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Blockbusters Loom as Supreme Court Term Begins

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It is surely tempting to summarize the Supreme Court's upcoming term in the voice of Charlie Brown's teacher: "*Wah wah, wah wah wah wah* , health care, *wah wah wah wah* , health care." The court's anticipated consideration of challenges to the Affordable Care Act would be momentous in any term; it becomes especially important when it occurs in the midst of the next presidential election. It is understandable that this potential case would receive most of the popular attention devoted to the court.

But health care is not the only important issue under consideration this term. To date, the court has announced its intention to decide cases presenting vexing questions of criminal, First Amendment, intellectual property, immigration and tax law. The justices also plan to wade deeply into topics such as justiciability, pre-emption and an unexpected focus on the rules governing lawsuits against government officials and their agents.

A shockingly disproportionate share of these cases hail from the 9th U.S. Circuit Court of Appeals. That appellate court, perhaps unfairly because of its sprawling size, typically supplies the Supreme Court with a large number of cases each year. This term, however, the 9th Circuit issued 21 out of the 53 cases currently selected for review — about 40 percent of the Supreme Court's total workload. By contrast, the 3rd Circuit has contributed only four cases.

Here are some highlights of the court's upcoming term:

Criminal Law

The court is addressing most of the major constitutional issues facing criminal practitioners — *Miranda*

warnings, Due Process Clause, Double Jeopardy Clause, Confrontation Clause, and the Fourth Amendment's warrant requirement. Most notable among these cases is a challenge to the warrantless installation of a GPS tracking device on a defendant's car. That case will go a long way toward defining this court's view of reasonable expectations of privacy, and will set the table for future challenges in our tech-omnipresent world, including searches of individuals' cellphones and smartphones.

- *Perry v. New Hampshire* (N.H.) — whether due process protections apply to all identifications made under suggestive circumstances, or only to those in which the police created the suggestive circumstances.
- *United States v. Jones* (D.C. Circuit) — whether police need a warrant to install a GPS tracking device on a vehicle to monitor movements on public streets.
- *Blueford v. Arkansas* (Ark.) — whether the Double Jeopardy Clause bars retrial on a greater offense when a jury deadlocks on a lesser-included offense but announces that it voted to acquit the defendant of the greater offense.
- *Howes v. Fields* (6th Circuit) — whether prisoners are always "in custody," and therefore entitled to *Miranda* warnings, when they are questioned about conduct occurring outside of the prison.
- *Williams v. Illinois* (Ill.) — whether the Confrontation Clause invalidates a state rule of evidence permitting expert witnesses to testify about the results of DNA testing conducted by other experts, who were not subject to cross-examination.

Justiciability

The justices are set to consider several cases addressing whether particular types of cases are appropriate for resolution by Article III courts:

- *M.B.Z. v. Clinton* (D.C. Circuit) — whether the "political question" doctrine precludes a federal court from adjudicating a challenge to the State Department's refusal to adhere to a federal statute directing the department how to record the birthplace of an American citizen on a passport and Consular Report of Birth Abroad.
- *First American Financial Corp. v. Edwards* (9th Circuit) — whether the Real Estate Settlement Procedures Act of 1974 can confer standing on a private plaintiff to sue providers of real estate settlement services even where the plaintiff did not suffer any actual injury.
- *Reynolds v. United States* (3rd Circuit) — whether a person convicted of a sex offense prior to enactment of the Sex Offender Registration and Notification Act has standing to challenge a rule implemented by the attorney general requiring retroactive registration of sex offenders.
- *Mims v. Arrow Financial Services LLC* (11th Circuit) — whether Congress properly divested federal courts of jurisdiction over private actions brought pursuant to the Telephone Consumer Protection Act.

Suits Against Government Actors

The justices have agreed to review several cases analyzing issues relating to lawsuits against government officials and their agents. This substantive focus may be purely coincidental, but it might also reflect a concerted effort by a group of justices to develop this area of law (or, perhaps to correct one particular court's misunderstanding of the law).

- *Minnecci v. Pollard* (9th Circuit) — whether a private plaintiff should be allowed to bring a *Bivens* action against individual employees of companies who contract with the federal government to provide prison services.

- *Rehberg v. Paulk* (11th Circuit) — whether a government witness who committed perjury is entitled to absolute immunity from a claim for civil damages.
- *Messerschmidt v. Millender* (9th Circuit) — whether the 9th Circuit applied the proper test to determine if police officers should receive qualified immunity from a claim for civil damages alleging that a search warrant that they obtained was invalid.
- *Filarsky v. Delia* (9th Circuit) — whether a private attorney retained to assist government employees conduct an internal investigation of misconduct is entitled to qualified immunity from a claim for civil damages.

