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This *Report* summarizes cases granted review on June 28, 2019 (Part I).

I. Cases Granted Review

● *Dep't of Homeland Security v. Regents of Univ. of Cal*., 18-587; *Trump v. NAACP*, 18-588; *McAleenan v. Vidal*, 18-589. The Court will resolve whether the Department of Homeland Security's decision to end the Deferred Action for Childhood Arrivals (DACA) policy is judicially reviewable and lawful. When the federal government "defers action" on an otherwise deportable alien, the appropriate official notifies the alien that he or she will forbear from seeking the alien's removal. DHS regulations allow aliens granted deferred action to apply for and receive work authorization. In 2012, DHS announced the DACA policy, under which the Secretary of DHS agreed to defer action from persons who came to the United States under the age of sixteen, continuously resided here for the prior five years, had not yet attained the age of 30, and satisfied certain other requirements. Two years later, DHS expanded DACA and announced the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a similar program for aliens who had a child who was a U.S. citizen or lawful permanent resident. Texas and 25 other states challenged DAPA and the expansion of DACA in federal court. The district court issued a nationwide preliminary injunction, which the Fifth Circuit affirmed on the ground that DAPA and expanded DACA violated the Administrative Procedure Act and the Immigration and Nationality Act. The Supreme Court affirmed by an equally divided Court. In June 2017 Texas and other states announced their intention to amend their complaint to challenge the original DACA policy. In September 2017, then-Attorney General Sessions sent a one-page letter advising the Acting Secretary of DHS that it should terminate DACA because it "was an unconstitutional exercise of authority by the Executive Branch." The letter stated that DACA "has the same legal and constitutional defects that . . . courts recognized as to" DAPA, and asserted that "it is likely that potentially imminent litigation would yield similar results with respect to DACA." The next day, the Acting Secretary issued a memorandum formally rescinding the program. She stated that, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated."

Various plaintiffs (including more than a dozen states) filed suits alleging that the termination of DACA was arbitrary, capricious, and otherwise not it accordance with the law and therefore invalid under the APA. District courts in the Eastern District of New York, the Northern District of California, and the District of Columbia heard the challenges. The district courts all ruled that DHS's rescission of DACA was reviewable and was arbitrary and capricious and/or unlawful. The Eastern District of New York concluded that the termination of DACA rests on an "erroneous legal conclusion that the DACA program is unlawful and unconstitutional," and on the "factually erroneous premise" that the courts in the Texas litigation had recognized "'constitutional defects . . . as to DAPA.'" The Northern District of California ruled that "the agency's decision to rescind DACA was based on a flawed legal premise" and that the government's "supposed 'litigation risk' rationale" was an invalid "post hoc rationalization" and, "in any event, arbitrary and capricious." And the District Court for the District of Columbia ruled that the rescission memorandum's "scant legal reasoning was insufficient to satisfy the Department's obligation to explain its departure from its prior stated view that DACA was lawful."

The court observed that "neither the Sessions Letter nor the Rescission Memo cited any statutory provision with which DACA was in conflict." And the court found DHS's reliance on the Fifth Circuit's ruling on the DAPA program "inapposite" because the Fifth Circuit relied on a factor not present here: that DAPA "seemed to conflict with the INA's 'intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status.'" The Court granted certiorari before judgment by the courts of appeals in these cases.

The United States argues first that "DHS's decision to rescind DACA—a policy of enforcement discretion—is a classic determination that is 'committed to agency discretion by law,' 5 U.S.C. 701(a)(2), and therefore unreviewable under the APA." It insists that enforcement decisions that depend on a "complicated balancing" of factors within the agency's expertise are traditionally not reviewable—a principle that "applies with particular force when it comes to immigration." On the merits, the United States asserts that "DHS reasonably rested its decision on the legal and practical implications of maintaining a policy of nonenforcement (original DACA) that is materially indistinguishable from policies (DAPA and expanded DACA) that were struck down by the Fifth Circuit in a decision affirmed by this Court." Given the similarities between DAPA and DACA, "DHS could permissibly rescind the DACA policy based on the agency's doubts about the legality of the policy and its likely fate in the courts." The United States also asserts that the rescission was properly based on policy considerations set forth in a memorandum Secretary of HHS Kirstjen Nielsen issued in response to an order issued by the District Court for the District of Columbia.

