SUPREME COURT YEAR IN REVIEW 2017

CASE SUMMARIES

Bankruptcy

Czyzewski v. Jevic Holding Corp., 580 U.S. __ (Mar. 22, 2017).

In this case, the Supreme Court held that bankruptcy courts cannot authorize distributions of settlement proceeds that do not follow the priority distribution scheme established in the Bankruptcy Code without the consent of the affected creditors. The Court reasoned that, although the Bankruptcy Code does not explicitly state that the priority distribution rules apply to structured dismissal settlements, the priority system is so integral to the Bankruptcy Code that it should be presumed to apply absent an affirmative expression of Congress' intent to do otherwise. Although the dismissal sections of the Bankruptcy Code grant judges some flexibility, that flexibility should be interpreted in the larger context of the statute as limited to orders that protect the reliance interests in the bankruptcy case, including those based on the priority rules. Although there have been lower court holdings that have allowed for settlement distributions that violated the priority scheme, those were interim dispositions, rather than final dispositions as in this case. Allowing a settlement distribution to deviate from the priority distribution scheme at the final distribution stage would circumvent the Bankruptcy Code's procedural safeguards and therefore is impermissible.

NOTES:

Civil Rights, Election Law, & Religion Clauses

Sessions v. Morales Santana, 582 U.S. __ (Jun. 12, 2017).

In this case, Luis Ramon Morales-Santana challenged a gender-based differential in the law governing acquisition of U.S. citizenship by a child born abroad when one parent is a U.S. citizen, and the other is not. In order for a foreign-born child to acquire U.S. citizenship, the law applicable to this case required

the U.S. citizen parent to have been physically present in the United States for ten years prior to the child's birth, at least five of which were after the age of 14 (the law now only requires physical presence for five years pre-birth). This requirement applied to married couples and unwed U.S. citizen fathers, but the law carved out an exception for unwed U.S. citizen mothers: an unwed mother transmitted U.S. citizenship to a child born abroad if she lived in the United States for just one year prior to the child's birth. When the government attempted to deport Morales-Santana for several criminal convictions, he asserted that he attained U.S. citizenship at birth based on the U.S. citizenship of his father. Because Morales-Santana's father moved from the United States to the Dominican Republic 20 days short of his 19th birthday, he failed to satisfy the requirement of five years' physical presence after age 14. Morales-Santana argued that the government's failure to recognize his paternally derived U.S. citizenship was a gender-based classification that provided differential treatment of unwed mothers and fathers and thus, violated the Constitution's equal protection guarantee. The Second Circuit agreed, and held Morales-Santana derived U.S. citizenship through his father.

Affirming in part, and reversing in part, the Supreme Court held that the gender-based distinction in the law violated the equal protection principle implicit in the Fifth Amendment, but that it could not convert the exception for unwed mothers into the general rule. Rather, the Court found the now-five-year physical presence requirement should apply to all, including children born to unwed U.S. citizen mothers, unless and until Congress modifies the law so that it neither favors nor disadvantages any person on the basis of gender.

NOTES:

Cooper v. Harris, 581 U.S. __ (May 22, 2017).

"A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason." Registered voters brought action challenging the redistricting of two North Carolina congressional districts—District 1 and District 12—as racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. Before redistricting, neither district had a majority black voting-age population (BVAP), but both consistently elected the candidates preferred by most African-American voters. The districts were redrawn after the 2010 consensus, increasing the BVAP in District 1 from 48.6% to 52.7% and in District 12 from 43.8% to 50.7%. A three-judge panel of the United States District Court for the Middle District of North Carolina ruled in favor of the voters, finding that racial considerations predominated in the drawing of both districts, that the State's actions with respect to District 1 were not justified by its claimed compliance with the Voting Rights Act of 1965 (VRA), and that the State made no attempt to justify its actions with respect to District 12.

Justice Kagan authored the opinion of the Court affirming the district court. First, the Court held that a similar state court case in which the State prevailed—though not irrelevant—did not preclude Plaintiffs' district court case because the State failed to establish that the plaintiffs in both actions were affiliated.

