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SCOTUS Cert Recap: SCOTUS Agrees To Hear Nine More Cases, Including On Section 230, Abetting Terrorism, Attorney-Client Privilege, And National Labor Relations Act Preemption

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On Oct. 3, the U.S. Supreme Court kicked off its new term by adding nine mores cases to its docket. These nine cases are the most the Court has granted out of its "Long Conference" – the justices' first meeting of the term, where they address cert. petitions that have accumulated over their summer recess – since 2017. Notably, the nine cases add up to one-seventh of the 63 opinions the Court issued in argued cases all of last term.

These cases raise issues from across the legal landscape, including telecommunications, privilege, labor, education, sovereign immunity, and immigration law.

Perhaps the highest-profile case concerns the scope of immunity federal law confers to internet companies that host user-generated content. That question has received increasing attention from courts and commentators in recent years, and could affect countless websites visited by billions of people.

The other issues the Court has agreed to address are significant as well, and they too merit close attention.

Terrorism Suits Against Tech Companies Tee Up Questions on Section 230 and the Anti-Terrorism Act

First up are a pair of cases – Gonzalez v. Google and Twitter v. Taamneh, decided in a single opinion by the U.S. Court of Appeals for the Ninth Circuit – arising from attempts to hold Google, Twitter, and Facebook liable for ISIS terrorist attacks. The plaintiffs, relatives of victims of the attacks, allege that ISIS used the companies' social media platforms to post videos and other content to recruit members and otherwise further the terrorist group's mission.

The two cases raise two very different questions. *Google* concerns what may turn out to be one of the most consequential questions of the term: Does Section 230(c)(1) of the Communications Decency Act, which prohibits "treat[ing]" internet companies as "publishers" of information provided by others, apply to algorithms the companies use to display user-generated content? And Twitter

concerns the federal statute on which the plaintiffs in these cases base their claims: Does the Anti-Terrorism Act, which authorizes civil suits against entities that "knowingly provid[e] substantial assistance" to foreign terrorist groups, apply to entities that provide widely available services and that work to prevent terrorists from using those services?

In its opinion, the Ninth Circuit held first in *Google* that Section 230(c)(1) bars claims against internet companies that seek to impose liability for allowing terrorist groups to place content on their platforms and for adopting algorithms that display such content. The Court reasoned that such claims seek to treat the companies as publishers and that the algorithms merely "select the particular content provided to a user based on that user's inputs."

In *Twitter*, the Ninth Circuit held the plaintiffs successfully stated an Anti-Terrorism Act aiding-and-abetting claim, on the theory that the defendant companies have been "aware of ISIS's use of their respective social media platforms for many years" and, while they prohibited and "regularly removed ISIS-affiliated accounts and content," in the Ninth Circuit's view had "refused to take meaningful steps to prevent that use." (For readers who are wondering, the Ninth Circuit reached the Anti-Terrorism Act issue notwithstanding its Section 230 conclusion due to a procedural quirk: The district court in Twitter had dismissed on Anti-Terrorism Act grounds without addressing Section 230, so the Ninth Circuit affirmed that decision even though it was practically nullified by the Ninth Circuit's interpretation of Section 230).

The Supreme Court has now agreed to review both of these conclusions, and in doing so it will no doubt be assisted by scores of amicus briefs. The Section 230 issue in particular is sure to draw significant attention from the telecommunications and media industries, from scholars, and from public interest groups. After all, the Court's decision could ultimately affect virtually every company or person who hosts or posts content on the internet.

Tax Lawyers' Opposition to Grand Jury Subpoena Spurs Court to Address Applicability of Attorney-Client Privilege to Dual-Purpose Communications

The Court will take up another broadly applicable question in In re Grand Jury, where it will decide the extent to which attorney-client privilege applies to communications made for both legal and non-legal purposes. The case involves attorney-client privilege claims raised by a law firm (whose identity remains sealed) that specializes in international tax issues. The Supreme Court has long held that this privilege protects confidential communications between attorney and client made to obtain or provide *legal* advice. And in applying this rule in the tax context, the lower courts have generally held that communications related to tax planning and potential tax litigation are treated as legal and privileged, while communications related to preparation of tax returns is treated as non-legal and non-privileged.

