The U.S. Supreme Court's 2015 Term:

Access Decisions from an Eight-Member Court

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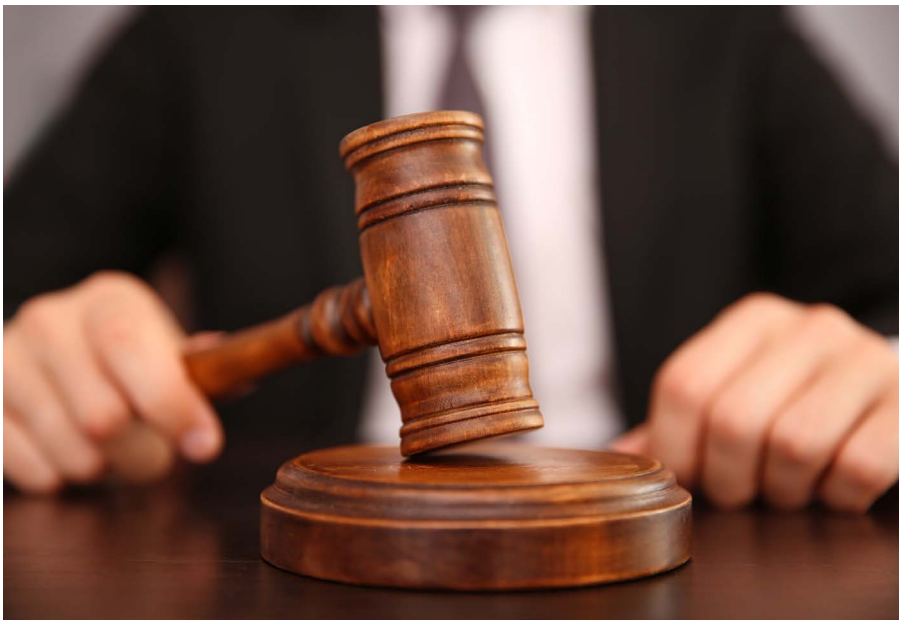

The U.S. Supreme Court's 2015 Term will be remembered principally for the unexpected death of Justice Antonin Scalia last February and how the Senate's failure to confirm a successor to that judicial icon forced the Court to work through its docket with only eight justices. Justice Scalia's nearly 30-year tenure on the Court began just five years before we started our annual review of Court cases implicating federal court "access."[1] From our perspective Justice Scalia's decisions over the years consistently tended, along with those of his conservative brethren, toward restricting rather than expanding access to the federal courts, but his plain-spoken approach, acerbic wit, and combative style made his opinions (particularly his innumerable caustic dissents) always engaging and often hilarious to read; he will be missed.

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Preemption

This year's docket did not include any blockbuster opinions interpreting the Patient Protection and Affordable Care Act.[2] But one decision applying the broad preemption clause of the Employee Retirement Income Security Act (ERISA) will disrupt the efforts of many states to collect data and information relating to their health care systems and insurance coverage. In *Gobeille v. Liberty Mutual Insurance Company* an insurance company challenged a Vermont statute requiring all health insurers to report to the state a wide array of health care data on medical claims, member eligibility, and providers, with the goal of creating an "all-payer claims database."[3] Nearly 20 states have established such databases, which are intended to be "'a resource for insurers, employers, providers, purchasers of health care, and State agencies.'"[4]

In *Gobeille* an insurer that operates employer health plans claimed that the Vermont reporting requirements were inconsistent with ERISA's record-keeping provisions, which apply to many employer-sponsored health insurance and benefit plans.[5] Justice Kennedy, writing for a six-member majority, began with ERISA's "terse but comprehensive" express preemption provision, which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[6] In prior decisions the Court had remarked upon the extraordinary breadth of this provision, and even Justice Scalia, the strictest of statutory constructionists, conceded that a literal reading of the clause could yield results that "'no sensible person could have intended.'"[7] Nevertheless, the majority here easily concluded that the reporting requirement could create inefficiencies

1 See Sargent Shriver National Center on Poverty Law, Federal Court Access Series (2015).

2 In *Zubik v. Burwell*, a challenge by nonprofit religious employers to the Patient Protection and Affordable Care Act's mandate to cover contraception for employees, the U.S. Supreme Court simply issued a per curiam remand to pursue a proposal to accommodate the employers' religious beliefs without depriving employees of the required coverage (136 S. Ct. 1557 (2016)).

3 *Gobeille v. Liberty Mutual Insurance Company*, 136 S. Ct. 936, 940–41 (2016).

4 *Id*. at 941 (quoting Vt. Stat. Ann. tit. 18, § 9410(h)(3)(B) (2016)).

5 *Id*. at 940.

6 *Id*. at 943 (quoting 29 U.S.C. § 1144(a) (2015)).

7 *Id*. (quoting *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring)).

or inconsistencies with ERISA's national system of "reporting, disclosure, and record keeping" and should therefore be preempted "to prevent the States from imposing novel, inconsistent, and burdensome reporting requirements on plans."[8]

In dissent Justices Ginsburg and Sotomayor emphasized the substantive benefits of the statute: "to improve the quality and utilization, and reduce the cost, of health care in Vermont."[9] Citing the numerous amici briefs filed in support of the Vermont requirement by other states and health care advocacy organizations, the dissenters described the policy interests served by the data collection system as "compelling" and disagreed with the majority's application of ERISA's "super-preemption" provision to invalidate the state statute in this case.[10]

Deference

Three years ago the Court ruled that pharmaceutical sales representatives were exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act and declined to defer to a recent U.S. Department of Labor interpretation of the issue; the interpretation was contrary to long-standing agency policy that such employees were not protected by the Act.[11] This Term, in *Encino Motorcars v. Navarro*, the Court again considered a claim for the Act's wages and overtime compensation, this time by auto dealership "service advisors."[12] These workers, who are paid commission on the automobile services they "sell" to customers, for many years were denied overtime compensation under the Act's exemption for a "'salesman ... or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.'"[13] In 2008 the Labor Department issued a proposed regulation codifying its decades-long policy of exempting service advisors from the Act's requirements.[14] However, in 2011, and after a change in presidential administrations, the Labor Department changed course; it issued a final rule that took the opposite position from the proposed regulation and eliminated the exemption for service advisors.[15]

After a group of service advisors sued their employer for overtime compensation under the Fair Labor Standards Act, the Ninth Circuit, deferring to the Labor Department's 2011 regulation, agreed that service advisors were not exempt from the statute's wage-and-hour requirements.[16] The Supreme Court granted certiorari to resolve a circuit split.[17]

