SULLIVAN & CROMWELL LLP

SUPREME COURT BUSINESS REVIEW

October Term 2022

Contents

Axon Enterprises v. *FTC* / *SEC* v. *Cochran*

Administrative Law - Constitutional Challenges

Many federal statutes require parties subject to administrative enforcement actions to first raise their claims to agency adjudicators before raising those claims in federal court. In *Axon* and *Cochran*, the Supreme Court considered whether two of those statutes, the Federal Trade Commission Act and the Securities Exchange Act of 1934, require agency review of claims challenging the constitutional structure of the administrative agencies themselves.

Axon and *Cochran* involved enforcement actions initiated by the FTC and SEC. In response to those actions, the regulated parties sued in federal district court, arguing that the agency proceedings against them were unconstitutional. Both challengers claimed that the Administrative Law Judges overseeing the enforcement actions were not politically accountable, and the defendant in the FTC action also argued that the agency could not act as both judge and prosecutor. Federal district courts dismissed both challengers' claims for lack of jurisdiction, and the Fifth and Ninth Circuit reached opposite conclusions on appeal.

The Supreme Court unanimously sided with the challengers. It reasoned that, absent a statutory directive, their constitutional claims were not "the type" that generally must be raised before an agency. The Court explained that (i) later judicial review would not be meaningful because the challengers argue that the enforcement proceedings themselves are unconstitutional, (ii) the challengers' claims were collateral to the agencies' proceedings, and (iii) the agencies had no special expertise in the constitutional issues raised by the challengers.

As a result of *Axon* and *Cochran*, regulated parties may go straight to federal district court to challenge the structure of the FTC or SEC, without first raising their claims in agency enforcement proceedings. Although the Court's decision did not resolve the merits of the challengers' constitutional claims, it will likely accelerate those challenges by ensuring that federal district courts will have the opportunity to weigh in sooner.

Nos. 21-86 and 21-1239

Opinion Date: 4/14/23

Vote: 9-0

Author: Kagan, J.

Lower Courts: 5th Cir. and 9th Cir.

Following Axon *and* Cochran, *regulated parties arguing that certain agencies are unconstitutionally structured will be able to pursue their claims directly in federal district court.*

Coinbase, Inc. v. *Bielski*

Arbitration – Stays Pending Appeal on Arbitrability

Under Section 16(a) of the Federal Arbitration Act (FAA), when a district court denies a party's motion to compel arbitration, the losing party may immediately appeal that decision. The statute, however, does not say whether district court proceedings must be stayed while that appeal is pending. Lower courts divided on whether such a stay is mandatory or instead a decision left to the district judge's discretion, and the Supreme Court agreed to resolve that split in *Coinbase*.

The Court held that district courts must stay proceedings while an appeal of a denial of a motion to compel arbitration is pending. The Court reasoned that, although the FAA does not expressly require a stay, Congress enacted the immediate-review provision in Section 16(a) against the background principle that appeals divest the district court of authority over aspects of the case that are involved in the appeal. Because an appeal on the question of arbitrability concerns whether the dispute should proceed in federal court at all, the Court concluded, the entire case is essentially "involved in the appeal." As a result, a stay of district court proceedings is required until the arbitrability question is resolved on appeal. This conclusion makes sense, the Court explained, because allowing the case to proceed in the district court during an appeal on arbitrability would ultimately deprive the losing party of many of the benefits of arbitration, such as "efficiency, less expense, [and] less intrusive discovery."

Going forward, *Coinbase* makes clear that parties may obtain full appellate review of a district court's denial of motions to enforce arbitration agreements without simultaneously having to engage in costly district court litigation.

No. 22-105

Opinion Date: 6/23/23

Vote: 5-4

Author: Kavanaugh, J.

Lower Court: 9th Cir.

Coinbase *holds that when a district court refuses to send a dispute to arbitration and the losing party immediately appeals that decision, pre-trial and trial proceedings must be stayed pending that appeal.*

Dupree v. *Younger*

Civil Procedure – Preserving Legal Issues for Appeal

In federal court, a party generally must wait until final judgment is entered at the end of a case before appealing. In that appeal, the party may raise arguments that were rejected at earlier, interlocutory stages of the case—for example, in a motion for summary judgment that was denied before the case proceeded to trial. Certain interlocutory rulings, however, cannot be appealed after final judgment without further action because they are rendered obsolete by subsequent case developments. For example, a sufficiency-of-the-evidence challenge rejected at summary judgment is not appealable after final judgment unless the litigant has first renewed that challenge in a post-trial motion. In *Dupree*, the Supreme Court considered whether purely legal arguments that are rejected at summary judgment must be raised in a post-trial motion to be preserved for appeal, or whether they are appealable after final judgment without further action.

Resolving a circuit split, the Court held that parties need not raise in a post-trial motion a purely legal issue resolved at summary judgment to preserve the issue for appeal. Defining a "purely legal" issue as one "that can be resolved without reference to any disputed facts," the Court held that re-raising the issue is unnecessary because a district court's decision on the law is not affected by later case developments. The Court's holding thus saves both courts and litigants from the empty exercise of re-asking a purely legal question when the court's answer is unlikely to change, and ensures that unwary litigants do not forfeit appellate review of crucial issues by failing to restate a legal argument the court already rejected.

