Access Decisions in the 2016–17 Term: A ( Mostly) Subdued U.S. Supreme Court in a Year of Political Upheaval

BY MONA TAWATAO, JANE PERKINS, AND GARY SMITH

With the exception of the late-Term ruling allowing parts of Pres. Donald Trump's travel ban to go into effect, complicated by the issuance of a new and more expansive ban, the 2016–17 U.S. Supreme Court Term lacked the drama of last Term caused by the unexpected death of Justice Antonin Scalia. Much of this past year's intrigue took place off the field with the Senate's refusal even to consider Pres. Barack Obama's nominee, Merrick Garland, and the shocking outcome of the presidential election. Though operating with only eight justices until April, when Trump's nominee, Neil Gorsuch, became the ninth justice, the Court heard, with a high degree of unanimity in its decisions, about the same number of cases as last Term. Many of those decisions have significant implications for those seeking access to and redress in federal court.

Personal Jurisdiction

In Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County, the Court considered the limits that the due process clause of the Fourteenth Amendment places on a state court regarding the exercise of specific jurisdiction over nonresidents of the state. The case was a mass product-liability action brought in California state court by both California residents and nonresidents who alleged that the drug Plavix, made by Bristol-Myers Squibb, damaged their health. Bristol-Myers moved to quash service of summons on the nonresidents' claims based on lack of specific jurisdiction, and the case ended up before the California Supreme Court. The California Supreme Court agreed unanimously with the state court of appeal that the state court did not have general jurisdiction. However, it split in holding that the state court had specific jurisdiction over the nonresidents' claims based on lack of specific jurisdiction, and the case ended up before the California Supreme Court.

readily is shown a connection between the forum contacts and the claim.\textsuperscript{3} The majority concluded that Bristol-Myers’s “extensive contacts with California” permitted the exercise of specific jurisdiction “based on a less direct connection between [Bristol-Myers’s] forum activities and plaintiffs’ claims than might otherwise be required.”\textsuperscript{4} The majority’s ruling was based on the similarity of claims between nonresidents and residents and Bristol-Myers having conducted significant research in California, albeit not related to Plavix.\textsuperscript{5}

The U.S. Supreme Court disagreed, 8 to 1. Writing for the majority, Justice Alito reached back to civil procedure mainstay International Shoe v. Washington and other precedents admonishing that “the Fourteenth Amendment limits the personal jurisdiction of state courts” to protect defendants from “the State’s coercive power.”\textsuperscript{6} He followed with a primer on the two types of personal jurisdiction: general jurisdiction, which may be exercised over a corporation in the state fairly regarded as the corporation’s “home” and enables claims against the corporation by residents and nonresidents alike, and specific jurisdiction, which requires “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”\textsuperscript{7}

As dictated by precedent, said the majority, the “primary concern” in determining whether specific jurisdiction is present is the “burden on the defendant.”\textsuperscript{8} Assessing the defendant’s burden includes considering not only practical and logistical concerns such as inconvenience and distance of forum, but also “the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”\textsuperscript{9} Therefore, the Court cautioned, the sovereignty a state enjoys, including the “sovereign power to try causes in [its] courts … imply[es] a limitation on the sovereignty of all its sister States.”\textsuperscript{10}

Accordingly the majority found inconsistent with precedent the California Supreme Court’s sliding-scale approach that gave special consideration to a corporation’s overall activity in the state whether or not the activity directly related to the case at hand.\textsuperscript{11} The majority held that the connection between the forum and specific claims at issue was insufficient, noting that the nonresidents did not receive a prescription for or did not purchase or ingest Plavix or were not injured by Plavix in California.\textsuperscript{12}

The lone dissenter, Justice Sotomayor, rued the decision; she cited Bristol-Meyers’s extensive business dealings in California during the period relevant to the case and the company’s California distributor responsible for nearly a quarter of the company’s worldwide revenue as proof of adequate contacts to establish specific jurisdiction.\textsuperscript{13} She feared a flood of piecemeal litigation that would be burdensome to all parties.\textsuperscript{14}

**Sovereign Immunity**

_**Lewis v. Clarke**_ examined limits on tribal sovereign immunity.\textsuperscript{15} Brian and Michelle Lewis were driving on a Connecticut highway when their car was hit from behind by a limousine driven by William Clarke, a Mohegan Tribe Gaming Authority employee who was transporting patrons from the Mohegan Sun Casino to their homes. The Lewises sued Clarke for damages in state court in his individual capacity. Clarke moved to dismiss the case on sovereign immunity grounds, arguing that he was acting within the scope of his employment when the crash occurred and, alternatively, that the Gaming Authority was the real party in interest because it had agreed to indemnify him for damages arising from his employment. Although the trial court rejected these arguments, the Connecticut Supreme Court reversed, holding that Clarke was acting within the scope of his employment and sovereign immunity barred the suit.\textsuperscript{16}

The U.S. Supreme Court unanimously reversed. The Court decided the case by relying on cases involving state officials and finding that, as in these cases, “the distinction between individual- and official-capacity suits is paramount here.”\textsuperscript{17} In official-capacity cases, the relief sought is from the official’s office and thus the sovereign itself. The government is the real party in interest. By contrast, personal-capacity suits, such as the case filed by the Lewises, seek to impose individual liability on the government employee for action taken under color of state law. The individual, not the sovereign, is the real party in interest. The Court found “no reason to depart from these general rules in the context of tribal sovereign immunity.”\textsuperscript{18} The Court also held that indemnification was a separate legal matter and not certain; thus the

\textsuperscript{3} Id. at 1778 (internal quotations omitted).
\textsuperscript{4} Id. at 1779 (internal quotations omitted).
\textsuperscript{5} Id.
\textsuperscript{6} Id.
\textsuperscript{7} Id. at 1780 (internal quotation omitted).
\textsuperscript{8} Id. (internal quotation omitted).
\textsuperscript{9} Id.
\textsuperscript{10} Id. (internal quotation omitted).
\textsuperscript{11} Id. at 1781.
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 1784–85 (Sotomayor, J., dissenting).
\textsuperscript{14} Id. at 1789.
\textsuperscript{15} Lewis v. Clarke, 137 S. Ct. 1285 (2017).
\textsuperscript{16} Lewis v. Clarke, 135 A.3d 677 (2016).
\textsuperscript{17} Lewis, 137 S. Ct. at 1292.
\textsuperscript{18} Id.
The Supreme Court took on time-bar issues in California Public Employees’ Retirement System v. ANZ Securities Incorporated.

