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This *Report* summarizes opinions issued on January 15 and 22, 2019 (Part I); and cases granted review on January 11 and 22, 2019 (Part II).

I. Opinions

● *New Prime Inc. v. Oliveira*, 17-340. Section 1 of the Federal Arbitration Act provides that the Act does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." By an 8-0 vote, the Court held that this exclusion covers not only "agreements between employers and employees but also agreements that require independent contractors to perform work." Dominic Oliveira works as a truck driver for New Prime. His contract with the company (which contains an arbitration provision) labels him not as an employee, but as an independent contractor. Oliveira filed a class action lawsuit in federal court against New Prime alleging that the company denies its drivers lawful wages by treating them as employees but failing to pay them a minimum wage. In response, New Prime asked the court to invoke its authority under the Act and compel arbitration. Oliveira responded that the Act does not apply to him because he falls within the §1 exclusion. He contended that, whether he is considered an employee or an independent contractor, his agreement with New Prime is a "contract[] of employment of . . . [a] worker[] engaged in . . . interstate commerce." New Prime disagreed, asserting that the exclusion applies only to contracts establishing an employer-employee relationship. The district court and First Circuit both ruled for Oliveira, holding that (1) courts, not arbitrators, should resolve whether a contract falls within the §1 exclusion, and (2) the exclusion extends to independent contractors. In an opinion by Justice Gorsuch, the Court affirmed.

The Court first held that a court should decide for itself whether §1's "contracts of employment" exclusion applies before ordering arbitration. "After all, to invoke its statutory powers under §§3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§1 and 2." The Court rejected New Prime's argument that the contract's delegation clause (delegating issues of arbitrability to the arbitrator) empowers the arbitrator, not courts, "to decide even the initial question whether the parties' dispute is subject to arbitration." Although that's generally so, explained the Court, "all this overlooks the necessarily antecedent statutory inquiry." The rule that the Act enforces delegation clauses kicks in only if the Act applies, *i.e.*, if the contract isn't excluded under §1.

Turning to the merits, the Court held that the phrase "contracts of employment" in §1 encompasses independent-contractor agreements. The Court began by noting that "words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." And although "[t]o many lawyerly ears today, the term 'contracts of employment' might call to mind only agreements between employers and employees," that was not the case when Congress enacted the Act in1925. "At that time, a 'contract of employment' usually meant nothing more than an agreement to perform work." The Court observed that contemporary dictionaries consistently defined "employment" "more or less as a synonym for 'work,'" without "distinguish[ing] between different kinds of work or workers." The Court found that early 20th-century federal and state cases, and federal statutes, did the same. Further, noted the Court, the Act speaks of "contracts of employment of . . . any . . . class of *workers*"—not "any class of employees." Finally, the Court rejected New Prime's resort to

the Act's intent to establish a pro-arbitration federal policy. The Court explained that statutes are the products of compromise and don't pursue their objectives at all costs. "By respecting the qualifications of §1 today, we respect the limits up to which Congress was prepared to go when adopting the Arbitration Act." (Quotation marks omitted.)

Justice Ginsburg filed a short concurring opinion which noted that some statutes' words "can enlarge or contract their scope as other changes, in law or in the world, require their application in new instances or make old applications anachronistic." (Quotation marks omitted.)

● *Stokeling v. United States*, 17-5554. In a 5-4 decision, the Court held that "a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of 'physical force' within the meaning of the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(2)(B)(i)." In 2016, petitioner Denard Stokeling pleaded guilty to possessing a firearm and ammunition after having been convicted of a felony, in violation of 18 U.S.C. §922(g)(1). Based on his prior criminal history, including a 1997 Florida robbery conviction, the probation office recommended that Stokeling be sentenced as an armed career criminal under ACCA, which provides that a person who violates §922(g) and has three previous convictions for a "violent felony" shall be imprisoned for a minimum of 15 years. ACCA defines "violent felony," in pertinent part, as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of *physical force* against the person of another." §924(e)(2)(A) (the "elements clause") (emphasis added). Under the categorical approach used by the Court in ACCA cases, the issue was whether an element of Florida robbery was the use of "physical force." In a 1997 decision, the Florida Supreme Court had explained that the "use of force" necessary to commit robbery requires "resistance by the victim that is overcome by the physical force of the offender." The district court held that Stokeling's prior 1997 Florida robbery conviction did not require the use of "physical force" and therefore did not justify the ACCA enhancement. The Eleventh Circuit reversed. In an opinion by Justice Thomas, the Court affirmed, holding "that the elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance."

