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ALERTS

SCOTUS Cert Recap: SCOTUS Adds 12 Cases To Docket, Including On Free Speech, Takings, Constitutional Remedies, And Claim Accrual

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Highlights

On Sept. 29, the U.S. Supreme Court agreed to consider the following questions:

Do the content-moderation restrictions and individualized-explanation requirements Florida and Texas impose on social media platforms comply with the Free Speech Clause?

Can a plaintiff bring a damages claim under the Takings Clause even in the absence of a statutory cause of action?

When a legislature requires a property owner to relinquish property as a condition of a land-use permit, is the legislative exaction subject to the same test that applies to similar administrative exactions?

What is the appropriate remedy for the constitutional violation found in Siegel v. Fitzgerald, which held that Congress contravened the constitutional requirement that bankruptcy laws be “uniform” by initially declining to impose certain bankruptcy fees in six of the country’s 94 federal judicial districts?

Does an Administrative Procedure Act claim “first accrue” under 28 U.S.C. §2401(a) when an agency issues a rule or when the

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rule first causes a plaintiff to be adversely affected or aggrieved?

Under the discovery accrual rule that applies to the Copyright Act's statute of limitations for civil actions, can a copyright plaintiff recover damages for acts that allegedly occurred more than three years before the plaintiff filed its lawsuit?

Does a company's failure to disclose trends or uncertainties as required under Item 303 of Regulation S-K support a Section 10(b) claim, even in the absence of an otherwise-misleading statement?

To be exempt from the Federal Arbitration Act, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?

When the federal government removes a person from the No Fly List and represents that the person will not be placed back on the list based on current information, does that moot litigation concerning the person's placement on the list?

Can a district court enter a criminal forfeiture order outside the time limitations set forth in Federal Rule of Criminal Procedure 32.2?

Does the Confrontation Clause allow a prosecutor to present expert testimony that conveys statements of a non-testifying forensic analyst where the analyst's statements are not offered for their truth and where the defendant did not subpoena the analyst?

October marks the beginning of another U.S. Supreme Court term, and on Sept. 29, the Court emerged from its "Long Conference" to add 12 new cases for this year's term. The Court's decisions in these cases will affect numerous areas of law, including free speech, takings, administrative-procedure, copyright, securities, arbitration, and criminal law.

Notably, if the Court hears the same number of arguments this term as it did last term, these 12 cases will constitute more than one-fifth of the term's entire caseload. Examining these cases will give lawyers and litigants a clearer roadmap for the Court's term, and a better sense of how the Court's decisions may affect the law going forward.

Pair of Cases Present Questions Concerning Free Speech and Social Media Regulation

Among the 12 granted cases, the two most prominent (*Moody v. NetChoice* and *NetChoice v. Paxton*) involve parallel challenges to recently enacted laws regulating social media platforms such as Facebook and YouTube. The laws – enacted by Florida and Texas – include content-moderation provisions that regulate whether and how platforms present user-generated content to other users as well as individualized-explanation provisions that require platforms to explain content-moderation decisions to affected users.

NetChoice, a trade association representing the platforms, challenges the

Florida and Texas laws under the First Amendment's Free Speech Clause. NetChoice argues that selecting, editing, and arranging third-party speech for presentation to social media users qualifies as constitutionally protected expressive activity. Florida and Texas disagree, and the federal appellate courts that heard these cases reached diametrically opposite conclusions.

The U.S. Court of Appeals for the Eleventh Circuit sided with NetChoice: It concluded that under a series of Supreme Court decisions beginning with *Miami Herald Publishing Co. v. Tornillo*, platforms' content-moderation decisions "constitute 'editorial judgments' protected by the First Amendment," and that the restrictions on these decisions failed First Amendment scrutiny. The U.S. Court of Appeals for the Fifth Circuit, meanwhile, rejected NetChoice's argument: It concluded that social media platforms – unlike the newspaper in *Miami Herald* – "exercise virtually no editorial control or judgment" and that requiring them to host user content therefore does not constitute compelled "speech" under the Supreme Court's free-speech doctrine.