Indemnification provision could not, “as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak.”

Time Bars
The Supreme Court took on time-bar issues in California Public Employees’ Retirement System v. ANZ Securities Incorporated. A putative securities-fraud class action was filed in 2008 against investment bank Lehman Brothers pursuant to Section 11 of the Securities Act of 1933. Petitioner California Public Employees’ Retirement System, commonly known as “CalPERS,” was a member of that putative class. The putative class action was consolidated with other suits against Lehman Brothers into one multidistrict case.

Section 13 of the Act, which governs the time limits for a Section 11 action, states:

No action shall be maintained to enforce any liability created under [Section 11] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. In no event shall any such action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public.

In 2011, more than three years after the subject securities transactions occurred, CalPERS filed against Lehman Brothers its own action alleging identical securities law violations as those alleged in the putative class action. CalPERS’s suit was consolidated with the multidistrict suit, and soon thereafter a proposed settlement was reached in the multidistrict case. However, CalPERS, believing it could do better on its own, chose to opt out of the multidistrict case. Respondents moved to dismiss the CalPERS case as untimely under Section 13’s three-year bar, but CalPERS, citing American Pipe and Construction Company v. Utah, argued that the three-year time period was tolled while the class action was pending. CalPERS

Writing for the five-justice majority, Justice Kennedy began with a lesson on the two types of statutory time bars: statutes of limitation and statutes of repose.

Lost in district court and on appeal.

In the Supreme Court, CalPERS fared no better, losing there in a split decision. Writing for the five-justice majority, Justice Kennedy began with a lesson on the two types of statutory time bars: statutes of limitation and statutes of repose. The purpose of statutes of limitation, he explained, is “to encourage plaintiffs ‘to pursue diligent prosecution of known claims.’” Accordingly, for statutes of limitation, the time begins to run “when the cause of action accrues,” which usually means “when the injury occurred or was discovered.”

By contrast, statutes of repose “effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time[,] and their purpose is ‘to give more explicit and certain protection to defendants.’” Thus statutes of repose begin to run on “the date of the last culpable act or omission of the defendant.”

The majority deemed Section 13 a statute of repose on several grounds, including the plain language of the second sentence of Section 13 (“in no event shall any such action be brought”) and the structure of Section 13 since, like other time-bar statutes, it pairs a short statute of limitations period with a longer period of repose.

The majority noted exceptions to this rule, such exceptions as when the statute of repose contains express exceptions or the intent underlying a particular time-bar statute supports allowing for equitable tolling.
tolling, the majority found no such exception in Section 13’s three-year bar.31

Further, the majority rejected CalPERS’s argument that its case should be equitably tolled in accordance with American Pipe, a federal antitrust class action.32 There the district court denied class certification for failure to satisfy the numerosity requirement of Rule 23, and individuals who would have otherwise been class members moved to intervene as individuals. The district court, citing the operative statute of limitations, denied the motions; the circuit court reversed, and the Supreme Court affirmed.33

The majority in CalPERS distinguished the tolling rule created in American Pipe because it arose primarily from “the judicial power to promote equity” within the bounds of Rule 23 and the applicable statute of limitations, rather than from a statutory mandate.34 That rule stood in contrast to the statutory intent underlying Section 13’s absolute three-year bar trumped the rule created in American Pipe.35

In a strong dissent, Justice Ginsburg, joined by Justices Breyer, Kagan, and Sotomayor, bemoaned the majority opinion as a disservice to the “least sophisticated” of the “investing public that [Section] 11 was designed to protect.”36 The decision, she lamented, meant “opting out [of a class action] cuts off any chance for recovery,” even when plaintiffs, as did CalPERS, give ample notice to respondents of the claims against them and the number and generic identity of class members.37

Service of Process
In Water Splash Incorporated v. Menon the Court considered whether a Texas-based water park company violated the Hague Service Convention by effectuating service by mail on defendant Menon, who resided in Canada.38 Water Splash had sued Menon for breach of a noncompetition contract provision. Menon challenged service following entry of default judgment for her failure to answer. In a unanimous opinion by Justice Alito, the Court held that the Hague Service Convention did permit service abroad by mail, thereby resolving disharmony among the circuit courts on the issue.39

The Hague Service Convention is a multilateral treaty whose purpose is “to simplify, standardize, and generally improve the process of serving documents abroad.”40 The Court focused its analysis on Article 10, the operative text of the treaty, and the context in which that language is used. Article 10 expressly prohibits the Convention from interfering with “the freedom to send judicial documents, by postal channels, directly to persons abroad.”41 “[S]end[]” is a broad term, and excluding the sending of documents for the purpose of service from the treaty’s meaning has no basis, Justice Alito reasoned.42 Further, he explained, in the context of a treaty whose title includes the words “Service Abroad” and whose preamble limits the scope of the treaty to service abroad, defendant Menon’s limiting interpretation made no sense.43

The Court dispensed with Menon’s argument that the meaning of Article 10 was ambiguous; the Court cited the drafters’ intent, the executive branch’s historic interpretation of the treaty, and how other signatories interpreted the treaty; each of these three items cited by the Court dictated an interpretation that the treaty allowed service abroad by mail.44

When a court describes your case as a “tactic” eight times in one opinion, your ultimate success is unlikely.

