

ANNUAL REPORT

2018-2019



IMPORTANT CASES FOR BUSINESS
FROM THE SUPREME COURT'S OCTOBER 2018 TERM

HUNTON
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TABLE OF CONTENTS

<i>Kisor v. Wilkie</i>, 139 S. Ct. 2400 (2019)	3
<i>Apple Inc. v. Pepper</i>, 139 S. Ct. 1514 (2019)	4
<i>Henry Schein, Inc. v. Archer & White Sales, Inc.</i>, 139 S. Ct. 524 (2019)	5
<i>New Prime Inc. v. Oliveira</i>, 139 S. Ct. 532 (2019)	6
<i>Lamps Plus, Inc. v. Varela</i>, 139 S. Ct. 1407 (2019)	7
<i>Nutraceutical Corp. v. Lambert</i>, 139 S. Ct. 710 (2019)	8
<i>Frank v. Gaos</i>, 139 S. Ct. 1041 (2019) (per curiam)	9
<i>Fort Bend County v. Davis</i>, 139 S. Ct. 1843 (2019)	10
<i>Weyerhaeuser Co. v. U.S. Fish & Wildlife Service</i>, 139 S. Ct. 361 (2018)	11
<i>Food Marketing Institute v. Argus Leader Media</i>, 139 S. Ct. 2356 (2019)	12
<i>Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.</i>, 139 S. Ct. 628 (2019)	13
<i>Return Mail, Inc. v. U.S. Postal Service</i>, 139 S. Ct. 1853 (2019)	14
<i>Iancu v. Brunetti</i>, 139 S. Ct. 2294 (2019)	15
<i>Merck Sharp & Dohme Corp. v. Albrecht</i>, 139 S. Ct. 1668 (2019)	16
<i>Home Depot U.S.A., Inc. v. Jackson</i>, 139 S. Ct. 1743 (2019)	17
<i>Lorenzo v. Securities & Exchange Commission</i>, 139 S. Ct. 1094 (2019)	18

ADMINISTRATIVE LAW

***Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)**

HOLDING

The Supreme Court declined to overrule *Auer* and *Seminole Rock*, which require courts to defer to a federal agency's reasonable interpretation of its own ambiguous regulations. Even so, courts should rigorously examine regulations to determine ambiguity, ensure the agency's interpretation is reasonable, and independently decide that *Auer* deference is appropriate before granting it.

SUMMARY

Under a pair of decisions—*Bowles v. Seminole Rock & Sand Co.* in 1945, then *Auer v. Robbins* in 1997—federal courts must defer to an executive-branch agency's reasonable interpretation of its own ambiguous regulations. The doctrine, most often called *Auer* deference, is based on the premise that agencies are in the best position to know what their regulations mean. But the doctrine has remained controversial and has faced criticism as violating due process by failing to give proper notice to citizens what regulations mean and violating the separation of powers by giving agencies the power to interpret regulations that they also write. In recent years, several Justices have suggested that, in the appropriate case, the Court should revisit or even overturn *Auer*.

Enter Vietnam veteran James Kisor, a Marine seeking benefits for post-traumatic stress disorder. The Department of Veterans Affairs limited Kisor's benefits based on one of its regulations. The Court of Appeals for the Federal Circuit affirmed, deferring under *Auer* to the agency's interpretation of the relevant regulation. The Supreme Court granted certiorari to decide whether to overrule *Auer* and *Seminole Rock*.

Although all nine Justices agreed to vacate the Federal Circuit's decision in Kisor's case, the Court reaffirmed *Auer* by a 5-4 vote. Justice Kagan delivered the opinion for the Court, which clarified the test for applying the doctrine. First, *Auer* deference applies only when regulations remain "genuinely ambiguous" after a court "exhaust[s] all traditional tools of construction." Second, in the face of that ambiguity, the agency's interpretation must be reasonable. And third, the reasonable interpretation must be an authoritative determination by the agency, relate to the agency's substantive expertise, and reflect the agency's fair and considered judgment. Under these clarified standards, deference will not apply to informal agency memos, when an agency is acting outside its domain of experience, or when the interpretation is an after-the-fact justification for agency action. The majority also held that *stare decisis* weighed against overturning *Auer* and *Seminole Rock*, emphasizing the long history of *Auer* deference and the instability that overruling it would cause. On that basis, the Court vacated and remanded the case for further proceedings based on its conclusion that the Federal Circuit had prematurely declared the applicable regulation ambiguous.

