SUPREME COURT BUSINESS REVIEW

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FCC v. *Prometheus Radio Project*

Administrative Law – Media Ownership Rules

Under its broad statutory authority to regulate broadcast media as "public convenience, interest, or necessity requires," the Federal Communications Commission ("FCC") has long maintained ownership rules that limit the number of radio stations, television stations, and newspapers that a single entity may own in any market. In 2017, the FCC reconsidered three such rules—the Newspaper/Broadcast Cross-Ownership, Radio/Television Cross Ownership, and Local Television Ownership Rules—and concluded that they no longer serve the public interest by helping foster competition, localism, or viewpoint diversity, and that repealing or modifying the rules is unlikely to harm minority and female ownership.

Public interest groups petitioned for review, arguing that the FCC's order was arbitrary and capricious under the Administrative Procedure Act ("APA"). Reasoning that the record did not support the FCC's conclusion on minority and female ownership, the Third Circuit agreed and vacated the FCC's order, directing the FCC to determine the likely effect of the rule changes on minority and female ownership using new empirical research or an in-depth theoretical analysis.

In a unanimous decision, the Supreme Court reversed, explaining that the Court need only determine that the FCC "reasonably considered the relevant issues and reasonably explained the decision" in order to uphold the agency's action. The Court determined that the FCC reasonably considered the record evidence, noting that, despite the FCC repeatedly requesting additional data on minority and female ownership, no commentators provided such data. The Court further concluded that the FCC reasonably determined that the three ownership rules no longer serve the public interest, observing that the "APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies" before making such a determination.

Nos. 19-1231, 19-1241

Opinion Date: 4/1/21

Vote: 9-0

Author: Kavanaugh, J.

Lower Court: 3d Cir.

Prometheus Radio Project *confirms a court's limited role in reviewing agency action.*

The APA does not generally require agencies to perform their own empirical or statistical studies.

National Collegiate Athletic Association v. *Alston*

Antitrust – Restrictions on Benefits to Student-Athletes

No. 20-512

Opinion Date: 6/21/21

Vote: 9-0

Author: Gorsuch, J.

Lower Court: 9th Cir.

For more than a century, the National Collegiate Athletic Association ("NCAA"), the governing body for college sports, has prohibited student-athletes from receiving compensation for their participation in collegiate athletics. In *NCAA*, the Supreme Court considered whether the NCAA's restrictions on certain education-related benefits—such as scholarships for graduate school and paid internships after athletic eligibility—violated federal antitrust law.

A unanimous Court held that the NCAA's restrictions on such benefits run afoul of Section 1 of the Sherman Act, which prohibits anticompetitive agreements that impose an undue restraint on trade or commerce. The Court concluded that the NCAA's restrictions are subject to a "rule of reason" analysis, as opposed to a more deferential "quick look" review, and favorably referred to its 2018 decision in *Ohio* v. *American Express*, which described a three-step burden-shifting framework for applying the rule of reason to "distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."

NCAA *may make it more difficult for plaintiffs to prevail on antitrust claims against joint ventures while laying the groundwork for broader challenges to the NCAA's restrictions.*

Although ruling against the NCAA, the Court appeared to adopt a standard for assessing the legality of joint ventures that is more favorable for defendants, requiring plaintiffs to establish that any procompetitive benefits could be achieved through "substantially less restrictive alternatives." Addition of the qualifier "substantially" may be significant in many cases. The Court also signaled a willingness to look more broadly at the NCAA's restrictions on student-athlete compensation, noting several times that wider challenges to the NCAA were not before it.

The week after the Court's decision, the NCAA announced that it would allow student-athletes to profit off of their names, images, and likenesses.

Collins v. *Yellen*

Constitutional Law – Structure of Federal Agencies

No. 19-422

Opinion Date: 6/23/21

Vote: 9-0

Author: Alito, J.

Lower Court: 5th Cir.

In response to the 2008 financial crisis, Congress created the Federal Housing Finance Agency ("FHFA") to supervise 13 government-sponsored entities involved in the mortgage-lending market. Congress designated the FHFA Director as the head of the agency, removable by the President only "for cause."

In *Collins*, the Supreme Court considered challenges brought by shareholders of Fannie Mae and Freddie Mac to certain actions taken by the FHFA after it put those entities into conservatorship. The Court rejected the shareholders' contention that the FHFA's actions exceeded its statutory authority because they substantially diluted the value of Fannie and Freddie. The FHFA's conservatorship provision, the Court reasoned, authorizes the agency to act in *either* the best interests of Fannie and Freddie *or* of the FHFA (and the public).

But the Court agreed with the shareholders' constitutional challenge to the FHFA's structure, holding that the "for cause" limitation on the President's authority to remove the FHFA Director violated the separation of powers. The Court's conclusion followed from its decision last Term in *Seila Law*, which invalidated similar limitations on the removal of the head of the Consumer Financial Protection Bureau. The Court declined, however, to unwind the transaction the shareholders complained of based on the constitutional violation. Instead, as in *Seila Law*, the Court remanded for the court of appeals to determine what remedy, if any, the shareholders could obtain.

Collins provides an additional reason to conclude that any limitation on the President's ability to remove the head of *any* federal agency led by a single individual is constitutionally suspect. Confirming its broad applicability, the Court stated that its holding did not turn on the "nature and breadth of an agency's authority." But whether affected parties may obtain meaningful remedies for such violations remains an open question in each particular case.

Collins *is another example of the Court striking down congressional limitations on the President's authority to remove an individual head of a federal agency, but the appropriate remedy for such inappropriate limitations on removal remains uncertain.*

United States v. *Arthrex, Inc.*

Constitutional Law – Review of Inferior Officer Decisions

No. 19-1434

Opinion Date: 6/21/21

Vote: 5-4

Author: Roberts, C.J.

Lower Court: Fed. Cir.

The America Invents Act, enacted by Congress in 2011, established the Patent Trial and Appeal Board ("PTAB") within the Patent and Trademark Office ("PTO"). Typically sitting in panels of three Administrative Patent Judges ("APJs"), the PTAB may review previously issued patents, including through the inter partes review procedure that can be instituted by any person who believes a patent is invalid. The only mechanism for review of the PTAB's determination of patentability is through an action filed in the Federal Circuit. In *Arthrex*, the Supreme Court considered whether the authority Congress vested in the PTAB and its APJs violates the Constitution.

After Arthrex, *decisions by Administrative Patent Judges on inter partes review are no longer final and are instead subject to discretionary review by the Director of the Patent and Trademark Office.*

The Court held that the PTAB's structure and authority violate the Appointments Clause. By providing for the appointment of APJs by the Secretary of Commerce rather than the President, the Court reasoned, Congress must have understood APJs to be "inferior officers." But inferior officers, according to the Court, may not exercise significant executive authority on behalf of the United States unless their decisions are subject to review by a "principal officer," appointed by the President and confirmed by the Senate. Because the Act did not provide for review of PTAB decisions on patentability by the PTO Director (a principal officer), the Court held that such PTAB decisions were unconstitutionally insulated from executive review. As a remedy, the Court held that all PTAB decisions on patentability at the conclusion of inter partes review must be subject to discretionary review by the PTO Director.

Parties dissatisfied with a PTAB decision on inter partes review may now request reversal of that decision by the Director. Because the Court limited its holding to inter partes review, it is unclear whether or how *Arthrex* will apply to other PTAB determinations (or to adjudicative proceedings in other agencies). And while it is unclear how the PTO will implement *Arthrex*, the Court made clear that whether to review any particular decision is within the Director's discretion.

AMG Capital Management, LLC v. *FTC*

Federal Trade Commission – Authority to Obtain Monetary Relief

Section 13(b) of the Federal Trade Commission Act authorizes the Federal Trade Commission ("FTC") to seek a preliminary or permanent "injunction" in federal court against a person or company for violating any provision of law under the FTC's purview (which generally includes consumer protection and antitrust cases). Although Section 13(b) references only "injunctions," for decades federal appellate courts had held that courts may also order the return of illegally obtained money as a corollary to injunctive relief. In *AMG*, the Court agreed to consider whether such awards of monetary relief are authorized under Section 13(b).