Nor did the state court case alter the standard of review, which is clear error. As to the merits of the case, the Court applied a two-step analysis, considering first whether Plaintiffs proved that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," and second, if so, whether the "design of the district" withstands strict scrutiny. Applying a clear error standard, the Court held: (1) the district court did not clearly err in finding that race was the predominant consideration in the redrawing of District 1, and the State's interest in VRA compliance did not justify that consideration; and (2) the district court did not clearly err in finding that race—and not political affiliation—predominated in the redrawing of District 12.

NOTES:

Gill v. Whitford (review granted for next term)

In this case, the Supreme Court will again take up the issue of partisan gerrymandering; that is, the practice of purposely drawing district lines to favor one party and put another at a disadvantage. More specifically, this case involves Wisconsin's appeal of the decision by a three-judge district court striking down, as the product of partisan gerrymandering, the redistricting map that the Republican-controlled legislature created after the 2010 census. Wisconsin complains about various aspects of the lower court's ruling. It argues, for example, that the plaintiffs cannot challenge the map in its entirety, but instead need to go district by district, and that the plan cannot be a partisan gerrymander if it is also consistent with traditional redistricting principles. Moreover, Wisconsin contends that wasteful and fruitless litigation over partisan gerrymandering has continued over the past 13 years, and it maintains that because this additional experience has failed to yield a limited and precise standard for evaluating partisan-gerrymandering claims, the Supreme Court should rule that such claims are nonjusticiable. The Supreme Court's ruling in the case will almost certainly be a major one that could affect redistricting efforts for decades to come.

NOTES:

Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. __ (Jun. 26, 2017).

Trinity Lutheran Church applied for a grant from a state program that gives funds to nonprofits to reimburse them for the installation of rubber playground surfaces made from recycled tires. Missouri's Department of Natural Resources, which administered the playground-resurfacing program, ranked Trinity Lutheran's application fifth out of 44, but it still did not give the church one of the 14 grants that

it awarded. The department explained that the Missouri state constitution bars money from the state treasury from going "directly or indirectly, in aid of any church, sect, or denomination of religion." Trinity Lutheran challenged the denial of a grant in federal district court, on the basis that the state's denial violated the First Amendment's free exercise clause, which bans the government from making laws or enacting policies "prohibiting the free exercise" of religion. The lower courts ruled for the state.

The Supreme Court reversed, holding that the state's policy violated the church's right to free exercise of its religion. The Court explained that under its precedent, the government needs a very good reason to rely on religious identity to deny a benefit that would otherwise be generally available—in this case receiving funding for the playground installation. The Court reasoned that because "this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program," the practice "must be subjected to the most rigorous scrutiny." The Court then concluded the state had not provided a compelling reason that would justify the exclusion from the program. The Court acknowledged that the stakes at issue from the state's policy were relatively low, noting that the result of the state's policy "is, in all likelihood, a few extra scraped knees" if the church could not replace its gravel playground. However, the opinion asserted that "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church is odious to our Constitution all the same, and cannot stand."

Justices Kennedy, Alito, and Kagan joined the Roberts opinion in full. Justices Gorsuch and Thomas joined almost all of the decision, but in a separate opinion in which Justice Thomas joined, Justice Gorsuch suggested that the Roberts opinion left "open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*." Justices Gorsuch and Thomas also declined to sign on to the third footnote in the opinion, which emphasized that the issue before the court in this case was "express discrimination based on religious identity with respect to playground resurfacing" and that the court was not weighing in on "religious uses of funding or other forms of discrimination." Justice Sotomayor dissented, in an opinion joined by Justice Ginsburg, noting that the opinion was "about nothing less than the relationship between religious institutions and the civil government—that is, between church and state," and that the Court's order "profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."

NOTES:

Pavan v. Smith, 582 U.S. __ (Jun. 26, 2017).

Petitioners, two married same-sex couples who had conceived children through anonymous sperm donation, sued the director of the Arkansas Department of Health, challenging a requirement under Arkansas law that a married woman's husband's name appear on her child's birth certificate as the

child's father. Based on that requirement, the Arkansas Department of Health had refused to list both same-sex spouses as parents, but instead issued certificates bearing only the birth mother's name.