Justice Kennedy, writing for a six-member majority, opened with a recitation of the familiar analysis, established in *Chevron U.S.A. Incorporated v. Natural Resources Defense Council Incorporated*, by which the federal courts determine whether to defer to an agency's interpretation of a disputed statutory provision.[18] After discussing the means—primarily notice-and-comment rulemaking—by which agencies exercise their "authority to resolve ambiguities in the statutory scheme" established by Congress, the majority observed that "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."[19] An agency must "'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[20]

Here the agency had issued a final rule that was contrary not only to its proposed rule but also to decades of agency policy holding service advisors exempt from the Fair Labor Standards Act's overtime requirements. While "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change," in doing so the agency must at least (1)"display awareness that it is changing position"; (2) "show that there are good reasons for the new policy"; and (3) take into account, where relevant, any "serious reliance interests" that might be affected by an abrupt change in long-standing policy.[21] Accordingly, wrote Justice Kennedy, "an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice,'" and such a rule "is itself unlawful and receives no *Chevron* deference."[22]

Applying this analysis, the Court unanimously agreed that the agency "offered barely any explanation" for overruling more than 30 years of consistent policy that had exempted service advisors from the Fair Labor Standards Act requirements.[23] Because "the Department said almost nothing" to justify the change in policy, the Court refused to "speculate on reasons that might have supported" its decision or to "'supply a

8 *Id*. at 945.

9 *Id*. at 953 (Ginsburg, J., dissenting).

10 *Id*. at 951, 958.

11 *Christopher v. SmithKline Beecham Corporation*, 132 S. Ct. 2156 (2012).

12 *Encino Motorcars Limited Liability Corporation v. Navarro*, 136 S. Ct. 2117 (2016).

13 *Id*. at 2123 (quoting 29 U.S.C. § 213(b)(10)(A)).

14 *Id*. at 2123–24.

15 *Id*. at 2123 (citing 29 C.F.R. § 779.372(c)(1) (2016)).

16 *Id*. at 2124 (citing *Navarro v. Encino Motorcars Limited Liability Corporation*, 780 F.3d 1267 (9th Cir. 2015)).

17 *Id*.

18 *Id*. at 2121–25 (citing *Chevron U.S.A. Incorporated v. Natural Resources Defense Council Incorporated*, 467 U.S. 387, 842–44 (1984)).

19 *Id*. at 2125.

20 *Id*. (quoting *Motor Vehicle Manufacturers Association of United States v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983)).

21 *Id*. at 2125–26 (citations omitted).

22 *Id*. at 2126 (quoting *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)).

23 *Id*.

reasoned basis for the agency's action that the agency itself has not given.'"[24]

Perhaps the most interesting aspect of this decision occurred in the Court's disposition of the case.[25] Rather than completing the task of statutory construction, the majority stated that "[b]ecause the decision below relied on *Chevron* deference to this regulation, it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance."[26]

Justice Thomas, joined by Justice Alito, dissented from the majority's "decision to punt" on the merits of the case.[27] The dissenters pointed to the almost identical situation posed just a few years earlier in *Christopher* where, as here, the Court had agreed that the agency's abrupt change in position was entitled to no deference, but the majority, in an opinion authored by Justice Alito, had then proceeded to interpret the statute to deny the employees' wage-and-hour claims.[28] Here the dissenters would have reached the same conclusion with respect to the service advisors' claims.[29] The only apparent explanation for the different results in these two nearly identical cases is Justice Scalia's absence—which apparently changed the Court's internal alignment on the disposition issue—from the decision in *Encino Motorcars*.

A discussion of administrative deference also arose in the context of a disputed regulation issued by the U.S. Patent and Trademark Office.[30] Congress in 2011 enacted the Leahy-Smith America Invents Act, which modified certain provisions in prior patent statutes governing "*inter partes* review," whereby a third party may ask the Patent Office "to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable in light of prior art."[31] In this case a third party challenged a number of claims made in a 2004 patent held by Cuozzo Speed Technologies on an automobile speedometer device. The Patent Office instituted *inter partes* review and ultimately canceled a number of the claims made in the patent, in part by applying a new interpretive standard set forth in a Patent Office regulation.[32] The losing patent holder challenged the Patent Office's authority to promulgate the regulation at issue and, after the Federal Circuit denied a petition for rehearing en banc, pursued that challenge to the Supreme Court.[33]

In Justice Breyer's opinion, which was unanimous on this issue, the Court concluded that because the statute itself expressly permits the Patent Office to issue rules "governing *inter partes* review," the agency clearly was authorized to promulgate a regulation establishing a substantive standard applicable to such reviews.[34] Invoking *Chevron*, the Court concluded that the standard set forth in the regulation represented a "reasonable exercise" of the agency's rulemaking power and was therefore entitled to deference.[35]

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In a concurring opinion, Justice Thomas agreed with the majority's analysis in light of the express authorization in the statute, but he expressed his concern that the Court's *Chevron* "fiction"—i.e., that "ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law"—raised, in his view, "serious separation-of-powers questions" that the Court should consider "[i]n an appropriate case."[36]

Appealability of Administrative Actions

One important component of federal court access is the appealability—or nonappealability—of administrative decisions by federal agencies; these decisions annually affect the lives of millions. This issue was raised in the case of *Cuozzo Speed Technologies v. Lee*, discussed above in the context of administrative deference.[37] The *Cuozzo* decision also provoked a discussion of the Court's judicial review jurisprudence.[38] In addition to challenging the Patent Office regulation establishing the standard of review governing *inter partes* proceedings, the patent holder had argued that the agency had wrongly undertaken *inter partes* review of some of the claims at issue because those claims were not properly raised in the initial request for review. A divided Federal Circuit panel had declined to review that argument and relied on the statute's provision that the "'determination

24 *Id*. at 2127 (quoting *State Farm*, 463 U.S. at 43).

25 *Id*.

26 *Id*. (citing *United States v. Mead Corporation*, 533 U.S. 218, 238–39 (2001)).

27 *Id*. at 2129 (Thomas, J., dissenting).

28 See *Christopher*, 132 S. Ct. at 2173–74.

29 *Encino Motorcars*, 136 S. Ct. at 2129–30 (Thomas, J., dissenting).

30 See *Cuozzo Speed Technologies Limited Liability Company v. Lee*, 136 S. Ct. 2131 (2016).

31 *Id*. at 2136.

32 *Id*.

33 *Id*. at 2139 (citing *In re Cuozzo Speed Technologies Limited Liability Company*, 793 F.3d 1297 (Fed. Cir. 2015)).

34 *Id*. at 2142.

35 *Id*. at 2145.

36 *Id*. at 2148 (Thomas, J., concurring) (quoting *Michigan v. Environmental Protection Agency*, Nos. 14-46, 14-47, 14-49 (U.S. June 29, 2015) (Thomas, J., concurring)).

