

The Supreme Court - June 25, 2018

The Supreme Court of the United States issued two decisions today:

Ohio v. American Express Co., No 16-1454: American Express (Amex), like all credit-card companies, operates a transaction network that serves two groups: cardholders and merchants. Because of Amex's cardholder-rewards model, Amex cardholders tend to spend more money than other cardholders. Amex uses this advantage to recruit merchants and charge higher merchant fees for transactions. To accept Amex cards, however, merchants must agree to "antisteering provisions." These provisions prevent merchants from enticing Amex cardholders to their business and then "steering" those cardholders away from using their Amex card at the point of sale so that the merchants do not have to pay the higher Amex fees. Petitioners—the United States and several states—sued Amex under §1 of the Sherman Act, claiming that these antisteering provisions are anticompetitive. The District Court, analyzing the markets for cardholders and merchants separately, found the antisteering provisions to violate the Sherman Act. The Second Circuit reversed. Today, the Court affirmed the Second Circuit, holding that the markets for cardholders and merchants should be analyzed as a single "two-sided market" and that Petitioners failed to prove that the antisteering provisions are anticompetitive.

The Court's decision is available [here](#).

Abbot v. Perez, No. 17-586: Shortly before the 2012 election, "in an abundance of caution," the Supreme Court directed a three-judge District Court to adjust Texas's 2011 districting plans to the extent those plans "likely" reflected racial gerrymanders or violations of the Voting Rights Act. The District Court adjusted the plans before a trial on the merits, and the Texas Legislature largely adopted those adjustments in 2013. In 2017, after a trial on the merits, the District Court found that Texas's adoption of the District Court's adjustments did not purge the discriminatory "taint" of the 2011 plans. The District Court also found, in the alternative, that three districts violated §2 of the Voting Rights Act because they had the effect of depriving Latinos of the equal

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opportunity to elect candidates of their choice. And the District Court found independent proof of racial gerrymandering in State House District 90. Today, after concluding it had jurisdiction to hear the appeal, the Supreme Court reversed in part, affirmed in part, and remanded. While the Court upheld the District Court's finding that State House District 90 was the product of impermissible racial gerrymandering, the Court held that plaintiffs failed to prove their §2 claims and that the District Court erred in shifting the burden to Texas to prove it had purged discriminatory taint of the 2011 plans.

The Court's decision is available [here](#).

Today, the Supreme Court granted certiorari in seven cases:

Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA Inc., No. 17-1229: Whether, under the Leahy-Smith America Invents Act, an inventor's sale of an invention to a third party that is obligated to keep the invention confidential qualifies as prior art for purposes of determining the patentability of the invention.

Henry Schein, Inc. v. Archer and White Sales, Inc., No. 17-1272: Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

Nutraceutical Corp. v. Lambert, No. 17-1094: Whether the Ninth Circuit erred by holding—in conflict with decisions by the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits—that equitable exceptions apply to mandatory claim-processing rules and can excuse a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the deadline under Federal Rule of Civil Procedure 23(f).

Washington State Department of Licensing v. Cougar Den Inc., No. 16-1498: Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

Dawson v. Steager, No. 17-419: Whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. §111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of certain former state law-enforcement officers, without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service.

Republic of Sudan v. Harrison, No. 16-1094: Whether the Second Circuit erred by holding—in direct conflict with the D.C., Fifth, and Seventh Circuits and in the face of an amicus brief from the United States—that plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C §1608(a) (3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs "via" or in "care of" the foreign state's diplomatic mission in the United States, despite U.S. obligations under the Vienna Convention on Diplomatic Relations to preserve mission inviolability.

Bistek v. Berryhill, No. 17-1183: Whether a vocational expert's testimony can constitute substantial evidence of "other work," 20 C.F.R. §404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised.