OVERSEAS DECISIONS BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library

Volume 20 Number 3 (1 May – 30 June 2023)

Decisions of the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa, the Supreme Court of New Zealand and the Hong Kong Court of Final Appeal. Admiralty, arbitration and constitutional decisions of the Court of Appeal of Singapore.

Administrative Law

Auckland Council v CP Group Ltd & Ors
Supreme Court of New Zealand: [2023] NZSC 53

Reasons delivered: 12 May 2023

Coram: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ

Catchwords:

> Administrative law – Judicial review – Auckland Council – Target rate – Unreasonableness – Where respondent council imposed Accommodation Provider Targeted Rate ("APTR") on properties used for purposes of commercial accommodation in relevant rating years – Where targeted rate was used to help fund expenditure on visitor attraction and major events – Where respondents, who were all subject to rate, sought judicial review of decision – Whether Council's decision complied with s 101(3)(a)(ii) of *Local Government Act 2002* – Whether Council considered distribution of benefits between community as a whole, any identifiable part of community and individuals – Whether decision to impose rate was unreasonable – Whether there is utility in fiduciary duty concept in context of unreasonableness inquiry.

Held (5:0): Appeal allowed.

Biden v Nebraska
Supreme Court of the United States: [Docket No. 22-506]

Reasons delivered: 30 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Administrative law – Standing – Student-loan debt-forgiveness – Authority of Secretary of Education to forgive loans ("Secretary") – *Higher Education Act of 1965* ("Education Act") – Where Title IV of Education Act governs federal financial aid mechanisms, including student loans (20 USC §1070(a)) – Where Act authorises Secretary to cancel or reduce loans in certain circumstances – Where under *Higher Education Relief Opportunities for Students Act of 2003* ("HEROES Act"), Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency" (§1098bb(a)(1)) – Where Secretary may issue such waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act affected by a national emergency] are not placed in a worse position financially in relation to that financial assistance because of [the national emergency]" (§§1098bb(a)(2)(A), 1098ee(2)(C)-(D)) – Where in 2022, as COVID-19 pandemic came to its end, Secretary invoked HEROES Act to issue "waivers and modifications" reducing or eliminating federal student debt of most borrowers – Where six States challenged plan as exceeding Secretary's statutory authority – Where Eighth Circuit issued nationwide preliminary injunction, and Supreme Court granted certiorari before judgment – Whether States have Article III standing to challenge Secretary's program – Whether Secretary has authority under Higher HEROES Act to depart from existing provisions of Education Act and establish student loan forgiveness program that will cancel about $430 billion in debt principal and affect nearly all borrowers.

Held (6:3 (Kagan, Sotomayor and Jackson JJ dissenting)): Judgment of Court of Appeals for the Eighth Circuit reversed; case remanded.

Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC & Ors
Constitutional Court of South Africa: [[2023] ZACC 19]

Reasons delivered: 26 June 2023

Coram: Zondo CJ, Kollapen, Madlanga, Majiedt JJ, Makgoka AJ, Mathopo J, Potterill AJ, Rogers and Theron JJ

Catchwords:

Administrative law – Advertising regulation – Advertising Regulatory Board NPC ("ARB") – Consent to jurisdiction of ARB – Imperative of judicial avoidance – Where applicant competes with second and third respondents in soap bar market – Where Colgate distributes its products through second and third respondents – Where Colgate and many other companies are members of ARB – Where applicant is not member of ARB – Where Colgate made complaint against applicant with ARB regarding offending packaging – Where ARB ordered applicant to desist from using offending packaging – Whether ARB could exercise jurisdiction over a non-member – Whether applicant consented to ARB's jurisdiction.

Held (9:0): Appeal refused with costs.

Department of Education v Brown
Supreme Court of the United States: Docket No. 22-535

Reasons delivered: 30 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Administrative law – Student-loan debt-forgiveness program – Standing – Where Secretary of Education Miguel Cardona ("Secretary") announced substantial student-loan debt-forgiveness plan ("Plan") – Where Plan discharges $10,000 to $20,000 of an eligible borrower's debt, depending on criteria such as borrower's income and type of loan held – Where Secretary invoked *Higher Education Relief Opportunities for Students Act of 2003* ("HEROES Act"), which authorised Secretary "to waive or modify any provision" applicable to federal "student financial assistance" in response to national emergency or disaster (20 USC §§1098bb(a)(1), (a)(2)(A), 1098ee(2)(C)-(D)) – Where before Plan took effect respondent sued to enjoin it – Where respondents are two borrowers who do not qualify for maximum relief under Plan – Where respondents argue that Secretary was required to follow notice-and-comment and negotiated rulemaking procedures in promulgating Plan – Where respondents argue that HEROES Act's procedural exemptions apply only when rule promulgated substantively authorised by Act, and because HEROES Act allegedly does not authorise Plan, Secretary was required to follow negotiated rulemaking and notice and comment – Where District Court rejected argument regarding scope of HEROES Act's procedural exemptions, but nevertheless vacated Plan as substantively unauthorised – Where Supreme Court granted certiorari before judgment to consider this case alongside *Biden v Nebraska*, No. 22–506, which presents a similar challenge to Plan – Whether respondents have Article III standing.

Held (9:0): Judgment of District Court for the Northern District of Texas vacated; case remanded.

United States v Texas
Supreme Court of the United States: [Docket No. 22-58]

Reasons delivered: 23 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Administrative law – Migration – Standing – Where in 2021, Secretary of Homeland Security promulgated new immigration enforcement guidelines ("guidelines") that prioritise arrest and removal from United States of non-citizens who are suspected terrorists or dangerous criminals or who have unlawfully entered the country only recently – Where Texas and Louisiana claim guidelines contravene two federal statutes that they read to require the arrest of certain non-citizens upon their release from prison (8 USC §1226(c)) or entry of a final order of removal (§1231(a)(2)) – Where District Court found guidelines unlawful and vacated them – Where Fifth Circuit declined to stay District Court's judgment, and Supreme Court granted certiorari before judgment – Whether States have standing to maintain suit – Whether Texas and Louisiana have Article III standing to challenge guidelines.

Held (8:1 (Alito J dissenting)): Judgment of District Court, Southern District of Texas reversed.

Woolworths New Zealand Limited v Auckland Council
Supreme Court of New Zealand: [[2023] NZSC 45]

Reasons delivered: 5 May 2023

Coram: O'Regan, Ellen France, Williams, William Young and Cooper JJ

Catchwords:

> Administrative law – Judicial review – "Unreasonableness" - Alcohol Regulatory and Licensing Authority – Where Auckland Council produced provisional alcohol policy ("Auckland PLAP") under s 75 of *The Sale and Supply of Alcohol Act 2012* ("2012 Act") – Where Auckland PLAP provided trading hours restriction and granting of new off-licenses restriction – Where supermarket chains appealed to Alcohol Regulatory and Licensing Authority on basis that several elements of Auckland PLAP unreasonable – Where judicial review of Licensing Authority's decision was sought – Whether Court of Appeal took inappropriately narrow approach to role of Licensing Authority – Whether Auckland PLAP unreasonable in light of object of 2012 Act – Whether 9:00pm closing time unreasonable – Whether new off-licence restrictions unreasonable – *The Sale and Supply of Alcohol Act 2012*, ss 3, 4, 75 and 81.

Held (5:0): Appeal dismissed with costs.

Arbitration

C v D
Hong Kong Court of Final Appeal: [2023] HKCFA 16

Reasons delivered: 30 June 2023

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Gummow NPJ

Catchwords:

> Arbitration – Jurisdiction – Compliance with pre-arbitration conditions – Condition precedent to arbitration – Where appellant and respondent entered into written agreement regarding operation of jointly-owned broadcasting satellite – Where agreement included arbitration clause and clause requiring good faith negotiations to resolve dispute before arbitration – Where contractual dispute arose as to whether appellant was in material default of agreement – Where respondent referred dispute to arbitration at Hong Kong International Arbitration Centre – Where appellant objected to arbitration on ground respondent had not complied with condition requiring negotiations to take place before commencing arbitration – Where in partial arbitral award, tribunal rejected objection – Where Court of First Instance dismissed appellant's application to set aside arbitral award – Where decision upheld by Court of Appeal – Whether, if arbitration agreement stipulates pre-arbitration condition that parties should first attempt to resolve their dispute by specified mechanism, arbitral tribunal's determination on fulfilment of that condition subject to recourse to court, pursuant to Article 34(2)(a)(iii) of UNCITRAL Model Law on International Commercial Arbitration, as implemented by s 81(1) of *Arbitration Ordinance* (Cap 609) – Proper distinction between challenge to arbitral tribunal's "jurisdiction" and challenge to "admissibility" of particular claim – Whether conceptual distinction between challenge to arbitral tribunal's "jurisdiction" and challenge to "admissibility" of particular claim should be adopted in aid of construction and application of *Arbitration Ordinance* (Cap 609).

Held (5:0): Appeal dismissed.

Coinbase, Inc. v Bielski
Supreme Court of the United States: Docket No. 22-105

Reasons delivered: 23 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Arbitration – Interlocutory appeals – Where putative class action filed on behalf of Coinbase users alleging Coinbase (petitioner), online currency platform, failed to replace funds fraudulently taken from users' accounts – Where petitioner filed motion to compel arbitration – Where District Court denied motion – Where petitioner filed interlocutory appeal to Ninth Circuit under *Federal Arbitration Act*, 9 USC §16(a), which authorises interlocutory appeal from denial of motion to compel arbitration – Where petitioner also moved District Court to stay its proceedings pending resolution of interlocutory appeal – Where District Court denied petitioner's stay motion, and Ninth Circuit likewise declined to stay District Court's proceedings pending appeal – Whether District Court must stay its pre-trial and trial proceedings while interlocutory appeal is ongoing.

Held (5:4 (Thomas, Sotomayor, Kagan and Jackson JJ dissenting)): Judgment of Court of Appeals for the Ninth Circuit reversed; case remanded.

Bankruptcy

Lac du Flambeau Band of Lake Superior Chippewa Indians v Coughlin
Supreme Court of the United States: Docket No. 22-227

Reasons delivered: 15 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Bankruptcy – Sovereign immunity – Indian tribes – Where petitioner federally recognised Indian tribe – Where one of petitioner's businesses extended respondent payday loan – Where shortly after receiving loan, respondent filed for chapter 13 bankruptcy, triggering automatic stay under Bankruptcy Code against further collection efforts by creditors – Where petitioner's business allegedly continued attempting to collect respondent's debt – Where respondent filed motion in Bankruptcy Court to enforce automatic stay and recover damages – Where Bankruptcy Court dismissed suit on tribal sovereign immunity grounds – Where First Circuit reversed, concluding that Code "unequivocally strips tribes of their immunity" – Whether Bankruptcy Code's abrogation of sovereign immunity of "governmental unit[s]" for specified purposes (11 USC §106(a)) extends to federally recognised Indian tribes.

Held (8:1 (Gorsuch J dissenting)): Judgment of Court of Appeals for the First Circuit affirmed.

Charity

London Borough of Merton Council v Nuffield Health
Supreme Court of the United Kingdom: [2023] UKSC 18

Reasons delivered: 7 June 2023

Coram: Lord Briggs, Lord Kitchin, Lord Sales, Lord Hamblen and Lord Leggatt

Catchwords:

> Charity – Statutory interpretation – Charitable purposes – Where ss 43(5) and 43(6)(a) of *Local Government Finance Act 1988* provides for mandatory 80% relief from business rates where "ratepayer is a charity or trustees for a charity" and premises are "wholly or mainly used for charitable purposes (whether of that charity or of that and other charities)" – Where respondent a registered charity – Where respondent runs 112 fitness and wellbeing centres – Where respondent operates private hospitals and clinics – Where respondent acquired members only gym, Merton Abbey, on 1 August 2016 – Where respondent applied to London Borough of Merton Council (the appellant) for mandatory and discretionary rate relief – Where application for relief initially granted – Where appellant withdrew relief because membership fees set at level which excluded persons of modest means from enjoying gym facilities – Whether respondent entitled to 80% relief from non-domestic rates in respect of Merton Abbey – Whether respondent a charity – Whether respondent established for exclusively charitable purposes – Whether public benefit requirement is satisfied – Whether use of premises "wholly ancillary to" or "directly facilitates" carrying out of charitable object.

