

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

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U.S. SUPREME COURT UPDATE: CASES OF INTEREST



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OCTOBER TERM 2021

By almost any measure, October Term 2021 was one of the most momentous in United States Supreme Court history. While this is largely due to a handful of high-profile cases implicating broader societal issues beyond this article's scope, the Supreme Court also decided a number of cases this past Term that are of particular interest to the civil litigators in ABTL. This article summarizes those noteworthy cases.



Darren Schweitzer

ARBITRATION

Federal courts cannot “look through” an arbitration agreement to the parties’ underlying substantive dispute to assert subject-matter jurisdiction over a petition to confirm or vacate an arbitration award under sections 9 and 10 of the Federal Arbitration Act.

Badgerow v. Walters, 142 S. Ct. 1310 (2022)

The Supreme Court decided a bonanza of arbitration cases this past Term. The first one, *Badgerow v. Walters*, addressed the method that federal courts must use to ascertain whether subject matter jurisdiction exists to adjudicate petitions to confirm or vacate arbitration awards under the Federal Arbitration Act (FAA).

Though the FAA permits a party to an arbitration agreement to seek various kinds of relief from a federal court, it does not create federal subject-matter jurisdiction— meaning the federal court must have an independent jurisdictional basis to adjudicate the matter. In *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009), the Supreme Court held that federal courts determine whether an independent jurisdictional basis exists over a petition to compel arbitration under FAA section 4 by “looking through” the petition to see whether the “underlying substantive controversy” falls within the court’s jurisdiction. *Badgerow* presented the question of whether this “look-through” approach applies to petitions to confirm or vacate arbitral awards under FAA sections 9 and 10.

After arbitrators dismissed plaintiff Denise Badgerow’s unlawful termination claims, she sued her employer’s principals in Louisiana state court to vacate the arbitration award. The principals removed the case to federal court, but plaintiff moved to remand the case back to state court, arguing that the federal court lacked jurisdiction to vacate or confirm the award under FAA sections 9 and 10. Acknowledging that *Vaden* involved different language in FAA section 4, the district court nevertheless applied *Vaden*’s look-through approach and determined that it had jurisdiction based on plaintiff’s underlying federal claims. The Fifth Circuit affirmed, emphasizing that a “principle of uniformity” dictated using the same approach for determining jurisdiction under each section of the FAA.

In an 8-1 opinion written by Justice Kagan, the Supreme Court reversed, holding that section 4’s look-through approach cannot be used to assess federal court jurisdiction over petitions to confirm or vacate arbitral awards under FAA sections 9 and 10. Unlike section 4, sections 9 and 10 lack the language directing district courts to determine whether they have jurisdiction over the “controversy between the parties” “save for [an arbitration] agreement.” In fact, sections 9 and 10 do not mention a court’s subject matter jurisdiction at all. Adhering to a strict textualist position, the Court rejected the policy arguments advocated both by the principals and by Justice Breyer in his dissent, regarding

the “administrative simplicity” an FAA-wide look-through rule would bring.

The upshot of this decision is that, moving forward, petitions to confirm or vacate arbitration awards will primarily be adjudicated by state courts. Federal courts will have jurisdiction to decide such petitions pursuant to FAA sections 9 and 10 *only* where diversity jurisdiction exists, which is based on the happenstance of the parties’ citizenship and the amount in controversy (i.e., the size of the arbitral award). Federal question jurisdiction cannot be a gateway to get such petitions into federal court because the federal claims pled in the underlying controversy that were the subject of the arbitration are now irrelevant after *Badgerow*’s repudiation of the look-through approach in confirmation and vacatur proceedings.

A plaintiff claiming the defendant waived its right to compel arbitration need not show she was prejudiced by the defendant’s delay.

Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022)

The Court also tackled the contours of the arbitration waiver doctrine last Term. It clarified that, notwithstanding the FAA’s “policy favoring arbitration,” the FAA bars courts from treating arbitration agreements any *more* favorably than other contracts, just as it bars courts from treating arbitration agreements any *less* favorably.

Plaintiff Robyn Morgan was a Taco Bell employee who filed a nationwide collective action against her employer, asserting violations of federal wage-and-hour laws. The employer litigated the case for eight months in court before shifting course and moving to compel arbitration under the FAA based on an arbitration agreement in Morgan’s initial job application. Morgan opposed, arguing that the employer had waived its right to arbitrate by litigating the case for so long. The lower courts eventually sent the case to arbitration, applying an Eighth Circuit test for arbitration waiver that required Morgan to show that she was prejudiced by the employer’s delay.

In a short unanimous opinion by Justice Kagan, the Court rejected the Eighth Circuit’s arbitration-specific waiver rule requiring a showing of prejudice. Recognizing that the FAA embodies a “policy favoring arbitration” that is meant to place the enforcement of arbitration agreements on an equal footing with other contracts, the Court reasoned that this principle did not permit courts to create their own arbitration-specific variants of federal procedural rules like this one. Since the usual rules governing waiver of contractual rights did not include a prejudice requirement, Morgan was not required to make such a showing.

The significance of this case may lie in its rare holding: This is one of the few cases in recent years in which the Court has ruled against a defendant seeking to compel arbitration under the FAA. Whether this and the next case (summarized below) indicate an emerging trend of skepticism towards FAA preemption arguments remains to be seen.

Airline cargo workers who load and unload goods from vehicles that travel in interstate commerce qualify as interstate “transportation workers” exempt from the Federal Arbitration Act.

Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022)

In another arbitration case on its docket this past Term, the Supreme Court addressed the so-called transportation worker exemption to the FAA. Section 1 of the FAA exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from the Act. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001), the Supreme Court held that section 1’s exemption applies only to “transportation workers” but failed to further define the term aside from stating that such workers must at least play a direct and “necessary role in the free flow of goods” across borders.

In this case, Latrice Saxon was an airline cargo loading supervisor who sued her employer, Southwest Airlines, for federal wage-and-hour violations. Southwest invoked the FAA to compel arbitration, and Saxon maintained that she was exempt as a “transportation worker” under the Act because she worked for a transportation company and handled goods moving in interstate commerce. The district court sided with Southwest and compelled arbitration, but the Seventh Circuit reversed.