31 Id. at 2050–51.
32 Id. at 2051–54.
33 American Pipe, 414 U.S. at 540.
34 CalPERS, 137 S. Ct. at 2051–52.
35 Id. at 2052.
36 Id. at 2057 (Ginsburg, J., dissenting).
37 Id. at 2056.
39 Justice Gorsuch did not participate in the case.
40 Water Splash, 137 S. Ct. at 1507.

Class Certification
When a court describes your case as a “tactic” eight times in one opinion, your ultimate success is unlikely. So learned Seth Baker and others in their nationwide class action case, Microsoft Corporation v. Baker.45

43 Id.
44 Id. at 1511–13.
The Court grounded its decision on the foundational principle that cases should be decided in a single appeal of a final decision and not in a piecemeal fashion.

Baker and other gamers claimed that a design defect caused the Microsoft Xbox to scratch discs during normal game-playing conditions. The district court denied their motion for class certification. Citing Federal Rule of Civil Procedure 23(f), the plaintiffs asked the Ninth Circuit for permission to appeal that ruling. They argued that the district court’s order resulted in a “death-knell” situation because the small size of their individual claims made it irrational to continue to bear the costs of litigating. The Ninth Circuit denied the Rule 23(f) petition. At that point the plaintiffs had several options for continuing the case; however, they moved for a voluntary dismissal with prejudice. After the district court entered final judgment on the dismissal, they appealed the order denying class certification to the Ninth Circuit on the ground that the voluntary dismissal was an appealable final decision under 28 U.S.C. § 1291. Using this tactic, they could pursue their individual claims or pursue classwide relief if the denial of class certification was reversed on appeal. Microsoft did not object to the dismissal but, not surprisingly, argued that voluntary dismissal left the plaintiffs with no right to appeal. The Ninth Circuit found the stipulated dismissal sufficient to trigger the decision on whether federal courts of appeals have jurisdiction under Section 1291 to review an order denying class certification after the named plaintiffs have voluntarily dismissed their claims with prejudice. Justice Ginsburg, writing for the majority, answered “no” to the question.

The Supreme Court granted certiorari to resolve a conflict among the circuits on the question of whether federal courts of appeals have jurisdiction under Section 1291 to review an order denying class certification after the named plaintiffs have voluntarily dismissed their claims with prejudice. Justice Ginsburg, writing for the majority, answered “no” to the question.

The Court grounded its decision on the foundational principle that cases should be decided in a single appeal of a final decision and not in a piecemeal fashion. Section 1291 codifies this final-judgment rule. According to Justice Ginsburg, “[b]ecause respondents’ dismissal device subverts the final-judgment rule, ... the tactic does not give rise to a ‘final decision’ under [Section] 1291.” The decision gives a number of reasons why the plaintiffs’ tactic failed. For example, the voluntary-dismissal tactic would invite “protracted litigation and piecemeal appeals” because the decision whether to take an immediate appeal would rest entirely with the plaintiff. Another vice of the tactic was that the tactic would allow indiscriminate appellate review of an interlocutory order and “severely undermine[]” Rule 26(f)’s “careful calibration” that placed the decision on whether to allow interlocutory appeals of class certification orders solely within the discretion of the courts of appeals. The tactic would work only in a plaintiff’s favor, even though the class issue could be just as important to the defendant. And the Rules Enabling Act evidenced congressional intent for decisions on finality to come from rulemaking, not “judicial decisions in particular controversies or inventive litigation ploys.”

**Intervention**

Town of Chester v. Laroe Estates Incorporated concerned intervention of right under Federal Rule of Civil Procedure 24(a)(2). Laroe Estates filed a motion to intervene of right in a case that had been filed by a land developer against the Town of Chester. The land developer’s case sought damages from the town; the land developer claimed that government red tape had obstructed his plans to build a mixed-use subdivision and left him on the brink of bankruptcy.

Laroe Estates, a real estate development company, alleged that it had an agreement with the land developer to purchase parcels of land within the development once it was approved and, in the interim, advanced money to the land developer. Laroe’s motion to intervene asserted claims that were substantially similar to the land developer’s claims but appeared to request something different, namely, compensation for the town’s taking of Laroe’s interest in the property. The district court denied intervention on the ground that Laroe had only an equitable interest in the property that did not confer standing; however, the Second Circuit reversed, holding that an intervenor of right did not need Article III standing.

---

46 Id. at 1711.  
47 Id.  
48 Id. at 1711–12.  
49 Id. at 1712.  
50 Id. Justice Thomas, joined by the Chief Justice and Justice Alito, concurred in the judgment but would have grounded the jurisdictional question on the lack of Article III standing instead of Section 1291. Id. at 1715–17 (Thomas, J., concurring in the judgment). Justice Gorsuch took no part in the case.  
51 Id. at 1712–13.  
52 Id. at 1713.  
53 Id. at 1714–15 (internal quotation omitted).  
54 Id. at 1714.  
56 Id. at 1646–49.  
57 Laroe Estates Incorporated v. Town of Chester, 828 F.3d 60 (2d Cir. 2016).

Citing a circuit split, the Supreme Court took the case and unanimously reversed. Justice Alito rooted the Court’s opinion in basic concepts of Article III standing, particularly the “traditional understanding” that “standing is not dispensed in gross,” and each plaintiff seeking compensatory relief must have suffered an injury in fact that is fairly traceable to the challenged conduct and likely to be redressed by a favorable decision from the court. The same principles apply, the Court held, to intervention of right: “an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.” Finding the record ambiguous regarding the exact nature of the relief Laroe sought, the Court remanded for further proceedings.

