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This *Report* summarizes opinions issued on June 10, 2019 (Part I); and cases granted review on that date (Part II).

I. Opinions

● *Parker Drilling Management Services, Ltd. v. Newton*, 18-389. The Court unanimously held that state law applies on the Outer Continental Shelf (OCS) only where federal law does not address the relevant issue, and not simply whenever state law is not preempted by federal law. Respondent Brian Newton was an employee of petitioner Parker Drilling who worked on drilling platforms in the OCS off California's coast. On behalf of a class of employees, he sued Parker Drilling claiming that under California labor laws he must be paid for standby time when he was required to be on the platform but was not working. The parties' dispute centered on whether California law applied under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331 *et seq.*, which applies federal law to the OCS, but "deems the adjacent State's laws to be federal law '[t]o the extent that they are applicable and not inconsistent with' other federal law." §1333(a)(2)(A). After Parker Drilling removed the case to federal court, the federal district court held, applying Fifth Circuit precedent, that California law did not apply on the OCS because the Fair Labor Standards Act's (FLSA's) comprehensive treatment of wage-and-hour laws did not leave "a significant gap for state law to fill." The Ninth Circuit reversed, holding that California's wage-and-hour laws could apply to the OCS because they "pertained to the subject matter at hand" and were not "mutually incompatible, incongruous, or inharmonious" with the FLSA. In an opinion by Justice Thomas, the Court vacated and remanded.

The Court explained as background that, after Congress divided the continental shelf between the states and the federal government, Congress passed OCSLA, "which affirmed that the Federal Government exercised exclusive control over the OCS." In "defin[ing] the body of law that governs the OCS," OCSLA applies federal law as if the OCS were a federal enclave. OCSLA also provides that, as noted above, "[t]o the extent that they are applicable and not inconsistent with . . . Federal laws and regulations, . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States." §1333(a)(2)(A). Although acknowledging that this phrase presented "a close question of statutory interpretation," the Court found Parker Drilling and the Fifth Circuit's interpretation of the phrase more persuasive. Because both parties' interpretations made redundant either the term "applicable" or "not inconsistent," the Court reasoned that "the two terms standing alone do not resolve the question before us."

As a result, the Court considered the broader history and context of OCSLA. It noted that "OCSLA reaffirmed the central role of federal law on the OCS." Reading OCSLA's provision regarding the applicability of state law together with other parts of the statute discussing the preeminence of federal law, the Court determined that "[t]aken together, these provisions convince us that state laws can be 'applicable and not inconsistent' with federal law under §1333(a)(2)(A) only if federal law does not address the relevant issue." That is, "federal law is exclusive in its regulation of the OCS, and . . . state law is adopted only as surrogate federal law." The Court rejected Newton's theory that state law could apply where not inconsistent with federal law as a "type of pre-emption analysis" that does not make sense to apply to the OCS, "[g]iven the primacy of federal law on the OCS." "Instead,

the question is whether federal law has already addressed the relevant issue; if so, state law addressing the same issue would necessarily be inconsistent with existing federal law and cannot be adopted as surrogate federal law. Put another way, to the extent federal law applies to a particular issue, state law is inapplicable."

The Court identified several other considerations that supported its interpretation. First, it noted that Newton's interpretation would treat the OCS "essentially the same as the adjacent State," by applying State law where not preempted by federal law. "[T]hat interpretation would render much of the OCSLA unnecessary." Second, the Court observed that OCSLA treats the OCS "'as an area of exclusive Federal jurisdiction within a state'—*i.e.*, as 'an upland federal enclave.'" And in federal enclaves, state law is intended to serve only a gap-filling function. And third, the Court identified three prior cases construing the OCSLA, all of which "viewed the OCSLA as adopting state law to fill in federal-law gaps." "[M]uch of our prior discussion of the OCSLA," the Court observed, "would make little sense if the statute essentially treated the OCS as an extension of the adjacent State." Finally, the Court applied its interpretation of §1333(a)(2)(A), and held that Newton's claims based on California law requiring compensation for time spent on standby and on California's minimum wage must fail: state law does not apply on the OCS to wage-and-hour issues that are already covered by the FLSA. The Court remanded the remainder of the case for analysis under its interpretation of OCSLA.