Justice Thomas penned a unanimous decision for the Court affirming the Seventh Circuit and ruling that section 1 exempts airline cargo loaders from the FAA’s coverage as a “class of workers engaged in foreign or interstate commerce.” The Court rejected the industrywide approach that the employee proffered to define workers exempted under the Act. It reasoned that words like “workers” and “engaged” in section 1 directed attention to the actual work that class members typically perform. But Saxon belonged to “a class of workers who physically load and unload cargo on and off airplanes on a frequent basis.” Airplane cargo loaders qualified as “engaged in foreign or interstate commerce” because they played a direct and necessary role in the free flow of goods across borders under the *Circuit City* standard, and because section 1 of the FAA contained references suggesting that cargo loading was a matter of foreign commerce.

The FAA's transportation worker exemption is an increasingly significant source of wage-and-hour class-action litigation against gig economy companies like Uber, Lyft, and Doordash. While the Court in *Saxon* did not weigh in on whether or how section 1's exemption may apply in those cases, that issue is percolating in the lower appellate courts, and *Saxon* may be most significant for clues it seems to provide as to how the Court may rule if and when it revisits the transportation worker exemption in that context.

The Federal Arbitration Act preempts California's rule against arbitration agreements that waive private attorneys general actions insofar as the rule precludes division of such actions into individual and nonindividual claims.

Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022)

Viking River Cruises was likely the most watched arbitration case on the Court's docket this past Term, as it involved the latest iteration of the ongoing back-and-forth between the U.S. Supreme Court and California courts about the FAA's scope and preemptive force in California wage-and-hour litigation.

The justices were tasked with disentangling a conflict between the FAA and California's Private Attorneys General Act (PAGA), Cal. Lab. Code §§ 2698–2699.8. PAGA permits any California employee who has suffered a violation of California's Labor Code to represent the state labor law enforcement agency in bringing claims against her employer on behalf of all of the business's employees who also suffered Labor Code violations. If the employee succeeds, 75 percent of the award goes to the state, and the remainder goes to the employees. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 382–84 (2014), the California Supreme Court held that any arbitration agreement waiving an employee's right to bring a PAGA representative action in any forum violated public policy.

Angie Moriana was a Viking River Cruises employee who had agreed to submit any employment disputes to binding arbitration and waived any right to bring a PAGA representative action against Viking. Moriana nevertheless sued Viking under PAGA, alleging various violations of California's Labor Code. Viking moved to compel arbitration, arguing that the FAA preempted the *Iskanian* rule. The trial court disagreed and denied the motion. The California Court of Appeal affirmed, emphasizing among other things that Moriana's claim could not be treated as an "individual PAGA claim" subject to arbitration because all PAGA claims were representative actions brought on behalf of the state, which had not agreed to arbitration.

Justice Alito wrote a somewhat fractured 8-1 opinion for the Court, holding that the FAA preempts *Iskanian*'s rule only

insofar as the rule precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. While conceding that nothing in the FAA mandated enforcing waivers of standing to assert claims on behalf of absent principals (such as the state in a PAGA case), the Court stated that PAGA's built-in claim joinder mechanism conflicted with the FAA by nullifying the consent plaintiff-employees provide when they agree to arbitrate. Indeed, state law could not make an arbitration agreement's enforceability contingent on whether a PAGA action was available or not, since PAGA permitted plaintiffs to introduce claims that the parties had not jointly agreed to arbitrate. Thus, while the FAA did not totally preempt *Iskanian*'s prohibition on PAGA representative action waivers in arbitration clauses, *Iskanian*'s rule could not go so far as to prevent such waivers from dividing PAGA actions into individual and non-individual claims. For this reason, Viking was entitled to compel arbitration of Moriana's individual PAGA claim.

The most interesting part of the case provides lessons for the future: After holding that the FAA required arbitration of Moriana's individual PAGA claim, the Court held that PAGA itself contained no mechanism for the non-individual portion of the PAGA claim to proceed in court while the individual claim was being arbitrated, and that the non-individual PAGA claim thus had to be dismissed. In a separate concurrence, Justice Sotomayor emphasized that the majority was interpreting California law in arriving at this holding, such that the California courts or legislature were free to accord Moriana statutory standing to pursue such non-individual PAGA claims, notwithstanding that the individual PAGA claim had been compelled to arbitration. The California Supreme Court has already granted review in a follow-up case, *Adolph v. Uber Technologies, Inc.*, G059860, 2022 WL 1073583 (Cal. Ct. App. Apr. 11, 2022) (unpublished), *review granted*, S274671 (Cal. July 20, 2022), to decide this very issue. So this saga likely will continue.

Only parties to proceedings in foreign governmental or intergovernmental adjudicative bodies—not private international arbitrations— may invoke the authority of U.S. federal courts to conduct discovery under 28 U.S.C. § 1782.

ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078 (2022)

These consolidated cases addressed an issue with significant implications for international commercial disputes. Section 1782 of Title 28 of the U.S. Code permits a U.S. district court to order a person within its jurisdiction to provide document

discovery or to sit for a deposition “for use in a proceeding in a foreign or international tribunal.” In both cases, respondents commenced foreign arbitration proceedings against petitioners and sought discovery orders in U.S. district court pursuant to section 1782. In one case, the district court issued the order, relying on Sixth Circuit precedent construing “tribunal” in section 1782 to include private arbitration panels. In the other, the Second Circuit held that private commercial arbitrations are outside the scope of section 1782, but nevertheless upheld the district court’s discovery order, reasoning that the arbitration proceeding met the definition of “tribunal” because it was conducted pursuant to a bilateral investment treaty (a so-called investor-state arbitration). The Supreme Court granted review to resolve whether one or both arbitration panels fit the definition of “foreign or international tribunal” under section 1782.