● *Espinoza v. Montana Dep't of Revenue*, 18-1195. The question presented is whether "it violate[s] the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?" In 2015, the Montana Legislature enacted a tax-credit scholarship program for K to 12 students. The program provides a tax credit of up to $150 annually to individuals and businesses who donate to private, non-profit scholarship organizations. The scholarship organizations then turn around and use the donations to award scholarships to families sending their children to private school. Soon after the program was enacted, the Montana Department of Revenue adopted an administrative rule—known as Rule 1—that prohibited scholarship recipients from using scholarships at religious schools. The Department justified Rule 1 as necessary to comply with Article X, §6 of the Montana Constitution, which prohibits the direct or indirect payment of public funds to religious schools or other institutions. Petitioners are low-income mothers who hoped to receive scholarships to send their children to Stillwater Christian School. The trial court issued an order permanently enjoining enforcement of Rule 1, ruling that it was ultra vires, not required by the Montana Constitution, and in violation of the U.S. Constitution. The Montana Supreme Court reversed. 393 Mont. 446.

The Montana Supreme Court concluded that the tax-credit scholarship program's inclusion of religious schools violates Article X, §6 of the Montana Constitution. Among other things, the court reasoned that the tax credit indirectly pays for education at religious schools and that "[r]eligious education is a rock on which the whole church rests, and to render tax aid to a religious school is indistinguishable from rendering the same aid to the church itself." The court then held that it could not sever religious schools from the rest of the scholarship programs, for "there is no mechanism within the [program] to identify where the secular purpose ends and the sectarian begins" or "when

the tax credit is indirectly paying tuition at a secular school and when the tax credit is indirectly paying tuition at a sectarian school." For those reasons, the court held Rule 1 to be ultra vires. The Montana Supreme Court thus invalidated the entire program. The court dismissed federal constitutional concerns, stating that "[a]lthough there may be a case where an indirect payment constitutes 'aid' under Article X, Section 6, but where prohibiting the aid would violate the Free Exercise Clause, this is not one of those cases."

Petitioners maintain that the lower courts are divided on "[w]hether the government may bar religious options from otherwise neutral and generally available student-aid programs." And they contend that neither *Locke v. Davey*, 540 U.S. 712 (2004), nor *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), resolved the issue. *Locke*, they say, merely held that a state need not provide scholarships to students pursuing a degree in devotional theology. And *Trinity Lutheran* addressed a program that would provide funds to religious institutions, not to religious uses of student aid. In their view, the Free Exercise and Equal Protection Clauses prohibit Montana from excluding students attending religious schools from the program and override Montana's no-aid provision.

● *Opati v. Republic of Sudan*, 17-1268. The Court granted certiorari limited to the second question presented, which asks: "Whether, consistent with this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Foreign Sovereign Immunities Act applies retroactively, thereby permitting recovery of punitive damages under 28 U.S.C. §1605A(c) against foreign states for terrorist activities occurring prior to the passage of the current version of the statute." Petitioners are U.S. government employees and contractors who were killed or injured in 1998 by bombings of the U.S. Embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania. They allege that the Republic of Sudan and other respondents provided material support to al Qaeda, which carried out the attacks. Prior to 2008, the Foreign Sovereign Immunities Act (FSIA) did not provide a federal cause of action against foreign state sponsors of terrorism or permit plaintiffs to recover punitive damages against them. While a case arising from the same incident but involving different plaintiffs was pending, Congress amended the FSIA to add such a cause of action and to authorize the recovery of punitive damages. Later that year, four additional groups of U.S. government employees killed or injured in the 1998 bombings (including petitioners here) filed new civil actions or intervened in the existing action asserting claims under the new federal cause of action. The district court eventually issued a default judgment for all plaintiffs and awarded more than $10 billion in damages, including about $4.3 million in punitive damages. Although the D.C. Circuit affirmed the district court's judgment as to respondents' liability, it held that punitive damages are not available against a foreign state sponsor of terrorism for conduct taken before the 2008 amendments to the FSIA. 864 F.3d 751.

The D.C. Circuit applied the "presumption against retroactive legislation" recognized in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and found it "obvious that the imposition of punitive damages under the new federal cause of action . . . operates retroactively because it increases Sudan's liability for past conduct." The court distinguished *Republic of Austria v. Altmann*, which held that certain provisions of the FSIA apply to pre-enactment conduct despite the absence of a clear statement in the statute. The court reasoned that *Altmann* addressed jurisdictional provisions, whereas this case concerns punitive damages, which "adhere[] to the cause of action" and are "essentially substantive." Petitioners argue that *Altmann* broadly "held that the FSIA is not subject to the anti-retroactivity principle enunciated in *Landgraf*." Indeed, argue petitioners, *Altmann* specifically

rejected a provision-by-provision approach to FSIA retroactivity, and instead held that the law "as a whole applies to preenactment conduct." They also assert that the D.C. Circuit ignored statutory text, which provides no temporal limitations on punitive damages and which transformed earlier claims into claims arising under the federal cause of action and then authorized punitive damages on those claims. The United States filed an amicus brief at the invitation of the Court which agrees with petitioners on this issue.