Chief Justice Roberts—the critical fifth vote in favor of retaining *Auer* deference—wrote a separate concurrence to explain that the supporters and detractors of the doctrine may well reach the same result in most cases. If *Auer* applies, that means a regulation is ambiguous, the agency has made a reasonable and authoritative interpretation within its own expertise and considered judgment, and the interpretation will not unfairly surprise those relying on it. In contrast, those in favor of jettisoning *Auer* would still give an agency the power to persuade the court of its interpretation, a form of "deference" outlined in *Skidmore v. Swift & Co.* While recognizing a distinction between deference and the power to persuade, the Chief Justice emphasized that cases in which *Auer* properly applies should largely overlap with cases in which a court would still be persuaded by the agency's interpretation under *Skidmore*. Lastly, the Chief Justice noted that the Court's decision to uphold *Auer* did not touch upon the doctrine of judicial deference to agency interpretations of federal laws under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

ANTITRUST

***Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019)**

HOLDING

The *Illinois-Brick* direct-purchaser rule, which bars antitrust suits by indirect purchasers, does not apply in a lawsuit by iPhone owners against Apple for the company's allegedly monopolistic behavior in the market for iPhone applications, because iPhone owners bought the applications directly from Apple.

SUMMARY

Apple launched its popular App Store in 2008, establishing the only marketplace where iPhone owners may lawfully purchase "apps." Apple does not create most of the apps; instead, independent developers create them and contract with Apple to sell them in the App Store. The developers set their price and pay Apple a 30 percent commission for each sale. In 2011, a group of iPhone owners sued Apple, alleging the company had unlawfully monopolized the market for apps by forcing all iPhone owners to purchase apps from the App Store and thereby pay Apple's substantial commission for every sale.

Section 4 of the Clayton Act provides that "any person" who suffers an antitrust injury may sue the monopolizing defendant. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court established a bright-line rule that allows antitrust suits from direct purchasers but bars lawsuits by indirect purchasers—those "who are two or more steps removed from the violator in a distribution chain." Citing *Illinois Brick*, Apple contended the plaintiffs were not direct purchasers from Apple, because the app developers set each app's purchase price. The district court agreed and dismissed the case. The Ninth Circuit reversed, holding that the iPhone owners were direct purchasers because they bought their apps directly from Apple.

In a 5-4 decision, the Supreme Court affirmed. Writing for the majority, Justice Kavanaugh explained that the broad language of the Clayton Act, which extends to "any person" who has been "injured," covers iPhone owners who claim they bought goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. The owners' app purchases did not pass through an intermediary; the owners bought apps directly from Apple. That was enough to show *Illinois Brick* did not bar the iPhone owners' suit. The Court rejected Apple's argument that antitrust suits should proceed against only the party who sets a product's price, an argument that could not be squared with the text of the statute. Moreover, endorsing a price-setting interpretation of *Illinois Brick* could motivate sellers to insulate themselves from antitrust suits by restructuring their supply chain relationships so they could disclaim responsibility for setting the ultimate retail price, all to the detriment of antitrust enforcement. Regardless whether the seller earns revenue through price markups or commissions, the Clayton Act allows its direct purchasers to sue for anticompetitive behavior.

ARBITRATION

***Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)**

HOLDING

Federal courts may not decline to send gateway questions of arbitrability to arbitration based on their view that a party's arbitrability argument is "wholly groundless."

SUMMARY

Under the Federal Arbitration Act, parties can agree that "arbitrability"—the threshold question whether an arbitration agreement covers a particular dispute—should be decided by an arbitrator. The rules of the American Arbitration Association, for example, require an arbitrator rather than a court to decide whether a dispute is covered by an arbitration agreement. Yet some courts have declined to send those questions to arbitration when they conclude that the argument in favor of arbitrability is "wholly groundless." The Supreme Court granted certiorari to determine whether that exception accords with the Federal Arbitration Act.

Archer and White, a small dental equipment distributor, sued manufacturer Henry Schein, Inc., for various federal and state antitrust violations, seeking both money damages and equitable relief. Schein invoked the arbitration agreement in the parties' contract, which required binding arbitration under the rules of the American Arbitration Association, except "for actions seeking injunctive relief." Archer and White responded that the exception for injunctive relief made Schein's argument for arbitration "wholly groundless," given the inclusion of equitable relief in the lawsuit. On that basis, Archer and White urged the district court to decide the arbitrability question rather than sending it to the arbitrator. The district court agreed and denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

In a unanimous decision, the Court reversed and remanded. Justice Kavanaugh—in his first opinion for the Supreme Court—explained that the "wholly groundless" exception is inconsistent with the Federal Arbitration Act. Under the Act, courts must enforce arbitration agreements by their own terms. That rule extends to agreements that cover "gateway questions of arbitrability." When an arbitration agreement is valid and enforceable, a court cannot impose its own view of arbitrability when the parties otherwise agreed that an arbitrator should decide that question. It is no answer to suggest that courts should intervene when arbitrability arguments are frivolous and thus make arbitration costly and inefficient. The Federal Arbitration Act contains no such exception. At bottom, if an agreement "delegates the arbitrability question to the arbitrator, the courts must respect the parties' decision as embodied in the contract."

***New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019)**

HOLDING

(1) A court, rather than an arbitrator, must decide whether an arbitration agreement falls within an exception to the Federal Arbitration Act; and (2) the Act's exception carving out "contracts of employment" for workers engaged in interstate commerce refers to "agreements to perform work," which include independent-contractor agreements.

SUMMARY

The Federal Arbitration Act requires federal courts to compel parties into arbitration based on their valid arbitration agreements. The Act carves out an exception, however, for "contracts of employment" for particular classes of transportation workers.

