

A Calm and Prolific Day at the Court, and a Better Day for Criminal Defendants Than for the Second Circuit – SCOTUS Today

Article By:

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With the Justices largely in agreement across the board, the Court issued May 11 five opinions. One of them provides a usefully definitive view of the limited nature of the so-called “dormant Commerce Clause.” Two of them are criminal law cases in which all the Justices were united in reversing the Second Circuit and taking a textually literal, constricting view favorable to defendants as to what constitutes wire fraud and related theft of honest services. Another decision favors a non-citizen fighting removal from the United States, and yet another upholds the sovereign immunity of U.S. territorial governments and their agencies.

The wire fraud case is *Ciminelli v. United States*. In a unanimous opinion written by Justice Thomas, the Court considered the case of a former New York State official who was convicted of violating the federal wire fraud statute, 18 U. S. C. §1343, in connection with an alleged bid-rigging scheme to obtain state-funded development projects associated with the “Buffalo Billion initiative.” The government relied solely on—and the trial court so instructed the jury that convicted Ciminelli—upon Second Circuit precedent that allowed the government to establish wire fraud by showing that the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions. Thus, “the District Court instructed the jury that the term ‘property’ in §1343 ‘includes intangible interests such as the right to control the use of one’s assets,’ which could be harmed by depriving [a contracting authority] of ‘potentially valuable economic information.’” Given that the conviction was based on the application of clear Second Circuit precedent, it was no surprise that the Court of Appeals affirmed. What might surprise some is that both conservative and liberal justices united in applying in a statutory case what, in other cases such as the recent reproductive rights constitutional decision in *Dobbs v Jackson Women’s Health Organization*, have been the controversial doctrines of textualism and originalism. Here, the Court rejected the Second Circuit’s long-standing right-to-control precedents and held that the right to control one’s assets is not “property” for purposes of §1343. Looking to the original meaning, the Court held that the right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. The federal wire fraud statute criminalizes the use of interstate wires for “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” 18 U. S. C. §1343. When the federal wire fraud statute was enacted, the “common understanding” of the words “to defraud” referred “to wronging one in his property rights.” *Cleveland v. United States*, 531 U. S. 12 (2000). This Court has,

therefore, consistently understood the statute's "money or property" requirement as limiting the "scheme or artifice to defraud" element, and that does not include intangible interests unconnected to traditional property rights.

Percoco v. United States is another case in which the Court reached a pro-defendant result, again reversing the Second Circuit and its understanding of the same federal wire fraud statute that was at the center of the *Ciminelli* decision previously discussed. Percoco was charged with conspiracy to commit honest-services wire fraud in relation to a labor-peace requirement that was a prerequisite for obtaining state funding for a lucrative project. Percoco had argued unsuccessfully that a private citizen cannot commit or conspire to commit honest-services wire fraud based on his own duty of honest services to the public. However, the trial court instructed the jury that Percoco could be found to have had a duty to provide honest services to the public during the time when he was not serving as a public official if the jury concluded, first, that "he dominated and controlled any governmental business" and, second, that "people working in the government actually relied on him because of a special relationship he had with the government." Based upon its own precedent, the Second Circuit affirmed. Justice Alito writing for the Court, with several affirmances and no dissents, reversed the judgment of the Second Circuit. The Supreme Court agreed that under some circumstances, a person nominally outside public employment could have a necessary fiduciary duty to the public if that person became an actual agent of the government by agreement, and thereby had a fiduciary duty to the government and derivatively to the public it serves. However, "the intangible duty of honest services" codified in 18 U.S.C. §1346 plainly does not extend a duty to the public to all private persons. Accordingly, the Supreme Court held that the Second Circuit's precedential case failed to state the correct test. That test, and the instruction the district court based its instruction on, implied that the public has a right to a private person's honest services whenever that private person's clout exceeds some ill-defined threshold, were held to be too vague. The failure of the jury instructions to define "the intangible right of honest services" with sufficient clarity that an ordinary person could understand what was prohibited and that arbitrary application might be forestalled was fatal to the conviction here. The government suggested that any error in the trial court's instructions was harmless because the evidence supported a holding that a private individual owes a duty of honest services in the discrete circumstances "when the person has been selected to work for the government" in the future and "when the person exercises the functions of a government position with the acquiescence of relevant government personnel." However, that was not what the trial court instructed or what was affirmed by the Second Circuit. Accordingly, the judgment was reversed, and the case remanded.

