Four new opinions today, including the case of the cussing cheerleader, *Mahanoy Area School District v. B.L. (No. 20-255)*, where the Court held (8-1) that, while schools may sometimes have a special interest in regulating some types of off-campus speech, those interests were insufficient to justify disciplining B.L, who
posted vulgar Snapchat messages after being cut from the varsity cheerleading squad. This morning’s other cases were not quite as salty, but no less important. In Cedar Point Nursery v. Hassid (No. 20-107), the Court held 6-3 that a California labor regulation that grants labor organizers the right to access an agricultural employer’s property to solicit support for unionization is a per se physical taking of the growers’ property under the Fifth Amendment. In Collins v. Yellen (No. 19-422), the Court held 7-2 that the structure of the Federal Housing Finance Agency (an entity created in 2008 to help supervise Fannie Mae and Freddie Mac) violates the separation of powers by limiting the President’s authority to remove the FHFA’s director (with some complicated additional questions thrown in). And in Lange v. California (No. 20-18), an essentially unanimous Court held that a police officer’s pursuit of a fleeing misdemeanor suspect does not categorically justify a warrantless entry into a home (with a split as to why that is so and when such entry might be justified). We’ll be back to summarize those cases soon, but in the meantime, let’s talk about Monday’s cases: NCAA v. Alston (No. 20-512), United States v. Arthrex, Inc. (No. 19-1434), and Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System (No. 20-222).

First up, in NCAA v. Alston (No. 20-512), the Court unanimously affirmed an injunction prohibiting the NCAA from enforcing rules that restrict education-related benefits for college athletes. The plaintiffs, a class of Division I student athletes in football and basketball, challenged a broad array of NCAA compensation limits, but the district court issued a narrow decision, only striking down the NCAA limits on education-related benefits that colleges can provide to student athletes—such as payments for tutoring and internships and scholarships for graduate school. The district court upheld NCAA limits on athletic scholarships and other payments related to athletic performance.

In affirming that decision, the Supreme Court emphasized that the key facts were not in dispute. The NCAA and its member schools have the “power to restrain student athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance.” The NCAA conceded that its rules have anticompetitive effects—otherwise student athletes would receive compensation more closely matching the athletic abilities they bring to their schools. (As Justice Gorsuch observed in his opinion for the Court: “Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.”) However, the NCAA argued that the traditional “rule of reason” standard for evaluating most antitrust claims should not apply and that its compensation rules should instead be subject to an “abbreviated deferential review” or a “quick look” under the antitrust laws. Justice Gorsuch gave short shrift to those arguments. While a quick look may be all that’s needed to evaluate the antitrust implications of “restraints at opposite ends of the competitive spectrum,” that’s not the case here. Here, with the NCAA claiming amateur sports provides pro-consumer benefits, and student-athletes challenging the NCAA’s monopsony power because they “have nowhere else to sell their labor,” a detailed rule of reason analysis is exactly what was required.

The Court rejected the NCAA’s core defense—that its compensation limits are intended to “preserve amateurism,” which in turn provides consumers with a unique product, amateur college sports. As Justice Gorsuch observed, the “NCAA’s
conception of amateurism has changed steadily over the years” and its rules have
“dramatically increased the amounts and kinds of benefits schools may provide to
student athletes.” More fundamentally, the Court recognized that the NCAA and the
college sports it oversees have grown into a “massive” commercial enterprise. The
men’s March Madness basketball tournament alone is worth $1.1 billion annually,
and the NCAA president, commissioners of the top conferences, and top football
coaches all have multi-million dollar salaries. Student athletes fund this massive
enterprise, but, based on a vague and outdated concept of amateurism, they don’t
share in the revenues they generate.