The Supreme Court unanimously held that Section 13(b)'s reference to a "permanent injunction" does not authorize the FTC to obtain court-ordered monetary relief. Relying on the plain meaning of the word "injunction," and contrasting Section 13(b) with other provisions of the Act—namely Sections 5 and 19, which permit the FTC to impose monetary penalties after certain administrative proceedings—the Court concluded that Congress did not authorize the FTC to seek monetary relief through Section 13(b). Instead, the Court reasoned, Section 13(b) was intended to empower the FTC to seek prospective relief to stop "seemingly unfair practices from taking place while the Commission determines their lawfulness."

As the Court noted, the FTC has already sought a legislative "fix" to permit monetary relief pursuant to Section 13(b). In the meantime, individuals and businesses can expect the FTC to pursue restitution and other monetary relief using its authority under Sections 5 and 19. Although those provisions impose more obstacles on the FTC (such as administrative proceedings or referral to the Department of Justice), they can authorize civil penalties that are not limited to a defendant's ill-gotten gains.

No. 19-508

Opinion Date: 4/22/21

Vote: 9-0

Author: Breyer, J.

Lower Court: 9th Cir.

AMG *clarifies that Section 13(b) of the Federal Trade Commission Act does not authorize the FTC to seek—or a court to award—equitable monetary relief. Instead, the FTC may use that provision only to obtain prospective relief barring allegedly unlawful practices.*

BP p.l.c. v. *Mayor and City Council of Baltimore*

Civil Procedure – Removal to Federal Court

No. 19-1189

Opinion Date: 5/17/21

Vote: 7-1

Author: Gorsuch, J.

Lower Court: 4th Cir.

Defendants may remove a civil action brought in state court to federal court on a number of grounds, including because the action includes a federal question. If a federal district court remands the case back to the state court, however, the grounds for appellate review are narrower. 28 U.S.C. § 1447(d) provides for appellate review of only "an order remanding a case to the State court from which it was removed pursuant to" (i) § 1442, the federal officer removal statute, or (ii) § 1443, the civil rights removal statute. In *BP*, the Supreme Court resolved a circuit split over whether § 1447(d) permits an appellate court to review any issue in a district court order remanding a case to a state court where a defendant in part premised removal on § 1442 or § 1443 or only those issues pertaining to § 1442 or § 1443.

BP *permits broader appellate review of federal district court orders remanding cases back to state court.*

Relying on the plain language of § 1447(d), the Court explained that the phrase "order remanding a case" simply means "a formal command from a district court returning the case to state court." That phrase does not distinguish between the defendant's different grounds for removal; as a result, § 1447(d) permits appellate courts to review "the whole of a district court's 'order,' not just some of its parts or pieces."

In reaching that conclusion, the Court rejected Baltimore's policy arguments, including that the Court's decision would incentivize defendants to include frivolous removal claims under § 1442 and § 1443 to allow for appellate review of a remand order. The Court reasoned that "'even the most formidable' policy arguments cannot 'overcome' a clear statutory directive," and, in any event, Congress had already addressed Baltimore's concern by allowing district courts to impose costs, expenses, and sanctions on defendants who frivolously remove a case from state court.

PennEast Pipeline Co. v. *New Jersey*

Eminent Domain – Ability of Private Parties to Condemn State Property

No. 19-1039

Opinion Date: 6/29/21

Vote: 5-4

Author: Roberts, C.J.

Lower Court: 3d Cir.

Private entities seeking to construct interstate natural gas pipelines generally must obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission. Once issued, the Natural Gas Act authorizes private certificate holders to exercise the federal government's eminent-domain power to acquire necessary rights-of-way to construct and maintain pipelines. In *PennEast Pipeline*, the Supreme Court considered whether principles of state sovereign immunity bar a private certificate holder from exercising this authority when it requires filing suit against a state in order to condemn state property for pipeline construction.

The Court held that state sovereign immunity principles do not bar such lawsuits. Surveying history and case law, the Court explained that the federal government has long wielded the power of eminent domain and delegated that authority to private parties. In addition, the Court explained, the federal government has long exercised this power (both itself and through delegates) to take property held by both individuals and states. As a result, the Court stated that there is no constitutional impediment to a private party exercising the eminent-domain power of the federal government to condemn state-owned property.

