Supreme Court Review: October Term 2016

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I. Criminal procedure

A. Vagueness and the Armed Career Criminal Act

Beckles v. United States, 137 S.Ct. 886 (2017). The Federal Sentencing Guidelines, including Section 4B1.2(a)'s residual clause, are not subject to vagueness challenges under the due process clause.

Lynch v. DiMaya, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 136 S.Ct. 31 (2016). Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

B. **Sixth Amendment right to fair trial**

Pena-Rodriguez v. Colorado, 137 S.Ct. 855 (2017). When a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

C. **Ineffective assistance of counsel**

Buck v. Davis, 137 S.Ct. 759 (2017). (1) The U.S. Court of Appeals for the 5th Circuit exceeded the limited scope of analysis for a certificate of appealability, which, by statute, follows a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course; and (2) petitioner Duane Buck has demonstrated ineffective assistance of counsel under Strickland v. Washington; and (3) the district court's denial of Buck's motion under Federal Rule of Civil Procedure 60(b)(6) was an abuse of discretion.

II. Constitutional rights

A. First Amendment

1. Speech

Lee v. Tam, 808 F.3d 1321 (Fed. Cir. 2015), *cert. granted,* 136 S.Ct. 30 (2016). Whether the disparagement provision of the Lanham Act, 15 U.S.C. 1052(a), which provides that no trademark shall be refused registration on account of its nature unless, *inter alia*, it "[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" is facially invalid under the Free Speech Clause of the First Amendment.

Expressions Hair Design v. Schniederman, 137 S.Ct. 1144 (2017). State no-surcharge laws restrict speech conveying price information; case is remanded to determine constitutionality.

Packingham v. North Carolina, 368 F.3d 380 (N.C. 2015), *cert. granted*, 137 S.Ct. 368 (2016). Whether, under the court's First Amendment precedents, a law that makes it a felony for any person on the state's registry of former sex offenders to "access" a wide array of websites – including Facebook, YouTube, and nytimes.com – that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts, is permissible, both on its face and as applied to petitioner, who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

2. Religion

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

B. Voting

Bethune-Hill v. Virginia State Board of Elections*,* 137 S.Ct. 788 (2017). 1) The district court employed an incorrect legal standard in determining that race did not predominate in 11 of 12 new state legislative districts drawn by the Virginia State Legislature after the 2010 census; and (2) the district court's judgment regarding District 75 -- that the legislature had good reason to believe that a 55 percent target for black voting-age population was necessary to avoid diminishing the ability of black voters to elect their preferred candidates, which at the time would have violated Section 5 of the Voting Rights Act of 1965 -- is consistent with the basic narrow tailoring analysis explained in *Alabama Legislative Black Caucus v. Alabama*.

McCrory v. Harris, 773 F.Supp.3d 1338 (M.D.N.C. 2015), *probable jurisdiction noted*, 136 S.Ct. 2512 (2016). 1) Whether the court below erred in presuming racial predominance from North Carolina's reasonable reliance on this Court's holding in *Bartlett v. Strickland* that a district created to ensure that African Americans have an equal opportunity to elect their preferred candidate of choice complies with the Voting Rights Act (VRA) if it contains a numerical majority of African Americans; (2) whether the court below erred in applying a standard of review that required the State to demonstrate its construction of North Carolina Congressional District 1 was "actually necessary" under the VRA instead of simply showing it had "good reasons" to believe the district, as created, was needed to foreclose future vote dilution claims;

(3) whether the court below erred in relieving plaintiffs of their burden to prove "race rather than politics" predominated with proof of an alternative plan that achieves the legislature's political goals, is comparably consistent with traditional redistricting principles, and brings about greater racial balance than the challenged districts; (4) whether, regardless of any other error, the three-judge court's finding of racial gerrymandering violations was based on clearly erroneous fact-finding; (5) whether the court below erred in failing to dismiss plaintiffs' claims as being barred by claim preclusion or issue preclusion; and (6) whether, in the interests of judicial comity and federalism, the Court should order full briefing and oral argument to resolve the split between the court below and the North Carolina Supreme Court which reached the opposite result in a case raising identical claims.

C. Takings

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

III. Civil rights statutes

A. Malicious prosecution

Manuel v. City of Joliet, 137 S.Ct. 911 (2017). An individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

B. Housing Discrimination

Bank of American v. City of Miami, 137 S.Ct. ___ (May 1, 2017). (1) A city is an "aggrieved person," under the Fair Housing Act and has standing to sue based on its economic losses; and (2) proximate cause requires more than just the possibility that a defendant could have foreseen that the plaintiff might ultimately lose money. Immigration

C. Immigration

Jennings v. Rodriguez, 804 F.3d 1060 (9th Cir. 2015), *cert. granted* 136 S.Ct. 2489 (2016). (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months; and (3) whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a

flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

D. Availability of suits

Ashcroft v. Abassi, 798 F.3d 218 (2d Cir. 2016), *cert. granted*, 137 S.Ct. 293 (2016). (1) Whether the judicially inferred damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, should be extended to the novel context of this case, which seeks to hold the former Attorney General and Director of the Federal Bureau of Investigation (FBI) personally liable for policy decisions made about national-security and immigration in the aftermath of the September 11, 2001 terrorist attacks; and (2) whether the former Attorney General and FBI Director are entitled to qualified immunity for their alleged role in the treatment of respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism; and (3) whether respondents' allegations that the Attorney General and FBI Director personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft v. Iqbal*, in light of the obvious alternative explanation—identified by the Court in *Iqbal*—that their actions were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to leave the United States.

Hernandez v. Mesa, 785 F.3d 117 (5th Cir. 2015), *cert. granted*, 137 S.Ct. 535 (2016). (1) Whether a formalist or functionalist analysis governs the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States; (2) whether qualified immunity may be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident; and (3) whether the claim in this case may be asserted under *Bivens v. Six Unknown Federal Narcotics Agents*

IV. Court jurisdiction and procedure

Goodyear Tire and Rubber v. Haeger, 137 S.Ct. __ (April 18, 2017). Federal courts have inherent authority to impose sanctions for misconduct, the order is limited to the fees the innocent party incurrent solely because of the misconduct.

Bristol-Myers Squibb Co. v. Superior Court of California, 206 Cal.Rptr.3d 636, 377 P.3d 874, *cert. granted*, 137 S.Ct. 827 (2017). Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims – that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.