Supreme Court Review: October Terms 2015 and 2016

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OCTOBER TERM 2015

## I. Criminal procedure

### A. Fourth Amendment

Utah v. Streiff, 136 S.Ct. 2056 (2016). Evidence seized incident to a lawful arrest on an outstanding warrant should not be suppressed when the warrant was discovered during an investigatory stop later found to be unlawful. Discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest.

Birchfield v. North Dakota, 136 S.Ct. 2160 (June 23, 2016). In the absence of a warrant, a state may make it a crime for a person to refuse to take a breath test, but not a blood test, to detect the presence of alcohol in the person's blood.

### B. Eighth Amendment

Montgomery v. Louisiana, 136 S.Ct. 718 (2016). *Miller v. Alabama* adopts a new substantive rule that applies retroactively on collateral review to people sentenced to life without possibility of parole for crimes committed as juveniles.

### C. Vagueness and the Armed Career Criminal Act

Welch v. United States, 136 S.Ct. 1257 (2016). Johnson v. United States announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review.

### D. Due process

Williams v. Pennsylvania, 136 S.Ct. 1899 (2016). Under the Due Process Clause, there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.

Foster v. Chatman, 136 S.Ct. 1737 (2016). (1) The Court has jurisdiction to review the judgment of the Georgia Supreme Court denying Timothy Foster a certificate of probable cause on his claim, under Batson v. Kentucky, that the state's use of peremptory challenges to strike all four black prospective jurors qualified to serve on the jury for his capital murder trial was racially motivated; and (2) the decision of the Georgia Supreme Court that Foster failed to show purposeful discrimination was clearly erroneous.

### E. Bribery

McDonnell v. United States, 136 S.Ct. 2355 (2016). setting up a meeting, talking to another official, or organizing an event or agreeing to do so, without more, does not fit the definition of "official act," for purposes of the federal bribery statute.

## II. Constitutional rights

### A. Freedom of Speech

Friedrichs v. California Teachers Association, 136 S.Ct. 1083 (2016). Affirmed by an evenly divided Court. (1) Whether *Abood v. Detroit Board of Education* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

Heffernan v. City of Patterson, 136 S.Ct. 1412 (2016). The First Amendment bars the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate.

### B. Voting

Evenwel v. Abbott, 136 S.Ct. 1120 (2016). The "one-person, one-vote" principle under the Equal Protection Clause allows States to use total population, and does not require States to use voter population, when apportioning state legislative districts.

### C. Reproductive rights

Whole Women's Health v. Cole, 136 S.Ct. 2292 (2016). Texas law restricting access to abortion – by requiring doctors have admitting privileges at a hospital within 30 miles of where an abortion is performed and requiring facilities to have surgical level facilities -- creates an impermissible undue burden on a woman's right to abortion.

### D. Equal protection

Fisher v. University of Texas, Austin, 136 S.Ct. 2198 (2016). The University of Texas affirmative action program that uses race as one factor among many in admissions decisions is constitutional.

## III. Civil rights statutes

Zubik v. Burwell, 136 S.Ct. 1557 (2016). Whether the HHS contraceptive-coverage mandate and its "accommodation" violate the Religious Freedom Restoration Act by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the government has not proven that this compulsion is the least restrictive means of advancing any compelling interest. Case remanded to the Courts of Appeals for possible settlement.

CRST Van Expedited, Inc. v. EEOC, 136 S.Ct. 1642 (2016). A favorable ruling on the merits is not a necessary predicate to find that a defendant is a prevailing party

Green v. Brennan, 136 S.Ct. 1769 (2016). When there is a constructive discharge claim, the "matter alleged to be discriminatory" includes the employee's resignation and the 45–day clock for a constructive discharge begins running only after the employee resigns.

## IV. Federal court jurisdiction

Campbell-Ewald v. Gomez, 136 S.Ct. 663 (2016). Consumer's complaint was not rendered moot by unaccepted offer of judgment.

Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016). Consumer could not satisfy the injury-in-fact demands of Article III standing by alleging a bare procedural violation of the Fair Credit Reporting Act. Case remanded to give plaintiff the opportunity to demonstrate a "concrete injury."

## V. Executive power

United States v. Texas, 136 S.Ct. 2271 (2016). Affirmed by an evenly divided Court. (1) Whether a state that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA) to challenge the Secretary of Homeland Security's guidance seeking to establish a process for considering deferred action for certain aliens because it will lead to more aliens having deferred action; (2) whether the guidance is arbitrary and capricious or otherwise not in accordance with law; (3) whether the guidance was subject to the APA's notice-and-comment procedures; and (4) whether the guidance violates the Take Care Clause of the Constitution, Article II, section 3.

OCTOBER TERM 2016

## I. Criminal law and procedure

### A. Sixth Amendment right to fair trial

*Pena-Rodriguez v. Colorado*, 350 P.3d 287 (Colo. 2015), *cert. granted*, 136 S.Ct. 1513 (2016). Whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

B. Ineffective assistance of counsel

*Buck v. Davis*, 623 Fed.Appx. 668 (5th Cir. 2015), *cert. granted* 136 S.Ct. 2409 (2016). Whether the Fifth Circuit imposed an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied petitioner a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an "expert" who testified that petitioner was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing.

C. Vagueness

*Beckles v. United States*, 616 Fed.Appx. 415 (11th Cir. 2015), *cert. granted*, 136 S.Ct. 2510 (2016). (1) Whether *Johnson v. United States* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in United States Sentencing Guidelines (U.S.S.G.) § 4B1.2(a)(2) (defining "crime of violence"); (2) whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review; and (3) whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*.

