

Supreme Court Update: *Brnovich v. AZ*, *Americans for Prosperity Fnd. v. Bonta*, *Minerva Surgical v. Hologic*, *Johnson v. Guzman Chavez*, *PennEast Pipeline Co. v. NJ*, *Yellen v. Confederated Tribes of Chehalis Reservation*

Article By:

Tadhg A.J. Dooley

David Roth

Supreme Court Update: *Brnovich v. Arizona* (No. 19-1257), *Americans for Prosperity Foundation v. Bonta* (No. 19-251), *Minerva Surgical v. Hologic* (No. 20-440), *Johnson v. Guzman Chavez* (No. 19-897), *PennEast Pipeline Co. v. New Jersey* (No. 19-1309), *Yellen v. Confederated Tribes of the Chehalis Reservation* (No. 20-543), *HollyFrontier Cheyenne Refining v. Renewable Fuels Assn* (No. 20-472)

In the final day of OT20, the Court handed down its two biggest decisions of the term: In [*Brnovich v. Arizona* \(No. 19-1257\)](#), the Court held (in a 6-3 decision by Justice Alito, with Justice Kagan leading the dissent), that two of Arizona's recently enacted voting restrictions do not violate Section 2 of the Voting Rights Act, and that one in particular (an anti-ballot harvesting measure) was not enacted with a racially discriminatory purpose; and in [*Americans for Prosperity Foundation v. Bonta* \(No. 19-251\)](#), the Court held (again 6-3, this time with the Chief writing for the majority and Justice Sotomayor leading the dissent) that California's requirement that nonprofits disclose the identities of their major donors to the state Attorney General's office is facially invalid under the First Amendment. The Chief also announced a few retirements in his end-of-term statement . . . but Justice Breyer's was not among them.

These two decisions rank as blockbusters in a relatively pedestrian term. They're also among the surprisingly few 6-3 decisions that have broken on ideological lines. More typical of OT20 were Tuesday's decisions (only one of which involved a 6-3 ideological split): In [*Minerva Surgical v. Hologic* \(No. 20-440\)](#), the Court held (5-4) that the Federal Circuit was correct to uphold the patent-law doctrine of assignor estoppel, but that it should only be applied when the assignor's claim of invalidity contradicts explicit or implicit representations made in assigning the patent; in [*Johnson v. Guzman Chavez* \(No. 19-897\)](#), the Court held (6-3) that the detention of a noncitizen ordered removed from the United States who reenters without authorization is governed by 8 U.S.C. 1231, not 1226; and in [*PennEast Pipeline Co. v. New Jersey* \(No. 19-1039\)](#), the Court held (5-4) that Section 717f(h) of the Natural Gas Act authorizes private companies holding certificates of necessity

issued by the Federal Energy Regulatory Commission to condemn all necessary rights-of-way, whether owned by private parties or States.

So The Nine are done (albeit with orders tomorrow and, who knows, potentially a late-breaking announcement), but we've got plenty of catching up to do. Read on for summaries of *Minerva Surgical*, as well as [Yellen v. Confederated Tribes of the Chehalis Reservation \(No. 20-543\)](#), concerning the eligibility of Alaska Native Corporations for CARES Act funding, and [HollyFrontier Cheyenne Refining v. Renewable Fuels Assn \(No. 20-472\)](#), concerning extensions of hardship exemptions under the Renewable Fuel Program.

We'll start with [Yellen v. Confederated Tribes of the Chehalis Reservation \(No. 20-543\)](#), where an interestingly divided Court held that Alaska Native Corporations (ANCs) qualify as "Indian tribe[s]" under the Indian Self-Determination and Education Assistance Act (ISDA) and therefore are eligible to receive hundreds of millions of dollars in federal CARES act funding set aside for "Tribal governments."

