

# OT 2016: Cases of interest

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## 1. Fourth Amendment – malicious prosecution claim

- *Manuel v. Joliet, II*, Case No. 14-9496 (argued October 5, 2016): The question presented is whether an individual’s Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment. This question was raised, but left unanswered, by this Court in *Albright v. Oliver*, 510 U.S. 266 (1994). Since then, the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have all held that a Fourth Amendment malicious prosecution claim is cognizable through 42 U.S.C. § 1983 (“Section 1983”). Only the Seventh Circuit holds that a Fourth Amendment Section 1983 malicious prosecution claim is not cognizable.

## 2. Insider Trading – tippee liability

- *Salman v. United States*, Case No. 15-628 (argued October 5, 2016): Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of “an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature,” as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

## 3. State exclusion of church program – Free Exercise and equal protection

- *Trinity Lutheran Church v. Pauley*. Case No. 14-1382 (cert. granted January 15, 2016): Trinity Lutheran Church applied for Missouri’s Scrap Tire Grant Program so that it could provide a safer playground for children who attend its daycare and for neighborhood children who use the playground after hours--a purely secular matter. But the state denied Trinity’s application solely because it is a church. The Eighth Circuit affirmed that denial by equating a grant to resurface Trinity’s playground using scrap tire material with funding the devotional training of clergy. The Eighth Circuit’s decision was not faithful to this Court’s ruling in *Locke v. Davey*, 540 U.S. 712 (2004), and deepened an existing circuit conflict. Three lower courts—two courts of appeals and one state supreme court--interpret *Locke* as justifying the exclusion of religion from a neutral aid program where no

valid Establishment Clause concern exists. In contrast, two courts of appeals remain faithful to Locke and the unique historical concerns on which it relied.

The question presented is: Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

#### 4. Design Patents – damage computation

- *Samsung Electronics Co. v. Apple, Inc.*, Case No. 15-777 (argued October 11, 2016). Design patents are limited to “any new, original and ornamental design for an article of manufacture.” 35 U.S.C. 171. A design-patent holder may elect infringer’s profits as a remedy under 35 U.S.C. 289, which provides that one who “applies the patented design ... to any article of manufacture ... shall be liable to the owner to the extent of his total profit, ... but [the owner] shall not twice recover the profit made from the infringement.” The Federal Circuit held that a district court need not exclude unprotected conceptual or functional features from a design patent’s protected ornamental scope. The court also held that a design-patent holder is entitled to an infringer’s entire profits from sales of any product found to contain a patented design, without any regard to the design’s contribution to that product’s value or sales. The combined effect of these two holdings is to reward design patents far beyond the value of any inventive contribution. The question[]presented [is]: Where a design patent is applied to only a component of a product, should an award of infringer’s profits be limited to those profits attributable to the component?

#### 5. Extraterritorial reach of constitutional rights

- *Hernandez v. Mesa*, Case No. 15-118 (cert granted October 11, 2016): In *Boumediene v. Bush*, this Court held that the Constitution’s extraterritorial application “turn[s] on objective factors and practical concerns,” not a “formal sovereignty-based test.” 553 U.S. 723, 764 (2008). That holding is consistent with Justice Kennedy’s concurrence two decades earlier in *United States v. VerdugoUrquidez*, 494 U.S. 259 (1990), rejecting four Justices’ formalist approach to extraterritorial application of the Fourth Amendment’s warrant requirement. The questions presented are:

1. Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment’s prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States?

2. May qualified immunity be granted or denied based on facts-such as the victim’s legal status unknown to the officer at the time of the incident?

IN ADDITION TO THE QUESTIONS PRESENTED BY THE PETITION, THE PARTIES ARE DIRECTED TO BRIEF AND ARGUE THE FOLLOWING QUESTION: “WHETHER THE CLAIM IN THIS CASE MAY BE ASSERTED UNDER *BIVENS v. SIX UNKNOWN FED. NARCOTICS AGENTS*, 403 U.S. 388 (1971).”