The fact that a particular state's law requires a condemnation lawsuit to be filed against the state in order to acquire such property does not eliminate that authority. The Court reasoned that, because the ability to condemn property is a necessary component of the eminent-domain power, the federal government's eminent-domain power necessarily includes the right to condemn state property, including through lawsuits. Because the states surrendered their immunity from such suits by the federal government when they ratified the Constitution, they could not invoke state sovereign immunity principles to bar condemnation suits by the federal government *or* private actors exercising the federal government's eminent-domain power.

PennEast Pipeline *reaffirms that the federal government can delegate its eminent-domain power to private actors. The private actors, in turn, can condemn any necessary rights-of-way, including when doing so involves bringing suit against a state.*

Rutledge v. *Pharmaceutical Care Management Assn.*

ERISA – Scope of Preemption of State Law

No. 18-540

Opinion Date: 12/10/20

Vote: 8-0

Author: Sotomayor, J.

Lower Court: 8th Cir.

The Employee Retirement Income Security Act ("ERISA") preempts "all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Under the Supreme Court's case law, a state law "relates to" an ERISA plan if it has a "connection with" or "reference to" such a plan. In *Rutledge*, the Supreme Court considered whether an Arkansas law regulating the prices at which pharmacies are reimbursed for drugs covered by prescription-drug plans is preempted by ERISA.

Reversing the Eighth Circuit, the Court unanimously held that ERISA does not preempt the Arkansas law. The Court reasoned that the state law does not have a "connection with" ERISA plans because it is "merely a form of cost regulation" that does not "forc[e] plans to adopt any particular scheme of substantive coverage." Nor does the state law "refer to" ERISA plans because it applies regardless of whether a prescription-drug plan is covered by ERISA. The Court rejected respondents' arguments that the Arkansas law affects central matters of ERISA plan administration and interferes with national uniformity, explaining that the state law does not require administrators "to structure their benefit plans in any particular manner" or "lead to anything more than potential operational inefficiencies."

Rutledge clarifies the scope of ERISA preemption for state laws that do not regulate ERISA plans but nonetheless may impact their costs. Although the effects of the decision remain to be seen, states might point to *Rutledge* to defend state laws regulating entities, such as pharmacies and pharmacy benefit managers, that interact with ERISA plans.

Rutledge *clarifies when a state law is preempted by ERISA and broadens the scope of permissible state laws that indirectly affect ERISA plans.*

Federal Republic of Germany v. *Philipp*

Foreign Sovereign Immunities Act – Expropriation Exception

No. 19-351

Opinion Date: 2/3/21

Vote: 9-0

Author: Roberts, C.J.

Lower Court: D.C. Cir.

The Foreign Sovereign Immunities Act ("FSIA") generally bars suits against foreign sovereign governments in U.S. courts, but contains an "expropriation exception" that allows such suits in cases involving "rights in property taken in violation of international law." In *Philipp*, the Supreme Court considered whether a country's alleged taking of its own nationals' property falls within this expropriation exception.

The plaintiffs—heirs of a consortium of Jewish-owned art firms—brought suit against Germany in U.S. court to recover for the allegedly coerced sale of the "Welfenschatz," a collection of medieval artifacts, by the Nazi regime. The heirs alleged that this sale was an act of genocide and thus violated international human rights laws, triggering the FSIA expropriation exception. Germany argued that the FSIA exception does not encompass *any* violation of international law, but is instead limited to international property law, which states that a sovereign state's taking of its own nationals' property does not violate international law—a principle known as the "domestic takings rule."

In Philipp, *the Court declined to interpret the "expropriation exception" to the FSIA to cover any international human rights violation, holding that it is instead limited to violations of the international law of property.*

The Supreme Court unanimously held that the FSIA's expropriation exception "refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule." Accordingly, that exception only applies to a foreign sovereign's expropriation of foreign nationals' property.

The broader interpretation advocated by the heirs, the Court reasoned, would improperly "transform[] the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations." Moreover, that interpretation would also render irrelevant the tight restrictions and conditions Congress placed on other FSIA exceptions, such as the noncommercial tort and terrorism exceptions. Finally, the Court concluded its narrower interpretation was supported by U.S. courts' practice of interpreting statutes to avoid creating "friction" with, and leading to potential retaliation from, foreign sovereign governments.

Google LLC v. *Oracle America, Inc.*

Intellectual Property – Fair Use Doctrine

No. 18-956

Opinion Date: 4/5/21

Vote: 6-2

Author: Breyer, J.