● *Quarles v. United States,* 17-778. The Court unanimously held that for the purposes of §924 of the Armed Career Criminal Act (ACCA), "burglary occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure." ACCA mandates a minimum 15-year sentence for a felon who unlawfully possesses a firearm and has three prior convictions for a "serious drug offense" or "violent felony," the latter of which is defined as including "burglary." 18 U.S.C. §924(e). Under *Taylor v. United States*, 495 U.S. 575 (1990), the statutory term "burglary" means "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Petitioner Jamar Quarles was sentenced as an armed career criminal based on a prior conviction under a Michigan third-degree home invasion law providing that a person commits the offense if he or she "breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor." Quarles argued that a conviction under this statute was not a burglary conviction under §924 because the statute includes defendants who form the intent to commit a crime at any time while unlawfully inside a dwelling, rather than at the moment their presence became unlawful. The district court rejected this argument, and the Sixth Circuit affirmed. In an opinion by Justice Kavanaugh, the Court affirmed.

The Court began with the *Taylor*'s definition of generic burglary—"unlawful . . . remaining in . . . a building or structure, with intent to commit a crime." The Court noted that the ordinary meaning of "remaining in" refers to a continuous activity, and that the Court has applied that ordinary meaning in analogous legal contexts. Applying this common understanding of "remaining in" as "a continuous event," the Court concluded that burglary for purposes of §942(e) occurs "if the defendant forms the intent to commit a crime *at any time* during the continuous event of unlawfully remaining in a building or structure." Thus, an intent to commit a crime is "contemporaneous with the unlawful remaining so long as the defendant forms the intent at any time while unlawfully remaining."

The Court found support for this interpretation of §924(e) from the legal context of the states' criminal laws in effect when the statute was enacted in 1986. A majority of the states proscribed remaining-in burglary—as opposed to entry-based burglary—and state courts that addressed the question uniformly interpreted "remaining-in burglary to occur when the defendant forms the intent to commit a crime at any time while unlawfully present in the building or structure." The Court found it unlikely that Congress intended to exclude remaining-in burglary from §924(e) where Congress' rationale for including burglary as a violent felony under the ACCA was burglary's inherent potential for violent confrontation between offender and occupant, which "does not depend on the exact moment when the burglar forms the intent to commit a crime while unlawfully present in a building or structure." The Court declined to conclude "that Congress enacted a self-defeating statute" by enacting ACCA with the objective of "imposing enhanced punishment on armed career criminals who have three prior convictions for burglary or other violent felonies," then excluding burglary convictions under many states' statutes because those statutes are broader than §924(e)'s generic burglary.

Justice Thomas concurred. He joined the opinion because he agreed that the Court "correctly applied [its] precedent requiring a 'categorical approach' to the enumerated-offenses clause of the [ACCA]." But Justice Thomas viewed the case as "demonstrat[ing] the absurdity of applying the categorical approach to the enumerated-offense clause," which "is difficult to apply and can yield dramatically different sentences depending on where a burglary occurred." Justice Thomas "suspect[ed] that the categorical approach . . . is not compelled by ACCA's text but was rather a misguided attempt to avoid Sixth Amendment problems," and stated that "the Court should consider whether its approach is actually required in the first place for ACCA's enumerated-offenses clause." Justice Thomas suggested that a conduct-specific analysis might be preferable because "[a] jury could readily determine whether a particular conviction satisfied the federal definition of burglary or instead fell outside that definition" and "would end the unconstitutional factfinding that occurs when applying the categorical approach."

● *Return Mail, Inc. v. United States Postal Service,* 17-1594. In a 6-3 decision, the Court held that the government is not a "person" capable of instituting any of the three review proceedings under the America Invents Act (AIA). The AIA established the Patent Trial and Appeal Board and created three types of administrative proceedings before that Board to allow a "person" to challenge the validity of a patent. 35 U.S.C. §§311(a), 321; AIA §18(a)(1). Return Mail owns a patent claiming a method for processing mail that is undeliverable. After the Postal Service introduced an address-change service to process undeliverable mail, Return Mail asserted that the service infringed on its patent. It sued the Postal Service seeking compensation for the unauthorized use of its invention. While that suit was pending, the Postal Service petitioned under the AIA for review of Return Mail's patent; the Board agreed with the government and cancelled Return Mail's patent claims. The Federal Circuit affirmed, holding (as relevant here) that the government is a "person" eligible to petition for review under the AIA. In an opinion by Justice Sotomayor, the Court reversed and remanded.