Going forward, litigants should still renew their arguments in a post-trial motion, even if they believe the district court ruled on purely legal grounds. But they can take some comfort that an inadvertent failure to re-raise a purely legal issue rejected on summary judgment will not cost them the opportunity to appeal.

No. 22-210

Opinion Date: 5/25/23

Vote: 9-0

Author: Barrett, J.

Lower Court: 4th Cir.

Dupree *holds that a party that loses at summary judgment on a purely legal question need not renew that argument in a post-trial motion to preserve it for appeal.*

National Pork Producers Council v. *Ross*

Constitutional Law – Dormant Commerce Clause

The Dormant Commerce Clause is a constitutional doctrine that prevents one state from passing laws that discriminate against other states or from improperly regulating commerce in other parts of the country. In an increasingly interconnected economy, however, one state's regulation of its own commerce and citizens also can have outsized effects elsewhere.

California's Proposition 12 altered the standards for pork products sold in the state and imposed new costs on out-of-state pork producers that sell goods in California. Those producers challenged that law under the Dormant Commerce Clause, contending that (i) Proposition 12 was an extraterritorial regulation because it forced out-of-state producers to substantially alter their operations, and (ii) Proposition 12's burdens on out-of-state businesses outweighed any in-state benefits to human health or animal welfare. The Ninth Circuit rejected both arguments.

A fractured Supreme Court upheld Proposition 12. All nine Justices rejected the pork producers' first argument, holding that a state law is not unconstitutionally extraterritorial solely because it has substantial effects out of state. A majority also rejected the producers' second argument, though it divided into two groups of Justices. One group held that courts cannot balance the in-state moral benefits of a law like Proposition 12 against its out-of-state economic burdens. The other group held that, although such balancing is permissible, the producers simply failed to establish a disproportionate burden on out-of-state businesses under the circumstances of this case.

Following *National Pork Producers*, it will be more difficult for businesses to challenge nondiscriminatory state laws under the Dormant Commerce Clause because they will need to make a strong showing that those laws impose a disproportionate burden on out-of-state commerce. The Court's decision may be particularly relevant for state environmental, social, and governance laws, which often have the practical effect of regulating activity beyond the state's borders but may not directly discriminate against out-of-state businesses.

No. 21-468

Opinion Date: 5/11/23

Vote: 5-4

Author: Gorsuch, J.

Lower Court: 9th Cir.

National Pork Producers *clarifies that the Dormant Commerce Clause does not bar nondiscriminatory state laws that have a significant impact beyond one state's borders, as long as the law's in-state benefits outweigh its burdens on out-of-state businesses.*

Students for Fair Admissions, Inc. v. *President and Fellows of Harvard College*

Constitutional Law - Affirmative Action in Higher Education

In two consolidated cases brought by non-profit Students for Fair Admissions (SFFA), the Supreme Court considered whether the admission programs of Harvard College and the University of North Carolina violate the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act.

The Supreme Court held that both programs were unlawful. The Court noted that the Equal Protection Clause (and thus Title VI) permits action based on race only "in the most extraordinary case[s]." Applying that principle, the Court explained, its previous cases permitted universities to use racial preferences only insofar as they "comply with strict scrutiny," do not "use race as a stereotype or negative," and "have a termination point."

The Court concluded that the challenged programs did not satisfy those requirements. First, the Court reasoned that the schools' justifications for relying on race were too abstract to satisfy strict scrutiny. Second, the Court determined that the programs impermissibly relied on racial stereotypes and disadvantaged some applicants based on their race. Finally, the Court held that the programs lacked a "logical end point."

The Court noted that universities may still "consider[] an applicant's discussion of how race affected his or her life." But it also made clear that universities may not use essays to re-establish the challenged programs. Going forward, there likely will be litigation about whether universities are complying with that mandate. Litigation in the immediate future also will focus on the extent to which *SFFA* bars race-based policies in other contexts, including employment discrimination under Title VII.

Nos. 20-1199 and 21-707

Opinion Date: 6/29/23

Vote: 6-3

Author: Roberts, C.J.

Lower Courts: 1st Cir. and 4th Cir.

In SFFA, *the Supreme Court rejected the use of race-based affirmative action in university admissions. Businesses should expect litigation over whether and how the Court's analysis applies in the employment context under Title VII.*

Ciminelli v. *United States*

Criminal Defense – Federal Fraud Statutes

The federal mail and wire fraud statutes criminalize schemes to defraud private persons of their "property" and the public of "the intangible right of honest services" of government officials. In recent years, the government has brought several prosecutions reflecting expansive interpretations of both statutes.

In *Ciminelli*, prosecutors charged the defendant with wire fraud based on a scheme to rig the bid process for state-funded development projects in Buffalo, New York. The defendant was convicted under the "right to control" theory of property fraud, under which a victim is deprived of "property" if the defendant withholds potentially valuable economic information necessary to make discretionary economic decisions.

The Supreme Court unanimously rejected the "right to control" theory on which the prosecution was based. It held that the federal fraud statutes cover the deprivation of traditional property interests, and that the right to valuable economic information does not qualify. The Court emphasized that the "right to control" theory would criminalize deceptive actions that have traditionally been handled through state contract and tort law.

The same day, the Court also decided *Percoco* v. *United States* (No. 21-1158), in which it rejected the government's attempt to apply the honest services fraud statute to a private citizen based on his influence over government decision-making.