The question in this case concerns how courts should treat the many communications made with both legal and non-legal purposes. The law firm's cert. petition – supported by amicus briefs from the U.S. Chamber of Commerce, the California Lawyers Association, and the Washington Legal Foundation – argued that the Courts of Appeals have given widely divergent answers to this question, including that such "dual-purpose" communications 1) are privileged whenever they have a significant legal purpose, 2) are privileged only when they have a legal purpose at least as significant as any non-legal purpose, and 3) are never privileged at all.

The Supreme Court will now decide which, if any, of these answers are correct. Its decision is sure to have significant consequences in the tax context, and the decision's consequences will likely be felt

in nearly every other area of law as well.

Labor Dispute Raises Question Concerning Labor Law Preemption of State Tort Claims for 'Non-Violent' Property Damage

In Glacier Northwest v. International Brotherhood of Teamsters, the Court will consider the scope of federal preemption under the National Labor Relations Act (NLRA). More than 60 years ago, the Court held in *San Diego Building Trades Council v. Garmon* that the NLRA impliedly preempts state tort claims based on conduct that the NLRA "arguably" protects or prohibits – except that there is no preemption "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that … we could not infer that Congress had deprived the States of the power to act." In the years since Garmon, the Court has considered the scope of this "local feeling" exception several times, and has observed that it extends to suits concerning "actual or threatened violence to persons or destruction of property."

The question in Glacier Northwest is whether this exception applies to an employer's claim against a union for intentionally but non-violently destroying the employer's property. The employer here, a concrete company that uses mixing trucks to deliver and pour concrete, alleges that in the midst of a labor dispute the union deliberately called for a work stoppage after the company's trucks were fully loaded for delivery, leaving the concrete to harden in the trucks' mixing drums – thereby destroying the concrete and nearly destroying the trucks. The Washington Supreme Court held the NLRA preempts the employer's claim, concluding the union's conduct was "arguably" protected (on the ground that "economic harm due to the possibility of a product perishing does not render a strike clearly unprotected" under the NLRA) and fell outside *Garmon's* "local feeling" exception (on the ground that the exception applies only "to conduct involving some sort of violence or danger that undermines public order").

The Supreme Court has agreed to review these conclusions and its decision will provide further clarity on the sorts of claims to which Garmon preemption applies.

Court Returns to the Individuals with Disabilities Education Act to Provide Further Clarity on the Act's Administrative-Exhaustion Requirement

In Perez v. Sturgis Public Schools, the Court returns to an issue it considered five years ago in Fry v. Napoleon Community Schools: When does the administrative-exhaustion requirement of the Individuals with Disabilities Education Act (IDEA) apply to claims brought under *other* federal statutes? The IDEA requires states, in exchange for federal funding, to provide a "free appropriate public education" to children with disabilities. When a parent believes a school has failed to meet this requirement, the law's administrative-exhaustion requirement obligates the parent to proceed through an extensive administrative dispute-resolution process before filing an IDEA suit in court. Once a suit is filed, the IDEA authorizes courts to issue injunctions and awards for expenses necessary to remedy IDEA violations – though not compensatory damages. Meanwhile, the Americans with Disabilities Act (ADA) and Rehabilitation Act impose additional requirements, including that public schools make "reasonable modifications" to accommodate students with disabilities. And unlike the IDEA, both of these statutes do authorize compensatory damages.