Invoking the same theme, the Court brushed aside the argument that the Court’s
decision in Board of Regents v. University of Oklahoma (1984)required a deferential
standard of review. In that case, the Court recognized the “revered tradition of
amateurism in college sports” and the need for “ample latitude” to be afforded under
the Sherman Act. But, as Justice Gorsuch made clear, “the market realities have
changed significantly since 1984.” Moreover, while the Court in Board of Regents did
not find the NCAA’s television rules to be per se unlawful as a horizontal price
restraint, it still found them unlawful. Board of Regents therefore provided little
support to the NCAA, since the Court there “invoked abbreviated antitrust review as
a path to condemnation, not salvation.”

What the NCAA is really seeking, Justice Gorsuch said, is “a sort of judicially
ordained immunity from the terms of the Sherman Act for its restraints of trade... because they happen to fall at the intersection of higher education, sports, and
money.” That is an argument the NCAA should make to Congress, not the courts.

The Court also found no flaw in the district court’s rule-of-reason analysis. It
rejected the NCAA’s claim that the lower court was impermissibly “micromanaging”
the NCAA’s business in finding that there were substantially less restrictive
alternatives to achieving the pro-competitive benefits that the NCAA’s compensation
rules arguably provided. To the contrary, the district court’s decision gave the NCAA
“substantially leeway”—for example, to determine what types of benefits provided to
student athletes are education-related. And the Court left intact the NCAA rules
limiting athletics-related compensation for student athlete, because the plaintiffs
did not appeal the district court’s upholding of those rules.

Channeling Goldilocks, Justice Gorsuch concluded by observing that “some will think
the district court did not go far enough,” while “others will think the district court
went too far.” But in his view, the Court, in his view, got it just right. The Court’s
task is not to resolve “the national debate about amateurism in college sports,” but
to review the narrow issue that was before it “through the appropriate lens of
antitrust law.”

Justice Kavanaugh’s concurring opinion, however, made it clear that the future is not
bright for other NCAA restrictions on paying student athletes. Practically inviting
the next round of antitrust challenges, he said “it is not clear how the NCAA can
legally defend its remaining compensation rules” and doubted that they “can pass
muster under ordinary rule of reason scrutiny.” He derided the NCAA’s principal
argument—that colleges can refuse to pay student athletes because the “defining
feature” of college sports is that “student athletes are not paid”—as “circular and
unpersuasive.” To Justice Kavanaugh, the defining feature of the current system is
that student athletes generate billions of dollars a year in revenues for colleges and universities “that flow to seemingly everyone except the student athletes.” While the great traditions of college sports are important, they “cannot justify the NCAA’s decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated.” Simply put, “price-fixing labor is price-fixing labor.”

While the Court awaits future cases, the rules barring student athletes from being compensated remains under attack. States have already begun passing legislation requiring colleges and universities to allow student athletes to be paid for use of their name, image and likeness in endorsements. Several of those laws take effect July 1st. It remains to be seen whether the NCAA will develop a set of rules for compensating student athletes that can pass muster under the antitrust laws before Congress and the states establish the rules themselves.

Next up, in United States v. Arthrex (No. 19-1434), we saw a familiar issue—whether an executive agency’s structure comports with the Constitution’s Appointments Clause—resolved in a familiar manner—no, it doesn’t; but we can just tweak the structure to avoid serious upheaval. Last time we told this story, it was in Seila Law LLC v. Consumer Financial Protection Bureau (2020), where a divided court held (5-4) that the CFPB’s single-Director-removable-only-for-cause structure was unconstitutional, but concluded (7-2) that the constitutional defect could be remedied by severing the single-Director provision from the rest of the statute. This time, the issue was whether the authority of Administrative Patent Judges (APJs) to issue decisions on behalf of the Executive Branch is consistent with the Appointments Clause. Once again, a (5-4) majority concluded that the level of authority exercised by APJs is inconsistent with the Appointments Clause because they are not nominated by the President and confirmed by the Senate. And once again, a different (7-2) majority concluded that the constitutional defect could be remedied by a tweaking of the statute creating the APJs to give the presidentially-appointed Director of the U.S. Patent and Trademark Office (PTO) more supervision over the APJs.