Lower Court: Fed. Cir.

Oracle owns the copyright to Java SE, a software platform that includes "declaring code," which permits programmers to use relatively simple commands to direct the performance of specific tasks, and "implementing code," which performs those tasks. In a dispute spanning more than a decade, Oracle claimed that Google infringed Oracle's Java SE copyright by using some of Java SE's declaring code and organizational structure in Google's Android platform. Google argued that the declaring code is not copyrightable and, even if it were, Google's use is protected by the fair use doctrine.

First, the Supreme Court held that whether there is a fair use defense is a mixed question of law and fact, but that the ultimate determination is a legal one subject to *de novo* appellate review.

Second, assuming without deciding that Java SE's declaring code is copyrightable, the Court concluded that Google's use of that code was a fair use under the four factors in Section 107 of the Copyright Act. While noting that those factors are "not exhaustive" and some are "more important in some contexts than in others," the Court reasoned that (i) Google copied only declaring code and not the implementing code for Java SE, (ii) Google's use was a transformative reimplementation of Java SE, (iii) Google did not copy a substantial amount of Java SE, and (iv) Google's copying created a new platform that benefited the public and that Oracle might not have been able to exploit on its own.

Because the Court declined to address whether Java SE's declaring code is copyrightable and used a flexible, multi-factor test for determining fair use, *Google* is unlikely to provide dispositive guidance for many computer code copyright disputes. *Google* may, however, indicate the Court's more general discomfort with a strong form of copyright protection for computer code and will provide ammunition for fair use defenses to using copyrighted computer code, particularly for code that is used for making features available to others (*e.g.*, a software platform).

Google *does not resolve whether computer code is copyrightable, but makes it easier to argue that use of certain types of copyrighted computer code is protected by the fair use doctrine.*

Minverva Surgical, Inc. v. *Hologic, Inc.*

Intellectual Property – Assignor Estoppel

In *Minerva*, the Supreme Court considered a challenge to the patent-law doctrine of assignor estoppel, which bars an inventor from assigning a patent and then claiming in litigation that the assigned patent is invalid. Hologic had acquired a patent on a medical device from an inventor. The inventor then founded Minerva and introduced a competing product. After expanding the original patent claim, Hologic sued for patent infringement, and successfully argued that assignor estoppel barred Minerva from challenging the validity of Hologic's patent.

The Supreme Court reaffirmed the assignor estoppel doctrine as "well grounded" in centuries-old fairness principles. Principles of "fair dealing," the Court reasoned, warrant precluding an inventor from expressly or implicitly representing that the assigned patent is valuable, only to turn around and argue in litigation that the invention was never patentable in the first place. The assignor estoppel doctrine, the Court explained, prevents such an "about-face" on fairness grounds.

By contrast, the Court held that assignor estoppel should not apply when the assignor's claim of invalidity in litigation does not contradict earlier representations. As an example, the inventor's assignment may occur before any representations about patentability could be made, such as automatic assignment by operation of an employment agreement. Or a previously valid patent may be rendered invalid by a change in law. Here, the Court remanded for consideration of whether Hologic's subsequently expanded patent claim was materially broader than the claims the inventor assigned, in which case the inventor might not have made any representations about the broader claim.

Minerva thus confirms the continued viability of the assignor estoppel doctrine, but imposes fairness-based limits on application of the doctrine that may permit more invalidity challenges by assignors than had previously been permitted.

No. 20-440

Opinion Date: 6/29/21

Vote: 5-4

Author: Kagan, J.

Lower Court: Fed. Cir.

Minerva *reaffirms the general rule that assignors of patent rights may be barred from later challenging the patent's validity, unless such a challenge does not inherently contradict express or implicit representations made upon assignment.*

California v. *Texas*

Jurisdiction – Standing to Challenge Unenforceable Laws

In *California* v. *Texas*, the Supreme Court considered a challenge brought by more than a dozen states and two individuals to the constitutionality of the § 5000A(a) minimum essential health insurance coverage requirement (the "mandate") of the Patient Protection and Affordable Care Act ("ACA"). The challengers alleged that the mandate, which the Court previously upheld as a valid exercise of Congress's taxing power, was no longer constitutional after Congress reduced the amount of the penalty for noncompliance to zero. The challengers then contended that the mandate was sufficiently central to the ACA that if it was struck down, the rest of the ACA should also fall.