Truck driver Dominic Oliveira sued trucking company New Prime for failing to pay its drivers lawful wages. Although New Prime hired its drivers under "independent contractor" agreements, Oliveira contended that the drivers were employees and thus entitled to statutory minimum wage. The agreements contained a broad arbitration provision, which delegated to the arbitrator the very question of a dispute's arbitrability. New Prime thus asked the district court to compel arbitration. The court denied the motion. New Prime took an immediate appeal to the First Circuit. Affirming the district court, the First Circuit held that the applicability of the exception had to be decided by a court, not an arbitrator. According to the First Circuit, the exception applied regardless whether the drivers were employees or independent contractors because "contract of employment" covered both scenarios.

The Supreme Court affirmed in a unanimous opinion written by Justice Gorsuch before Justice Kavanaugh was confirmed. First, the Court held that a federal court must independently decide whether a dispute is fit for arbitration under the Federal Arbitration Act before compelling arbitration. As a matter of sequencing, the court must first know whether an agreement falls within the Act before it can assert that authority. Even a clause delegating questions of arbitrability to an arbitrator is "merely a specialized type of arbitration agreement," the enforceability of which a federal court must assess before exercising its power to compel arbitration. Second, the Court held that the phrase "contracts of employment" was not limited solely to employer-employee relationships. Instead, assessing the historical record and contemporary authorities from the Act's enactment in 1925, the Court explained that "contracts of employment" refers to "agreements to perform work." On that basis the exception applies to employees and independent contractors alike.

***Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)**

HOLDING

Under the Federal Arbitration Act, courts may not infer from ambiguous language in an arbitration agreement that the parties agreed to class arbitration.

SUMMARY

The Federal Arbitration Act mandates that courts enforce arbitration agreements according to their terms and preempts state laws that hinder that goal. In the context of class arbitration, the Supreme Court has held that parties must affirmatively agree to proceed on a class basis. If the contract is silent on class arbitration, parties may not be compelled to submit to it.

In 2016, a hacker tricked a Lamps Plus employee into providing the tax information of about 1,300 employees. After a fraudulent federal income tax return was filed for employee Frank Varela, he filed a putative class action on behalf of the effected employees against Lamps Plus in federal court. Because Varela and most employees had signed broad arbitration agreements, Lamps Plus asked the court to compel arbitration on an individual basis. The district court agreed, but ordered arbitration on a class basis. The Ninth Circuit affirmed, concluding that different phrases in the agreement could be read to support class arbitration. The appeals court reasoned that the agreement's failure to mention class proceedings did not preclude class arbitration but merely created an ambiguity over whether arbitration had to proceed on an individual or class basis. Applying state-law principles requiring courts to construe ambiguities against the drafter, the Ninth Circuit upheld the district court's order compelling class arbitration.

The Supreme Court reversed and remanded. In a 5-4 decision authored by Chief Justice Roberts, the Court emphasized that arbitration "is strictly a matter of consent." That consent extends to fundamental questions like whether arbitration must proceed individually or on a class basis. Contrary to the Ninth Circuit's approach, the Supreme Court held that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." The *contra proferentem* doctrine employed by the Ninth Circuit—construing ambiguities against the drafter—does not determine the parties' intent, but gives a last-resort public policy basis to pick one side's interpretation of an ambiguous agreement. Because that doctrine ignores the fundamental principle of consent, it should not be used to determine what parties agreed to in an arbitration agreement.

CLASS ACTIONS

***Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019)**

HOLDING

The 14-day deadline to seek permission to appeal a class-certification decision under Federal Rule of Civil Procedure 23(f) is not subject to equitable tolling.

SUMMARY

Rule 23(f) of the Federal Rules of Civil Procedure allows a party to seek permission from a federal appellate court to appeal a district court's decision to grant or deny class certification. A petition seeking that permission must be filed "within 14 days after the order is entered."

Troy Lambert filed a class-action lawsuit against Nutraceutical Corporation, alleging its marketing of a dietary supplement violated California consumer-protection law. The California district court at first certified the class, but then revisited the decision and decertified the class. During a status conference 10 days later, Lambert told the district court he wanted to seek reconsideration of the decertification decision. The district court instructed him to file the motion within the next 10 days. Lambert filed the reconsideration motion (now 20 days after decertification), which the district court denied three months later. Within 14 days of that denial, Lambert sought permission to appeal under Rule 23(f). The Ninth Circuit held that Lambert's petition was untimely because it had not been filed within 14 days of the original decertification order. Even so, the appeals court held that deadline should be tolled based on Lambert's otherwise diligent conduct and compliance with the district court's deadline for reconsideration.