37 See *Cuozzo*, 136 S. Ct. at 2131 (majority opinion).

38 *Id*. at 2139.

by the [Patent Office] whether to institute an *inter partes* review under this section shall be *final and nonappealable*.'"[39]

Justice Breyer, writing on this issue for a six-member majority, acknowledged that the Court applies a "'strong presumption' in favor of judicial review" when it interprets statutes purporting to limit or preclude such review.[40] However, the presumption can be overcome by "'clear and convincing' indications" that Congress intended to preclude review, including express statutory language, specific legislative history, and "'inferences of intent drawn from the statutory scheme as a whole.'"[41] Here the majority found the statutory bar sufficient to preclude review, at least with respect to administrative decisions concerning the factual sufficiency of allegations set forth in a petition for *inter partes* review.[42] Justice Breyer cautioned that the majority's conclusion did not "categorically preclude review" of a final agency decision regarding the *inter partes* process if, for example, the appeal included constitutional issues or claims that the agency had acted in excess of its statutory jurisdiction.[43]

Attorney Fees

This Term the Court issued three decisions implicating statutory attorney fees. In *Kirtsaeng v. John Wiley and Sons Incorporated* a defendant who was sued for copyright infringement by a textbook publisher prevailed on the merits after protracted litigation culminating in an initial Court decision that upheld the legal argument underpinning the defendant's defense.[44] The defendant then sought more than $2 million in attorney fees from the plaintiff, pursuant to the Copyright Act provision under which a district court "'may ... award a reasonable attorney's fee to the prevailing party.'"[45]

The district court and the court of appeals both denied the fee request; they relied upon Second Circuit precedent that "gave 'substantial weight' to the 'objective reasonableness'" of the losing party's position when considering a fee claim under the statute.[46] Here the plaintiff's legal position, while ultimately unsuccessful, indisputably had been "reasonable" since several appellate courts and three dissenting Supreme Court justices had agreed with it.[47]

The Court granted the defendant's petition for certiorari to give the lower courts "additional guidance" on the application of the fee-shifting provision.[48] The plaintiff contended that the underlying purposes of the Copyright Act were best served by the Second Circuit's practice of according "substantial weight" to the "objective reasonableness" of the losing party's position, a test which, it argued, would encourage "parties with strong legal positions to stand on their rights and deter[] those with weak ones from proceeding with litigation."[49] By contrast, the defendant's proposal would reward successful litigants, regardless of the reasonableness of their opponents' position, if their litigation "resolved an important and close legal issue and thus meaningfully clarified copyright law."[50] The Court ultimately decided that "placing substantial weight on objective reasonableness" more clearly advances the broad objective of the Copyright Act.[51] But it cautioned that the reasonableness factor is not "dispositive" and the district court may take into account "a range of considerations" (e.g., litigation misconduct) in determining fee claims under the statute.[52]

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In *CRST Van Expedited Incorporated v. Equal Employment Opportunity Commission* the Court again offered clarification for deciding claims under a fee-shifting statute, in this case Title VII of the Civil Rights Act of 1964.[53] The case began after the Equal Employment Opportunity Commission (EEOC) sued CRST, an interstate trucking firm, for "hostile ... work environment" sexual discrimination against a class of female drivers.[54] The litigation did not go well for the EEOC. While it originally sought relief on behalf of over 250 female employees, during the course of the lengthy proceedings before both the district court (which eventually took a very dim view of the EEOC's conduct) and the court of appeals, virtually all of the employees were dismissed on a variety of legal grounds (including discovery sanctions against the

39 *Id*. (quoting 35 U.S.C. § 314(d) (2015)).

40 *Id*. at 2140 (citing *Mach Mining Limited Liability Company v. Equal Employment Opportunity Commission*, 135 S. Ct. 1645, 1650–51 (2015)).

41 *Id*. at 2140 (citing *Block v. Community Nutrition Institute*, 467 U.S. 340, 349–50 (1984)).

42 *Id*. at 2141–42.

43 *Id*. at 2142. These potential exceptions gave insufficient assurance for Justice Alito, who, along with Justice Sotomayor, filed a dissent that, relying primarily on the Court's long-standing "strong presumption favoring judicial review," would have permitted the patent holder's appeal in this case (*id*. at 2148–49 (Alito, J., dissenting)).

44 *Kirtsaeng v. John Wiley and Sons Incorporated*, 136 S. Ct. 1979, 1984 (2016) (citing *Kirtsaeng v. John Wiley and Sons Incorporated*, 133 S. Ct. 1351 (2013)).

45 *Id*. at 1983 (quoting 17 U.S.C. § 505 (2015)).

46 *Id*. at 1984 (quoting *Matthew Bender and Company v. West Publishing Company*, 240 F.3d 116, 122 (2d Cir. 2001)).

47 *Id*.

48 *Id*. at 1985.

49 *Id*. at 1986.

50 *Id*. at 1985 (internal quotation omitted).

51 *Id*. at 1988.

52 *Id*. at 1988–89.

53 *CRST Van Expedited Incorporated v. Equal Employment Opportunity Commission*, 136 S. Ct. 1642, 1646 (2016) (citing 42 U.S.C. § 2000e-5(k) (2015)).

54 *Id*. at 1647–48.

EEOC).[55] Following the (first) appeal in the case, a grand total of one plaintiff—the original complainant—remained before the court, and the EEOC reached a settlement on her behalf with the defendant.[56]

At the district court's invitation, the defendant filed a motion for attorney fees against the EEOC; the court granted the motion with a fee of over $4 million.[57] On the EEOC's appeal of that award the court of appeals reversed the district court; the appellate court relied on circuit precedent requiring that a "prevailing party" under Title VII's fee-shifting provision must obtain not merely a dismissal but a "'judicial determination ... on the merits'" of the discrimination claims at issue.[58] The Supreme Court granted certiorari to resolve a circuit split on the issue.[59]

Title VII says that "the court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee."[60] After determining that the party seeking fees has "prevailed" in the litigation, the district court must decide whether (and how) to exercise its "discretion" to grant fees.[61] With regard to prevailing *defendants*, for decades the Supreme Court has held, under the fee-shifting provisions of Title VII and other federal civil rights statutes, that plaintiffs would be liable for defendants' fees only if the plaintiff's claims were "'frivolous, unreasonable, or groundless.'"[62]