● *Thole v. U.S. Bank, N.A.*, 17-1712. The two questions presented by the petition are: (1) "May an ERISA plan participant or beneficiary seek injunctive relief against fiduciary misconduct under 29 U.S.C. 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof?" (2) "May an ERISA plan participant or beneficiary seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof?" The Court also asked the parties to brief "[w]hether petitioners have Article III standing." Respondents are sponsors and fiduciaries of a pension plan offered by respondent U.S. Bank. It is a "defined benefit" plan, which means it pays participants a set amount of benefits fixed by contract. Petitioners filed a putative class action against respondents, alleging that they—in violation of well-accepted principles of diversification—invested all of the plan's asserts in high-risk equities. And they allege that more than 40% of the plan's asset were invested in respondent's own proprietary mutual funds. As a consequence, claim petitioners, the plan lost $1.1 billion—$748 million more than a properly diversified plan would have lost. They filed suit under ERISA seeking (1) an injunction under 29 U.S.C. §1132(a)(3) to stop the misconduct and replace the fiduciaries and (2) restoration to the plan of the $748 million under 29 U.S.C. §1132(a)(2). After the lawsuit was filed, however, respondents contributed $339 million to the plan, returning it to "overfunded" status. The district court held that the contribution eliminated any Article III case or controversy. The Eighth Circuit affirmed, though on statutory grounds only. 873 F.3d 617.

The Eighth Circuit relied on circuit precedent which "concluded that §1132(a)(2) does not permit a participant in a defined-benefit plan to bring suit claiming liability . . . for alleged breaches of fiduciary duties when the plan is overfunded." As to the injunction claims under §1132(a)(3), the court held that when a plan is overfunded, "there is no 'actual or imminent injury to the Plan itself' " and therefore petitioners were not "within the class of plaintiffs whom Congress has authorized to sue under the statute." The Court agreed to review those two statutory rulings, as well as whether there is Article III standing. Petitioners assert that "history and Congress's judgment [ ] show Congress permissibly authorized participants to seek an injunction against fiduciary misconduct regardless of individual financial harm." Such suits, they say, "vindicate participants' concrete, real-world—and, indeed, common-sense—interest in having pension plans free from fiduciary misconduct." As to their claim for restoration under §1132(a)(2), petitioners assert that "[t]he Eighth Circuit's conclusion that petitioners fell outside the statute's zone of interests because they had not suffered individual financial harm is indefensible." That is because the provision "does not turn on the participant's own loss; it expressly contemplates participants seeking recovery on behalf of the plan for the plan's losses." Finally, petitioners say they have Article III standing because "[t]he participant's injury is the invasion of her right to a plan free from fiduciary misconduct—an intangible injury that Congress has made actionable based on centuries of common-law precedent." The United States filed an amicus brief at the invitation of the Court that agrees with petitioners' position.

● *Babb v. Wilkie*, 18-882. The Court limited the grant of certiorari to the following question: "Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any 'discrimination based on age,' 29 U.S.C. §633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action." The legal background is as follows. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Court held that a private-sector employee alleging age discrimination under the ADEA must prove but-for causation to prevail. The Court explained that the ADEA's private-sector provision prohibits discrimination "because of" an individual's age—and the phrase "because of" sounds in but-for causation. In *University of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), the Court reached the same conclusion with respect to Title VII retaliation claims. The Court stated that "but for" causation is "the default rule[]" in tort law that Congress "is presumed to have incorporated" in a statute "absent an indication to the contrary in the statute itself." *Gross* and *Nassar* distinguished Title VII as amended by the Civil Rights Act of 1991, which allows employer liability when discrimination is a "motivating factor" in the challenged employment action. At issue here is whether the ADEA's federal-sector provision is another exception to the default rule of but-for causation. That provision states that "[a]ll personnel actions" affecting employees or applicants for employment in executive agencies who are at least 40 years of age "shall be made free from any discrimination based on age." 29 U.S.C. §633a(a).

