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SUPREME COURT UPDATE[1]

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ADMINISTRATIVE LAW

Courts must continue to defer to an agency's reasonable interpretation of its own ambiguous regulation.

Kisor v. Wilkie, 18-15 (5-4 Kagan). By a 5-4 vote, the Court declined to overrule Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. The Court clarified, however, that Auer deference applies only when a court finds a statute "genuinely" ambiguous after "resort[ing] to all the standard tools of interpretation." Further, said the Court, Auer deference (even to a reasonable agency reading of an ambiguous rule) should be granted only if the interpretation is "the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views"; if it "in some way implicate[s] [the agency's] substantive expertise"; if "it reflect[s] 'fair and considered judgment'" (and isn't "a merely 'convenient litigating position' or 'post hoc rationalizatio[n] advanced' to 'defend past agency action against attack'"); and if it does not "create[] 'unfair surprise' to regulated parties."

Citizenship question on census does not violate the Enumeration Clause or the Census Act, but Secretaries justification may still be pretextual.

Department of Commerce v. New York, 18-966 (5-4 Roberts). The Court rejected Enumeration Clause and Administrative Procedure Act challenges to the Secretary of Commerce's decision to add a question about citizenship status to the 2020 census questionnaire, but affirmed the district court's conclusion that the Secretary's stated justification for adding the question (to help DOJ enforce the Voting Rights Act) was pretextual, which warrants a remand to the Department of Commerce to provide a non-pretextual justification.

ANTITRUST

iPhone owners may sue Apple under antitrust laws for monopolizing the retail market for the sale of apps.

Apple, Inc. v. Pepper, 17-204 (5-4, Kavanaugh). By a 5-4 vote, the Court held that iPhone owners are direct purchasers of applications (apps) sold on the iPhone App Store and may sue Apple under the antitrust laws for allegedly monopolizing the retail market for the sale of apps. The Court therefore held that the Illinois Brick doctrine—under which only direct purchasers may sue for antitrust damages, not downstream indirect purchasers—does not apply. The Court reasoned that "iPhone owners bought the apps directly from Apple"; they are "not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain." Apple contended that this case involves the sort of pass-on theory that Illinois Brick bars because the app developers have to pay Apple's 30% commission; iPhone owners are injured only if the developers pass on some of that overcharge. Disagreeing, the Court stated that "Apple's effort to transform Illinois Brick from a direct-purchaser rule to a 'who sets the price' rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers."

CIVIL RIGHTS

Because police officers had probable cause to arrest Russell Bartlett, his First Amendment retaliatory arrest claim fails as a matter of law.
Nieves v. Bartlett, 17-1174 (6-3 Roberts). By a 6-3 vote, the Court held that the existence of probable cause to arrest generally defeats a First Amendment retaliatory arrest claim. The Court reasoned that "speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest"; that creates "causal complexities" only a probable-cause requirement can cure. Without that requirement, officers could not "go about their work without undue apprehension of being sued." The Court added a caveat, however: "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."

The statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor.
McDonough v. Smith, 18-485 (6-3 Sotomayor). 18-485. By a 6-3 vote, the Court held that the statute of limitations for a §1983 claim alleging that a prosecutor presented fabricated evidence does not begin to run until the favorable termination of the challenged prosecution. The Court analogized the false-evidence claim to another claim challenging the integrity of criminal prosecution—malicious prosecution. The Court found that the pragmatic concerns that motivated malicious prosecution's favorable-termination requirement—avoiding parallel criminal and civil litigation over the same subject matter and the possibility of conflicting criminal and civil judgment—apply with equal force to false-evidence claims. The Court found the soundness of its conclusion reinforced by the consequences that would follow from a discovery rule: in jurisdictions where prosecutions regularly last longer than the limitations period, defendant would have to choose between letting their claims expire and filing a civil suit against the person currently prosecuting them.

ADEA applies to state entities regardless of the number of employees.
Mount Lemmon Fire District v. Guido, 17-587 (8-0, Ginsberg, Kavanaugh did not sit). The Court unanimously held that the Age Discrimination in Employment Act applies to state entities regardless of how few employees they have. The Act provides that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." 29 U.S.C. §630(b). The Court concluded that §630(b) establishes two distinct categories of covered employers: "persons engaged in an industry affecting commerce with 20 or more employees; and States or political subdivisions with no attendant numerosity limitation."

Partisan gerrymandering claims are not justiciable in federal courts.
Rucho v. Common Cause, 18-422; Lamone v. Benisek, 18-726 (Roberts 5-4). By a 5-4 vote, the Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." The Court explained that "[t]here are no legal standards discernible in

the Constitution for" determining when partisan considerations have gone too far, "let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts."

