INSIDE

The Supreme Court's Recent Sexual Harassment Decisions: Holding Employers Liable for Sexual Harassment by Supervisors

The Section 502 Single-Family Housing Program: Does it Still Meet the Needs of Rural Borrowers?

Choice, Quality, Appeal Rights, and Surrogate Decision Making: A Medicare+Choice Primer

Elder Law Updates

The Supreme Court's 1997-98 Term
The Supreme Court’s 1997–98 Term: The Texas Interest on Lawyers’ Trust Account Case and Others Affecting Access to Justice

by Gill Deford, Matthew Diller, Deborah Goldberg, Brian Lawlor, Jane Perkins, and Yolanda Vera

The first part of this article focuses on Phillips v. Washington Legal Foundation, the case that poverty law advocates will probably remember as the most important decision made during the 1997–98 Supreme Court term. Since their inception in the early 1980s, Interest on Lawyers’ Trust Account (IOLTA) funds have been a vital source of funding for legal services and other public interest law programs throughout the nation. Here we explore what the “Texas IOLTA” case may mean for legal services funding. The remainder of the article examines a number of this past term’s lower-profile Supreme Court decisions that potentially affect the ability of low-income clients to access the federal courts. The cases are an amalgam of federal practice decisions that include holdings regarding administrative law practice, federal court removal, immunity defenses, standing, and ripeness.

I. The Texas IOLTA Decision

For poverty law advocates the 1997-98 term of the Supreme Court will probably be remembered above all for the Court’s troubling decision in Phillips v. Washington Legal Foundation. Confronted by dramatic cuts in congressional funding for legal services, programs have relied on IOLTA funding as a financial bulwark against the further erosion of client access to equal justice. Although limited in its holding and without immediate impact, Phillips raises unresolved questions that may hurt future funding.

A. Background

Phillips does not immediately affect access of the poor to federal court, but its ultimate impact is uncertain. The decision revives a constitutional challenge to IOLTA programs, a major source of funding for legal services for the poor. If the

1 Phillips v. Washington Legal Found., 118 S. Ct. 1925 (1998) (Clearinghouse Nos. 51,789, 51,405). Deborah Goldberg, senior attorney at the Brennan Center for Justice at New York University School of Law, is the author of part I of this article. The other authors are members of the Federal Court Access Group, an ad hoc group of legal services and public interest attorneys monitoring Supreme Court developments concerning poor people’s access to federal court. The group gratefully acknowledges the continuing support of the Lou Stein Center on Ethics and Public Interest Law at Fordham University School of Law. Gill Deford is an attorney with AARP Foundation Litigation; Matthew Diller is an associate professor of law at Fordham University School of Law; Brian Lawlor is regional counsel at Legal Services of Northern California; Jane Perkins is an attorney at the National Health Law Program; and Yolanda Vera is an attorney at the Western Center on Law and Poverty. For more information about the Federal Court Access Group contact Matthew Diller, Fordham University School of Law, 140 W. 62d St., New York, NY 10023; 212.636.6980.

For note on authors see footnote 1.
challenge succeeds, the ensuing loss of funds will limit access to justice as surely as any jurisdictional bar.

IOLTA programs, such as the Texas one at issue in *Phillips*, negotiate the complexities of banking, tax, and professional responsibility rules to make otherwise barren client funds economically productive. Under the programs lawyers deposit client funds that cannot produce financial gain for the client into a pooled IOLTA account. These funds are unproductive because they typically are so small or held for such a short period of time that the transaction costs of placing them into interest-bearing NOW (negotiable order-of-withdrawal) accounts outweigh the value of the interest the deposits can earn. The interest on the pooled IOLTA account, approximately $100 million nationwide, is then distributed principally to organizations providing legal services to the poor.

In the district court plaintiffs raised two constitutional challenges to Texas's IOLTA program. First, they claimed that the program effected a "taking" of the client's property without just compensation and thus violated the Fifth Amendment. Second, they alleged that the program violated their First Amendment rights by compelling them to subsidize legal services programs to which they are politically opposed.