Because the AIA provisions at issue do not define the term "person," the Court "proceed[ed] from the presumption that the Government is not a 'person' authorized to initiate these proceedings absent an affirmative showing to the contrary." That is in keeping, held the Court, with the "longstanding interpretative presumption that 'person' does not include the sovereign." The Court found that this reading of "person" is consistent not only with common usage, but with the Dictionary Act, which

Congress directed courts to apply unless a term's particular statutory context indicates otherwise. "The Dictionary Act has since 1947" not included the government in its definition of "person." 1 U.S.C §1.

The Court found that the Postal Service failed to overcome the presumption by pointing "to some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government." The Court rejected the Postal Service's argument that because the term "person" includes the government when used elsewhere in the AIA, it includes the government in the provisions concerning patent challenges. The Court noted that "[t]he consistent-usage canon breaks down where Congress uses the same word in a statute in multiple conflicting ways"—and the meaning of "person" is not consistent across its many appearances in the Patent Act and AIA. "Sometimes 'person' plainly includes the Government, sometimes it plainly excludes the Government, and sometimes—as here—it might be read either way." Nor was the Court persuaded that, because §207(a) authorizes the government to obtain its own patents and protect its interests in those patents, Congress necessarily intended that the government be permitted to challenge the validity of someone *else's* patents in adversarial proceedings before the Board. The Court concluded that "the mere existence of some Government-inclusive references" cannot make the affirmative showing required to overcome the presumption that the government is not a "person."

The Court rejected the Postal Service's argument that the Patent Office's historic treatment of the government as a "person" who may ask the Patent Office to conduct an ex parte reexamination of an issued patent dictates that the government be a "person" who may initiate AIA review proceedings. The Court explained that an ex parte reexamination by the Patent Office is meaningfully different from an AIA review proceeding. The former is an internal agency process in which the challenger may not participate, whereas the latter is an adversarial proceeding between the challenger and the patent owner. By excluding the government from AIA review proceedings, the AIA "avoids the awkward situation that might result from forcing a civilian patent owner (such as Return Mail) to defend the patentability of her invention in an adversarial, adjudicatory proceeding initiated by one federal agency (such as the Postal Service) and overseen by a different federal agency (the Patent Office)."

Finally, the Court was unpersuaded by the Postal Service's argument that it must be a "person" for purposes of initiating AIA review proceedings because it is subject to civil liability for patent infringement and, when sued for infringement, may assert a defense of patent invalidity. The Postal Service argued that it would be anomalous to deny it a benefit afforded to other infringers—the ability to challenge a patent *de novo* before the Patent Office, rather than as an infringement defense that must be proved by clear and convincing evidence. But the Court "s[aw] no oddity . . . in Congress' affording non-government actors an expedient route that the Government does not also enjoy for heading off potential infringement suits." It observed that non-government actors "face greater and more uncertain risks if they misjudge their right to use a technology," facing injunction and punitive damages, whereas the government is liable only for "reasonable and entire compensation" for its infringements. It was therefore "reasonable for Congress to have treated them differently."

Justice Breyer dissented, joined by Justices Ginsburg and Kagan. The dissent distinguished the AIA provisions the Court relied upon to show inconsistency in statutory usage of the term "person." Those provisions, said the dissent, "concern details of administration that, almost by definition,

could not involve an entity such as the Government." By contrast, the dissent found the provisions concerning AIA review proceedings "much closer" to the provisions concerning "the criteria for obtaining patents" and "the availability of certain infringement defenses," in which Congress used the term "person" to include the government. The dissent found further support for its view in the legislative history and in longstanding executive interpretation. One of the purposes of the AIA—to make it easier to challenge questionable patents—"is implicated to the same extent whether the Government or a private party is the one accused of infringing an invalid patent." And the executive branch "has long indicated that Government agencies count as 'perso[ns]' who are entitled to invoke the administrative review procedures that pre-date the [AIA]." With respect to the "awkward situation" of a private party suing one government agency before another one, the dissent noted that the same situation arises when a private party challenges a government patent, and "[t]hus, the situation the majority attempts to avoid is already baked into the cake."