Pre-Emption

In recent years, the court has lurched between aggressive and seemingly permissive applications of the pre-emption doctrine. Doctrinal clarity is difficult to mine from these opinions, but the court will tackle the issue again in several cases, including one with broad ramifications for states attempting to reduce health-care spending:

- *Maxwell-Jolly v. Independent Living Center of Southern California* (9th Circuit) (consolidated with three other cases) — whether the Medicaid Act pre-empts a California law designed to reduce rates of reimbursement to health-care providers.
- *Kurns v. Railroad Friction Products Corp.* (3rd Circuit) — whether federal laws regulating railroad safety pre-empt lawsuits under state law seeking relief for injuries allegedly caused by railroad companies.
- *National Meat Association v. Harris* (9th Circuit) — whether the Federal Meat Inspection Act pre-empts a California criminal law regulating the treatment of livestock.

First Amendment

Cases testing the boundaries of the First Amendment's speech and religion clauses are always a staple of the court's diet. This term is no different. The two most prominent such cases involve the entertainment industry and employment law:

- *FCC v. Fox Television Stations Inc.* (2nd Circuit) — whether the FCC's standards for determining indecency for public broadcasts are unconstitutionally vague.
- *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (6th Circuit) — whether and how a "ministerial exception" should be engrafted onto federal employment-discrimination laws in order to insulate religious organizations from lawsuits by employees performing religious functions.
- *Knox v. Service Employees International Union, Local 1000* (9th Circuit) — whether a state can require its employees to pay union fees intended to finance political expenditures.
- *United States v. Alvarez* (9th Circuit) — whether the Stolen Valor Act violates the Free Speech Clause of the First Amendment by making it a crime to claim falsely that one was awarded military decorations or medals.

Human Rights

This is not an area in which the Supreme Court often has occasion to explore, but the justices granted two cases in mid-October that both address questions relating to the ability of American law to respond to human-rights violations committed outside the country.

- *Kiobel v. Royal Dutch Petroleum* (2nd Circuit) — whether corporations may be sued under the Alien Tort

Statute for tort liability resulting from human-rights violations (including torture, extrajudicial executions and genocide).

- *Mohamad v. Rajoub* (D.C. Circuit) — whether a corporation or anyone other than natural persons may be sued under the Torture Victim Protection Act of 1991 for liability allegedly resulting from torture of a U.S. citizen by officers of the Palestinian Authority and the Palestine Liberation Organization.

Other areas of the law

For many years, practitioners in these three areas of law must have felt ignored by the Supreme Court. Not this term. Indeed, IP law has enjoyed renewed attention from the justices in the past two terms, and maybe dipping their toes into the fields of tax and immigration law will spur the court to revisit those areas more frequently as well.

Intellectual Property

- *Golan v. Holder* (10th Circuit) — whether Congress can restore copyright protection to works that already passed into the public domain.
- *Mayo Collaborative Services v. Prometheus Laboratories* (Federal Circuit) — whether observed correlations between blood test results and patient health are patentable.
- *Keppos v. Hyatt* (Federal Circuit) — whether applicants may present new evidence in an appeal of the final denial of a patent application if that evidence could have been presented to the Patent and Trademark Office in the first instance.
- *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S* (Federal Circuit) — whether Congress authorized generic drug manufacturers to sue makers of a brand-name drug to force correction of information submitted to the FDA about the brand-name patent's scope, where that incorrect information would affect the FDA's decision to approve the generic version.

Tax

- *Hall v. United States* (9th Circuit) — whether capital gains created during the sale of petitioners' family farm in the course of a Chapter 12 bankruptcy may be deemed an administrative expense payable under the bankruptcy reorganization plan.
- *United States v. Home Concrete & Supply* (4th Circuit) — whether an understatement of gross income attributable to an overstatement of basis in sold property is an omission that triggers an extended six-year assessment period.

Immigration

- *Holder v. Sawyers* (9th Circuit) — whether an alien's years living as an unemancipated minor with a parent who obtained lawful immigration status may be counted in the alien's petition to cancel removal, which requires seven years of continual lawful residence in the U.S.
- *Vartelas v. Holder* (2nd Circuit) — whether a guilty plea entered prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act may be used to deny a lawful permanent resident the right to re-enter the U.S. following trips abroad.

Not Yet Selected

Despite this recitation of exciting cases that the court is set to review this term, we may all agree that the case that will prove most memorable has not yet been selected for review. When (not if) the court reviews

the constitutionality of the Affordable Care Act this term, that decision will relegate these other cases to a supporting role in the public's eye. Until that time, though, the public can join practitioners in the enjoyment of watching the justices debate these interesting and difficult questions of law. •

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