Anticipating that many situations will raise both IDEA and ADA/Rehabilitation Act issues, the IDEA addresses how these statutes interact: Before a plaintiff files an ADA/Rehabilitation Act suit "seeking relief that is also available under" the IDEA, the plaintiff must exhaust the IDEA's administrative

procedures “to the same extent as would be required had the action been brought under” the IDEA. In *Fry*, the Court held that this administrative-exhaustion requirement does not apply “when the gravamen of the plaintiff’s suit is something other than the denial of … a ‘free appropriate public education.’”

In reaching this conclusion, the Court indicated it would “leave for another day” the further question whether exhaustion is required when the plaintiff complains of the denial of a free appropriate public education but “the specific remedy she requests – here, money damages for emotional distress – is not one that an IDEA hearing officer may award.”

With *Perez*, the Court has now agreed to confront this question. The case involves a student who brought an IDEA claim against his school using the IDEA’s administrative process; in the midst of that process, the parties settled, with the school agreeing to pay for compensatory education and the student’s attorney’s fees. The student then filed an ADA suit for compensatory damages in federal court, arguing that the IDEA’s administrative-exhaustion requirement was no barrier because (1) the settlement agreement awarded all the relief the IDEA authorizes and thus continuing with the administrative process would have been futile, and (2) compensatory damages are not “relief that is also available under” the IDEA.

The U.S. Court of Appeals for the Sixth Circuit, however, concluded that the case should be dismissed. The Supreme Court is now set to review that conclusion, and its decision will affect schools and students across the country.

Prosecution Against Turkish Bank Prompts Court to Decide Whether Federal Courts Have Criminal Jurisdiction Over Corporate Entities Owned by Foreign States

In Halkbank v. United States, the Court will consider how, if at all, the Foreign Sovereign Immunity Act (FSIA) applies to federal criminal prosecutions. The defendant in the case – a bank majority-owned by Turkey and accused by the U.S. federal government of laundering $1 billion in Iranian funds and then lying to U.S. officials about the scheme – raises two arguments for dismissing the prosecution. It contends that there is no criminal jurisdiction at all, because the FSIA’s jurisdiction-granting provision extends only to a “nonjury civil action,” and because the general criminal-jurisdiction statute – which extends to “all offenses against the laws of the United States” – does not specifically include suits against foreign states and thus under common law rules presumptively excludes them. And the bank further argues that even if there were jurisdiction, the FSIA would itself bar the prosecution: Its immunity provision provides generally that “a foreign state shall be immune from the jurisdiction” of U.S. courts, and the bank argues that the one relevant exception—which abrogates sovereign immunity for certain “commercial activity” – is inapplicable, on the ground that the alleged acts underlying the prosecution occurred outside the United States and did not cause a “direct effect” in the United States.

The U.S. Court of Appeals for the Second Circuit rejected both of these arguments. And in response to the bank’s subsequent cert. petition, the federal government insisted that there are serious doubts concerning the Court’s appellate jurisdiction over the interlocutory order denying sovereign immunity, that the case fails to implicate a circuit split, and that the bank failed to preserve its argument that common-law jurisdictional rules presumptively exclude foreign states.

Nevertheless, the Court granted the petition, which underscores the considerable financial and

foreign policy stakes of the case – stakes that make the case well worth watching.

Court Set to Determine Whether Congress Has Abrogated Sovereign Immunity of the Financial Oversight and Management Board for Puerto Rico

The Court will address another sovereign immunity issue in Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, a case concerning the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). PROMESA established the Financial Oversight and Management Board for Puerto Rico and gave the Oversight Board broad authority over Puerto Rico's laws and budgets, including the authority to file debt-restructuring cases on Puerto Rico's behalf. The Court first considered PROMESA three terms ago, rejecting an Appointments Clause challenge to the law's method of appointing Oversight Board members.

Here, the Court will decide whether PROMESA's jurisdictional provision – which provides that "any action" brought against the Oversight Board or otherwise arising out of PROMESA "shall be brought" in the district court for Puerto Rico – abrogates any sovereign immunity the Oversight Board might otherwise have.