In the Supreme Court, petitioners argued that “foreign or international tribunal” in section 1782 specifically meant a foreign government tribunal or a tribunal established by an international agreement between sovereigns. They also relied on section 1782’s legislative history, which they argued strongly indicated that Congress did not contemplate arbitration proceedings within the definition of “tribunal” when enacting section 1782. Respondents countered that the phrase didn’t necessarily connote government affiliation. The parties also disputed whether the provision excluded arbitration panels in stating that foreign tribunals may apply the “practice and procedure of [a] foreign country,” since international commercial arbitration panels are not bound by the practice or procedure of any particular country.

Justice Barrett wrote the opinion for a unanimous Court, holding that only governmental or intergovernmental adjudicative bodies constitute “foreign or international tribunals” under section 1782 and that private international arbitration panels do not fall within that definition. The Court focused on the natural meaning of “foreign tribunal” as a tribunal belonging to a foreign nation—a meaning that required the tribunal to possess sovereign authority. The Court found support for this meaning in section 1782’s language presuming that foreign tribunals “follow[ed] ‘the practice and procedure of a foreign country.’” Similarly, “international tribunal” was best understood as a tribunal imbued by two or more nations with their official sovereign power to adjudicate disputes. Any reading to the contrary would undermine the Federal Arbitration Act’s narrower scope of discovery and conflict with the historical practice of using section 1782 only to assist foreign courts.

This case resolved a persistent question involving an entrenched circuit split that had vexed international arbitration practitioners in recent years. The Court’s opinion provides needed clarity to counsel handling international commercial

arbitrations as to the scope of their rights to conduct discovery, which should help them shape their strategies in such matters with more precision.

CHOICE OF LAW

Cases under the Foreign Sovereign Immunities Act asserting non-federal claims against a foreign state or instrumentality are subject to the same choice-of-law rules as similar suits against private parties.

Cassirer v. Thyssen-Bornemisza Collection Foundation, 142 S. Ct. 1502 (2022)

This case, arising from the intriguing history of Impressionist Camille Pissarro’s painting *Rue Saint-Honoré in the Afternoon, Effect of Rain*, addressed which choice-of-law rule governs in a suit raising non-federal claims under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602–1611. The FSIA establishes a default rule of immunity in federal and state court for foreign states and their instrumentalities, but it includes a number of exceptions allowing suit.

The Cassirer family owned and possessed the Pissarro painting until World War II, when a family member surrendered the painting to the Nazis to secure an exit visa. About 60 years later, a Cassirer descendent learned that the Thyssen-Bornemisza Collection Foundation, an entity controlled by Spain, possessed the painting. He sued the foundation in California federal court asserting various property law claims and invoking an FSIA exception for expropriated property to establish the court’s jurisdiction. *See* 28 U.S.C. §§ 1603(b), 1605(a)(3). Both lower courts opted for a choice-of-law rule based in federal common law, which led them to apply Spanish property law instead of California property law.

In an opinion by Justice Kagan, the Supreme Court unanimously vacated and remanded, holding that non-federal FSIA claims against a foreign state or instrumentality are subject to the same choice-of-law rule as similar suits against private parties. The Court explained that section 1606 of the FSIA specifically requires foreign states to be subject to the same rules of liability as private parties when they are not entitled to immunity under the Act, and only use of the same choice-of-law rule could guarantee the same liability. This meant that California’s choice-of-law rule applied in this case, since federal courts sitting in diversity borrow the forum state’s choice-of-law rule. The Court further noted that the federal government disclaimed any unique federal interests to justify the federal common lawmaking that would support using a competing choice-of-law rule based in federal common law.

While the legal issue decided in this case is somewhat arcane, the practical impact of the Court’s decision may be significant. California has been a hotbed of Holocaust-era art restitution litigation, and California law has been solicitous toward heirs of Holocaust victims bringing such claims. The holding in this case may encourage the filing of more such claims since plaintiffs will now be secure in the knowledge that they can invoke favorable California law.

CIVIL PROCEDURE

Federal Rule of Civil Procedure 60(b)(1) applies to judicial mistakes of law, not just party mistakes.

Kemp v. United States, 142 S. Ct. 1856 (2022)

Federal Rule of Civil Procedure 60(b) allows a court to “relieve a party . . . from a final judgment” under various circumstances, imposing different deadlines for parties to submit their motions for relief depending on the context. Rule 60(b)(1), for example, allows a party to seek postjudgment relief for “mistake, inadvertence, surprise, or excusable neglect” within a year of the judgment. *See* Fed. R. Civ. P. 60(c)(1). Similarly, Rule 60(b)(6) provides a catch-all provision permitting parties to seek relief from a judgment for “any other reason that justifies relief,” and only requires parties to file their motion “within a reasonable time,” Fed. R. Civ. P. 60(c)(1). The question in this case was whether habeas petitioner Dexter Kemp was subject to a one-year filing deadline by seeking relief from an error that qualified as a “mistake” under Rule 60(b)(1)’s deadline, or whether the error only fit Rule 60(b)(6), allowing Kemp more time to file.

Kemp was convicted of various drug and gun crimes. After losing on appeal, he moved the district court to vacate his sentence under 28 U.S.C. § 2255, but the district court determined that his motion to vacate was untimely. Almost two years later, Kemp moved under Rule 60(b)(6) to have the district court reopen the judgment. Both the district court and the Eleventh Circuit held that Kemp’s motion actually alleged a “mistake” under Rule 60(b)(1) and was therefore untimely under that provision’s one-year limitations period.

In the Supreme Court, Kemp argued that the judicial error he alleged was not a Rule 60(b)(1) “mistake.” Instead, the text and structure of Rule 60 demonstrated that use of “mistake” in Rule 60(b)(1) was a legal term of art that did not extend to a court’s errors of law. The Government countered that the plain meaning of “mistake” included “misconception[s],” “misunderstanding[s],” and “misjudgment[s]” and that

surrounding provisions supported interpreting “mistake” as including at least obvious judicial errors.

Justice Thomas wrote an 8-1 opinion for the Court affirming that Kemp’s motion to reopen was untimely because Rule 60(b)(1)’s use of “mistake” included all judicial errors of law. Relying on dictionary definitions, the Court stated that the word “mistake” applied to “‘fault[s] in opinion or judgment’” and “errors ‘of law’” when the rule was revised in 1946 to capture more than just litigant errors.