Both cases continue a clear trend over the last decade or more of the Court attempting to rein in federal prosecutors' aggressive use of the fraud statutes, especially to prosecute public corruption. Of the two, *Ciminelli* may have more far-reaching consequences, as it eliminates prosecutors' ability to rely on an often-easier showing that victims were deprived of information relevant to their decision-making, without needing to establish that they lost money or traditional property.

No. 21-1170

Opinion Date: 5/11/23

Vote: 9-0

Author: Thomas, J.

Lower Court: 2d Cir.

Ciminelli *reaffirms that federal fraud prosecutions must be limited to schemes to deprive the victim of money or traditional forms of property. In* Ciminelli *and another case from this Term,* Percoco, *the Court continues a trend of rejecting the government's expansive federal fraud theories.*

United States ex rel. Polansky v. *Executive Health Resources, Inc.*

False Claims Act – *Qui Tam* Actions

The False Claims Act (FCA) authorizes *qui tam* actions by private parties, called "relators," who sue on behalf of the United States. The government may intervene and take over litigating the case during the "seal period"—the window at the outset of the action during which the case is sealed. If the government chooses not to intervene, the relator litigates the action. But the government has a right to intervene later for "good cause."

In *Polansky*, the government chose not to intervene during the seal period. But years later, the government moved to dismiss the case under § 3730(c)(2)(A) of the FCA. The relator argued that the government could not do so because it had not intervened during the seal period. The government responded that § 3730(c)(2)(A) did not require it to intervene at all.

The Supreme Court adopted neither position. Instead, it held that the government may move to dismiss over a relator's objection an FCA action under § 3730(c)(2)(A) so long as it moved to intervene at some point, whether during the seal period or afterward. The Court also held that, in determining whether to grant such motions, district courts should apply the lenient standard under Federal Rule of Civil Procedure 41(a) for voluntary dismissal of civil cases.

Notably, Justice Thomas's dissent stated that there "are substantial arguments that the *qui tam* device is inconsistent with Article II." In a concurrence, Justice Kavanaugh, joined by Justice Barrett, echoed that view. As a result, a direct challenge to the constitutionality of the FCA's *qui tam* provisions may be not far down the road.

No. 21-1052

Opinion Date: 6/16/23

Vote: 8-1

Author: Kagan, J.

Lower Court: 3d Cir.

Polansky *holds that the government may move to dismiss a False Claims Act suit over a relator's objection even if it did not initially intervene in the case, and that courts should almost always grant such motions. But three Justices signaled their view that the FCA's* qui tam *device may be unconstitutional.*

United States ex rel. Schutte v. *SuperValu Inc.*

The False Claims Act – Scienter

The FCA allows private parties to bring lawsuits on behalf of the United States against any person who "knowingly" submits a false claim to the government. In *Schutte*, the Supreme Court considered the nature of that knowledge requirement.

Medicare and Medicaid typically limit their drug reimbursement payments to a pharmacy's "usual and customary" charges to the public. Plaintiffs alleged that certain pharmacies claimed that their retail prices were "usual and customary," even though they frequently offered discounted prices to customers. There was evidence that the pharmacies subjectively knew that these lower, discounted prices qualified as their "usual and customary" charge. The Seventh Circuit, however, held that this subjective knowledge did not matter: the pharmacies could not have "knowingly" submitted false claims unless their interpretation of "usual and customary" was *objectively* unreasonable.

The Supreme Court unanimously reversed. It held that what matters is not whether a defendant's acts were consistent with any objectively reasonable interpretation of the law, but instead whether the defendant knew its claim was false.

Interpreting the language of the FCA, the Court explained that the plaintiffs could establish scienter by making one of three showings: (i) that the defendants actually knew that their reported prices were not "usual or customary"; (ii) that they were aware of a substantial risk that their reported prices were not "usual or customary" and intentionally avoided learning the answer; or (iii) that they were aware of that substantial and unjustifiable risk and submitted the claims anyway. The Court also rejected respondents' argument that the ambiguity of the phrase "usual and customary" precludes a finding of scienter.

No. 21-1326

Opinion Date: 6/1/23

Vote: 9-0

Author: Thomas, J.

Lower Court: 7th Cir.

Schutte *holds that the FCA's scienter element looks to the defendant's subjective awareness of the falsity of its claim, and rejected the lower court's rule that considered only whether the defendant's interpretation of the relevant law was objectively reasonable.*

Turkiye Halk Bankasi A.S. v. *United States*

Foreign Relations Law – Foreign Sovereign Immunities Act

Under the Foreign Sovereign Immunities Act (FSIA), a foreign state and its instrumentalities typically are immune from civil suit in the United States. In *Turkiye Halk Bankasi*, the Supreme Court considered whether that immunity extends to federal criminal prosecution.

The United States indicted Halkbank, a bank owned by Turkey, for conspiring to evade sanctions against Iran. Halkbank challenged the prosecution on the ground that federal courts lack statutory jurisdiction over such prosecutions. Halkbank also contended that it was immune from prosecution under the FSIA.