CRIMINAL LAW

The term "burglary" in the Armed Career Criminal Act includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation.
United States v. Stitt, 17-765 (9-0 Bryer). The Armed Career Criminal Act imposes mandatory minimum prison sentences on defendants who are convicted of certain federal offenses and who have at least three prior qualifying state or federal convictions for certain violent felonies or drug-related crimes. The Act defines "violent felony" as, among other things, "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary." Victor J. Stitt and Jason Daniel Sims were each convicted of unlawful possession of a firearm and were given and mandatory minimum fifteen-year sentence for having three previous convictions for violent felonies. The prior convictions for each defendant included a state-law conviction for burglarizing a structure or vehicle that has been adapted or is customarily used for overnight accommodation. At the time that the Armed Career Criminal Act was passed, most state burglary laws included burglary of vehicles such as RVs or campers that had been adapted or were customarily used as accommodations. The Court therefore held that Congress intended to include burglaries of those types of dwellings in the Act.

The Armed Career Criminal Act's elements clause encompasses a robbery offense that, like Florida's law, requires the criminal to overcome the victim's resistance.
Stokeling v. United States, 17-5554 (5-4 Thomas). The Armed Career Criminal Act imposes mandatory minimum prison sentences on defendants who are convicted of certain federal offenses and who have at least three prior qualifying state or federal convictions for certain violent felonies or drug-related crimes. The Act defines "violent felony" as, among other things, any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Denard Stokeling was convicted of unlawfaul possession of a firearm and ammunition. His prior criminal convictions included a Florida state law conviction for robbery that had as an element resistance by the victim that is overcome by the physical force of the offender. The Court held that Congress intended to include the common law definition of robbery in the Act. At common law, a person committed robbery if he overcame resistance, however slight, to take personal property. Stokeling's Florida robbery conviction thus satisfied the definition of violent felony in the Act.

A person commits burglary as a qualifying offense under the Armed Career Criminal Act if he forms the intent to commit a crime at any time while remaining unlawfully in the structure.
Quarles v. United States, 17-778 (9-0 Kavanaugh). The Armed Career Criminal Act imposes mandatory minimum prison sentences on defendants who are convicted of a predicate federal offense and who have at least three prior qualifying state or federal convictions for certain violent felonies or drug-related crimes. The Act defines "violent felony" to include "burglary."

And Supreme Court precedent construed burglary to mean the modern crime enacted in most states of entering into or remaining unlawfully in a structure with the intent to commit a crime. *See Taylor v. United States,* 495 U. S. 575 (1990). Jamar Alonzo Quarles was convicted of unlawful possession of a firearm. His prior convictions included a state law conviction for burglary in Michigan. Quarles argued that Michigan's burglary statute was broader that the definition in the Act because it criminalized burglary in which the intent to commit a crime was formed at any time while the offender remained unlawfully in a structure. The Act, Quarles asserted, was only meant to encompass burglaries in which the intent to commit a crime existed at the time the offender first began remaining unlawfully in the structure. The Supreme Court disagreed. At the time Congress passed the Armed Career Criminal Act, most states included within their burglary statutes forming the intent to commit the crime at any time while remaining unlawfully in a structure, not just at the moment the offender begins to remaining unlawfully.

DEATH PENALTY

***Baze v. Rees* and *Glossip v. Gross* govern all Eighth Amendment challenges alleging that a method of execution inflicts unconstitutionally cruel pain.**

Bucklew v. Precythe, 17-8151 (5-4 Gorsuch). Russell Bucklew was convicted in Missouri of murder and sentenced to death by lethal injection using pentobarbital. He challenged the means of his execution, asserting that a medical condition would make death by pentobarbital severely painful for him. To succeed on an Eighth Amendment challenge to the manner of execution, an inmate must first identify a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." Bucklew first argued that this test applied only to facial challenges and not to as-applied challenges. The Court rejected this notion, holding that the requirement of presenting a viable alternative was an element of any challenge, facial or as-applied. The Court then considered Bucklew's proposed alternative, nitrogen hypoxia. That challenge failed because execution by nitrogen hypoxia is only theoretically feasible. The Eighth Amendment does not require Missouri to experiment with new, untested methods of execution. Additionally, Bucklew presented no evidence that using nitrogen hypoxia would significantly reduce a severe risk of pain.

DOUBLE JEOPADY

The dual-sovereignty doctrine – under which two offenses are not the "same offence" for double jeopardy purposes if prosecuted by separate sovereigns – is upheld.

Gamble v. United States, 17-646 (7-2 Alito). By a 7-2 vote, the Court declined to overrule the "dual sovereign" exception to the Double Jeopardy Clause, which allows a person to be prosecuted twice for the same criminal conduct if the prosecutions are brought by two separate sovereigns. The Court found that the text of the Clause and its prior cases support the doctrine. And it found the historic evidence insufficient to justify overruling its longstanding precedents embracing the exception. In the Court's words, "All told, this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws—much less do so with enough force to break a chain of

precedent linking dozens of cases over 170 years."