Here the threshold issue was whether a defendant must obtain a judicial determination on the merits of plaintiff's discrimination claim to qualify as a prevailing party. Justice Kagan, writing for another unanimous Court, had little difficulty rejecting the Eight Circuit's position, which was contrary to the holding of every other circuit that had considered the issue.[63] The Court cited numerous appellate and even Supreme Court decisions in which defendants properly had been awarded fees, due to the plaintiff's "frivolous, unreasonable, or groundless" conduct, where the disposition in the defendant's favor had not been on the merits.[64] Having rejected the Eighth Circuit's constricted interpretation of "prevailing party" for purposes of a defendant's entitlement to fees, the Court declined the EEOC's request to further refine that definition (i.e., to require a defendant to at least have obtained a "preclusive disposition") and remanded the case to the lower courts to reassess the defendant's motion in light of the Court's "guidance" on the issues.[65]

This Term's third decision implicating attorney fees was its most unusual. The Court periodically issues per curiam reversals of circuit decisions involving civil rights and attorney fee issues where the appellate court, through negligence or inadvertence, clearly has misconstrued or misapplied long-standing Supreme Court precedent on the issue.[66] This year in *James v. City of Boise* the Court reviewed a decision by the Idaho Supreme Court, which, in deciding a claim under 42 U.S.C. § 1988 for attorney fees by a prevailing defendant in a civil rights case, had concluded it was not bound by the U.S. Supreme Court's 36-year-old interpretation of Section 1988, permitting a defendant in a civil rights case to recover fees only if the plaintiff's claim was "frivolous, unreasonable, or without foundation."[67] Remarkably the Idaho court held that the U.S. Supreme Court "does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute" and proceeded to award the defendant fees without determining if the plaintiff's action was "frivolous, unreasonable, or without foundation."[68]

In a stern per curiam summary reversal, the Court admonished that the "the Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."[69] The Court quoted a 200-year-old opinion by Justice Story, who observed that if state courts were free to disregard the Supreme Court's rulings on the federal constitution, federal laws, and federal treaties, "'[t]he public mischiefs that would attend such a state of things would be truly deplorable.'"[70]

Standing

Article III of the Constitution authorizes federal courts to decide "cases" or "controversies."[71] A party can invoke federal court jurisdiction only if the party has "standing" because the party has suffered an "injury in fact" that is "fairly traceable" to the conduct being challenged and that is likely to be resolved by a favorable decision.[72] Standing was dismissed in several cases this Term.

55 *Id*. at 1648–49.

56 *Id*. at 1650.

57 *Id*. at 1650–51.

58 *Id*. at 1651 (quoting *Marquart v. Lodge 837, International Association of Machinists and Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994)).

59 *Id*.

60 42 U.S.C. § 2000e-5(k).

61 *CRST Van Expedited*, 136 S. Ct. at 1646.

62 *Id*. (quoting *Christiansburg Garment Company v. Equal Employment Opportunity Commission*, 434 U.S. 412, 422 (1978)).

63 *Id*. at 1651–52.

64 *Id*. at 1652–53.

65 *Id*. at 1654.

66 See, e.g., *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (summarily revising denial of fees to plaintiff under 42 U.S.C. § 1988 for misapplying standard for "prevailing party").

67 *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (citing *Hughes v. Rowe*, 449 U.S. 5 (1980)).

68 *Id*. at 686 (quoting *James v. City of Boise*, 351 P.3d 1171, 1192 (2015)).

69 *Id*.

70 *Id*. (quoting *Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816)).

71 U.S. Const. art. III, § 2.

72 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Spokeo Incorporated v. Robins, the most anticipated standing case, focused on the injury-in-fact requirement.[73] Thomas Robins filed a class action lawsuit against Spokeo, a consumer reporting agency, after its "people search engine" posted incorrect information about his education, family, and financial status.[74] Concerned this would affect his employment prospects, Robins sued Spokeo; Robins cited Fair Credit Reporting Act provisions requiring reporting agencies to follow "'reasonable procedures to assure the maximum possible accuracy of'" consumer reports and authorizing individuals to sue violators for actual or statutory damages.[75]

The Ninth Circuit concluded that Robins had standing.[76] The Supreme Court accepted the case to decide "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute."[77] By the time the Court decided the case, only eight justices were sitting, and the opinion was an uneventful kick back to the lower court.

Rather than squarely decide the issue before it, Justice Alito, writing for a six-member majority, focused on the requirement that, to establish injury in fact, a plaintiff must show the plaintiff to have suffered a "concrete *and* particularized" injury.[78] Discussion of each of these terms ensued. A "particularized" injury is one that "must affect the plaintiff in a personal and individual way."[79] A "concrete" injury is one that is "de facto," that actually exists; it is "real" and not "abstract" and can be tangible or intangible.[80] Congress can "'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'"[81] However, a plaintiff does not automatically satisfy the "concrete" injury-in-fact requirement when-

Standing was dismissed in several cases this Term.

ever a statute grants a person a statutory right and authorizes the person to bring suit to vindicate that right. Depending on the circumstance, the "risk of real harm" can satisfy the requirement of concreteness, as can "the violation of a procedural right granted by statute."[82] Here the Court concluded that the Ninth Circuit had "elided" the injury-in-fact requirements by focusing on the second requirement (particularity) while overlooking the first (concreteness).[83] The case was remanded for a determination of whether the alleged injuries were sufficiently concrete. Look for the issue that was presented in the petition for certiorari to return to the Supreme Court.

The Court also focused on injury in fact in *Wittman v. Personhuballah*, an appeal filed by members of Congress from Virginia; those members had intervened in a case brought by voters who challenged the redrawing of their district as an unconstitutional gerrymander.[84] The members of Congress supported the redrawn plan. A three-judge district court ruled for the voters and ordered a new districting plan. The State Board of Elections did not appeal, but the members of Congress did.[85]

Writing for a unanimous Court, Justice Breyer dismissed the appeal for lack of jurisdiction. He began by pointing out that the intervenors could not step into the shoes of the Board of Elections unless they independently met Article III's standing requirements.[86] In a supplemental brief on standing, the members of Congress had argued that redrawing the redrawn plan had the effect of reducing their likelihood of reelection. The Court assumed, without deciding, that this type of injury could be legally cognizable; however, the Court found no evidence of this harm in the record. Thus Justice Breyer dismissed the appeal with the admonishment that, when issues of standing are raised, the party invoking federal court jurisdiction "cannot simply allege a nonobvious harm, without more. Here, there is no 'more.'"[87]

Mootness

The Court's Article III jurisprudence requires that "an actual controversy … be extant at all stages of review, not merely at the time the complaint is filed."[88] Otherwise the case is moot. A case is considered moot, however, "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[89] *Campbell-Ewald Company v. Gomez* looked at whether a class action becomes moot

73 See *Spokeo Incorporated v. Robins*, 136 S. Ct. 1540 (2016).

74 *Id*. at 1544.