The Supreme Court rejected both arguments, but left open a third possible avenue for foreign states and their instrumentalities to avoid federal criminal prosecution. The Court held that federal courts have jurisdiction over such prosecutions under the plain text of 18 U.S.C. § 3231, which covers "all offenses against the laws of the United States." And the Court held that the FSIA does not immunize foreign states or their instrumentalities from *criminal* proceedings because, by its text and structure, the FSIA extends only to civil cases. The Court, however, remanded for the Second Circuit to consider whether common-law principles of sovereign immunity render Halkbank immune from federal prosecution.

Depending on how courts—including the Second Circuit on remand—address common-law immunity, *Turkiye Halk Bankasi* may pave the way for more prosecutions in the Unites States of instrumentalities of foreign states. The decision also left open whether *state*—as opposed to federal—prosecutors can prosecute foreign states or their instrumentalities.

No. 21-1450

Opinion Date: 4/19/23

Vote: 9-0

Author: Kavanaugh, J.

Lower Court: 2d Cir.

Turkiye Halk Bankasi *holds that the Foreign Sovereign Immunities Act does not immunize foreign states and their instrumentalities from federal criminal prosecution. The decision's practical impact, however, will depend on how courts, including the Second Circuit on remand, address common-law immunity arguments.*

Abitron Austria GmbH v. *Hetronic International, Inc.*

Intellectual Property – Extraterritorial Application of Trademark Law

In *Abitron*, the Supreme Court considered the extent to which two provisions of the Lanham Act—both of which prohibit the "use in commerce" of goods or services that are likely to be confused with another's U.S. trademark—apply to infringing conduct that occurs outside the United States. The dispute in this case involved a U.S. manufacturer that sued a group of European companies for trademark infringement in connection with sales that occurred outside the United States. The court of appeals held that the Lanham Act applied because those foreign sales had a substantial effect on U.S. commerce by diverting potential sales away from the U.S. manufacturer.

No. 21-1043

Opinion Date: 6/29/23

Vote: 9-0

Author: Alito, J.

Lower Court: 10th Cir.

The Supreme Court unanimously vacated the court of appeals' decision. Applying the well-established presumption against extraterritorial application of U.S. statutes absent clear direction from Congress, the Court first held that the Lanham Act does not apply to extraterritorial conduct. The Court then turned to the question of how to determine whether a particular suit involved a permissible domestic application of the Act or an impermissible extraterritorial one. That determination, the Court explained, turns on whether the alleged conduct relevant to the "focus" of the Lanham Act provisions at issue occurred inside or outside the United States. The provisions at issue here, according to the Court, extend only to when the "infringing use in commerce" by the defendant occurs inside the United States. The Court rejected the broader interpretation of four Justices who concurred in the judgment that would have required only that the "effects" of the infringement—*e.g.*, likely consumer confusion—occur in the United States to constitute a domestic application of the Act.

Abitron *makes clear that provisions of the Lanham Act imposing trademark-infringement liability apply only where the allegedly infringing use of a trademark in commerce occurs in the United States.*

The Court did not further define what constitutes the relevant "use in commerce" that must occur inside the United States to give rise to liability, so future litigation in international trademark infringement cases will likely focus on that question.

Amgen Inc. v. *Sanofi*

Intellectual Property – Patent Validity

Under the Patent Act, a patent's specification must provide enough information to enable any skilled artisan to "make and use" the claimed invention. In recent years, courts have invalidated many patent claims, particularly in the pharmaceutical industry, for failing to satisfy that enablement requirement.

Amgen obtained two patents that claimed a "genus" of antibodies used to treat high cholesterol. Amgen's claims identified how to make 26 specific antibodies and provided two methods for making the others within the genus. When Amgen sued Sanofi for infringement, the district court held that Amgen's patents were invalid because they did not enable others to make the entire claimed genus—which Sanofi argued was millions of antibodies—without undue experimentation. The Federal Circuit affirmed.

The Supreme Court also affirmed. It explained that "a patent which claims an entire class . . . must enable a person skilled in the art to make and use the entire class," emphasizing that "the more a party claims for itself the more it must enable." Applying that standard, the Court held that Amgen had not done enough to show someone skilled in the art how to make all of the claimed antibodies with a "reasonable amount of experimentation."

Amgen clarifies that the Federal Circuit's patent enablement standard applies with full force to claims that cover an entire genus, a holding that may endanger many patents in the pharmaceutical space and require pharmaceutical companies and other inventors to rely, if possible, on narrower patent claims.

No. 21-757

Opinion Date: 5/18/23

Vote: 9-0

Author: Gorsuch, J.

Lower Court: Fed. Cir.

Amgen *holds that patents claiming an entire "genus" must enable skilled artisans to make and use the full scope of the invention without undue experimentation.*

Andy Warhol Foundation for the Visual Arts, Inc. v. *Goldsmith*

Intellectual Property - Copyright Fair Use

The "fair use" doctrine permits the unlicensed use of copyrighted works for various purposes, such as criticism and teaching. To determine whether the doctrine applies, courts consider several factors, including "the purpose and character" of the use of the copyrighted work.

In 1984, pop-culture artist Andy Warhol made a silkscreen portrait of the musician Prince using a photo taken by professional photographer Lynn Goldsmith. Upon Prince's death in 2016, The Andy Warhol Foundation (AWF) licensed the portrait, titled Orange Prince, to Condé Nast for $10,000, without paying Goldsmith. AWF invoked the fair use doctrine, contending that the "purpose and character" factor weighed against copyright infringement because Orange Prince was "transformative"—*i.e.*, its aesthetic and meaning differed from Goldsmith's original photo. After AWF won in district court, the Second Circuit reversed, concluding that the licensed reprint was not fair use.