Title V of the Coronavirus Aid, Relief, and Economic Security (CARES) Act allocated \$8 billion to "Tribal governments" to compensate for pandemic-related expenditures. Under the statute, a "Tribal government" is the "recognized governing body of an Indian tribe" as defined in the ISDA. The ISDA, in turn, defines an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act[,] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The question in this case was whether ANCs—for-profit corporations set up to manage assets provided by Congress through the Alaska Native Claims Settlement Act on behalf of Alaska Natives (their shareholders)—qualify as "Indian tribe[s]" under the ISDA. If yes, they'd be entitled to approximately \$450 million in CARES Act funds; if no, that money would be dispersed among other Indian tribes across the country. The Treasury Department determined that ANCs are Indian Tribes under the ISDA, after consulting with the Department of the Interior, which has long held that view. But a group of federally recognized Indian tribes sued, arguing that ANCs are not tribes because they're not "recognized" in the sense of having nation-to-nation relations with the federal government. The D.C. Circuit agreed with the federally recognized Tribes.

The Supreme Court reversed, in a 6-3 decision by Justice Sotomayor, joined by all but Justices Gorsuch, Thomas, and Kagan. Justice Sotomayor agreed with the ANCs that they fall under the plain meaning of the ISDA's definition of "Indian tribe." ANCs are "established pursuant to" the ANCSA and are thereby "recognized as eligible" for all the benefits of that act (including hundreds of millions of dollars and tens of millions of acres of land provided by the United States to Alaska Natives in care of the ANCs). She rejected the federally recognized Tribes' argument that the ISDA's phrase "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" is a term of art signifying a "federally recognized tribe." That was so because they failed to show that the recognized-as-eligible clause was an accepted way of saying "a federally recognized tribe" when the ISDA was passed in 1975.

Even if the federally recognized Tribes were correct that the recognized-as-eligible clause is a term of art that excludes ANCs, Justice Sotomayor maintained that ANCs would still qualify as "Indian tribe[s]" under the ISDA because the recognized-as-eligible clause only modifies the first clause of the definition ("any Indian tribe . . .") not the "Alaska clause." Because the definition so clearly includes "any Alaska Native village or regional or village corporation," it would make no sense for them to be excluded by the subsequent clause. (In the same way, Sotomayor argued, if a restaurant

advertised “50% off any meat, vegetable, or seafood dish, including ceviche, which is cooked,” it would not be reasonable to conclude that the “which is cooked” clause excludes ceviche, since it is deliberately included in the deal.)

Justice Gorsuch led the charge for the dissenters. In his view, there were two key questions in the case: “(1) Does the statute’s final clause (call it the recognition clause) apply to the ANCs listed earlier? (2) If so, are the ANCs ‘recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians?’” On the first question, the last-antecedent principle would suggest that the ANCs, “[a]s the nearest referent and part of an integrated list of other modified terms,” must be subject to the recognition clause. While there might be debate about whether the recognition clause modifies the *preceding* clause, “it would be passing strange to suggest that the recognition clause applies to everything *except* the term immediately preceding it.” (Gorsuch found Sotomayor’s “ceviche” hypo to be “a bit underdone,” especially since the inimitable Mark Bittman has written about “fish . . . ‘cooked by marinating it in an acidic dressing’ like lime juice”.) Other clues in the CARES Act suggest that Congress was thinking of “Indian tribe[s],” side-by-side with states and local governments as “entities capable of having a government-to-government relationship with the United States,” which ANCs do not. ANCs are corporations. Their boards may govern the enterprise “[b]ut they do not govern any people or direct any government.” Looking at the statute as a whole, Justice Gorsuch concluded that “[t]he recognition clause denotes the formal recognition between the federal government and a tribal government that triggers eligibility for the full panoply of special benefits given to Indian tribes.” Because ANCs are not formally recognized and not entitled to the full panoply of benefits, they should not be eligible for this particular tranche of CARES Act dollars.

Next, in [Minerva Surgical, Inc. v. Hologic, Inc. \(No. 20-440\)](#), a divided court addressed the continued viability of a long-recognized equitable doctrine of patent law: assignor estoppel. Taking the pen for the majority, Justice Kagan concluded that the doctrine remains alive and well, but it’s not without limits.