The Oversight Board insists that there is no abrogation. It notes that PROMESA does not mention sovereign immunity and that the Supreme Court has long held that it will find abrogation only if Congress's intent to abrogate is "unmistakably clear." And it argues that PROMESA's grant of jurisdiction over actions against the Oversight Board therefore applies only where some other law has abrogated the Oversight Board's sovereign immunity. The U.S. Court of Appeals for the First Circuit disagreed: It reasoned that, in authorizing federal courts to hear actions against the Oversight Board, Congress must have contemplated that sovereign immunity would not bar such actions.

The Supreme Court's resolution of this dispute will surely be significant for Puerto Rico, and its decision could affect lower courts' willingness to find sovereign-immunity abrogation for all fifty states in many other contexts.

Ohio National Guard Convinces Court to Review Whether Federal Labor Relations Authority Can Regulate Labor-Relations Issues Involving State National Guards

In Ohio Adjutant General's Department v. Federal Labor Relations Authority (FLRA), the Court will decide whether the Civil Service Reform Act of 1978 gives the FLRA authority to regulate federal labor-relations disputes between state national guards – here, the Ohio National Guard – and unions representing the full-time "technicians" who work for them. These technicians are often described as "dual-status" because, while they hold a military grade and are supervised by state officials, federal law characterizes them as civilian federal employees for the purpose of federal benefits statutes and the Federal Tort Claims Act.

The key statutory provision here authorizes the FLRA to regulate labor-relations issues involving employees of an "Executive agency," defines as "an Executive department, a Government corporation, and an independent establishment" – with "independent establishment" in turn defined as "an establishment in the executive branch … which is not an Executive department, military department, [or] Government corporation."

The Ohio National Guard contends that a state national guard does not qualify under any of these

definitions, for it is not a corporation (and thus not a “Government corporation”) and is not part of the executive branch of the federal government (and thus not an “Executive department” or “independent establishment”).

The U.S. Court of Appeals for the Sixth Circuit held otherwise: Joining all of the several other circuits to consider the question, it concluded that “in their capacity as employers of dual-status technicians … state national guards are executive agencies.” Acknowledging this unanimity among the circuits, the Ohio National Guard asked the Supreme Court to nevertheless consider this question for itself – and to further decide, if the FLRA does apply to state militias, whether it is unconstitutional.

Notwithstanding the lack of a circuit split, the Supreme Court agreed to consider the Guard’s statutory question while declining to consider its constitutional question – all of which signal the Guard has good odds of persuading the Court to adopt its interpretation of “Executive agency.”

Court Will Decide How to Characterize and Satisfy Immigration Law’s Administrative-Exhaustion Rule

In Santos-Zacaria v. Garland, the Court will again take up the task of distinguishing between jurisdictional requirements and claim-processing rules. As the Court explained last term, the “distinction matters” because “[j]urisdictional requirements cannot be waived or forfeited, must be raised by courts sua sponte, and … do not allow for equitable exceptions.”

Here, the Court will examine a provision of immigration law that permits a federal court to “review a final order of removal only if … the alien has exhausted all administrative remedies available to the alien as of right.” The U.S. Court of Appeals for the Fifth Circuit treated this as a jurisdictional rule – it raised the issue itself and dismissed for failure to exhaust – and the Supreme Court will now decide whether the Fifth Circuit was correct to do so.

In addition to characterizing this administrative-exhaustion rule, the Court has also agreed to decide what non-citizens must do to satisfy the rule when they seek to argue that the Board of Immigration Appeals (BIA) engaged in impermissible fact-finding. The Fifth Circuit held that, in this situation, the non-citizen must file a motion to reconsider with the BIA. The petitioner, meanwhile, argues that the decision whether to grant such motions lies within the BIA’s discretion, and that BIA reconsideration is therefore not an administrative remedy “available to the alien as of right.” Immigration lawyers around the country will be looking to see who the Court decides is right.

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