The Commerce Clause case is *National Pork Producers Council v. Ross* and involves a challenge to a California law known as Proposition 12, which forbids the in-state sale of whole pork meat that comes from breeding pigs or their immediate offspring that have been "confined in a cruel manner." Several agricultural trade associations sued, claiming that Proposition 12 violated the U.S. Constitution because the fact that California imports most of the pork it consumes means that most compliance costs will be borne by out-of-state firms. The district court held that this claim failed to state a valid cause of action, and the Ninth Circuit affirmed. Justice Gorsuch wrote the controlling opinion of the Supreme Court affirming the judgment of the Ninth Circuit, with a mix-and-match array of selective joinders and concurrences concerning the application of the Commerce Clause, but with no dissents. The linchpin of the decision is the fact that the petitioners did not allege that Proposition 12 purposefully discriminates against out-of-state economic interests. In other words, the law applies equally to in-state and out-of-state pork producers. The Gorsuch opinion rehearses the well-known proposition that the Constitution vests Congress with the power to "regulate Commerce . . . among the several States." Art. I, §8, cl. 3. Although Congress may seek to exercise this power to regulate the interstate trade of pork, and many pork producers have urged Congress to do so, Congress has

yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other states. Thus, the petitioners' claim rests on the "dormant Commerce Clause theory," pursuant to which the Commerce Clause not only vests Congress with the power to regulate interstate trade, but also "contain[s] a further, negative command," one effectively forbidding the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." State laws offend this dormant aspect of the Commerce Clause when they seek to "build up . . . domestic commerce" through "burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U. S. 434, 1879. At the same time, though, the Court has reiterated that, absent purposeful discrimination, "a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" the interests of its citizens. *Ibid.* The antidiscrimination principle lies at the "very core" of the Court's dormant Commerce Clause jurisprudence. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U. S. 564 (1997). In sum, the Commerce Clause prohibits the enforcement of state laws "driven by . . . 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Department of Revenue of Ky. v. Davis*, 553 U. S. 328 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U. S. 269 (1988)). The petitioners here disavow any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state pork producers. Given this concession that Proposition 12 does not implicate the antidiscrimination principle, petitioners first invoke what they call the "extraterritoriality doctrine." They contend that the Court's dormant Commerce Clause cases suggest an additional and "almost per se" rule forbidding enforcement of state laws that have the "practical effect of controlling commerce outside the State." The Supreme Court rejects the proposed "almost per se" rule and reiterates that the core of Commerce Clause protection is based upon discrimination, whether on the face of a law or in its application.

Joined by every other Justice save Justice Thomas, Justice Kagan wrote the opinion of the Court in *Financial Oversight and Management Board for Puerto Rico v. Centro De Periodismo Investigativo, Inc.*, holding that nothing in a federal law known as the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), designed to deal with a Puerto Rican fiscal crisis brought about by excessive public debt, abrogates the Petitioner Board's sovereign immunity from legal claims. The Court assumed without deciding that Puerto Rico, a U.S. Territory, enjoys sovereign immunity and the Board partakes of it. Notwithstanding some equivocal language in the statute concerning the fact that suits are to be brought in federal district court, the Supreme Court holds that nothing in PROMESA shows any unmistakably clear congressional intent to abrogate the Board's sovereign immunity.

No, *Santos-Zacaria v. Garland* hasn't anything to do with the affairs of an embattled member of Congress. Instead, it is an immigration case in which a non-citizen sought protection from removal from the United States. The petitioner, having lost her administrative case, filed a petition for review in the Fifth Circuit under 8 U. S. C. §1252, alleging that the Board of Immigration Appeals had impermissibly engaged in factfinding that only an Immigration Judge could perform. The Fifth Circuit dismissed her petition in part, finding that she had not satisfied §1252(d)(1)'s exhaustion requirement. Section 1252(d)(1) provides that "[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." The Fifth Circuit raised the exhaustion issue *sua sponte* based on its characterization of §1252(d)(1)'s exhaustion requirement as jurisdictional. And the Fifth Circuit concluded that Santos-Zacaria failed to exhaust because she failed to raise her impermissible-factfinding claim to the Board in a motion for reconsideration before filing her petition for judicial review. Justice Jackson, writing for a court unanimously joining or concurring in the judgment, held that Section 1252(d)(1)'s exhaustion requirement is not jurisdictional essentially because Congress has made no clear statement

otherwise. Thus, not requiring the non-citizen to see Board reconsideration, the Court vacates the order of the Fifth Circuit below and remands the case.

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