Held (5:0): Appeal dismissed.

Civil Procedure

Dupree v Younger
Supreme Court of the United States: Docket No. 22-210

Reasons delivered: 25 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Civil procedure – Exhaustion defence – Preservation requirement – Where respondent claimed during pretrial detention in Maryland state prison that petitioner (then correctional officer lieutenant) ordered three prison guards to attack him – Where respondent sued petitioner for damages under 42

USC §1983, alleging excessive use of force – Where prior to trial, petitioner moved for summary judgment under Federal Rule of Civil Procedure 56(a), arguing respondent failed to exhaust administrative remedies as required by law – Where rule 56 requires District Court to enter judgment on claim or defence if there is "no genuine dispute as to any material fact and movant is entitled to judgment as a matter of law" – Where District Court denied motion, finding no dispute that Maryland prison system had internally investigated respondent's assault, and concluding that this inquiry satisfied respondent's exhaustion obligation – Where at trial, petitioner did not present evidence relating to exhaustion defence – Where jury found petitioner and four co-defendants liable and awarded respondent $700,000 in damages – Where petitioner did not file a post-trial motion under rule 50(b), which allows disappointed party to file renewed motion for judgment as matter of law – Where petitioner appealed single issue to Fourth Circuit: District Court's rejection of their exhaustion defence – Where Fourth Circuit dismissed appeal, bound by its precedent which holds that any claim or defence rejected at summary judgment is not preserved for appellate review unless renewed in a post-trial motion – Whether preservation requirement extends to a purely legal issue resolved at summary judgment.

Held (9:0): Judgment of Court of Appeals for the Fourth Circuit vacated; case remanded.

Constitutional Law

303 Creative LLC v Elenis
Supreme Court of the United States: Docket No. 21-476

Reasons delivered: 30 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – First Amendment – Freedom of speech – Refusal to create websites for same-sex couples – Where Ms Smith, owner of petitioner company wanted to expand graphic design business to include services for couples seeking wedding websites – Where Ms Smith was worried Colorado would use *Colorado Anti-Discrimination Act* ("CADA") to compel her to create websites celebrating same-sex marriage – Where to clarify her rights, Ms Smith filed lawsuit seeking an injunction to prevent State from forcing her to create websites celebrating marriages that defy her belief that marriage should be reserved to unions between one man and one woman – Where CADA prohibits all "public accommodations" from denying "the full and equal enjoyment" of its goods and services to any customer based on, inter alia, sexual orientation (*Colorado Revised Statutes* §24–34–601(2)(a)) – Where District Court held that Ms Smith was not entitled to injunction sought, and Tenth Circuit affirmed – Whether First

Amendment prohibits Colorado from forcing website designer to create expressive designs speaking messages with which designer disagrees.

Held (6:3 (Sotomayor, Kagan and Jackson JJ dissenting)): Judgment of Court of Appeals for the Tenth Circuit reversed.

Allen v Milligan; Allen v Caster

Supreme Court of the United States: Docket No. 21-1086 and No. 21-1087

Reasons delivered: 8 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – Voting rights – District plan – Racial discrimination – Where §2 of *Voting Rights Act*, 52 USC §10301 as originally enacted in 1965, tracked language of Fifteenth Amendment, providing that "[t]he right of citizens of the United States to vote shall not be denied or abridged… on account of race, color, or previous condition of servitude" – Where in 1992, §2 litigation challenging State of Alabama's districting map resulted in State's first majority-black district – Where Alabama's congressional map remained similar since that litigation – Where following 2020 decennial census, group of plaintiffs sued the State, arguing State's population growth rendered existing congressional map malapportioned and racially gerrymandered in violation of Equal Protection Clause – Where while litigation was proceeding, Alabama Legislature's Committee on Reapportionment drew new districting map that would reflect distribution of prior decade's population growth across the State – Where resulting map largely resembled 2011 map on which it was based and similarly produced only one district in which black voters constituted a majority – Where that new map was signed into law as HB1.

Where three groups of Alabama citizens brought suit seeking to stop Alabama's Secretary of State from conducting congressional elections under HB1 – Where *Caster* plaintiffs challenged HB1 as invalid under §2 – Where *Milligan* plaintiffs brought claims under §2 and Equal Protection Clause of Fourteenth Amendment – Where *Singleton* plaintiffs amended complaint in their ongoing litigation to challenge HB1 as a racial gerrymander under Equal Protection Clause – Where *Milligan* and *Singleton* actions were consolidated before District Court – Where District Court found for all plaintiffs' claims and enjoined Alabama from using HB1 in forthcoming elections – Whether districting plan adopted by State of Alabama for its 2022 congressional elections likely violated §2 of the *Voting Rights Act*, 52 USC §10301 – Proper application of three-part framework from *Thornburg v Gingles*, 478 US 30 – Whether District Court's application of §2 is unconstitutional – Whether §2 applies to single-member redistricting.

Held (5:4 (Thomas, Alito, Gorsuch and Barrett JJ dissenting): Judgment of District Court for the Northern District of Alabama affirmed.

Arena Holdings (Pty) Ltd t/a Financial Mail & Ors v South African Revenue Service & Ors
Constitutional Court of South Africa: [2023] ZACC 13

Reasons delivered: 30 May 2023

Coram: Baqwa AJ, Kollapen, Madlanga, Majiedt, Mathopo JJ, Mbatha AJ, Mhlantla, Rogers and Tshiqi JJ

Catchwords:

> Constitutional law – Absolute prohibition of access to tax records – Right to access to information – Right to freedom of expression – Right to privacy – Public interest override – Where third applicant made application to South African Revenue Service to gain access to former President of Republic of South Africa's tax records – Where asserted that there was credible evidence that former President was not tax compliant – Where applicant refused on basis that former President entitled to confidentiality under ss 34(1) and 35(1) of *Promotion of Access to Information Act 2 of 2000* ("PAIA") and s 69(1) of *Tax Administration Act 28 of 2011* – Whether tax information held by state receives absolute protection from disclosure under PAIA – Whether right to privacy and secrecy fulfilled limitation test in s 36 of *Constitution* – Whether impugned provisions unconstitutional to extent they limit right of access to information – Whether right to freedom of expression prevents media from lawfully obtaining tax information and from reporting on it.

Held (5:4): Order of constitutional invalidity confirmed.

Canadian Council for Refugees v Canada (Citizenship and Immigration)
Supreme Court of Canada: [2023] SCC 17

Reasons delivered: 16 June 2023

Coram: Wagner CJ, Karakatsanis, Côté, Brown,[1] Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ

Catchwords:

> Constitutional law – *Charter of Rights* – Right to life, liberty and security of person – Fundamental justice – Where refugee status claims of foreign nationals that arrived at Canadian land ports of entry from United States were ineligible to be considered in Canada pursuant to Safe Third Country Agreement – Whether provision in federal immigration and refugee

[1] Brown J did not participate in the final disposition of the judgment.

protection regulations designating United States as safe third country infringes refugee claimants' right to liberty and security of person – Whether s 15 *Charter* claim be remitted to Federal Court or decided based on record on appeal **–** *Canadian Charter of Rights and Freedoms*, ss 7 and 15 – *Immigration and Refugee Protection Act*, SC 2001, c 27, s 101(1)(e) – *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 159.3 – Agreement between Government of Canada and Government of United States of America for cooperation in examination of refugee status claims from nationals of third countries, Can TS 2004 No. 2.

Immigration – Refugee protection – Ineligibility – Whether provision in federal immigration and refugee protection regulations designating United States as safe third country is ultra vires enabling statute.

Held (8:0): Appeal allowed in part.

Centre for Child Law v T.S & Ors
Constitutional Court of South Africa: [2023] ZACC 22

Reasons delivered: 29 June 2023

Coram: Maya DCJ, Baqwa AJ, Kollapen, Madlanga, Majiedt, Mathopo JJ, Mbatha AJ, Mhlantla, Rogers and Tshiqi JJ

Catchwords:

Constitutional law – Right to equality – Human dignity – Right of child to have their best interest considered of paramount importance – Where Office of the Family Advocate's ("Family Advocate") services are, in cases of divorcing or divorced parents, provided on demand – Where same procedure not available to unmarried or never married parents – Whether s 4 of *Mediation in Certain Divorce Matters Act 24 of 1987* unconstitutional in that it unfairly discriminates between children of married parents and those of never married parents in manner in which their best interests are investigated by Family Advocate – Whether impugned provision has legitimate governmental purpose – *Children's Act 38 of 2005*, ss 6(2)(c), 6(2)(d), 6(4)(b), and 7(1)(n) – Bill of Rights, ss 9(3), 10, and 28.

Held (10:0): Order of constitutional invalidity confirmed.

City of Cape Town v Independent Outdoor Media (Pty) Ltd & Ors
Constitutional Court of South Africa: [2023] ZACC 17

Reasons delivered: 23 June 2023

Coram: Maya DCJ, Baqwa AJ, Kollapen, Madlanga, Majiedt, Mathopo JJ, Mbatha AJ, Mhlantla and Rogers JJ

Catchwords:

Constitutional law – Separation of powers – Legislative and executive authority of Municipal Councils – Parliament's competence in respect of building regulations – Where dispute arose regarding advertisements on Overbeek building in Cape Town – Where in 1999 and 2000, second respondent leased two advertising spaces on building to first respondent – Where applicant authorised first respondent to advertise on two spaces for five years, in terms of by-laws applicable at time – Where authorisation lapsed, and first respondent continued to display advertisements on building, in contravention of City of Cape Town's (applicant) by-laws – Where in 2016 applicant brought application in High Court against first and second respondents for removal of unauthorised advertisements – Where in 2021, second respondent brought similar action in High Court for first respondent to remove advertisements – Where second respondent brought counter-application seeking declaration that applicant's by-laws void because promulgated without complying with s 29(8) of *National Building Regulations and Building Standards Act 103 of 1977* – Where applicant challenged constitutionality of s 29(8) – Whether impugned legislation infringes legislative autonomy of municipalities to make and administer by-laws on matters listed in Part B of Schedules 4 and 5 of *Constitution* – Whether impugned legislation exceeds Parliament's competence in respect of building regulations – Whether impugned legislation offends separation of powers doctrine because making of by-laws falls within exclusive terrain of legislative branch of government, and Minister's power to veto by-laws unconstitutional infringement by executive into municipal legislative sphere – *Constitution*, ss 151(2) and 156(2).

Held (9:0): Order of constitutional invalidity confirmed.

Counterman v Colorado

Supreme Court of the United States: [Docket No. 22-138]

Reasons delivered: 27 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – First Amendment – Free speech – Threatening messages – Mental requirement – Where from 2014 to 2016, petitioner sent hundreds of Facebook messages to CW – Where they never met and CW never responded – Where several of petitioner's messages envisaged violent harm befalling CW – Where petitioner's messages put CW in fear and upended daily existence – Where State charged petitioner under *Colorado Revised Statues* §18–3–602(1)(c) – Where petitioner moved to dismiss charge on First Amendment grounds, arguing that messages were not "true threats" and therefore could not form basis of criminal prosecution – Where trial court rejected that argument under objective standard, finding that reasonable person would consider messages threatening – Where

petitioner appealed, arguing that First Amendment required State to show not only that statements objectively threatening, but also that they were aware of their threatening character – Where Colorado Court of Appeals disagreed and affirmed their conviction – Where Colorado Supreme Court denied review – Whether First Amendment requires proof that defendant had subjective understanding of threatening nature of their statements – Whether mental state of recklessness sufficient.

Held (7:2 (Thomas and Barrett JJ dissenting)): Judgment of Colorado Court of Appeals vacated; case remanded.