Statutory Construction

A number of this Term’s decisions required the Court to engage in statutory construction analysis. Several provisions of the federal Fair Housing Act were at issue in Bank of America Corporation v. City of Miami, Against two banks, the City of Miami filed a Fair Housing Act complaint for damages alleging that their racially discriminatory and predatory lending practices led to disproportionate foreclosures and housing vacancies in minority neighborhoods; such foreclosures and vacancies impaired the city’s effort to assure racial integration, diminished its property tax revenue, and caused greater municipal service costs.

The district court dismissed the complaint, but the Eleventh Circuit reversed, holding that (1) the city’s alleged injuries fell within the “zone of interests” protected by the Fair Housing Act and (2) the complaint adequately alleged that the banks’ conduct was the proximate cause of the injuries. The Supreme Court granted certiorari to review both issues.

In a 5-to-3 decision written by Justice Breyer, the Court’s analysis began with a review of Article III standing requirements:

“a plaintiff must show an ‘injury in fact’ that is ‘fairly traceable’ to the defendant’s conduct and ‘that is likely to be redressed by a favorable judicial decision.’” The Court observed that “whether a plaintiff comes within the zone of interests [protected by a statute] is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a plaintiff must show an ‘injury in fact’ that is fairly traceable to the defendant’s conduct and that is likely to be redressed by a favorable judicial decision.”

Several provisions of the federal Fair Housing Act were at issue in Bank of America Corporation v. City of Miami.

A “plaintiff must show an ‘injury in fact’ that is ‘fairly traceable’ to the defendant’s conduct and ‘that is likely to be redressed by a favorable judicial decision.’” The Court observed that “whether a plaintiff comes within the zone of interests [protected by a statute] is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a plaintiff must show an ‘injury in fact’ that is fairly traceable to the defendant’s conduct and that is likely to be redressed by a favorable judicial decision.”

Several provisions of the federal Fair Housing Act were at issue in Bank of America Corporation v. City of Miami.

Title VII of the Civil Rights Act of 1964, for fear of opening the door to a parade of “farfetched” damages claims allegedly caused by employment discrimination. In this case, concluded Justice Breyer, the Court’s Fair Housing Act precedent already held that the type of financial injuries alleged by the city do fall within the zone of interests protected by the statute.

Indeed, virtually all of these claims were explicitly held to be cognizable Fair Housing

68 Id. at 1301.
69 Id. at 1307.
70 Id. at 1303, 1305 (internal quotation omitted).
71 Id. at 1304 (citing Thompson v. North American Stainless Limited Partnership, 562 U.S. 170 (2011)).
72 Id.
Act–related injuries, which the plaintiff municipality in Gladstone Realtors v. Village of Bellwood alleged were caused by discriminatory housing “steering” practices of the defendant realtors in that case.70

Turning to the issue of proximate cause, the majority found the Eleventh Circuit’s analysis to be incomplete.71 The Court remanded the case to the lower court to ensure the requisite “direct relation” between the injuries claimed and the alleged discriminatory conduct.72

The Court issued two decisions this Term arising under the Individuals with Disabilities Education Act.73 In Endrew F. v. Douglas County School District RE-1 the Court revisited its 35-year-old landmark decision in Board of Education v. Rowley to decide an issue left unresolved in that case.74 Although Rowley held that the Act established a substantive right to a “free appropriate public education” for children with disabilities, Rowley had declined to endorse any specific standard for determining “when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act.”75

In Endrew F., the parents of a fifth-grader with autism had removed him from public school because they were dissatisfied with the school’s individualized education program (IEP); they then sought reimbursement from the district for the cost of his private school placement (where his progress “improved significantly”).76

After administrative and district court decisions concluding that the proposed IEP did not deprive Endrew of a free appropriate public education, the Tenth Circuit affirmed those findings.77 While the lower court acknowledged that Endrew’s performance under past IEPs “did not reveal immense educational growth,” it concluded that the IEP’s objectives were “sufficient to show a pattern of, at the least, minimal progress,” which in their view was all that Rowing required.78 The Supreme Court granted certiorari to review the Tenth Circuit’s holding that a disabled child’s IEP, under Rowley, need only be calculated to confer “some educational benefit” and to enable the child to make “some progress.”79

Chief Justice Roberts, writing for a unanimous Court, decided that the lower court’s standard was too limited and read too narrowly Rowley’s interpretation of the right to a free appropriate public education. The Court also declined to adopt the broader standard proposed by the parents, who argued that the Act required a free appropriate public education to provide “opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”80

After an analysis of the statutory definitions for both an IEP and a free appropriate public education in the context of its holding in Rowley, the Court crafted this definition, which it described only as a “general standard,” to describe the Act’s substantive requirement:

[A] student offered an educational program providing “merely more than de minimis” progress [the standard adopted by the Tenth Circuit] from year to year can hardly be said to have been offered an education at all. For children with disabilities receiving instruction that aims so low would be tantamount to “sitting idly ... awaiting the time when they were old enough to drop out.” The [Act] demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.81

This Term’s second foray into the educational arena occurred in Fry v. Napoleon Community Schools, where the Court examined the relationship between the Individuals with Disabilities Education Act and two other statutes implicating the rights of persons with disabilities.82 In Fry the parents of a kindergarten student with cerebral palsy sought permission to allow the girl’s service animal to accompany her to school to help

71 Id. at 1306. Justice Thomas, joined by Justices Kennedy and Alito, filed a dissent that agreed with the Court’s disposition on the issue of proximate cause but disputed the majority’s conclusion on the primary issue, i.e., whether the city even had standing as an “aggrieved person” under the Fair Housing Act (id. at 1307 (Thomas, J., dissenting)).
72 Id. at 1306. Justice Thomas, joined by Justices Kennedy
75 Board of Education, 458 U.S. at 201–2.
76 Endrew F., 137 S. Ct. at 996–97.
77 Id. at 1001.
78 Id. at 1000–1001 (quoting Rowley, 458 U.S. at 179). The Court remanded the case for “further proceedings consistent with this opinion” (id. at 1002).
80 Id. at 1001.
81 Id. at 1000–1001 (quoting Rowley, 458 U.S. at 179). The Court remanded the case for “further proceedings consistent with this opinion” (id. at 1002).
One of Justice Gorsuch's first opinions for the Court required an exercise of statutory interpretation in which all of his new colleagues joined.