EIGHTH AMENDMENT

The excessive fines clause now applies to the States.
Timbs v. Indiana, 17-1091 (9-0 Ginsberg). The Court unanimously held that the Eighth Amendment's Excessive Fines Clause is incorporated so as to apply to the states. Petitioner Tyson Timbs pleaded guilty in state court to conspiracy to commit theft and dealing in a controlled substance. In connection with his crime, Indiana sought civil forfeiture of Timbs's vehicle—a Land Rover SUV Timbs purchased for $42,000 with money he received from an insurance policy when his father died. The trial court denied the state's request for forfeiture of the vehicle, noting that the Land Rover is four times the maximum $10,000 monetary fine assessable against him for his drug conviction. The court found that seizing the vehicle would be grossly disproportionate to the gravity of Timbs's offense and thus unconstitutional under the Excessive Fines Clause. The court of appeals affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause does not apply to the states. In an opinion by Justice Ginsburg, the Court reversed and remanded.

The Eighth Amendment does not foreclose executing someone who does not remember their crime.
Madison v. Alabama, 17-7505 (5-3 Kagan (Kavanaugh took no part in the decision)). In this incompetency-to-be-executed case, the Court held that (1) the Eighth Amendment does not bar execution of a person who lacks memory of his crime, and (2) the Eighth Amendment prohibits execution of a person who, because he suffers from dementia, is unable to rationally understand the reasons for his sentence. The Court vacated the state court decision holding that petitioner — a 68-year-old man suffering from dementia — may be executed because (the Court found) the state court might have held that "only delusions, and not dementia, can support a finding of incompetency."

FEDERALISM

The United States Constitution retained States sovereign immunity from from private suits brought in the courts of other states.
Franchise Tax Board of California v. Hyatt, 17-1299 (Thomas 5-4). By a 5-4 vote, the Court overruled Nevada v. Hall, 440 U.S. 410 (1979), which held that a sovereign state may be haled into another state's courts without its consent. The Court stated that "Nevada v. Hall is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution." Specifically, "the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, [and] also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." Finding that "[s]tare decisis does not compel continued adherence to this erroneous precedent," the Court held "that States retain their sovereign immunity from private suits brought in the courts of other States."

FIRST AMENDMENT

A World War I memorial in the form of a forty-foot tall Latin cross erected in 1925 that sits on public ground in the middle of a busy intersection does not violate the establishment clause.
American Legion et al. v. American Humanist Association, 17-1717 (7-2 Alito). By a 7-2 vote, the Court held that a memorial cross on Maryland state land that was erected following World War I does not violate the Establishment Clause. The Court reasoned that a presumption of constitutionality exists for "longstanding monuments, symbols, and practices." In particular, it explained that crosses carry an "added secular meaning" in commemorating World War I," in which "the cross had become a symbol closely linked to the war." The Court also noted that "it is surely relevant that the monument commemorates the death of particular individuals," and that it is "natural and appropriate" to invoke the symbol of the cross that marks the graves of those individuals' "comrades near the battlefields where they fell." It concluded that "destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."

Public Access channels are not state actors and are not subject to First Amendment restraints.
Manhattan Community Access Corp. v. Halleck, 17-1702 (Kavanaugh 5-4). By a 5-4 vote, the Court held that an operator of public access channels—a private, non-profit corporation—is not a state actor subject to the Free Speech Clause's restraints. The Court reasoned that operating "public access channels on a cable system is not a traditional, exclusive public function" and that "a private entity such as [the corporation here] who opens its property for speech by others is not transformed by that fact alone into a state actor."

United States Patent and Trademark Office may not refuse to register immoral or scandalous trademarks.
Iancu v. Brunetti, 18-302 (Kagan 5-4). Section 2(a) of the Lanham Act provides that the Patent and Trademark Office may refuse to register "immoral" or "scandalous" trademarks. By a 6-3 vote, the Court held that the provision is viewpoint based and therefore violates the First Amendment. The Court explained that the statute "distinguishes between two opposed set of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter." The Court rejected as atextual the government's proposed limiting construction, under which the provision would merely allow the PTO to refuse to register marks that are vulgar (e.g., lewd, sexually explicit, or profane).