Petitioner Norris Babb is a pharmacist who joined a Department of Veterans Affairs medical center in Bay Pines, Florida in 2004. In 2010, the VA announced a nationwide initiative called "Patient Aligned Care Term," which made certain pharmacists eligible for promotion if they spent at least 25% of their time practicing "disease state management" (or DSM). Babb sought a promotion, but the medical center's management concluded that it could not allow Babb to spend 25% of her time practicing DSM. Separately, Babb applied for two open positions in the anticoagulation clinic, but was not selected for either one. Babb sued the Secretary of the VA alleging a variety of claims, including age discrimination in violation of the ADEA. The district court granted the Secretary's motion for summary judgment, holding that although Babb established a prima facie case, the Secretary offered non-discriminatory reasons for its actions that no jury could reasonably conclude were pretextual. The Eleventh Circuit affirmed on the age discrimination claim. 822 F.3d 1179. As relevant here, the Eleventh Circuit held that the district court properly applied a but-for causation standard under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), framework for assessing Babb's federal-sector age discrimination claim. The court stated that if it were "writing on a clean slate," it "might well agree" with Babb that such claims should be governed by a "motivating-factor (rather than but-for) causation standard," but it was bound by circuit precedent.

Babb argues that the ADEA does not use the phrase "because of," but instead says that federal employees "shall be made free from any discrimination based on age"—a "sweeping" phrase which shows that "the federal government is held to [a] higher standard" than private sector employees. He insists that the Court should respect Congress' decision not to use "because of" language. And he observes that the EEOC and the Merit Systems Protection Board have both concluded that federal-sector age discrimination claims do not require but-for causation. The United States counters that the federal-sector provision uses the phrase "based on age," which "naturally means age must be a but-for cause of the alleged discrimination in a personnel action."

● *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 18-1048. At issue is "[w]hether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel." Chapter 2 of the Federal Arbitration Act (FAA) implements the New York Convention, whose goal is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts." Toward that end, the Convention says that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration." N.Y. Convention, Art. II §1. Its implementing provisions incorporate the background principles of Chapter 1 of the FAA, which applies to domestic arbitration agreements. In *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), the Court held that Chapter 1 of the FAA permits enforcement of a domestic arbitration provision "against (or for the benefit of) a third party" nonsignatory if enforcement would be permitted "under state contract law." *Arthur Andersen* further stated that "background principles of state law" "allow a contract to be enforced by or against nonparties to the contract through" equitable estoppel. Petitioner contends that the same is true for arbitration agreements subject to the New York Convention.

Respondent Outokumpu operates a stainless-steel plant in Alabama. It entered contracts with Fives St. Corp. to purchase equipment. The contracts contain clauses providing that all disputes in connection with them shall be subject to arbitration in Germany. Fives subcontracted with petitioner GE Energy, a foreign corporation, to supply motors for the equipment. When the motors later failed, Outokumpu sued GE Energy in Alabama state court. GE Energy removed and then moved to dismiss and compel arbitration. The district court found removal proper, and then granted GE Energy's motion. The Eleventh Circuit reversed the district court's decision to dismiss the case and compel arbitration. 902 F.3d 1316. It held that GE Energy could not force Outokumpu to arbitrate because GE Energy was not a signatory to Outokumpu's contracts with Fives. The Eleventh Circuit agreed that equitable estoppel would allow a nonsignatory to enforce an arbitration agreement under Chapter 1 of the FAA. But the court distinguished arbitration agreements subject to the New York Convention on the ground that the Convention—in contrast to Chapter 1 of the FAA—expressly provides that a party may compel arbitration only if "there is an agreement in writing" that is "signed by the parties." See Article II, §2. And so it restricts arbitration to the specific parties to the agreement.

GE Energy points to the New York Convention's implementing provisions in Chapter 2 of the FAA, which state that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. §208. And so, GE Energy says, if equitable estoppel applies and allows non-signatories to enforce arbitration agreements under Chapter 1, it equally applies to arbitration agreements under Chapter 2 (the Convention). GE Energy disagrees with the Eleventh Circuit that the Convention's requirement that an arbitration agreement be "signed by the parties" to be enforceable changes this. "[T]hat provision," it says, "simply prohibits unwritten arbitration agreements—that is, it requires only that an agreement be signed by the parties to that agreement for the arbitration clause to be valid. Once an 'agreement in writing' exists—*i.e.*, one 'signed by the parties' to that agreement—Article II §2 says nothing about who can enforce it."