When the school refused, the parents filed with the U.S. Department of Education’s Office of Civil Rights a complaint alleging that the exclusion of their child’s service dog violated her rights under both the Americans with Disabilities Act (ADA) and the Rehabilitation Act. In response to the school’s contention that it had supplied all the educational services (including a full-time personal aide) required under the Individuals with Disabilities Education Act, the Office of Civil Rights found that even though the school might not have violated the child’s right to a free appropriate public education under the Act, its denial of her service dog constituted an independent violation of the antidiscrimination provisions of the ADA and the Rehabilitation Act.

Dissatisfied with the school’s response to the finding of the Office of Civil Rights, the parents enrolled their child in a different public school (which welcomed her service dog) and filed in federal court a complaint seeking damages, under the ADA and the Rehabilitation Act, for failure of her prior school to make a reasonable accommodation for the child’s use of her service animal.

The district court granted the defendant’s motion to dismiss on the ground that Section 1415(l) of the Individuals with Disabilities Education Act—a statute not cited in the parents’ complaint—says that if a lawsuit brought under federal antidiscrimination laws (such as the ADA and the Rehabilitation Act) seeks “relief that is also available” under the Individuals with Disabilities Education Act, the plaintiff must first exhaust the Individuals with Disabilities Education Act’s administrative remedies. The Sixth Circuit affirmed, concluding that because the injuries alleged from the discrimination were “generally ‘educational’” in nature, the claims could have been brought under the Individuals with Disabilities Education Act.

Justice Kagan, writing for an essentially unanimous court, first concluded that because “the only relief the [Individuals with Disabilities Education Act] makes ‘available,’” for purposes of the exhaustion provision, is relief for denial of a free appropriate public education, any suit brought under other antidiscrimination laws must allege denial of a free appropriate public education to trigger the exhaustion requirement. In determining whether a plaintiff is seeking relief for the denial of a free appropriate public education, “[w]hats matters is the crux—or, in legal-speak, the gravamen—of the plaintiff’s complaint, setting aside any attempts at artful pleading.” In an effort to offer some practical guidance for this inquiry, Justice Kagan observed that a “cue” for distinguishing when a “complaint against a school concerns the denial of a free appropriate public education might be found by “asking a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say a public theater or library? ... [S]econd, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?” The Court instructed that “when the answer to those questions is yes,” a complaint that does not expressly allege the denial of a free appropriate public education is unlikely to be seeking relief under the Individuals with Disabilities Education Act. After giving some additional examples to guide the lower courts in this analysis, the Court remanded the case to the Court of Appeals to make the required review.

One of Justice Gorsuch’s first opinions for the Court required an exercise of statutory interpretation in which all of his new colleagues joined. Henson v. Santander Consumer USA Incorporated raised a narrow question arising under the Fair Debt Collection Practices Act. The plaintiffs were consumers who had obtained automobile loans from a finance company and who had defaulted on their repayments; subsequently the finance company sold the loans to the defendant, which then tried to collect in ways that allegedly violated the Act’s prohibitions against abusive collection practices. The plaintiffs sued for damages under the Act, but the district court

---

83 Id. at 751.
84 Id. at 749 (citing 29 U.S.C. § 794 (2015); 42 U.S.C. §§ 12131–12165 (2015)).
85 Id. at 752.
86 Id. at 752.
87 Id. at 748 (citing 20 U.S.C. § 1415(f)).
88 Id. at 752 (quoting Fry v. Napoleon Community Schools, 788 F.3d 622, 627 (6th Cir. 2015)).
89 Id. Two Justices filed a brief concurrence joining in nearly all of the majority’s analysis.
90 Id. at 755.
91 Id. at 756.
92 Id.
93 Id. at 758.
95 Id. at 1720–21.
The plaintiffs then turned to “the field on which they seem most eager to pitch bat-
tle”—the “policy” underlying the statute.\footnote{101} The plaintiffs asserted—and the Court ac-
nowledged—that the defendant’s business of “purchasing [and collecting] defaulted debt” is an industry practice that did not exist at the time of the Act’s passage in 1977, and the plaintiffs urged the Court to find that “[h]ad Congress known this new industry would blossom … it surely would have judged defaulted debt purchasers more like (and in need of the same special rules as) independent debt collectors.”\footnote{102}

The Court declined the plaintiffs’ invitation to “rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.”\footnote{103} The Court also deferred various other “policy” arguments raised by the plaintiffs as “matters for Congress, not this Court, to resolve,” and Justice Gorsuch ended his opinion with a rhetorical flourish that might have come directly from his confirmation hearings: “the proper role of the judiciary … [is] to apply, not amend, the work of the People’s representatives.”\footnote{104}

The Court was more closely divided in a second decision interpreting the Fair Debt
Collection Practices Act, this time in a bankruptcy context. The plaintiff in Midland Funding Limited Liability Corporation v. Johnson was a consumer who had filed a bankruptcy under Chapter 13 of the Bankruptcy Code.\footnote{105} The defendant debt collection agency filed, in the bankruptcy action, a “proof of claim” seeking payment for a credit card debt which, as the claim itself made clear, had accrued more than ten years prior to the bankruptcy filing.\footnote{106}

Subsequently Johnson filed against the defendant under the Fair Debt Collection Practices Act a separate lawsuit seeking damages, alleging that its filing of a claim in bankruptcy court that it knew was time-barred constituted “false, deceptive, … misleading[,] … unfair[,] or unconscionable” conduct, all of which is prohibited under the Act.\footnote{107} The district court, holding that the Act was inapplicable, dismissed the case, but the Eleventh Circuit disagreed.\footnote{108} The Supreme Court granted certiorari to resolve a division in the lower courts over the application of the Act to such time-barred debt claims filed in bankruptcy court.\footnote{109}

Justice Breyer, writing for a five-member majority, first found it “reasonably clear” that the defendant’s filing of a time-barred proof of claim did not fall within the scope of the first three categories of the Act’s violations, that is, conduct that is “false, deceptive, or misleading.”\footnote{110} A “claim,” under the Bankruptcy Code, is defined as a “right to payment,” and here the relevant state
law made clear that even a time-barred creditor retains the “right” to repayment.113 Although the plaintiff contended that the term “claim” must mean “enforceable claim,” the Court rejected that argument.114 Justice Breyer acknowledged that whether the defendant’s “assertion of an obviously time-barred claim is ‘unfair’ or ‘unconscionable’ [the final two categories of the Act’s violations] present[s] a closer question.”115 The majority conceded, as the plaintiff and the dissent strenuously argued, that a number of lower courts have held that a debt collector’s knowing assertion of a time-barred claim in a civil lawsuit for collection does constitute “unfair” or “unconscionable” conduct in violation of the Act.116 Those courts, suggested the majority, enforced the Act to protect “unsophisticated” conduct in violation of the Act.117 The dissent dismissed that effort because “there is virtually no evidence that the statutes-of-limitations defense, who might no longer have information sufficient to raise the defense, and who might therefore “unwittingly repay a time-barred debt.”118

In the majority’s view, these considerations “have significantly diminished force in the context of a Chapter 13 bankruptcy” because the bankruptcy claims resolution process, particularly the appointment of trustees to review the claims, “make[s] it considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met [as it was in Johnson’s case] with resistance, objection, and disallowance.”119 The Court concluded that filing a claim in a Chapter 13 proceeding “that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act.”120 Justice Sotomayor, joined by Justices Ginsburg and Kagan, filed a forceful dissent that adopted the primary “policy” argument advanced by the plaintiff.121 The dissent cited a number of empirical and policy studies asserting that “[p]rofessional debt collectors have built a business out of buying stale debt [for pennies on the dollar], filing claims in bankruptcy proceedings to collect it, and hoping no one notices that the debt is too old to be enforced by the courts.”122 The dissent suggested that while the Act’s protections have “largely beaten back” these abuses in state court the bankruptcy process, a wide variety of courts and commentators have observed that debt buyers now have turned to the bankruptcy court forum and have “‘deluge[d]’ the bankruptcy courts with claims on debts deemed unenforceable under state statutes of limitations.”123

With respect to the majority’s attempt to distinguish the bankruptcy process from the civil debt-collection process, the dissent dismissed that effort because “there is virtually no evidence that the majority’s [arguments] hold[] true in practice.”124 Justice Sotomayor concluded with this admonishment: “It is said that the law should not be a trap for the unwary. Today’s decision sets just such a trap.”125

The case of Ziglar v. Abbasi deserves a brief mention because of its implications for plaintiffs raising claims against federal officials for damages arising from alleged violations of constitutional law under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.126 Ziglar is a long-running class action filed by detainees charged with immigration violations and held for years because of potential “connections to terrorism,” following the September 11, 2001, attacks.127 They filed in 2009 against five federal officials a complaint alleging that the conditions of their interrogation and confinement violated various constitutional provisions; for such violations, they sought damages under Bivens.128 After determining that most of the claims at issue did indeed seek “a Bivens remedy in a new context,” the Court applied the “special factors” test set forth in its post-Bivens precedent to hold that, while the allegations in the complaint regarding the detainees’ treatment are “tragic,” the question before the Court is “not whether the [defendants’] alleged conduct was proper,” but whether the Court should “allow an action for money damages in the absence

---

113 Id. at 1411–12 (internal quotations omitted).
114 Id. at 1412–13 (internal quotation omitted).
115 Id. at 1413.
116 Id.
117 Id. (internal quotation omitted).
118 Id. at 1413–14.
119 Id. at 1415–16.
120 Id. at 1416 (Sotomayor, J., dissenting).
121 Id.
122 Id. at 1417–18 (internal quotations omitted).
123 Id. at 1420.
124 Id. at 1421.
126 Ziglar, 137 S. Ct. at 1851.
127 Id. at 1853.
128 Id. at 1857 (internal quotation omitted). Justice Gorsuch was not yet seated, and Justices Kagan and Sotomayor recused themselves because of their participation in the case prior to their appointments to the Court.
Preemption

John and Sandra Howell divorced in 1991.130 John was serving in the Air Force, and the divorce decree treated his future monthly military retirement pay as community property, meaning that Sandra would receive half the pay. John soon retired. About 13 years later, the Department of Veterans Affairs found John disabled, and he elected to receive disability benefits, which, unlike retirement pay, are not taxable. Under federal law, he had to waive a portion of his retirement pay,131 Sandra’s monthly divorce payments were thus reduced pro rata, and she went to court to enforce the original decree. The Arizona Supreme Court ruled that the divorce decree gave Sandra a vested interest in the original amount of retirement pay and increased the amount she received from the retirement pay to indemnify her for the loss caused by the waiver.132