The Arkansas Supreme Court initially upheld the constitutionality of the state statute, but the United States Supreme Court subsequently reversed. In a *per curiam* opinion, the Court explained that in *Obergefell v. Hodges*, it had made clear that the Constitution entitles same-sex couples to civil marriage on the same terms and conditions as opposite-sex couples. The Court reasoned that, having chosen to make its birth certificates more than mere markers of biological relationships and to use them to give married parents a certain legal recognition that is not available to unmarried parents, Arkansas was not permitted to deny same-sex married couples that recognition.

NOTES:

Masterpiece Cake Shop v. Colorado Civil Rights Comm'n (review granted for next term)

A same-sex couple from Colorado visited Masterpiece Cakeshop to order a custom wedding cake. Masterpiece's owner refused to bake the cake, telling the couple he does not create wedding cakes for same-sex weddings because of his religious beliefs. The couple filed a complaint with the Office of Administrative Courts, arguing Masterpiece discriminated against them in violation of Colorado's Anti-Discrimination Act ("CADA"), which prohibits businesses open to the public from discriminating against their customers on the basis of race, religion, gender, or sexual orientation. An Administrative Law Judge ruled in favor of the couple, and the Colorado Civil Rights Commission affirmed. The Commission issued a cease and desist order requiring Masterpiece to (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.

The Colorado Court of Appeals affirmed the Commission's decision and held that the cease and desist order does not violate Masterpiece's right to free speech or free exercise of religion. The Colorado Supreme Court denied certiorari, but the United States Supreme Court granted certiorari and will hear the case next term. The issue presented to the Court is whether applying CADA to compel Masterpiece's owner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

NOTES:

Trump v. International Refugee Assistance Project, 582 U.S. __ (Jun. 26, 2017).

In this interim order, issued *per curiam*, the Supreme Court granted *certiorari* to review preliminary injunctions issued by the U.S. District Courts of Maryland and Hawaii, and upheld by the Fourth and Ninth Circuits, enjoining the implementation of President Trump's executive order banning the entry of foreign nationals from six predominantly Muslim nations into the United States ("EO"), and granted the government's request to stay those preliminary injunctions in part. In analyzing the case, the Court balanced the equities between the interests of those impacted by the EO and the national security concerns of the government. The Court issued a compromise ruling and held that the preliminary injunctions would remain in force as to individuals with a "bona fide relationship with a person or entity in the United States" but would otherwise be stayed.

The Court determined that "[f]or individuals, a close familial relationship is required" for the injunction to apply and provided examples of this relationship in the wife and mother-in-law of two of the plaintiffs in the case who had been barred from entry. As to entities, the Court ruled that "the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading" the EO. The Court compared plaintiff University of Hawaii, which had such a bona fide relationship with students impacted by the EO, to a hypothetical "nonprofit group devoted to immigration issues," which could not establish such a relationship with a foreign national as a pretext to avoid the EO. This ruling as to individuals and entities applies equally to refugees. The Court stayed the injunctions as to persons without such a relationship as overbroad, reasoning that "[d]enying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national." Quoting *Kleindienst v. Mandel*, the Court noted that "an unadmitted and nonresident alien has no constitutional right of entry to this country."

Justice Thomas filed a separate opinion joined by Justices Alito and Gorsuch concurring in part and dissenting in part. Justice Thomas opined that he would have stayed the injunctions in full. He reasoned the compromise injunction was too broad and could "prove unworkable," burdening "executive officials with the task of deciding—on peril of contempt—whether individuals . . . have sufficient connection" to a person in the United States and risking "a flood of litigation."

Soon after the ruling, the Trump administration issued guidelines that excluded grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins from the definition of "close familial relationship" and instructed that such foreign nationals from the six affected countries were to be barred from entry. The District of Hawaii struck down this interpretation and exempted "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States" as well as refugees in the process of being resettled through a refugee resettlement agency from the EO. In *Trump v. Hawaii*, 2017 WL 3045234 (July 19, 2017), the Court denied the government's motion to seek clarification of its order in *Trump v. IRAP*, leaving the District Court's order intact as to the scope of a close familial relationship. However, it stayed the District Court's preliminary injunction as applied to refugees. The case is scheduled to be heard on the merits in October.