The district court granted summary judgment dismissing both claims. The trial court, citing decisions from the First and Eleventh Circuits that rejected Fifth Amendment challenges to IOLTA programs, found that clients had no property interest in the proceeds generated by client funds pooled in IOLTA accounts or in

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2 Before 1980, federal banking law prohibited banks from paying interest on demand accounts. See 12 U.S.C. §§ 371a, 1464b(1)(b), 1828g. State rules of professional responsibility required, however, that client funds be available to the client upon demand (absent an agreement to the contrary) and prohibited lawyers from benefiting from the funds. See, e.g., Supreme Court of Texas, State Bar Rules, art. X, § 9, Texas Disciplinary Rules of Professional Conduct 1.14 (Vernon Supp. 1993). Lawyers therefore tended to pool client funds in noninterest-bearing checking accounts, and only the banks profited from the deposits. If the sums were large enough, the client could have the lawyer deposit the funds in interest-bearing savings accounts. In 1980 Congress revised the banking law to authorize negotiable order of withdrawal (NOW) accounts, on which interest may be paid. See 12 U.S.C. § 1832 (1989). But NOW accounts are available only to individuals and charitable organizations (see id. § 1832(a)(2)), so funds that must be available on demand for commercial clients organized as corporations or partnerships cannot earn interest for the client through that investment vehicle. Corporate funds may be deposited in NOW accounts only if a charitable organization has the exclusive right to the interest generated. See 118 S. Ct. at 1928. Interest on Lawyers' Limited Practice Officers' Trust Accounts (IOLTA) programs hold their funds in NOW accounts, so the principal of the various accounts is still available on demand to the client, while the interest generated by the pooled fund can be used for charitable purposes.

3 Federal tax law requires that the interest from each subaccount of a lawyer's (or law firm's) pooled account be reported separately. Bank service charges and the lawyers' administrative fee for opening and maintaining a NOW subaccount for an individual or not-for-profit client, including the costs of tax reporting, may be greater than the interest that can be earned on some subaccounts. Those funds are pooled in IOLTA accounts, and the interest on them need not be subaccounted or reported to the Internal Revenue Service (IRS) as long as client participation in the program is mandatory. See Rev. Rul. 87-2, 1987-1 C.B. 18, restating Rev. Rul. 81-209, 1981-2 C.B. 16.

4 All 50 states and the District of Columbia have approved IOLTA programs either by court rule or by statute. Indiana is in the process of implementing its program.


7 See id. at 9.
excluding others from the beneficial use of those funds. The court also rejected the First Amendment claim because it found that the interest on the accounts was not the clients' property and the plaintiffs thus were not forced to subsidize legal services for the poor and were not otherwise compelled to associate with the IOLTA program or its recipients. The court also held that the state agency administering the IOLTA program had complete Eleventh Amendment immunity from suit but that the individual defendants were immune only from claims for monetary (as opposed to injunctive) relief.

On appeal the Fifth Circuit affirmed the Eleventh Amendment decision but reopened both of plaintiffs' claims. The court determined that the interest generated on client funds is the property of the client. The Fifth Circuit vacated the summary judgment and remanded the case for further factual development and reconsideration of the constitutional claims. It noted that the district court's decision on the merits was wholly premised on the notion that clients did not have a valid property interest in the interest proceeds earned on funds in IOLTA accounts.

The Fifth Circuit decision created a split among the circuits on whether interest generated on IOLTA accounts is property of the clients. When the Phillips defendants petitioned for a writ of certiorari to resolve the split, the plaintiffs supported the request. The Supreme Court granted the writ to decide the following very limited question:

Is interest earned on client trust funds held by lawyers in IOLTA accounts a property interest of the client or lawyer, cognizable under the Fifth Amendment of the U.S. Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could not earn interest for the client or lawyer?

