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This *Report* summarizes opinions issued on January 7 and 8, 2019 (Part I); and cases granted review on January 4, 2019 (Part II).

I. Opinions

● *Shoop v. Hill*, 18-56. The Court summarily reversed a Sixth Circuit decision that had granted habeas relief to a death-row inmate based on a decision—*Moore v. Texas*, 137 S. Ct. 1039 (2017)—issued long after the inmate's conviction and sentence became final. Petitioner Danny Hill was convicted of torture, rape, and murder in Ohio in 1986, and sentenced to death. Hill later filed a state court petition contending that his death penalty is illegal under *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits execution of a person who is mentally disabled. Ohio courts denied his request. In 2010, Hill filed a federal habeas petition seeking review of his *Atkins* claim. The district court denied the petition, but the Sixth Circuit reversed. It relied on *Moore v. Texas*, which faulted a Texas state court for improperly evaluating adaptive functioning, one of the key components of an intellectual-disability assessment. The Sixth Circuit ruled that the Ohio courts likewise improperly evaluated Hill's adaptive functioning, overemphasizing his adaptive strengths and stressing his improved behavior in prison. The Sixth Circuit acknowledged that *Moore* post-dated the state-court rulings, but held that *Moore* was merely an application of *Atkins*. Through a *per curiam* decision, the Court reversed.

The Court explained that under 28 U.S.C. §2254(d)(1), habeas relief is appropriate only when the state court's ruling is "so lacking in justification that that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." The inquiry, therefore, is what law was clearly established when the Ohio courts rejected the *Atkins* claim. Although *Atkins* itself was on the books, that ruling "gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes." The Court only "expounded on the definition of intellectual disability" in *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore*—"which came years after the decisions of the Ohio courts." The Court concluded that "no reader of the decision of the Court of Appeals can escape the conclusion that it is heavily based on *Moore*." Indeed, noted the Court, Hill didn't assert a §2254(d)(1) claim (as opposed to a claim under §2254(d)(2) that the state courts unreasonably applied the facts) until after *Moore* was decided. The Court therefore vacated and remanded to allow the Sixth Circuit to determine whether its ruling could be sustained based solely on the legal rules clearly established at the relevant time.

● *City of Escondido v. Emmons*, 17-1660. The Court summarily reversed a Ninth Circuit decision that had denied qualified immunity to two police officers sued for using excessive force. Escondido police received a 911 call about a domestic violence incident at an apartment. Officers responded, but initially could not get anyone to open the door. Marty Emmons then opened the door, attempted to go past Officer Craig, and closed the door behind him despite Officer Craig's order not to close the door. Officer Craig stopped Emmons, took him quickly to the ground, and handcuffed him. A video shows that Emmons was not in any apparent pain. Police then helped him up and arrested him for resisting and delaying a police officer. Emmons later sued Officer Craig and Sergeant Toth under §1983 seeking money damages based on their alleged use of excessive force in violation of the Fourth Amendment. The district court granted summary judgment to Sergeant Toth after finding that

he used no force at all. It also granted summary judgment to Officer Craig, finding (based on video evidence) that he acted professionally and respectfully, and that the law did not clearly establish that he could not take down an arrestee in these circumstances. The Ninth Circuit reversed and remanded for trial on the excessive force claims against both officers. Its entire analysis of the qualified immunity issue was: "The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013)." Through a *per curiam* opinion, the Court reversed in part, vacated in part, and remanded.

The Court found erroneous and "quite puzzling" the Ninth Circuit's unexplained reinstatement of the claim against Sergeant Toth, given the district court's conclusion that only Craig used force. As to Officer Craig, the Court found that the Ninth Circuit made the same error it had made "many times" before: failing to define the clearly established right with specificity. Quoting its precedent, the Court said that "it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force"; "the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue . . . ." The Court found the Ninth Circuit's citation to *Gravelet-Blondin* insufficient, for that decision "involved police force against individuals engaged in *passive* resistance." The Court remanded to allow the Ninth Circuit to assess whether clearly established law barred Officer Craig "from stopping and taking down a man in *these circumstances*." (Emphasis added.)