Haaland v Brackeen; Cherokee Nation v Brackeen; Texas v Haaland; Brackeen v Haaland

Supreme Court of the United States: Docket No. 21-376, No. 21-377, No. 21-378 and No. 21-380

Reasons delivered: 15 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – Racial discrimination – *Indian Child Welfare Act* ("ICWA") – State care adoption and foster care proceedings – Where ICWA requires placement of Indian child according to Act's hierarchical preferences, unless state court finds "good cause" to depart from them – Where under those preferences, Indian families or institutions from any tribe (not just tribe to which child has tie) outrank unrelated non-Indians or non-Indian institutions – Where preferences of Indian child or their parent generally cannot trump those set by statute or tribal resolution – Where petitioners birth mother, foster and adoptive parents, and State of Texas – Where petitioners filed suit in Federal Court against the United States and other federal parties – Where several Indian Tribes intervened to defend law alongside federal parties – Where petitioners challenged ICWA as unconstitutional on multiple grounds: that Congress lacks authority to enact ICWA and that several of ICWA's requirements violate the anticommandeering principle of Tenth Amendment; that ICWA employs racial classifications that unlawfully hinder non-Indian families from fostering or adopting Indian children; that §1915(c), the provision that allows tribes to alter prioritisation order, violates nondelegation doctrine – Where petitioners were successful in District Court – Where Fifth Circuit affirmed in part and reversed in part – Whether ICWA is unconstitutional – Whether ICWA exceeds Congress's legislative power – Whether §1915(c) violates nondelegation doctrine – Whether prioritising "other Indian families" and "Indian foster home[s]" over non-Indian families unconstitutionally discriminates on basis of race – Whether ICWA violates anticommandeering principle of the Tenth Amendment.

Held (7:2 (Thomas and Alito JJ dissenting)): Judgment of Court of Appeals for the Fifth Circuit affirmed in part and reversed in part; case vacated and remanded in part.

Makana Peoples Centre v Minister of Health & Ors
Constitutional Court of South Africa: [2023] ZACC 15

Reasons delivered: 9 June 2023

Coram: Zondo CJ, Maya DCJ,[2] Baqwa AJ, Kollapen, Madlanga, Majiedt , Mathopo JJ, Mbatha AJ, Mhlantla, Rogers and Tshiqi JJ

Catchwords:

> Constitutional law – Statutory regime for involuntary admission and treatment – Mental health review boards – International law obligations – Where *Mental Health Care Act 17 of 2002* ("MHC Act") provided scheme for involuntary detention of mental health care user – Where MHC Act established review boards – Whether procedural safeguards for deprivation of liberty constitutionally compliant – Whether involuntary inpatient treatment should be subject to automatic independent review prior to or immediately following initial detention of person involuntarily detained under MHC Act – Whether mental health review boards sufficiently independent – Whether ss 33 and 34 of MHC Act limit rights of involuntary users guaranteed in ss 10, 12(1) and 34 of Bill of Rights – Whether limits justified under s 36 of Bill of rights.

Held (10:0): Order of constitutional invalidity not confirmed.

Mallory v Norfolk Southern Railway Co
Supreme Court of the United States: Docket No. 21-1168

Reasons delivered: 27 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Constitutional law – Fourteenth Amendment – Due process clause – Requiring out-of-state corporation to consent to personal jurisdiction – Where petitioner worked for respondent as freight-car mechanic for nearly 20 years – Where petitioner, after they left company, moved to Pennsylvania for a period before returning to Virginia – Where during this period petitioner diagnosed with cancer, which he attributed to work at respondent – Where petitioner sued former employer under *Federal*

[2] Maya DCJ was present for part of the hearing, but did not participate in the final disposition of the case.

> *Employers' Liability Act*, 45 USC §§51–60, a federal workers' compensation scheme permitting railroad employees to recover damages for their employers' negligence – Where petitioner filed lawsuit in Pennsylvania state court – Where respondent, company incorporated in Virginia and headquartered there, resisted suit on basis that Pennsylvania court's exercise of personal jurisdiction over it would offend Due Process Clause of Fourteenth Amendment – Where Pennsylvania requires out-of-state companies that register to do business in Commonwealth to agree to appear in its courts on "any cause of action" against them (42 *Pennsylvania Consolidated Statutes* §5301(a)(2)(i),(b)) – Where Pennsylvania Supreme Court found Pennsylvania law, requiring out-of-state firm to answer in Commonwealth any suits against it in exchange for status as registered foreign corporation and benefits that entails, violates Due Process Clause – Whether Due Process Clause of Fourteenth Amendment prohibits a State from requiring an out-of-state corporation to consent to personal jurisdiction to do business there.

Held (5:4 (Roberts CJ, Kagan, Kavanaugh and Barrett JJ dissenting)): Judgment of Pennsylvania Supreme Court vacated; case remanded.

Mogale & Ors v Speaker of the National Assembly & Ors
Constitutional Court of South Africa: [2023] ZACC 14

Reasons delivered: 30 May 2023

Coram: Maya DCJ, Kollapen, Madlanga, Majiedt JJ, Makgoka AJ, Mathopo J, Potterill AJ, Rogers and Theron JJ

Catchwords:

> Constitutional law – National Assembly – National Council of Provinces and provincial legislatures – Public hearings – Reasonableness – Where applicants applied for order declaring National Assembly, National Council of Provinces and provincial legislatures failed to fulfil constitutional obligations to facilitate reasonable public involvement in passing of *Traditional and Khoi-San Leadership Act 3 of 2019* – Where applicants challenged adequacy of public hearings held by National Assembly and eight of nine provincial legislatures – Where Parliament and provincial legislatures held public participation processes across all nine provinces – Whether Court has exclusive jurisdiction – Whether applicants have standing – Whether Parliament and provincial legislature met standards prescribed by law for public participation – Whether process followed in facilitating public participation was reasonable.

Held (9:0): Order of constitutional invalidity confirmed, and declaration that Parliament failed to comply with its constitutional obligation to facilitate public involvement before passing *Traditional and Khoi-San Leadership Act 3 of 2019*.

Moore v Harper
Supreme Court of the United States: Docket No. 21-1271

Reasons delivered: 27 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Constitutional law – Elections – Gerrymandering – Elections Clause – Role of courts in elections disputes – Independent state legislature theory – Where following 2020 decennial census, North Carolina's General Assembly drafted new federal congressional map, which several groups of plaintiffs challenged as impermissible partisan gerrymander in violation of North Carolina Constitution – Where trial court found partisan gerrymandering claims nonjusticiable under State Constitution, but North Carolina Supreme Court reversed – Where Court enjoined use of maps and remanded case to trial court for remedial proceedings – Where legislative defendants then filed emergency application in United States Supreme Court, citing Elections Clause and requesting stay of North Carolina Supreme Court's decision – Where after United States Supreme Court granted certiorari, North Carolina Supreme Court issued decision addressing remedial map adopted by trial court – Where North Carolina Supreme Court then granted legislative defendants' request to rehear that remedial decision in *Harper II* – Where Court ultimately withdrew opinion in *Harper II* concerning remedial maps and overruled *Harper I*, repudiating its holding that partisan gerrymandering claims justiciable under North Carolina Constitution – Where Court dismissed plaintiffs' claims but did not reinstate 2021 congressional plans struck down in *Harper I* under State Constitution – Whether United States Supreme Court has jurisdiction to review judgment of North Carolina Supreme Court in *Harper I* that adjudicated Federal Elections Clause issue – Whether Elections Clause vests exclusive and independent authority in state legislatures to set rules regarding federal elections – Whether Elections Clause insulates state legislatures from review by state courts for compliance with state law.

Held (6:3 (Thomas, Alito and Gorsuch JJ dissenting): Judgment of North Carolina Supreme Court affirmed.

National Pork Producers Council v Ross
Supreme Court of the United States: Docket No. 42-468

Reasons delivered: 30 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – Interstate commerce – Animal welfare – Where *California Health & Safety Code Ann* §25990(b)(2) ("Proposition 12") forbids in-state sale of whole pork meat from breeding pigs "confined in a cruel manner" – Where shortly after Proposition 12's adoption, National Pork Producers Council and American Farm Bureau Federation (petitioners) filed lawsuit on behalf of their members who raise and process pigs alleging that Proposition 12 violates Constitution by impermissibly burdening interstate commerce – Whether Proposition 12 violates Constitution by impermissibly burdening interstate commerce.

Held (9:0; 5:4 (Roberts CJ, Alito, Kavanaugh and Jackson JJ dissenting in part): Judgment of Court of Appeals for the Ninth Circuit affirmed.

R v Hanan
Supreme Court of Canada: [2023] SCC 12

Reasons delivered: 5 May 2023

Coram: Côté, Rowe, Martin, Kasirer and Jamal JJ

Catchwords:

Constitutional law – Charter of Rights – Right to be tried within reasonable time – Transitional exceptional circumstance – Where accused applied for stay of proceedings based on violation of right to be tried within reasonable time – Where trial judge held that net delay exceeded *Jordan* ceiling but denied stay based on application of transitional exceptional circumstance – Where Court of Appeal upheld trial judge's decision – Whether courts below erred in applying transitional exceptional circumstance – Whether accused's right to be tried within reasonable time infringed – *Canadian Charter of Rights and Freedoms*, s 11(b).

Held (5:0): Appeal allowed, convictions set aside and stay of proceedings entered.

Samia v United States
Supreme Court of the United States: Docket No. 22-196

Reasons delivered: 23 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – Sixth Amendment – Confrontation clause – Co-defendant's confession – Where petitioner arrested along with co-defendants – Where all three co-defendants tried jointly – Where prior to trial, Government moved to admit co-defendant's post arrest confession

claiming petitioner shot victim – Where maker of confession not testifying, so US Drug Enforcement Administration agent testified that co-defendant admitted to "a time when the other person he was with pulled the trigger on that woman in a van that he and [co- defendant] was driving" – Where other portions of agent's testimony recounting co-defendant's confession used "other person" descriptor to refer to someone with whom they had travelled and lived and who carried a particular firearm – Where before agent's testimony and again prior to deliberations, District Court instructed jury that agent's testimony about co-defendant's confession admissible only as to that particular co-defendant, and should not be considered as to the other two co-defendants – Where petitioner appealed and argued that admission of co-defendant's confession was constitutional error because other evidence and statements at trial enabled jury to immediately infer that "other person" described in confession was petitioner – Where Second Circuit, pointing to established practice of replacing defendant's name with neutral noun or pronoun in no testifying co-defendant's confession, held that admission of confession did not violate petitioner's Confrontation Clause rights – Whether Confrontation Clause bars admission of non-testifying co-defendant's confession where (1) confession has been modified to avoid directly identifying non-confessing co-defendant and (2) court offers a limiting instruction that jurors may consider confession only with respect to confessing co-defendant.

Criminal law – Evidence – Confession of co-defendant.

Held (6:3 (Sotomayor, Kagan and Jackson JJ dissenting)): Judgment of Court of Appeals for the Second Circuit affirmed.

Smith v United States
Supreme Court of the United States: Docket No. 21-1576

Reasons delivered: 15 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – Venue Clause – Retrial – Where petitioner indicted in Northern District of Florida for theft of trade secrets from website owned by StrikeLines – Where before trial, petitioner moved to dismiss indictment for lack of venue, citing *Constitution's* Venue Clause and its Vicinage Clause – Where petitioner argued trial in Northern District of Florida improper because petitioner had accessed StrikeLines' website from home in Mobile (in Southern District of Alabama) and servers storing StrikeLines' data located in Orlando (in Middle District of Florida) – Where District Court concluded factual disputes related to venue should be resolved by jury and denied petitioner's motion to dismiss without prejudice – Where jury found petitioner guilty, and petitioner moved for judgment of acquittal based on improper venue – Where District Court denied motion – Where petitioner

appealed to Eleventh Circuit which held venue was improper, but that trial in improper venue did not bar re-prosecution – Whether *Constitution* permits retrial of defendant following trial in improper venue conducted before jury drawn from wrong district.

Held (9:0): Judgment of Court of Appeals for the Eleventh Circuit affirmed.