The Court explained that ACCA's original language asked whether the offender had three prior convictions "for robbery or burglary," and defined "robbery" as taking another's property "by force or violence." That definition, found the Court, "mirrored the elements of the common-law crime of robbery, which has long required force or violence"—and which found "'violence' was 'committed if sufficient force [was] exerted to overcome the resistance encountered." That was so even where the force was relatively small, such as the amount needed to break a watch chain off a person. The Court added that the common law treated the terms "force" and "violence" interchangeably. Taken together, ruled the Court, the original ACCA defined robbery as requiring "[s]ufficient force to overcome resistance . . . however slight the resistance." The Court concluded that Congress did not intend to narrow ACCA's scope when it amended the law in 1986 by replacing "robbery and burglary" with the more general elements clause, which "extended ACCA to cover any offense that has as an element 'the use, attempted use, or threatened use of physical *force*.'" Rather, said the Court, Congress' retention of the term "force" showed that it intended to "retain[] the same common-law definition that undergirded the original definition." The Court found support for this reading by the fact that in 1986

between 31 and 43 states had defined robbery as requiring force that overcomes a victim's resistance. The Court declined to construe the statute in a way such that most states' robbery would not qualify as ACCA predicates.

The Court stated that its "understanding of 'physical force' comports with *Johnson v. United States*, 559 U.S. 133 (2010)," which held that mere physical contact was insufficient to meet ACCA's "physical force" requirement. *Johnson* ruled that "physical force" means "force capable of causing physical pain or injury." And so while *Johnson* held that mere "actual and intentional touching" (the level of force to commit common-law battery) does not count as "physical force," the Court here held that robbery meets the definition because "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*." Robbery "necessarily involves a physical confrontation and struggle." The Court added that there need not be "any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality." Given these definitions, the Court had little difficulty concluding that Florida robbery qualified as a "violent felony" under ACCA's elements clause.

Justice Sotomayor filed a dissent, which Chief Justice Roberts and Justices Ginsburg and Kagan joined. The dissent maintained that *Johnson* controls and mandates a ruling for Stokeling. Specifically, the dissent quoted *Johnson* as interpreting the phrase "physical force" to mean "a degree of force that is 'violent,' 'substantial,' and 'strong'—'that is, force capable of causing physical pain or injury to another person.'" In the dissent's view, the Florida robbery statute does not meet that standard because it can require "essentially no force at all"—*e.g.*, the force used "by a pickpocket who attempts to pull free after the victim catches his arm." Congress did not intend to impose a 15-year minimum sentence on "glorified pickpockets, shoplifters, [or] purse snatchers." ACCA, the dissent explained, does not look to past crimes "to get a sense of whether a particular defendant is generally a recidivist; rather, it looks to past crimes to determine specifically 'the kind or degree of danger the offender would pose were he to possess a gun.'" The dissent accused the majority of "bury[ing]" the *Johnson* opinion and creating a "brave new world of textual interpretation" that will result in the phrase "physical force" leading a "Janus-faced existence."

● *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, 17-1229. The Leahy-Smith America Invents Act (AIA) bars a person from receiving a patent on an invention that was "in public use, *on sale*, or otherwise available to the public before the effective filing date of the claimed invention." 35 U.S.C. §102(a)(1) (emphasis added). The Court unanimously held that this ban on patenting inventions that had already been on sale applies even where the sale was "to a third party who is contractually obligated to keep the invention confidential."

