectation that the procedure would be rarely used and would move litigation out of state courts, thereby producing "additional federal litigation, additional costs, and additional delays." All of that would "interfere with" the bankruptcy laws' objectives of securing "a prompt and effectual" resolution of bankruptcy cases "within a limited period." Finally, the Court rejected Taggart's effort to analogize this situation to violations of

automatic stays entered at the outset of bankruptcy proceedings. Specific language not applicable to discharge orders applies to violations of automatic stays, which (in any event) serve different purposes than discharge orders. The Court remanded to allow the lower courts to apply in the first instance the "fair ground of doubt" (objective reasonableness) standard.

● *Fort Bend County, TX v. Davis*, 18-525. Title VII of the Civil Rights Act of 1964 requires plaintiffs to first file a charge of employment discrimination with the EEOC before filing suit in federal court. The Court unanimously held that "Title VII's charge-filing instruction is not jurisdictional," but rather is "properly ranked among the array of claim-processing rules that must be timely raised to come into play." Respondent Lois Davis worked for petitioner Fort Bend County in information technology. In 2010, she informed Fort Bend's human resources department that the director of information technology (Charles Cook) was sexually harassing her. Following an investigation, Cook resigned. Davis alleges that her supervisor, a friend of Cook's, then retaliated against her by (among other things) curtailing her work responsibilities. Seeking redress, Davis submitted an "intake questionnaire" and then a charge with the EEOC. While her EEOC charge was pending, Davis was fired for failing to show up for work on a Sunday—even though Davis told her supervisor that she had a commitment at church that day. Davis supplemented her EEOC allegations by writing the word "religion" on her intake questionnaire; but she did not change her formal charge document. A few months later Davis received a "right to sue" letter from the Department of Justice. Davis then filed a civil action in federal district court against the county, alleging discrimination on account of religion and retaliation for reporting sexual harassment. The district court granted Fort Bend's motion for summary judgment. The Fifth Circuit affirmed as to the retaliation claim, but reversed as to the religious discrimination claim. On remand (now years into the litigation), Fort Bend moved to dismiss the complaint on the ground that Davis failed to state a religious-discrimination claim in her EEOC charge. The district court, finding the charge-filing requirement jurisdictional, granted the motion. The Fifth Circuit reversed, finding that the charge-filing requirement is not jurisdictional and that Fort Bend forfeited it by failing to raise it in a timely fashion. In an opinion by Justice Ginsburg, the Court affirmed.

The Court explained that its recent decisions have reserved the word "jurisdictional" for "prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." And "Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision, as Congress has done with the amount-in-controversy requirement for federal-court diversity jurisdiction." Plus, the Court will "treat a requirement as 'jurisdictional' when 'a long line of [Supreme] Cour[t] decisions left undisturbed by Congress attached a jurisdictional label to the prescription.'" But deeming a law jurisdictional matters because subject-matter jurisdiction may be raised by a defendant at any time and courts must consider them *sua sponte*. The Court "has therefore stressed the distinction between jurisdictional prescriptions and nonjurisdictional claim-processing rules, which 'seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'" The Court explained that a "claim-processing rule may be 'mandatory' in the sense that a court must enforce the rule if a party 'properly raise[s]' it. But an objection based on a mandatory claim-processing rule may be forfeited 'if the party asserting the rule waits too long to raise the point.'" (Citations omitted.) The Court had therefore adopted the following rule: "'If the Legislature clearly states that a [prescription] count[s] as jurisdictional, then courts and litigants will be

duly instructed and will not be left to wrestle with the issue[;] [b]ut when Congress does not rank a [prescription] as jurisdictional, courts should treat the restriction as nonjurisdictional in character.'"