Although this case was decided in the criminal and habeas contexts, it is also a significant decision for civil litigants in federal court. It clarified that a party may seek relief from a final judgment under Rule 60(b)(1) based on a judge’s (not just a party’s or lawyer’s) mistake of law.

DAMAGES

Emotional distress damages are unavailable in private enforcement actions under the Rehabilitation Act and the Affordable Care Act.

Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022)

This case addressed whether emotional distress damages may be recovered in private actions to enforce either the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), or the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116. In *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979), the Supreme Court held that an implied private right of action exists for victims of discrimination to sue entities receiving federal funds under the similarly-worded Title VI and Title IX of the Civil Rights Act of 1964 (whose remedies are expressly incorporated into the Rehabilitation Act and the Affordable Care Act). Since Congress enacted these statutes under its power granted in the Constitution’s Spending Clause—and these statutes accordingly bind private entities only based on their consent to receive federal funding—the Supreme Court has generally relied on contract law principles to determine whether particular remedies are available in private actions under the statutes. It has allowed remedies only where the funding recipient would have had notice at the time it accepted federal funding.

In *Cummings*, defendant Premier Rehab Keller denied plaintiff Jane Cummings’s request that it provide an American Sign Language interpreter for her physical therapy appointments. Cummings then sued Premier Rehab for disability discrimination under the Rehabilitation Act and the Affordable Care Act, which applied to Premier Rehab because it had received Medicare

and Medicaid reimbursements. The district court dismissed Cummings's complaint, observing that Cummings sought only damages for emotional harm, which were not recoverable under either statute. The Fifth Circuit affirmed.

In a 6-3 opinion by Chief Justice Roberts, the Court affirmed that emotional distress damages are unavailable under either statute. Relying on *Barnes v. Gorman*, 536 U.S. 181 (2002), the Court reasoned that funding recipients have notice of remedies that are either explicitly provided in the relevant statute or "traditionally available in suits for breach of contract." Both the Rehabilitation Act and the Affordable Care Act were silent as to available remedies, and emotional distress damages were otherwise not *generally* available in breach of contract actions despite their availability in certain circumstances where breach was likely to result in serious emotional disturbance. Requiring entities to know more than the basic principles of contract law in deciding to accept federal funds further "risk[ed] arrogating legislative power" by permitting courts to freely create remedies based on silent statutory language.

Justice Kavanaugh, joined by Justice Gorsuch, concurred in an opinion emphasizing that Congress has the sole power to establish and expand remedies for private causes of action, while courts lack this power. He would have reached the same result based on this separation of powers rationale.

This opinion is the latest example of the Court's hostility toward implied private rights of action and implied remedies, which can be expected to continue for the foreseeable future.

LABOR AND EMPLOYMENT

ERISA's duty of prudence requires plan fiduciaries to regularly monitor investments included in defined contribution retirement plans.

Hughes v. Northwestern University, 142 S. Ct. 737 (2022)

This case clarifies the duties retirement plan fiduciaries owe to plan participants in defined contribution plans under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*

Northwestern University offered its employees two ERISA-regulated defined contribution retirement plans (plans wherein participants choose their investments from a menu of options selected by plan administrators). Plaintiffs, a group of current and former Northwestern employees, sued the university and its plan administrators alleging that they violated their duty of prudence under ERISA by, among other things, offering needlessly expensive investment options and incurring excessive

recordkeeping fees. The district court granted defendants' motion to dismiss, and the Seventh Circuit affirmed.

In a short opinion by Justice Sotomayor, the Court unanimously vacated the judgment. The Court relied on *Tibble v. Edison International*, 575 U.S. 523, 529 (2015), which interpreted ERISA's duty of prudence to include a duty to regularly monitor investments and remove imprudent ones. Plaintiffs' allegations that defendants had offered needlessly expensive investment options and excessive recordkeeping fees plainly invoked this rationale. Contrary to the Seventh Circuit's reasoning and defendants' argument, plan administrators could not be excused from their duty to monitor by fulfilling their distinct obligation of assembling a diverse menu of investment options.

ERISA duty-of-prudence litigation against plan administrators raising these types of claims is a growth industry at the moment. The Court's opinion does nothing to put the brakes on this trend.

FIRST AMENDMENT FREE SPEECH

A city ordinance restricting the digitization of "off-premises" signs is content neutral for purposes of First Amendment Free Speech Clause analysis.

City of Austin v. Reagan National Advertising of Austin, LLC, 142 S. Ct. 1464 (2022)

City of Austin addresses an important and recurring First Amendment issue in the context of billboard advertising.

The City of Austin's sign ordinance permitted new construction of "on-premises signs," i.e., signs that advertised goods or services located on the site where the sign is installed, but not construction of new "off-premises" signs—those that advertised goods and services located elsewhere. Owners could maintain preexisting off-premises signs as "non-conforming signs" under the ordinance but could not increase their degree of nonconformity by, for instance, digitizing those signs.

Plaintiff Reagan National Advertising of Austin, LLC sought city permits to digitize some of its off-premises billboards, and the City denied its applications. Reagan National then sued the City alleging that the ordinance violated the First Amendment's Free Speech Clause. The district court ruled the ordinance's regulation of off-premises signs was content neutral under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), making it subject to intermediate scrutiny, and it upheld the City's ordinance under this standard.

The Fifth Circuit disagreed, holding the ordinance unconstitutional. Broadly interpreting *Reed*, the court reasoned that the ordinance's on-/off-premises distinction required officials to read a sign's message and investigate the speaker's identity, making it a content-based restriction subject to strict scrutiny. Under this heightened standard, the law violated the First Amendment.