South African Iron and Steel Institute & Ors v Speaker of the National Assembly & Ors
Supreme Court of Canada: [2023] SCC 18

Reasons delivered: 16 June 2023

Coram: Maya DCJ, Kollapen, Madlanga, Majiedt JJ, Makgoka AJ, Mathopo J, Potterill AJ, Rogers and Theron JJ

Catchwords:

Constitutional law – Constitutional obligation to facilitate public involvement – Where *National Environmental Management Laws Amendment Act 2 of 2022* ("NEMLA"*)* sought to amend definition of "waste" in *National Environmental Management Waste Act 59 of 2008* – Where on 16 September 2015, first version of NEMLA Bill approved by Cabinet and published for public comment on 13 October 2015 – Where NEMLA Bill amended and went through a number of versions – Where applicant contended that although they were afforded an opportunity to participate in legislative process leading to "D" version of Bill, they were not afforded an opportunity to make representations in respect of "E" and "F" versions – Whether Parliament failed to comply with constitutional obligations to facilitate public participation - Whether material amendments without further public involvement passes constitutional muster – Whether amendments are material – Whether amendments triggered need for further public involvement.

Held (9:0): Declaration of constitutional invalidity, and declaration that Parliament failed to comply with its constitutional obligation to facilitate public involvement.

Students for Fair Admissions, Inc. v President and Fellows of Harvard College; Students for Fair Admissions, Inc. v University of North Carolina
Supreme Court of the United States: Docket No. 20-1199 and No. 21-707

Reasons delivered: 29 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – Affirmative action – University admissions – Race as factor in university admissions – Equal Protection Clause of Fourteenth Amendment – Where Harvard College and University of North Carolina ("UNC") employ highly selective admissions process – Where admission to each school can depend on student's grades, recommendation letters, or extracurricular involvement – Where admission also depend on student's race – Where race considered at multiple stages of admission process – Where in Harvard admissions process, "race is a determinative tip for" significant percentage "of all admitted African American and Hispanic applicants" – Where First Circuit found that Harvard's consideration of race resulted in fewer admissions of Asian-American students – Where petitioner is Students for Fair Admissions ("SFFA"), a non-profit organisation whose stated purpose is "to defend human and civil rights secured by law, including right of individuals to equal protection under the law" – Where SFFA filed separate lawsuits against Harvard and UNC, arguing race-based admissions programs violate, respectively, Title VI of *Civil Rights Act of 1964* and Equal Protection Clause of Fourteenth Amendment – Where after separate bench trials, both admissions programs were found permissible under Equal Protection Clause and United States Supreme Court precedents – Whether admissions systems used by Harvard College and UNC are lawful under Equal Protection Clause of Fourteenth Amendment.

Held (6:2 (Sotomayor and Kagan JJ dissenting, Jackson J recused)): Judgment of Court of Appeals for the First Circuit reversed (Docket No. 20-1199).

Held (6:3 (Sotomayor, Kagan and Jackson JJ dissenting)): Judgment of Court of Appeal for the Fourth Circuit reversed (Docket No. 21-707).

Tyler v Hennepin County, Minnesota

Supreme Court of the United States: Docket No. 21-166

Reasons delivered: 25 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Constitutional law – Takings Clause – Excessive Fines Clause – Fifth and Eighth Amendments – Where petitioner owned condominium in Minnesota that accumulated unpaid real estate taxes along with interest and penalties – Where County seized condo and sold it for $40,000, keeping $25,000 excess over petitioners tax debt for itself pursuant to *Minnesota Statutes* §§281.18, 282.07 and 282.08 – Where petitioner filed suit, alleging County unconstitutionally retained excess value of home above tax debt in violation of Takings Clause of Fifth Amendment and Excessive Fines Clause of Eighth Amendment – Where District Court dismissed suit for failure to state claim and Eight Circuit affirmed – Whether conduct of County constituted taking of property without just compensation, in violation of Fifth Amendment –

Whether petitioner plausibly alleged violation of Fifth Amendment's Takings Clause.

Held (9:0): Judgment of Court of Appeals for the Eighth Circuit reversed.

United States v Hansen
Supreme Court of the United States: Docket No. 22-179

Reasons delivered: 23 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Constitutional law – First Amendment – Unconstitutionally overbroad – Where respondent fraudulently promised hundreds of noncitizens path to US citizenship through "adult adoption" – Where respondent earned nearly $2 million from their scheme – Where United States charged respondent with, inter alia, violating 8 USC §1324(a)(1)(A)(iv), which forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law" – Where respondent convicted and moved to dismiss clause (iv) charges on First Amendment overbreadth grounds – Where District Court rejected respondent's argument, but Ninth Circuit concluded that clause (iv) was unconstitutionally overbroad – Whether §1324(a)(1)(A)(iv) is unconstitutionally overbroad.

Held (7:2 (Sotomayor and Jackson JJ dissenting)): Judgment of Court of Appeals for the Ninth Circuit reversed; case remanded.

VJV and Another v Minister of Social Development and Another
Constitutional Court of South Africa: [2023] ZACC 21

Reasons delivered: 29 June 2023

Coram: Zondo CJ, Maya DCJ, Baqwa AJ, Kollapen, Madlanga, Majiedt, Mathopo JJ, Mbatha AJ, Mhlantla, Rogers and Tshiqi JJ

Catchwords:

> Constitutional law – In-vitro fertilisation ("IVF") – Unfair discrimination – Family and parenthood – Equality and dignity – Where applicants two women in permanent life partnership – Where applicants utilised IVF – Where first applicant's gamete and gamete of donor fertilised during IVF process – Where embryos were then transferred into uterus of second applicant, resulting in her pregnancy and twins were born to applicants – Where pursuant to s 40 of *Children's Act 38 of 2005*, children were regarded as children of second applicant but not first applicant – Whether impugned

provisions constitute unfair discrimination – Whether impugned provisions violate applicants' dignity – Whether impugned provisions not in best interests of child.

Held (11:0): Order of constitutional invalidity confirmed.

Copyright

Andy Warhol Foundation for Visual Arts, Inc. v Goldsmith
Supreme Court of the United State: Docket No. 21-869

Reasons delivered: 18 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Copyright – Infringement – Exceptions – Fair use – Where petitioner Andy Warhol Foundation for the Visual Arts, Inc. ("AWF"), licensed to Condé Nast for $10,000 an image of "Orange Prince", created by Andy Warhol – Where Orange Prince derived from copyrighted photograph taken in 1981 by professional photographer respondent – Where years later, respondent granted limited license to Vanity Fair for use of one of their Prince photos as "artist reference for an illustration" – Where terms of license included that use would be for "one time" only – Where Vanity Fair hired Warhol to create illustration, and Warhol used respondent's photo to create purple silkscreen portrait of Prince, which appeared with article about Prince in Vanity Fair's November 1984 issue – Where magazine credited Goldsmith for "source photograph" and paid them $400 – Where after Prince died in 2016, Vanity Fair's parent company (Condé Nast) asked AWF about reusing 1984 Vanity Fair image for special edition magazine that would commemorate Prince – Where Condé Nast learned about other Prince Series images, and opted instead to purchase license from AWF to publish Orange Prince – Where respondent did not know about Prince Series until 2016, when they saw Orange Prince on cover of Condé Nast's magazine – Where respondent notified AWF of their belief that it had infringed their copyright – Where AWF then sued respondent for declaratory judgment of noninfringement or, alternatively, fair use – Where respondent counterclaimed for infringement – Where District Court considered four fair use factors in 17 USC §107 and granted AWF summary judgment on its defence of fair use – Where Court of Appeals reversed, finding that all four fair use factors favoured respondent – Whether first fair use factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes," §107(1), weighs in favour of AWF's recent commercial licensing to Condé Nast.

Held (7:2 (Roberts CJ and Kagan J dissenting)): Judgment of Court of Appeals for the Second Circuit affirmed.

Contract Law

Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited
Constitutional Court of South Africa: [2023] ZACC 20

Reasons delivered: 28 June 2023

Coram: Zondo CJ, Maya DCJ, Baqwa AJ, Kollapen, Madlanga, Majiedt, Mathopo JJ, Mbatha AJ, Mhlantla, Rogers and Tshiqi JJ

Catchwords:

> Contract law – Interpretation of contracts – Exemption clauses – Exclusion of liability – Public policy – Where on 10 July 2009 applicant and respondent entered into National Distribution Agreement – Where clause 17 of agreement provided if applicant required respondent to handle or deal with high value goods, there would be special arrangements made in writing in advance – Where clause 17 provided if applicant required or caused respondent to handle or deal with high value goods without special arrangements made in writing in advance, respondent would incur no liability – Where in 2012 applicant caused respondent to handle or deal with goods of high value without having made special arrangements with respondent, and employee of respondent stole a consignment of laptops belonging to applicant – Whether respondent liable to applicant for loss arising from theft of applicant's consignment of laptop computers – Whether clause 17 was contrary to public policy.

Held (6:5): Appeal dismissed with costs.

Corporations Law

Slack Technologies, LLC v Pirani
Supreme Court of the United States: Docket No. 22-200

Reasons delivered: 1 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Corporations Law – Public offering of securities – Misleading registration statement – Where petitioner conducted direct listing to sell its share to public in New York Stock Exchange in 2019 – Where petitioner filed registration statement for specified number of registered shares it intended to offer in its direct listing – Where under direct listing process, holders of

pre-existing unregistered shares in petitioner free to sell them to public right away – Where petitioner's direct listing offered for purchase 118 million registered shares and 165 million unregistered shares – Where respondent bought 30,000 petitioner shares on day petitioner went public, and later bought 220,000 additional shares – Where stock price dropped, and respondent filed class-action lawsuit against petitioner alleging violation of §11 of *Securities Act of 1933* ("the 1933 Act") by filing materially misleading registration statement – Where petitioner argued complaint failed to state claim under §11 because respondent had not alleged they purchased shares traceable to allegedly misleading registration statement, leaving open possibility they purchased shares not registered by means of registration statement – Where District Court denied motion to dismiss but certified its ruling for interlocutory appeal – Where Ninth Circuit accepted the appeal and affirmed – Whether s 11 of the 1933 Act requires plaintiff to plead and prove they purchased securities registered under a materially misleading registration statement – Meaning of "such security".

Held (9:0): Judgment of Court of Appeals for the Ninth Circuit vacated; case remanded.

Criminal Law

Ciminelli v United States
Supreme Court of the United States: Docket No. 21-1170

Reasons delivered: 11 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Criminal law – Federal wire fraud – Where petitioner convicted of federal wire fraud violation of 18 USC §1343 for involvement in scheme to rig bid process for obtaining state-funded development projects – Where government relied solely on Second Circuit's right-to-control theory of wire fraud, under which government can establish wire fraud by showing defendant schemed to deprive victim of potentially valuable economic information necessary to make discretionary economic decisions – Where District Court instructed jury that term "property" in §1343 "includes intangible interests such as right to control use of one's assets", which could be harmed by deprivation of "potentially valuable economic information" – Where on appeal, petitioner argued right to control one's assets not "property" for purposes of §1343 – Where Second Circuit affirmed convictions on basis of longstanding right-to-control precedents – Whether right-to-control theory supports liability under federal wire fraud statute.

Held (9:0): Judgment of Court of Appeals for the Second Circuit reversed; case remanded.

Dubin v United States
Supreme Court of the United States: [Docket No. 22-10]

Reasons delivered: 8 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Criminal law – Fraud – Identity theft – Where petitioner convicted of healthcare fraud under 18 USC §1347 after they overbilled Medicaid for psychological testing performed by company they helped manage – Where respondent argued petitioner committed aggravated identity theft under §1028A(a)(1), which applies when defendant, "during and in relation to any [predicate offense, such as healthcare fraud], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" – Where respondent argued §1028A(a)(1) automatically satisfied because petitioner's fraudulent Medicaid billing included their Medicaid reimbursement number, a "means of identification" – Where District Court, bound by Fifth Circuit precent, allowed petitioner's conviction for aggravated identity theft to stand, even though, in District Court's view, crux of the case was fraudulent billing, not identity theft – Where Fifth Circuit affirmed – Where no dispute that petitioner overbilled Medicaid for psychological testing – Whether, in defrauding Medicaid, petitioner committed "[a]ggravated identity theft," 18 USC §1028A(a)(1), triggering mandatory 2 year prison sentence.