Petitioner Helsinn Healthcare is a pharmaceutical company that makes a treatment for chemotherapy-induced nausea and vomiting using the chemical palonosetron. In 2000, Helsinn and MGI Pharma entered into a license agreement and a supply and purchase agreement. The license agreement granted MGI the right to distribute, promote, market, and sell .25 mg doses of palonosetron; in exchange, MGI made upfront payments to Helsinn and would pay future royalties on its distribution. Under the supply and purchase agreement, MGI purchased palonosetron exclusively from Helsinn, and Helsinn agreed to supply MGI. Both agreements required confidentiality as to proprietary infor-

mation, although the companies announced their agreements in a joint press release. MGI also reported the agreements to the Securities and Exchange Commission. In 2003, Helsinn began filing patent applications and did so over the next 10 years, claiming a priority to January 30, 2003—nearly two years after Helsinn and MGI entered into the agreements. Some years later, in 2011, respondent Teva Pharmaceutical sought approval from the FDA to market a generic .25 mg palonosetron product. Helsinn sued Teva for infringing on its palonosetron patent. In defense, Teva asserted that the patent was invalid because the .25 mg dose was "on sale," under the Leahy-Smith America Invents Act (AIA), more than one year before Helsinn filed its patent application. The district court concluded that the "on sale" provision did not apply because an invention is not "on sale" unless the sale or offer made the claimed invention available to the public. Here, Helsinn and MGI's agreements were generally not public. The Federal Circuit reversed, concluding that "if the existence of the sale is public, the details of the invention need not be publicly disclosed in the terms of sale." Here, the sale between Helsinn and MGI was publicly disclosed, and thus the "on sale" bar applied. In a opinion by Justice Thomas, the Court affirmed.

The Court held that the sale of an invention to a third party who is obligated to keep the invention confidential places the invention "on sale" for purposes of the AIA. The Court noted that "[e]very patent statute since 1836 has included an on-sale bar." The bar, explained the Court, "reflects Congress' 'reluctance to allow an inventor to remove existing knowledge from public use' by obtaining a patent covering that knowledge." And although none of the Court's pre-AIA precedents "expressly addressed the precise question presented in this case, [its] precedents suggest that a sale or offer could cause an inventor to lose the right to patent, without regard to whether the offer discloses each detail of the invention." The Court concluded that "[i]n light of [its] settled pre-AIA precedent, . . . we presume that when Congress reenacted the same language in the AIA, it adopted the earlier judicial construction of that phrase." The Court acknowledged that the AIA added the phrase "or otherwise available to the public," but found that that alteration to the pre-AIA statutory framework was "not enough of a change for us to conclude that Congress intended to alter the meaning of the reenacted term 'on sale.'"

II. Cases Granted Review

● *New York State Rifle & Pistol Ass'n v. City of New York*, 18-280. The Court will resolve whether New York City's "ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel." New York State forbids possession of handguns without a license. Each petitioner holds a "premises" license, which authorizes a person to possess a handgun at a designated premises. A New York City rule allows persons with premises licenses to transport their handguns, unloaded and locked, to and from authorized shooting ranges within the city. The rule does not permit transporting a handgun to a second residence or to a shooting range outside the city. One petitioner wishes to transport a handgun to his second home. Two other petitioners live in New York City and wish to transport their handguns to use at shooting ranges outside the city. They filed suit in federal court challenging the transportation limitations. The district court granted summary judgment to the city. The Second Circuit affirmed. 883 F.3d 45.