Notably, after the Supreme Court asked the United States for its views, it recommended granting review in both cases and adopting the Eleventh Circuit's position: "The act of culling and curating the content that users see," the United States argued, "is inherently expressive, even if the speech that is collected is almost wholly provided by users."

The Supreme Court has now agreed to review the Fifth and Eleventh Circuits' decisions. Given the stakes of the case, the Court will no doubt be assisted by scores of amicus briefs. In last term's Section 230 case, for example, the Court received more than 80 amicus briefs. And as in that case, the Court's decision in the *NetChoice* cases could ultimately affect virtually every company or person who hosts or posts content on the internet.

In Dispute Over Texas Highway Project, the Court Will Decide Whether Takings Plaintiffs Can Sue States Without a Statutory Cause of Action

Devillier v. Texas is another significant constitutional law case, this one concerning an important question about the Takings Clause: Can a plaintiff bring a takings claim against a state even in the absence of a statutory cause of action?

In *Devillier*, the plaintiffs originally brought state-court inverse-condemnation suits against the state of Texas. The plaintiffs alleged that by raising an interstate highway Texas has caused their properties to flood in times of heavy rainfall, and they argue that this flooding constitutes a taking for which they are owed just compensation under the Takings Clause. Texas removed the suits to federal court and then moved to dismiss them for lack of a statutory cause of action.

Quoting the Supreme Court's most recent *Bivens* decision (*Hernandez v. Mesa*, from 2020), Texas argues that the plaintiffs need a statutory cause of action because a "federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." The U.S. Court of Appeals for the Fifth Circuit agreed, and the plaintiffs then sought Supreme Court review. The plaintiffs argue that Texas's position allows states to violate the Takings Clause with impunity and contradicts the

Supreme Court's 1987 decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* – which held that the Takings Clause is "self-executing" and that "the compensation remedy" is therefore "required by the Constitution."

Notably, plaintiffs can bring takings claims against the federal government via the Tucker Act and against local governments via 42 U.S.C. § 1983. Neither of these statutes, however, apply to states, since the Supreme Court has long held that states are not "persons" subject to suit under Section 1983. Accordingly, there is no obvious statutory cause of action by which a plaintiff can bring a federal takings claim against a state. In *Devillier*, the Court will decide whether the Constitution itself provides the necessary cause of action. The Court's decision likely will not be the last word on states' amenability to suit for takings claims. In part because Texas removed the case to federal court, *Devillier* does not present the question whether sovereign immunity bars plaintiffs from suing states for takings in federal court; the case, however, will be an important one.

Court Will Consider Whether Land-Use Exactions Doctrine Applies to Legislative Rules

Sheetz v. County of El Dorado is another Takings Clause case, and it concerns the extent to which legislatures may require property owners to give up part of their property as a condition of obtaining land-use permits.

Sheetz is a twist on the Supreme Court's landmark Takings Clause decisions in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. In those cases – both of which involved challenges to administrative conditions on land use – the Court held that governments may not condition the approval of a land use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the exaction and the proposed land use. The question in *Sheetz* – which involves a county ordinance that imposes a "traffic impact mitigation fee" on building permits – is whether this *Nollan/Dolan* framework applies to generally applicable legislative conditions on land use.

Some state and federal courts have answered this question in the negative, concluding that while *administrative* exactions threaten to force a few individuals to bear burdens that should be borne by the public as a whole, generally applicable *legislative* rules do not present the same concerns. Other state and federal courts have reached the opposite conclusion, reasoning that the Takings Clause applies to the government whether it acts via administrative adjudication or via legislation.

The lower-court split on this question is longstanding, and the Supreme Court had previously declined to resolve the split on numerous occasions. The Court has now agreed to confront this question, and its answer will affect governments and property owners across the country.

Court Confronts Difficult Remedial Question Raised by Last Year's Decision That the Bankruptcy Clause Prohibits Imposing Different Bankruptcy Fees in Different Districts

In *Office of the United States Trustee v. John Q. Hammons Fall 2006*, the

Court will pick up from where it left off in last year's decision in *Siegel v. Fitzgerald*, which held that a 2017 amendment to the bankruptcy fee schedule exceeded Congress's authority to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States."