The Supreme Court affirmed. The Court explained that the fair use defense turns on the specific use at issue—here, the licensed Warhol reprint used in the Condé Nast story. The Court also explained that (i) a commercial purpose cuts against fair use, even though it is not dispositive, and (ii) adding a new aesthetic or meaning to an original work is not alone sufficient to trigger fair use. Applying those principles, the Court held that AWF was not protected by fair use because it licensed Orange Prince to a magazine for commercial purposes and used the portrait to celebrate Prince's life, a purpose indistinguishable from Goldsmith's many licensing deals for her own photo.

Goldsmith limits the fair use defense by holding that what matters is the "purpose and character" of the challenged *use* (here, AWF's licensing to a magazine), rather that the creator's purpose when producing the allegedly infringing work (here, the message of Warhol's silkscreen portraits). As a result, copyright infringement claims may be more likely to succeed in commercial settings going forward.

No. 21-869

Opinion Date: 5/18/23

Vote: 7-2

Author: Sotomayor, J.

Lower Court: 2d Cir.

Goldsmith *limits copyright law's "fair use" defense in contexts where the defendant copies an original work for commercial reasons and uses the new work for similar purposes as the original.*

Glacier Northwest, Inc. v. *International Brotherhood of Teamsters*

Labor & Employment – Preemption of State Tort Law

Under longstanding Supreme Court precedent, the National Labor Relations Act (NLRA) preempts state laws that "arguably" conflict with its protections. In *Glacier Northwest*, the Supreme Court considered whether the NLRA's protection of employees' right to strike preempts state-law tort claims against a union for intentionally damaging company property during a strike.

Glacier Northwest sells ready-mix concrete in the Pacific Northwest. In August 2017, its employees' union announced a work stoppage to commence while Glacier was in the middle of making deliveries of concrete. According to the company, the timing of the strike created a risk that the undelivered concrete would harden and damage its trucks. Although Glacier was able to prevent damage to its trucks, the undelivered concrete hardened and could not be recovered. Glacier sued the union for damages under state tort law, but the Washington Supreme Court held that those claims were preempted by the NLRA.

The Supreme Court reversed. The Court explained that although the NLRA protects the right to strike, its protection is not absolute. In particular, the NLRA does not protect striking employees who fail to take "reasonable precautions" to avoid damage to their employer's property. Here, the Court reasoned, by waiting to initiate the work stoppage until after the employees had mixed the concrete and set out for deliveries, the union not only failed to take reasonable precautions against damage to the concrete and Glacier's trucks, but in fact created that risk. Under those allegations, the Court held, the NLRA did not even "arguably protect" the union's conduct.

Glacier Northwest makes clear that the NLRA does not protect the right of employees to strike in a way that affirmatively creates a risk of damage to their employers' property, but instead requires that they take reasonable precautions to avoid such damage.

No. 21-1449

Opinion Date: 6/1/23

Vote: 8-1

Author: Barrett, J.

Lower Court: Wash. S. Ct.

Glacier Northwest *holds that the National Labor Relations Act does not preempt state-law suits over employee strikes that intentionally endanger employer property.*

Groff v. *DeJoy*

Labor & Employment – Religious Accommodations

Title VII of the Civil Rights Act requires covered employers to accommodate their employees' religious practices unless doing so would impose an "undue hardship" on their business. Relying on a sentence in a 1977 Supreme Court opinion, lower courts had long interpreted "undue hardship" to mean any cost to an employer that is "more than . . . *de minimis*." In *Groff*, for instance, the Third Circuit relied on that language to hold that accommodating the plaintiff's refusal to work on Sundays imposed undue hardship on his employer by disrupting workflow and contributing to a workplace climate of resentment.

The Supreme Court unanimously reversed. Clarifying its earlier decision, the Court explained that an employer that denies a religious accommodation cannot merely show that the costs of the accommodation would be more than *de minimis*. Instead, the employer must show that it would experience a "burden" that is "substantial in the overall context of an employer's business." Under this standard—which the Court noted was more consistent with the statutory term "undue hardship"—courts must conduct a fact-specific inquiry into the particular accommodations at issue and their impact on the employer in light of the "size and operating cost" of the business.

The Court's opinion concluded by providing some guidance for employers going forward. The Court noted that much of the EEOC's existing guidance in this area was sufficiently protective of religious exercise and would likely be unaffected by its decision in this case. Employers facing requests for religious accommodations, the Court cautioned, must consider the costs of different options, such as voluntary shift swapping, before asserting an undue hardship. The Court also explained that the impact of an accommodation on other coworkers is relevant only to the extent it affects the conduct of the business.

No. 22-174

Opinion Date: 6/29/23

Vote: 9-0

Author: Alito, J.

Lower Court: 3d Cir.

Groff *clarifies that employers covered by Title VII must accommodate their employees' religious practices unless doing so would impose a substantial burden on their business.*

Helix Energy Solutions Group, Inc. v. *Hewitt*

Labor & Employment – Fair Labor Standards Act Overtime Pay

Employees covered by the Fair Labor Standards Act (FLSA) generally are entitled to time-and-a-half pay for work over 40 hours a week. The FLSA exempts from that overtime compensation any employee who works as a "bona fide executive." To fall under that exemption, Department of Labor regulations provide that an employee must, among other requirements, be paid "on a salary basis." In *Helix*, the Supreme Court considered whether a highly compensated employee paid a daily rate is paid "on a salary basis."