II. Cases Granted Review

● *McKinney v. Arizona,* 18-1109. The questions presented are (1) whether, when correcting a sentence or resentencing, a court must apply the law currently in effect or the law in effect when the sentence first became final; and (2) whether a sentence that violates *Eddings v. Oklahoma*, 455 U.S. 104 (1982), can be corrected on appeal without remand for resentencing. James McKinney was convicted of murdering two victims while burglarizing their homes, and was sentenced to death by a trial judge. The Arizona Supreme Court affirmed his conviction and sentence in 1996, after conducting an "independent review of the record and of the aggravating and mitigating evidence to determine whether the sentence is justified." The Ninth Circuit eventually granted habeas relief on the ground that the Arizona courts refused as a matter of law to give weight to nonstatutory mitigation evidence unless the evidence was causally related to the crimes. The Ninth Circuit ruled that this violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), which held that under the Eighth Amendment a sentencer in a capital case may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence" offered by the defendant. The Ninth Circuit remanded with instructions to grant the writ unless the state corrected the constitutional defect in McKinney's death sentences or imposed a lesser sentence. 813 F.3d 798. On remand, the state asked the Arizona Supreme Court to conduct a new independent review of McKinney's sentences. The Arizona Supreme Court granted the motion, rejecting McKinney's contention that he was entitled to resentencing by a jury under *Ring v. Arizona*, 536 U.S. 584 (2002). The court reasoned that "McKinney's case was 'final' before the decision in *Ring*." After weighing the aggravating and mitigating evidence itself, the Arizona Supreme Court affirmed his sentences. 426 P.3d 1204.

McKinney argues that his case is not final because—following the grant of post-conviction relief—the state high court granted *de novo* review of his sentence. In his view, "where a court exercises discretion to correct a defendant's sentence or conduct a resentencing, the defendant's conviction is rendered non-final for purposes of th[e] Court's retroactivity jurisprudence." As support for that proposition, McKinney cites *Jimenez v. Quarterman*, 555 U.S. 113 (2009), where the "Court held that where a state court reopens direct review, a final conviction is rendered non-final." *Jiminez* reasoned that a conviction is no longer final where it is "again capable of modification through direct appeal to the state courts and to this Court on certiorari review." McKinney says the same is true following a

federal grant of habeas relief. McKinney further argues that where a death sentence violates *Eddings*, that error cannot be remedied on appeal without remand for resentencing. "The nature of *Eddings* error," McKinney says, "is a sentencer's failure to consider mitigating evidence. The proper remedy for that error is for the sentencer to consider mitigating evidence. An appellate court—which by nature *reviews* the trial court's judgment—does not serve the same sentencing function."

● *Comcast Corp. v. National Ass'n of African American-Owned Media*, 18-1171. The Court will resolve whether "a claim of race discrimination under 42 U.S.C. §1981 fail[s] in the absence of but-for causation." Entertainment Studios Networks (ESN) owns and operates seven television networks. It was founded in 1993 by an African-American and is presently 100% African-American owned. To be seen by viewers, ESN (like all television networks) must enter "carriage contracts" with cable operators. ESN met with Comcast executives at various times between 2008 and 2015, but Comcast declined to carry ESN's networks. ESN responded by filing suit against Comcast and other major cable carriers that declined to carry its networks. In 2016, ESN and the National Association of African American-Owned Media (respondents) filed suit against Comcast and other parties alleging racial discrimination in contracting in violation of §1981, which provides (in pertinent part) that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts." The district court dismissed the complaint (as twice amended), finding that none of the facts it alleges is inconsistent with "a decision not to contract with [ESN] for legitimate business reasons or, in itself, indicates that the decision was racially discriminatory." The Ninth Circuit reversed. 743 Fed. App'x 106.

The Ninth Circuit relied on its decision in *National Association of African American-Owned Media v. Charter Communications, Inc*., 915 F.3d 617 (2018), which presented similar legal issues and was argued and decided on the same day by the same panel. In *Charter*, the court held that "to prevail in a Rule 12(b)(6) motion on their §1981 claim, Plaintiffs needed only to plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract, and not necessarily the but-for cause of that decision." *Charter* reasoned that "Section 1981 guarantees 'the same right' to contract 'as is enjoyed by white citizens.'" And "[i]f discriminatory intent plays any role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen." The court therefore concluded that, "unlike the ADEA or Title VII's retaliation provision, §1981's text permits an exception to the default but-for causation standard." Applying that standard, the Ninth Circuit in *Comcast* ruled that respondents' second amended complaint "includes sufficient allegations from which we can plausibly infer that [ESN] experienced disparate treatment due to race and was thus denied the same right to contract as a white-owned company, which violates § 1981." Among other allegations, the court emphasized Comcast's decisions to offer carriage contracts to "lesser-known, white-owned networks . . . at the same time it informed [ESN] that it had no bandwidth or carriage capacity."