NOTES:

Criminal Law

Pena-Rodriguez v. Colorado, 580 U.S. __ (Mar. 6, 2017).

In a 5-3 opinion by Justice Kennedy, the Supreme Court held in *Peña-Rodriguez v. Colorado* that there is an exception to the no-impeachment rule when a juror's racial bias "was a significant motivating factor in his or her finding of guilt." The no-impeachment rule "give[s] substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations." The broader common-law version of the no-impeachment rule was adopted by Congress in Federal Rule of Evidence 606(b). Every state and the District of Columbia follows some version of the no-impeachment rule.

The jury found Defendant-Petitioner Miguel Angel Peña-Rodriguez guilty of unlawful sexual contact and harassment, but did not reach a verdict on the attempted sexual assault charge. After the jury was discharged, two jurors informed defense counsel that another juror expressed anti-Hispanic bias towards both Defendant-Petitioner and his alibi witness. The state court denied Defendant-Petitioner's motion for a new trial because Colorado Rule of Evidence 606(b), like Federal Rule of Evidence 606(b), "generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict." The Defendant-Petitioner's conviction was affirmed by the Colorado Court of Appeals and the Colorado Supreme Court. The United States Supreme Court reversed the conviction and remanded the case, reasoning that racial bias was different because "if left unaddressed, would risk systemic injury to the administration of justice." The Supreme Court held "that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."

NOTES:

Honeycutt v. United States, 581 U.S. __ (Jun. 5, 2017).

The issue in *Honeycutt* is whether "a defendant may be held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 21 U.S.C. § 853 mandates forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result" of certain drug crimes.

Terry Honeycutt managed sales and inventory for a hardware store owned by his brother, Tony Honeycutt. Defendants Terry and Tony Honeycutt were ultimately indicted for federal drug crimes, which included conspiracy to distribute a product used to manufacture methamphetamine. The "Government sought forfeiture money judgments against each brother in the amount of $269,751.98,

which represented the hardware store's profits from the sale" of the product. Tony pleaded guilty and agreed to forfeit $200,000; Terry Honeycutt proceeded to trial where the Government sought the difference of $69,751.98. "The District Court declined to enter a forfeiture judgment, reasoning that [Terry] Honeycutt was a salaried employee who had not personally received any profits from the iodine sales." The Court of Appeals for the Sixth Circuit reversed on the grounds that, as co-conspirators, the brothers are "jointly and severally liable for any proceeds of the conspiracy."

The Supreme Court disagreed and held that "[f]orfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime." Here, Terry Honeycutt had no ownership in his brother's store and did not personally benefit from selling the product used to manufacture methamphetamine. Instead, Terry Honeycutt was a salaried employee. Accordingly, Terry Honeycutt did not obtain the tainted property as a result of the crime and § 853 therefore did not require any forfeiture.

NOTES:

Death Penalty

Moore v. Texas, 581 U.S. __ (Mar. 28, 2017).

The Supreme Court vacated and remanded a decision by the Texas Court of Criminal Appeals (CCA), which declined to adopt the state habeas court's recommendation that the petitioner be found mentally disabled and exempt from execution under the Eighth Amendment's proscription of "cruel and unusual punishments." The petitioner, Bobby James Moore, was convicted of capital murder for fatally shooting a store clerk during a botched robbery at the age of 20 and sentenced to death. Moore challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. The habeas court found that Mr. Moore was intellectually disabled based upon evidence showing significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition.