The Supreme Court reversed. In a unanimous decision by Justice Sotomayor, the Court held that although Rule 23(f) was not jurisdictional (and therefore could be waived or forfeited), its 14-day time period is mandatory when properly raised. The text of Rule 23(f) and related appellate rules on petitions seeking permission to appeal (distinguished from appeals as of right) do not allow for any flexibility of deadlines. And, as the Court explained, "[c]ourts may not disregard a procedural rule's plain import any more than they may a statute's." In short, the 14-day deadline under Rule 23(f) may not be tolled. The Court left open whether Lambert's petition was still timely because it had been filed within 14 days of the reconsideration order, an issue the Ninth Circuit did not reach. On remand, the Ninth Circuit could consider that question in the first instance.

Frank v. Gaos, 139 S. Ct. 1041 (2019) (per curiam)

HOLDING

The Supreme Court declined to review whether federal class-action settlements may include *cy pres* awards, opting instead to vacate the lower court's settlement approval and remand for consideration of whether any of the named plaintiffs had suffered the injury necessary for Article III standing under *Spokeo, Inc. v. Robins*.

SUMMARY

Under Article III of the Constitution, plaintiffs in federal court must have “standing” to sue, which requires in part that the plaintiff have suffered a concrete and particularized injury. In 2016, the Supreme Court held in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, that a plaintiff must point to a concrete injury even in the context of an alleged statutory violation.

Frank v. Gaos did not come to the Supreme Court on the question of standing. Three named plaintiffs brought class actions against Google, claiming the company violated the Stored Communications Act by transmitting users' internet search terms to third-party websites. The case went to mediation, which led to a classwide settlement agreement. As part of the settlement, Google agreed to include disclosures on its webpages. The company also promised to pay \$8.3 million—not to any of the class members, but mostly to six nonprofit organizations whose work indirectly benefited the class members. Such organizations are known as *cy pres* recipients. Some class members objected to the use of *cy pres* recipients, but the district court approved the settlement. The Ninth Circuit affirmed. The Supreme Court granted certiorari to decide whether the federal class action rule allows *cy pres* awards.

Once the case came to the Supreme Court, standing became the focal point. Although standing had been raised as a defense by Google, the district court had rejected the argument, relying instead on pre-*Spokeo* Ninth Circuit precedent that held that the violation of a statute that provides for a private right of action always satisfies the injury-in-fact requirement. That decision was no longer good law after *Spokeo*, but the Ninth Circuit had not addressed the issue when it upheld the *cy pres* award. Although the Supreme Court had an independent obligation to ensure there was Article III standing—and thus federal court jurisdiction over the case—it declined to be the first court to decide the issue. The Supreme Court therefore vacated the Ninth Circuit's decision and remanded for a lower court to reexamine standing. Whether any member of the class suffered a concrete injury remains to be decided, as does the propriety of *cy pres* awards in federal class actions.

EMPLOYMENT LAW

***Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019)**

HOLDING

Title VII's requirement that plaintiffs file a discrimination charge with the Equal Employment Opportunity Commission before suing is not jurisdictional.

SUMMARY

Under Title VII of the Civil Rights Act of 1964, employees who want to sue their employer for discrimination must first file a charge with the Equal Employment Opportunity Commission (EEOC). The EEOC then investigates the charge and determines whether to act, either through informal conciliation or formal litigation. If the EEOC opts to take no action, the EEOC issues a "right-to-sue" letter to the employee, who then may sue the employer. Over the years, federal courts of appeals divided over whether Title VII's charge-filing precondition was jurisdictional, which in turn informed whether the defense could be raised at any time or could be forfeited by the employer (or even whether a district court had to sua sponte dismiss a case).

Lois Davis was a municipal employee in Fort Bend County, Texas. After reporting sexual harassment and experiencing retaliation, Davis filed a charge for harassment and retaliation with the EEOC. While that charge was pending, Davis's supervisor demanded she work on a Sunday despite her commitments at church. When Davis did not report to work, she was fired. Although Davis wrote "religion" on an EEOC questionnaire, she did not add that claim to her formal charge document. When the EEOC issued a right-to-sue letter, Davis sued the employer for retaliation and religious-based discrimination. After years of litigation—including a trip to the Fifth Circuit to affirm the rejection of Davis's retaliation claim—the employer asserted for the first time that the district court lacked jurisdiction over the religious-discrimination claim because Davis had not included the allegation in her formal EEOC charge. The district court agreed, concluded it lacked jurisdiction over that charge, and dismissed the claim. On appeal, the Fifth Circuit reversed, holding that the charge prerequisite was nonjurisdictional and had been forfeited by the employer.

The Supreme Court affirmed. In a unanimous opinion authored by Justice Ginsburg, the Court noted the overuse of the term "jurisdiction"—even in its own past decisions. The term should be reserved "for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." Unless Congress clearly states a statutory requirement goes to a court's jurisdiction, federal courts should treat the rule as nonjurisdictional. Turning to Title VII's charge-filing precondition—which appears in a separate provision from the Act's specific grant of subject-matter jurisdiction over Title VII claims—that provision is focused on the plaintiff's procedural obligations, not a court's authority. The Court thus concluded that "Title VII's charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts."

ENVIRONMENTAL LAW

***Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018)**

HOLDING

Land designated as “critical habitat” under the Endangered Species Act of 1973 must be habitat for the listed species, and the Secretary of the Interior’s decision not to exclude area from “critical habitat” is subject to judicial review.