The Supreme Court unanimously reversed.133 The opinion relied heavily on previous cases. A 1981 case, McCarty v. McCarty, held that state law allowing consideration of a veteran’s retirement pay as community property was preempted by federal law, which makes the benefit a “personal entitlement.”134 In response, Congress enacted the Uniformed Services Former Spouses’ Protection Act allowing states to treat veterans’ “disposable retired pay” as divisible property but expressly excluding from the definition of “disposable retired pay” amounts deducted “as a result of a waiver ... required by law in order to receive’ disability benefits.”135 In Mansell v. Mansell the Court interpreted the new federal law as a “precise and limited” grant of power to the state to divide federal retirement pay; otherwise federal law “completely pre-empted the application of state community property law to military retirement pay.”136

In the Howells’ case, the Arizona Supreme Court had distinguished Mansell because Mansell’s waiver occurred before the divorce while Mr. Howell’s waiver took place years after the divorce proceedings. The U.S. Supreme Court found the difference in time irrelevant: “We see nothing in this circumstance that makes the reimbursement award to Sandra any the less an award of the portion of military retirement pay that John waived in order to obtain disability benefits.”137 The Court also held that the Arizona court’s orders “stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted.”138 The Court sought to soften the hardship that the preemption would work by suggesting that, when deciding the nature of a divorce decree, family courts can account for the contingency that the military retirement pay might be waived.139

Arbitration

In another setback for consumers who enter into arbitration agreements, following last Term’s decision in DIRECTV Incorporated v. Imburgia, the Court reaffirmed the supremacy of the Federal Arbitration Act this Term in Kindred Nursing Centers Limited Partnership v. Clark.140

Beverly Wellner and Janis Clark, representing the estates of their respective family members, brought against Kindred Nursing Centers separate suits alleging that substandard care caused the deaths of their respective family members in a Kentucky nursing home that Kindred owned. Through powers of attorney, both Wellner and Clark had completed and signed the paperwork necessary to move their family members into the nursing home. The paperwork included an arbitration agreement that all claims related to the family member’s stay at the nursing home would be resolved through binding arbitration instead of a lawsuit.

129 Id. at 1859, 1869. Justices Breyer and Ginsburg dissented, arguing that the claims fell “well within the scope of traditional constitutional tort law” and that “[i]n wartime as well as in peacetime ... the judicial branch of the Nation’s government [must] stand ready to afford a remedy ... for ... unconstitutional abuses of official power” (id. at 1873 (internal quotations omitted) (Breyer, J., dissenting)).
131 Id. at 1403 (citing applicable statute for each branch of armed forces).
132 Id. at 1404–5 (citing In re Marriage of Howell, 361 P.3d 936 (Ariz. 2015) and noting that different state courts had reached different conclusions).
133 Id. at 1402. Justice Gorsuch took no part in the case.
134 Id. at 1403 (citing McCarty v. McCarty, 453 U.S. 210 (1981)) (internal quotation omitted).
136 Id. at 1404 (quoting Mansell v. Mansell, 490 U.S. 581, 588 (1989)).
137 Id. at 1405.
138 Id. at 1406. Justice Thomas did not join this part of the opinion; he labeled this framework “an illegitimate basis for finding the preemption of state law” (id. at 1406 (Thomas, J., concurring in part and concurring in the judgment)).
139 Id.
Kindred moved to dismiss the lawsuits and asserted that the lawsuits were barred by the arbitration agreements Wellner and Clark had signed. After the trial and appellate courts ruled that the cases could go forward, the cases went to the Kentucky Supreme Court, which consolidated the cases and affirmed the lower court decisions.

The Kentucky Supreme Court found that Wellner’s power of attorney was too narrow to enable her to enter into the arbitration agreement on behalf of her husband but found that Clark’s was broad enough to so bind her mother. Nevertheless, the Kentucky Supreme Court invalidated both arbitration agreements. It held that Kentucky’s constitutional guarantee to the right to a judge or jury trial is “inviolate” and that, under the state’s “clear-statement rule,” only an express provision in the arbitration agreement or in any contract forgoing this right could waive it.

On Kindred’s petition, the U.S. Supreme Court granted certiorari and roundly rejected the Kentucky Supreme Court’s main holding. In a withering opinion, Justice Kagan began by spelling out the equal-treatment principle established by the Federal Arbitration Act—“[a] court may invalidate an arbitration agreement based on ‘generally applicable contract defenses’ like fraud or unconscionability, but not on legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’”

Thus, she wrote, the Act preempts not only “any state rule [that] discriminate[s] on its face against arbitration,” or that fails to place arbitration agreements on equal footing with other agreements, but also “any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.” Since Kentucky’s clear-statement rule hinged on waiver of the right to go to court on a jury trial—the primary characteristic of arbitration agreements—the majority concluded that the rule was “too tailor-made” for arbitration agreements and therefore violated the Federal Arbitration Act.

The majority sharply dismissed the Kentucky Supreme Court’s position that the clear-statement rule was not solely focused on arbitration agreements but also could apply when the holder of a power of attorney tried to waive other fundamental constitutional rights of the principal. “But what other rights, really?” chided Justice Kagan, regarding the highly improbable and “fanciful” hypotheticals offered by the Kentucky Supreme Court such as waiving the principal’s right to worship freely or agreeing to bind the principal to personal servitude.

Turning to respondents Wellner and Clark’s main argument—that Kentucky’s clear-statement rule applied only to contract enforcement and not formation and was thus not barred by the Federal Arbitration Act—the majority said “no” based on the Act’s text and case law interpreting it. First, the Court pointed out, the Act itself states that an arbitration agreement must be treated as “valid, irrevocable, and enforceable.” Validity, the Court reasoned, speaks to contract formation. The Court concluded that interpreting the Federal Arbitration Act to cover contract formation was consistent with an earlier decision interpreting the Act, in which the Court discussed the impermissibility of applying a contract defense such as duress in a way that disfavors arbitration since the issue of duress arises during contract formation.