Held (9:0): Judgment of Court of Appeals for the Fifth Circuit vacated; case remanded.

HKSAR v Choy Yuk Ling (蔡玉玲)
Hong Kong Court of Final Appeal: [[2023] HKCFA 12]

Reasons delivered: 5 June 2023

Coram: Cheung CJ, Ribeir, Fok, Lam PJJ and Gummow NPJ

Catchwords:

> Criminal law – Statutory interpretation – Falsity of statement – Knowingly made false statement – Where appellant charged with two counts of knowingly making false statement in material particular for purpose of obtaining certificate (*Road Traffic Ordinance*, s 111(3)(a)) – Where falsity alleged was appellant's assertion that purpose of applying for certificate was "[o]ther traffic and transport related matters", when it was in fact for investigative journalism relating to use of vehicle in question in connection with an alleged crime – Where Magistrate and Court of First Instance found

appellant guilty – Whether lower courts were right to infer that appellant knew statements were false – Whether appellant's purpose of seeking certificate was relevant to applications – Whether appellant's statement that they were applying for certificate for "[o]ther traffic and transport related matters" was false.

Held (5:0): Appeal allowed and convictions quashed.

HKSAR v Chen Keen (alias Jack Chen) (陳克恩); HKSAR v Hao May (formerly known as Wang May Yan) (alias May Wang); HKSAR v Yee Wenjye (also known as Yu Wenjie) (alias Eric Yee)
Hong Kong Court of Final Appeal: [2023] HKCFA 11

Reasons delivered: 24 May 2023

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Gummow NPJ

Catchwords:

Criminal law – Costs in criminal cases – Retrial aborted – Statutory interpretation – Where appellants initially convicted of various criminal charges – Where convictions were quashed on appeal and retrial ordered – Where prosecution witness gave unsolicited evidence during retrial prejudicial to appellants – Where deputy judge acceded to appellants' joint application to discharge jury, and appellants were due to be tried before new jury – Where appellants applied for costs of aborted retrial – Where deputy judge allowed application – Where Court of Appeal disagreed and reversed costs order – Meaning of "is not tried for an offence for which he has been indicted or committed for trial" – Whether Court of First Instance has jurisdiction under s 4 of *Costs in Criminal Cases Ordinance* to award costs to defendant in a jury trial when, without fault on their part, trial is aborted and they have to be tried before another jury – *Costs in Criminal Cases Ordinance*, ss 4, Pt II, Pt III and Pt IV.

Held (5:0): Appeals dismissed.

Jones v Hendrix
Supreme Court of the United States: Docket No. 21-857

Reasons delivered: 22 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Criminal law – Intervening change in interpretation of criminal statute – Restrictions on second or successive §2255 motions – Where District Court sentenced petitioner after conviction on two counts of unlawful possession

of firearm by felon, in violation of 18 USC §922(g)(1), and one count of making false statements to acquire firearm – Where Eighth Circuit affirmed petitioner's convictions and sentence – Where petitioner filed motion pursuant to 28 USC §2255, which resulted in vacatur of one of their concurrent §922(g) sentences – Where years later, Supreme Court held in *Rehaif v United States* 588 US ___, that defendant's knowledge of status that disqualifies them from owning firearm element of §922(g) – Where *Rehaif's* holding abrogated contrary Eighth Circuit precedent applied by courts in petitioner's trial and direct appeal – Where petitioner filed for writ of habeas corpus under 28 USC §2241 in district of imprisonment – Where District Court dismissed petitioner's habeas petition for lack of subject-matter jurisdiction, and Eighth Circuit affirmed – Whether §2255(e) allows prisoner asserting intervening change in interpretation of criminal statute to circumvent *Antiterrorism and Effective Death Penalty Act of 1996's* restrictions on second or successive §2255 motions by filing §2241 habeas petition.

Held (6:3 (Sotomayor, Kagan and Jackson JJ dissenting)): Judgment of Court of Appeals for the Eighth Circuit affirmed.

Lora v United States
Supreme Court of the United States: Docket No. 22-49

Reasons delivered: 16 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Criminal law – Sentencing – Multiple prison sentences – Running sentences concurrently or consecutively – Where petitioner convicted of federal crime of aiding and abetting, in violation of 18 USC §924(j)(1), which penalises "a person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm," where "the killing is a murder" – Where petitioner also convicted of second federal crime, conspiring to distribute drugs – Where at sentencing, District Court concluded it lacked discretion to run the sentences for petitioner's two convictions concurrently, because §924(c)(1)(D)(ii)'s bar on concurrent sentences governs §924(j) sentences – Where District Court sentenced petitioner to consecutive terms of imprisonment for drug-distribution-conspiracy count and §924(j) count – Where Court of Appeals affirmed – Whether §924(c)'s bar on concurrent sentences extends to a sentence imposed under a different subsection, §924(j).

Held (9:0): Judgment of Court of Appeals for the Second Circuit vacated; case remanded.

Percoco v United States
Supreme Court of the United States: [Docket No. 21-1158]

Reasons delivered: 11 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Criminal law – Fraud – Honest-services wire fraud – Where petitioner served as Executive Deputy Secretary to New York Governor from 2011 to 2016 – Where during eight-month period in 2014, petitioner resigned from government service to manage Governor's re-election campaign – Where during this hiatus, petitioner accepted payments totalling $35,000 to assist real-estate development company in its dealings with state agency – Where subsequently, petitioner urged senior official at state agency to drop requirement that real-estate development company enter into Labour Peace Agreement with local unions as precondition to receiving state funding for lucrative project – Where United States Department of Justice indicted and charged petitioner with conspiracy to commit honest-services wire fraud in relation to labour-peace requirement – Where petitioner argued unsuccessfully that private citizen cannot commit or conspire to commit honest-service wire fraud based on their own duty of honest services to public – Where trial court instructed jury that petitioner could be found to have had duty to provide honest services to public during time when he was not serving as public official if jury concluded, first, that "he dominated and controlled any governmental business" and, second, that "people working in government actually relied on him because of a special relationship he had with government" – Where jury convicted petitioner – Whether private citizen with influence over government decision-making can be convicted for wire fraud on theory that he or she deprived public of its "intangible right of honest services" – Proper test for determining whether a private person may be convicted of honest services fraud.

Held (9:0): Judgment of Court of Appeals for the Second Circuit reversed; case remanded.

R v Basque
Supreme Court of Canada: [[2023] SCC 18]

Reasons delivered: 30 June 2023

Coram: Wagner CJ, Karakatsanis, Côté, Brown,[3] Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

Catchwords:

[3] Brown J did not participate in the final disposition of the judgment.

Criminal law – Sentencing – Mandatory minimums – Credit for pre-sentence driving prohibition – Where offender charged with impaired driving released on undertaking not to operate motor vehicle while awaiting trial – Where offence carries mandatory prohibition against operating motor vehicle during period of not less than one year – Whether sentencing judge could grant credit for driving prohibition period already served by offender while awaiting trial – *Criminal Code*, RSC 1985, c C-46, ss 259(1)(a) and 719(1).

Held (8:0): Appeal allowed.

Yegiazaryan v Smagin; CMB Monaco v Smagin

Supreme Court of the United States: Docket No. 22-381 and No. 22-383

Reasons delivered: 22 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Criminal law – *Racketeer Influenced and Corrupt Organizations Act* ("RICO") – Extraterritoriality – Private action under RICO – Domestic-injury inquiry – Where respondent won arbitration award in 2014 against petitioner – Where petitioner has lived in California since 2010 and respondent has lived in Russia – Where respondent filed suit to confirm and enforce award in Central District of California pursuant to Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Where District Court initially froze Petitioner's California assets before finally entering judgment against them – Where District Court also entered several post judgment orders barring petitioner and those acting at their direction from preventing collection on judgment – Where while action was ongoing, petitioner awarded multimillion dollar arbitration award in unrelated matter and sought to avoid District Court's asset freeze by concealing funds, which were ultimately transferred to bank account with CMB Monaco – Where in 2020, respondent filed this civil suit under RICO, which provides private right of action to "[a]ny person injured in his business or property by reason of a violation of" RICO's substantive provisions (18 USC §1964(c)) – Where respondent alleges petitioner and others worked together to frustrate respondent's collection on California judgment through pattern of wire fraud and other RICO predicate racketeering acts, including witness tampering and obstruction of justice – Where District Court dismissed complaint on ground respondent failed to plead "domestic injury" as required by *RJR Nabisco, Inc. v European Community*, 579 US 325, 346 – Where Ninth Circuit reversed, rejecting District Court's rigid, residency-based approach to domestic-injury inquiry and instead applied context-specific approach – Proper approach to "domestic-injury" requirement for private civil RICO suits.

Held (6:3 (Thomas, Alito and Gorsuch JJ dissenting)): Application dismissed.

Customs and Excise

JTI POLSKA Sp. Z o.o. & Ors v Jakubowski & Ors
Supreme Court of Canada: [2023] UKSC 19

Reasons delivered: 14 June 2023

Coram: Lord Reed, Lord Hodge, Lord Briggs, Lord Sales, Lord Hamblen, Lady Rose and Lord Richards

Catchwords:

> Customs and Excise – Interpretation of international conventions – Convention on the Contract for the International Carriage of Goods by Road 1956 ("CMR") – Where appellants road hauliers based in Poland – Where respondents buy and sell tobacco products internationally – Where respondents contracted appellants to transport cigarettes from Poland to England – Where road carriage undertaken subject to CMR – Where under European excise duty suspension arrangement, excise duty on cigarettes suspended until such time as consignment released or deemed to have been released for commercial consumption – Where during transit, 289 cases of cigarettes were stolen – Where respondents incurred excise duty of £449,557 as cigarettes were deemed to have been released for commercial consumption in United Kingdom – Where respondents claimed compensation from appellants under CMR – Where parties settled claim save as to excise duty – Whether road carrier is liable for excise duty of £449,557 levied by His Majesty's Revenue and Customs – Proper approach to interpretation of international conventions – Whether *James Buchanan & Co. Ltd v Babco Forwarding & Shipping (UK) Ltd.* [1978] AC 141 was wrongly decided – CMR, Arts 6.1, 23.4, and 32.

Held (7:0): Appeal dismissed.

Defamation

Hansman v Neufeld
Supreme Court of Canada: [2023] SCC 14

Reasons delivered: 19 May 2023

Coram: Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ

Catchwords:

Courts – Dismissal of proceeding that limits debate – Defamation – Public interest weighing exercise – Fair comment – British Columbia framework for dismissal of strategic lawsuits against public participation ("SLAPP") – Where defamation action concerned statements made by defendant in response to school board trustee plaintiff's opposition to sexual orientation and gender identity initiative dismissed under provincial anti-SLAPP legislation by chambers judge – Whether chambers judge erred in public interest weighing exercise – Whether chambers judge erred in finding that plaintiff did not show grounds to believe defendant had no valid fair comment defence – *Protection of Public Participation Act*, SBC 2019, c 3, s 4(2).

Held (6:1 (Côté J dissenting)): Appeal allowed.

Employment Law

Glacier Northwest, Inc. v International Brotherhood of Teamsters
Supreme Court of the United States: Docket No. 21-1449

Reasons delivered: 1 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Employment law – Industrial action – Limits to strikes – Reasonable precautions – Where petitioner delivered concrete to customers in Washington State – Where petitioner's truck drivers members of International Brotherhood of Teamsters Local Union No. 174 – Where after collective-bargaining agreement between Glacier and Union expired, Union called for work stoppage on morning it knew company in midst of mixing substantial amounts of concrete, loading batches into ready-mix trucks, and making deliveries – Where following work stoppage, petitioner prevented significant damage to its trucks, but all concrete mixed that day hardened and became useless – Where petitioner sued respondent for damages in state court, claiming respondent intentionally destroyed company's concrete and conduct amounted to common-law conversion and trespass to chattels – Where respondent moved to dismiss petitioner's claims on ground *National Labor Relations Act* ("NLRA") pre-empted them – Where respondent argued NLRA, which protects employees' rights "to self-organization, to form, join, or assist labor organizations… and to engage in other concerted activities for purpose of collective bargaining or other mutual aid or protection" (29 USC §157), protected drivers' conduct, so State lacked power to hold Union accountable for any of strike's consequences – Where Washington Supreme Court agreed with respondent – Whether employees can withhold labour if doing so risks damage to their employer's property – Whether strike exceeded limits of NLRA – Whether

strikers took reasonable precautions – Whether harm to property imminent – Whether danger foreseeable.