The Second Circuit found that, although the Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment creates an individual right to possess and carry weapons, the right is subject to limits such as lawful prohibition on carrying firearms in sensitive places. To assess the validity of gun regulations, the Second Circuit applies a two-step inquiry: "first, we determine whether the challenged legislation impinges upon conduct protected by the Second Amendment, and second, if we conclude[] that the statute[] impinge[s] upon Second Amendment rights, we must next determine and apply the appropriate level of scrutiny." (Quotation marks omitted). The court proceeded on the assumption that the Second Amendment applied. To determine the level of scrutiny, it considered "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." (Quotation marks omitted). The court applied intermediate scrutiny, finding that the New York City license conditions to do not implicate the core of the Second Amendment, which protects firearm possession in the home, and that the restrictions are not a substantial burden because they do not prohibit firearm ownership. The court went on to conclude that the transportation limits satisfy intermediate scrutiny because, as explained in affidavits submitted by a former commander of the state licensing division, they protect public safety and prevent crime. The Court further held that the limitations do not violate the dormant Commerce Clause because they are not protectionist and, even if they were, they are justified by a public safety purpose. And the limitations do not violate the right to travel because "[t]he Constitution protects the right to travel, not the right to travel armed."

Petitioners argue that the Second Amendment right to possess firearms for protection implies a corresponding right to train and practice with a firearm, and to possess the firearm at a second home. They insist that the city's safety concerns do not overcome their Second Amendment rights: "the City has presented precisely zero empirical evidence that transporting an *unloaded* handgun *locked up* in a container *separate from* its ammunition . . . poses any material safety risk." Petitioners maintain that "the City's transport ban only undermines its professed public safety concerns, as the ban has the perverse effects of forcing residents to keep handguns in their vacant New York residences, and to transport their handguns all around the city—the very activity the City claims is dangerous—in search of one of seven in-city shooting ranges tucked into the boroughs." They contend that city's transportation limitation "is exemplary of a broader push by local governments to restrict Second Amendment rights through means that would never fly in any other constitutional context." Petitioners also assert that the in-city shooting range limitation improperly favors local enterprises to the detriment of out-of-state competitors in violation of the Commerce Clause and unconstitutionally deters travel between states.

● *Mitchell v. Wisconsin,* 18-6210. At issue is whether a warrantless blood draw from an unconscious motorist who has been arrested for drunk driving violates the Fourth Amendment in a state with an implied-consent statute. Petitioner Gerald Mitchell was arrested by Officer Jaeger for operating while intoxicated. On the way to the police station Mitchell became lethargic; in his holding cell, he appeared to pass out. Officer Jaeger concluded that he could not give Mitchell a breath test, and therefore drove him to a hospital for a blood test. On the drive to the hospital, Mitchell lost consciousness. During the drive, Officer Jaeger read Mitchell the statutorily mandated statement which conveyed (among other things) that if Mitchell refused a blood test his driving privileges would be revoked and the refusal could be used against him in court. Mitchell was unconscious, however, and did not answer. At the hotel, a phlebotomist drew his blood and found that his blood-alcohol concentration

was .222. The state charged Mitchell with driving under the influence and with a prohibited alcohol concentration. Mitchell moved to suppress the warrantless blood test, arguing that it violated the Fourth Amendment. The state responded that its implied-consent statute provides that a person is presumed to have given consent by driving on public roads, and is presumed to have not withdrawn consent when unconscious if police have probable cause to believe that the person was driving drunk. *See* Wis. Stat. §§343.305(2), (3)(b). The state trial court denied Mitchell's motion, and a jury convicted him of driving under the influence of alcohol. The Wisconsin Supreme Court affirmed by a 5-2 vote. 914 N.W.2d 151.

A three-Justice plurality concluded that Mitchell had "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." And "through drinking to the point of unconsciousness," Mitchell forfeited his opportunity under Wisconsin's implied-consent statute to withdraw his consent. The court relied on *South Dakota v. Neville*, 459 U.S. 553 (1983), which held that drivers do not have a "constitutional right to refuse to take a blood-alcohol test" in a state that imposes only civil penalties for such failure. And the court held that nothing in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (holding that states may not impose criminal penalties for driver's failure to consent to blood test), undercuts implied-consent laws that impose civil penalties. The plurality concluded that it is reasonable, and therefore constitutional, for a state to conclude that a person who drank to the point of unconsciousness did not withdraw his (implied) consent to a blood test. A two-Justice concurring opinion disagreed that the blood test was a consent search, but found the test reasonable under the circumstances and therefore valid under the Fourth Amendment. They found the blood test reasonable because Mitchell "had been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence."