● *Henry Schein, Inc. v. Archer & White Sales Inc.*, 17-1272. The Court unanimously ruled that the "wholly groundless" exception to arbitrability is inconsistent with the Federal Arbitration Act and the Court's precedent construing it. Archer and White entered into a distribution agreement with Schein that contained an arbitration clause. The clause stated that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]." After their relationship soured, Archer and White sued Schein in federal district court alleging antitrust violations and seeking both money damages and injunctive relief. Schein asked the district court to refer the issue to arbitration. Archer and White countered that part of their requested relief was injunctive relief, which is not subject to arbitration. Schein noted, however, that the clause expressly incorporated the AAA's rules, which provide that arbitrators decide whether an arbitration agreement applies to a particular dispute. Relying on Fifth Circuit precedent, the district court ruled that Schein's request for arbitration was wholly groundless and denied the motion for arbitration. The Fifth Circuit affirmed. In an opinion by Justice Kavanaugh, the Court vacated and remanded.

The Court explained that, "[u]nder the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." Further, the "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (Internal quotation marks omitted.) See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). The Court noted, however, that some courts of appeal have held that courts should decide arbitrability, despite a contract delegating that issue to an arbitrator, "if, under the contract,

the argument for arbitration is 'wholly groundless.'" Those courts reasoned that doing so "enabled courts to block frivolous attempts to transfer disputes from the court system to arbitration." The Court rejected that approach, ruling that the Act requires courts to interpret contracts as written. If a contract grants arbitrators the authority to decide arbitrability issue, a court may not override it—regardless of the court's view of the strength of the arguments. The Court pointed to its precedent holding that a court may not rule on the merits of an underlying claim that is assigned to an arbitrator even if the claim appears frivolous. *AT&T Techs., Inc. v. Communications Workers of Am*., 475 U.S. 643, 649 (1986). So too, held the Court, with arbitrability questions.

The Court rejected Archer and White's four arguments in defense of the "wholly groundless" exception. First, Archer and White pointed to §§3 and 4 of the Act, which require courts to be "satisfied" that issues are "referable to arbitration" under the "agreement" and require courts to compel arbitration only "in accordance with the terms of an agreement." That argument, said the Court, amounts to the contention that courts must resolve all issues of arbitrability. But "that ship has sailed." The Court's precedents hold that the court must first determine that a valid arbitration agreement exists; if it does, courts must abide by provisions delegating arbitrability issues to arbitrators. Second, the Court rejected Archer and White's argument that §10 of the Act—which gives courts authority to hold on appeal that an arbitrator "exceeded" his or her "powers"—gives courts power to make comparable rulings at the front end of the process. Third, the Court declined to engraft an exception to the Act in the name of efficiency, noting that collateral litigation over what constitutes a "wholly groundless" claim may offset any possible time and money saved by letting arbitrators rule on groundless claims. Finally, the Court concluded that it may not rewrite the statute to deter frivolous arbitration motions. The Court remanded the case, expressing no view on whether the contract at issue in fact delegated the arbitrability question to an arbitrator.

● *Culbertson v. Berryhill*, 17-773. The Court unanimously held that the Social Security Act's limits on attorney's fees apply separately to administrative proceedings and court proceedings, and do not impose an aggregate limit for both stages of proceedings. Under 42 U.S.C. §406(a)(2), fee awards for representation before the Social Security Administration are limited to "25 percent of the total amount of such past-due benefits" or, if the claimant has a fee agreement with counsel, the lesser of that amount or $6,000. Meanwhile, §406(b) limits fees for representation before the court to "not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." The Act authorizes the agency to withhold past-due benefits to pay those fees directly to the attorney. Petitioner Richard Culbertson is an attorney who represented a person claiming Social Security disability benefits (Katrina Wood). After proceedings before the agency level, the agency denied the claim. Wood sought judicial review, at which time she signed a contingency-fee agreement with Culbertson to pay 25% of the total past-due benefits awarded by the court. The district court reversed the agency. On remand, the agency awarded $34,383 in benefits to Wood and withheld 25% of those benefits ($8595.75) to cover any direct payment of attorney's fees. The agency also granted Culbertson's §406(a) petition in part, awarding him $2865 for representing Wood before the agency. Culbertson then moved in district court for a separate fee award under §406(b) for representing Wood there. Although the math is complicated (in part because of how everyone dealt with a separate $4107.27

attorney's fee award Culbertson obtained under the Equal Access to Justice Act), the end result was this: The court granted his request only in part, because the attorney's fees he sought from the court, when added to the $2865 he already received from the agency, would (when taking into account the EAJA fees) have given him total attorney's fees of more than 25% of Wood's past-due benefits. The Eleventh Circuit affirmed, holding that the 25% limit from §406(b) applies to the total fee award under both §§406(a) and (b). In an opinion by Justice Thomas, the Court reversed.