● *Kelly v. United States*, 18-1059. At issue is whether "a public official 'defraud[s]' the government of its property by advancing a 'public policy reason' for an official decision that is not her subjective 'real reason' for making the decision." The case arises from the "Bridgegate" scandal. Petitioner Bridget Kelly was Deputy Chief of Staff to former New Jersey Governor Chris Christie. After the mayor of Fort Lee refused to endorse Christie's reelection bid, David Wildstein—the Chief of Staff to the Port Authority's Deputy Executive Director (Baroni)—told Kelly that the Port Authority could "close down" lanes of the George Washington bridge that access Fort Lee. Kelly responded, "Time for some traffic problems in Fort Lee." Although their purpose was to "creat[e] a traffic jam that would punish [the mayor]," Wildstein and Kelly (in consultation with Baroni) created a fake "traffic study" to "provide a cover story" for the lane closures. On September 9, 2013, Port Authority police reduced the number of Fort Lee's access lanes from three to one, creating gridlock, which remained in effect for four days. After obtaining Wildstein's cooperation, federal prosecutors indicted Kelly and Baroni for wire fraud under 18 U.S.C. §1343, theft from a federally funded entity under 18 U.S.C. §666, and conspiracy to commit the same. The district court denied motions by Baroni and Kelly to dismiss the indictment. A jury convicted both defendants on all counts. The district court denied the defendants' motion for acquittal or a new trial. And the Third Circuit affirmed in relevant part. 909 F.3d 550.

On the wire fraud count, the Third Circuit sustained the government's theory that the defendants had fraudulently deprived the Port Authority of "property." First, found the court, the defendants' false rationale for the lane allocation satisfied the deception element of the fraud offense. Second, held the court, that lie deprived the Port Authority of "intangible property"—specifically (in the cert petition's words), "the labor of the extra toll collectors needed for the realignment, the labor of the staff who actually conducted the traffic study by 'collect[ing]' and 'analyz[ing]' data about the impacts of the realignment, and even Wildstein's and Baroni's own time spent working on the realignment." The court also held that the defendants deprived the Authority of its "right to control" the bridge's operation. The Third Circuit upheld the §666 convictions on the same core reasoning.

Kelly argues that "the 'fraud' here—and the basis for convictions under two federal criminal statutes—was *concealment of political motives for an otherwise-legitimate official act*. All that separates a routine decision by a public official from a federal felony, per the opinion below, is a jury finding that her public-policy justification for the decision was not *really and truly* her subjective reason for making it. . . . Taken seriously, it would allow any federal, state, or local official to be indicted based on nothing more than the (ubiquitous) allegation that she lied in claiming to act in the public interest." Kelly argues that the Third Circuit decision undoes *McNally v. United States*, 483 U.S. 350, 360 (1987), and *Skilling v. United States*, 561 U.S. 358 (2010), which held that honest-services fraud is limited to bribery and kickbacks. That is, "the Third Circuit's approach would revive, as pecuniary fraud, the prosecutions that th[e] Court in *Skilling* rejected under the honest-services law." The United States counters that Kelly "does not identify any statutory element that her own conduct or the conduct of her coconspirators failed to satisfy." And it dismisses Kelly's parade of horribles, explaining that the Third Circuit's reasoning does not apply to "officials who possess unilateral authority over discretionary resources, therefore do not need to lie to allocate those resources, and so do not cause a deprivation of money or property 'by means of' their deception." Further, "the fact that petitioner was politically motivated to carry out her fraudulent scheme is irrelevant to her guilt."

● *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc*., 18-1086. The Court will resolve "[w]hether, when a plaintiff asserts new claims, federal preclusion principles can bar a defendant from raising defenses that were not actually litigated and resolved in any prior case between the parties." Petitioner Lucky Brand Dungarees sells "jeans and other casual apparel" at department stores and retail locations. It owns the trademark LUCKY BRAND and other marks that include the word "lucky." Respondent Marcel Fashions Group owns the trademark GET LUCKY. Marcel first sued Lucky for trademark infringement and unfair competition in 2001, but the parties settled in 2003. In 2005, Lucky sued Marcel, which had licensed to two other companies a "Get Lucky" line of jeanswear and sportswear. Marcel counterclaimed, seeking to invalidate Lucky's marks. The action resulted in a final judgment permanently enjoining Lucky from using the GET LUCKY mark (but nothing more) and ordering Lucky to pay damages. The current action began in 2011 when Marcel again sued Lucky for trademark infringement based on alleged acts of infringement that postdate the 2005 action. It sought an injunction prohibiting Lucky from "using the LUCKY BRAND marks." Following one trip to the Second Circuit and back, Lucky moved to dismiss on the ground that the 2003 settlement agreement—which contained a broad release by Marcel—barred Marcel's claims. Marcel countered that the preclusive effect of the final order in the 2005 action barred Lucky from relying on the 2003 settlement because Lucky could have raised that defense in the 2005 action and did not. The district court granted Lucky's motion, rejecting Marcel's preclusion argument. The Second Circuit vacated and remanded. 898 F.3d 232.