Applying that rule here, the Court had little difficulty concluding that "Title VII's charge-filing requirement is not of jurisdictional cast." Courts' subject-matter jurisdiction to hear Title VII cases comes from 28 U.S.C. §1331's general grant of jurisdiction and Title VII's own jurisdictional provision, 42 U.S.C. §2000e-5(f)(3). The charge-filing requirement is located in other provisions of Title VII, none of which speaks to courts' authority to hear cases. Rather, found the Court, "Title VII's charge-filing provisions 'speak to . . . a party's procedural obligations.'" In short, "Title VII's charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts." The Court rejected Fort Bend's effort to equate the charge-filing requirement with rules requiring that certain claims be channeled to administrative agency adjudication before the case may proceed to federal court. And it dismissed Fort Bend's plea that treating the requirement as jurisdictional would advance Congress's objective of "encouraging conciliation and affording the EEOC first option to bring suit." Stated the Court, "a prescription does not become jurisdictional whenever it 'promotes important congressional objectives.'"

● *Home Depot U.S.A., Inc. v. Jackson*, 17-1471. The Court held, in a 5-4 decision, that a third-party counterclaim defendant may not remove a case to federal court under either the general removal statute or the Class Action Fairness Act of 2005 (CAFA). This litigation began when Citibank sued respondent George Jackson in state court for unpaid debts on his Home Depot credit card. Jackson responded with counterclaims brought on behalf of a class against petitioner Home Depot and another entity, alleging that his debts were incurred from sales that violated state consumer protection laws. Home Depot removed the case to federal court, prompting Jackson to file a motion to remand. The district court granted Jackson's motion and the Fourth Circuit affirmed, holding that neither the general removal statute, 28 U.S.C. §1441(a), nor CAFA's removal provision, 28 U.S.C. §1453(b), permitted removal by a third-party counterclaim defendant. The Court granted certiorari "to determine whether a third party named in a class-action counterclaim brought by the original defendant can remove if the claim otherwise satisfies the jurisdictional requirements of CAFA." In an opinion by Justice Thomas, the Court held it may not and affirmed.

The Court first considered whether a third-party counterclaim defendant, "that is, a party brought into a lawsuit through a counterclaim filed by the original defendant," may remove the counterclaim under 28 U.S.C. §1441(a). That statute "permits 'the defendant or the defendants' in a state-court action over which the federal courts would have original jurisdiction to remove that action to federal court." The Court rejected Home Depot's argument that because it is a "defendant" to the counterclaim, it may avail itself of the removal statute. Although "the term, 'defendant,' standing alone, is broad," the Court reasoned that the term must be considered "in light of the structure of the statute and our precedent." That context reveals that when discussing "defendants," "the statute refers to 'civil action[s],' not 'claims.'" A "civil action" that a federal court assesses to determine if it has jurisdiction over and is thus removable "is the action as defined by the plaintiff's complaint. And "'the defendant' to that action is the defendant to the complaint, not a party named in a counterclaim." Therefore, ruled the Court, §1441(a) "does not permit removal based on counterclaims at all." The Court noted that this interpretation of the term "defendant" was bolstered by the differentiation of defendants, third-party defendants, and counterclaim defendants in the Federal Rules of

Civil Procedure, and by contrasting §1441(a) with other statutes that allow removal by parties other than the original defendant. The Court also pointed to its decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), in which a counterclaim defendant that was also the original plaintiff was precluded from removing an action. Lastly, the Court rebutted Home Depot's argument that prohibiting third-party counterclaim defendants from removing cases was "counter to the history and purposes of removal," because Congress "did not intend to allow all defendants an unqualified right to remove."

The Court also held that CAFA's removal provision, 28 U.S.C. §1453(b), does not provide a basis for a third-party counterclaim defendant to remove an action. That provision allows removal of a class action "'by any defendant without the consent of all defendants' and 'without regard to whether any defendant is a citizen of the State in which the action is brought.'" The Court rejected Home Depot's argument that the phrase "any defendant" in this statute should be read more broadly than the phrase "the defendant" in §1441(a). Instead, it agreed with Jackson that "Congress intended only to alter certain restrictions on removal, not expand the class of parties who can remove a class action." That is, "[t]he two clauses in §1453(b) that employ the term 'any defendant' simply clarify that certain limitations on removal that might otherwise apply do not limit removal under §1453(b)." In the Court's view, CAFA removed the requirements of absolute diversity and consent by all defendants for removal, but did not "alter[] §1441(a)'s limitation on *who* can remove." Furthermore, wrote the Court, interpreting "defendant" differently between the general removal statute and CAFA would "render the removal provisions" in 28 U.S.C. §1446 that apply to both statutes "incoherent." That the Court's ruling could mean that defendants may bring unremovable counterclaims "is a consequence of the statute Congress wrote."