Csaba Truckai invented the NovaSure System, a medical device designed to treat abnormal uterine bleeding, in the late 90s. His patent application represented that the device uses an applicator head to destroy targeted cells in the uterine lining; that head is “moisture permeable,” meaning that it removes fluid during treatment. He then assigned the patent application to his company, Novacept. Hologic, Inc. ultimately acquired Novacept’s assets, including the patent. After selling his interest in Novacept, Truckai founded another company—you guessed it, Minerva Surgical. There, he developed the Minerva Endometrial Ablation System, another device designed to treat abnormal uterine bleeding. Just like the NovaSure System, it used an applicator head, but unlike the NovaSure System it is “moisture impermeable” and doesn’t remove fluid during treatment. The PTO issued a patent in 2015. But while Truckai was at work developing the Minerva System, Hologic filed a continuation application in which it asserted a new claim that sought to extend its patent to encompass applicator heads generally, whether or not they are moisture permeable (i.e., to include devices like the Minerva System). The PTO issued the altered patent in 2015.

Armed with the altered patent, Hologic sued Minerva for patent infringement. Minerva defended itself by arguing that Hologic’s patent was invalid. Hologic responded by invoking the doctrine of assignor estoppel, contending that because Truckai assigned the original patent application, he (Minerva), could not then challenge the patent’s validity. The district court agreed with Hologic, and the Federal Circuit affirmed. But the Supreme Court reversed and remanded.

Writing for a majority of five (the Chief, plus Justices Breyer, Sotomayor, and Kavanaugh), Justice

Kagan began with the threshold question of whether the doctrine of assignor estoppel is still good law. Starting with the policy behind the doctrine, she noted that it finds its roots in fairness principles: an inventor should not be allowed to sell her patent, reap the financial benefits, and then challenge the validity of the same patent. That's why the Court unanimously approved the doctrine in *Westinghouse v. Formica* way back in 1924. "After all, the grantor purports to convey the right to exclude others; how can he later say, given that representation, that the grantee in fact possesses no such right?"

Minerva argued that the assignor estoppel doctrine is either already defunct or should be. The Court disagreed. Justice Kagan first rejected Minerva's contention that the Patent Act of 1952 abrogated the doctrine by mandating that invalidity "shall be a defense in any action" involving infringement. Congress legislates against "a backdrop of common law adjudicatory principles." If it had intended to eliminate common law preclusion doctrines like assignor estoppel by enacting the Patent Act of 1952, it would have said so. Justice Kagan similarly disagreed that the Court's post-*Westinghouse* decisions eliminated the doctrine. While subsequent decisions have quibbled with the proper scope of assignor estoppel, the doctrine itself remains intact. And Justice Kagan gave little credence to the argument that the need to "weed out bad patents" supports "overthrowing assignor estoppel." When an inventor assigns a patent, they impliedly warrant that it is valid. They cannot be allowed to have their cake and eat it too by later disavowing the patent so that they gain "the price of assigning the patent and the continued right to use the invention it covers."

Having concluded that assignor estoppel is very much alive, Justice Kagan examined its application to Hologic's patent infringement claim. In *Westinghouse*, the Court left open the question of whether an assignor, like Minerva, who assigns a patent application as opposed to the patent itself waives the right to challenge claims not included in the original application. According to the majority, it does not. The fairness principles that underly equitable estoppel do not apply if Hologic's new claim is materially broader than the ones Truckai assigned because Truckai could not have warranted the validity of such a claim in the assignment. The Court thus remanded the action to the Federal Circuit to examine the breadth of Hologic's new claim and determine whether it was materially broader than what Truckai assigned.

Justice Barrett, joined by Justice Thomas and Justice Gorsuch, penned the principal dissent. In their view, the Patent Act of 1952 abrogated the doctrine of assignor estoppel. Justice Barrett emphasized that the Act sets forth a comprehensive scheme for the creation and protection of patent rights. In their view, the Act's omission of the doctrine of assignor estoppel was dispositive. Justice Alito, separately dissented. He thought that the question at hand ultimately could not be answered without squarely addressing whether *Westinghouse* should be overruled. But neither the majority nor the principal dissent grappled with that question at all. As a result, he would have dismissed the writ as improvidently granted.