SUMMARY

Under the Endangered Species Act of 1973, the Secretary of the Interior must designate “critical habitat” for endangered species. That land need not be where the species currently lives, but it must be “essential for the conservation of the species.” Separately, the Act authorizes the Secretary to exclude areas that otherwise would be critical habitat if the benefits of excluding it outweigh the benefits of designating it under the Act.

The U.S. Fish and Wildlife Service designated property in Louisiana as “critical habitat” for the endangered dusky gopher frog, but the frog had not lived on that property for many years and, importantly, the land would have to be modified to ensure the frog could survive there (for example, the existing timber plantation would need to be replaced with an open-canopy forest). Weyerhaeuser and others who owned the property sued to challenge the critical-habitat designation, the Fish and Wildlife Service’s decision not to exclude their property from the frog’s critical habitat, and the methodology and factors used to weigh the effect of the designation. The district court approved both the Fish and Wildlife Service’s designation of the land as “essential to the conservation of the species” and its comparative-benefit methodology, but declined to consider Weyerhaeuser’s challenge to the discretionary decision not to exclude the land. The Fifth Circuit affirmed, holding that “critical habitat” does not include a habitability requirement. The circuit court also held that the decision whether to exclude the land was an unreviewable act of agency discretion.

In a unanimous opinion by the Chief Justice issued before Justice Kavanaugh was confirmed, the Supreme Court vacated the Fifth Circuit’s decision. First, the Court held that, by definition, “critical habitat” must be “habitat.” The Court did not decide whether that meant land must be currently habitable, instead remanding to the Fifth Circuit to consider that question in light of the administrative record. Second, the Court held that the decision whether to exclude the land from critical habitat is subject to judicial review. The Court thus instructed the Fifth Circuit to determine whether the Fish and Wildlife Service’s decision not to exclude the land from critical habitat was arbitrary, capricious, or an abuse of discretion.

FREEDOM OF INFORMATION ACT

***Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019)**

HOLDING

If information is treated as private by its owner and provided to the government under an assurance of privacy, the information is “confidential” under the Freedom of Information Act’s Exemption 4 and protected from mandatory disclosure.

SUMMARY

This case began when a newspaper filed a Freedom of Information Act (FOIA) request for data submitted by grocery stores to the U.S. Department of Agriculture showing store-level participation in the federal Supplemental Nutrition Assistance Program. The USDA declined the full request by invoking a variety of exemptions to FOIA, including Exemption 4, which shields “confidential” commercial or financial information from mandatory disclosure. Undeterred, the newspaper sued the USDA to compel the remaining numbers, arguing that Exemption 4 did not shield the agency from full disclosure because the remaining numbers were not “confidential.” The newspaper cited a 1974 D.C. Circuit decision that limited “confidential” information under Exemption 4 to information whose release would “cause substantial harm to the competitive position” of the information’s original owner. Here, the newspaper argued that because the disclosure of the numbers would not substantially harm the competitive position of the retailers that originally owned the data, the numbers were not “confidential” under Exemption 4 and therefore, not protected from the newspaper’s FOIA request. The district court agreed and ordered disclosure, finding that the numbers the agency withheld did not satisfy the competitive harm test. Although the USDA declined to appeal, the Food Marketing Institute, a trade association that represents grocery retailers, intervened and filed its own appeal. The Eighth Circuit rejected the Food Marketing Institute’s appeal, affirming the district court’s use of the competitive harm test when defining “confidential” under Exemption 4.

In a 6-3 opinion authored by Justice Gorsuch, the Supreme Court reversed and remanded, finding that the information fell within Exemption 4. After confirming the Food Marketing Institute’s standing to appeal, the Court turned to the question at issue: what does “confidential” mean within FOIA’s Exemption 4? The Court rejected the D.C. Circuit’s approach, finding that it muddled clear statutory language by engrafting the competitive harm test onto Exemption 4. FOIA does not provide a definition, so the Court looked to dictionaries and determined that “confidential” information is “customarily kept private” and received with “some assurance that it will remain secret.” Because the grocery stores kept their data private and gave it to the USDA with such an assurance, it was shielded from disclosure under FOIA.

INTELLECTUAL PROPERTY

***Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, 139 S. Ct. 628 (2019)**

HOLDING

An inventor who has not yet filed for a patent but sells an invention to a buyer who is contractually obligated to keep the invention confidential places the invention “on sale” under 35 U.S.C. § 102(a)(1), which bars the inventor from receiving a patent, and the 2011 revision to § 102 under the Leahy-Smith America Invents Act did not change that longstanding understanding of the “on-sale bar.”