75 *Id*. at 1545 (citing 15 U.S.C. §§ 1681e(b), 1681n(a) (2015) (Section 1681e(b) requiring reasonable procedures and Section 1681n(a) authorizing cause of action)).

76 *Robins v. Spokeo Incorporated*, 742 F.3d 409 (9th Cir. 2014).

77 Petition for a Writ of Certiorari, *Spokeo Incorporated v. Robins*, No.13-1339, 2014 WL 1802228 (U.S. May 1, 2014).

78 *Spokeo*, 136 S. Ct. at 1548.

79 *Id*. (citations omitted).

80 *Id*. (citing *Concrete*, Black's Law Dictionary (9th ed. 2009)).

81 *Id*. at 1549 (quoting *Lujan*, 504 U.S. at 578).

82 *Id*.

83 *Id*. at 1548.

84 See *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

85 See 28 U.S.C. § 1253 (2015) (granting right to appeal three-judge district court orders directly to Supreme Court).

86 *Wittman*, 136 S. Ct. at 1735–36 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

87 *Id*. at 1737 (citation omitted).

88 *Arizonans for Official English*, 520 U.S. at 67 (citation omitted).

89 *Knox v. Service Employees International Union Local 1000*, 132 S. Ct. 2277, 2287 (2012) (internal quotation omitted).

when the defendant offers the individual named plaintiff full settlement of the claim but the plaintiff rejects the offer.[90]

The defendant contracted with the Navy to send text messages to young adults who had consented to receiving solicitations regarding service in the Navy. Gomez, who was nearly 40 and had not consented to receiving texts, filed a class action against Campbell-Ewald; Gomez cited the Telecommunications Consumer Protection Act, which prohibits automatic telephone dialing systems from contacting individuals without their consent.[91] Gomez sought treble damages, costs, attorney fees, and an injunction prohibiting unsolicited messaging.[92]

Before the agreed-upon deadline for Gomez to file a motion for class certification, Campbell-Ewald proposed a settlement and filed an offer of settlement pursuant to Federal Rule of Civil Procedure 68, in which the company offered to pay Gomez all his requested damages and costs. After Gomez refused the offer, the defendant moved to dismiss the case for lack of subject-matter jurisdiction; the defendant argued that its offer mooted Gomez's individual claim and that, because a class had not been certified, the putative class claims were also moot.[93] The Ninth Circuit ruled that the case was not moot, and the Supreme Court granted certiorari to resolve a disagreement among the circuits.[94]

In a 6-to-3 decision, the Court concluded that the case was not moot. Justice Ginsburg's opinion made two main points. First, under basic principles of contract law

In recent years the Court has made it more difficult for groups of similarly affected individuals to bring class actions.

"an unaccepted offer of judgment cannot moot a case."[95] Adopting Justice Kagan's dissenting opinion in *Genesis Healthcare Corporation v. Symczyk*, the Court reasoned that "[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."[96] Second, the majority pointed out that Rule 68 gave Campbell-Ewald no support because, under the rule, an offer of judgment "is considered withdrawn" if not accepted within 14 days.[97] However, the Court emphasized that its ruling was narrow and that it "need not, and do[es] not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."[98]

Kingdomware Technologies v. United States involved an exception to the mootness doctrine.[99] The case arose after the government decided to procure an emergency notification system for Veterans Administration medical centers but did not include set-asides for veteran-owned businesses during the procurement process. Kingdomware, a veteran-owned small business, brought an action for declaratory and injunctive relief; Kingdomware argued that the government had not followed procurement rules requiring the set-asides. However, after the case was filed, the requested relief could not be granted because the contracts in dispute had been completed. Thus there was no live controversy.[100]

The Court allowed the case to proceed under the "capable of repetition, yet evading review" exception to mootness.[101] This exception applies when the duration of the challenged action is too short to be fully litigated prior to its expiration, and there is a "reasonable expectation that the same complaining party will be subject to the same action again."[102] Writing for the Court, Justice Thomas concluded, "That exception applies to these short-term contracts" that were fully performed less than two years after they were awarded.[103] Moreover, Kingdomware had been awarded government contracts in the past and was reasonably likely to be awarded contracts in the future if its interpretation of the law prevailed.[104]

Class Actions

In recent years the Court has made it more difficult for groups of similarly affected individuals to bring class actions. For example, *Wal-Mart Stores v. Dukes* refused to certify a nationwide class of employees because the Court rejected the statistical evidence the employees used to establish a common policy of discrimination and,

90 See *Campbell-Ewald Company v. Gomez*, 136 S. Ct. 663 (2016).

91 *Id*. at 666–67 (citing 47 U.S.C. § 227(b)(1)(A)(iii) (2015)).

92 *Id*. at 667.

93 *Id*. at 667–68.

94 *Id*. at 669 (collecting cases).

95 *Id*. at 670 (citation omitted).

96 *Id*. (quoting *Genesis Healthcare Corporation v. Symczyk*, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting)). A Fair Labor Standards Act case, *Genesis Healthcare* differed from *Campbell-Ewald* because Symczyk did not dispute in the lower courts that the offer of settlement had mooted her individual claim, and, assuming the individual claim was moot, the Court concluded that collective-action allegations standing alone could not maintain a case.

97 *Id*. at 671 (quoting Fed. R. Civ. P. 68(b)).

98 *Id*. at 672.

99 See *Kingdomware Technologies Incorporated v. United States*, 136 S. Ct. 1969 (2016).

100 *Id*. at 1974–75.

101 *Id*. at 1976.

102 *Id*. (internal quotation omitted).

103 *Id*.

104 *Id*.

thus, common questions of fact as required by Federal Rule of Civil Procedure 23.[105]

In *Tyson Foods v. Bouaphakeo*, however, the Court refused to extend *Wal-Mart* and announce a broad rule against the use of "representational evidence" to determine the extent of liability in a Rule 23(b)(3) class action case.[106] A jury had awarded compensatory damages to a group of employees who did not receive overtime pay for time spent donning and doffing protective equipment. Because Tyson had failed to keep records of donning and doffing times, the employees had been forced to prove injury by using representational evidence, studies by experts who used videos of donning and doffing in the plant to determine average donning and doffing times and, from there, to determine which employees were entitled to overtime pay.[107]

On appeal, Tyson Foods opposed class certification and argued that each employee did not establish that employee's actual donning and doffing time and, as a result, did not satisfy Rule 23(b)(3)'s requirement that common issues predominate. Relying on *Wal-Mart*, Tyson Foods called for a rule banning the use of representational evidence to establish liability.[108] The Court refused, saying that a categorical ban "would make little sense."[109] The Court noted that many cases had allowed such evidence.[110] A "representative or statistical sample, like all evidence, is a means to establish or defend against liability," and its permissibility turns not on the form of the case (class or individual action) but "on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action," Justice Kennedy's majority opinion pointed out.[111] Rejecting Tyson Foods' reliance on *Wal-Mart*, the Court said that case

> does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability.... While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy.[112]

The Court repeatedly noted that Tyson Foods failed to keep legally required records of donning and doffing times or to challenge the employee experts' methodologies under *Daubert*.[113] The Court concluded that "this problem appears to be one of petitioner's own making."[114]

The Court's decision in *DirecTV Incorporated v. Imburgia* was bad news for state consumer protection laws on class arbitration waivers.