The Court relied on §406(b)'s plain language, which refers to proceedings before courts and then to "a reasonable fee for *such representation*, not in excess of 25 percent of the total." (Emphasis added.) The phrase "such representation," concluded the Court, refers to the representation before the court. "Accordingly, the 25% cap applies only to fees for representation before the court, not the agency." This makes sense, the Court found: "Because some claimants will prevail before the agency and have no need to bring a court action, it is unsurprising that the statute contemplates separate fees for each stage of representation." The Court also noted that the two provisions' calculation of fee limits are different because only §406(a) has the $6,000 limit. Finally, the Court rejected the argument proffered by Court-appointed amicus that the "fees are certified for payment out of a single source: the 25% past-due benefits withheld by the Commissioner." The Court agreed that "if there is only a single 25% pool for direct payment of fees, Congress might not have intended aggregate fees higher than 25%." But, held the Court, the statutory text does not permit that reading. And the agency's choice to withhold only one pool of 25% does not alter the statutory text.

II. Cases Granted Review

● *Rucho v. Common Cause,* 18-422. The Court will review a three-judge district court decision holding that 12 of the 13 North Carolina congressional districts drawn by a 2016 redistricting plan violate the Equal Protection Clause because they were gerrymandered to discriminate against Democratic voters. After the 2010 census, the Republican-controlled legislature drew a congressional districting map that its drafter said was intended "to create as many districts as possible in which GOP candidates would be able to successfully compete for office." After that plan was invalidated in part as a racial gerrymander, the Republican legislature appointed the same person to "draw a map that would maintain the existing partisan makeup of the state's congressional delegation," which "included 10 Republicans and 3 Democrats." The plan was completed and approved in 2016. Two groups of plaintiffs—comprising, among others, 26 individual voters spanning all 13 congressional districts—filed separate lawsuits challenging the 2016 plan as an unconstitutional partisan gerrymander. After a trial, a divided panel held that plaintiffs had statewide standing for their claims and that the map was unconstitutional under the Equal Protection Clause, the First Amendment, and the Elections Clauses. While the case was on appeal to the Supreme Court, the Court decided *Gill v. Whitford*, 138 S. Ct. 1916 (2018), which rejected statewide standing in partisan gerrymandering cases and instead held that plaintiffs must establish standing by showing that the districts in which they live were unnecessarily "packed" or "cracked." The Court then vacated the district court decision and remanded for further consideration in light of *Gill*. On remand, the district court

held that at least one plaintiff had standing to challenge each of the 13 congressional districts; and that 12 of the districts were unconstitutional. 318 F. Supp. 3d 777.

On the merits, the district court held that "to prove a prima facie partisan gerrymandering claim under the Equal Protection Clause, a plaintiff must show both [1] discriminatory intent and [2] discriminatory effects," and that the discriminatory effects are not "attributable to the state's political geography or another legitimate redistricting objective." The court explained that the necessary discriminatory effect is that a voter is placed in a packed or cracked district. The court further explained that "each of the three elements of a partisan vote dilution claim must be satisfied for each district." Then, after finding "compelling statewide evidence bearing on discriminatory intent, discriminatory effects, and lack of justification," the court walked through each district. Aided by numerous alternative districting plans offered by plaintiffs, including thousands of computer-generated plans, the court "conclude[d] that partisan considerations predominated in the drawing of all but one of the thirteen districts in the 2016 Plan."