Held (8:1 (Jackson J dissenting)): Judgment of Supreme Court of Washington reversed; case remanded.

Groff v DeJoy
Supreme Court of the United States: Docket No. 22-174

Reasons delivered: 29 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Employment law – Religious accommodation – Discrimination – Undue hardship – Where petitioner Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest – Where in 2012, petitioner took mail delivery job with United States Postal Service ("USPS") – Where petitioner's position generally did not involve Sunday work, but that changed after USPS agreed to begin facilitating Sunday deliveries for Amazon – Where petitioner unwilling to work Sundays, and USPS redistributed petitioner's Sunday deliveries to other USPS staff – Where petitioner received "progressive discipline" for failing to work on Sundays and eventually resigned – Where petitioner sued under Title VII of *Civil Rights Act of 1964*, asserting USPS could have accommodated Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business" (42 USC §2000e(j)) – Where District Court granted summary judgment to USPS, and Third Circuit affirmed based on Supreme Court's decision in *Trans World Airlines, Inc. v Hardison*, 432 US 63, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship" – Where Third Circuit found de minimis cost standard met here, concluding that exempting petitioner from Sunday work had "imposed on his co-workers, disrupted the workplace and workflow, and diminished employee morale" – Whether *de minimis* reading of *Hardison* is a mistake – Proper application of *Hardison* – Meaning of "undue hardship" under Title VII – Proper approach to requirement of "reasonably accommodate" under Title VII.

Held (9:0): Judgment of Court of Appeals for the Third Circuit vacated; case remanded.

Ohio Adjutant General's Department v Federal Labor Relations Authority
Supreme Court of the United States: Docket No. 21-1454

Reasons delivered: 18 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Employment law – Unfair labour practices dispute – Jurisdiction – Where Federal Service Labor-Management Relations Statute ("FSLMRS") establishes Federal Labor Relations Authority ("FLRA") to investigate and adjudicate labour disputes – Where American Federation of Government Employees exclusive representative of certain federal civil-service employees known as dual-status technicians who work for Ohio National Guard – Where petitioners Ohio National Guard, Ohio Adjutant General, and Ohio Adjutant Generals' department – Where after collective-bargaining agreement expired, petitioners asserted they not bound by FSLMRS when interacting with Guard's dual-status technicians – Where Union subsequently filed unfair labour practice complaint with FLRA to resolve dispute – Where Union submitted that FLRA only has jurisdiction over labour organisations and federal agencies – Where petitioners argued Guard was not "agency" and dual-status technician bargaining-unit employees not "employees" for purposes of FSLMRS – Where FLRA held: it had jurisdiction over Guard, dual-status technicians had collective-bargaining rights under FSLMRS, and Guard's actions in repudiating CBA violated FSLMRS – Where Sixth Circuit denied relief – Whether FLRA properly exercised jurisdiction over unfair labour practices dispute – Whether petitioners are "agency" for purposes of FSLMRS when they act in their capacities as supervisors of dual-status technicians – 5 USC §7101 *et seq*.

Held (7:2 (Alito and Gorsuch JJ dissenting)): Judgment of Court of Appeals for the Sixth Circuit affirmed.

Family Law

Anderson v Anderson
Supreme Court of Canada: [2023] SCC 13

Reasons delivered: 12 May 2023

Coram: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamalm and O'Bonsawin JJ

Catchwords:

> Family law – Family assets – Domestic contracts – Where parties entered into agreement regarding division of family property without receiving independent legal advice – Where agreement failed to meet statutory requirements entitling it to presumptive enforceability under provincial family property legislation – Where husband claimed that enforcing agreement would be unfair and seeking division of family property pursuant to applicable legislation – Where framework governing evaluation of agreements are not presumptively binding under provincial family property

legislation – Whether *Miglin* framework applies to all domestic contracts – *The Family Property Act*, SS 1997, c F-6.3, ss 38, 40.

Held (7:0): Appeal allowed.

Fiona Margaret Mead v Lilach Paul and Brett Paul
Supreme Court of New Zealand: [2023] SCC 70

Reasons delivered: 20 June 2023

Coram: Glazebrook, O'Regan, Ellen France, Williams and Kós JJ

Catchwords:

Family law – Property interests – Qualifying relationship – Polyamorous relationship – Where parties formed triangular polyamorous relationship – Where parties lived in property purchased by appellant – Where parties separated and appellant remains resident in property – Where first respondent sought orders in Family Court determining parties' respective shares in property – Where appellant protested Family Court's jurisdiction on basis parties did not have qualifying relationship under *Property (Relationships) Act 1976* ("PRA") – Where High Court held that PRA did not apply to parties – Where Court of Appeal held that polyamorous relationship cannot be qualifying relationship under PRA, but Family Court had jurisdiction to determine claims among three people in polyamorous relationship, where each partner in relationship was in discrete qualifying relationship with each of other partners in that polyamorous relationship – Whether triangular relationship itself could be qualifying relationship under PRA – Whether triangular relationship could be subdivided into two or more qualifying relationships.

Held (3:2): Appeal dismissed with costs.

Sutton v Bell
Supreme Court of New Zealand: [2023] SCC 65

Reasons delivered: 1 June 2023

Coram: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ

Catchwords:

Family law – Property interests – Property settlement – De facto relationships – Where first appellant and respondent in de facto relationship for seven and half years – Where first appellant and respondent had two children together – Where just before commencement of de facto relationship, first appellant transferred residential property to second appellant, being trustees of a trust – Where after relationship ended, respondent claimed first appellant transferred property to defeat their claim

or rights under *Property (Relationships Act) 1976* ("PRA") – Where Family Court held that de facto relationship began before transfer of property – Where High Court found that de facto relationship began after transfer of property, and that s 44 of PRA applied to transfer – Where Court of Appeal found that s 44 of PRA applied to transfer – Whether Court of Appeal erred in dismissing appeal to that Court – Whether s 44 of PRA applies to disposition of property made prior to commencement of de facto relationship – Whether disposition made in order to defeat claim or rights – Whether living together establishes strong but rebuttable presumption that s 44 of PRA is engaged.

Held (5:0): Appeal dismissed with costs.

Unger & Anor (in substitution for Hasan) v Ul-Hasan (deceased) & Anor
Supreme Court of the United Kingdom: [2023] UKSC 22

Reasons delivered: 28 June 2023

Coram: Lord Hodge, Lord Hamblen, Lord Leggatt, Lord Burrows and Lord Stephens

Catchwords:

Family law – Where wife and husband married in 1981 – Where husband obtained divorce in 2012 in Pakistan – Where wife applied to courts in England and Wales for financial relief under s 12(1) of *Matrimonial and Family Proceedings Act 1984* ("1984 Act") – Where husband died before final determination of wife's application – Where wife pursued claim against husband's estate – Where High Court considered itself bound by Court of Appeal decision in *Sugden v Sugden* [1957] P 120, but would otherwise have held wife could continue claim against estate of deceased husband on basis wife's unadjudicated claim for financial relief cause of action vested in her and subsisting against husband's estate under s 1(1) of *Law Reform (Miscellaneous Provisions) Act 1934* – Where High Court considered that Court of Appeal authority incorrect but was compelled to follow it – Where High Court granted certificate pursuant to s 12(1) *Administration of Justice Act 1969* enabling application for leave to Supreme Court – Whether unadjudicated claim for financial provision under 1984 Act survives death of respondent and can be continued against their estate.

Held (5:0): Appeal dismissed.

Fraud

United States ex rel. Schutte v Supervalu Inc.; United States et al. ex rel. Proctor v Safeway, Inc
Supreme Court of the United States: Docket No. 21-1326 and No. 22-111

Reasons delivered: 1 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Fraud – Knowledge – Scienter element – Standard of knowledge – Where petitioners sued retail pharmacies under False Claims Act ("FCA"), 31 USC §3729 *et seq* – Where FCA permits private parties to bring lawsuits in name of United States against those they believe have defrauded Federal Government (§3730(b)) and imposes liability on anyone who "knowingly" submits "false" claim to Government (§3729(a)) – Where petitioners claim respondents defrauded two federal benefits programs, Medicaid and Medicare – Where petitioners alleged respondents offered various pharmacy discount programs to their customers, yet reported their higher retail prices, rather than their discounted prices – Where petitioners presented evidence that respondents believed their discounted prices were their usual and customary prices and tried to prevent regulators and contractors from finding out about their discounted prices – Where two essential elements of FCA violation are falsity of claim and defendant's knowledge of claim's falsity (scienter element) – Where District Court in two separate cases held that respondents could not have acted "knowingly" – Where Seventh Circuit affirmed both cases – Whether FCA's scienter element refers to defendant's knowledge and subjective beliefs, or what objectively reasonable person may have known or believed – Whether respondents could have scienter required by FCA if they correctly understood that standard and thought that their claims were inaccurate.

Held (9:0): Judgment of Court of Appeals for the Seventh Circuit vacated; case remanded.

Human Rights

R (on the application of Maguire) v His Majesty's Senior Coroner for Blackpool & Fylde & Anor
Supreme Court of the United Kingdom: [2023] UKSC 20

Reasons delivered:

Coram: Lord Reed, Lord Lloyd-Jones, Lord Sales, Lord Stephens, Lady Rose

Catchwords:

> Human rights – Coronial inquest – Expanded verdict – Right to life – European Convention on Human Rights ("Convention"), art 2 – Where individual had Down's Syndrome and lived in care home requiring round-the-clock supervision – Where individual subject to standard authorisation for deprivation of liberty made under *Mental Capacity Act 2005* – Where

individual suffered fits and care home staff called ambulance – Where individual refused to go to hospital – Where ambulance obtained advice from out-of-hours GP, while it was desirable individual attend hospital, condition was not so serious that paramedics should override wishes – Where following morning, individual suffered fatal cardiac arrest – Where coroner (respondent) opened inquest into individual's death – Where coroner determined expanded verdict was not required and directed jury to give standard verdict – Where individual's mother sought judicial review of decision that expanded verdict not required – Where High Court dismissed mother's claim – Where Court of Appeal dismissed appeal – Where mother appealed to Supreme Court – Whether, in circumstances surrounding individual's death, effect of art 2 was that coroner required to direct jury at inquest to return expanded verdict in accordance with section 5(2) of *Coroners and Justice Act 2009* – Whether arguable breach of systems duty or operational duty on part of care home, so as to trigger enhanced procedural obligation – Whether arguable breach of systems duty or operational duty on part of any of healthcare providers, so as to trigger that obligation.

Held (5:0): Appeal dismissed.

Migration

Ashebo v Minister of Home Affairs & Ors
Constitutional Court of South Africa: [2023] ZACC 16

Reasons delivered: 12 June 2023

Coram: Maya DCJ, Kollapen, Madlanga, Majiedt JJ, Makgoka AJ, Mathopo J, Potterill AJ, Rogers and Theron JJ

Catchwords:

Migration – Constitutional law – Principle of non-refoulement – Lawfulness of detention - Right to freedom and security of person – Where applicant challenged order of High Court of South Africa, which struck their urgent application from roll for lack of urgency – Where applicant foreign national from Ethiopia – Where applicant arrested in Pretoria for unlawfully entering and residing in South Africa – Where applicant entered South Africa illegally from Zimbabwe on 11 June 2021 due to fear of persecution in their country – Where applicant sought order prohibiting deportation until status under *Refugees Act 130 of 1998*, alternatively under *Refugees Amendment Act 11 of 2017* lawfully and finally determined – Whether delay in applying for asylum can be disqualification from initiating asylum application process – Whether illegal foreigner entitled to be released from detention after expressing intention to seek asylum while awaiting deportation until such time that application finalised – Whether illegal foreigner entitled to opportunity to be interviewed by immigration officer – Whether applicant's detention became unlawful at some point, once reasonable period elapsed

with no effort made on respondents' part to bring them before Refugee Status Determination Officer – *Refugees Act 130 of 1998*, ss 22 and 21(4).