Congress has divided the nation's bankruptcy courts into two slightly different categories: 88 of the 94 judicial districts operate under the U.S. Trustee program, while six (all in North Carolina and Alabama) operate under the Bankruptcy Administrator program. The 2017 amendment increased the quarterly fees paid by debtors in large Chapter 11 bankruptcies from $30,000 to $250,000, and made this increase immediately applicable to all pending and future cases in Trustee districts – but imposed the increase in Administrator districts nine months later, and then only to future cases. In *Siegel*, the Court held that this disparate treatment violated the Bankruptcy Clause's "uniformity" requirement, but it remanded the case for further proceedings on the appropriate remedy for this constitutional violation.

On this remedial question, the United States argues that the Court should make its holding prospective-only, noting that Congress has already fixed this problem going forward by requiring Bankruptcy Administrator districts to use the same fee schedule as U.S. Trustee districts. Or, the United States contends, the Court could simply require debtors in Bankruptcy Administrator districts to pay *additional* fees equaling what debtors in U.S. Trustee districts paid. The debtor in this case, meanwhile, argues that the U.S. Trustee should be required to *refund* the "excess" fees paid by debtors in U.S. Trustee districts – fees that, according to the United States, total approximately $326 million.

The U.S. Court of Appeals for the Tenth Circuit sided with the debtor. It noted that requiring debtors in Bankruptcy Administrator districts to pay additional fees may be practically impossible, and concluded that a refund is the only way to remedy the injury suffered by debtors in U.S. Trustee districts. The Supreme Court has now agreed to review this conclusion. Its decision will not only affect bankruptcy practitioners, but will also indicate the Court's views on the appropriate remedy in situations likewise involving unconstitutional differential treatment.

Federal Reserve Regulation on Debit-Card Fees Raises Question Concerning Accrual Date for Administrative Procedure Act Challenges to Agency Rules

In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Court will address when the statute of limitations to challenge an action by a federal agency under the Administrative Procedure Act (APA) begins to run. The APA is the main mechanism for challenging agency actions, including regulations, providing a cause of action to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." And the APA bars any action filed after six years "after the right of action first accrues."

The APA plaintiff here is a North Dakota truck stop that seeks to challenge a 2011 Federal Reserve rule that caps debit card processing fees. The Federal Reserve contends that the challenge is untimely, arguing that it accrued when the rule at issue was adopted. The challenger, however, contends that its claim did not accrue until 2018,

when it opened for business and began processing debit card transactions – and thus when it first suffered a "legal wrong" or was "adversely affected or aggrieved."

The U.S. Court of Appeals for the Eighth Circuit joined several other federal appellate courts in agreeing with the Federal Reserve that APA claims accrue when the challenged rule is first adopted. The Sixth Circuit, however, has adopted the APA's plaintiff's legal wrong/adversely affected rule. The Supreme Court has now agreed to resolve this circuit split, and the rule it adopts will have wide-ranging consequences for APA cases of all sorts.

Copyright Plaintiffs Will Soon Learn Whether They Can Recover Damages for Acts That Occurred More Than Three Years Before the Lawsuit

Warner Chappell Music, Inc. v. Nealy confronts the Court with another statute-of-limitations question, this one concerning the extent to which the Copyright Act's limitations provision limits a plaintiff's damages. The Copyright Act authorizes recovery of "actual damages suffered . . . as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." And the Act's statute of limitations requires any action to be brought "within three years after the claim accrued."

The 11 federal appellate courts that have addressed the question have all held that the "discovery rule" applies to copyright infringement claims, such that copyright claims accrue when the plaintiff learns or should have learned that the defendant was violating its copyright. The federal courts of appeals are divided, however, on whether plaintiffs whose claims are timely under this discovery rule can recover damages for acts that occurred more than three years before they filed suit.