The Supreme Court reversed the Fifth Circuit in a 6-3 opinion written by Justice Sotomayor. It held that the City ordinance was content neutral. Calling the Fifth Circuit's interpretation of *Reed* "too extreme," the Court emphasized that—unlike the regulations in *Reed* that gave favorable treatment to ideological and political subject matter—the City's ordinance drew only a content-neutral, location-based distinction. Moreover, the Court's First Amendment jurisprudence upholding solicitation and off-premises billboard regulations recognized that content-neutral speech restrictions may require evaluating the speech's content to some extent. *Reed* could not be read to suggest that any regulation considering speech's function or purpose must be treated as content-based.

The opinion in *Reed* was broadly written and threatened widespread invalidation of off-premises sign ordinances if consistently applied. Justice Thomas's dissent in *City of Austin* (joined by Justices Gorsuch and Barrett) leaves little doubt that the majority has receded from the categorical position staked out in *Reed*. First Amendment litigation over off-premises sign ordinances has been growing in recent years. This case may indicate that the Court's interest in these types of claims is waning.

MEDICAL EXPENSES/TORT SETTLEMENTS

State Medicaid programs can seek reimbursement for expenses paid to their beneficiaries from the portion of settlement funds with third-party tortfeasors designated for future medical expenses.

Gallardo v. Marstiller, 142 S. Ct. 1751 (2022)

When Medicaid beneficiaries receive a personal injury settlement compensating them for medical expenses, federal law requires that the settlement funds be used to reimburse Medicaid. *See* 42 U.S.C. §§ 1396a(a)(25)(H), 1396k. Florida law acknowledges this requirement and permits the Florida Agency for Healthcare Administration (FAHCA) to seek reimbursement as long as it is not "in excess of the amount of medical assistance paid by Medicaid," regardless of whether such settlement funds were meant to compensate the beneficiary for past or future medical expenses. Fla. Stat. § 409.910 (2022).

Florida law also allows beneficiaries to challenge the amount that the state claims for reimbursement.

Plaintiff Gianinna Gallardo was injured when a pickup truck hit her as she was exiting a school bus. FAHCA paid Gallardo \$862,688.77 for her medical care. Gallardo separately secured an \$800,000 settlement from the tortfeasors via a state court action, and the settlement explicitly allocated \$35,367.52 for past medical expenses. FAHCA sought to recover more than the \$35,367.52 allocation, and Gallardo brought a section 1983 action against FAHCA seeking a declaration that Florida was not entitled to more than what the settlement allocated for past medical expenses.

The district court granted summary judgment for Gallardo, concluding that federal Medicaid law preempts Florida's statutory scheme. It enjoined the state from seeking reimbursement from portions of Gallardo's recovery meant to cover future medical expenses. The Eleventh Circuit disagreed, holding that FAHCA *could* seek reimbursement from funds for future medical expenses consistent with federal law.

In a 7-2 opinion by Justice Thomas, the Supreme Court sided with FAHCA, holding that state Medicaid programs can seek reimbursement from third-party settlement funds allocated for future medical expenses. The Court largely relied on 42 U.S.C. § 1396k(a)(1)(A)'s plain language, which grants states "any rights . . . to payment for medical care." It reasoned that the provision's most natural reading covered payments for both past and future medical expenses. The statutory context of the Medicaid Act reinforced this conclusion because other relevant provisions, like section 1396a(a)(45), only distinguished between medical and nonmedical care, not past and future care. Congress had also demonstrated its ability to draw a more refined past/future distinction elsewhere in the Act, suggesting that it affirmatively chose not to do so in this third-party settlement context. *See* 42 U.S.C. § 1396a(a)(25)(H).

Medicaid and Medicare have in recent years become more aggressive about seeking reimbursement for medical expenses paid to their beneficiaries from settlements with third-party tortfeasors. This decision expands the scope of those programs' ability to do so. Trial lawyers representing both plaintiffs and defendants should be cognizant of the requirements for informing and compensating Medicaid and Medicare when negotiating and finalizing settlements in tort cases.

OCTOBER TERM 2022

The Court has also granted certiorari in a number of civil cases raising issues of interest to business litigators. Those cases, which are summarized in the next section, will be argued next Term.

CIVIL PROCEDURE/JURISDICTION**Do federal district courts have subject matter jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence?**

Axon Enterprise, Inc. v. Federal Trade Commission, No. 21-86 (cert. granted Jan. 24, 2022)

Over the past century, Congress has created various quasi-independent agencies like the Federal Trade Commission (FTC) with the power to commence administrative enforcement proceedings, in lieu of filing lawsuits in federal court. In these proceedings, the agencies make their case before in-house administrative law judges, who frequently rule for the agencies.

This issue recently came to the fore when Axon Enterprise, Inc., a law enforcement body camera manufacturer, attempted to acquire a competitor. The FTC quickly raised antitrust concerns with Axon and instituted an investigation, resulting in the FTC imposing settlement demands on Axon and threatening to initiate an administrative proceeding if Axon failed to comply. Axon filed an action in district court asserting, among other things, that the FTC's administrative proceeding violated Axon's Fifth Amendment due process rights in permitting the agency to serve as prosecutor, judge, and jury in its own enforcement process. The district court dismissed Axon's complaint for lack of subject matter jurisdiction, finding that Congress had impliedly precluded the court's jurisdiction over the claims in enacting the FTC's administrative review scheme via the Federal Trade Commission Act, 15 U.S.C. § 41. The Ninth Circuit agreed, noting that every other circuit to have addressed the issue is in accord. The Supreme Court granted certiorari to decide whether federal district courts have power to review constitutional challenges to the FTC's structure.

Constitutional challenges to the structure of administrative agencies based on separation of powers arguments are on the rise, and a majority of the Court appears sympathetic to such challenges on the merits. This case raises a gateway jurisdictional issue, but if the Court rules for Axon, it could open the gates even further to such challenges.

Do federal district courts have subject matter jurisdiction over constitutional challenges to the Securities and Exchange Commission's structure?

Securities & Exchange Commission v. Cochran, No. 21-1239 (cert. granted May 16, 2022)

In a case presenting issues similar to those in *Axon Enterprise* in a similar posture, the Court will take up an accountant's constitutional challenge to the Securities and Exchange Commission's (SEC's) structure in the coming Term.