The CCA refused to accept the habeas court's recommendation because, among other things, (i) the habeas court applied guidelines currently accepted by the medical community instead of outdated 1992 guidelines approved by the CCA's 2004 decision in *Ex parte Briseno*, 135 S.W.3d 1 (2004), and (ii) the habeas court failed to apply the seven evidentiary factors that the CCA invented in *Briseno* as relevant to the intellectual-disability inquiry without any citation to medical or judicial authority. The CCA emphasized evidence that Moore had demonstrated "adaptive strengths" as evidenced by Moore living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison as

demonstrating a lack of disability. The Supreme Court acknowledged that states have discretion to determine the appropriate methods for determining whether a defendant is intellectually disabled for purposes of the Eighth Amendment's proscription but affirmed that such discretion is not unfettered and must be informed by the medical community's diagnostic framework. The Supreme Court found that the CCA's reliance on outdated standards no longer accepted by the medical community, its application of judicially invented factors for determining intellectual disability, and disregard for current medical standards did not meet the requirements of the Eight Amendment.

NOTES:

Buck v. Davis, 580 U.S. __ (Feb. 22, 2017).

A Texas jury convicted petitioner Duane Buck of capital murder. Under state law, the jury could impose a death sentence only if it found that Buck was likely to commit acts of violence in the future. Buck's attorney called a psychologist to offer his opinion on that issue. The psychologist testified that Buck probably would not engage in violent conduct, but he also stated that one of the factors pertinent in assessing a person's propensity for violence was his race, and that Buck was statistically more likely to act violently because he is black. The jury sentenced Buck to death.

In 2000, in a different case involving a death row inmate at whose sentencing the same psychologist had offered similar testimony, Texas urged the Supreme Court to send the case back to the lower court for resentencing. There, Texas told the Court that "the infusion of race as a factor for the jury to weigh in making its determination violated his constitutional right to be sentenced without regard to the color of his skin." The Texas attorney general then issued a statement decrying the use of race in sentencing and identifying six other cases, including Buck's, in which this psychologist had testified. But, while Texas agreed to resentencing in the other five cases, Texas never agreed to allow Buck to be resentenced.

Buck thus returned to federal court. Buck filed a federal habeas petition in 2004, arguing that his attorney's introduction of the psychologist's testimony violated his Sixth Amendment right to the effective assistance of counsel. However, the attorney who represented Buck in his first postconviction proceeding in state court had failed to raise this claim. In 2006, a federal district court relied on that failure—properly, under then-governing law—to hold that Buck's ineffective-assistance-of-counsel claim was unreviewable.

Then, in 2014, Buck sought to reopen that 2006 judgment by filing a motion under Federal Rule of Civil Procedure 60(b)(6). He argued that intervening Supreme Court decisions had changed the law in a way that excused his failure to raise his ineffective assistance of counsel claim in state court, permitting him to litigate his claim on the merits in his federal habeas proceeding. In addition to this change in the law, Buck argued that other "extraordinary circumstances" justified reopening the 2006 judgment under Rule

60. The district court denied the motion, and the Fifth Circuit declined to issue the certificate of appealability ("COA") that Buck requested so that he could appeal the district court's decision.

As the case came to the Supreme Court, it involved only the technical question of whether the Fifth Circuit had used the right test to decide whether to issue a COA. The Court held that whether a COA should issue does not hinge on whether an inmate's arguments are correct. Instead, the question is whether judges could reasonably disagree about the merits of the inmate's claims. Buck's request for a COA, properly examined, raised two separate questions: (1) whether reasonable jurists could debate the district court's conclusion that Buck was not denied effective assistance of counsel, and (2) whether reasonable jurists could debate the district court's holding that Buck had not shown that "extraordinary circumstances" warranted reopening his case under Rule 60. Because the Fifth Circuit had "essentially decid[ed] the case on the merits" of these questions before rejecting Buck's application for a COA, and because both sides had "essentially briefed and argued the underlying merits at length," the Supreme Court opted to look at the merits of Buck's claims, rather than address only whether a COA should have issued.

First, the Court found that Buck's attorney's decision to have the psychologist testify violated Buck's right to the effective assistance of counsel. Justice Roberts, writing for the majority, stated that the psychologist's report "said, in effect, that the color of Buck's skin made him more deserving of execution," and that "[n]o competent defense attorney would introduce such evidence about his own client." The majority also found that there was a reasonable probability that this testimony made a difference in Buck's sentencing. The Court said this testimony "coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing. The effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race."