Equitable Tolling

In *Menominee Indian Tribe of Wisconsin v. United States* the Court upheld the denial of the Menominee Indian Tribe's equitable tolling claim and consequent dismissal of the tribe's untimely breach of contract claim against the federal government.[115] The tribe had filed its claim nearly two years after the applicable six-year statute of limitations had run, and the tribe invoked equitable tolling on the basis that at the time of filing, a similar putative class action was pending in district court.[116]

Writing for a unanimous Court, Justice Alito referred to the Court's past decisions that "expressly characterized" the two components of equitable tolling—"(1) that [the litigant] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing"—as "elements" that must both be satisfied, "not merely factors of indeterminate or commensurable weight."[117] The phrase "extraordinary circumstance stood in his way" does not encompass delays of the litigant's own making, but rather it means circumstances beyond the litigant's control, the Court clarified.[118] The Court concluded that the tribe's cost-driven decision to rely on the pending putative class action, but not to join it, was not a circumstance beyond the tribe's control.[119]

105 See *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011).

106 See *Tyson Foods Incorporated v. Bouaphakeo*, 136 S. Ct. 1036 (2016). While the case concerned class certification under Federal Rule of Civil Procedure 23(b)(3), its reasoning should apply more generally when proof involves a representational sample.

107 *Id*. at 1043–44.

108 *Id*. at 1042–43.

109 *Id*. at 1046.

110 *Id*.

111 *Id*. at 1046.

112 *Id*. at 1048.

113 See *id*. at 1047, 1049 (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)).

114 *Id*. at 1050.

115 See *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016).

116 See *American Pipe and Construction Company v. Utah*, 414 U.S. 538 (1974) (class action status denied due to failure to demonstrate requisite numerosity, but filing of original class action tolls running of statute for all purported class members who timely move to intervene after class certification is denied).

117 *Menominee*, 136 S. Ct. at 755–56 (quotation and citations omitted).

118 *Id*. at 756 (quotation omitted).

119 *Id*. at 756–57.

Highlighting the "hugely unequal bargaining power of the parties," Justice Ginsburg railed against the Court's steady evisceration of consumer protections through coercive class arbitration.

Arbitration

The Court's decision in *DirecTV Incorporated v. Imburgia* was bad news for state consumer protection laws on class arbitration waivers.[120] Customers living in California sued DirecTV in state court over early service termination fees and, in so doing, challenged the service agreement's provision waiving class arbitrations.[121] At the time the customers entered into the agreement, such waiver provisions were unenforceable under California law.[122] However, the U.S. Supreme Court subsequently ruled that California law was preempted by the Federal Arbitration Act.[123] Were the plaintiff customers then subject to DirecTV's waiver provision? The Court said, Yes.

Writing for the 6-to-3 majority, Justice Breyer first made clear that the case was not about federal law preemption of California law on enforceability of arbitration waivers.[124] Rather, the case was a matter of contract interpretation, specifically, whether the "considerable latitude" the Federal Arbitration Act gives parties to an arbitration contract "to choose what law governs some or all of its provisions" extends to preempted California law on class-arbitration waiver clauses.[125]

One provision of the service agreement stated that "if the 'law of your state' makes the waiver of class arbitration unenforceable, then the entire arbitration provision 'is unenforceable.'"[126] However, another provision stated that the arbitration provision "shall be governed by the Federal Arbitration Act."[127] Justice Ginsburg and fellow dissenter Justice Sotomayor asserted that these provisions at the very least created ambiguity in the contract and should be construed against DirecTV, the sole drafter of the form contract, and not the hapless consumer.[128] The majority found no ambiguity and concluded that the contract had to be analyzed in light of the supremacy of the Federal Arbitration Act over the "law of [the consumers'] state" on class arbitration waivers. The majority said that the California court erred in interpreting the term "law of your state" to permit application of a *preempted* state law. The majority further faulted the state court for failing to give "due regard" to the federal policy favoring arbitration by basing its ruling on principles applicable only to arbitration contracts; the California court's interpretation placed arbitration contracts on 'unequal footing' with all other contracts.[129]

Highlighting the "hugely unequal bargaining power of the parties," Justice Ginsburg railed against the Court's steady evisceration of consumer protections through coercive class arbitration, based on what she views as blind, ill-reasoned adherence to the presumption favoring arbitration.[130]

Statute of Limitations

Musacchio v. United States, a unanimous opinion by Justice Thomas, serves as a primer on how to determine whether a statute of limitations for a federal statute is jurisdictional.[131] Ordinarily a time bar is not jurisdictional unless "Congress has 'clearly stated' that it is."[132] To find such a clear statement, the Court looks at the "'text, context, and relevant historical treatment'" of the statute.[133] Musacchio, a criminal defendant, sought to invoke a limitations defense for the first time on appeal under a general federal criminal statute of limitations. Applying the three-part test to the subject statute, the Court affirmed the Fifth Circuit's rejection of Musacchio's defense because (1) the text of the subject statute was not written in jurisdictional terms; (2) by contrast, the statute immediately preceding the subject statute was written in jurisdictional terms; and (3) cases going back 140 years established that criminal defendants must raise a statute-of-limitations defense under the subject statute while in district court and cannot do so on appeal.[134]

Administrative Procedure Act

The Court's decision in *United States Army Corps of Engineers v. Hawkes Company* clarified agency action "finality" under the Administrative Procedure Act.[135] Pursuant to the requirements of the Clean Water

120 See *DirecTV Incorporated v. Imburgia*, 136 S. Ct. 463 (2015).

121 *Id*. at 466.

122 *Id*. at 468.

123 See *AT&T Mobility Limited Liability Corporation v. Concepcion*, 563 U.S. 333 (2011).

124 *DirecTV*, 136 S. Ct. at 468.

125 *Id*.

126 *Id*. at 466.

127 *Id*.

128 *Id*. at 475–76 (Ginsburg, J., dissenting).

129 *Id*. at 471 (majority opinion).

130 *Id*. at 475 (Ginsburg, J., dissenting).

131 See *Musacchio v. United States*, 136 S. Ct. 709 (2016).

132 *Id*. at 717 (citations omitted).