In April 2016, the SEC brought an enforcement action against certified public accountant Michelle Cochran. It alleged that she violated the Securities Exchange Act's auditing standards. See 15 U.S.C. § 78y. An SEC administrative law judge (ALJ) subsequently imposed a \$22,500 penalty on Cochran and banned her from practicing before the SEC for five years. After the Supreme Court decided *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and remanded Cochran's proceeding for hearing before a constitutionally appointed ALJ, Cochran filed suit in federal district court to enjoin the enforcement proceeding against her, arguing that the "for-cause" removal protection that SEC ALJs enjoy violated the President's removal power under Article II of the Constitution.

The district court dismissed Cochran's case for lack of subject matter jurisdiction. It reasoned that because section 78y of the Exchange Act permitted judicial review of final SEC orders in the courts of appeals, the Act implicitly stripped district courts of jurisdiction to hear challenges regarding SEC enforcement proceedings.

The en banc Fifth Circuit reversed. It noted that section 78y did not explicitly preclude district court jurisdiction over Cochran's constitutional claims. The circuit court also pointed to the Supreme Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 491 (2010), which had specifically rejected the argument that section 78y divested district courts of jurisdiction over removal power challenges. And even assuming that *Free Enterprise* did not apply, the Fifth Circuit applied the multifactor test articulated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994), to conclude that Congress had not implicitly precluded district court jurisdiction via the Exchange Act.

In seeking certiorari, the SEC emphasized that the Fifth Circuit is out of step with every other court of appeals to consider this issue. Due to overlapping issues in the cases, the Court has permitted the Solicitor General to file a consolidated response brief on behalf of both the FTC in *Axon Enterprise* and the SEC in *Cochran*, but the cases are scheduled for separate arguments on the same day next Term.

Like *Axon Enterprise*, this case indirectly implicates separation of powers arguments near and dear to the hearts of the Court's conservative justices. In particular, Chief Justice Roberts has spent his entire tenure on the Court seeking to expand the President's Article II powers to appoint and remove executive branch officials (including independent administrative agency officials) at will. *Axon Enterprise* and *Cochran* thus present the Chief Justice and his colleagues with another opportunity to move the ball on this project, albeit in a preliminary jurisdictional posture. If Axon and Cochran win these cases, don't be surprised to see the Court take up their merits arguments a Term or two down the road.

Do state consent-by-registration statutes fall afoul of Fourteenth Amendment Due Process Clause limits on state courts' general personal jurisdiction?

Mallory v. Norfolk Southern Railway Co., No. 21-1168 (cert. granted Apr. 25, 2022)

Under the Due Process Clause of the Fourteenth Amendment, state courts can exercise personal jurisdiction only over defendants who have sufficient minimum contacts with the forum state such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Two categories of personal jurisdiction exist within this framework: specific personal jurisdiction and general personal jurisdiction. While specific jurisdiction requires a connection among the forum state, the defendant's in-state actions, and the plaintiff's claims, general jurisdiction requires that a corporate defendant have contacts with the forum state so "continuous and systematic" as to render it essentially "at home" in the state.

This case raises the issue of whether a state's consent-by-registration statute—wherein a state requires out-of-state corporations to register with the state to conduct business there and then permits state courts to assert general personal jurisdiction over those corporations based on this registration—violates the Due Process Clause's general jurisdiction principles.

Plaintiff Robert Mallory sued Norfolk Southern Railway Company under the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51–60, for exposing him to harmful carcinogens during his employment with the company, eventually causing him to develop colon cancer. Although Norfolk Southern was a Virginia corporation with its principal place of business in that state, Mallory filed his action in Pennsylvania state court, arguing that the railway consented to personal jurisdiction in Pennsylvania by registering to do business there under the state's consent-by-registration statute, 42 Pa. Cons. Stat. § 5301(a)(2). The state trial court held that it lacked personal jurisdiction

over Norfolk Southern, finding that the corporation's purported consent to jurisdiction under the state's statute was involuntary and, thus, invalid.

The Pennsylvania Supreme Court agreed that the state's statutory scheme created an involuntary and unconstitutional framework. The court reasoned that invoking general jurisdiction based on a corporation's state registration failed to comport with *International Shoe's* "'traditional conception of fair play and substantial justice,'" and conflicted with the U.S. Supreme Court's directive in *Daimler AG v. Bauman*, 571 U.S. 117, 136 (2014) that foreign corporations are subject to general personal jurisdiction only in a state where they are at home based on their incorporation and principal place of business. The court further held that any notice Pennsylvania's statute provided to foreign corporations regarding personal jurisdiction was insufficient to render the state's consent to jurisdiction voluntary. In their Supreme Court briefing, Mallory and Norfolk Southern further developed these arguments about unconstitutional conditions and coerced consent, as well as the original public meaning of the Due Process Clause as it pertains to personal jurisdiction of state courts.

Notably, the Court granted the plaintiff's petition for certiorari in this case seeking review of a state high court ruling in the defendant's favor—a rarity for the Roberts Court in civil cases. There are also other hints that Mallory may face a receptive audience. In the most recent personal jurisdiction case decided by the Court, *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1032–39 (2021), Justice Gorsuch (joined by Justice Thomas) and Justice Alito in separate concurring opinions expressed doubt about the continued viability of *International Shoe's* general-vs.-specific personal jurisdiction dichotomy for out-of-state corporate defendants. Justice Gorsuch in particular sounded strong notes of sympathy for the plaintiffs' argument that multinational corporations should be considered "at home" and thus subject to general personal jurisdiction in any state where they do a sufficient amount of business. If Justice Gorsuch and Justice Thomas join with the Court's three liberal justices to rule for Mallory, it will mark a significant departure from the Court's previous personal jurisdiction precedents.

Pennsylvania is one of the few states that asserts general personal jurisdiction based on out-of-state corporate registration with the state. If the Court gives the green light to asserting general personal jurisdiction via this practice, expect to see more states adopt consent-by-registration statutes. Indeed, such a result would likely spell the effective end of personal jurisdiction as a geographic limit on state courts' power over out-of-state corporate defendants and initiate a revolution in personal jurisdiction doctrine.