## 6. Bivens and qualified immunity

- ***Hasty v. Turkmen***, Case No. 15-1363 (cert. granted October 11, 2016): This putative class action was filed by foreign nationals who were illegally in the United States and detained following the September 11th terrorist attacks. The FBI designated respondents as “of interest” or “high interest” to its investigation into the attacks; Bureau of Prisons policy mandated that detainees so designated be housed in the most restrictive conditions permissible. Respondents brought this action seeking to hold petitioners Dennis Hasty and James Sherman, who were the Warden and Associate Warden at the Metropolitan Detention Center, personally liable in damages, along with others. Respondents claim that Hasty and Sherman should be liable because (inter alia) they concluded-and thus “knew”-that the FBI lacked evidence to support its terrorism designations for respondents. The questions presented are:
  1. Whether, as the Second Circuit held, the judicially implied cause of action for damages against individual officials recognized in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), extends to this context.
  2. Whether qualified immunity was properly denied, notwithstanding the specific circumstances confronted by petitioners-including the FBI’s terrorism designations for respondents-because the Constitution “clearly” prohibits any “condition of pretrial detention not reasonably related to a legitimate governmental objective,” Pet. App. 57a-58a, or imposed “because of \* \* \* race, ethnicity, religion, and/or national origin,” id. at 72a-73a.
  3. Whether the allegations against Hasty and Sherman-such as the assertion that they “knew” the FBI’s terrorism designations for respondents were wrong but imposed otherwise mandatory confinement conditions because they had discriminatory intent-are sufficiently plausible to state a claim under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

## 7. Death Penalty – racial bias

- ***Buck v. Davis***, Case No. 15-8049 (argued October 5, 2016): Duane Buck’s death penalty case raises a pressing issue of national importance: whether and to what extent the criminal justice system tolerates racial bias and discrimination. Specifically, did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard

that contravenes this Court's precedent and deepens two circuit splits when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an "expert" who testified that Mr. Buck was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?

**8. Eighth Amendment – mental capacity and delayed execution**

- *Moore v. Texas*, Case No. 15-797 (argued November 29, 2016): 1. Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed. 2. Whether execution of a condemned individual more than three-and-one-half decades after the imposition of a death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.

**9. Sixth Amendment right to impartial jury**

- *Pena-Rodriguez v. Colorado*, No. 15-606 (argued October 11, 2016): Most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law. The question presented is whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

**10. Immigration – equal protection**

- *Lynch v. Morales-Santana*, No. 15-1191 (argued November 9, 2016): In order for a United States citizen who has a child abroad with a non-U.S. citizen to transmit his or her citizenship to the foreign-born child, the U.S.-citizen parent must have been physically present in the United States for a particular period of time prior to the child's birth.

The questions presented are:

1 - Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection.

2 - Whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

**11. Regulatory taking case**

- *Murr v. Wisconsin*, No. 15-214 (cert. granted January 15, 2016) In a regulatory taking case, does the “parcel as a whole” concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

**12. Class actions – jurisdiction to review after voluntary dismissal**

- *Microsoft Corp. v. Baker*, No. 15-457 (cert. granted January 15, 2016) Whether a federal court of appeals has jurisdiction under both Article III and 28 USC § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice..

**13. Individuals with Disabilities Education Act**

- *Andrew F. v. Douglas County School District*, No. 15-827 (cert. granted September 29, 2016): What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

**14. First Amendment – use of internet by sex offender**

- *Packingham v. North Carolina*, No. 15-1194 (cert. granted 10/28/16): The North Carolina Supreme Court sustained petitioner’s conviction under a criminal law, N.C. Gen. Stat. § 14-202.5, that makes it a felony for any person on the State’s registry of former sex offenders to “access” a wide array of websites-including Facebook, YouTube, and nytimes.com-that enable communication, expression, and the exchange of information among their users, if the site is “know[n]” to allow minors to have accounts. The law-which applies to thousands of people who, like petitioner, have completed all criminal justice supervision-does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a website for any illicit or improper purpose.

The question presented is:

Whether, under this Court's First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner - who was convicted based on a Facebook "post" in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

**15. Due process – monetary penalties**

- *Nelson v. Colorado*, No. 15-1256 (cert. granted September 29, 2016): Colorado, like many states, imposes various monetary penalties when a person is convicted of a crime. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Rather, Colorado requires defendants to prove their innocence by clear and convincing evidence to get their money back. The Question Presented is whether this requirement is consistent with due process.

**16. State no-surcharge laws**

- *Expressions Hair Design v. Schneiderman*, No. 15-1391 (cert. granted September 29, 16): Ten states have enacted laws that allow merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge."

The question presented is:

Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?

**17. Tribal Immunity**

- *Lewis v. Clarke*, No. 15-1500 (cert. granted 9/29/16): Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

**18. Agency deference - *Auer***

- *Gloucester County School Board v. G.G.*, No. 16-273 (cert. granted October 28, 2016): Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of

Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer v. Robbins*, 519 U.S. 452(1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent—who was born a girl but identifies as a boy—to use the boys' restrooms at school. The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled? [Note: Court did not take this question.]
2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?
3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

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