The Second Circuit held that "*res judicata* precludes Lucky Brand from raising its release defense in this action." That is because, held the court, "under certain conditions parties may be barred by claim preclusion from litigating defenses that they could have asserted in an earlier action, and that the conditions in this case warrant application of that defense preclusion principle." (Footnote omitted.) Specifically, it held "that defense preclusion bars a party from raising a defense where: (i) a previous action involved an adjudication on the merits; (ii) the previous action involved the same parties or those in privity with them; (iii) the defense was either asserted or could have been asserted, in the prior action; and (iv) the district court, in its discretion, concludes that preclusion of the defense is appropriate because efficiency concerns outweigh any unfairness to the party whose defense would be precluded." And that is so, held the court, even though the new action involves different claims than the prior action.

Lucky asserts that the Federal Circuit, Ninth Circuit, and Eleventh Circuit "have all held that where a second case involves claims that postdate the first case between the parties, the defendant is not precluded from raising defenses that were not actually litigated and resolved in the first case." Those courts are correct, Lucky says, because—under basic preclusion principles—"[c]laim preclusion bars 'successive litigation of the very same claim' by the very same parties. A claim is not 'the very same' as one raised in an earlier case if it is 'predicated on events that postdate the filing of' the earlier case. As such, claim preclusion 'does not bar claims that are predicated on events that postdate the filing of the initial complaint.'" (Citations omitted.) "Equally settled are the contours of issue preclusion, which bars re-litigation of issues that were 'actually litigated and resolved' in a prior case." Lucky goes on to cite Wright & Miller for the proposition that "in successive actions growing out of different transactions, the defendant is free to raise defenses that were equally available but omitted from the first action."

● *Romag Fasteners, Inc. v. Fossil Inc.*, 18-1233. The question presented is "[w]hether, under section 35 of the Lanham Act, 15 U.S.C. §1117(a), willful infringement is a prerequisite for an award of an infringer's profits for a violation of section 43(a), *id*. §1125(a)." Section 43 of the Lanham Act protects trademark holders from various types of infringing conduct. Specifically, section 43(a) prohibits false representations by using another's distinctive mark; section 43(c), which Congress added in 1996, creates a federal cause of action for trademark dilution; and section 43(d), which Congress added in 1999, prohibits "cyberpiracy." Section 35 of the Act sets forth remedies for violations of section 43. Prior to 1999, it authorized an award of infringer's profits for "a violation under [section 43(a)]," "subject to principles of equity." As amended in 1999 and 2002, it authorizes an award of the infringer's profits, "subject to the principles of equity," for "a violation under [section 43(a) or (d)], or a willful violation under [section 43(c)]." The circuits are divided over whether willfulness is a prerequisite to recover an infringer's profits not only for trademark dilution under section 43(c), but also for ordinary infringement under section 43(a).

Petitioner Romag Fasteners sells patent magnetic snap fasteners for use in wallets and handbags under its registered trademark ROMAG. Respondent Fossil designs, markets, and distributes handbags and small leather goods. In 2002, Fossil and Romag entered into an agreement authorizing Fossil to use Romag fasteners in its products. In 2010, however, Romag's president discovered that certain Fossil handbags sold in the United States contained counterfeit snaps bearing the Romag mark. It filed suit in federal court against Fossil and retailers of Fossil products for patent and trademark infringement. A jury found, among other things, that Fossil had infringed Romag's trademark but did not do so willfully. The district court later held that Romag is not entitled to an award of Fossil's profits because Romag failed to prove that Fossil acted willfully. The Federal Circuit, applying governing Second Circuit law, affirmed. 817 F.3d 782.