It may go without saying that the Chief Justice was the architect of this brokered solution. In an opinion for the Court—joined in full by Justices Kavanaugh and Barrett, and in part by Justices Alito and Gorsuch (while attracting a concurrence in the judgment from Justices Breyer, Kagan, and Sotomayor)—the Chief began with an overview of Congress’s efforts over the course of nearly 250 years to deliver a functioning patent system that both efficiently issues patents and provides for a reasonably simple means for challenging them. Congress’s most recent attempt was the Leahy-Smith America Invents Act of 2011, which a new means of patent adjudication called inter partes review, under which anyone (besides the patent owner) can challenge the validity of an existing patent in a streamlined manner that is generally preferable to litigation. (The nerdiest among you may recall that this system itself survived a constitutional challenge a few years ago in Oil States Energy Services v. Greene’s Energy Group (2018).) To oversee that system, Congress also established the Patent Trial Appeal Board (PTAB) as an executive adjudicatory body within the PTO. The PTAB sits in panels of at least three members, who are predominantly APJs, with the PTAB Director and Deputy Director thrown in. All of the members of the PTAB (save the Director, who is appointed by the President)
including the 200-odd APJs, are appointed by the Secretary of Commerce.

And therein lies the constitutional rub: Because the APJs exercise essentially unreviewable discretion over inter partes review, they arguably function as “principal officers” who must be appointed by the President with the advice and consent of the Senate. At least, that’s what Arthrex argued after a panel of three APJs concluded one of its patents was invalid. The Federal Circuit agreed, finding that APJs are principal officers whose appointments were unconstitutional because neither the Secretary nor the Director can review their decisions or remove them at will. Though the Federal Circuit concluded that the appointment of the APJs was unconstitutional, it declined to strike down the entire statutory scheme created by the America Invents Act. Instead, it severed the provisions that provided APJs with tenure, making them removable at will by the Secretary of Commerce.

As previewed above, the Supreme Court agreed that the APJs’ appointments were unconstitutional, but it disagreed on the remedy and therefore vacated the Federal Circuit’s judgment. As the Chief explained, the Appointments Clause provides that only the President (with advice and consent of the Senate) can appoint principal officers, while the President, the courts, or heads of departments may appoint “inferior officers.” Thus, the principal question was whether APJs are principal officers. The Chief concluded that they were, largely because their decisions are effectively unreviewable. While the Director of the PTO has some tools of administrative oversight, and can indirectly influence the course of proceedings (by, for example, designating APJs predisposed to decide cases in his preferred manner) neither he nor any other superior executive officer can directly review decisions by APJs. Nor can the Director effectively control APJs through threat of removal, since they can only be fired “for such cause as will promote the efficiency of the service.” “Given the insulation of PTAB decisions from any executive review,” the Chief concluded, “the President can neither oversee the PTAB himself nor attribute the Board’s failings to those whom he can oversee. APJs accordingly exercise power that conflicts with the design of the Appointments Clause to preserve political accountability.” The Chief acknowledged that his opinion didn’t quite “say whether APJs are principal officers who were not appointed in the manner required by the Appointments Clause, or instead inferior officers exceeding the permissible scope of their duties under that Clause.” But that distinction didn’t matter because “both formulations describe the same constitutional violation: Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us.”

The Chief then turned to the appropriate remedy, now joined only by Justices Alito Kavanaugh, and Barrett. In their view, “the structure of the PTO and the governing constitutional principles chart a clear course: Decisions by APJs must be subject to review by the Director.” After all, the Chief reasoned, “[i]n every respect save the insulation of their decisions from review within the Executive Branch, APJs appear to be inferior officers.” So why not tweak the statute to treat them as inferior officers through and through? Because Congress has vested the Director with the “powers and duties” of the PTO, the Director already has the authority to provide for a means of reviewing PTAB decisions. “The Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board.” This approach differs from that taken by the Federal Circuit, which sought to remedy
the constitutional violation by simply severing the portion of the statute that provided APJs with tenure protections. Even if that remedy would solve the constitutional problem, the Chief argued, “review by the Director better reflects the structure of supervision within the PTO and the nature of APJs’ duties.” The Court therefore remanded to the Acting Director to determine whether to rehear the inter partes petition that started this whole case, and stressed that, while the Director must have the discretion to review decisions of APJs, he need not do so in this or any other case.

