Supreme Court Business Briefing

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MOLOLAMKEN
SUPREME COURT BUSINESS BRIEFING

There was no shortage of action on the Supreme Court's business docket this Term. The Court decided major cases on interstate commerce, intellectual property, and other topics affecting business.

The Court issued a pair of decisions that granted States significant authority over out-of-state businesses. The Court held that California could prohibit in-state sales of pork products from pigs raised in inhumane conditions, even though the vast majority of pork production occurs elsewhere. The Court also rejected a due process challenge to a Pennsylvania statute that required businesses to consent to state court jurisdiction as a condition of registering to do business there.

The Court issued a pair of important trademark decisions, reining in the territorial scope of the U.S. trademark laws, and allowing the distiller of Jack Daniel's whiskey to sue the maker of a "Bad Spaniels" chew toy for infringement. In the patent arena, the Court restricted pharmaceutical companies' ability to obtain broad patents for "genus" claims that cover entire classes of antibodies. And in the copyright sphere, the Court rejected a "fair use" claim over an Andy Warhol painting of Prince used as a commemorative magazine cover.

Big Tech scored a win. The Court rejected a lawsuit accusing Twitter, Facebook, and Google of aiding and abetting terrorist attacks by not doing enough to prevent terrorist groups from using their social media platforms. Even so, the Court reserved for another day a more controversial issue—the scope of immunity that social media companies enjoy when third parties use their platforms to post harmful content.

Outside the business docket, the Court's Term will be most remembered for its decision striking down affirmative action programs at Harvard and the University of North Carolina. While that case specifically concerned higher education, cases addressing affirmative action in the business arena are surely not far behind. The decision will likely inspire future challenges to other affirmative action programs, including programs at businesses that receive federal funding or are subject to other antidiscrimination laws. The decision will also stoke new discussions over how best to promote diversity and inclusion in the workplace.

The Court welcomed a new member to the bench, Justice Ketanji Brown Jackson, who has already earned a reputation for her incisive questioning at oral argument. The Court also set a new benchmark for the deliberate pace of its decisions, handing down a full half of its rulings within the last month of the Term.

We are pleased to present the thirteenth annual MoloLamken Supreme Court Business Briefing. We have identified cases with the greatest potential impact on a wide range of businesses. For each, we have distilled the facts and holdings to a concise summary and highlighted why the decision matters to business. Our aim is to allow busy people to stay current on the Supreme Court's docket and understand the potential impact of its decisions with a minimum of time and effort. We hope you find it informative.

ABOUT MOLOLAMKEN

MoloLamken is a law firm focused exclusively on representing clients in complex disputes and investigations. Our clients are based throughout the world.

Our founding partners, Steven Molo and Jeffrey Lamken, developed national reputations based on their courtroom successes while partners at large, full-service firms, where they held leadership positions. They formed the firm with an abiding belief that complex disputes and investigations are most effectively handled by smaller teams comprised of smart, highly experienced lawyers focused on results rather than process.

We provide experienced advocacy—for plaintiffs and defendants—before juries, judges, arbitral forums, and appellate courts, including the Supreme Court of the United States. We also represent clients in criminal and regulatory investigations, and we conduct internal investigations.

Our strength lies in the intellect, creativity, and tenacity of our lawyers and our experience in applying those attributes to achieve great results for clients in serious matters.

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Abitron Austria GmbH v. Hetronic International, Inc., No. 21-1043

trademarks — territorial scope

Abitron addressed whether U.S. trademark law applies to uses of trademarks in foreign countries.

The federal Lanham Act establishes a system for protecting U.S. trademarks. It allows trademark owners to sue for infringement where an unauthorized "use in commerce" of a mark is likely to cause consumer confusion.

In this case, Hetronic International, a U.S. company that makes remote controls for construction equipment, sued a group of German and Austrian companies known as Abitron for trademark infringement. Hetronic sought damages for all of Abitron's worldwide sales, even though the vast majority of those sales were made outside the United States.

Abitron argued that the Lanham Act did not apply extraterritorially to its use of trademarks in foreign countries. The district court rejected that argument, and a jury awarded Hetronic approximately $96 million in damages, nearly all of which was for sales that Abitron made abroad. The U.S. Court of Appeals for the Tenth Circuit affirmed the Act's application to Abitron's foreign trademark uses.

The Supreme Court vacated the Tenth Circuit's decision. The Court applied its established two-step framework for evaluating the territorial scope of U.S. laws. At the first step, the Court asks whether a statute contains a clear indication that it applies outside the United States. The Court held that the Lanham Act contains no such indication and therefore applies only domestically.