The courts that have limited damages to such a three-year "lookback" period have stressed language in the Supreme Court's 2014 decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, which addressed whether the equitable defense of laches can bar an otherwise-timely copyright claim: In the course of answering "no" to that question, the Court observed that the Copyright Act's limitations period "allows plaintiffs during that lengthy term to gain retrospective relief running only three years back from the date the complaint was filed." Yet other courts, including the Court of Appeals for the Eleventh Circuit in *Warner Chappell*, have rejected such a lookback period, concluding that the Copyright Act's text "does not place a time limit on remedies for an otherwise timely claim" – and that "*Petrella's* statements about the availability of relief are directed to the way the statute of limitations works when claims accrue under the injury rule, not the discovery rule."

The Supreme Court has agreed to resolve this circuit split (though not the antecedent question whether a discovery rule applies to copyright claims in the first place), and its decision will have major consequences for copyright holders. Copyright claims that are timely under a discovery rule may seek damages for many years of infringement – as in *Warner Chappel* itself, where the plaintiffs seek relief for infringement that occurred 10 years before they filed suit. The Court will soon decide

whether such damages are available.

Court Set to Decide Whether Failures to Disclose Trends or Uncertainties Can Support Section 10(b) Securities-Fraud Claims

In *Macquarie Infrastructure v. Moab Partners*, the Court will consider if a company's failure to disclose trends or uncertainties that are likely to have a material impact on its financial position gives rise to a private cause of action under federal securities law. The Supreme Court has inferred a private cause of action under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, which together prohibit untrue statements and omissions of material facts "necessary" to make an affirmative statement "not misleading." Separately, Item 303 of SEC Regulation S-K requires a company to disclose known trends or uncertainties that are likely to have a material impact on its financial position.

The question in *Macquarie Infrastructure* is whether a Section 10(b) claim can rest on a failure to provide a disclosure required under Item 303, even without an affirmative statement that is rendered misleading by omission. The U.S. Court of Appeals for the Second Circuit has held that violations of Item 303 can support Section 10(b) claims, concluding that financial statements that omit elements required by Item 303 can "mislead" investors under Section 10(b) where the omission is material. The U.S. Courts of Appeals for the Third, Ninth, and Eleventh Circuits, however, have disagreed, reasoning that the text indicates that omissions can give rise to liability under Section 10(b) only when they cause other affirmative statements to be misleading. The Supreme Court's resolution of this circuit split will have far-reaching consequences for public companies and securities litigators.

Court to Clarify the Scope of the "Transportation Worker" Exception to Federal Arbitration Act

In *Bissonnette v. LePage Bakeries Park Street*, the Court will address the scope of the "transportation work" exemption in the Federal Arbitration Act (FAA). The FAA generally imposes extensive obligations on federal courts to enforce arbitration agreements, but exempts contracts with "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." In its 2001 decision in *Circuity City Stores v. Adams*, the Supreme Court interpreted this language to apply to employment contracts of "transportation workers." In the years since, lower courts have proceeded to answer numerous follow-on questions concerning how to determine which workers fall into that category.

The question in *Bissonnette* is whether this exemption applies to any worker who transports goods through the channels of interstate commerce, or whether such a worker must also be employed by a company that is itself in the transportation industry. The U.S. Court of Appeals for the Second Circuit took the latter position, holding that the workers in *Bissonette* – truck drivers who haul Wonder Bread goods to market – were in the "bakery industry," not the "transportation industry."

Other circuits have rejected this "industry specific" approach, emphasizing the Supreme Court's 2022 decision in *Southwest Airlines v. Saxon*, which indicated that this FAA exemption does *not* apply to someone who works

for a transportation provider but does not themselves perform "activities within the flow of interstate commerce." In deciding between these approaches, the Supreme Court's decision will have significant consequences for companies across many different industries (e.g., manufacturing and retail companies, which may employ truck drivers and other delivery workers but are not in directly the transportation industry).