Mitchell argues in his petition that, absent an exigency, the Fourth Amendment prohibits warrantless blood searches. See *Birchfield*; *Missouri v. McNeely*, 569 U.S. 141 (2013). He insists that state implied-consent statutes cannot circumvent that constitutional right. Although searches based on consent are an exception to the warrant requirement, implied-consent statutes have "nothing to do with the 'voluntary consent' that this Court has established as an exception to the warrant requirement." Consent under such a statute reflects "not a choice by the motorist: it is a choice by the legislature." Mitchell adds that *Birchfield* specifically addressed unconscious drivers, stating in a footnote that "we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be."

● *N.C. Dep't of Revenue v. Kimberly Rice Kaestner 1992 Family Trust*, 18-457. The Court will resolve whether the Due Process Clause permits states to tax trusts based on the trust beneficiaries' in-state residency. The respondent trust (the Trust) was created in New York; its trustee was a resident of Connecticut; and its beneficiaries were residents of North Carolina. When a trust earns income, North Carolina assesses taxes on the amount of taxable income that is for the benefit of residents of the state. N.C. Gen. Stat. §105-160.2. Accordingly, the North Carolina Department of Revenue assessed tax on undistributed income that accumulated in the Trust from 2005 to 2008. The Trust paid $1.28 million in taxes under protest, and then filed this lawsuit. The Trust argued that it

did not have constitutionally sufficient connections with North Carolina, and the state's taxation therefore violated the Due Process and dormant Commerce Clauses. The trial court held that the state's assessment of taxes violated the Due Process Clause; the North Carolina Court of Appeals affirmed; and the North Carolina Supreme Court (by a 6-1 vote) affirmed. 814 S.E.2d 43.

The North Carolina Supreme Court concluded that the Trust and its beneficiaries "have legally separate, taxable existences." That means the Trust's minimum contacts with North Carolina cannot be established by the beneficiaries' contacts with the state. Yet "it was [the Trust's] beneficiaries, not [the Trust], who reaped the benefits and protections of North Carolina's laws by residing here." The court concluded that "[w]hen, as here, the income of a foreign trust is subject to taxation solely based on its beneficiaries' availing themselves of the benefits of our economy and the protections afforded by our laws, [due process] guarantees are violated." The state contends in its petition that the North Carolina Supreme Court relied on an "arbitrary, formalistic," and outdated rationale—"the idea that trust beneficiaries' contacts with a taxing state are not contacts of the trust itself." To the contrary, argues the state, "a beneficiary is no stranger to a trust." According to the state, "[i]n the context of trust taxation, the required 'minimum connection' is the residency of the beneficiary in the taxing state. This residency creates a 'definite link' between the trust and the taxing state; indeed, if not for the in-state beneficiary who consumes the resources of the taxing state, the trust itself could not exist." The state also warns that the North Carolina Supreme Court's rule is a "judicially created tax shelter" under which beneficiaries are able to avoid paying taxes altogether.

● *Parker Drilling Mgmt. Services, Ltd. v. Newton,* 18-389. At issue is whether California state wage laws apply to workers on drilling platforms on the outer continental shelf under the Outer Continental Shelf Lands Act (OCSLA). OCSLA makes federal law applicable to the outer continental shelf, which consists of all submerged coastal lands within the United States' jurisdiction. But OCSLA also makes the law of the adjacent state applicable to the extent such law is not inconsistent with federal law. Specifically, it provides: "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . , the civil and criminal laws of each adjacent State, . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf." 43 U.S.C. §1333(a)(2)(A). The question here is "whether under OCSLA, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit has held."