Justice Gorsuch, who joined the Court’s decision with respect to the constitutional question, dissented from the remedy portion. In his view, it may be appropriate to sever a portion of a statute (as the Court did here, with respect to the provision directing that PTAB decisions may not be reviewed by the Director) when Congress has given some indication of what should happen once the severed portion is out. But here, Congress did nothing of the sort. What’s more, this case didn’t involve a single problematic subsection; rather, “it is the combination of separate statutory provisions that conspire to create a constitutional violation.” Nor is this a case where there’s only one possible way out of the problem. “Without some direction from Congress, this problem cannot be resolved as a matter of statutory interpretation.” Therefore, Gorsuch argued, the Court should have simply identified the constitutional violation and set aside the PTAB decision in this case, leaving for Congress the job of coming up with a remedy.

So without Gorsuch, how did the Chief form a majority on the remedial question? Enter the liberal bloc, with Justice Breyer writing for Kagan and Sotomayor. Though they agreed with Justice Thomas’s dissent on the merits question (while adding a few points about how the Court should take a more functional and less formalistic stance on separation-of-powers and Appointments Clause issues), they nevertheless concurred in the Court’s remedial judgment. As Justice Breyer explained, “any remedy should be tailored to the constitutional violation” identified by the majority. Because the majority concluded that the current statutory scheme is unconstitutional solely because APJs’ decisions are not reviewable by the Director alone, it was appropriate to address that specific problem, as the Chief’s opinion does. Therefore, Breyer cast his (and Kagan’s and Sotomayor’s) vote to the majority with respect to the Court’s remedial holding.

Justice Thomas dissented (joined in part by Breyer, Sotomayor, and Kagan...a grouping you don’t see every day). In his view, there was no way that the 250 APJs, “who sit at the bottom of an organizational chart, nestled under at least two levels of authority” qualify as “principal” officers under the Appointments Clause. “Neither our precedent nor the original understanding of the Appointments Clause requires Senate confirmation of officers inferior to not one, but two officers below the President.” As Justice Thomas observed, the majority couldn’t quite make up its mind about whether APJs are inferior or principal officers, and therefore took pains to ensure that they would remain inferior officers by rewriting the Director’s statutory powers. He would instead “simply leave intact the patent scheme Congress has created.”

Our final case is *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System (No. 20-222)*. It’s unfortunately a bit complicated. But the 30,000 foot
version is that defendants in securities cases can rebut the presumption in favor of class certification by showing that the public statements that are the basis for the claim are too generic to have affected a traded security’s market price. If you want more than that, though, you have to get into the weeds of some fractured opinions.

Before we do that, let’s talk about the law and the facts. Section 10(b) of the Securities and Exchange Act of 1934 and its implementing regulation, Rule 10b-5, prohibit making material misrepresentations and omissions in connection with the sale of securities. The Court long ago held this statute creates an implied right of action, allowing plaintiffs who relied on the alleged misrepresentation to sue for securities fraud and recover damages. Traditionally, the way plaintiffs proved reliance was by showing they knew of the misrepresentation and traded based on it. But in Basic, Inc. v. Levinson (1988), the Court adopted the “fraud-on-the-market” theory, which allows plaintiffs to invoke a rebuttable presumption that the alleged misrepresentation impacted the price of the stock (and hence the price at which the plaintiff bought or sold it). Thus so long as an alleged misrepresentation was publicly known, material, traded in an efficient market, and the plaintiff traded the stock between the time when the misrepresentation as made and the truth was revealed, Basic presumes reliance. This presumption is particularly helpful in private class actions because it allows plaintiffs to prove reliance through evidence common to the class (one of the requirements for class certification), a requirement that would be almost impossible to meet if each plaintiff had to prove individual knowledge and reliance.