Comcast relies on Supreme Court decisions that "made clear that but-for causation remains the *sine qua non* of a discrimination claim where Congress has not expressly directed otherwise." See *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009) (ADEA); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (Title VII retaliation claim). Comcast maintains that the Ninth Circuit made three fundamental errors in concluding that Congress "expressly directed otherwise" in §1981. First, the court relied on the absence of language that "explicitly suggest[s]" but-for causation, which "flipped the default rule of but-for causation on its head." Second, the Ninth Circuit failed to heed

Gross and *Nassar*'s demand that courts "cannot ignore Congress' decision to amend Title VII's relevant provisions [to expressly abandon but-for causation] but not make similar changes to" other antidiscrimination provisions. Third, says Comcast, "the single statutory indicium of the proper causation standard offered by the Ninth Circuit comes nowhere close to overriding the default rule of but-for causation." Comcast argues that §1981's command that African-Americans have "the same right" to contract "as is enjoyed by white citizens" does not dictate a specific causation rule and therefore does not overcome the default of but-for causation. ESN counters that "the ADEA provision at issue in *Gross* and the Title VII retaliation provision at issue in *Nassar*" both use the words "because of" or "because." By contrast, §1981 guarantees the "same right" to contract. "This difference in language alone," says ESN, "supports a different liability standard for section 1981." ESN argues that §1981's structure and broad remedial purpose also support a lessened causation standard.

● *Atlantic Richfield Co. v. Christian*, 17-1498. The Court will decide three questions related to a state court's ability to grant damages for the restoration of a Superfund site. The dispute concerns the former Anaconda copper smelter in Montana, which has been a Superfund site since 1983. A group of property owners at the site sued Atlantic Richfield (ARCO), the successor to the company that operated the smelter. They alleged various state-law tort claims and sought restoration damages—funds that would be used to conduct restoration work on their properties. The property owners sought "restoration work in excess of what the EPA required of ARCO in its selected remedy," including more stringent soil and groundwater remediation. ARCO moved for summary judgment, contending that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 *et seq.*, barred the owners' claims. A Montana district court denied ARCO's motion and granted the property owners' motion for summary judgment on ARCO's CERCLA affirmative defense. The Montana Supreme Court affirmed. 408 P.3d 515.

The Montana Supreme Court rejected ARCO's three theories as to why CERCLA precludes the property owners from seeking restoration damages under state law. First, it determined that the owners' claim did not constitute a "challenge" to EPA's selected remedy and therefore was not precluded by §113(h) of CERCLA, which deprives courts of jurisdiction over "challenges to removal or remedial action." That is because, in the Montana court's view, the owners "are not seeking to interfere with [the EPA's] work, nor are they seeking to stop, delay, or change the work EPA is doing." Nor, according to the court, does §113(h) speak to state-court, as opposed to federal, jurisdiction. Second, the court rejected ARCO's argument that the owners are "Potentially Responsible Parties" (PRPs) prohibited from undertaking any remedial action at the site under §122(e)(6) of CERCLA. Although property owners at a CERCLA facility are PRPs under CERCLA, these owners have never been designated PRPs and the statute of limitations for a claim against them as PRPs has passed. "Put simply, the PRP horse left the barn decades ago." Finally, the court concluded that CERCLA generally does not preempt the owners' claim for restoration damages, as CERCLA contains savings clauses for state law actions and because the requested remedy is not incompatible with the EPA's remedy.