The state defendants raise three core issues on appeal. First, they maintain that plaintiffs lack standing. That is so, first, because this case "has always been an effort to vindicate a generalized preference to see more Democrats from North Carolina elected to Congress"—a sort of injury *Gill* deemed insufficient. The state defendants also contend that plaintiffs' claimed district-specific "dilutionary" injuries do not suffice because "every voter still has a full right to cast an undiluted vote." In short, they say, "[v]oters do not suffer cognizable injury from the lack of proportional representation in the legislature, as this Court's cases 'clearly foreclose any claim that the Constitution requires proportional representation.'" Second, the state defendants argue that partisan gerrymandering claims are non-justiciable because it is a political question for which there is no workable legal test. Third, the state defendants fault the district court's approach, saying it "produced four separate tests, each of which would encourage ever-more redistricting litigation while threatening state-drawn districting maps across the country."

● *Lamone v. Benisek,* 18-726. The Court will review a three-judge district court decision holding that Maryland's 2011 congressional districting plan constitutes an unconstitutional partisan gerrymander. In 2016, plaintiffs amended their complaint to allege a First Amendment retaliation claim. Specifically, they asserted that the drafters of the 2011 plan "purposefully and successfully flipped [the former Sixth District] from Republican to Democratic control" by "moving the district's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." At an earlier stage of the case, the district court held that plaintiffs asserting this type of claim must allege three elements: (1) "the plaintiff must allege that those responsible for the map redrew the lines of his district with the specific intent to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated"; (2) they must allege "that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference;"

and (3) "the plaintiff must allege causation—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." The plaintiffs requested a preliminary injunction, which the district court denied on the ground that they were unlikely to show the required causation. The Supreme Court affirmed the denial. *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (*per curiam*). On remand, the district court awarded summary judgment to plaintiffs, enjoined the state from conducting any further elections under the 2011 map, and directed the state to submit, for the district court's approval, a new congressional districting plan that redraws the boundaries.

The district court first concluded that the Maryland Democratic officials who drew the 2011 map had the requisite partisan intent: they had "a narrow focus on diluting the votes of Republicans in the Sixth Congressional District in an attempt to ensure the election of an additional Democratic representative in the State's [eight-member] congressional delegation." Next, the court held that the redrawn district "meaningfully burdened [plaintiff's] representation rights" by making it "much less likely" they could "elect their preferred candidate than before the 2011 redistricting," as shown by the outcomes of the three post-2011 elections. Third, "as to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent." In a separate section of its opinion, the district court held that the state also violated the plaintiffs' First Amendment right to associate. The court quoted Justice Kagan's concurring opinion in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), stating that plaintiffs can prove associational injury, as "distinct from vote dilution," by showing that the state has "burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." The court ruled that plaintiffs met that test by showing that "voter engagement in support of the Republican Party dropped significantly" and that it became more difficult for plaintiffs and other Republicans "to 'band together in promoting among the electorate candidates who espouse their political views.'"

The state defendants argue that the district court did not set forth a workable "limited and precise" test for adjudicating partisan gerrymandering claims. They argue that the district court's approach conflicts with *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), where the Court refused to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." The state faults the associational right holding, noting that "any redistricting" could cause the affects the court identified. And the state asserts that the district erred by treating the prior map as a constitutional baseline, which prevents legislatures from remedying a past partisan gerrymander. More generally, the state criticizes the district court for not providing "any method to measure how much" vote dilution "is too much." The state separately asserts that the district court improperly granted summary judgment by resolving disputes of material fact and making credibility findings. Finally, the state maintains that injunctive relief is foreclosed by plaintiffs' delays during district court proceedings, particularly in not asserting a First Amendment retaliation claim until their 2016 amended complaint.

● *Iancu v. Brunetti,* 18-302. The Court will resolve whether the provision of the Lanham Act barring registration of a trademark if it contains "immoral" or "scandalous" matter, 15 U.S.C. §1052(a), is facially invalid under the Free Speech Clause. Eric Brunetti is the proprietor of a clothing line. In 2011 he applied for a federal registration of the mark "FUCT" for use on various lines of apparel. A U.S. Patent and Trademark Office examining attorney refused registration under §1052(a) on the ground that FUCT will be perceived as a scandalous term. The Trademark Trial and Appeal Board affirmed. The Federal Circuit reversed. 877 F.3d 1330. The court relied in part on *Matal v. Tam*, 137 S. Ct. 1744 (2017), which held that the prohibition of registering trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead" is unconstitutional because "[s]peech may not be banned on the ground that it expresses ideas that offend." The Federal Circuit reasoned that "[t]he Supreme Court's decision in *Tam* supports our conclusion that the government's interest in protecting the public from off-putting marks is an inadequate government interest for First Amendment purposes." It also concluded in the alternative that the scandalous-mark provision would not survive First Amendment standards that apply to commercial speech.