At the second step, the Court examines whether a particular application of a statute would be a permissible domestic application or an impermissible extraterritorial one. The Court held that, in the trademark context, that test focuses on whether the offending conduct—the use of the trademark—occurred in the United States. The Court rejected an alternative theory, advanced by the U.S. government, that would extend the Act to foreign uses of trademarks so long as those uses create a likelihood of confusion in the United States.

Abitron makes clear that U.S. companies seeking to protect their trademarks abroad must rely on the laws of each country where their marks are used. That holding will help foreign businesses avoid being drawn into U.S. litigation over their conduct overseas. It will also reduce the potential for international friction arising from differences among trademark regimes.

On the other hand, the decision will impose additional costs on U.S. trademark owners. Businesses seeking to enforce their trademarks globally will now have to pursue infringers in multiple jurisdictions. As the Supreme Court noted, several international conventions facilitate the registration of trademarks in multiple countries. The Court's decision makes it more important for global companies to seek those international protections.

(Disclosure: MoloLamken LLP represented the petitioners in this case.)

*After **Abitron,** U.S. companies seeking to protect their trademarks abroad must rely on the laws of each country where their marks are used.*

Amgen Inc. v. Sanofi, No. 21-757

patents — enablement

Amgen addressed the standard for "enablement" of patent claims.

The Patent Act grants inventors a period of exclusive use of their inventions in return for publicly disclosing how to make and use their inventions. The Act thus requires that a patent contain a description of the claimed invention that is sufficient "to enable any person skilled in the art . . . to make and use" the invention. A patent that fails that enablement requirement is invalid.

This case concerned Amgen's patents for antibodies that lower cholesterol. Amgen's patents covered a class, or "genus," of antibodies that bind at a precise location on a protein known as PCSK9. In doing so, those antibodies block PCSK9 from impairing the body's natural mechanisms for removing cholesterol. Amgen's patents disclosed 26 examples of those antibodies by amino acid sequence and described techniques scientists could use to identify others.

Amgen sued Sanofi for infringement after Sanofi marketed a cholesterol medication that relied on an antibody within Amgen's patented genus. A jury found for Amgen, but the district court overturned the verdict. The court held that Amgen's patents were not enabled because, even following the patents' instructions, scientists would have to perform an unreasonable amount of experimentation to make all of the antibodies within the patented genus. The U.S. Court of Appeals for the Federal Circuit affirmed.

The Supreme Court affirmed. It explained that, where a patent claim covers an entire class of substances, the patent must enable a person skilled in the art to make and use the full scope of the invention as defined by the claim. The patent need not describe precisely how to make and use every member of the class. For example, it may suffice to describe a key quality or feature running through the class. But skilled artisans must be able to use the disclosure to make all members of the class without unreasonable experimentation.

The Court held that Amgen's patent claims did not meet that standard. The broader the claims, the Court explained, the more the inventor must enable. The Court held that Amgen's patent claims encompassed a broad class of antibodies, but the patent did not reasonably enable scientists to make and use all the antibodies within that class. The Court clarified that enablement does not depend on the cumulative effort to make each and every member of the class. But the Court described the techniques disclosed in Amgen's patents as trial-and-error methods of creating candidate antibodies and then screening them to see if they had the desired functionality. That was insufficient for enablement.

Amgen could call into question the validity of numerous patents that cover a range of compounds. The decision may encourage pharmaceutical companies to bring competing products to market despite existing patents. That competition, however, may come at the expense of innovation. Companies that have made substantial investments in research and development may see the decision as denying them protection for the full scope of the inventions they discovered.

Amgen may prompt inventors to reconsider relying on genus claims when patenting their inventions. In the past, pharmaceutical and biotech firms have relied on genus claims to protect inventions with thousands of minor variations. Those firms may now have to consider new strategies to protect their inventions.

(Disclosure: MoloLamken LLP represented the petitioners in this case.)

***Amgen** may prompt inventors to reconsider relying on genus claims when patenting their inventions.*

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, No. 21-869

copyright — fair use

Warhol addressed the "fair use" defense to copyright infringement.

The Copyright Act allows a copyright holder to sue for the unauthorized use of a copyrighted work and to seek damages or an injunction. But the statute contains an exception for "fair use," such as criticism, comment, news reporting, teaching, scholarship, or research. To determine whether a use is "fair," courts consider four factors: the purpose and character of the use; the nature of the work; the amount and substantiality of the portion copied; and the effect of the use upon the potential market for or value of the copyrighted work.