B. The Supreme Court Decision

In a 5-4 decision the Supreme Court held that, for purposes of the Takings Clause of the Fifth Amendment, interest earned on client funds held in IOLTA accounts is the property of the client. The Court first determined that under Texas law interest follows principal. Since the principal indisputably belongs to the client, the Court concluded that any accrued interest attached as a property right incident to the ownership of the underlying principal.

The Court recognized that the funds pooled in IOLTA accounts might not generate net interest for the client but determined that the accrued interest was nevertheless property, even if it had no economic value. The Court said that while the interest income at issue might have had no economically realizable value to its owner, possession, control, and dis-

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8 See id. at 6-8, citing Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962 (1st Cir. 1993), and Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir. 1987).
10 See id. at 10-11.
11 See Washington Legal Found., 94 F.3d at 1004.
12 Id.
13 See W. Frank Newton & James W. Paulsen, Constitutional Challenges to IOLTA Revisited, 101 DICK. L. REV. 549, 552 & n.17 (1997) (describing the creation of the split and subsequent petition for Supreme Court review as the Washington Legal Foundation's strategy). The plaintiffs also sought a writ of certiorari for consideration of sovereign immunity under the Eleventh Amendment, but the Supreme Court declined to review that issue.
15 Phillips, 118 S. Ct. at 1928. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. All four remaining justices joined in two separate dissents filed by Justice Souter and Justice Breyer.
16 Id. at 1930-32.
17 Id. at 1932.
18 Id. at 1933.
position were nonetheless valuable rights inherent in the property.\textsuperscript{19} The Court did not decide whether the property had been “taken” or whether compensation would be due. It left these two remaining elements of the takings claim to be addressed on remand.\textsuperscript{20}

Justice Souter, in dissent, noted that because the Court decided only the first element of the takings claim—whether a

The Fifth Circuit decision created a split among the circuits on the issue of whether interest generated on Interest on Lawyers' Trust Accounts is the property of the clients.

property interest was at stake—the Phillips holding could turn out to be only an "inconsequential abstraction" for Fifth Amendment purposes.\textsuperscript{21} He argued that the wiser course would have been to vacate the Fifth Circuit's similarly limited judgment and remand the case for consideration of all three elements of the takings claim.\textsuperscript{22} Such an approach, he urged, would "reduce the risk of placing such undue emphasis on the existence of a generalized property right as to distort the taking and compensation analyses that necessarily follow before the Fifth Amendment's significance can be known."\textsuperscript{23}

Justice Souter also maintained that "both the taking and compensation questions are serious ones for respondents."\textsuperscript{24} As to the taking issue, he noted that the essentially ad hoc factual inquiry that the

court must conduct under Penn Central Transportation Co. v. New York City\textsuperscript{25} involved consideration of "the nature of the government's action, its economic impact, and the degree of any interference with reasonable, investment-backed expectations."\textsuperscript{26} In the Phillips case there was no physical occupation or seizure of tangible property, no apparent economic impact, no investment, and no reasonable expectation of net interest.\textsuperscript{27} These circumstances, Justice Souter concluded, "would not bode well for claimants."\textsuperscript{28}

The client's inability to earn net interest also "raises serious questions about entitlement to compensation," which usually involves repayment of "the full monetary equivalent of the property taken."\textsuperscript{29} The claimant's private loss is measured "objectively and independently of the claimant's subjective valuation" and without consideration of the public gain.\textsuperscript{30}

Since the IOLTA programs use "funds the client never had or could have received," the rules for calculating any compensation owed "would not obviously produce much benefit to respondents."\textsuperscript{31} Justice Souter concluded that the property issue should not have been decided in the abstract, but if it were so considered, it should have been decided in accordance with Justice Breyer's dissenting opinion.\textsuperscript{32}

Justice Breyer focused on the assumptions underlying the very narrow question addressed. He argued that "[i]t [the most that Texas law here could have taken from a client is not a right to use his principal to create a benefit (for he had no such right), but the client's right to keep the client's