Held (9:0): Appeal allowed with costs.

Pugin v Garland; Garland v Cordero-Garcia, aka Cordero
Supreme Court of the United States: Docket No. 22-23 and No. 22-331

Reasons delivered: 22 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Migration – Removal from United States – Offence relating to obstruction of justice – Where in immigration proceedings, non-citizens Cordero-Garcia and Francois Pugin determined removable from United States on ground of convictions for aggravated felonies, namely, offences "relating to obstruction of justice" – Where Ninth Circuit concluded on appeal that Cordero-Garcia's state conviction for dissuading witness from reporting crime did not constitute offence "relating to obstruction of justice" because state offence did not require that investigation or proceeding be pending – Where Fourth Circuit concluded that Pugin's state conviction for accessory after the fact constituted offence "relating to obstruction of justice" even if state offence did not require investigation or proceeding be pending – Whether offence "relat[es] to obstruction of justice" under §1101(a)(43)(S) even if the offence does not require investigation or proceeding be pending.

Held (6:3 (Sotomayor and Gorsuch JJ dissenting, Kagan J dissenting in part)): Judgment of Court of Appeals for the Fourth Circuit affirmed; judgment of Court of Appeals for the Ninth Circuit reversed and case remanded.

R (on the application of Wang & Anor) v Secretary of State for the Home Department
Supreme Court of the United Kingdom: [2023] UKSC 21

Reasons delivered: 21 June 2023

Coram: Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose, Sir Declan Morgan

Catchwords:

> Migration – Interpretation of Immigration Rules – Eligibility for leave to remain under Tier 1 (Investor) Migrant regime ("regime") – Where individual subscribed to scheme designed to ensure qualification for leave to remain under regime – Where under this scheme, individual borrowed necessary £1 million which was invested on their behalf – Where subsequently individual applied for leave to remain in UK as Tier 1

> (Investor) Migrant on basis of their participation in scheme – Where Secretary of State refused application on basis that money was not "under [her] control" and because money was invested in excluded type of company – Where decision upheld following internal review – Where application for judicial review dismissed by Upper Tribunal – Where Court of Appeal overturned Upper Tribunal's decision and set aside Secretary of State's decision – Where Secretary of State appealed to Supreme Court – Whether £1 million loaned to individual was "money under [her] control" within meaning of Immigration Rules.

Held (5:0): Appeal allowed.

R (on application of Marouf) v Secretary of State for the Home Department
Supreme Court of the United Kingdom: [2023] UKSC 23

Reasons delivered: 28 June 2023

Coram: Lord Reed, Lord Hodge, Lord Burrows, Lady Rose, Lord Richards

Catchwords:

> Migration – Extraterritoriality – Vulnerable Persons Resettlement Scheme ("Resettlement Scheme") – Public service equality duty ("PSED") – Where appellant Palestinian refugee living in Lebanon, having fled conflict in Syria – Where appellant asserted should be treated as eligible to come to United Kingdom under Resettlement Scheme – Where Resettlement Scheme applied only to refugees referred by United Nations High Commissioner for Refugees ("UNHCR") – Where appellant outside remit of UNHCR because registered with United Nations Relief and Works Agency – Where UNHCR has specific mandate to assist by resettlement in third country, UNRWA has no such mandate – Where subsequently Palestinian refugees cannot take part in Resettlement Scheme – Where appellant brought judicial review proceedings challenging lawfulness of Secretary of State's adoption and operation of Resettlement Scheme – Where appellant pursued ground of challenge that Secretary of State failed to comply with PSESD because they did not have due regard to equality – Where High Court held that PSED did have extraterritorial effect – Where Court of Appeal disagreed and held that it did not – Whether PSED imposed by s 149 of *Equality Act 2010* requires public bodies to have due regard to need to promote goals listed in that section when exercising functions in so far as exercise affects lives of people living outside United Kingdom – Whether presumption against extraterritoriality rebutted.

Held (5:0): Appeal dismissed.

Santos-Zacaria v Garland
Supreme Court of the United States: Docket No. 21-1436

Reasons delivered: 11 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Migration – Removal proceedings – Protection from removal – Exhaustion requirement – Where petitioner non-citizen in removal proceedings – Where petitioner sought protection from removal and was denied by Immigration Judge – Where petitioner unsuccessfully appealed to Board of Immigration Appeals – Where petitioner appealed to Fifth Circuit, alleging Board impermissibly engaged in fact-finding that only Immigration Judge could perform – Where Fifth Circuit dismissed appeal in part, finding petitioner not satisfied exhaustion requirement under 8 USC §1252(d)(1), which provides "[a] court may review a final order of removal only if... the alien has exhausted all administrative remedies available to the alien as of right" – Whether §1252(d)(1)'s exhaustion requirement jurisdictional – Whether §1252(d)(1) requires seeking discretionary administrative review, like reconsideration by Board of Immigration Appeals.

Held (9:0): Judgment of Court of Appeals for the Fifth Circuit vacated in part; case remanded.

Patents

Amgen Inc. v Sanofi
Supreme Court of the United States: Docket No. 21-757

Reasons delivered: 18 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Patents – Infringement – Enablement requirement – Where patents covering antibodies engineered by scientists that help reduce levels of low-density lipoprotein ("LDL") cholesterol – Where to treat patients with high LDL cholesterol, scientists explored how antibodies might be used to inhibit PCSK9, a naturally occurring protein that binds to and degrades LDL receptors responsible for extracting LDL cholesterol from bloodstream – Where two pharmaceutical companies, Amgen and Sanofi, each developed PCSK9-inhibiting drug – Where in 2011, Amgen obtained patent for antibody employed in its drug, and Sanofi received one covering antibody used in its drug – Where each patent described relevant antibody by its unique amino acid sequence – Where dispute arose between petitioners and respondents concerning two additional patents Amgen obtained in 2014 that related back to company's 2011 patent – Where later issued patents purport to claim for Amgen "the entire genus" of antibodies that (1) "bind

to specific amino acid residues on PCSK9," and (2) "block PCSK9 from binding to [LDL receptors]" – Where after Amgen obtained 2014 patents, it sued Sanofi for infringement – Where Sanofi argued not liable to Amgen for infringement because Amgen's relevant claims invalid under *Patent Act's* 35 USC §112(a) "enablement" requirement – Where Sanofi characterised methods Amgen outlined for generating additional antibodies as amounting to little more than trial-and-error process of discovery and Amgen's patents failed to meet enablement requirement because they sought to claim for Amgen's exclusive use potentially millions more antibodies than company had taught person skilled in the art to make – Where District Court and Federal Circuit held that Amgen's patents failed to meet enablement requirement – Whether Amgen's patents meet *Patent Act's* enablement requirement.

Held (9:0): Judgment of Court of Appeals for the Federal Circuit affirmed.

Private International Law

Financial Oversight and Management Board for Puerto Rico v Centro de Periodismo Investigativo, Inc.
Supreme Court of the United States: Docket No. 22-96

Reasons delivered: 11 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Private international law – Where in 2016 Congress passed Puerto Rico *Oversight, Management, and Economic Stability Act* ("PROMESA"), 48 USC §2101 *et seq*., to deal with fiscal crisis in Puerto Rico – Where statute created Financial Oversight and Management Board for Puerto Rico (petitioner in this case) as "entity within the territorial government" of Puerto Rico – Where non-profit media organisation asked petitioner to release various documents relating to its work – Where media organisation sued petitioner after requests unfulfilled – Where petitioner moved to dismiss on sovereign immunity grounds – Where District Court rejected defence and First Circuit affirmed – Whether PROMESA categorically abrogates any sovereign immunity board enjoys from legal claims.

Held (8:1 (Thomas J dissenting)): Judgment of Court of Appeals for the First Circuit reversed; case remanded.

Re: Guy Kwok Hung Lam (林國雄) v Ex Parte: Tor Asia Credit Master Fund LP
Hong Kong Court of Final Appeal: [2023] HKCFA 9

Reasons delivered: 4 May 2023

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and French NPJ

Catchwords:

> Private international law – Jurisdiction – Exclusive jurisdiction clause – Where appellant advanced term loans to company controlled by respondent pursuant to agreement which contained exclusive jurisdiction clause in favour of New York courts – Where appellant commenced bankruptcy proceedings against respondent in Hong Kong – Where Court of First Instance granted bankruptcy order on basis that respondent unable to demonstrate *bona fide* dispute on substantial grounds in relation to petition debt – Where Court of Appeal unanimously allowed respondent's appeal and dismissed bankruptcy petition – Where Court of Appeal granted leave to appellant to appeal on proper approach of Hong Kong court to bankruptcy petition where parties agreed to submit to exclusive jurisdiction of specified foreign court – Whether Court of First Instance's jurisdiction amenable to exclusion by contract – Whether Court of First Instance has discretion to decline exercise of jurisdiction on forum grounds – Proper exercise by Court of First Instance to decline jurisdiction.

Held (5:0): Appeal dismissed with costs.

Statutory Interpretation

Commissioners for His Majesty's Revenue and Customs v SSE Generation Ltd
Supreme Court of the United Kingdom: [2023] UKSC 17

Reasons delivered: 17 May 2023

Coram: Lord Reed, Lord Briggs, Lord Hamblen, Lord Leggatt and Lord Stephens

Catchwords:

> Statutory interpretation – Meaning of "tunnel" – Meaning of "aqueduct" – Where respondent claimed capital allowances on expenditure incurred when constructing hydro-electric power station – Where appellant disputed certain allowances claimed by respondent on basis certain relevant assets do not give rise to allowable expenditure under *Capital Allowances Act 2001* ("CAA") – Where items constructed for collection and transmission of water to, through, and from hydro-electric power station ("disputed items") are part of state-of-the-art hydro-electric scheme constructed and operated by respondent – Where s 22 List B Item 1 of CAA disqualifies from relief expenditure on "[a] tunnel, bridge, viaduct, aqueduct, embankment or cutting" – Whether disputed items are a "tunnel" or an "aqueduct" within meaning of those words as used in s 22 List B of Ch 3, Pt 2 of CAA.

Held (5:0): Appeal dismissed.

Health and Hospital Corporation of Marion County, Indiana v Talevski
Supreme Court of the United States: Docket No. 21-806

Reasons delivered: 8 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Statutory interpretation – Civil action for deprivation of rights – Where respondent moved to nursing home in 2016 – Where respondent brought action under 42 USC §1983 against county-owned nursing home and its agents (collectively, "HHC"), claiming that HHC's treatment violated rights guaranteed under *Federal Nursing Home Reform Act* ("FNHRA") – Where District Court granted HHC's subsequent motion to dismiss respondent's complaint, reasoning that no plaintiff can enforce provisions of FNHRA via §1983 – Where Seventh Circuit reversed, concluding that rights referred to in two FNHRA provisions invoked by respondent, right to be free from unnecessary chemical restraints (§1396r(c)(1)(A)(ii)), and right to be discharged or transferred only when certain preconditions are met (§1396r(c)), "unambiguously confer individually enforceable rights on nursing home residents," making those rights presumptively enforceable via §1983 – Where Seventh Circuit further found nothing in FNHRA indicated congressional intent to foreclose §1983 enforcement – Whether FNHRA provisions at issue unambiguously create §1983 enforceable rights – Whether incompatibility between private enforcement under §1983 and remedial scheme Congress devised.

Held (7:2 (Thomas and Alito JJ dissenting)): Judgment of Court of Appeals for the Seventh Circuit affirmed.