This case involved two pictures of the recording artist Prince. Lynn Goldsmith is a rock concert photographer whose works include photographs of Prince. Well-known artist Andy Warhol used one of Goldsmith's photographs to create iconic silkscreen paintings of Prince. After Prince died, publisher Condé Nast licensed one of Warhol's paintings from the Andy Warhol Foundation to use on the cover of a commemorative magazine. Goldsmith, who had licensed her Prince photographs to other magazines, complained that the Condé Nast cover infringed her copyright.

The Foundation sued for a declaration of fair use, and the district court ruled in its favor. The court held that the first fair use factor favored the Foundation because Warhol's painting was transformative—the painting was immediately recognizable as a Warhol and not as Goldsmith's photograph. The U.S. Court of Appeals for the Second Circuit reversed, holding that merely adding a new aesthetic or new expression does not make a use transformative for fair use purposes.

The Supreme Court affirmed. The Court held that the first factor favors fair use only when the alleged infringer's use of the work has a purpose or character different from the original. Even though Warhol's silkscreen painting had a very different aesthetic from Goldsmith's original photograph, the Foundation's use of the image—licensing it to a magazine to accompany stories about Prince—was no different from Goldsmith's use of the photograph. The Court noted that the Copyright Act expressly protects an author's right to license "derivative works," such as movies based on books. Given that provision, the mere addition of new aesthetics or new expression to an existing work will generally not be enough to qualify as fair use.

Warhol is an important but narrow decision. Artists generally remain free to use copyrighted content to create their own artistic works. If an artist tries to license the work to a commercial publication, however, courts will scrutinize whether that use of the work has a different purpose or character from the original. The Court made clear that those legal principles apply even to famous artists like Andy Warhol.

Warhol is also a useful reminder that multiple people may assert copyrights in a work. Businesses that license creative content should be careful to include indemnification provisions or other mechanisms that will help protect them if a creator of underlying source material later asserts rights in the content.

*After **Warhol,** the mere addition of new aesthetics or new expression will generally not be enough to qualify as fair use.*

Axon Enterprise, Inc. v. Federal Trade Commission, No. 21-86

administrative law — judicial review

Axon *strengthens the hand of regulated businesses facing agency enforcement proceedings.*

Axon addressed whether parties to an agency's ongoing administrative enforcement proceedings may bring an immediate constitutional challenge to the agency's structure in federal court.

The Federal Trade Commission and the Securities and Exchange Commission both have authority to bring enforcement actions in court, but they can also bring administrative proceedings internally at the agency. When the agency proceeds administratively, the action is typically heard first by an administrative law judge. The ALJ's decision is then subject to review by the Commission. A party may then seek judicial review in a federal court of appeals. Ordinarily, a party dissatisfied with the agency proceeding must wait to seek judicial intervention until the end of the case, and then seek relief through that statutory review mechanism.

In these cases, parties to ongoing FTC and SEC enforcement proceedings filed lawsuits in federal district court, alleging that the agencies were unconstitutionally structured. Both plaintiffs argued that restrictions on the ability to remove ALJs from office unlawfully insulated them from the President's constitutional authority to oversee the execution of federal law. One plaintiff also argued that the FTC violated due process by combining prosecutorial and adjudicatory functions in a single entity.

The district courts dismissed both suits. On appeal, the U.S. Courts of Appeals for the Fifth and Ninth Circuits reached conflicting decisions. The Ninth Circuit held that the district court lacked jurisdiction to hear the plaintiff's challenge and that the plaintiff was required instead to pursue its claims through the statutory review mechanism after a final agency decision. The Fifth Circuit, by contrast, held that the plaintiff could pursue her claims immediately in district court because she challenged the very structure of the agency rather than a discrete agency decision.

The Supreme Court held that the suits could proceed. The Court acknowledged that statutory review schemes often foreclose suits challenging ongoing agency proceedings. But the plaintiffs' constitutional challenges to the agencies' structure or very existence were not the sort of claims that had to be brought through the statutory review process. After-the-fact review, the Court explained, would not be sufficient to remedy the plaintiffs' ongoing harm from allegedly illegitimate agency proceedings. The constitutional claims were also unrelated to the issues before the agencies and fell outside the agencies' expertise. As a result, district courts remained open to hear those claims.

Axon provides new means for regulated businesses to fend off agency enforcement actions. The Constitution provides a variety of plausible grounds for challenging agency structures, including appointment procedures, removal restrictions, and the exercise of legislative or judicial functions. If such challenges could be raised only after the fact through statutory review processes, judicial review might come too late to provide meaningful relief. Many regulated parties may feel they have no choice but to settle the agency's claims rather than face years of burdensome and expensive proceedings.