ARCO sought certiorari review on all three theories rejected by the Montana Supreme Court. Describing the case as "one of the most consequential decisions interpreting CERCLA in years," it criticizes the decision below as "permit[ting] state tort suits to obstruct complex and costly CERCLA cleanups undertaken at EPA's direction." ARCO first argues that the Montana court's interpretation of "challenge" in §113(h) of CERCLA as including only cases seeking remedies that "actively interfere

with EPA's work" conflicts with six federal courts of appeals. Those courts, in ARCO's view, correctly interpret CERCLA as stripping jurisdiction over actions seeking remedies "related to the goals of the [EPA] cleanup" or that "call[] into question" or "impact[]" the cleanup. Next, ARCO contends that "[b]ecause plaintiffs are property owners at the Superfund site, they are PRPs, full stop" and cannot take remedial action at the site without EPA approval. Finally, ARCO argues that the case presents "a classic case of conflict preemption: the remedy plaintiffs seek conflicts with the CERCLA cleanup that EPA has ordered." Pointing to an amicus brief filed by the United States below, ARCO maintains that the owners' requested remedy would both make EPA's "remedies difficult or impossible to achieve" and would "thwart CERCLA's central objectives of promoting settlement and preventing multiple, conflicting remedies at a Superfund site."

● *Intel Corp. Investment Policy Committee v. Sulyma*, 18-1116. ERISA's statute of limitations bars claims that a fiduciary breached a duty to plan holders if they are brought more than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. §1113(2). At issue is whether that limitations period "bars suit where all of the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information." Respondent Christopher Sulyma worked at Intel from 2010 to 2012 and participated in two of the company's retirement plans. The plans invested in funds that were managed by Intel investment committees. Following the 2008 financial crisis, the investment committees decided to increase the funds' diversification by investing in hedge funds and private equity. In Fund Fact Sheets provided to plan holders in 2010 (and through other communications), the committees explained their new allocation policy: it would reduce volatility and increase performance when the market declined. On the flip side, said the Sheets, the funds would underperform in certain market conditions and would have to pay higher fees. As it turned out, equity markets surged and the funds produced lower returns than equity-heavy index funds. In October 2015, Sulyma filed a putative class action against the plans and investment committees (petitioners), alleging that they imprudently overallocated funds in the plans to alternative investments and failed to disclose relevant facts about those allocations, in violation of ERISA. The district court granted summary judgment to petitioners, ruling that Sulyma's claims were time-barred because the elements of the underlying violations had been disclosed to him more than three years before he sued. The Ninth Circuit reversed. 909 F.3d 1069.

The Ninth Circuit held that, although evidence showed that the information had been sent to Sulyma more than three years before he filed suit, the undisputed record did not show that Sulyma was "actually aware" of the disclosed information. The court explained that "the plaintiff must have *actual* knowledge, rather than constructive knowledge." This "means the plaintiff is actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff." The Ninth Circuit held that the actual knowledge/constructive knowledge distinction is compelled by ERISA's history: the statute initially looked to both actual knowledge and constructive knowledge (when the plaintiff "could reasonably be expected to have obtained knowledge of such breach or violation"), but Congress repealed the constructive knowledge provision in 1987. Applying its interpretation here, the court found summary judgment inappropriate because Sulyma testified that he was unaware of the Fund Fact Sheets and other disclosures made prior to October 2012. There is therefore a dispute of material fact regarding whether Sulyma *actually* was aware of those documents before then.

Petitioners argue that the Sixth Circuit got it right when it held, contrary to the Ninth Circuit, that "[a]ctual knowledge does not require proof that the individual [p]laintiffs actually saw or read the documents that disclosed" the relevant facts. It therefore held that, "[w]hen a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms." Petitioners maintain that, "[w]hen contained in a statute of limitations, the term 'actual knowledge' necessarily covers situations in which the plaintiff 'had' or possessed the facts that form the basis for a claim." That interpretation of "actual knowledge," they say, does not equate it with "constructive knowledge"; it simply holds a plaintiff "responsible for the factual information that he actually possesses." Petitioners add that the Ninth Circuit's reading "will undermine the balance that ERISA's carefully crafted disclosure framework seeks to achieve," for under that reading "no amount of disclosure by plan fiduciaries can ensure that plan participants will possess 'actual knowledge' of the facts disclosed by the plan, enabling virtually every plaintiff to get past a motion for summary judgment." This would "render the three-year limitations period essentially meaningless."