Justice Alito, joined by Chief Justice Roberts and Justices Gorsuch and Kavanaugh, wrote a lengthy dissent. He objected that the Court "reads an irrational distinction" between original and third-party defendants even though "[n]either chose to be in state court" and "[b]oth might face bias there." Following a discussion of CAFA's history, Justice Alito noted that "he cannot imagine why a Congress eager to remedy alleged state-court abuses in class actions would have chosen to discriminate between two classes of defendants, neither of whom had ever chosen the allegedly abusive state forum." He described the absence of removal authority for third-party counterclaim defendants as a "loophole" that "there is no evidence that anyone" considered. Furthermore, the dissent contended, the text of CAFA's removal provision encompasses third-party counterclaim defendants. That is because "the key term here is 'any defendant,'" which is broad enough to encompass third-party defendants.

The dissent next criticized the majority for "incorporat[ing] into CAFA a specialized sense of 'defendant,' derived from its use in the general removal statute, §1441," which "they assert . . . refers only to an *original* defendant." This interpretation is wrong, the dissent contended, because "CAFA's *text* is broader" and "sweeps in '*any* defendant'"; this change from §1441 does not only allow removal by a single defendant instead of §1441's unanimity rule, but generally "guarantee[s] a broad reach for the word 'defendant.'" The dissent continued by rebutting other arguments by Jackson and the majority. First, Justice Alito disputed Jackson's reading of cases interpreting §1441 before Congress enacted CAFA and their relevance to CAFA's interpretation. Second, he argued that other stat-

utes allowing removal by third-party defendants do not bear on the interpretive question here because they allow removal by any party, rather than distinguishing among different types of defendants. And third, Justice Alito rejected Jackson's contention that CAFA's removal authority was derivative of §1441 and must be constrained by "§1441(a)'s restriction to 'civil action[s]' over which federal courts have 'original jurisdiction,'" else CAFA be unconstitutional by allowing removal of actions lacking federal jurisdiction. Instead, in his view, CAFA "implicitly limits removal to class actions where there is minimal diversity, thus satisfying Article III." Finally, Justice Alito disagreed with the majority "that third-party defendants are *not* covered by the general removal provision, §1441." This interpretation of §1441, he contended, rests on a misunderstanding of the Court's ruling in *Shamrock Oil*. Moreover, he critiqued the majority's application of the "well pleaded complaint" rule to counterclaims removed under §1441: "the rule, which limits the filings courts may consult in determining if they have jurisdiction, is based on policy concerns that do not arise here."

● *Azar v. Allina Health Services, Inc*., 17-1484. By a 7-1 vote, the Court held that the Department of Health and Human Services needed to utilize notice-and-comment rulemaking when it "revealed a new policy on its website that dramatically—and retroactively—reduced payments to hospitals serving low-income patients" under Medicare. The case concerns "Medicare Part A," under which the federal government pays hospitals directly for providing covered patient care. To encourage hospitals to serve low-income patients, HHS offers additional payments to hospitals that serve a "disproportionate number" of such persons. The payments are calculated in part by using a hospital's so-called "Medicare fraction": the time the hospital spent caring for Part-A-entitled patients who were also entitled to Social Security income-support payments over the total time the hospital spent on Part A patients. An issue arose as to whether Medicare Part C patients—who tended to be wealthier—should be counted in the denominator (which would lower the fraction and hence the payments). HHS went back and forth on the issue until 2014, when it posted on its website a spreadsheet announcing the 2012 Medicare fractions for 3,500 hospitals and noting that the fractions included Part C patients. A group of hospitals sued HHS, arguing that it violated its notice-and-comment obligations. The D.C. Circuit ruled in favor of the hospitals. In an opinion by Justice Gorsuch, the Court affirmed.