Respondent Brian Newton worked on a drilling platform off of the California coast for petitioner Parker Drilling. He worked 14-day shifts, each day spending 12 hours on duty and 12 hours off duty while staying on the platform. In January 2015, the California Supreme Court held that California law entitles workers to compensation for on-call hours spent at their worksite. Newton filed a class action alleging that Parker Drilling was required to pay him for the 12 hours each day that he spent off duty on the platform. The district court held that he was not entitled to payment, ruling that federal law governs and state law applies only to the extent it is necessary to fill a significant void or gap in federal law. It found that the Fair Labor Standards Act is a comprehensive wage and hour law, so there is no gap to be occupied by California state law. The Ninth Circuit reversed, holding that state laws apply under OCSLA whenever they are applicable to the subject matter at hand and not inconsistent with federal law, regardless of whether there is a gap in federal law. 881 F.3d 1078.

Parker Drilling argues that OCSLA makes federal law the law of the continental shelf, and that §1333(a)(2)(A) makes state law applicable only if there is no federal law that would apply. It insists that the Court's precedents, such as *Rodrigue v. Aetna Cas. & Sur. Co*., 395 U.S. 352 (1969), expressly held that OCSLA allows state law only "to fill federal voids." Parker Drilling separately argues that California law should not control here because it is inconsistent with federal law. It says that "each of the state-law provisions that Newton invokes has an FLSA counterpart that regulates the same topic in a different way." Newton argues that OCSLA imports state laws to the continental shelf as a surrogate for federal law "[t]o the extent that [such state laws] are applicable and not inconsistent with [OCSLA]." California wage-and-hour laws are "applicable" to Newton; and those laws are not inconsistent with the FLSA because they provide greater protection than federal law. Employers can comply with both regulatory regimes.

● *McDonough v. Smith,* 18-485. The question presented is "[w]hether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor . . . or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use[.]" Petitioner Edward McDonough twice stood trial on dozens of criminal charges. He was ultimately acquitted. He later filed a §1983 lawsuit against respondent Youel Smith, the prosecutor in McDonough's case, alleging that Smith fabricated evidence, including forging witness affidavits in a pre-trial investigation and falsifying other evidence in grand jury proceedings and at trial. McDonough filed suit within three years of his acquittal, but more than three years from when he would have first found out that fabricated evidence was being used against him. The district court dismissed McDonough's §1983 claim as untimely. The Second Circuit affirmed, holding that the "injury for this constitutional violation occurs at the time the evidence is used against the defendant," and the statute of limitations therefore begins to run when the criminal defendant first "becomes aware of the [the] tainted evidence and its improper use." 898 F.3d 259.

McDonough argues that the Court should embrace the majority rule, adopted by five courts of appeals, that the statute of limitations for a §1983 claim based on fabricated evidence begins to run when the criminal proceedings terminate in the defendant's favor. Those courts, relying on *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Wallace v. Kato*, 549 U.S. 84 (2007), held that such claims are analogous to the common-law tort of malicious prosecution. McDonough maintains that a contrary ruling would require "defendants to file a civil complaint explaining why the evidence against them in an *ongoing criminal trial* is fabricated—potentially subjecting any criminal defendant" to cross-examination. Similarly, officers and prosecutors may be forced to produce documents and be deposed in a civil matter while a criminal matter remains pending. Respondent Smith argues that the Court should affirm the Second Circuit because under the "traditional federal rule of accrual, 'the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable.'"