\textsuperscript{19} Id.
\textsuperscript{20} Id. at 1934.
\textsuperscript{21} Id. at 1935.
\textsuperscript{22} Id. at 1934.
\textsuperscript{23} Id. at 1935.
\textsuperscript{24} Id. at 1936.
\textsuperscript{26} Phillips, 118 S. Ct. at 1936.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id. (quoting United States v. Reynolds, 397 U.S. 14, 16 (1970)).
\textsuperscript{30} Phillips, 118 S. Ct. at 1936.
\textsuperscript{31} Id.
\textsuperscript{32} See id.
principal sterile, a right to prevent the principal from being put to productive use by others. To Justice Breyer the real question is therefore "whether 'interest,' earned only as a result of IOLTA rules and earned upon otherwise barren client principal 'follows principal.'" The slogan "interest follows principal," said Justice Breyer, does not in itself answer that question. Because no interest could have been earned absent the IOLTA program, Justice Breyer believes that the interest is not the client's private property.

C. Analysis

The significance of the Phillips decision for IOLTA programs cannot be known with certainty until the case runs its full course after remand. But indications are good that despite the decision the programs will not be found to effect a compensable taking. What the Phillips majority appears to have been doing in reaching out to decide the property issue in isolation is not so much "skew[ing] the resolution of the taking and compensation issues," as Justice Souter suggested, although that too is a reasonable concern, as improving plaintiffs' chances for success on their First Amendment claim.

The long-standing takings jurisprudence summarized in both of the Phillips dissents suggests that the Texas IOLTA program should withstand the takings challenge. As Justice Souter points out, under the standard Penn Central analysis, to argue that the state has "taken" the value of the accrued interest will be difficult. The plaintiffs may thus be forced to argue that the state has deprived them only of "control" over the interest or, as Justice Breyer so tellingly described it, confiscated the "right to prevent the principal from being put to productive use by others." But the Supreme Court recognized in Andrus v. Allard that "where an owner possesses a full 'bundle' of property rights," as the client does in the case of the principal, "the destruction of one 'strand' of the bundle is not a taking." Moreover, even if a taking is found, the courts can follow the lead of the Phillips dissenters and hold that "just compensation" in this case is no compensation because the property taken is without economic value.

The First Amendment claim could be more troubling on remand. The plaintiffs claim that the IOLTA program violates their First Amendment rights to free speech and association by compelling them to subsidize political or ideological purposes with which they disagree. In considering that claim, the district court will no longer be able to reason that "the interest generated by the IOLTA program is not the property of any of the Plaintiffs, [and] thus, the collection and use of the interest by the IOLTA program does not constitute financial support by the Plaintiffs of the recipient organizations." The court can nevertheless reject the First Amendment claim on the ground that clients voluntarily convey their funds to lawyers in the first place and thus no state compulsion is involved. At oral argument before the Supreme Court, Deputy Solicitor General Edwin Kneedler raised this point. Although clients may find it dif-

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33 Id. at 1938 (Breyer, J., joined by Stevens, Souter, Ginsburg, JJ., dissenting).
34 Id.
35 Id. at 1939.
36 The case will be remanded first to the Fifth Circuit, which can either retain the case and set a briefing schedule on the remaining issues or remand the case to the district court. The more likely scenario, and the assumption of the analysis below, is that the case will go back to the district court.
37 Phillips, 118 S. Ct. at 1937.
38 Id. at 1938.
41 According to Deputy Solicitor General Edwin Kneedler, the IRS revenue rulings exempting IOLTA interest from the clients' gross income presuppose that, once the funds are deposited in a lawyer's trust account, the clients have no control over the interest. But the client can refuse to deliver the funds to a lawyer, without affecting the revenue rul-

NOVEMBER–DECEMBER 1998 | CLEARINGHOUSE REVIEW
ficult to persuade attorneys to provide representation without a monetary retainer, the private contractual relationship and private economic interests create that problem, not by state action. The district court may thus distinguish the IOLTA program from the line of Supreme Court cases barring use of mandatory union fees for political activity unrelated to collective bargaining.\footnote{Washington Legal Found., 873 F. Supp. at 10.}