Axon thus strengthens the hand of regulated businesses facing enforcement proceedings. By challenging the agency's structure or authority in court, a regulated entity may be able to obtain significant leverage. Enforcement targets should stay abreast of potential grounds for bringing constitutional challenges to their regulators.

Ciminelli v. United States, No. 21-1170

wire fraud — "right to control" theory

Ciminelli addressed the "right to control" theory of liability for federal wire fraud.

This case arose from then-Governor Andrew Cuomo's "Buffalo Billion" initiative for economic development in Upstate New York. Funding for the program was administered through the nonprofit Fort Schuyler Management Corporation. A contractor, Louis Ciminelli, allegedly schemed with a Fort Schuyler board member to rig the bidding process so that Ciminelli's company would win development contracts worth hundreds of millions of dollars.

Ciminelli was indicted under the federal wire fraud statute, which makes it a crime to defraud a person out of "money or property" using interstate wires such as telephone lines or the Internet. The government relied on something known as the "right to control" theory. That theory treats the right to valuable economic information needed to make discretionary economic decisions as a form of "property" for purposes of the federal fraud statutes. The government argued that, by rigging the bidding process, Ciminelli deprived Fort Schuyler of information it would have considered valuable in deciding how to use its assets and thus deprived Fort Schuyler of "property." The jury convicted, and the U.S. Court of Appeals for the Second Circuit affirmed.

The Supreme Court reversed. The Court explained that the federal fraud statutes criminalize only schemes to deprive people of traditional property interests. Information needed to make discretionary economic decisions, the Court held, is not a traditional property interest. The "right to control" theory was accordingly not a valid basis for liability under those statutes.

The "right to control" theory, the Court emphasized, would vastly expand federal criminal law. Because the theory treats the mere deprivation of information as a deprivation of property, it could make virtually any deceptive act a violation of the federal fraud statutes. The Court refused to adopt such a theory in the absence of supporting statutory language.

Ciminelli continues the Supreme Court's decades-long trend of rejecting expansive interpretations of the federal criminal fraud statutes. Federal prosecutors often use the mail and wire fraud statutes to charge businesses or their employees with crimes. *Ciminelli* delivers the Court's clearest message yet that, absent specific statutory language, those statutes reach only schemes to deprive victims of traditional property interests.

Although *Ciminelli* rejects one theory of liability, it does not render the federal fraud statutes toothless. Prosecutors may be able to reframe "right to control" cases in terms of traditional property interests. For example, although the Supreme Court did not decide the issue, the contracts that Ciminelli allegedly obtained by fraud might themselves qualify as traditional property interests. And other federal or state laws may impose criminal liability even if the federal fraud statutes do not.

(Disclosure: MoloLamken LLP represented an amicus curiae *in this case.)*

> ***Ciminelli*** *continues the Supreme Court's trend of rejecting expansive interpretations of the federal criminal fraud statutes.*

Groff v. DeJoy, No. 22-174

employment law — religious accommodations

*After **Groff**, companies will need to be thoughtful and flexible in addressing requests for religious accommodations in ways that do not undermine their business objectives.*

Groff addressed the scope of employers' obligations to provide religious accommodations to employees in the workplace.

Title VII of the Civil Rights Act of 1964 requires employers to accommodate an employee's religious practices unless doing so would impose an "undue hardship on the conduct of the employer's business." Many lower courts, relying on language from an earlier Supreme Court decision, held that an employer could deny an accommodation if the accommodation would impose "more than a *de minimis* cost" on the employer.

This case involved Gerald Groff, an Evangelical Christian employee of the U.S. Postal Service who sought an exemption from working on Sundays. After being disciplined for his unwillingness to work on those days, Groff resigned. Groff sued the Postal Service under Title VII, alleging that it could have accommodated his religious observance without undue hardship. The district court ruled in the Postal Service's favor, and the U.S. Court of Appeals for the Third Circuit affirmed. The Third Circuit concluded that accommodating Groff's Sunday observance would impose more than a *de minimis* burden on the Postal Service by burdening Groff's coworkers, disrupting the workplace and workflow, and diminishing employee morale.

The Supreme Court vacated that decision. The Court held that Title VII's undue hardship standard permits an employer to deny a religious accommodation only if the accommodation would impose a *substantial* burden. The ordinary meaning of "undue hardship," the Court reasoned, requires something more than a *de minimis* burden. The Court explained that the burden must be evaluated in relation to the overall context of the employer's business, including the employer's size and operating costs.