In the end, on Clark’s case the Court reversed, finding that the Kentucky Supreme Court had invalidated the arbitration agreement she entered into based solely on the clear-statement rule. However, in Wellner’s case, since the Kentucky Supreme Court had found that the narrowness of her power of attorney barred her from entering into the arbitration agreement in the first place, the U.S. Supreme Court remanded to enable the trial court to determine if narrowness truly drove the decision on Wellner’s case or if that decision had the “taint” of the clear-statement rule.

**Attorney Fees**

Goodyear Tire and Rubber Company v. Haeger concerned payment of attorney fees when bad faith has entered the picture. Courts have the inherent authority, the decision agreed, to sanction a litigant for bad-faith conduct by ordering it to pay the innocent party’s attorney fees; however, “such an order is limited to the fees the innocent party incurred solely because of the misconduct—or put another way, to the fees that party would not have incurred but for the bad faith.”

In this case the Haeger family sued Goodyear Tire after the family’s motor home swerved off the highway and flipped. The family alleged that the crash...
Goodyear Tire and Rubber Company v. Haeger concerned payment of attorney fees when bad faith has entered the picture.

was caused by the vehicle’s tires, which the family claimed were not designed to withstand the level of heat generated by a motor home traveling at highway speeds. Discovery in the case lasted years, with Goodyear’s responses “both slow in coming and unrevealing in content.”154 The parties settled on the eve of trial.

Some months later, the Haegers’ attorney read a newspaper article reporting on a similar lawsuit and describing data from Goodyear indicating that the tires got unusually hot at high speeds. The lawyer had not seen those data. When contacted by the lawyer, Goodyear admitted having withheld the information even though the Haegers had repeatedly requested “all testing data” related to the tires.155 The Haegers sought sanctions from the district court for discovery fraud; these sanctions would include their attorney fees and costs expended in the litigation.156 Clearly irritated, the district court ordered a comprehensive award of $2.7 million in legal fees and costs that the Haegers incurred since the moment, early on, when Goodyear made its first dishonest discovery response.157 Because Goodyear had behaved so badly, the district court saw no need to find a “causal link between [those expenses and] the sanctionable conduct.”158

After the Ninth Circuit affirmed the award, the Supreme Court agreed to hear the case to resolve a split among the circuits. Justice Kagan’s opinion for a unanimous court reversed.159 Courts possess, the opinion noted as an initial matter, “inherent power,” not conferred by a rule or statute, to manage their cases, and this authority includes imposition of sanctions.160 Continuing, however, Justice Kagan stated that the Court had “made clear” that such sanction must be compensatory, not punitive, in nature.161 She explained, “That means, pretty much by definition, that the court can shift only those attorney’s fees incurred because of the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.163 And while courts need not become “green-eyeshade accountants (or whatever the contemporary equivalent is),” the goal is to “do rough justice” by awarding the “sum total of the fees that, except for the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong.”162 Moreover, a sanction is compensatory if it covers the bills that the litigation abuse caused and no more; accordingly courts must establish a causal, but-for link between the misbehavior and the legal fees paid by the innocent party.

What of the 2017–18 Term? The Court has already heard argument in Gill v. Whitford, setting the stage for a momentous decision on partisan gerrymandering, and a trio of cases on the important question of whether employees can be made to waive the right to bring class proceedings.164 Up later this Term is Masterpiece Cakeshop Limited v. Colorado Civil Rights Commission, the blockbuster case on Colorado’s public accommodations law in which a business owner is claiming a First Amendment right to discriminate against same-sex couples.165 The volatility of the Trump administration and the unknowns about Justice Gorsuch have many on edge about how the Court will decide these cases and a host of others that bear on federal court access and consumer and civil rights.

AUTHORS’ ACKNOWLEDGMENT
Gill Deford, the driving force behind the Federal Access Group that has authored this annual article for Clearinghouse Review since 1993, retired earlier this year following a remarkable career as a litigator and advocate for seniors and low-income people across the country, most recently

154 Id.
155 Id.
156 Id.
158 Id. at 975.
159 Justice Gorsuch did not participate in the case.
160 Goodyear Tire and Rubber Company, 137 S. Ct. at 1186.
161 Id. (citing International Union, Mine Workers of America v. Bagwell, 512 U.S. 821 (1994)).
162 Id.
163 Id. at 1187.
164 Id. (internal quotations omitted).
with the Center for Medicare Advocacy.\footnote{See The Supreme Court and Federal Court Access, Clearinghouse Community (n.d.) (featured collection of all Supreme Court recap Clearinghouse articles since 1993).} We dedicate this article to Gill to express our gratitude for his many years of leadership and co-authorship; his wit, wisdom, and guiding presence are dearly missed.

**MONA TAWATAO**  
Senior Litigator  
Western Center on Law and Poverty  
1107 9th St. Suite 700  
Sacramento, CA 95814  
916.282.5104  
mtawatao@wclp.org

Mona serves as faculty and as a member of the advisory committee for the Shriver Center’s Racial Justice Training Institute, and the Western Center on Law and Poverty is part of the Legal Impact Network.

**JANE PERKINS**  
Legal Director  
National Health Law Program  
200 N. Greensboro St. Suite D-13  
Carrboro, NC 27510  
919.968.6308 ext. 101  
perkins@healthlaw.org

**GARY F. SMITH**  
Executive Director  
Legal Services of Northern California  
517 12th St.  
Sacramento, CA 95814  
916.551.2111  
gsmith@lsnc.net