● *Monasky v. Taglieri*, 18-935. The Court will resolve two questions under the Hague Convention on the Civil Aspects of International Child Abduction: (1) the standard of review for a district court's determination of a child's "habitual residence"; and (2) the legal standard for determining the "habitual residence" of an infant too young to acclimate to her surroundings. This case concerns a custody dispute between two parents, Michelle Monasky and Domenico Taglieri, over their daughter, A.M.T. Monasky, an American, and Taglieri, an Italian, met and married in the United States but then moved to Italy. During this marriage, Taglieri physically and allegedly sexually abused Monasky. Monasky gave birth to A.M.T. in Italy and, eight weeks after A.M.T. was born, returned to the United States with her. Taglieri filed an action in Italy to terminate Monasky's parental rights, and the Italian court ruled in his favor ex parte. He also filed a petition in Ohio federal court under the Hague Convention seeking A.M.T.'s return to Italy. The district court granted Taglieri's petition, finding that Italy was A.M.T.'s country of "habitual residence"; Monasky returned A.M.T. to Italy. The en banc Sixth Circuit affirmed the district court's ruling that A.M.T. must be returned to Italy under the Hague Convention. 907 F.3d 404.

The Convention "addresses a pressing and never-ceasing policy problem—the abductions of children by one half of an unhappy couple." Under a federal statute that implements the Convention, a "parent may petition a federal or state court to return abducted children to their country of habitual residence," which country's courts then resolve any child custody claims. "The key inquiry in many Hague Convention cases . . . goes to the country of the child's habitual residence." The Sixth Circuit noted that in most cases, a habitual residence is the "place in which the child has become 'acclimatized.'" But as "a back-up inquiry for children too young or too disabled to become acclimatized," the court "looks to 'shared parental intent.'" "Shared parental intent," in the court's view, does not require a "meeting of the minds" between the parents because that would "create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected." Applying this standard, the Sixth Circuit found that the district court's conclusion that Italy was A.M.T.'s "habitual residence" was not clear error, as there was "[s]ome evidence . . . that Monasky and Taglieri intended to raise A.M.T. in Italy." Although some evidence "pointed in the other direction," the court determined that it had "no warrant to second-guess" the

district court's "well-considered finding." The en banc court rejected Monasky's argument "that the district court's determination of habitual residence is a finding of 'ultimate fact' that [the courts of appeals] review de novo."

Monasky contends that the Sixth Circuit's opinion creates or widens circuit splits on two issues. First, she asks the Court to determine whether "a district court's determination of habitual residence under the Hague Convention should be reviewed *de novo*, . . . under a deferential version of *de novo* review, . . . or under clear-error review," all different standards applied by courts of appeals. Monasky argues that *de novo* review is proper. Analogizing "habitual residence" determinations to probable-cause review, she maintains that the "Court has . . . made clear that mixed questions of law and fact are subject to *de novo* appellate review where they require application of historical facts to a statutory or constitutional standard." On the second issue, Monasky argues that the Sixth's Circuit's holding that a "meeting of the minds" or "subjective agreement" between the parents is not needed to establish an infant's "habitual residence" is incorrect and conflicts with the holdings of other circuits. Instead, Monasky contends, "the parents must actually have agreed at some point on where to raise the infant to establish her habitual residence in that country." In her view, the Sixth Circuit's standard "conflicts with the Hague Convention's language and purpose," which limit the Convention's application to children removed from a country where a child has been present with a "settled purpose," and not merely physically present. "Especially in the context of domestic violence," she warns, "a legal standard that does not require actual agreement between the parents opens the door to manipulation and forum-shopping by abusive parents and spouses."

Taglieri insists that the Sixth Circuit's decision to apply clear error review was correct. He points to the Court's recent decision in *U.S. Bank National Association ex rel. CW Capital Asset Management v. Village at Lakeridge*, 138 S. Ct. 960 (2018), as "explain[ing] that not all . . . mixed questions [of fact and law] are subject to the same standard of review"; some are reviewed *de novo*, and others under the clear-error standard, depending "on whether answering [the question] entails primarily legal or factual work." The "habitual residency" question, in his view, is "an inquiry that 'immerse[s] courts in case-specific factual issues'" such that clear error review is proper. As to the standard for establishing an infant's "habitual residence," Taglieri argues that "shared parental intent" governs, but that such intent can be established through evidence other than a subjective agreement by the parents, "such as objective actions by the parents demonstrating a shared intent."

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