SUMMARY

The fundamental goal of American patent law is to encourage discovery and advancement by granting inventors a limited period of exclusive rights over their inventions. To balance that goal against the need for competition, Congress has imposed conditions on an inventor’s ability to patent an idea. For more than 150 years, one of those conditions has been the so-called “on-sale bar,” which prohibits inventors from seeking patent protections for inventions that have already hit the market. In its 1998 *Pfaff v. Wells Electronics* decision, the Supreme Court held that the sale need not be public to render an invention non-patentable—“secret sales” could trigger the on-sale bar. In the Leahy-Smith America Invents Act of 2011, Congress amended the bar in 35 U.S.C. § 102(a)(1) to prohibit patents for inventions “in public use, on sale, or otherwise available to the public” before the inventor filed to obtain a patent.

Helsinn Healthcare developed the drug palonosetron, which treats the side effects of chemotherapy. In 2001, Helsinn entered into an agreement with MGI Pharma, under which MGI would purchase palonosetron from Helsinn and distribute it in the United States. The purchase agreement forbade MGI from disclosing any proprietary information about palonosetron. Helsinn then filed a series of applications for a patent on palonosetron, including the most recent application in May 2013. Because of its filing date, the 2013 application is governed by the AIA rather than the previous version of the patent statute. In 2011, Teva Pharmaceuticals attempted to manufacture a generic version of palonosetron. Helsinn then sued for patent infringement. Teva defended that the 2001 purchase agreement between Helsinn and MGI placed palonosetron “on sale” under § 102, and the drug thus was barred from patent protection. In response, Helsinn contended that the 2011 amendment to § 102—which added the catchall phrase “or otherwise available to the public”—signaled a revision to the “on-sale” provision that required the sale to be public. The Federal Circuit sided with Teva, holding that the AIA did not change the meaning of the “on-sale” bar. Helsinn sought certiorari, asking the Supreme Court to find that the AIA changed the meaning of “on sale” under § 102.

In a unanimous opinion authored by Justice Thomas, the Supreme Court affirmed the Federal Circuit. The Court observed that the purpose of the patent statute is to motivate inventors to disclose “new, useful, and nonobvious advances in technology and design” by offering a temporary monopoly on the invention. The limitations on patentability in § 102 serve this purpose by stopping inventors from “remov[ing] existing knowledge from public use” through obtaining a patent. Supreme Court precedent suggests, and the Federal Circuit has repeatedly held, that the on-sale bar applies irrespective of whether the sale resulted in public disclosure of the invention. And when Congress amended § 102 in 2011, it retained the “on-sale” language from the previous versions, which indicates a tacit endorsement of the existing case law. Ultimately, the Court concluded that there was no evidence that Congress intended the AIA to “upset [the] body of precedent” on the meaning of “on sale.”

Return Mail, Inc. v. U.S. Postal Service, 139 S. Ct. 1853 (2019)

HOLDING

The federal government is not a “person” capable of seeking review of the validity of a patent before the Patent Trial and Appeal Board under the Leahy-Smith America Invents Act.

SUMMARY

In the Leahy-Smith America Invents Act of 2011, Congress created the Patent Trial and Appeal Board (PTAB) and provided several ways for a “person” to challenge the validity of an issued patent. Those proceedings allow for an administrative review of the patent, which can be appealed to the Federal Circuit.

Return Mail owns a patent related to the processing of undeliverable mail. For a time, the United States Postal Service (USPS) considered licensing Return Mail’s invention, but they never struck a deal. A few years later, USPS rolled out its own enhanced address-change service for undeliverable mail, which Return Mail claimed infringed its patent. Infringement litigation and review at the Patent Office ensued. As relevant here, USPS ultimately petitioned the PTAB for a validity review under one of the methods outlined in the America Invents Act. The PTAB agreed that Return Mail’s claims were ineligible for patent protection, so it canceled the claims underlying the patent. Return Mail sought review at the Federal Circuit, but that court affirmed the PTAB’s decision. In reaching its decision, the Federal Circuit concluded that the federal government is a “person” that can petition the PTAB for review of an issued patent’s validity.

The Supreme Court reversed. In a 6-3 decision authored by Justice Sotomayor, the Court held that the federal government is not a “person” capable of petitioning the PTAB to institute patent review proceedings under the America Invents Act. At the outset, the Court observed that the patent statutes do not define the term “person.” Without an express definition, the Court applied the longstanding presumption that the statutory term “person” excludes the government. That presumption flows from both common usage and the Dictionary Act, which excludes the federal government from the definition of “person.” None of the Postal Service’s arguments overcame the presumption here. The Court recognized that among the 18 references to “person[s]” in the Act, some clearly included the federal government, but other uses obviously excluded it. And the government’s ability to participate in the patent system in other ways—such as by obtaining patents, petitioning for patent review through different processes, or being subject to liability for infringement—did not necessarily mean the government must be treated as a “person” who could seek PTAB review under the America Invents Act. Because the federal government is not a “person” under the America Invents Act, the Postal Service could not petition the PTAB to review the validity of Return Mail’s patent.

***Iancu v. Brunetti*, 139 S. Ct. 2294 (2019)**

HOLDING

The Lanham Act’s prohibition on the registration of “immoral or scandalous” trademarks violates the First Amendment.