The Court did not reach the constitutional question because it determined that the challengers lacked standing to pursue their claims. With respect to the individual plaintiffs, the Court held that they could not show that their alleged injury—the fact that they pay each month for health insurance—is fairly traceable to the ACA mandate because the ACA no longer includes a penalty provision that would render the mandate enforceable. As the Court explained, challengers to a federal statute must demonstrate an injury threatened by the *enforcement* of the provision, not merely its existence.

As to the states, the Court rejected their claim that the ACA mandate injured them "in the form of the increased use of (and therefore cost to) state-operated medical insurance programs," because the states failed to demonstrate that the now-unenforceable mandate caused an increase in enrollment in such programs. The Court also rejected the states' reliance on increased administrative costs of complying with other ACA provisions, because those obligations were not imposed by the mandate, and the states did not challenge the constitutionality of those other provisions.

No. 19-840

Opinion Date: 6/17/21

Vote: 7-2

Author: Breyer, J.

Lower Court: 5th Cir.

California *v.* Texas *confirms that a party challenging the validity of a statute must demonstrate an injury traceable to the potential enforcement of that provision. Because the ACA's minimum coverage requirement can no longer be enforced, the Court found the plaintiffs lacked standing to challenge it.*

Ford Motor Co. v. *Montana Eighth Judicial District*

Personal Jurisdiction – Specific Jurisdiction Over Non-Resident Defendants

The Due Process Clause of the Fourteenth Amendment limits the power of state courts to exercise jurisdiction over nonresident defendants. Outside the states where it is incorporated or headquartered, a corporation is generally subject to jurisdiction if (i) it has "purposefully availed" itself of that state's market and (ii) the plaintiff's claims "arise out of or relate to" the corporation's contacts with that state. In *Ford*, the Supreme Court unanimously held that the second condition may be satisfied even if the non-resident corporation's contacts with the state did not directly *cause* the plaintiff's injuries.

The plaintiffs sued Ford in their home states for injuries they sustained in car accidents. Contesting jurisdiction, Ford argued that because it had designed, manufactured, and sold those vehicles in other states, the plaintiffs' claims did not "arise out" of the business Ford does in their home states. The Court rejected this argument, holding that a nonresident defendant's in-state activities need not directly cause a plaintiff's injury in order for the plaintiff's claims to "relate to" those activities. Here, the Court reasoned, because Ford sold and serviced the types of vehicles involved in the accidents in the states where plaintiffs lived and were injured, there was a sufficient "connection" between Ford's contacts in those states and the plaintiffs' injuries to support personal jurisdiction.

After *Ford*, a corporation that purposefully serves a state market with a particular product should expect to be subject to suit in that state's courts for injuries the product allegedly causes to citizens of that state. Future litigation will likely focus on how similar the defendant's in-forum contacts must be to the conduct that gave rise to the suit, and on how *Ford* applies to non-residents injured in a state (or residents injured out-of-state). Notably, the Court expressly declined to address how its analysis might differ in the context of internet transactions.

No. 19-368

Opinion Date: 3/25/21

Vote: 8-0

Author: Kagan, J.

Lower Court: Montana Supreme Court

Ford *holds that a nonresident corporation may be sued in a state when it purposefully services a market for a product in that state and that product injures one of the state's residents within the state's borders. This is the case even if the plaintiff's particular injury was not directly caused by the corporation's activities in that state.*

TransUnion LLC v. *Ramirez*

Standing – Concrete Injury Requirement

In *TransUnion*, the Supreme Court considered the type of harm that individuals must demonstrate in order to maintain a suit based on a violation of rights conferred by a statute. The plaintiffs—a putative class of more than 8,000 TransUnion customers—alleged that TransUnion violated multiple provisions of the Fair Credit Reporting Act ("FCRA") by misidentifying the class members as potentially being on a list of suspected terrorists maintained by the Treasury Department's Office of Foreign Assets Control ("OFAC"). The issue in *TransUnion* was whether class members who were improperly flagged as being on OFAC's suspected-terrorist list in violation of FCRA requirements, but whose credit reports were not actually disseminated to third-party businesses, had suffered the kind of "concrete injury" necessary to demonstrate Article III standing.