Michael Hewitt was an employee of Helix Energy Solutions, which paid him a daily rate with no overtime pay. Hewitt earned at least $963 per day, totaling over $200,000 annually. When Hewitt sued Helix under the FLSA for overtime pay, Helix argued that Hewitt was exempted from such compensation as a bona fide executive. The Fifth Circuit held that Hewitt was not a bona fide executive because he was not paid on a salary basis.

The Supreme Court affirmed. Two Department of Labor regulations governed the Court's analysis. One, § 541.602(a), provides that an employee is paid on a salary basis if he or she is paid on a weekly or less frequent basis in a predetermined amount that does not depend on the number of days or hours worked. The Court held that daily-rate employees, regardless of income, are not paid on a salary basis under that standard. The second regulation, § 541.604(b), provides that a daily-rate employee may nevertheless satisfy the salary-basis requirement if his or her employer guarantees a weekly payment of at least $455 *and* that weekly payment approximates the employee's usual earnings. Helix conceded that Hewitt did not meet that latter standard. The Court thus held that Hewitt was not paid on a salary basis and was not a bona fide executive.

Following *Helix*, employers who pay their employees a daily rate must offer overtime, even to highly compensated employees, unless another FLSA exemption applies or the employer guarantees a qualifying weekly payment under § 541.604(b).

No. 21-984

Opinion Date: 2/22/23

Vote: 6-3

Author: Kagan, J.

Lower Court: 5th Cir.

Helix *clarifies that highly compensated employees paid a daily rate are not exempted from the Fair Labor Standard Act's overtime requirements as bona-fide executives unless they also receive a guaranteed weekly payment approximating their usual earnings.*

Mallory v. *Norfolk Southern Railway Co.*

Personal Jurisdiction – Consent as a Condition to Corporate Registration

In *Mallory*, the Supreme Court considered a due process challenge to a Pennsylvania law that requires corporations wishing to do business in the state to register and consent to general personal jurisdiction in Pennsylvania courts—meaning they can be sued in Pennsylvania on "any cause of action," even if the lawsuit has no connection to Pennsylvania.

In a closely divided opinion, the Court held that Pennsylvania's law does not violate the Due Process Clause, because Norfolk Southern consented to Pennsylvania's exercise of jurisdiction by complying with the registration requirement. At least where the company engages in "extensive activities" in the state and there is no other reason to conclude that the exercise of jurisdiction is deeply unfair, the Court held that there is no due process problem with a state requiring foreign corporations to consent to general jurisdiction in its courts in order to access the market. But Justice Alito's concurring opinion—which provided the crucial fifth vote for the majority on the due process issue—suggested that the Pennsylvania law might violate other constitutional provisions, such as the Dormant Commerce Clause.

According to the parties, no other state currently has a law like Pennsylvania's, but every state requires companies to register in order to do business there. Following this decision, other states may determine (whether by legislation or judicial interpretation) that corporations registered to do business in the state are subject to general jurisdiction in their courts. Such statutes may be vulnerable to constitutional challenge on other grounds. But in the meantime, plaintiffs may engage in increased forum-shopping to bring suit in state courts perceived to be particularly favorable, regardless of whether their claims have any connection to those states.

No. 21-1168

Opinion Date: 6/27/23

Vote: 5-4

Author: Gorsuch, J.

Lower Court: Pa. S. Ct.

Mallory *holds that due process concerns do not preclude a state from conditioning the right of out-of-state corporations to do business in the state on the companies' consent to the jurisdiction of its courts over any lawsuit, even if the claims lack any connection to the state.*

Slack Technologies, LLC v. *Pirani*

Securities Litigation – Tracing Requirement

Section 11 of the Securities Act of 1933 (1933 Act) imposes strict liability on issuers for materially false or misleading registration statements. Under Section 11, when a registration statement contains a material misstatement, any person who has acquired "such security" may bring suit. For decades, lower courts had interpreted this to mean that liability attaches only when a buyer can trace the purchased shares to the allegedly misleading registration statement. In 2018, the SEC approved direct listings, a new process for listing shares that, unlike a traditional initial public offering (IPO), can result in the sale of both registered and unregistered shares on the first day of trading. In the context of a direct listing, the Ninth Circuit in *Slack* departed from the long-standing understanding of Section 11's tracing requirement and held that tracing can be satisfied when unregistered shares are traded publicly because of a registration statement.

The Supreme Court unanimously reversed. Although it found no "clear referent" for defining what "such security" in Section 11 means, the Court concluded based on contextual indications that "such security" refers to a security issued under the allegedly misleading registration statement. As a result, liability "runs with [the] registered shares alone," and a Section 11 plaintiff must plead and prove that securities were purchased under the registration statement alleged to be materially misleading, not merely some sort of "minimal relationship" between the securities and the allegedly misleading registration statement.