Our last case of the day is [HollyFrontier Cheyenne Refining v. Renewable Fuels Association \(No. 20-472\)](#), which addressed a statutory-interpretation coming out of the Renewable Fuel Program (RFP): Can you receive an "extension" of an exemption from a statutory mandate if you had previously allowed your exemption to lapse, or does the term "extension" imply that your exemptions must remain continuously in force? Writing for a slightly odd majority of six Justices (all the male Justices), the Court concluded that your exemptions need not be continuous.

Under the RFP, Congress mandated that refineries blend certain volumes of renewable fuels (like ethanol) into the fuels they produce. Concerned at the costs complying with this mandate would impose on small refineries, Congress gave them a blanket exemption from compliance until 2011.

Congress also directed the EPA to extend the exemption for two years if it determined that complying would impose a disproportionate economic hardship on a given refinery. In addition, a small refinery could “at any time” petition for an “extension of the exemption” due to economic hardship. The three small refineries at issue in this case all benefited from the initial blanket exemption. But after that, their exemptions expired (at various times and in various circumstances). Nevertheless, they later applied for and EPA granted them an “extension of the exemption” due to economic hardship. A group of renewable fuel producers challenged the EPA’s grant of these extensions, and the district court vacated them, holding that the refineries were ineligible for extensions because they had allowed their exempt status to lapse in the past. The Tenth Circuit agreed.

Writing the aforementioned majority of six Justice Gorsuch reversed and upheld the EPA’s grant of the extensions. The Tenth Circuit’s decision turned on its view that the term “extension” necessarily implied a continuity requirement: If an exemption from a mandate has already expired, then it doesn’t make much sense to talk about getting an “extension” of the exemption. But the Court disagreed, pointing out that it is natural and consistent with ordinary usage to talk about extensions even after a deadline has expired. Think, for example, of a “forgetful student who asks for an ‘extension’ for a term paper after the deadline has passed.” The same applies to lawyers too: The Federal Rules of Civil Procedure permit a court to “extend the time” for various acts even “after the time has expired.” And recent COVID-19 relief packages provided for the “extension” of public benefits that had already lapsed. Finally, if ordinary usage wasn’t enough to get there, the RFP itself confirmed this reading by, among other things, allowing small refineries to apply for extensions “at any time.”

Finding these statutory-interpretation principles enough, Justice Gorsuch rejected both sides’ reliance on use legislative history and purpose. The renewable fuel producers had argued that the RFP’s scheme was intended to “funnel” refineries into compliance quickly and that this legislative goal was best accomplished by requiring continuity for an exemption under subparagraph (B). The small refineries, by contrast, argued that the Court shouldn’t read a continuity requirement into subparagraph (B) because the provision was intended to act as a “safety valve” for small refineries, which would often have trouble meeting RFP compliance standards when operating in a volatile fuel market. Justice Gorsuch saw no reason to “pick sides” in this debate, instead laying out these competing narratives as an example of how legislative history and purpose are poor guides to statutory interpretation.

Justice Barrett dissented, joined by Justices Sotomayor and Kagan. She argued that the majority’s reading of “extension” was possible but certainly wasn’t the ordinary meaning of the term. For example, she noted, it’d be odd if a guest stayed at a hotel, checked out, and then returned three years later asking to “extend” the prior stay. Rather, continuity was inherent in the term “extension.” This was true even of the majority’s example of the forgetful student: in that instance, the student was really asking the teacher to reach back and retroactively “extend” the deadline; not to create a new, separate window in which to submit the paper. Therefore, in the absence of some compelling evidence to the contrary (which she went on to examine in detail and didn’t find), she would’ve given “extension” this ordinary meaning.

That’s all for now. We’ll be back soon to give you a fuller rundown on the Court’s final decisions of the term.

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