The United States argues that *Tam* is not controlling because that case involved viewpoint discrimination. By contrast, it argues, a "significant body of precedent hold[s] that restrictions on the use of profanity and sexual images are viewpoint neutral." The United States acknowledges that §1052(a) is a content-based restriction, but insists that "content-based restrictions on registration are a longstanding feature of federal trademark law, including in provisions that have never been viewed as constitutionally suspect." The United States maintains that the provision is properly viewed as not restricting speech, for it merely prohibits the registration of trademarks. And "[e]ven without federal registration, respondent may use vulgar terms or symbols to identify his goods in commerce, and he may seek to enforce his chosen mark in both state and federal courts against others whom he believes have misused it or have misappropriated any goodwill associated with it." In that vein, the United States argues that §1052(a) should be analyzed not as a restriction on speech, but as a refusal to provide a government benefit—and the government has broad latitude to set conditions on government benefits, so long as they are viewpoint neutral. Finally, the United States asserts that, at the very least, the trademark-registration program should be viewed as a commercial speech restriction subject to less demanding scrutiny, which it survives because the government has a strong "interest in protecting the public from scandalous images."

● *Emulex Corp. v. Varjabedian*, 18-459. At issue is whether §14(e) of the Securities Exchange Act of 1934—which bars false statements and material omissions made in connection with a tender offer—provides a private right of action for a negligent misstatement or omission. Emulex was an electronics equipment producer that sought to merge with Avago Technologies Wireless (USA) Manufacturing Inc. through a tender offer. Under the terms of that tender offer, a subsidiary of Avago offered to pay $8 for every share of outstanding Emulex stock. Emulex filed a recommendation statement with the Securities and Exchange Commission listing reasons for approving the merger. The next day, Gary Varjabedian, a shareholder of Emulex, filed a federal class action seeking to enjoin the merger. He alleged that the recommendation statement negligently failed to include important information, making the statement misleading. The district court dismissed the case on the ground

that §14(e) of the Securities and Exchange Act includes a scienter requirement, which mere negligent conduct does not satisfy. The Ninth Circuit reversed. Recognizing a circuit split on the issue, it held that §14(e) requires a showing of "only negligence, not scienter." 888 F.3d 399.

The Ninth Circuit reasoned that §14(e)'s text is "devoid of any suggestion that scienter is required" and found that the Court had construed "largely identical" text to "require[] a showing of negligence, not scienter." See *Aaron v. SEC*, 446 U.S. 680 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The court also pointed to §14(e)'s "legislative history and purpose," which "place[] more emphasis on the quality of information shareholders receive in a tender offer than on the [issuer's] state of mind." Petitioner Emulex argues that §14(e) uses a number of words—"fraudulent," "deceptive," and "manipulative"—that undeniably "connote[] intentional or willful conduct designed to deceive or defraud investors," "a type of conduct quite different from negligence." (Internal quotation marks omitted.) It also argues that §14(e) is modeled on the anti-fraud provisions of Securities Exchange Act §10(b) and Rule 10b-5, which the Court in *Ernst & Ernst* held require a showing of scienter. Emulex adds that §14(e) "lacks the 'significant procedural restrictions' that Congress has included when it has created an express right of action under the securities laws for negligence."

● *Taggart v. Lorenzen*, 18-489. At issue is whether, under bankruptcy law, a creditor can be found in contempt for violating a discharge injunction if the creditor had a good-faith belief that the injunction did not apply to its actions. Section 524(a)(2) of the Bankruptcy Code provides that a bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." And §105(a) authorizes courts to issue any order necessary to carry out the provisions of the bankruptcy code. The question is whether courts may, under §105(a), find a creditor in contempt for violating §542(a)(2) if the creditor acted in good faith.