● *Fort Bend County, TX v. Davis,* 18-525. At issue is whether Title VII's administrative exhaustion requirement—which requires plaintiffs to exhaust claims of employment discrimination with the Equal Employment Opportunity Commission (EEOC) before filing suit in federal court—is a jurisdictional prerequisite to suit or a waivable claim-processing rule. In 2007, Fort Bend County hired Lois Davis as an information technology supervisor. In 2011, Davis filed a charge of discrimination with the EEOC. Davis alleged that she had been the subject of sexual harassment and that after she complained her supervisor retaliated against her. She did not claim any discrimination based on religion. Her EEOC claim was denied, but the EEOC issued her a right-to-sue letter. In January 2012, Davis sued the county, alleging that it violated Title VII by retaliating against her for complaining about sexual harassment. For the first time, Davis asserted that the county also engaged in religious discrimination by requiring her to appear for work on Sunday. The district court granted the county's summary judgment motion. The Fifth Circuit reversed in part, finding there was a genuine issue of material fact as to whether the county had a sufficiently compelling reason for requiring Davis to work on Sunday. On remand, Davis amended her complaint, expanding her claim of religious discrimination. The county moved to dismiss, arguing that the district court lacked subject-matter jurisdiction to consider this claim because Davis did not raise it in her EEOC charge. The district court granted the county's motion. A divided panel of the Fifth Circuit reversed, holding that Title VII's administrative exhaustion requirement is not a jurisdictional bar to suit and that the county forfeited its opportunity to assert an exhaustion defense because it did not raise it until the case was remanded. 893 F.3d 300.

The county argues that the plain text of Title VII makes federal jurisdiction contingent on the existence of an EEOC charge. The relevant provision says that, once the EEOC and the Attorney General decline to act on a charge of discrimination, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." 42 U.S.C. §2000e-5(f)(1). According to the county, by limiting when an "action" may be "brought," the provision uses "jurisdictional language." It cites several Court decisions supposedly embracing that interpretation. Davis responds that the Fifth Circuit (along with eight other circuits) have correctly concluded that Title VII's mandate to exhaust administrative remedies is not a jurisdictional requirement. She first argues that two Court cases have already treated "the statute's mandate to exhaust administrative remedies" as a claim-processing rule: *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). She maintains that the plain language of Title VII does not clear the "high bar" for establishing a jurisdictional prerequisite, which requires Congress to "expressly label a provision 'jurisdictional' or otherwise make clear it affects the power of a court."

● *Rehaif v. United States,* 17-9560. Federal law prohibits "an alien . . . illegally or unlawfully in the United States" from possessing a firearm or ammunition that has traveled in interstate commerce. 18 U.S.C. §922(g)(5). Federal law further provides that "[w]hoever knowingly violates" §922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. §924(a)(2). The Court will resolve whether, "in a prosecution for possession of a firearm and ammunition by an alien who is unlawfully present in the United States, in violation of [§]922(g)(5), the government must prove that the person who knowingly possessed a firearm also knew that he was unlawfully in the United States." In other words, does "knowingly" in §924(a)(2) apply both to the possession of a firearm *and* the illegal-alien status?

Petitioner Hamid Rehaif is a citizen of the United Arab Emirates. He lived in Florida on a student visa, but was academically dismissed from the university he was attending, which terminated his immigration status. He later rented a firearm at a shooting range and possessed a box of ammunition. He was arrested and charged with possessing a firearm and ammunition as an illegal alien in violation of §922(g)(5). At trial, the jury was instructed that prosecutors were not required to prove that Rehaif knew he was in the country unlawfully; only that he was unlawfully in the United States and knowingly possessed a firearm or ammunition. He was convicted, and the Eleventh Circuit affirmed the conviction. 888 F.3d 1138.

The Eleventh Circuit reasoned that "[t]extual support, prior precedent, congressional acquiescence, and analogous common law" counseled against applying a *mens rea* requirement to the status element of §922(g)(5). The court added that courts have long read the statute that way, and Congress has never saw fit to amend the statute. Rehaif argues that the phrase "knowingly violates" in §924(a)(2) is not limited to knowledge of possession of the firearm or ammunition, and that it applies equally to the citizenship-status element. He relies on a dissent by then-Judge Gorsuch which noted that *mens rea* requirements generally attach to all elements of a crime, and there is nothing in the structure of §922(g) crimes that requires the opposite result.