The Supreme Court also clarified that, while an impact on other employees may be relevant, mere coworker animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot make a burden "undue." Finally, the Court emphasized that an employer may have to consider multiple approaches. For example, even if forcing other employees to work overtime in response to a request like Groff's would impose an undue burden, other options, such as voluntary shift-swapping, might be appropriate.

Groff greatly strengthens the protections for religious freedom in the workplace. As the Court noted, the *de minimis* standard had made it harder for many members of minority faiths to enter and remain in the workforce. For example, courts had allowed one business to fire a Muslim woman for wearing traditional Muslim attire, and another to fire a Sikh restaurant manager for keeping a beard, based on the purported impact on customers' willingness to patronize the business. *Groff*'s substantial burden standard ensures more meaningful protections for religious observances that impose only speculative or easily avoided burdens on the employer.

Given the diversity of religious practices in America, employers can expect to confront a wide range of requests for accommodation. Companies will need to be thoughtful and flexible in addressing such requests in ways that do not undermine their business objectives.

Jack Daniel's Properties, Inc. v. VIP Products LLC, No. 22-148

trademarks — parody products

Jack Daniel's addressed the scope of a trademark owner's protection against products that parody the owner's goods.

The federal Lanham Act establishes a registration system for trademarks and provides a cause of action for infringement. The Act defines trademarks to include words, names, or symbols that identify and distinguish the owner's goods, as well as graphic designs and the overall appearance of a product or its packaging. Trademark infringement can occur when another person's use of a similar mark threatens to confuse consumers about the source of the goods. In addition, owners of famous trademarks can sue where use of a mark threatens to tarnish or otherwise dilute the owner's mark, even without a likelihood of confusion. Some courts, citing First Amendment concerns, have established a stricter standard for infringement claims against companies that make humorous or otherwise "expressive" uses of a trademark.

VIP Products makes chewable rubber dog toys that parody well-known products. This case involved its "Bad Spaniels" toy, designed to look like the iconic Jack Daniel's whiskey bottle. The toy includes a number of humorous riffs on Jack Daniel's labeling—for example, replacing the traditional "Old No. 7 Tennessee Sour Mash Whiskey" text with "The Old No. 2 On Your Tennessee Carpet." After the product launched, Jack Daniel's accused VIP of infringing and diluting its trademarks. VIP argued that its product was an "expressive work" protected by the First Amendment. The U.S. Court of Appeals for the Ninth Circuit agreed and ruled in favor of VIP.

The Supreme Court vacated the Ninth Circuit's decision. The Court acknowledged that some courts had established a stricter standard for infringement claims challenging another company's expressive use of a trademark. In the Court's view, however, no such standard should apply when the alleged infringer uses the trademark to designate the source of its own goods—in other words, to identify its brand. In those circumstances, the defendant's First Amendment interests must ordinarily give way to the trademark owner's interest in avoiding consumer confusion.

VIP conceded that it used the "Bad Spaniels" trademark to indicate the source of its own goods. It printed the name on its packaging and had even registered as trademarks several of its other parody names. Because VIP was using the mark to identify the source of its goods, it could not claim any special protection for expressive works. The Supreme Court thus remanded for the Ninth Circuit to apply ordinary trademark standards.

Although many consumers find parody products humorous and harmless, trademark owners often complain that such products tarnish their brands, particularly in the luxury goods industry. The Court's decision strengthens the ability of trademark holders to keep those products off the market. Nonetheless, the Court's rationale turns critically on whether a parody product uses the mark to identify the source of the goods. In *Jack Daniel's*, VIP conceded that point, but many defendants will be more circumspect in future cases. Thus, while *Jack Daniel's* makes it easier for trademark owners to claim infringement, it by no means ensures victory.

Jack Daniel's *strengthens the ability of trademark holders to keep parody products off the market.*

Mallory v. Norfolk Southern Railway Co., No. 21-1168

personal jurisdiction — business registration statutes

Mallory addressed whether a State violates due process by requiring out-of-state corporations to consent to jurisdiction as a condition of registering to do business in the State.

The Fourteenth Amendment's Due Process Clause limits the authority of state courts to exercise jurisdiction over lawsuits against out-of-state corporations. Generally, a State may exercise "specific jurisdiction" if the corporation has minimum contacts with the State and the claims in the suit relate to those contacts. Alternatively, a State may exercise "general jurisdiction" for any claims if the corporation is incorporated in the State or has its principal place of business there.