133 *Id*. (quoting *Reed Elsevier Incorporated v. Muchnick*, 559 U.S. 154, 166 (2010)).

134 *Id*. at 717–18.

135 See *United States Army Corps of Engineers v. Hawkes Company*, 136 S. Ct. 1807 (2016).

Musacchio v. United States, a unanimous opinion by Justice Thomas, serves as a primer on how to determine whether a statute of limitations for a federal statute is jurisdictional.

Act, peat mining companies in Minnesota sought a permit from the Army Corps of Engineers to discharge materials into waters near their mining operations.[136] The corps has a process for the often-difficult determination as to whether waters are regulated by the Clean Water Act: issuing either "preliminary" or "approved" "jurisdictional determinations" that remain valid for five years.[137] The corps issued an "approved" jurisdictional determination in which the corps found that the waters at issue were indeed "water[s] of the United States" and thus subject to Clean Water Act restrictions.[138] The companies sought judicial review of the corps' action under the Administrative Procedure Act. The corps asserted that its judicial determination was not final and thus not appealable, but the Eighth Circuit disagreed.[139]

Chief Justice Roberts, author of the seven-justice majority opinion, first applied the "finality" test the Court had set forth in *Bennett v. Spear*: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[140]

136 *Id.* at 1812–13.

137 *Id.* at 1812.

138 *Id.* at 1813.

139 *Id.*

140 *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The Court concluded that the approved jurisdictional determination was final and a "consummation" of the corps' decision making. The Court based its conclusion on the rigorous and comprehensive fact finding involved, the contrast between an "approved" determination and the mere advisory nature of a preliminary determination, and the fact that "the corps itself describes approved [jurisdictional determinations] as 'final agency action'" in its regulations.[141] The Court dismissed the idea that the corps' ability to revise an approved jurisdictional determination based on new information made its determination nonfinal since the Court had found in earlier decisions that the ability to revise was a common characteristic of final agency actions.[142]

The Court found that the jurisdictional determination also satisfied the second prong of *Bennett* because it gave rise to legal consequences.[143] An approved determination that finds no jurisdictional waters binds the corps for five years, and, per a long-standing official agreement between the corps and the Environmental Protection Agency, binds other federal entities as well, thereby significantly narrowing the potential legal liability a company faces for discharging pollutants without a permit.[144] Conversely an approved judicial determination that finds the subject waters to be jurisdictional "waters of the United States" does not offer this safe harbor.[145]

141 *Id.* at 1814 (citation omitted).

142 *Id.*

143 *Id.*

Having found finality, the Court then had to determine that the peat mining companies had no adequate alternatives to review in court under the Administrative Procedure Act to deem the corps' action reviewable.[146] The corps asserted that the companies had two such alternatives: discharge the material without a permit or "apply for a permit and seek judicial review if dissatisfied."[147] The Court found neither to be an adequate alternative based on the great risk of civil and criminal penalties of the former and the great expense and length of the latter.[148] Justices Kagan and Ginsburg, in separate concurring opinions, offered further nuance bolstering the finality holding.[149] Justice Kennedy's concurring opinion, joined by Justices Thomas and Alito, expressed concern over the reach of the Clean Water Act and the "crushing" penalties for violating it.[150]

The Court's decision in _United States Army Corps of Engineers v. Hawkes Company_ clarified agency action "finality" under the Administrative Procedure Act.

144 *Id.*

145 *Id.*

146 *Id.* at 1815 (citing 5 U.S.C. § 704 (2015)).

147 *Id.*

148 *Id.* at 1815–16.

149 *See id.* at 1817 (Kagan, J., concurring); *id.* at 1817–18 (Ginsburg, J., concurring).

150 *Id.* at 1816 (Kennedy, J., concurring).

Jurisdiction

The Court did not have much to say about jurisdictional issues. It did reiterate that mandatory language does not equate to a jurisdictional requirement: A statute "does not become jurisdictional just because it is mandatory and must be strictly construed."[151]

Justice Kagan, writing for a six-member majority, concluded that Section 27 of the Securities Exchange Act of 1934 used a jurisdictional test equivalent to that derived from the "arising under" language of 28 U.S.C. § 1331.[152] Having equated the two provisions—notwithstanding that Section 27 does not include the "arising under" language of Section 1331, a point which the unlikely pairing of Justices Thomas and Sotomayor noted in rejecting the Court's analysis—the majority offered an observation about Section 1331.[153] Although federal jurisdiction usually attaches when federal law supplies the cause of action, federal jurisdiction may also attach in a small number of cases based on state law: "[A] federal court has jurisdiction of a state-law claim if it necessarily raises a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state power."[154]

Exhaustion of Administrative Remedies

The Prison Litigation Reform Act of 1995 requires an inmate to exhaust "'such administrative remedies as are available' before bringing suit to challenge prison conditions."[155] Justice Kagan's opinion interpreting that provision for an essentially unanimous Court may offer useful insights about exhaustion in general.

Because the provision's language is mandatory, the Court rejected the court of appeals' interpretation excusing exhaustion because of "special circumstances": "[M]andatory language means a court may not excuse a failure to exhaust, even to take such circumstances into account."[156] While a judicially imposed exhaustion requirement "remain[s] amenable to judge-made exceptions … a statutory exhaustion provision stands on a different footing. There, Congress sets the rules …. For that reason, mandatory exhaustion statutes like the [Prison Litigation Reform Act] establish mandatory exhaustion regimes, foreclosing judicial discretion."[157]

Nevertheless, Justice Kagan noted that the statute itself had a "textual exception to mandatory exhaustion," and she stated that only "available" remedies need be exhausted.[158] She then cited three circumstances in which an administrative remedy is not available. The first occurs when the procedure "operates as a simple dead end …. When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy."[159]

The second occurs when "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it."[160] Third, a remedy is unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."[161]

Although these instances of unavailability are set in the context of prison, one or more of them might be applicable in other situations if the statutory exhaustion requirement includes an "availability" condition. Indeed, even a statute without explicit language to that effect could be interpreted to include such a condition.[162]

Statutory Construction

The Court issued no blockbuster statutory construction opinions (if, indeed, that adjective can ever properly be coupled with "statutory construction"). Instead, spread through a variety of decisions, the Court reiterated a few of the key canons of statutory construction. One of these was "*noscitur a sociis*, a word is known by the company it keeps. While not an inescapable rule, this canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."[163] In *McDonnell v. United States* the key issue was whether the governor's fawning behavior toward a generous businessman-constituent amounted to an "official act," which turned on whether a meeting, call, or event

151 *V.L. v. E.L.*, 136 S. Ct. 1017, 1021 (2016) (internal quotation omitted).