The key statutory background is as follows: The Administrative Procedure Act does not apply to public benefit programs such as Medicare. To remedy that gap, Congress adopted a Medicare-specific statute that requires the government to provide public notice and a 60-day comment period for any "rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under [Medicare]." 42 U.S.C. §1395hh(a)(2). The key phrase for purposes of this case was "substantive legal standard." The hospitals argued that "the statute means to distinguish a substantive from a *procedural* legal standard. On this account, a substantive standard is one that 'creates duties, rights and obligations,' while a procedural standard specifies how those duties, rights, and obligations should be enforced." All agree that HHS's 2014 action constituted a substantive legal standard under that definition. The government, however, contended that "the statute means to distinguish a substantive from an interpretive legal standard. Under the APA, 'substantive rules' are those that have the 'force and effect of law,' while 'interpretive rules' are those that merely 'advise the public of the agency's construction of the statutes and rules which it administers.' On the government's view, the 1987 Medicare notice-and-

comment statute meant to track the APA's usage in this respect." (Citations omitted.) The Court concluded that the hospitals had the better reading of the statute.

First, noted the Court, the Medicare Act specifically contemplates that a "statement of policy" can be a "substantive legal standard." "Yet, by definition under the APA, statements of policy are not substantive; instead they are grouped with and treated as interpretive rules. 5 U.S.C. §553(b)(A). This strongly suggests the Medicare Act just isn't using the word 'substantive' in the same way as the APA." Second, the Medicare Act empowers the government to make retroactive "substantive change[s]" in, among other things, "interpretive rules" and "statements of policy." §1395hh(e)(1). "But this statutory authority would make no sense if the Medicare Act used the term 'substantive' as the APA does. It wouldn't because, again, interpretive rules and statements of policy—and any changes to them—are not substantive under the APA by definition." Third, whereas Congress expressly borrowed one of the APA's exemptions in the Medicare Act, it declined expressly "to borrow the *other* APA exemption, for interpretive rules and policy statements." The Court rejected the government's efforts to overcome those textual indications of the statute's meaning. The Court also rejected the government's resort to legislative history (which it found inconclusive) and the government's policy arguments (which can't justify a court "rewrit[ing]" a clear statute and which "don't carry much force even on their own terms").

Justice Breyer dissented. In his view, "[i]n the 1980s" (when Congress enacted the provision at issue), "the words 'regulation' and 'substantive' . . . carried a special meaning in the context of administrative law. This Court had recognized the 'central distinction' drawn by the APA between 'substantive rules' on the one hand and 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other.'" In Justice Breyer's view, §1395hh(a)(2)'s use of the phrase "substantive legal standard" can only be understood in that context; the phrase is "interchangeable" with the APA term "substantive rules." And he agreed with the government that when §1395hh(a)(2) uses the term "statement of policy" it is not referring to *all* statements of policy, "but rather only those that are, in effect, substantive rules." Justice Breyer acknowledged that "[t]his reading may seem odd at first blush," but said that "the statutory history and the consequences of the alternative interpretation persuade me that this is precisely what Congress intended." As to the practical consequences, he observed that HHS "has issued tens of thousands of pages of manual instructions, interpretive rules, and other guidance documents. . . . To imagine that Congress wanted the agency to use those procedures in respect to a large percentage of its Medicare guidance manuals is to believe that Congress intended to enact what could become a major roadblock to the implementation of the Medicare program."

● *Mont v. United States*, 17-8995. By a 5-4 vote, the Court held that pretrial detention later credited as time served for a new offense tolls a federal term of supervised release. In 2004, petitioner Jason Mont pleaded guilty to federal drug offenses and was sentenced to 84 months' imprisonment to be followed by 5 years of supervised release. Mont was released from federal prison in 2012; his supervised release was "slated to end on March 6, 2017." Alas, Mont committed several more drug offenses in 2015 and 2016. On June 1, 2016, he was arrested and incarcerated in a county jail, and has remained in state custody ever since. In October 2016, a state trial court accepted Mont's guilty pleas; and on March 21, 2017 the court sentenced him to six months' imprisonment—but credited the roughly 10 months he was incarcerated before then as time served. The