Separate from those traditional grounds for jurisdiction, Pennsylvania has a statute that requires out-of-state corporations to consent to jurisdiction, for any and all claims, as a condition of registering to do business in the State. Robert Mallory, a Virginia resident, invoked that statute to sue Norfolk Southern, a Virginia-based railroad, in Pennsylvania state court. Mallory claimed that his exposure to carcinogens while working for Norfolk Southern in Virginia and Ohio caused him to suffer from cancer. The state trial court held that Pennsylvania's registration statute violated Norfolk Southern's due process rights, and the Pennsylvania Supreme Court affirmed.

The U.S. Supreme Court reversed. Even though Norfolk Southern's operations in Pennsylvania would not support jurisdiction under the traditional tests for specific or general jurisdiction, the Court held that the railroad's registration to do business there was a valid consent to jurisdiction under the Pennsylvania statute. According to the Court, Norfolk Southern made a voluntary choice to register while aware of the consequences. That voluntary consent was enough for jurisdiction, even though the claims had no connection to the State.

Mallory grants state courts broad authority to hear lawsuits against out-of-state companies in cases that do not meet the traditional standards for specific or general jurisdiction. Those traditional standards permit jurisdiction only if the claim relates to the defendant's contacts with the State or the defendant is incorporated or has its principal place of business there. *Mallory* effectively recognizes a third basis, permitting States to insist on consent to jurisdiction for all lawsuits as a condition of registering to do business in the State.

Plaintiffs will welcome the greater flexibility to pursue claims in the forum of their choice. Out-of-state defendants, however, will not relish having to defend lawsuits that have little or no connection to the State. Companies with nationwide operations cannot easily forgo doing business in a State over conditions the State attaches to registration.

The full practical effect of the decision remains to be seen. At the moment, few States have statutes like Pennsylvania's that subject out-of-state corporations to jurisdiction, even for unrelated claims, as a condition of registering to do business. In addition, while the Court rejected a due process challenge, Justice Alito wrote separately to suggest that statutes like Pennsylvania's might be vulnerable to challenge on other grounds—namely, that they interfere with interstate commerce. *Mallory* therefore probably is not the last word on this topic.

Mallory *grants state courts broad authority to hear lawsuits against out-of-state companies.*

National Pork Producers Council v. Ross, No. 21-468

interstate commerce — animal welfare laws

National Pork Producers *makes it more difficult to challenge state laws that burden out-of-state business interests.*

National Pork Producers addressed whether a California law banning the in-state sale of pork from pigs raised in inhumane conditions violates the Constitution's dormant Commerce Clause.

In 2018, California voters approved Proposition 12, which forbids sales in California of pork from pigs raised in conditions of confinement that prevent them from lying down, standing up, or turning around freely. Two organizations of pork producers challenged the law in federal court, arguing that it violated the dormant Commerce Clause. The Constitution's Commerce Clause gives Congress authority to regulate interstate commerce. The Supreme Court has also long recognized a "dormant" aspect to the Clause that implicitly prohibits state laws from discriminating against or otherwise excessively burdening interstate commerce.

The plaintiffs conceded that Proposition 12 did not discriminate against out-of-state pork producers. But they argued that the law violated the dormant Commerce Clause for two other reasons. First, they claimed that Proposition 12 had the practical effect of regulating commerce outside the State. Nearly all pork producers are based outside California, yet they must conform their out-of-state operations to Proposition 12's mandates if they want to sell pork into that market. Second, the plaintiffs argued that Proposition 12 imposed substantial burdens on interstate commerce that clearly outweighed its in-state benefits. The district court dismissed the claims, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court likewise affirmed. The Court rejected the challengers' argument that state laws that regulate in-state sales violate the dormant Commerce Clause merely because they have the practical effect of regulating out-of-state production.

The Court also rejected the claim that Proposition 12 imposed burdens out of proportion to its in-state benefits. On that issue, however, the Court was unable to agree on a majority rationale. Some Justices concluded that courts lack the capacity to balance Proposition 12's economic costs against the essentially moral interests in animal welfare that Proposition 12 sought to advance. Other Justices concluded that the plaintiffs had not adequately alleged that Proposition 12 imposed a substantial burden on interstate commerce, only that it prevented some out-of-state producers from implementing their preferred methods of operation.