DORMANT COMMERCE CLAUSE

Do allegations of a state law’s “dramatic” and “pervasive” practical effects on a nationwide industry (1) state a dormant Commerce Clause violation under the clause’s extraterritoriality principle, or (2) constitute an excessive burden on interstate commerce under the dormant Commerce Clause?

National Pork Producers Council v. Ross, No. 21-468 (cert. granted Mar. 28, 2022)

In recent years, the California legislature has enacted a number of laws regulating product standards, such as the treatment of animals whose meat is shipped from other states to California for sale to its consumers. The purpose and effect of these laws is to regulate the animal husbandry practices of farmers and slaughterhouses in other states. Many of these laws have been challenged under the dormant Commerce Clause for impermissible extraterritoriality and burdens on interstate commerce.

In 2018, California voters passed Proposition 12, amending sections 25990 to 25993 of the state’s Health and Safety Code. The law banned the sale of whole pork meat in California if it was sourced from pigs raised inconsistently with California standards, regardless of whether the producers were out of state or not. The National Pork Producers Council and the American Farm Bureau Federation sued California officials arguing that the law violated the dormant Commerce Clause under two theories: (1) the law impermissibly regulated conduct outside of California by requiring out-of-state producers to change their operations, and (2) the law imposed an excessive burden of increased operational costs on interstate commerce without advancing any legitimate local interest regarding animal welfare or human health.

The district court dismissed the trade associations’ complaint for failure to state a claim, and the Ninth Circuit affirmed. Addressing the associations’ extraterritoriality theory, the Ninth Circuit relied on a narrow interpretation of relevant Supreme Court precedent to conclude that the dormant Commerce Clause’s extraterritoriality principle bars only “price control or price affirm[ing]” state laws—categories that clearly did not encompass Proposition 12. On the excessive burden theory, the circuit court found that the associations’ claims of mere increased costs, without more, could not constitute a significant burden on interstate commerce despite the potential nationwide impact at play.

In their merits briefing, the trade associations claim that Proposition 12 causes “dramatic” and “pervasive” practical effects on the nationwide pork industry and that such effects constitute indirect regulation of out-of-state conduct sufficient for the dormant Commerce Clause’s extraterritoriality principle to apply. They further contend the Ninth Circuit improperly narrowed the scope of the excessive burden test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) by presuming that allegations of increased operational costs would not trigger the test’s burden/benefit inquiry under the dormant Commerce Clause. Under that inquiry, the associations argue that they stated a sufficient claim since Proposition 12 substantially burdens national pork production and is premised on a foundation of illusory local benefits.

Starting in 2013, when Judge Jeffrey Sutton of the Sixth Circuit wrote an influential concurrence questioning the continued viability of the extraterritoriality branch of dormant Commerce Clause doctrine, *see American Beverage Ass’n v. Snyder*, 735 F.3d 362, 377–81 (6th Cir. 2013) (Sutton, J., concurring), an increasing number of lower courts have rejected or narrowly construed the extraterritoriality principle as an independent test under the dormant Commerce Clause. And Justices Thomas and Gorsuch have expressed skepticism regarding the dormant Commerce Clause as a whole. Whether these clues point toward a wholesale reevaluation of dormant Commerce Clause doctrine in this case remains to be seen.

ENVIRONMENTAL PROTECTION

What is the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act?

Sackett v. Environmental Protection Agency, No. 21-454 (cert. granted Jan. 24, 2022)

An Idaho couple will reach the Supreme Court for a second time in this dispute over what constitutes “waters of the United States,” which is how the Clean Water Act (CWA), 33 U.S.C. § 1362(7), defines “navigable waters” that may be regulated by the Environmental Protection Agency (EPA) and Army Corps of Engineers under its ambit. That question has been left open since the Court decided *Rapanos v. United States*, 547 U.S. 715 (2006). There, Justice Scalia’s plurality opinion had articulated a narrower, more categorical test for what constitutes “waters of the United States” while Justice Kennedy’s controlling concurrence proposed a broader, more functional test.

Plaintiffs Chantell and Michael Sackett planned to build their new home on a residential lot near Idaho’s Priest Lake in 2004. Shortly after construction began, the EPA issued them

an administrative compliance order stating that the property contained wetlands subject to protection under the CWA, and thus, it ordered them to restore the property to its natural state. The Sacketts instead sued the EPA in federal court, contending that the agency's jurisdiction under the CWA did not extend to their property because their wetlands were not "waters of the United States" under the Act.

After the case traveled up and back down the federal court system on a different issue, the Ninth Circuit ultimately disagreed with the Sacketts, holding that the EPA had jurisdiction over their lot under the CWA. In doing so, it applied the "significant nexus" test proposed by Justice Kennedy in *Rapanos*, 547 U.S. at 779–80. That test allows the EPA to exercise jurisdiction over wetlands where the wetlands "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" The Ninth Circuit first reasoned that the Sacketts' wetlands met the relevant CWA regulatory definition of "waters of the United States" because they were adjacent to a jurisdictional tributary. See 33 C.F.R. § 328.3(a)(1), (5), (7). The court then applied the "significant nexus" test from Justice Kennedy's *Rapanos* concurrence to conclude that the Sacketts' wetlands significantly affected the ecology and water quality of nearby Priest Lake, a navigable waterway.

The Supreme Court granted certiorari on the question of "[w]hether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)." In their briefing, the Sacketts advocate a two-step inquiry based on the test from Justice Scalia's *Rapanos* plurality opinion in lieu of the "significant nexus" test. The first step asks whether a wetland may be considered a "water," which requires the wetland to have a continuous surface-water connection to a clearly navigable body of water like a stream, ocean, river, or lake. If the wetland is a "water," then the second step asks whether it is "of the United States," meaning it is subject to Congress's authority over the channels of interstate commerce. The Sacketts assert that this test, unlike the "significant nexus" test, is compelled by Supreme Court precedent and the CWA's text and legislative history. Applying the test to their property, they contend that their wetlands do not maintain surface-water connections to any other "waters," and that they are not in any case traditional navigable waters "of the United States."