FOURTH AMENDMENT

A statute authorizing a blood draw from an unconscious motorist does not provide an exception to the warrant requirement, but such circumstances will often constitute an exigency, excusing compliance with the warrant requirement.
Mitchell v. Wisconsin, 18-6210 (5-4 Alito). By a 5-4 vote (with the 5 consisting of a 4-Justice plurality and a 1-Justice concurrence), the Court held that "[w]hen police have probable cause

to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC" under the exigent circumstances exception to the Fourth Amendment's warrant requirement. (Actually, that's what the plurality concluded, but that's effectively the Court's holding under the Marks rule.)

GUILTY PLEAS

Appellate waivers in plea deals do not foreclose appeals.
Garza v. Idaho, 17-1026 (6-3 Sotomayor). In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court held that trial counsel who refuses a criminal defendant's request to file a notice of appeal has performed deficiently and that prejudice will be presumed. The Court held here by a 6-3 vote that this rule applies even where the defendant signed a guilty plea that included an appeal waiver. The Court explained that appeal waivers do not bar all potential appellate claims. A defendant therefore has the right to demand that his counsel file a notice of appeal, which is "a simple, nonsubstantive act" that doesn't specify which claims the defendant may ultimately assert. Counsel's failure to file the notice is presumptively prejudicial, the Court held, because that failure deprives the defendant of the entire appellate proceeding.

SENTENCING

Pretrial detention later credited as time served for a new conviction tolls a supervised-release term under 18 U.S.C. §3624(e), even if the court must make the tolling calculation after learning whether the time will be credited.
Mont v. United States, 17-8995 (5-4Thomas). Jason J Mont had served four years and three months of five-year term of supervised release for federal drug and firearm charges when he was arrested and incarcerated pre-trial on state drug trafficking charges. Mont was ultimately convicted and sentenced by the state court to serve six years in prison and given credit for the ten months he served in pre-trial detention. After Mont was sentenced on the state charges, and after his term of federal supervised release should have expired, the federal district court issued a warrant and had him brought for a supervised release hearing. That court revoked his supervised release and ordered him to serve 42 months imprisonment. Mont appealed, claiming that the federal court lacked jurisdiction that his term of supervised release had expired without the Court issuing a summons for a supervised release violation. By a 5-4 vote, the Supreme Court held that a term of pre-trial incarceration for which a federal probationer is given credit for time served tolls the expiration of a term of supervised release because it qualifies as being "imprisoned in connection with a conviction for a Federal, State, or local crime" under 18 U.S.C. § 3624(e).

SIXTH AMENDMENT—JURY TRIAL

Shameless Mississippi prosecutor violated Batson by repeatedly striking the majority of black jurors in six different trials for the same offense.
Flowers v. Mississippi, 17-9572 (7-2 Kavanaugh). By a 7-2 vote, the Court held that a prosecutor violated Batson v. Kentucky, 476 U.S. 79 (1986), when he struck five of the six prospective black jurors at Flowers' most recent trial. Flowers had been tried five prior times for the same murders: thrice his convictions were reversed on appeal (once because of a Batson violation); twice the jury hung. In finding a Batson violation at his sixth trial, the Court pointed to four critical facts: "in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck"; "in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors"; at the most recent trial, "the State engaged in dramatically disparate questioning of black and white prospective jurors"; and "the State then struck at least one black prospective juror . . . who was similarly situated to white prospective jurors who were not struck by the State."

Federal statute that requires a judge to impose an additional term of prison beyond the original sentence upon a finding that the probationer committed certain enumerated offenses while on probation violates the probationers right to a jury trial.
United States v. Haymond, 17-1672 (5-4 Gorsuch). Under 18 U.S.C. §3583(k), when a federal judge finds by a preponderance of the evidence that a sex offender subject to the Sex Offender Registration and Notification Act commits certain criminal offenses during a term of supervised release, the court must revoke the supervised release and require the defendant to serve in prison at least the first five years of the term of supervised release. By a 5-4 vote (with the 5 consisting of a 4-Justice plurality and a concurring opinion), the Court held that §3583(k) violates the defendant's Sixth Amendment right to a jury trial. The plurality reasoned that just as a fact that requires a mandatory minimum sentence must be found by a jury, see Alleyne v. United States, 570 U. S. 99 (2013), so too must a fact found for purposes of §3583(k), which "increased 'the legally prescribed range of allowable sentences.'" Justice Breyer issued the decisive concurring opinion in which he distinguished §3583(k) from typical supervised-release-revocation laws. He found decisive that §3583(k) "applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute"; "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long"; and imposes a five-year mandatory minimum term of imprisonment "upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense.'" "Taken together," he concluded, "these features of §3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution."

TAKINGS

Property owners need not exhaust state remedies before bringing a federal takings claim.
Knick v. Township of Scott, PA, 17-647 (Roberts 5-4). By a 5-4 vote, the Court overruled

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), which had held that a property owner may not bring a federal takings action until he first exhausts state court remedies. The Court here explained: “A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under §1983 at that time.”