National Pork Producers makes it more difficult to challenge state laws that impose local product standards that burden out-of-state business interests. But the Court did not go as far as it might have. Some have argued that the dormant Commerce Clause should apply only to discriminatory state laws. Yet the Court confirmed that even facially neutral laws may be invalid when they impose highly disproportionate burdens. Nonetheless, the fractured nature of the decision leaves significant doubt over how the Court will evaluate such laws.

The Court's decision may encourage businesses confronting burdensome state laws to seek redress from the political branches rather than the courts. Even if a state law does not violate the dormant Commerce Clause, Congress generally remains free to use its express Commerce Clause powers to preempt the law. The Court's narrower view of the dormant Commerce Clause may cause businesses to see federal legislation as a more promising means of counteracting state laws that burden out-of-state companies.

(Disclosure: MoloLamken LLP represented a respondent in this case.)

Slack Technologies, LLC v. Pirani, No. 22-200

securities law — direct listings

Slack addressed the tracing requirement for private suits under the Securities Act of 1933.

The Securities Act generally requires companies to register securities with the SEC before offering them to the public. To do so, a company must file a registration statement with detailed financial information. Where there are material misstatements or misleading omissions in a registration statement, Section 11 permits "any person acquiring such security" to sue for damages. Courts have traditionally required plaintiffs invoking that remedy to "trace" the shares they purchased back to the new shares offered under the registration statement.

This case arose out of Slack's use of a relatively new mechanism known as a "direct listing" to go public on the New York Stock Exchange. Similar to a traditional initial public offering, a company engaging in a direct listing must file a registration statement. In a typical IPO, underwriters insist that company insiders refrain from selling their own shares for a set period, effectively ensuring that the only shares offered to the public at the time of the IPO are new shares covered by the registration statement. In a direct listing, by contrast, companies do not rely on underwriters, and insiders may sell their shares as soon as a public market exists.

When Slack went public, it issued new shares pursuant to a registration statement. But Slack's insiders also sold their own unregistered shares at the same time. Slack's share price later dropped, and an investor brought a class action, alleging that the company's registration statement contained material misrepresentations and omissions.

Slack moved to dismiss, arguing that the plaintiff could not prove that the shares he bought were registered rather than unregistered shares. The district court allowed the suit to proceed, and the U.S. Court of Appeals for the Ninth Circuit affirmed. The Ninth Circuit held that the Securities Act's tracing requirement could be met in the context of a direct listing so long as the challenged registration statement was a cause of the shares' public trading, even if the shares the plaintiff purchased were unregistered.

The Supreme Court vacated the Ninth Circuit's ruling. The Court held that plaintiffs must trace their shares back to the allegedly misleading registration statement even in the context of a direct listing. The statutory reference to "such security" requires such tracing, the Court explained, even though a direct listing may make it much harder to meet that requirement. The Court remanded the case to the Ninth Circuit to determine whether the plaintiff could meet that standard.

Slack makes it significantly harder for plaintiffs to pursue Securities Act claims in the context of a direct listing. Companies may turn increasingly to direct listings as a means to access a public market for their securities without the full range of liability associated with an IPO. Nonetheless, the securities laws still provide other potent remedies. In particular, Section 10(b) of the Securities Exchange Act of 1934 allows investors to sue without any tracing requirement—although that provision requires investors to show that the defendant acted intentionally or recklessly when it made the false statement.

***Slack** makes it significantly harder for plaintiffs to pursue Securities Act claims in the context of a direct listing.*

Twitter, Inc. v. Taamneh, No. 21-1496

social media platforms — aiding and abetting

Twitter *limits aiding and abetting liability for businesses whose products are used by terrorists or other wrongdoers.*

Twitter addressed the scope of social media platforms' liability for aiding and abetting under the federal Antiterrorism Act.

The Antiterrorism Act allows U.S. nationals injured by acts of international terrorism to sue the perpetrators for damages. Where an attack is committed by a designated foreign terrorist organization, the statute also allows plaintiffs to sue anyone who "aids and abets" the attack "by knowingly providing substantial assistance."

This case arose out of an ISIS terrorist attack at a nightclub in Istanbul, Turkey. Relatives of a victim who died in the attack sued three of the largest social media platforms—Facebook, Twitter, and Google (which owns YouTube)—under the Antiterrorism Act's aiding and abetting provision. The plaintiffs alleged that the companies knowingly allowed ISIS to use their platforms for recruiting, fundraising, and spreading propaganda, and that the companies failed to take sufficient measures to restrict ISIS-related content. The plaintiffs also alleged that Google shared revenue with ISIS under YouTube's ad-revenue sharing program. The plaintiffs did not allege that ISIS used the defendants' platforms specifically to plan the Istanbul attack.