The Court held that class members whose inaccurate credit reports had not been disseminated by TransUnion failed to demonstrate an injury sufficient to support standing. Congress's creation of a statutory right of action, the Court explained, does not by itself confer standing for violation of that statute. Instead, plaintiffs suing for violation of federal laws must still show that they suffered a concrete injury beyond the statutory violation. Moreover, the Court explained, such injury must have a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts," such as physical, pecuniary, or reputational harm. Here, the Court explained, the class members whose erroneous reports were not disseminated failed to establish a harm or sufficient risk of harm, and thus lacked standing to assert their claims.

By holding that statutory violations alone cannot support Article III standing, *TransUnion* appears to resolve an issue that had long divided courts confronting lawsuits raising congressionally created rights. Future litigation will focus on whether plaintiffs can demonstrate a real-life injury resulting from the statutory violation that has been "traditionally recognized" by U.S. courts.

No. 20-297

Opinion Date: 6/25/21

Vote: 5-4

Author: Kavanaugh, J.

Lower Court: 9th Cir.

TransUnion *confirms that, to support Article III standing, plaintiffs cannot rely solely on violation of a statutory right of action created by Congress, but must also demonstrate a concrete harm they suffered as a result of the statutory violation.*

Goldman Sachs Group, Inc. v. *Arkansas Teacher Retirement System*

Securities Litigation – Class Certification

Halliburton Co. v. *Erica P. John Fund, Inc.* held that a defendant in a securities fraud case may rebut at class certification the fraud-on-the market presumption of classwide reliance established in *Basic Inc.* v. *Levinson* by showing that the challenged statements did not impact the stock price. In *Goldman Sachs*, the Supreme Court considered the standards courts must apply in determining whether defendants have rebutted price impact.

First, the Court held that the generic nature of a challenged statement "often is important evidence of price impact that courts should consider at class certification," even if such evidence "overlaps with materiality or any other merits issue." The Court emphasized that the generic nature of a statement is "particularly" important in cases, such as *Goldman Sachs*, where plaintiffs rely on the "inflation-maintenance" theory to argue that the statements maintained an artificially inflated stock price even though they did not increase the stock price when made. Although expressly refusing to consider the validity of the inflation-maintenance theory, the Court noted that there may be a "mismatch" between a generic challenged statement and a specific corrective disclosure, causing the assumptions behind that theory to "break down" and providing "less reason to infer" price impact.

Second, the Court held that defendants bear the burden of persuasion and must establish a lack of price impact by a preponderance of the evidence. The Court observed, however, that "the allocation of the burden is unlikely to make much difference on the ground" because "[t]he defendant's burden of persuasion will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise."

***S&C represents Goldman Sachs in this case.**

No. 20-222

Opinion Date: 6/21/21

Vote: 8-1

Author: Barrett, J.

Lower Court: 2d Cir.

Goldman Sachs *clarifies that, in securities fraud cases, the generic nature of a challenged statement is important evidence of price impact that courts must consider in determining whether defendants rebutted the* Basic *presumption at class certification.*

CIC Services, LLC v. *Internal Revenue Service*

Tax – Scope of Anti-Injunction Act

No. 19-930

Opinion Date: 5/17/21

Vote: 9-0

Author: Kagan, J.

Lower Court: 6th Cir.

The Anti-Injunction Act bars any "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). As a result, a federal tax can typically be challenged only by suing for a refund after paying the tax. CIC, a material advisor to taxpayers involved in micro-captive transactions filed a suit challenging an IRS Notice requiring material advisors and taxpayers to report detailed information about micro-captive transactions or potentially face civil tax liability and criminal liability. The IRS moved to dismiss under the Anti-Injunction Act, arguing that, to challenge the Notice, CIC had to disobey it and then sue for a refund of any tax penalty. The district court granted the IRS's motion, and the Sixth Circuit affirmed.

The Supreme Court's reasoning in CIC Services *may open the door to more pre-enforcement challenges to IRS rules and regulations.*

The Supreme Court unanimously reversed, holding that CIC's lawsuit challenged the Notice's reporting requirement and not the potential downstream tax penalty for violating that requirement. The Court looked to the suit's "objective aim" to determine its purpose, reasoning that three aspects of the Notice "refute the idea that this is a tax action in disguise." *First*, the reporting requirement inflicts significant costs separate from the tax penalty. *Second*, the reporting requirement and tax penalty are several steps removed from each other. And *third*, the reporting requirement is also backed by criminal penalties, which "practically necessitate a pre-enforcement, rather than a refund, suit."