After *Slack*, plaintiffs face greater hurdles in pursuing Section 11 claims against direct listings than IPOs. But liability under Section 10(b) of the Securities Exchange Act of 1934 still remains a possibility for registration statements issued as part of a direct listing. The Court also declined to interpret Section 12 of the 1933 Act, cautioning that it contains "distinct language that warrants careful consideration."

No. 22-200

Opinion Date: 6/1/23

Vote: 9-0

Author: Gorsuch, J.

Lower Court: 9th Cir.

Slack *clarifies that a claim under Section 11 of the Securities Act of 1933 requires pleading and proving that purchased securities were registered under the allegedly misleading registration statement.*

Bittner v. *United States*

Tax – Failure to Report Foreign Bank Accounts

The Bank Secrecy Act (BSA) and its implementing regulations require U.S. persons who possess a foreign bank or financial account with an aggregate balance of more than $10,000 to file an annual Report of Foreign Bank and Financial Accounts, known as an "FBAR." The statute imposes a maximum penalty of $10,000 for a non-willful violation. In *Bittner*, the Supreme Court addressed how that penalty provision applies to a person with multiple qualifying accounts who fails to file an accurate or timely FBAR. Does that person violate the statute one time (for failing to file the required report) or commit separate violations for each account that is not reported?

A dual Romanian-American citizen with over 50 qualifying foreign accounts did not file FBARs from 2007 to 2011. Although the violations were non-willful, the government sought $2.72 million in penalties—imposing a $10,000 penalty for each account that was not reported in each year. The defendant challenged that amount, contending that he should have been subject to only a single $10,000 penalty each year.

The Supreme Court held that the BSA is best read to authorize penalties on a per-report, not a per-account, basis. The Court noted that the statutory section governing non-willful violations discusses "reports," whereas the section governing willful violations addresses "accounts." The Court then explained that additional "contextual clues"—including the government's own public guidance, the Act's drafting history, and the statute's structure and purpose—supported its reading.

Although *Bittner* determined that penalties for non-willful violations of the FBAR filing requirement are capped at $10,000 per year, the penalty for a willful violation remains the larger of $100,000 or 50% of the relevant account balance. Foreign account holders should file timely, accurate FBARs to avoid penalties.

No. 21-1195

Opinion Date: 2/28/23

Vote: 5-4

Author: Gorsuch, J.

Lower Court: 5th Cir.

Bittner *holds that a non-willful violation of the Bank Secrecy Act's annual reporting requirement for foreign bank accounts exposes the holder to a $10,000 penalty per incorrect report, rather than a $10,000 penalty per foreign account.*

Twitter, Inc. v. *Taamneh*

Technology – Liability for Aiding and Abetting Terrorism

The Anti-Terrorism Act (ATA) imposes civil liability for aiding and abetting "an act of international terrorism." In *Twitter*, U.S. nationals whose family member was killed in an ISIS terrorist attack at a night club in Istanbul sued Twitter for violating the ATA, alleging that Twitter knowingly hosted, recommended, and profited from ISIS content on its platform. They also brought similar claims against Facebook and Google (which owns YouTube).

The Supreme Court held that the claims should be dismissed and clarified the standard for an ATA aiding-and-abetting claim. To state such a claim, the Court held that a plaintiff must allege "conscious, voluntary, and culpable participation" by the defendant in the act of terrorism at issue. Twitter's mere creation of a social media platform, coupled with its failure to take more aggressive action to remove ISIS-related content from the platform, failed to satisfy that standard because it did not constitute *culpable* participation *in the night club attack*.

The Court also expressed strong skepticism about finding ATA aiding-and-abetting liability without a "direct nexus" between Twitter's alleged support of ISIS and the night club attack. Absent such a concrete connection, the Court concluded that the plaintiffs would have had to—and did not—allege that Twitter "so systemically and pervasively assisted ISIS" that it "could be said to aid and abet every single ISIS attack."

Twitter will make it more difficult for plaintiffs to bring ATA aiding-and-abetting claims where a company provides "routine services" to a customer without favoring the customer over others or where there is only an attenuated connection alleged between the defendant's conduct and the terrorist act.

No. 21-1496

Opinion Date: 5/18/23

Vote: 9-0

Author: Thomas, J.

Lower Court: 9th Cir.

Twitter *establishes that aiding-and-abetting liability under the Anti-Terrorism Act requires "conscious, voluntary, and culpable participation" in the act of terrorism at issue.*

S&C's Supreme Court and Appellate Practice

Led by former Acting Solicitor General of the United States Jeff Wall—who has argued 30 times before the U.S. Supreme Court—and drawing on the experience of 20 former U.S. Supreme Court clerks and more than 80 former federal circuit court clerks, S&C's Supreme Court and Appellate Practice handles challenging and high-profile appeals around the country. Our Supreme Court and Appellate lawyers collectively have significant experience before the Supreme Court and scores of other federal and state courts of appeals.

A distinctive feature of our practice is that S&C's appellate lawyers have handled every phase of litigation. They have tried and arbitrated cases, conducted internal investigations, and represented clients in governmental investigations. This broad experience gives them a valuable perspective from which to develop more effective arguments based on their experience in those other contexts, and enables them to work collaboratively with trial teams to frame those arguments persuasively at every stage of a case. Clients appreciate that this structure allows the same teams to handle motions, trials, and appeals. Even in matters that S&C has not handled in the initial stages, clients also often seek out our team's tailored appellate expertise, skilled advocacy, and strategic advice.