Several pension funds sued Goldman Sachs, alleging that it inflated the price of its stock by making statements about its ability to manage potential conflicts of interest. But the statements at issue were generic ones, like “We have extensive procedures and controls that are designed to identify and address conflicts of interest.” According to the plaintiffs, these statements were false, because Goldman in fact had engaged in several conflicted transactions. When news of those transactions later became public, its stock price dropped. Plaintiffs moved to certify a class of those who had purchased stock before the truth came out, relying on Basic’s presumption to establish that class members had relied on these misstatements in trading. But Goldman fought class certification, arguing these statements were so generic that they could not possibly have affected the price of its stock and hence Basic’s presumption was inapplicable. After several trips between the district court and the Second Circuit, the Second Circuit eventually affirmed the district court’s certification of a class, finding that Goldman had failed to establish sufficiently that its alleged misstatements could not have impacted its stock’s price.

In the Supreme Court, Goldman argued that the Second Circuit had erred by concluding that the generic nature of an alleged misrepresentation is irrelevant to whether it could have had an impact on the market price (so as to take advantage of Basic’s presumption). It also argued the Second Circuit wrongly placed the burden on it to prove lack of price impact. But before the Court, the plaintiffs essentially yielded on the first question, conceding that the generic character of a statement like “we have controls for conflicts of interest” is relevant because general statements will generally have less of an effect on a security’s price than a more specific one. The plaintiffs and Goldman also agreed that courts may, at the class-
cert stage, consider the generic nature of a statement, and that they can rely on expert testimony to decide whether a statement could have had a price impact.

Justice Barrett agreed with the parties on these issues, in a part of her majority opinion joined by every other Justice. Eight members of the Court (all but Sotomayor) then concluded that it was not entirely clear the Second Circuit had adequately weighed the generic nature of Goldman's alleged misstatements or addressed all the record evidence submitted by the parties as to price impact. So the Court remanded to the Second Circuit to take a closer look.

Justice Barrett then turned Goldman's second argument: whether the Second Circuit rightly placed the burden on it to show the lack of price impact (as opposed to requiring plaintiffs to prove such an impact in the first instance). In a part of her opinion joined by six members of the Court (all but Thomas, Alito, and Gorsuch), she concluded that it had. Indeed, in her view, the Court had already decided this question in Basic, holding that it is the defendant's obligation to rebut the presumption that public statements have an impact on a stock's price. To be sure, she emphasized that placing the burden of persuasion on the defendant is “unlikely to make much difference on the ground,” because in cases like this one, the parties typically submit dueling expert evidence on price impact. Ultimately, district courts must assess all this evidence and see who has the better proof; the burden only matters in the rare case of a perfect tie. Thus on remand, the Second Circuit should continue to place the burden on Goldman to show the absence of a price impact.

Justice Sotomayor briefly concurred in part and dissented. She agreed with everyone else that defendants may rebut Basic’s presumption that investors relied on public misstatements in trading a security by showing that the alleged misstatement was too generic to have affected the stock’s price. But reviewing the Second Circuit’s decision, she thought the court had adequately considered just that issue; it simply found that Goldman had failed to carry its burden of showing that was the case for these specific misstatements. She thus would affirmed the Second Circuit’s opinion.

Justice Gorsuch, joined by Justices Thomas and Alito, also concurred and dissented in part. As noted, he agreed that the Basic’s presumption can be rebutted by showing that a statement was too generic to have a price impact. But in his view, Basic and other cases only imposed on defendant the burden of production, that is, the obligation to come forward with evidence that, if taken as true, would permit the conclusion that the Basic presumption does not apply. But once the defendant does so, the burden of persuasion remains where it always was: with the plaintiff, who after all is the party moving for class certification.

That’s quite enough for one Update. But we’ll be back tomorrow with news of the Court’s latest decisions, as well as summaries of as many of today’s decisions as we can get to...

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