Court to Resolve Important Mootness Question in "No Fly List" Case

In *FBI v. Fikre*, the Court will determine whether removal from the "No Fly List" moots a case. The No Fly List comprises individuals "who are prohibited from flying within, to, from, and over the United States." The plaintiff in this case alleges that he was placed on the No Fly List in April 2010 but acknowledges he was taken off in May 2016 and has not been put back on. Twice the district court dismissed his claims as moot, based on the standard the Supreme Court laid out in its 2013 decision in *Already v. Nike* – which held that voluntary compliance moots a case where "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." The U.S. Court of Appeals for the Ninth Circuit, however, reversed the district court's dismissal both times, most recently on the ground that the government's declaration – which said the plaintiff would not be placed back on the list based on currently available information – failed to adequately assure the plaintiff that "he will not be banned from flying for the same reasons that prompted the government to add him to the list in the first place."

While the Ninth Circuit found the government's statement wanting, other federal appellate courts have held No Fly List claims moot upon the execution of material identical declarations. The outcome of this case will not only decide a circuit split, but also determine how much assurance a plaintiff must be given that behavior will not recur in order to moot a case.

Court to Decide Whether Deadline for Criminal Forfeiture Orders Is Jurisdictional

In *McIntosh v. United States*, the Court will again consider the relative weight of a time limit in federal law – in particular, the deadline for entering a preliminary forfeiture order under Federal Rule of Criminal Procedure 32.2(b)(2)(B). This Rule provides that, "[u]nless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final."

In *McIntosh*, the district court failed to abide by this rule: It did not enter a preliminary forfeiture order before sentencing, orally ordered forfeiture at sentencing, and only entered a final order of forfeiture years after sentencing (and after remand from the court of appeals). The criminal defendant argued that the district court's failure to comply with the Rule's time limit precluded forfeiture, but the U.S. Court of Appeals for the Second Circuit rejected this argument.

In doing so, it applied the Supreme Court's 2010 decision in *Dolan v. United States*, which described three types of statutory deadlines: 1) "jurisdictional," which "prevents the court from permitting or taking the action" and the prohibition is absolute and not waivable; 2) "claims-

processing rules," which regulate the timing of motions or claims, the benefit of which can be forfeited; and 3) "time-related directives," which are legally enforceable but do not deprive a judge or other public official of the power to take action after the deadline passes. Joining the U.S. Court of Appeals for the Fourth Circuit, the Second Circuit held that Rule 32.2(b)'s requirements are "time-related directives" that were not mandatory, while the U.S. Courts of Appeals for the Sixth and Eighth Circuits have denied forfeitures on the grounds that the Rule is either a mandatory claims-processing rule or a jurisdictional rule. The Court is now set to settle this circuit split and clarify the categories of statutory deadlines set out in *Dolan* – a which will have consequences not just for criminal defendants, but for all sorts of litigants in federal court.

Court Takes Up Confrontation Clause Case Testing Experts' Ability to Convey Statements of Non-Testifying Forensic Analysts

In *Smith v. Arizona*, the Court will confront a case that lies at the junction between the rules of evidence and the Sixth Amendment's Confrontation Clause. In 2011, the Supreme Court held that when the prosecution in a criminal trial introduces a forensic analyst's certifications, the analyst becomes a witness whom the defendant has a Sixth Amendment right to confront. This left open the question in *Smith* – whether the Confrontation Clause allows a prosecutor to present expert testimony that conveys testimonial statements of a non-testifying forensic analyst where the analyst's statements are not offered for their truth and where the defendant did not seek to subpoena the analyst.

In *Smith*, drug evidence related to the defendant's drug-related charges was tested by one analyst, but a substitute expert – who did none of his own testing and solely relied on the prior analyst's notes – testified at trial.

The Court attempted to answer a similar question in 2012 in *Williams v. Illinois*, but the Court's 4-1-4 decision left courts across the country divided in its application: Courts have split both over whether a non-testifying analyst's statements are not offered for their truth and thus fall outside the Confrontation Clause, and whether a defendant can claim prejudice if he declined to subpoena the analyst. The outcome of this case will provide important clarification for courts, prosecutors, and criminal defendants around the country on this difficult constitutional issue.

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