Our appellate experience covers virtually all of our litigation practices, including antitrust, bankruptcy, criminal defense, intellectual property, labor and employment, M&A litigation, products liability, and securities litigation.

Please contact any member of the Firm's Supreme Court and Appellate Practice with any questions about Supreme Court or other appellate matters.

Meet the Editors

Judson Littleton

Judd Littleton is a partner in S&C's Litigation Group and co-head of the Firm's Supreme Court and Appellate Practice. His diverse practice focuses on Supreme Court and appellate work, complex commercial litigation, and criminal defense and investigations. Prior to joining the Firm, Judd served as a trial attorney in the Civil Division of the U.S. Department of Justice, where he litigated cases involving a wide range of constitutional and statutory issues and received the Attorney General's Distinguished Service Award, the Department's second-highest award for employee performance. Judd also previously served as a Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice, where he worked on numerous cases before the U.S. Supreme Court and federal courts of appeals. He clerked for Chief Justice John G. Roberts, Jr. of the U.S. Supreme Court and for Judge A. Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit. Judd is a member of the Edward Coke Appellate Inn of Court and the Supreme Court Historical Society. He was recognized by *The National Law Journal* as one of its 2019 D.C. Rising Stars.

Julia Malkina

Julia Malkina is a partner in S&C's Litigation Group and Supreme Court and Appellate Practice, as well as co-lead of the Firm's Securities Litigation Practice. She joined the Firm in 2015 after serving as a law clerk to Justices Sandra Day O'Connor (Ret.) and Stephen G. Breyer of the U.S. Supreme Court, a Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice, and a law clerk to then-Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit. Her practice comprises appellate court litigation, trial court litigation, and regulatory proceedings in a number of areas, including securities, commodities, and criminal law. She was named a 2022 Rising Star by *Law360* and a 2020 Rising Star by the *New York Law Journal* for her representations in precedent-setting cases across those areas. Julia also was selected a 2022 "Top 500 Leading Litigator in America" by *Lawdragon* and for *Benchmark Litigation*'s 2022 "40 & Under List." She is a member of S&C's Women's Initiative Committee, which seeks to recruit, retain, and advance the Firm's women lawyers.

Morgan Ratner

Morgan Ratner is a partner in S&C's Litigation Group and is a member of the Firm's Supreme Court and Appellate Practice. She has argued nine cases before the U.S. Supreme Court. Before joining the Firm, Morgan served in the Office of the Solicitor General at the U.S. Department of Justice. During her tenure there, she argued Supreme Court cases involving areas of federal law such as securities regulation, bankruptcy, employment, intellectual property, criminal law, and elections law. While at the Solicitor General's Office, Morgan also filed over 150 Supreme Court briefs at the merits and certiorari stages and received a John Marshall Award, the Department of Justice's highest award offered to attorneys. Morgan clerked for Chief Justice John G. Roberts, Jr. of the U.S. Supreme Court and then-Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit. She is ranked by *Chambers USA* for Nationwide Appellate Law and was named a 2022 *Law360* Rising Star in the Appellate field.

New York
Telephone: +1 212 558 4000
Facsimile: +1 212 558 3588
125 Broad Street
New York, NY 10004-2498
United States

Washington, D.C.
Telephone: +1 202 956 7500
Facsimile: +1 202 293 6330
1700 New York Avenue, N.W. Suite 700
Washington, D.C. 20006-5215
United States

Los Angeles
Telephone: +1 310 712 6600
Facsimile: +1 310 712 8800
1888 Century Park East
Los Angeles, CA 90067-1725
United States

Palo Alto
Telephone: +1 650 461 5600
Facsimile: +1 650 461 5700
550 Hamilton Avenue
Palo Alto, CA 94301-2010
United States

Beijing
Telephone: +86 10 5923 5900
Facsimile: +86 10 5923 5950
Suite 501
China World Office 1
One Jian Guo Men Wai Avenue
Beijing, 100004
China

Hong Kong
Telephone: +852 2826 8688
Facsimile: +852 2522 2280
20th Floor
Alexandra House
18 Chater Road, Central
Hong Kong
China

Tokyo
Telephone: +81 3 3213 6140
Facsimile: +81 3 3213 6470
Otemachi First Square East Tower 16F
5-1, Otemachi 1-chome
Chiyoda-ku, Tokyo 100-0004
Japan

London
Telephone: +44 20 7959 8900
Facsimile: +44 20 7959 8950
1 New Fetter Lane
London EC4A 1AN
England

Paris
Telephone: +33 1 7304 1000
Facsimile: +33 1 7304 1010
51 rue La Boétie
Paris, 75008
France

Frankfurt
Telephone: +49 69 4272 5200
Facsimile: +49 69 4272 5210
Neue Mainzer Straße 52
Frankfurt am Main, 60311
Germany

Brussels
Telephone: +32 2896 8000
Facsimile: +32 2896 8099
Boulevard du Régent 35
1000 Brussels
Belgium

Melbourne
Telephone: +61 3 9635 1500
Facsimile: +61 3 9654 2422
101 Collins Street
Melbourne, Victoria 3000
Australia

Sydney
Telephone: +61 2 8227 6700
Facsimile: +61 2 8227 6750
The Chifley Tower
2 Chifley Square
Sydney, New South Wales 2000
Australia