federal district court then issued a warrant (on March 30, 2017) and set a supervised release hearing. Two days before the hearing, Mont asserted that the district court lacked jurisdiction because his supervised release had ended on March 6. The district court held that it still had jurisdiction, revoked Mont's supervised release, and ordered him to serve an additional 42 months' imprisonment to run consecutive to his state sentence. The Sixth Circuit affirmed, holding that Mont's supervised-release period was tolled during the 10 months he was held in pretrial detention in state custody. In an opinion by Justice Thomas, the Court affirmed.

Under 18 U.S.C. §3624(e), a term of supervised release "does not run during any period in which the person *is imprisoned in connection with a conviction* for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." (Emphasis added.) The Court concluded that "pretrial detention later credited as time served for a new conviction is 'imprison[ment] in connection with a conviction' and thus tolls the supervised-release term under §3624(e)." Walking through the statutory language, the Court observed first that "the definition of 'is imprisoned' may well include pretrial detention." The dictionary defines "imprison" to mean "[t]o put in a prison," "to incarcerate," "[t]o confine a person, or restrain his liberty, in any way"—definitions that sweep in pretrial detention. Second, "the phrase 'in connection with a conviction' encompasses a period of pretrial detention for which a defendant receives credit against the sentence ultimately imposed." Indeed, "pretrial incarceration is directly tied to the conviction when it is credited toward the new sentence." Third, "the text undeniably requires courts to retrospectively calculate whether a period of pretrial detention should toll a period of supervised release." We know that, found the Court, because it includes a 30-day minimum incarceration threshold, which can be applied only after 30 days expire.

The Court found its reading supported by the principle that "prison time is 'not interchangeable' with supervised release." The Court also observed that "it would be an exceedingly odd construction of the statute to give a defendant the windfall of satisfying a new sentence of imprisonment and an old sentence of supervised release with the same period of pretrial detention." Finally, the Court rejected Mont's contention "that the present tense of the statute ('*is* imprisoned') forbids any backward looking tolling analysis." The Court found nothing in the statute that requires a court to determine whether supervised release has been tolled "at the exact moment when the defendant is held in pretrial incarceration." Just as a court won't know immediately whether the imprisonment will exceed 30 days, so too a court may not know at first whether pretrial detention will be tied to a conviction as time served.

Justice Sotomayor filed a dissenting opinion, which Justices Breyer, Kagan, and Gorsuch joined. In her view, "[m]ost naturally read, a person 'is imprisoned in connection with a conviction' only while he or she serves a prison term after a conviction. The statute does not allow for tolling when an offender is in pretrial detention and a conviction is no more than a possibility." Justice Sotomayor pointed to the provision's "present-tense construction": "In normal usage, no one would say that a person 'is imprisoned in connection with a conviction' before any conviction has occurred, because the phrase would convey something that is not yet—and, indeed, may never be—true: that the detention has the requisite connection to a conviction." And "had Congress wanted to toll supervised release during pretrial confinement, it could have chosen an alternative to the word 'imprisoned' that more readily conveys that intent, such as 'confined' or 'detained.'" Justice Sotomayor then

criticized the majority for "shift[ing] the statute's frame of reference from that present-tense assessment (what is) to a backward-looking review (what was or what has been)." On statutory context, the dissent noted that "the goals of supervised release can be fulfilled to some degree even when an offender is detained" (such as submitting DNA samples or taking drug tests). Finally, the dissent pointed to the "unfairness" of offenders "hav[ing] no notice of whether they are bound by the terms of supervised release."

● *Smith v. Berryhill,* 17-1606. The Court unanimously held that a dismissal by the Social Security Administration's Appeals Council on timeliness grounds after a claimant has received a hearing before an administrative law judge on the merits qualifies as a "final decision . . . made after a hearing" for purposes of allowing judicial review under 42 U.S.C. §405(g). The Social Security Act allows for judicial review of "any final decision . . . made after a hearing" by the Social Security Administration (SSA). 42 U.S.C. §405(g). Petitioner Ricky Lee Smith was denied Social Security benefits after a hearing by an administrative law judge and completed the administrative review process by appealing to the agency's Appeals Council, which dismissed the appeal as untimely. Smith then appealed to the district court, which dismissed the case for lack of jurisdiction. The Sixth Circuit affirmed, holding that the Appeals Council's dismissal of an untimely petition is not a "final decision" subject to judicial review. In an opinion by Justice Sotomayor, the Court reversed and remanded.