The district court dismissed the complaint. The U.S. Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit concluded that the defendants' assistance to ISIS's activities, along with their general awareness of their role in ISIS's enterprise, was sufficient to state a claim for aiding and abetting.

The Supreme Court reversed. The Court explained that, under common-law tort principles, a defendant may be held liable for aiding and abetting another person's wrongdoing only if it consciously and culpably participates in or supports the wrongful act at issue. That standard, the Court held, was not met in this case. There was no allegation that ISIS used the defendants' platforms to plan the Istanbul attack or that the defendants were involved in that attack. Nor had the defendants given ISIS such systematic and pervasive assistance that they could be said to have aided and abetted *every* ISIS attack. Although the defendants were generally aware that ISIS used their platforms, there was no allegation that they treated ISIS differently from their billions of other users. And while Google allegedly shared some advertising revenue with ISIS, there was no allegation that the revenue was substantial.

Twitter limits aiding and abetting liability for businesses whose products are used by terrorists or other wrongdoers. It makes clear that such liability generally cannot be based on a company's provision of routine goods or services on the same terms offered to other customers. While *Twitter* involved the Antiterrorism Act, the common-law tort principles the Court invoked are likely to inform aiding and abetting standards under other statutes as well.

The Court's decision allowed it to sidestep an even more important issue for social media platforms. Section 230 of the Communications Decency Act provides immunity to social media platforms for publishing third-party content. The Court had agreed to address the scope of that immunity in a separate case involving similar allegations against Google, but it instead vacated and remanded that case in light of its ruling in *Twitter*. Given the ongoing debate over the reach of Section 230, the Court will surely decide that issue in another case sooner rather than later.

United States ex rel. Schutte v. SuperValu Inc., No. 21-1326

False Claims Act — scienter

Schutte addressed whether the False Claims Act's scienter element—which prohibits "knowingly" presenting false claims to the federal government—depends not only on what the defendant subjectively believed, but also on what an objectively reasonable person could have believed.

The FCA imposes liability, including treble damages and additional penalties, for "knowingly" presenting false or fraudulent claims for payment to the government. In *Schutte*, private whistleblowers brought FCA suits on behalf of the government against two companies that operate pharmacies, SuperValu and Safeway. The plaintiffs alleged that the pharmacies overcharged Medicaid and Medicare when seeking reimbursement for prescription drugs. Under governing regulations and contracts, reimbursement was limited to the pharmacies' "usual and customary" prices. In submitting claims, the pharmacies represented that their usual and customary prices were their retail prices. The plaintiffs alleged that those claims were false because the pharmacies' usual and customary prices were actually discounted prices they routinely charged to many customers, and that the pharmacies knew those were their usual and customary prices.

The district court granted summary judgment for the pharmacies, and the U.S. Court of Appeals for the Seventh Circuit affirmed. The Seventh Circuit held that a defendant cannot "knowingly" submit a false claim if the claim would be true under any objectively reasonable interpretation of the law. The court concluded that the phrase "usual and customary" could reasonably be understood to refer to the pharmacies' retail prices. It thus held that the pharmacies could not have "knowingly" submitted false claims by seeking reimbursement at those prices—even if they actually believed the law referred to their discounted prices.

The Supreme Court vacated that decision. It held that the FCA's scienter element refers to a defendant's knowledge and subjective beliefs when it submits a claim, not what an objectively reasonable person may have known or believed. A defendant that knows or believes a claim is false under the correct interpretation of the law thus is liable for knowingly presenting a false claim, even if someone could have reasonably interpreted the law differently. Likewise, the scienter requirement is satisfied if a defendant is aware of a substantial risk that a claim is false under the correct interpretation—for example, because a regulator told the defendant how it interprets the law—but the defendant submits the claim anyway. The Court remanded the case for the Seventh Circuit to apply the proper standard.

Schutte makes it more difficult for businesses to fend off FCA suits brought by the government or by private whistleblowers. A defendant cannot win dismissal or summary judgment simply by offering a reasonable interpretation of the law that is consistent with its conduct. Discovery into the defendant's actual beliefs at the time it submitted the claim will often be necessary. If there is evidence the defendant did not subjectively believe its proffered interpretation, it could face trial and potentially substantial damages.

That risk underscores the importance of consulting counsel about ambiguous legal requirements—and seeking agency or judicial clarification if necessary. A business that knows how an agency interprets the law, but disregards that interpretation, runs a significant risk of FCA liability.

> ***Schutte** makes it more difficult for businesses to fend off False Claims Act suits.*

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