The Federal Circuit observed that prior to the 1999 amendment, several courts of appeal required a showing of willfulness for claims under section 43(a) on the ground that section 35 says that awards are "subject to equitable principles." And as a matter of equity, a willfulness requirement (in the Second Circuit's words) "is necessary to avoid the conceivably draconian impact that a profits remedy might have in some cases." The Federal Circuit ruled that, although the Second Circuit has not addressed the impact of the 1999 amendment (which specifically speaks to willfulness only in relation to section 43(c) trademark dilution claims), it saw "nothing in the 1999 amendment that permits us to declare that the governing Second Circuit precedent is no longer good law." In particular, it found that "the limited purpose of the 1999 amendment was simply to correct an error in the 1996 Dilution Act" relating to claims under section 43(c)," not to make "any change to the willfulness requirement for violations of [section 43(a)]." The court noted that Congress did not change the phrase "subject to principles of equity," which was the source of the willfulness requirement for violations of section 43(a). And the court found that the "willful violation" language serves purposes unrelated to section 43(a) claims.

Romag argues that the plain language of section 35 imposes a willfulness requirement only for trademark dilution cases. In short, "Congress' decision to distinguish between damages for 'a violation' of the Lanham Act's infringement and cyberpiracy provisions (sections 43(a) and (d)) and 'a willful violation' of trademark dilution protections (section 43(c)) has meaning." And "[i]f Congress intended to impose a threshold willfulness requirement for profits awards under section 43(a)— in

addition to section 43(c)—it had a straightforward way to do so: it could have referred to 'willful violations under sections 43(a) and (c).'"

● *Rodriguez v. FDIC*, 18-1269. "The Internal Revenue Code permits affiliated corporate groups—consisting of a parent corporation and its subsidiaries—to file a consolidated income tax return. 26 U.S.C. §§1501, 1504(a). When the Internal Revenue Service issues a tax refund to an affiliated group, that refund is made 'directly to and in the name of' the parent corporation, even if the refund arises in whole or in part from the losses of a corporate subsidiary. 26 C.F.R. §1.1502-77(c), (d)(5). Three Circuits, including the court below, have adopted a federal common law rule known as the '*Bob Richards* rule,' under which a tax refund paid to an affiliated group is presumed to belong to the corporate subsidiary whose losses gave rise to the refund unless the parties clearly agree otherwise. Four Circuits reject that rule, and instead determine ownership of a tax refund based on applicable state law. The question presented is: Whether courts should determine ownership of a tax refund paid to an affiliated group based on the federal common law '*Bob Richards* rule' . . . or based on the law of the relevant State . . . ." The issue mostly matters when some or all of the corporate group enters bankruptcy. "If a parent corporation owns a tax refund, then the refund is part of its bankruptcy estate, and a subsidiary claiming a right to the refund merely stands in the same position as the corporation's other 'unsecured creditor[s].' In contrast, if a parent holds the tax refund as agent or trustee for its subsidiary, then equitable title to the refund belongs to the subsidiary, and the parent corporation may not use the refund to pay any of its other debts." (Citation omitted).

United Western Bancorp, Inc. (UWBI) is a bank holding company. One of its subsidiaries is United Western Bank (the Bank), a federally chartered savings and loan association based in Colorado. In 2008, UWBI and its subsidiaries entered into a Tax Allocation Agreement that deemed UWBI and its subsidiaries an "affiliated group" for purposes of the Internal Revenue Code and established procedures by which subsidiaries "pay taxes to UWBI, and UWBI repays the subsidiaries for tax refunds it receives." In 2011, UWBI sought a tax refund of over $4 million based on the Bank's losses. While the refund request was pending before the IRS, the Office of Thrift Supervision closed the Bank and appointed the FDIC as receiver. UWBI became insolvent as well and filed for bankruptcy. Petitioner Simon Rodriguez was appointed Trustee of UWBI's estate. The IRS then completed its audit and issued a refund of about $4 million. The FDIC filed a proof of claim in UWBI's bankruptcy case for the tax refund on the ground that the refund stemmed from the Bank's business losses, which gave the Bank equitable title to the refund. The Trustee initiated an adversary proceeding in the bankruptcy court, claiming UWBI was the equitable owner of the refund. The bankruptcy court ruled for the Trustee based on the Allocation Agreement as construed under Colorado law. The district court reversed. And the Tenth Circuit affirmed. 914 F.3d 1262. It applied the *Bob Richards* rule, named after the Ninth Circuit's decision in *In re Bob Richards Chrysler-Plymouth Corp., Inc.*, 473 F.2d 262 (9th Cir. 1973). As noted, under that rule, a tax refund paid to an affiliated group is presumed to belong to the corporate subsidiary whose losses gave rise to the refund unless the parties clearly agree otherwise. Because the Allocation Agreement was ambiguous (in the Tenth Circuit's view), the *Bob Richards* rule meant that the tax refund belonged to the Bank.