Since the Rehnquist Court era, the Supreme Court has consistently narrowed the scope of the EPA's and Army Corps' jurisdiction to regulate wetlands as "waters of the United States" under the CWA. If the Court rules for the Sacketts and adopts the position advocated by Justice Scalia's plurality opinion in

Rapanos, it may spell the end of federal government efforts to regulate development on wetlands without a clear surface connection to oceans, lakes, rivers, or streams.

INTELLECTUAL PROPERTY

Is an artistic work that conveys a different "expression, meaning or message" from its source material "transformative" and thus protected from copyright infringement liability under the fair use doctrine?

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, No. 21-869 (cert. granted Mar. 28, 2022)

This copyright infringement case arrives at the Supreme Court in the wake of the Court's recent decision in *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021). In that case, the Court found that copying computer code could be "transformative" and thus protected from copyright infringement liability under the fair use doctrine if it "alter[ed]" the copyrighted work "with new expression, meaning or message." This case tests the metes and bounds of that holding in the visual media space.

In 1984, Andy Warhol used Lynn Goldsmith's photo of the musical artist Prince to create a series of sixteen silkscreen prints. Years later, Goldsmith became aware of the prints and registered her original photo with the U.S. Copyright Office. The Andy Warhol Foundation (AWF), as holder of the silkscreen series' copyright, sued Goldsmith seeking a declaratory judgment of noninfringement or, alternatively, fair use. Goldsmith asserted a counterclaim for copyright infringement under 17 U.S.C. §§ 106 and 501. The district court granted summary judgment for AWF on its fair use claim, concluding that Warhol's work was "transformative" and not a market substitute given its different portrayal of Prince and its removal of nearly all of the original photo's protectible elements.

The Second Circuit reversed. The court applied the four fair-use factors set out in 17 U.S.C. § 107 and held Warhol's work not transformative because it "recognizably deriv[ed] from, and retain[ed] the essential elements of, its source material." After *Google* was decided, the circuit court issued a revised opinion still holding for Goldsmith but adding language distinguishing the Supreme Court's holding in *Google* as arising in an "unusual context."

In the Supreme Court, AWF argues that the "meaning-or-message" test used in *Campbell v. Actuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and *Google* appropriately reflects the text, purpose, and history of copyright law and is, therefore, the correct test to apply. Under that test, the Prince Series is clearly transformative, as both lower courts recognized, because

it erased the humanity from Goldsmith’s image as a comment on society’s conception of celebrities as products. AWF also critiques the Second Circuit’s test as improperly focusing on visual similarities—an aspect more appropriate for the threshold “substantial similarity” inquiry used to determine whether a prima facie case of copyright infringement has been shown.

The Court has decided relatively few fair use cases in the modern era, so every fair use case it decides is significant for copyright law. Which way the Court goes in this celebrity-driven case will likely have a profound effect on the fair use doctrine and the transformative use test for the foreseeable future.

LABOR AND EMPLOYMENT

Is an employee who earns over \$200,000 a year based on daily pay exempt from overtime pay requirements as a “highly compensated” employee under the Fair Labor Standards Act?

Helix Energy Solutions Group, Inc. v. Hewitt, No. 21-984 (cert. granted May 2, 2022)

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219, generally requires employers to pay “time and a half” for any time worked over a standard 40-hour workweek. *See* 29 U.S.C. § 207(a). The Secretary of Labor, however, has promulgated regulations that exempt “highly compensated” employees and more modestly paid “executive,” “administrative,” and “professional” employees from this overtime requirement. 29 C.F.R. §§ 541.100, 541.200, 541.300, 541.601. In order to fit within these categorical exemptions, an employee must satisfy certain job performance criteria, meet a minimum income threshold, and be paid on a salary basis.

Plaintiff Michael Hewitt worked as an oil rig tool pusher for Helix Energy Solutions Group for over two years. Though he was only ever paid a daily rate for his work, he earned on average over \$200,000 every year. After Helix fired him, Hewitt sued Helix for retroactive overtime pay under the FLSA, contending that Helix never paid him on a salary basis as the law required to exempt him from overtime pay under the Act. The district court disagreed with Hewitt and granted Helix summary judgment.

The en banc Fifth Circuit reversed, holding that Hewitt did not qualify as an exempt salaried employee under the FLSA. The court emphasized that daily wage earners are not ordinarily considered salaried employees as a matter of common parlance, a distinction the FLSA regulations recognized in their definition of “salary.” 29 C.F.R. § 541.602(a), (a)(1). The court otherwise held that the plain text of the regulations resolved the issue. Specifically, 29 C.F.R. § 541.604(b) contained a special rule permitting daily rate employees to be regarded as salaried

for purposes of the FLSA’s exemption. That rule, however, required such employees to have an arrangement guaranteeing a minimum weekly pay reasonably related to their actual daily amount earned—a condition not present in Hewitt’s employment agreement. Given Helix’s failure to comply with this requirement, Hewitt could not be considered exempt from the FLSA overtime requirement as a salaried employee.

In its petition for certiorari to the Supreme Court, Helix argued that the circuit court mistakenly applied a provision meant only for the category of exempt “executive,” “administrative,” and “professional” employees to Hewitt’s circumstances. Instead, the only relevant inquiry is whether Hewitt qualifies as a “highly compensated employee” under 29 C.F.R. § 541.601(a), and Hewitt’s annual income clearly fits this description. Hewitt responds that Helix is not entitled to the “highly compensated employees” exemption because the company failed to establish that Hewitt was paid on a guaranteed salary basis as required by 29 C.F.R. § 541.602. He otherwise asserts that the circuit court correctly applied 29 C.F.R. § 541.604(b), as Helix’s theory would treat the provision as mere inoperative surplusage within the FLSA.

The Roberts Court has consistently favored employers in wage-and-hour cases under the FLSA and other employment laws. Combined with the fact that the Court granted the employer’s petition for a writ of certiorari from an en banc Fifth Circuit ruling, this probably gives Helix an edge. Stay tuned.

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