Respondents sued petitioner Bradley Taggart in state court for allegedly transferring his interest in an LLC without honoring the LLC's operating agreement's provision giving respondents a right of first refusal to buy his interest. Before trial, Taggart filed for Chapter 7 bankruptcy and received a bankruptcy discharge. Taggart then sought to be dismissed from the state-court litigation (which was going forward anyway against Taggart's attorney, who had paid for the LLC interest). The trial court refused, finding Taggart was a necessary party—but respondents agreed not to pursue a money judgment against him. After respondents prevailed at trial, they sought attorney's fees from Taggart, alleging that his post-bankruptcy participation in the case fell outside the discharge injunction. Taggart alleged in both state court and federal bankruptcy court that respondents' attempt to obtain attorney's fees from him violated the bankruptcy discharge. Both courts concluded that respondents had violated the discharge injunction. The bankruptcy court held respondents in contempt for the violation, rejecting the argument that a good-faith belief that their actions were proper foreclosed liability. The Bankruptcy Appellate Panel reversed, concluding that a finding of contempt requires that a creditor be aware both of the discharge *and* that the discharge applied to the creditor's specific claim. The Ninth Circuit affirmed, holding that respondents could not be in contempt because they believed in good faith that the discharge injunction was inapplicable. 888 F.3d 438.

The Ninth Circuit followed circuit precedent holding that "the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." Taggart argues that, as a general principle, good faith is not a bar to a finding of contempt because the purpose of contempt is remedial and not dependent on intent. He emphasizes that effectuating the bankruptcy discharge requires that discharged debtors have recourse for injunction violations. Respondents counter that contempt orders are equitable and give courts discretion to determine if a damages award is appropriate. They also argue that "[t]he question here is relevant only in cases where the scope of the discharge is ambiguous and the creditor seeks a court order resolving the ambiguity. In that circumstance, a creditor ought to be able to request and obtain a court's determination of the discharge's scope without fear of sanctions if the discharge is ultimately found applicable."

● *United States v. Davis*, 18-431. Federal law makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. §924(c)(1)(A). Section 924(c)(3)(B) specifies that the term "crime of violence" includes any "offense that is a felony . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." At issue is whether that definition is unconstitutionally vague.

Respondents Maurice Davis and Andre Glover were involved in robberies of four convenience stores using a shotgun. The United States sought criminal convictions under §924(c) for Davis and Glover's use of a firearm during a crime of violence. Before trial, Davis and Glover moved to dismiss the §924(c) claims, arguing that the definition of "crime of violence" is unconstitutionally vague. Each was ultimately convicted of several crimes, including brandishing a short-barreled shotgun during a "crime of violence." Davis and Glover appealed, and the Fifth Circuit affirmed. Davis and Glover then petitioned for review in the Supreme Court. While the petition was pending, the Court held in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), that the identically worded definition of "crime of violence" in 18 U.S.C. §16(b) was unconstitutionally vague. The Court then granted Davis and Glover's petitions, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of *Dimaya*. On remand, the Fifth Circuit found that §924(c)(3)(B) is impermissibly vague.

The statute at issue in *Dimaya*, 18 U.S.C. §16(b), defined what prior felony convictions rendered aliens deportable. In holding §16(b)'s "residual clause" unconstitutionally vague, the Court explained that it uses a "categorical approach" that asks whether "the ordinary case" of the offense poses the required "substantial risk." But, *Dimaya* held, a court cannot reliably determine the nature of a particular crime's "ordinary case" or what level of risk suffices. (*Dimaya* relied on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which found the Armed Career Criminal Act's residual clause unconstitutionally vague.) The United States argues in its petition that *Dimaya* does not control here because §924(c)(3)(B) can be enforced under a case-by-case inquiry as to whether the specific conduct at issue"—not the hypothetical conduct of an 'ordinary case'—satisfies [its] substantial-risk test . . . . And, so construed, Section 924(c)(3)(B) does not implicate the constitutional infirmity with the ordinary-case approach that was identified in *Dimaya* and *Johnson*[.]" The United States reasons that

the Court adopted a categorical approach "in the singular context of judicial identification of what crimes (most often, state crimes) of prior conviction fit federal definitions of violent crimes so as to expose a defendant to enhanced penalties or other adverse consequences in subsequent federal proceedings." (Internal quotation marks omitted.) Here, by contrast, "[w]here the conduct that constitutes the 'crime of violence' is already part of the offense conduct that the government must prove to the jury, it is both natural and practical for the jury also to determine whether that conduct 'by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense,' 18 U.S.C. 924(c)(3)(B)."

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