*Lynch v. DiMaya*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 136 S.Ct. ___ (Sept. 29, 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.

## II. Constitutional rights

A. First Amendment

1. Speech

*Lee v. Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *cert. granted*, 136 S.Ct. ___ (Sept. 29, 2016). Whether the disparagement provision of the Lanham Act, 15 U.S.C. 1052(a), which provides that no trademark shall be refused registration on account of its nature unless, *inter alia*, it "[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" is facially invalid under the Free Speech Clause of the First Amendment.

*Expressions Hair Design v. Schniederman*, 808 F.3d 118 (2d Cir. 2015), *cert. granted*, 136 S.Ct. ___ (2016). Whether state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or regulate economic conduct (as the Second and Fifth Circuits have held).

*Packingham v. North Carolina*, 368 F.3d 380 (N.C. 2015), *cert. granted*, 137 S.Ct. ___ (2016). Whether, under the court's First Amendment precedents, a law that makes it a felony for any person on the state's registry of former sex offenders to "access" a wide array of websites – including Facebook, YouTube, and

nytimes.com – that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts, is permissible, both on its face and as applied to petitioner, who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

2. Religion

*Trinity Lutheran Church of Columbia v. Pauley*, 788 F.3d 779 (8th Cir. 2015), *cert. granted*, 136 S.Ct. 691 (2016). Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

B. Voting

*Bethune-Hill v. Virginia State Board of Elections*, 141 F.Supp.3d 505 (E.D. 2015), *probable jurisdiction noted*, 136 S.Ct. 2406 (2016). (1) Whether the court below erred in holding that race cannot predominate even where it is the most important consideration in drawing a given district unless the use of race results in "actual conflict" with traditional districting criteria; (2) whether the court below erred by concluding that the admitted use of a one-size-fits-all 55% black voting age population floor to draw twelve separate House of Delegates districts did not amount to racial predominance and trigger strict scrutiny; (3) whether the court below erred in disregarding the admitted use of race in drawing district lines in favor of examining circumstantial evidence regarding the contours of the districts; (4) whether the court below erred in holding that racial goals must negate all other districting criteria in order for race to predominate; and (5) whether the court below erred in concluding that the General Assembly's predominant use of race in drawing House District 75 was narrowly tailored to serve a compelling government interest.

*McCrory v. Harris*, 773 F.Supp.3d 1338 (M.D.N.C. 2015), *probable jurisdiction noted*, 136 S.Ct. 2512 (2016). 1) Whether the court below erred in presuming racial predominance from North Carolina's reasonable reliance on this Court's holding in *Bartlett v. Strickland* that a district created to ensure that African Americans have an equal opportunity to elect their preferred candidate of choice complies with the Voting Rights Act (VRA) if it contains a numerical majority of African Americans; (2) whether the court below erred in applying a standard of review that required the State to demonstrate its construction of North Carolina Congressional District 1 was "actually necessary" under the VRA instead of simply showing it had "good reasons" to believe the district, as created, was needed to foreclose future vote dilution claims; (3) whether the court below erred in relieving plaintiffs of their burden to prove "race rather than politics" predominated with proof of an alternative plan that achieves the legislature's political goals, is comparably consistent with traditional redistricting principles, and brings about greater racial balance than the challenged districts; (4) whether, regardless of any other error, the three-judge court's finding of racial gerrymandering violations was based on clearly erroneous fact-finding; (5) whether the court below erred in failing to dismiss plaintiffs' claims as being barred by claim preclusion or issue preclusion; and (6) whether, in the interests of judicial comity and

federalism, the Court should order full briefing and oral argument to resolve the split between the court below and the North Carolina Supreme Court which reached the opposite result in a case raising identical claims.

C. Takings

*Murr v. Wisconsin*, 859 N.W.2d 628 (Wis. 2015), *cert. granted*, 136 S.Ct. 890 (2016). Whether, in a regulatory taking case, the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.

## III. Civil rights

A. Malicious prosecution suits

*Manuel v. City of Joliet*, 590 Fed. Appx. 641 (7th Cir. 2015), *cert. granted*, 136 S.Ct. 890 (2016). Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

B. Housing Discrimination

*Bank of American v. City of Miami*, 800 F.3d 1262 (11th Cir. 2015), *cert. granted*, 136 S.Ct. 2544 (2016). (1) Whether, by limiting suit to "aggrieved person[s]," Congress required that a Fair Housing Act plaintiff plead more than just Article III injury-in-fact; and (2) whether proximate cause requires more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some theoretical chain of contingencies.

*Wells Fargo & Co. v. City of Miami*, 800 F.3d 1258 (11th Cir. 2015), *cert. granted*, 136 S.Ct. 2544 (2016) 1) Whether the term "aggrieved" in the Fair Housing Act imposes a zone-of-interests requirement more stringent than the injury-in-fact requirement of Article III; and (2) whether the City is an "aggrieved person" under the Fair Housing Act.

C. Immigration

*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.

D. Transgender discrimination

*Gloucester County School Board v. G.G.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 137 S.Ct. ___ (2016). (1) Whether courts should extend deference to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought; and (2) whether, with or without deference to the agency, the Department of Education's specific interpretation of Title IX and 34 C.F.R. § 106.33, which provides that a funding recipient providing sex-separated facilities must "generally treat transgender students consistent with their gender identity," should be given effect.