152 *Merrill Lynch, Pierce, Fenner and Smith Incorporated v. Manning*, 136 S. Ct. 1562, 1570 (2016).

153 *Id*. at 1576 (Thomas, J., concurring in the judgment).

154 *Id*. at 1570 (internal quotation omitted).

155 *Ross v. Blake*, 136 S. Ct. 1850, 1854–55 (2016) (quoting 42 U.S.C. § 1997e(a)).

156 *Id*. at 1856.

157 *Id*. at 1857 (citations omitted).

158 *Id*. at 1858.

159 *Id*. at 1859 (internal citations omitted).

160 *Id*.

161 *Id*. at 1860.

162 Here the Court was unable to determine from the record whether an available remedy existed and remanded for a lower court to make that determination (id. at 1860–62).

163 *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (internal quotations and citations omitted).

The Court issued no blockbuster statutory construction opinions (if, indeed, that adjective can ever properly be coupled with "statutory construction").

was a "question" or "matter."[164] Since those two words were linked to four others in the bribery statute—"cause, suit, proceeding or controversy"—the Court applied the *noscitur a sociis* canon to reach this conclusion: "Because a typical meeting, call, or event arranged by a public official is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a 'question' or 'matter' under [the bribery statute]."[165]

The Chief Justice made a similar observation about the importance of context in another unanimous opinion: "Statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[166] Justice Kagan reiterated this point in trying to discern the meaning of "describe," which "takes on different meanings in different contexts."[167] Her guiding principle to accomplish that task was to "interpret the relevant words not in a vacuum, but with reference to the statutory context."[168]

Perhaps *the* most basic rule of statutory construction was trotted out on several occasions: "[W]e begin with the language of the statute. If the statutory language is unambiguous and the statutory scheme is coherent and consistent … the inquiry ceases."[169] When "the statute speaks in unambiguous terms," courts must apply that meaning, not their own preference, and "must honor Congress's choice."[170] This approach, which is seemingly uncontroversial but which had been ignored by the court of appeals, was the basis for the Supreme Court's conclusion that the lower court could not impose a "special circumstances" exception to the exhaustion requirement at issue in the case.[171]

This analysis resulted in a unanimous opinion interpreting a provision of the Sex Offender Registration and Notification Act in favor of the offender.[172] The court of appeals had affirmed a conviction for failing to update his registration when he moved from Kansas to the Philippines, but the Supreme Court reversed the lower court on the basis of a "straightforward reading of the statutory text."[173] The statute requires an offender to register in one of three jurisdictions shortly after the offender changes residence—where the offender resides, is an employee, or is a student—and does not include a foreign country in the definition of "jurisdiction."[174] Since he could not register in the Philippines (where he might have been employed or been a student), the government argued that he should have registered in Kansas, which failure was the basis of the conviction.[175]

Observing that the statutory provision "uses only the present tense," the Court held that the offender could not be held accountable for not registering in Kansas because he no longer resided there.[176] Furthermore, since the registration requirement takes effect only "'*after* each change of … residence,'" the offender "could not have appeared in person … 'after' leaving the State."[177] Justice Alito added that Congress could easily have drafted legislation to require the new registration in the jurisdiction from which the offender was departing, but the legislature's failure to do so did not require the courts "to add an extra clause to the text …. To supply omissions transcends the judicial function."[178] In other words, the precise statutory language controls even when it leads to a result that was probably caused by the drafters simply failing to consider the circumstance of an offender leaving the country.[179]

The Court noted the canon that each word of a provision should have a meaning. In *McDonnell*, the gubernatorial bribery case, the Court refused to ascribe "un-

164 *Id*. The Chief Justice's decision for a unanimous Court is worth reading for its description of what the governor and his wife did to bring down the wrath of the U.S. Department of Justice (see *id*. at 2362–64). His conclusion nicely summarizes the difference between inappropriate behavior and illegal behavior: "There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute" (*id*. at 2375).

165 *Id*. at 2368–69.

166 *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (internal quotation omitted).

167 *Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016).

168 *Id*. at 1626 (internal quotation omitted).

169 *Kingdomware Technologies*, 136 S. Ct. at 1976 (internal quotations and citations omitted).

170 *Ross*, 136 S. Ct. at 1856, 1857 (citation and footnote omitted).

171 *Id*. at 1856–57. The exhaustion aspect of the decision is discussed *supra*.

172 See *Nichols v. United States*, 136 S. Ct. 1113 (2016).

173 *Id*. at 1118.

174 *Id*. at 1117.

175 *Id*.

176 *Id*. (citing 42 U.S.C. § 16913(a)).

177 *Id*. at 1117–18 (quoting 42 U.S.C. § 16913(c)).

178 *Id*. at 1118 (internal quotation omitted).

179 *Id*.

limited" scope to the words "question" and "matter" because that reading would eliminate any meaningful role for other words in the statute.[180] This reading of the language "comports with the presumption that statutory language is not superfluous."[181] In *Torres* the rule was stated as "our ordinary assumption that Congress, when drafting a statute, gives each provision independent meaning."[182]

The *Kingdomware Technologies* decision offers a comprehensive primer on the venerable "shall versus may" distinction:

> Unlike the word "may," which implies discretion, the word "shall" usually connotes a requirement. Compare *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 … (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"), with *United States v. Rodgers*, 461 U.S. 677, 706 … (1983) (explaining that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion").[183]

In short, "shall" means "must."[184]

The Court emphasized the importance of a dictionary definition. An opinion by Justice Kagan on behalf of five other justices considered the federal firearms prohibition after a misdemeanor conviction for the "use" of physical force against a domestic relation when the misdemeanor was for reckless rather than intentional conduct.[185] Noting that "[d]ictionaries consistently define the noun 'use' to mean the 'act of employing' something," the Court ruled out "an involuntary motion" as coming within that meaning.[186] However, "the word 'use' does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so."[187] The Court concluded that "Congress's definition of a 'misdemeanor crime of violence' contains no exclusion for convictions based on reckless [as opposed to knowing or intentional] behavior."[188]

What will the 2016 Term bring with respect to federal court access? The answer to that question depends in large part upon the recent election. The current members of the Court no doubt are simply hoping that all nine seats on the bench are occupied as soon as possible.

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180 *McDonnell*, 136 S. Ct. at 2369.

181 *Id*. (internal quotation omitted).

182 *Torres*, 136 S. Ct. at 1628 n.8.

183 *Kingdomware Technologies*, 136 S. Ct. at 1977.

184 *Id*.

185 *Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016).

186 *Id*. at 2278–79 (citations to lay dictionaries and *Black's Law Dictionary* omitted).

187 *Id*. at 2279.

188 *Id*. at 2280.