In allowing CIC's suit to go forward, the Court expressly noted that its holding does not alter the established rule that the Anti-Injunction Act "draws no distinction between regulatory and revenue raising tax rules." Simply put, the Anti-Injunction Act did not apply in this case because "the suit targets not a regulatory tax, but instead a regulation that is not a tax."

Facebook, Inc. v. *Duguid*

Technology – Autodialers under the Telephone Consumer Protection Act

No. 19-511

Opinion Date: 4/1/21

Vote: 9-0

Author: Sotomayor, J.

Lower Court: 9th Cir.

The Telephone Consumer Protection Act ("TCPA") prohibits certain unwanted telemarketing practices, including by restricting calls made with an "automatic telephone dialing system" ("autodialer"). The TCPA defines an autodialer as equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and the capacity "to dial such numbers."

Facebook gives users the option of receiving text messages when their accounts are accessed on an unrecognized device or browser. The plaintiff Noah Duguid brought a putative class action alleging that this optional security feature is an impermissible use of an autodialer under the TCPA.

The Supreme Court unanimously held that to qualify as an autodialer, "a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." Relying on the "series-qualifier canon" of statutory interpretation, the Court concluded that the clause "using a random or sequential number generator" modifies both verbs that precede it—"store" and "produce."

The Court also reasoned that the statutory context further supports excluding devices that do not use such a number generator, because the TCPA's restrictions "target a unique type of telemarketing equipment" that risks tying up emergency and business phone lines. Conversely, interpreting the definition of autodialer to include devices that merely store and dial telephone numbers "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel," sweeping in even ordinary cell phones. Any changes to the TCPA to account for advances in automation technology, the Court made clear, would have to come from Congress.

Facebook *clarified the TCPA's definition of "automatic telephone dialing system," significantly narrowing the scope of conduct that falls under the TCPA.*

Van Buren v. *United States*

Technology – Scope of Computer Fraud and Abuse Act

No. 19-783

Opinion Date: 6/3/21

Vote: 6-3

Author: Barrett, J.

Lower Court: 11th Cir.

In *Van Buren*, the Supreme Court held that Section (a)(2) of the Computer Fraud and Abuse Act ("CFAA"), which makes it unlawful to "exceed[] authorized access" to information on a computer network, does not apply where a person who is generally authorized to access certain information does so for an unauthorized or improper purpose. Rather, the Court interpreted Section (a)(2) to apply only to cases where a person accesses information that she lacks authority to access for any purpose.

The Court focused on the CFAA's text, reasoning that the plain meaning of "exceeds authorized access" encompasses obtaining information from only "particular areas in the computer . . . to which [a person's] computer access does not extend," and does not look at her motives for access. So, if a person has access to a given file, folder, or database for one purpose, then she does not violate the CFAA by accessing it for a different purpose, even if that purpose is forbidden by company policy or contract. To rule otherwise, the Court noted, would "attach criminal penalties to a breathtaking amount of commonplace computer activity," like using a work computer to browse social media or send personal emails.

Following *Van Buren*, a person can violate Section (a)(2) in two ways: by accessing a computer network without authorization, or by accessing a computer network with authorization but using that access to obtain information stored in a location on the network that she is barred from accessing. Law enforcement and employers can no longer rely on the CFAA where employees access confidential or proprietary information for an unauthorized or improper purpose. Other avenues, however, remain to address such conduct, including through company policies that narrowly limit access for any purpose to sensitive information and other federal and state statutory and common law provisions prohibiting the improper use of information that a person is authorized to access.

Van Buren *has significant implications for law enforcement and employers, especially where employees access confidential or proprietary information for an unauthorized or improper purpose.*

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Led by former Acting Solicitor General of the United States Jeff Wall—who has argued more than 30 times before the U.S. Supreme Court—and drawing on the experience of 13 former U.S. Supreme Court clerks and more than 75 former federal circuit court clerks, S&C's Supreme Court and Appellate Practice adeptly 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.

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