Supreme Court Review: October Term 2017

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I. Criminal Law and Procedure

A. Fourth Amendment

Byrd v. United States, 679 Fed.Appx. 146 (3d Cir. 2017), *cert. granted*, 138 S.Ct. 54 (2017). Whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.

United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S.Ct. 2211 (2017). Whether the warrantless seizure and search of historical cellphone records revealing the location and movements of a cellphone user over the course of 127 days is permitted by the Fourth Amendment.

Collins v. Virginia, 292 Va. 486, 790 S.E.2d 611 (Va. 2017), *cert. granted*, 138 S.Ct. 53 (2017). Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a house and search a vehicle parked a few feet from the house.

District of Columbia v. Wesby, 765 F.3d 13 (D.C. Cir. 2016), *cert. granted*, 137 S.Ct. 826 (2017). (1) Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest the partiers for trespassing under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state; and (2) whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

B. Fifth Amendment

City of Hays, Kansas v. Vogt, 844 F.3d 1255 (10th Cir. 2016), *cert. granted*, 138 S.Ct. 55 (2017). Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial.

C. Sixth Amendment

McCoy v. Louisiana, 218 So.3d 535 (La. 2016), *cert.* granted, 138 S.Ct. 53 (2017). Whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection.

D. Guilty Pleas

Class v. United States, *cert. granted*, 137 S.Ct. 1065 (2017). Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.

E. Criminal Trials

United States v. Sanchez-Gomez, 859 F.3d 649 (9th Cir. 2017), *cert. granted*, 138 S.Ct. 543 (2017). Whether the U.S. Court of Appeals for the 9th Circuit erred in asserting authority to review respondents' interlocutory challenge to pretrial physical restraints and in ruling on that challenge notwithstanding its recognition that respondents' individual claims were moot.

II. Immigration

Sessions v. DiMaya, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 136 S.Ct. 31 (2016). Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

Jennings v. Rodriguez, 804 F.3d 1060 (9th Cir. 2015), *cert. granted* 136 S.Ct. 2489 (2016). (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months; and (3) whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

Trump v. Hawaii, ___ F.3d ___ (2017), *cert. granted*, 138 S.Ct. ___ (Jan. 19, 2018).
(1) Whether the respondents' challenge to the president's suspension of entry of aliens abroad is justiciable; (2) whether the proclamation – which suspends entry, subject to exceptions and case-by-case waivers, of certain categories of aliens abroad from eight countries that do not share adequate information with the United States or that present other risk factors – is a lawful exercise of the president's authority to suspend entry of aliens abroad; (3) whether the global injunction barring enforcement of the proclamation's entry suspensions worldwide, except as to nationals of two countries and as to persons without a credible claim of a bona fide relationship with a person or entity in the United States, is impermissibly overbroad; and (4) whether the proclamation violates the establishment clause of the Constitution.

III. First Amendment

Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 370 P.3d 272 (Colo.App.2015), *cert. granted*, 137 S.Ct. 2290 (2017). Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

Janus v. American Federation, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 138 S.Ct. 54 (2017). Whether *Abood v. Detroit Board of Education* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

National Institute of Family and Life Advocates v. Bacerra, 839 F.3d 823 (9th Cir, 2017), *cert. granted*, 138 S.Ct. 446 (2017). Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the free speech clause of the First Amendment, applicable to the states through the 14th Amendment.

Minnesota Voters Alliance v. Mansky, 849 F.3d 749 (8th Cir. 2017), *cert. granted*, 138 S.Ct. 446 (2017). Whether Minnesota statute Section 211B.11, which broadly bans all political apparel at the polling place, is facially overbroad under the First Amendment.

Lozman v. City of Riviera Beach, Florida, 681 Fed.Appx. 746 (11th Cir. 2017), *cert. granted*, 138 S.Ct. 447 (2017). Whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law.

IV. Voting Rights

Gill v. Whitford, 218 F.Supp. 3d 837 (W.D.Wis. 2016), *probable jurisdiction noted*, 137 S.Ct. 2268 (2017). (1) Whether the district court violated *Vieth v. Jubelirer* when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis; (2) whether the district court violated *Vieth* when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles; (3) whether the district court violated *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*; (4) whether the defendants are entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed; and (5) whether partisan-gerrymandering claims are justiciable.

Benisek v. Lamone, 203 F.Supp.3d 579 (D.Md. 2017), *probable jurisdiction noted*, 138 S.Ct. ___ (Dec. 8, 2017). (1) Whether the majority of the three-judge district court erred in holding that, to establish an actual, concrete injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must prove that the gerrymander has dictated and will continue to dictate the outcome of every election held in the district under the gerrymandered map; (2) whether the majority erred in holding that the *Mt. Healthy City Board of Education v. Doyle* burden-shifting framework is inapplicable to First Amendment retaliation challenges to partisan gerrymanders;

and (3) whether, regardless of the applicable legal standards, the majority erred in holding that the present record does not permit a finding that the 2011 gerrymander was a but-for cause of the Democratic victories in the district in 2012, 2014, or 2016.

Abbott v. Perez, ___ F.Supp.3d ___ (W.D. Tex. 2017), *probable jurisdiction noted*, 138 S.Ct. ___ (Jan. 12, 2018). 1) Whether the district court issued an appealable interlocutory injunction when it invalidated Texas' duly enacted redistricting plan and ordered the parties to appear at a remedial hearing to redraw Texas House of Representatives districts unless the governor called a special legislative session to redraw the Texas House map within three business days; (2) whether the Texas legislature acted with an unlawful purpose when it enacted Texas House of Representatives districts originally imposed by the district court to remedy any potential constitutional and statutory defects in a prior legislative plan that was repealed without ever having taken effect; (3) whether any of the invalidated districts that were unchanged from the 2012 court-imposed remedial plan to the 2013 legislatively adopted plan (in Bell, Dallas and Nueces Counties) are unlawful, when the district court in 2012 issued an opinion explaining why these districts were lawful; and (4) whether the Texas Legislature had a strong basis in evidence to believe that consideration of race to maintain a Hispanic voter-registration majority was necessary in House District 90 in Tarrant County, when one of the plaintiffs in the lawsuit told the legislature it had to keep the district's population above 50 percent Spanish-surnamed-voter registration to avoid diluting Hispanic voting strength.

V. Federalism

Christie v. National College Athletic Association; New Jersey Thoroughbred Horsemen's Association, Inc. v. National Collegiate Athletic Association, 832 F.3d 389 (3d Cir. 2016), *cert. granted*, 137 S.Ct. 2327 (2017). *Whether* a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States*.

South Dakota v. Wayfair, Inc., ___ S.D. ___ (2017), *cert. granted*, 138 S.Ct. ___ (Jan. 12, 2018). Whether the Supreme Court should abrogate *Quill Corp. v. North Dakota*'s sales-tax-only, physical-presence requirement.

VI. Federal Statutes

Epic Systems Corp. v. Lewis, (together with *Ernst & Young LLP v. Morris* and *NLRB v. Murphy Oil USA, Inc.*), 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S.Ct. 809 (2017). Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

Jesner v. Arab Bank PLC, 808 F.3d 144 (2d Cir. 2016), *cert. granted*, 137 S.Ct. 1432 (2017). Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.