Sackett v Environmental Protection Agency
Supreme Court of the United States: Docket No. 21-454

Reasons delivered: 25 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Statutory interpretation – Waters of the United States – Where petitioners purchased property near Priest Lake, Idaho, and began backfilling lot with dirt to prepare for building home – Where Environmental Protection Agency ("EPA") informed petitioners their property contained wetlands and backfilling violated *Clean Water Act*, which prohibits discharging pollutants

into "the waters of the United States" (33 USC §1362(7)) – Where EPA ordered petitioners to restore site, threatening penalties of over $40,000 per day – Where EPA classified wetlands on petitioners' lot as "waters of the United States" because near a ditch that fed into a creek, which fed into Priest Lake, a navigable, intrastate lake – Where petitioners alleged property was not "waters of the United States" – Where District Court and Ninth Circuit held that *Clean Water Act* covers wetlands with ecologically significant nexus to traditional navigable waters and that petitioners' wetlands satisfied that standard – Whether wetlands are "waters of the United States" – Meaning of "waters of the United States".

Environmental law – Federal environmental law – Protections for wetlands.

Held (9:0): Judgment of Court of Appeals for the Ninth Circuit reversed; case remanded.

Taxation

Deans Knight Income Corp. v Canada

Supreme Court of Canada: [2023] SCC 16

Reasons delivered: 26 May 2023

Coram: Wagner CJ, Karakatsanis, Côté, Brown,[4] Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ

Catchwords:

Taxation – Income tax – Tax avoidance – Application of general anti-avoidance rule – Limitation on losses deductible from taxable income – Where corporation lacking income sufficient to use non-capital losses and other tax attributes from previous years to reduce corporate income tax – Where corporation entered into transactions with other parties and deducted non-capital losses from income earned in new investment venture – Where deductions denied by Minister – Where Tax Court held that transactions were tax avoidance but were not abusive under general anti-avoidance rule – Where Court of Appeal concluded that transactions were abusive – Whether general anti-avoidance rule applicable to deny corporation's deductions of non-capital losses – *Income Tax Act*, RSC 1985, c 1 (5th Supp.), ss 111(5) and 245.

Held (7:1 (Côté J dissenting)): Appeal dismissed.

Polselli v Internal Revenue Service

Supreme Court of the United States: Docket No. 21-1599

[4] Brown J did not participate in the final disposition of the judgment.

Reasons delivered: 18 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Taxation – Summonses – Notice requirement – Where Internal Revenue Service ("IRS") entered official assessments against one of petitioners for more than $2 million in unpaid taxes and penalties – Where Revenue Officer issued summonses to three banks seeking financial records of several third parties, including petitioners – Where IRS must generally provide notice to any person identified in summons pursuant to 24 USC §7609(a)(1) – Where no notice required under §7609(c)(2)(D)(i) when IRS issues summons "in aid of the collection of… an assessment made… against the person with respect to whose liability the summons is issued" – Where petitioners brought motion to quash summons under §7609(b)(2)(A) – Where District Court held that under §7609(c)(2)(D)(i), no notice required and petitioners could not bring motion to quash – Where Sixth Circuit affirmed on appeal – Whether exception to notice requirement in § 7609(c)(2)(D)(i) applies only if delinquent taxpayer has legal interest in accounts or records summoned by IRS under §7602(a).

Held (9:0): Judgment of Court of Appeals for the Sixth Circuit affirmed.

Tort

Jalla & Anor v Shell International Trading and Shipping Co Ltd & Anor
Supreme Court of the United Kingdom: [2023] UKSC 16

Reasons delivered: 10 May 2023

Coram: Lord Reed, Lord Briggs, Lord Kitchin, Lord Sales and Lord Burrows

Catchwords:

> Tort – Nuisance – Private nuisance – Continuing private nuisance – Major oil spill – Where appellants two Nigerian citizens – Where respondents companies within Shell group of companies – Where on 20 December 2011, oil leak lasting six hours occurred at Bonga oil field, 120km off coast of Nigeria – Where respondents alleged to be liable for operation behind oil spill – Where respondents alleged oil had not been removed or cleaned up – Where assumed for purposes of appeal that some quantity of oil reached Nigerian Atlantic shoreline within weeks of 20 December 2011 – Where issue of limitation arose when appellants sought to make certain amendments to claim form and particulars of claim over six years after oil spill – Whether there is continuing private nuisance and hence continuing cause of action – Whether continuing cause of action for tort of private nuisance accrues afresh from day to day.

Held (5:0): Appeal dismissed.

Robert Roper v Mariya Ann Taylor
Supreme Court of New Zealand: [2023] NZSC 49

Reasons delivered: 12 May 2023

Coram: Winkelmann CJ, Glazebrook, O'Regan, Williams and William Young JJ

Catchwords:

> Tort – False imprisonment – Compensatory damages – Effect of accident compensation scheme – Where Taylor joined Royal New Zealand Air Force ("RNZAF") in 1985 at age 18 – Where Roper was Taylor's superior – Where Taylor alleged Roper, bullied, verbally abused, sexually harassed, inappropriately touched, and falsely imprisoned her between 1985 and 1988 – Where Taylor alleged she complained but RNZAF failed to do anything about it – Where Taylor plead assault, intentional infliction of emotional distress, false imprisonment (against both Roper and RNZAF) and breach of duty of care as an employer (against RNZAF only) – Where Taylor failed in High Court but partially succeeded in Court of Appeal – Where Court of Appeal determined that Taylor could sue for compensatory damages with regard to false imprisonment, but not assaults due to statutory bar – Where Roper and Attorney-General appealed Court of Appeal judgment – Where Supreme Court also granted Taylor leave to cross-appeal against holding that she was entitled to ACC cover – Whether Court of Appeal erred in its interpretation of *Willis v Attorney-General* [1989] 3 NZLR 574 and in interpretation of s 317 of *Accident Compensation Act 2001* ("2001 ACC Act") – Whether Court of Appeal erred in its interpretation of s 21B of 2001 ACC Act – Whether Court of Appeal approach inconsistent with text, scheme and purpose of 2001 ACC Act – Whether 2001 ACC Act excluded any claim for compensatory damages – Meaning of "sudden".

Held (5:0): Appeal allowed; cross appeal dismissed.

Twitter, Inc. v Taamneh
Supreme Court of the United States: Docket No. 21-1496

Reasons delivered: 18 May 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Tort – International terrorism – *Antiterrorism Act* ("ATA") – Civil aiding and abetting – Where in 2017, Masharipov carried out terrorist attack on Reina nightclub in Istanbul on behalf of Islamic State of Iraq and Syria ("ISIS") –

Where Masharipov killed Alassaf and 38 others – Where Alassaf's family brought suit under 18 USC §2333, ATA provision that permits US nationals who have been "injured… by reason of an act of international terrorism" to file civil suit for damages – Where instead of suing ISIS directly under §2333(a), respondents invoked § 2333(d)(2) to sue Facebook, Twitter (petitioner here), and Google (which owns YouTube), for aiding and abetting ISIS – Where respondents alleged that for several years companies knowingly allowed ISIS and its supporters to use their platforms and "recommendation" algorithms as tools for recruiting, fundraising, and spreading propaganda – Where respondents allege that companies have, in process, profited from advertisements placed on ISIS' tweets, posts, and videos – Where District Court dismissed complaint for failure to state claim – Where Ninth Circuit reversed judgment of District Court – Whether conduct of social-media company defendants gives rise to aiding and abetting liability for Reina nightclub attack – Whether petitioners' conduct constitutes "aid[ing] and abett[ing], by knowingly providing substantial assistance" – Meaning of "aid and abet".

Criminal law – terrorism – aiding and abetting – providing substantial assistance.

Held (9:0): Judgment of Court of Appeals for the Ninth Circuit reversed.

Trade Marks

Abitron Austria GmbH v Hetronic International, Inc.
Supreme Court of the United States: Docket No. 21-1043

Reasons delivered: 29 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Trade marks – Presumption against extraterritoriality – Worldwide infringement – Where case concerns trade mark dispute between respondent (US company) and six foreign parties (collectively the petitioner) – Where respondent manufactures remote controls for construction equipment – Where petitioner, once licensed distributor for respondent, claimed ownership of rights to much of respondent's intellectual property and began employing respondent's marks on products it sold – Where respondent sued petitioner in Western District of Oklahoma for trade mark violations under two related provisions of *Lanham Act*, which prohibit unauthorised use in commerce of protected marks when, inter alia, use likely to cause confusion (§§1114(1)(a) and 1125(a)(1)) – Where respondent sought damages for petitioner's infringing acts worldwide – Where petitioner argued respondent sought impermissible extraterritorial application of *Lanham Act* – Where District Court rejected petitioner's

argument, and jury awarded respondent approximately $96 million in damages related to petitioner's global employment of respondent's marks – Where District Court entered permanent injunction preventing petitioner from using respondent's marks anywhere in world – Where on appeal, Tenth Circuit narrowed injunction, but otherwise affirmed the judgment – Whether presumption against extraterritoriality rebutted.

Held (9:0): Judgment of Court of Appeals for the Tenth Circuit vacated; case remanded.

Jack Daniel's Properties, Inc. v VIP Products LLC

Supreme Court of the United States: Docket No. 22-148

Reasons delivered: 8 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Trade marks – Infringement – Fair use – *Rogers* test – Dilution by tarnishment – Where respondent made squeaky, chewable dog toy designed to look like bottle of Jack Daniel's whiskey ("Bad Spaniels Toy") – Where dog toy replaces some attributes of Jack Daniel's bottle with jokes, for example, "Jack Daniel's" become "Bad Spaniels" – Where petitioner demanded respondent stop selling toy – Where respondent sought declaratory judgment that Bad Spaniels neither infringed nor diluted Jack Daniel's trade marks – Where petitioner counterclaimed for infringement and dilution – Where respondent argued petitioner's infringement claim failed under *Rogers* test – Where respondent argued when "expressive works" involved, *Rogers* test requires dismissal of infringement claim at outset unless complainant can show either (1) challenged use of mark "has no artistic relevance to the underlying work" or (2) that it "explicitly misleads as to the source or the content of the work" – Where respondent argued petitioner could not make that showing, *Lanham Act's* statutory "likelihood of confusion" standard became irrelevant – Where respondent argued petitioner could not succeed because Bad Spaniels parody of Jack Daniel's and therefore made "fair use" of its famous marks – Where District Court rejected both of respondent's contentions, and held *Rogers* test does not apply when another's trade mark is used for "source identification", and instead infringement suit turns on likelihood of confusion – Where District Court likewise rejected respondent's invocation of the fair-use exclusion, holding that parodies fall within that exclusion only when they do not use famous mark to identify source of alleged diluter's product – Where Ninth Circuit reversed – Whether petitioner should have had to satisfy *Rogers* threshold test before case could proceed to *Lanham Act's* likelihood of confusion inquiry – Whether Bad Spaniels constituted dilution by tarnishment.

Held (9:0): Judgment of Court of Appeals for the Ninth Circuit vacated; case remanded.

Tribal Law

Arizona v Navajo Nation; Department of the Interior v Navajo Nation
Supreme Court of the United States: Docket No. 21-1484 and No. 22-51

Reasons delivered: 22 June 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

> Tribal law – Treaty – Right to use water – Affirmative steps to secure water – Where 1868 peace treaty ("treaty") between United States and Navajo Tribe established Navajo Reservation almost entirely in Colorado River Basin of western United States – Where Federal Government's reservation of land for Indian tribe implicitly reserves right to use needed water from various sources that arise on, border, cross, underlie, or are encompassed within reservation – Where respondents faced water scarcity problem – Where Navajos filed suit seeking to compel United States to take affirmative steps to secure needed water for Tribe – Where States of Arizona, Nevada, and Colorado intervened against Tribe to protect those States' interests in water from Colorado River – Where US District Court for District of Arizona dismissed Navajo Tribe's complaint, but Ninth Circuit reversed, holding United States has duty under 1868 treaty to take affirmative steps to secure water for Navajos – Whether treaty requires United States to take affirmative steps to secure water for Navajos.

Held (5:4 (Sotomayor, Kagan, Gorsuch and Jackson JJ dissenting)): Judgment of Court of Appeals for the Ninth Circuit reversed.