Moreover, the case is not over even if the court rejects such distinction. The district court has already found "no constitutional infirmity with respect to attorneys' mandatory participation in the IOLTA program,"\footnote{Id.} irrespective of the clients' interest in controlling beneficial use of their funds. As to those clients whose interests may be burdened, the court will have to assess the extent of the burden and corresponding level of constitutional scrutiny, and the state will have to demonstrate a sufficiently important interest that the IOLTA program is appropriately tailored to serve. The district court previously recognized that "providing indigent Texans with the means to gain access to the legal system is a significant state interest."\footnote{Id. at 820}

The risk of losing either the Fifth or First Amendment claim should not be minimized, however. An injunction giving clients control over the use of the interest generated by lawyers' trust accounts would very likely force IOLTA programs to treat the interest as income to clients, at least until the Internal Revenue Service rules otherwise. The prospect of being taxed on interest they could never collect would very likely act as a strong disincentive even to clients who would otherwise voluntarily participate in IOLTA programs. On the other hand, the potential loss of funding and concomitant loss of access to the courts should weigh in the equitable balancing against granting injunctive relief.

How the competing interests of property owners and the poor will be resolved upon remand remains to be seen. That Phillips will never have any practical import for IOLTA programs in Texas or elsewhere is entirely possible. In any event, IOLTA programs are safe for now, and lawyers must continue to comply with IOLTA requirements in their states.

II. Administrative Law Practice

In Allentown Mack Sales and Services v. NLRB the Supreme Court addressed the "substantial evidence" standard for reviewing adjudicatory decisions by administrative agencies.\footnote{Allentown Mack Sales & Servs. v. NLRB, 118 S. Ct. 818 (1998).} The decision evinces a relatively rigorous application of the substantial evidence test that may be useful to litigants challenging agency decisions. Justice Scalia's discussion of conflicts between professed administrative standards and actual agency practices is of particular interest to poverty lawyers who frequently deal with gaps between agency policies and practices.

The case dealt with a decision by the National Labor Relations Board (NLRB) that an employer was not permitted to conduct a poll to determine whether workers continued to support the union because it had not shown sufficient "good-faith reasonable doubt" about the issue.\footnote{Id. at 820} Under NLRB policy an employer that believes a recognized union no longer enjoys the support of the workers may conduct an internal poll of employees only if it can show that it has a good-
faith reasonable basis for doubting that a majority of workers support the union.48 The administrative law judge found that seven of thirty-two workers in the bargaining unit had made statements that could reasonably be viewed as casting doubt on their support for the union. The judge found that statements by roughly 20 percent of the bargaining unit were insufficient to cast doubt on the majority's support of the union. NLRB adopted the judge’s findings.49

Five justices concluded that the determination was not supported by substantial evidence because the agency did not weigh two of the workers’ statements that the dissatisfaction with the union was widespread.50 The Court rejected the agency's argument that these statements were entitled to no weight because they were only unsubstantiated assertions of other people’s opinions. First, looking up Webster’s Dictionary, Justice Scalia found that the “good-faith doubt” standard required only a reasonable basis for “uncertainty.”51 He then concluded that even if the statements could not be viewed as establishing that a majority of workers no longer supported the union, they nonetheless created uncertainty about the issue.52

Justice Scalia also rejected the agency’s finding that the statements were not probative because there was a new owner of the company and the discontent with the union might have been limited to its relation with the past owner.53 He noted that the union’s status as the recognized bargaining agent stemmed only from a legal presumption that union representation continued after the sale of a company. Discontent with the union should be presumed to continue as well since the union’s authority rested on a presumption that the workers viewed the new owner the same way as the former owner.54 Justice Scalia concluded that “giving fair weight to [the employer’s] circumstantial evidence, we think it quite impossible for a rational fact finder to avoid the conclusion that Allentown had reasonable grounds to doubt—to be uncertain about—the union’s retention of majority support.”55