● *Food Marketing Institute v. Argus Leader Media,* 18-481. The Court will resolve whether the Freedom of Information Act exception for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" includes confidential business information beyond what could cause competitive harm. 5 U.S.C. §552(b)(4) (Exemption 4). Respondent Argus Leader is a newspaper that submitted a FOIA request for information about federal funds disbursed through the Supplemental Nutrition Assistance Program (SNAP). It requested names and addresses of stores that received federal SNAP funds, as well as the total amount of federal funds each store received. The U.S. Department of Agriculture provided some of the requested information, but declined to provide the amounts of SNAP funds disbursed to particular stores. Argus Leader sued to obtain that information; the Department defended on multiple grounds. As relevant here, the Department relied on Exemption 4, presenting industry witnesses who testified that retailers don't let their competitors know the amount of SNAP redemptions at their individual stores. The district court held that the exemption did not apply because there was insufficient evidence regarding competitive harm that might stem from the disclosure of individual store data. After judgment, petitioner Food Marketing Institute intervened to pursue an appeal. The Eighth Circuit affirmed. 889 F.3d 914.

Relying on circuit precedent, the Eighth Circuit held that the Department had to show that disclosure of the information is likely to impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. It found no error in the district court's conclusion that neither showing was made here. Food Marketing Institute argues that the Eighth Circuit rule derives from *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), which gave Exemption 4 a non-textual reading. It says that "that D.C. Circuit decision came from a very different era of statutory construction. *National Parks* made no pretense of focusing on the statutory text." In its view, Exemption 4's plain language asks only whether the requested information is a "trade secret," or commercial or financial information," that is "confidential." And the ordinary meaning of "confidential" does not look to whether information would cause competitive harm.

● *Quarles v. United States,* 17-778. At issue is whether, under the Armed Career Criminal Act (ACCA), generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, or whether it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure. ACCA imposes a mandatory 15-year prison term upon any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony." "Violent felony" includes a burglary conviction that is publishable by imprisonment for more than one year. In *Taylor v. United States*, 495 U.S. 575 (1990), the Court held that ACCA uses the term "burglary" in its generic sense, to cover any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." This case concerns how the word "remaining in" operates in conjunction with the phrase "with intent to commit a crime."

Petitioner Jamar Quarles pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1). At sentencing, the government identified three prior convictions as crimes of violence, including Quarles' prior Michigan conviction for home invasion in the third degree. Quarles argued that his conviction for home invasion was not a "violent felony" because the conviction lacked the requisite *Taylor* elements. In particular, he argued, it did not require a proof of intent to commit a crime at the moment the defendant entered or first unlawfully remained inside the building. The district court disagreed and sentenced Quarles to 204 months' imprisonment. The Sixth Circuit affirmed. 850 F.3d 836. The Sixth Circuit reasoned that "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." Thus, the court held that "generic burglary . . . does not require intent at entry."

Quarles argues that to qualify as "burglary" under ACCA, a prior state conviction must have required proof of "contemporaneous intent"—*i.e.*, the intent to commit a crime must exist when the defendant entered the property or first unlawfully remained within it. He contends that "conclusion follows from this Court's precedent, ACCA's text and purpose, and better-reasoned circuit court decisions." That is, requiring contemporaneous intent is the best reading of *Taylor*'s definition of generic burglary, namely, the "unlawful or unprivileged entry into, or remaining in, a building or structure, *with intent* to commit a crime" (emphasis added). And that interpretation distinguishes robbery, subject to ACCA's severe sentencing enhancements, and mere trespass with a subsequent crime. In his view, "[t]here is a clear difference between breaking into a home with the intent to steal, or surreptitiously concealing oneself in a jewelry store until the close of business with the intent to take merchandise, on the one hand, and a hiker who enters an unoccupied cabin for protection from the cold and only later opportunistically decides to take food or supplies."

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