The Trustee argues that "[t]he *Bob Richards* rule has no statutory foundation, and satisfies none of the stringent requirements for federal common lawmaking." In particular, says the Trustee, the Supreme "Court has 'uniformly require[d] the existence of' a '*significant conflict* between some

federal policy or interest and the use of state law' as 'a precondition for recognition of a federal rule of decision.'" Yet the "Court's precedents make clear that there is no 'conflict' with federal policy—let alone a 'significant' one—posed by the application of state law to determine whether a bankruptcy estate owns a tax refund. On the contrary, 'Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.'" Accordingly, he argues, "[c]ourts should determine ownership of tax refunds the same way they determine other property-rights questions in bankruptcy: by applying the substantive laws of the relevant state, not by placing a heavy federal thumb on one side of the scale. Had the Tenth Circuit applied that approach here, it would have concluded—as the Bankruptcy Court did—that Colorado law assigns the $4 million tax refund at issue to UWBI, not to the Bank."

● *Shular v. United States*, 18-6662. The Court will resolve "[w]hether the determination of a 'serious drug offense' under the Armed Career Criminal Act requires the same categorical approach used in the determination of a 'violent felony' under the Act." The Armed Career Criminal Act (ACCA) imposes a mandatory minimum term of 15 years' imprisonment for persons convicted of possessing a firearm as a felon if the defendant has three prior convictions for a "serious drug offense" or a "violent felony." The ACCA defines a "serious drug offense" as either (i) certain specified federal drug offenses or "(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. §802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. §924(e)(2)(A). At issue here is how courts should assess whether prior state convictions satisfy clause (ii).

Petitioner Eddie Lee Shular pleaded guilty to several federal drug offenses. The Probation Office determined that Shular had six prior convictions under Florida law for either selling cocaine or possessing cocaine with intent to sell. It further concluded that those state convictions constitute "serious drug offenses" under clause (ii). Shular objected that "Congress intended 'serious drug offense' as defined in 18 U.S.C. §924(e)(2)(A) to be those offenses that require" a particular "'*mens rea* element,' namely, that 'the defendant knew he was selling a controlled substance.'" And, he argued, the Florida statutes under which he was convicted did not have that *mens rea* element. The district court rejected his argument based on Eleventh Circuit precedent, *United States v. Smith*, 775 F.3d 1262 (2014); and the Eleventh Circuit affirmed. In *Smith*, the Eleventh Circuit stated that "[w]e need not search for the elements of 'generic' definitions of 'serious drug offense' . . . because [the term] is defined by a federal statute," and the plain language of the ACCA definition "require[s] only that the predicate offense 'involve[ ]' . . . certain activities related to controlled substances."

Through a series of cases beginning with *Taylor v. United States*, 495 U.S. 575 (1990), the Court has applied a "categorical approach" to assessing whether a prior state conviction constitutes a predicate "violent felony" under ACCA. Under the categorical approach, the court compares the elements of the state crime of conviction with the elements of the "generic" version of the offense—that is, the offense as commonly understood. Shular contends that there is "no logical or textual basis to suggest the Court would not apply the same analysis in the context of a 'serious drug offense' under ACCA." He asserts that, "[l]ike the term 'violent felony' construed in *Taylor*, 'serious drug offense' is defined in terms of an enumerated list of generic crimes." And he insists that, "[i]f the categorical approach applied, none of [his] Florida convictions would qualify as a 'serious drug offense'

because the Florida crimes are broader than the generic drug analogues which require a *mens rea* element."

The United States defends the Eleventh Circuit's ruling. It argues that "[t]he text of the definition of 'serious drug offense' in Section 924(e)(2)(A)(ii) requires comparing a state-law offense to a federal-law analogue in only one respect: it requires that the state-law offense regulate a 'controlled substance (as defined in [21 U.S.C. 802]).' Petitioner does not dispute that his prior convictions satisfy that requirement. The remainder of the definition requires only a determination whether the state-law offense 'involv[es]' the manufacture, distribution, or possession with intent to distribute or manufacture those substances." The United States further asserts that, whereas the definition of "violent felony" "necessarily required identifying the 'generic meaning' of the enumerated crimes," clause (ii) of the definition of "serious drug offense" does not.

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