The Court began with the text of §405(g)—"any final decision . . . made after a hearing." It found that "final decision" denotes a terminal event in the administrative review process and should be read expansively, as suggested by Congress' use of "any." Under the Court's reading of the plain language of the statute, the Appeals Council's dismissal, which was "binding and not subject to further review" by the SSA, 20 CFR §416.1472, was a "final decision." Turning to the phrase "after a hearing," the Court construed "hearing" as denoting an ALJ hearing, as the term does consistently elsewhere in the statute. (The Court noted that its precedents "make clear that an ALJ hearing is not an ironclad prerequisite for judicial review," but declined to decide when a decision might be final without an ALJ hearing "because, in any event, this is a mine-run case and Smith obtained the kind of hearing that §405(g) most naturally suggests: an ALJ hearing on the merits.") Finally, the Court emphasized that §405(g)'s "after a hearing" requirement is not a "matter of mere chronology," but requires that the "final decision" be tethered to the relevant hearing.

The Court found that statutory context also weighs in favor of reviewability because appeals from agency determinations are appeals from the action of a federal agency, and "in the separate administrative-law context of the Administrative Procedure Act" an action is "final" if it marks the end of the agency's decisionmaking process and either determines rights and obligations or is an action from which legal consequences will flow. Finally, reviewability of Appeals Council dismissals after ALJ hearings was confirmed by the strong presumption that Congress intends judicial review of administrative action. Neither the statutory language nor structure rebutted this presumption; "Congress has not suggested that it intended for the [agency] to be the unreviewable arbiter" of whether claimants complied with administrative procedures.

The Court rejected the argument of amicus (appointed after the SSA agreed with Smith) that the Court's reading would render judicially reviewable any final decision, no matter how collateral, if

a hearing had occurred. As the Court explained, an Appellate Council dismissal is not "merely collateral," but "calls an end to a proceeding in which a substantial factual record has already been developed and on which considerable resources have already been expended." Were amicus correct, "a claimant could make it to the end of the SSA's process and then have judicial review precluded simply because the Appeals Council stamped 'untimely' on the request, even if that designation was patently inaccurate." The Court also disagreed with amicus' prediction that the Court's construction would lead to a flood of litigation, noting that the number of untimeliness dismissals was relatively small and the Eleventh Circuit had followed the Court's approach since 1983 and seen no dramatic increase in litigation. The Court also rejected amicus' resort to *Chevron* deference, explaining that the scope of judicial review of agency action "is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency."

With respect to the scope of judicial review, although there is no jurisdictional bar to a federal court reaching the merits of a case dismissed as untimely by the Appeals Council, the Court found that under fundamental principles of administrative law "a federal court generally goes astray if it decides a question that has been delegated to an agency if the agency has not first had a chance to address the question." "Accordingly, in an ordinary case, a court should restrict its review to the procedural ground that was the basis for the Appeals Council dismissal and (if necessary) allow the agency to address any residual substantive questions in the first instance."

II. Cases Granted Review

● *Allen v. Cooper*, 18-877. The question presented is "[w]hether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), in providing remedies for authors of original expression whose federal copyrights are infringed by States." The dispute's origins were the discovery in 1996 of Blackbeard's flagship, *Queen Anne's Revenge*, off the North Carolina shore. The salvage firm that made the discovery retained petitioners Frederick Allen and his company, Nautilus Productions (collectively, Nautilus), to document (through video and other media) salvage of the ship. Allen registered with the U.S. Copyright Office copyrights for videos and still images of the wreck and salvage efforts. The State of North Carolina and its Department of Natural and Cultural Resources (collectively, the State) allegedly infringed the copyrights by uploading and posting the copyrighted work without permission. Although the parties initially settled the case, the State allegedly resumed its infringing activities. In 2015, Nautilus sued the State and various state officials. As relevant here, the suit sought money damages against the State under the Copyright Act, which Congress had amended in 1990 to expressly abrogate the states' Eleventh Amendment immunity. The State moved to dismiss the copyright claim based on its Eleventh Amendment immunity. The district court denied the motion, but the Fourth Circuit reversed. 895 F.3d 337.