SUMMARY

In 2017, the Supreme Court found the Lanham Act’s prohibition of “disparaging” trademarks unconstitutional under the First Amendment. Here, the Court addressed a similar provision—15 U.S.C. § 1052(a)—which barred the registration of “immoral or scandalous” trademarks.

This case began when Erik Brunetti tried to register the mark for his clothing line, which bears a name resembling profanity. The U.S. Patent and Trademark Office (PTO) found the mark to be “immoral or scandalous” and denied its registration. Brunetti sued the PTO, alleging the Act’s “immoral or scandalous” rule discriminated based on viewpoint, and thus violated the First Amendment. The Federal Circuit agreed and struck down § 1052(a).

The Supreme Court granted review and affirmed. Writing for the Court, Justice Kagan emphasized a core principle of free speech: the government may not discriminate against speech based on the viewpoint it conveys. The Lanham Act’s “immoral or scandalous” bar did just that, because it allowed the PTO to disfavor offensive ideas, registering marks deemed moral and decent while denying those purportedly hostile to “conventional moral standards.” Resisting that conclusion, the government had proposed that the Court interpret § 1052(a) as applying only to marks that are immoral or scandalous based on “their *mode* of expression”—covering only lewd, sexually explicit, or profane language. But the Court dismissed that proposal, reasoning that it would require the Court to rewrite—not just interpret—the statute. Because § 1052(a) allowed the PTO to discriminate based on viewpoint, the Court held that it violated the First Amendment.

Although the Court unanimously agreed that the “immoral” bar under § 1052(a) violated the First Amendment, several justices, including the Chief Justice, Justice Breyer, Justice Alito, and Justice Sotomayor, wrote separately to suggest Congress could properly impose a narrower prohibition on scandalous or otherwise vulgar marks.

PREEMPTION

***Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019)**

HOLDING

State law failure-to-warn claims are preempted by federal law when the drug manufacturer can show a judge that the Food and Drug Administration refused to approve a drug label to include a warning despite being “fully informed” by a manufacturer of the justifications for making the change under state law.

SUMMARY

Federal law gives the Food and Drug Administration (FDA) responsibility for ensuring the safety of prescription drugs and establishing requirements for drug labeling. Drug manufacturers therefore must work with the FDA to “develop an appropriate label” during the drug-approval process. After a drug is on the market, the manufacturer can apply to change a drug’s label, but it also can make additions to or strengthen warnings without prior FDA approval through the “changes being effected” (or CBE) process. Even then, however, the FDA can reject a CBE change after the fact. In the Supreme Court’s 2009 *Wyeth v. Levine* decision, the Court held that “clear evidence” that the FDA would not have approved a change preempts a state law failure-to-warn claim.

Merck Sharp & Dohme developed Fosamax, a drug that treats osteoporosis in women. During the drug’s development, Merck’s scientists found a then-theoretical risk that the drug could encourage “micro-fractures [that] would not heal.” The company raised the possibility when it applied for FDA approval, but the FDA approved the label in 1995 without requiring any mention of the risk. By 2008, more evidence substantiated a causal link between Fosamax and a condition known as “atypical femoral fractures.” Merck asked the FDA for approval to change Fosamax’s label to reference the risk of femoral fractures. In pertinent part, the FDA rejected the change based on inadequate justification from the submitted scientific literature. But in 2011, after the FDA conducted its own analysis, the agency ordered the change.

This case arose when 500 plaintiffs filed a class-action lawsuit against Merck raising failure-to-warn claims over the company’s lack of a femoral fracture warning between 1999 and 2010. Merck argued the claims were preempted by federal law based on the FDA’s decision not to require the warning until 2011. Although Merck conceded it could have added the change through the CBE process, it argued that the FDA ultimately would have rejected it. The district court sided with Merck and deemed the claims preempted. The Third Circuit vacated and remanded that decision, concluding that a jury should weigh the facts here and decide whether they meet the “clear evidence” standard from *Wyeth*.

In a 6-3 decision authored by Justice Breyer, the Supreme Court vacated and remanded the Third Circuit’s decision. First, the Court held that *Wyeth*’s “clear evidence” standard is met when a manufacturer can show that the FDA was “fully informed” of the manufacturer’s justification for adding a label under state law but nevertheless rejected a warning label change. Second, and importantly, the Court held that “clear evidence” of agency disapproval must be decided by a judge, not a jury. On that basis, the Court sent the case back to the Third Circuit for consideration under the clarified standard.

REMOVAL TO FEDERAL COURT

Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2019)

HOLDING

A third-party counterclaim defendant—“a party brought into the case as an additional defendant to a counterclaim asserted against the original plaintiff”—cannot remove an action to federal court even if the claim otherwise satisfies the general removal statute or the removal provision of the Class Action Fairness Act.

SUMMARY

The general removal statute, 28 U.S.C. § 1441(a), allows a state-court “defendant or defendants” to remove to federal court “any civil action” that otherwise could have originated in federal court. The Class Action Fairness Act, 28 U.S.C. § 1453(b), likewise gives the power to remove certain class actions from state court to “any defendant without the consent of all defendants.”