Second, the Court found that Buck had shown "extraordinary circumstances" that would justify reopening his case under Rule 60. The possibility that "Buck may have been sentenced to death because of his race," combined with the "remarkable steps" that Texas took in the five other cases in which the same psychologist had testified, entitled Buck to relief under Rule 60.

Justice Thomas, joined by Justice Alito, dissented. Justice Thomas disputed the majority's conclusion that the jury might have reached a different verdict without the psychologist's testimony before it, describing "the prosecution's evidence of both the heinousness of" Buck's crime "and his complete lack of remorse" as "overwhelming." But Justice Thomas's main complaint was the extent to which the majority's "single-minded focus on according relief" to Buck led it to "bulldoze obstacles" in order "to justify it."

NOTES:

First Amendment & Trademarks

Matal v. Tam, 582 U.S. __ (Jun. 19, 2017).

Simon Tam, lead singer of the rock group "The Slants," sought federal trademark registration of the band's name. The Patent and Trademark Office denied the application based on a provision of the Lanham Act prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead," based on its view that the band's name disparaged Asian Americans.

The Supreme Court held that the Lanham Act's disparagement clause violates the First Amendment. Justice Alito, writing for the Court, explained that the clause "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"

Justice Kennedy, writing for four justices, concurred and explained that the disparagement clause constituted impermissible viewpoint discrimination because it "reflects the Government's disapproval of a subset of messages it finds offensive."

NOTES:

Trial & Appellate Practice / Arbitration

Microsoft Corp. v. Baker, 582 U.S. __ (Jun. 12, 2017).

Consumers filed a class action against Microsoft alleging the Xbox 360 was defective. The district court granted Microsoft's motion to strike the consumers' class allegations. Instead of pursuing their individual claims to final judgment on the merits, the plaintiffs stipulated to a voluntary dismissal of their claims "with prejudice," but reserved the right to revive their claims should the Ninth Circuit reverse the district court's certification denial. Plaintiffs then appealed the decision, challenging only the interlocutory order striking their class allegations. The Ninth Circuit held it had jurisdiction to hear the appeal, and reversed the district court's decision. Microsoft filed a writ of certiorari on the issue of the Ninth Circuit's claim to jurisdiction, which was granted.

The Supreme Court held that plaintiffs in a putative class action cannot transform a tentative interlocutory order into a final judgment within the meaning of 12 U.S.C. § 1291 simply by dismissing their claims with prejudice. According to the Court, the plaintiffs' voluntary-dismissal tactic invited protracted litigation and piecemeal appeals and undercut Congress' intent in giving Courts of Appeal the

discretion under FRCP 23(f) to grant review of certification denials. The Ninth Circuit therefore lacked jurisdiction under Article III to consider plaintiffs' appeal. The Supreme Court reversed and remanded.

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Kindred Nursing Centers Limited Partnership v. Clark, 581 U.S. __ (May 15, 2017).

The Supreme Court held that the Federal Arbitration Act "preempts any state rule discriminating on its face against arbitration." Plaintiffs-Respondents Beverly Wellner and Janis Clark held power-of-attorneys for now-deceased nursing home residents, respectively, Wellner's husband and Clark's mother. Wellner and Clark each signed an arbitration agreement with the nursing home as part of the process of moving their relative into the nursing home. After Wellner's husband and Clark's mother died, their estates brought separate suit against the nursing home alleging that the nursing home's substandard care caused both deaths. The nursing home moved to dismiss both lawsuits, arguing that the arbitration agreements in each prohibited the filing of the lawsuit in court. The Kentucky state courts denied the nursing home's motions to dismiss. The Kentucky Supreme Court held that under Kentucky's constitution, a "clear-statement rule" required a power of attorney to expressly provide that the representative could enter into an arbitration agreement or other contracts that implicated "fundamental constitutional rights." The Court held that Kentucky's requirement that a representative possess specific authority to enter into an arbitration agreement violated the Federal Arbitration Act because this requirement treats arbitration agreements differently from other contracts. The Court also rejected Plaintiffs-Respondents' argument that the Federal Arbitration Act does not apply to contract formation. The Court reversed in part, vacated in part, and remanded.

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