The Fourth Circuit analyzed the Copyright Remedy Clarification Act of 1990 to determine whether its purported abrogation of state sovereign immunity was valid. Nautilus first contended that Congress validly enacted the Act under Article I's Patent and Copyright Clause. The Fourth Circuit rejected that argument, holding that "*Seminole Tribe* and its progeny [ ] make clear that" (outside the unique context of bankruptcy) "Congress cannot rely on its Article I powers to abrogate Eleventh

Amendment immunity." The Fourth Circuit next held that the Copyright Remedy Clarification Act is not proper Fourteenth Amendment legislation. That is so, first, because Congress did not invoke its power under §5 of the Fourteenth Amendment when it enacted the law; it relied only on the Patent and Copyright Clause. Second, the court concluded that the law is not a congruent and proportionate response to state violations of the Fourteenth Amendment. The court found the circumstances comparable to what the Supreme Court addressed in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), where it "determined that Congress was not faced with sufficient evidence of *unconstitutional* patent infringement to justify abrogation" through the Patent Remedy Act.

Nautilus argues in its petition that the *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006)—holding that Congress validly abrogated states' sovereign immunity under the Bankruptcy Clause—means "that Congress can properly abrogate state sovereign immunity pursuant to an Article I power." And it maintains that some of the same considerations that led to the outcome in *Katz* apply with equal force to the Patent and Copyright Clause. Nautilus further contends that the Copyright Remedy Clarification Act is a proper exercise of Congress' power under §5 of the Fourteenth Amendment. It maintains that the legislative record shows that Congress was acting in response to unconstitutional state infringements of copyrights. And it insists that this legislative record was "substantially more extensive than that underlying the Patent Remedy Act," at issue in *Florida Prepaid*. Nautilus also asserts (in attempting to distinguish *Florida Prepaid*) that "[b]y its nature, copyright infringement entails an element of intentionality that patent infringement does not."

● *Holguin-Hernandez v. United States*, 18-7739. At issue is "[w]hether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence." After petitioner Holguin-Hernandez pleaded guilty to drug trafficking, a federal district court revoked his supervised release from a prior crime. At the supervised-release-revocation hearing, Holguin-Hernandez's counsel asked the court "to consider no additional time or certainly less than the [Sentencing Guidelines]," which called for a revocation term of 12 to 18 months' imprisonment. The court imposed a 12-month term of imprisonment, to run consecutively to the 60-month term he received for his most recent drug trafficking conviction. Counsel did not object to the revocation term. On appeal, Holguin-Hernandez challenged his sentence as substantively unreasonable under the standard the Court set out in *Gall v. United States*, 552 U.S. 38 (2007). The Fifth Circuit affirmed the sentence in an unpublished order. It held that because Holguin-Hernandez "failed to raise his challenges in the district court, [its] review is for plain error only." The court then ruled that Holguin-Hernandez "failed to show that the imposition of the 12-month total sentence constituted a clear or obvious error," as required for relief under the plain-error standard.

Holguin-Hernandez argues that "[o]ther circuits hold that no post-sentence objection is required, reasoning that the determination of the substantive reasonableness of the length of the sentence imposed constitutes an appellate function that is unaffected by whether the defendant objected to the sentence." Agreeing with those other circuits, Holguin-Hernandez argues that "[w]hen a defendant has made his sentencing request obvious to the district court, he has done what the contemporaneous-objection rule encourages him to do." As the Seventh Circuit put it, "Since the district court will already have heard argument and allocution from the parties and weighed the relevant §3553(a) factors before pronouncing sentence, we fail to see how requiring the defendant to

then protest the term handed down as unreasonable will further the sentencing process in any meaningful way." The United States agrees that the Fifth Circuit "incorrectly applied plain-error review to that claim." It stated that "[w]hen a defendant argues for a given sentence and the district court imposes a different sentence, the defendant has already put the court on notice of his objection to the length of the sentence and so—in accord with [Federal Rule of Criminal Procedure] 51(a) . . . — need not repeat that objection after the court announces the sentence." The Court will presumably appoint counsel as amicus curiae to defend the Fifth Circuit's approach.