This case began when a financial services company sued George Jackson in North Carolina state court to collect an outstanding credit card debt. Jackson responded by filing a consumer-protection counterclaim against the financial services company and asserting class-action claims against Home Depot and another company as third-party counterclaim defendants. After the financial services company dismissed its claims against Jackson, Home Depot removed the case to federal court, citing both the general removal statute and the Class Action Fairness Act. On Jackson’s motion, the district court remanded the case to the North Carolina state court. After giving Home Depot permission to appeal the remand order, the Fourth Circuit affirmed, finding that neither § 1441(a) nor § 1453(b) allowed Home Depot to remove the class-action claims filed against it.

In a 5-4 opinion authored by Justice Thomas, the Supreme Court affirmed. First, the Court dismissed Home Depot’s argument that it could remove the third-party counterclaim under § 1441(a) as “a ‘defendant’ to the claim against it.” Based on the general removal statute’s structure and related precedent, only defendants in the original action—not third-party counterclaim defendants—may remove a case to federal court. Second, the Court rejected the alternative argument that removal was proper under § 1453(b) of the Class Action Fairness Act, which allows “any defendant” to remove. The grant of removal power to “any defendant” does not extend to third parties. Instead, it simply altered the general removal rule that “all” properly joined and served defendants must join in or consent to removal. And that alteration did not change the meaning of “defendant” in §§ 1441(a) and 1453(b), which must be read in harmony. The Court thus agreed with the lower courts that Home Depot could not remove the counterclaim from North Carolina state court. That result may allow defendants to sue diverse third-party counterclaim defendants without risking removal, the Court acknowledged, but Congress retains the power to amend the removal statutes to address that situation.

SECURITIES

***Lorenzo v. Securities & Exchange Commission*, 139 S. Ct. 1094 (2019)**

HOLDING

A person who disseminates a false or misleading statement with intent to defraud can violate provisions of federal securities law, even if the person is not the “maker” of the statement and, as a result, is not liable under Rule 10b-5(b).

SUMMARY

Federal law gives the SEC the power to prohibit deceptive practices in the purchase or sale of securities. SEC Rule 10b-5 does just that, making it unlawful to (a) “employ any device, scheme, or artifice to defraud,” (b) “make any untrue statement of material fact,” or (c) “engage in any act, practice or course of business [that] operates as a fraud or deceit” in connection with securities transactions. In its 2011 *Janus Capital v. First Derivative Traders* decision, the Supreme Court held that only the “maker” of a statement can be liable under subsection (b), and a person is only a “maker” if he or she has “ultimate authority” over the statement, including its content and the means and modes of its communication. Someone who merely participates in the preparation or dissemination of a false statement cannot be held primarily liable under subsection (b).

In 2009, investment banker Francis Lorenzo sent a pair of emails to prospective investors that contained false statements drafted by his superior. The SEC charged Lorenzo with violating federal securities law, including Rule 10b-5. The SEC assessed a \$15,000 fine and imposed a lifetime ban on working in the securities industry. On appeal to the D.C. Circuit, Lorenzo argued he could not be liable under Rule 10b-5 because his boss had been the “maker” of the statements. The appeals court agreed that Lorenzo could not be liable under subsection (b) of the Rule, but upheld the SEC’s finding because Lorenzo had violated subsections (a) and (c). The Supreme Court granted certiorari to decide whether someone who is not a “maker” of a statement can violate those other subsections of Rule 10b-5 and related securities laws.

In a 6-2 decision, the Supreme Court affirmed the D.C. Circuit and held that Lorenzo may be primarily liable for his statements under subsections (a) and (c) even if he did not “make” them. Writing for the majority, Justice Breyer reasoned that because Lorenzo sent the emails with the intent to deceive, manipulate, or defraud, it was “difficult to see how his actions could escape the reach” of the securities laws. This conclusion was bolstered by the fact that Lorenzo was not “tangentially involved in dissemination,” but rather that he directly and knowingly sent false statements, invited follow-up questions, and signed the statements in his capacity as the vice president of an investment banking company. Although Lorenzo could not be a primary violator of subsection (b), subsections (a) and (c) have different requirements and he could be primarily liable under those provisions. Finally, the Court rejected Lorenzo’s argument that he should only be secondarily liable under the “aiding and abetting” companion statute, since that statute requires that a primary actor be held liable. If there is no primary violator, Lorenzo may escape liability altogether. This does not, the Court reasoned, comport with Congress’ intent to “root out all manner of fraud in the securities industry.”

ABOUT OUR ISSUES AND APPEALS TEAM

Led by a former justice of the Supreme Court of Texas and two former state solicitors general, lawyers on Hunton Andrews Kurth LLP's accomplished issues and appeals team have represented clients in federal and state appellate courts nationwide, including in the Supreme Court of the United States. Among the firm's lawyers are a former justice of the Supreme Court of Virginia and more than 30 who have clerked for federal and state appellate judges throughout the country, including US Supreme Court Justice Clarence Thomas. This service gives keen insight into how appeals are viewed and handled from the other side of the bench.

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