● *Retirement Plans Committee of IBM v. Jander*, 18-1165. In *Fifth Third Bancorp v. Dudenhoeffer,* 573 U.S. 409 (2014), the Court addressed a claim under ERISA that the fiduciaries of an Employee Stock Ownership Plan (ESOP) breached their fiduciary duty of prudence by not acting on inside information indicating that the market was overvaluing the company's stock. The Court recognized that there is a "legitimate" concern that "subjecting ESOP fiduciaries to a duty of prudence without the protection of a special presumption will lead to conflicts with the legal prohibition on insider trading," given that "ESOP fiduciaries often are company insiders" subject to allegations that they "were imprudent in failing to act on inside information they had about the value of the employer's stock." To address that concern, the Court held that, "[t]o state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." The question presented here is "[w]hether *Fifth Third*'s 'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time."

IBM offers its employees an ESOP, which offers participants various investment options, including the IBM Stock Fund, which invested mainly in IBM common stock. Petitioner Retirement Plans Committee of IBM is the ESOP Plan's fiduciary; the company's CFO and General Counsel (also petitioners) were members of the Committee. In 2015, groups of IBM employees filed two related actions, one under the securities laws and the other under ERISA. The securities fraud action alleged "that the defendants fraudulently concealed impairment of the Company's microelectronics unit, thereby artificially inflating IBM's reported value." The ERISA action asserted the same fraud; the plaintiffs alleged that "the ESOP's fiduciaries breached their duty of prudence under Section 404 of ERISA by continuing to invest the ESOP's funds in IBM stock despite allegedly knowing that its market price was artificially inflated by undisclosed impairment of the microelectronics unit." And they "alleged that when Petitioners learned that the Company's stock price was artificially inflated, they should have either made corrective disclosures about the microelectronic unit's true value or frozen further investments in IBM stock." They also alleged (in an amended complaint) that disclosure of the fraud was "inevitable" and that "the magnitude of the stock price correction resulting from a delayed disclosure would increase over time." The district court dismissed both lawsuits. As to the ERISA action, the court held that the plaintiffs (respondents here) failed to plead what *Fifth Third* required—"facts showing that Petitioners 'could not have concluded' that publicly disclosing the alleged 'fraud' or halting further investments in IBM stock would be more likely to harm the Fund than to help it." The Second Circuit reversed. 910 F.3d 620.

The Second Circuit concluded that respondents had "sufficiently pleaded that no prudent fiduciary in the Plan defendants' position could have concluded that earlier disclosure would do more harm than good." The court relied on respondents' allegations that delayed "disclosure of a prolonged fraud causes 'reputational damage' that 'increases the longer the fraud goes on'" and that disclosure of the truth was inevitable. Petitioners argue that the Second Circuit decision "conflicts with the entire thrust of th[e] Court's decision in *Fifth Third*. Th[e] Court recognized the threat posed by meritless ERISA litigation against ESOP fiduciaries in the wake of a stock price drop," and adopted "a heightened pleading standard designed to protect ESOP fiduciaries from 'the threat of costly duty-of-prudence lawsuits [that] will deter companies from offering ESOPs to their employees.'" According to petitioners, "[t]he decision below eviscerates that decision by providing a road map for surviving a motion to dismiss. By alleging that the costs of undisclosed fraud grow over time and that revelation of the fraud is inevitable, ERISA plaintiffs will routinely satisfy a pleading standard designed to be rigorous, context-specific and protective of fiduciaries of companies who have responded to Congress's policy preferences by establishing ESOP plans."

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