The agency also sought to defend its decision by showing that it had regularly rejected evidentiary showings such as that made by the employer in this case.56 Justice Scalia cited law review articles acknowledging that NLRB applied the “good-faith doubt” standard so as to require a showing that a majority of workers wished to repudiate the union.57 NLRB viewed this history as supportive of its position, seeking deference to what it viewed as its consistent interpretation of the standard.58

Justice Scalia, however, did not view the situation as sanguinely. He saw the argument as an indication that the agency’s actual practice differed from its professed policy:

It is certainly conceivable that an adjudicating agency might consistently require a particular substantive standard to be established by a quantity or character of evidence so far beyond what reason and logic would require as to make it apparent that the announced standard is not really the effective one.59
Justice Scalia continued that in such a situation courts must hold the agency to its professed rather than its applied standard, regardless of whether the agency would have had authority to adopt its practice as a formal policy. He concluded that

adjudication is subject to the requirement of reasoned decision making. . . . It is hard to imagine a more violent breach of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And consistent repetition of that breach can hardly mend it.

Justice Scalia went on to explain that when a decision applies a standard other than the one that it articulates, it hampers consistent application of the law by agency personnel and impedes judicial review. As a result, "[r]eviewing courts are entitled to take [the enunciated] standards to mean what they say, and to conduct substantial evidence review on that basis." Taking issue with the majority's interpretation of the evidence, Justice Breyer and three other justices found substantial evidence to support the NLRB's determination. Justice Breyer also disagreed with the majority's view that NLRB had been disingenuous and argued that the Court should defer to the agency's construction of its "good-faith reasonable doubt" standard in light of the agency's "specialized knowledge of the workplace."

Allen town Mack Sales is significant because it (1) embraces a robust form of "substantial evidence" review, (2) rejects the agency's interpretation of its own legal standard, and (3) discusses the evils of administrative duplicity. In addition, the case is another example of the Court's trend to use dictionary definitions to over-ride administrative interpretations of statutes.

Social security practitioners should be alert to the holding in Forney v. Commissioner of Social Security. In this case the Court allowed a social security disability claimant to appeal a federal district court order remanding the case to the agency. Forney's complaint asked the court to reverse outright the agency decision to deny her disability benefits or, in the alternative, to remand the case to the agency for further proceedings. The Ninth Circuit decided that, because Forney might on remand secure all the relief sought, she was a prevailing party and therefore was not allowed to appeal. A unanimous Supreme Court, reversing the Ninth Circuit, noted that from Forney's perspective the second (remand) alternative meant further delay and risk and was only half a loaf. As such, she obtained some but not all of the relief she requested and therefore was allowed to appeal

The decision brings social security disability cases in line with other cases that find a right to appeal in comparable circumstances. While the Court previously upheld the government's right to

60 Id. at 826.
61 Id.
62 Id. at 827.
63 Id. at 828.
64 Id. at 833 (Breyer, J., dissenting). Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg.
65 Id. at 834. Justice Breyer referred to "settled principles permitting agencies broad leeway to interpret their own rules." Id.
69 Forney, 118 S. Ct. at 1987-88.
70 For a listing of these cases see id.
appeal remand orders in social security cases, it did so without addressing the issue of whether claimants enjoyed the same right. Forney affirmatively addresses this issue.\(^{71}\)

### III. Federal Court Removal

Another significant decision set in an administrative context but with broader jurisdictional implications was the holding in *City of Chicago v. International College of Surgeons.*\(^{72}\) In a decision that the dissent called a watershed and a landmark,\(^{73}\) the Court held that federal district courts had removal jurisdiction over appeals of local administrative action when the complaint included federal claims.\(^{74}\) By implicit extension, the dissent observed, the Court approved this enlargement of district court authority in diversity cases.\(^{75}\)

When Chicago denied a demolition permit, the property owners—two organizations—sought review of the denial in state court and also raised federal due process and equal protection claims.\(^{76}\) Analyzing the city’s removal of the case to federal court, the Supreme Court in a 7-2 decision authored by Justice O’Connor began with the traditional observation that “[t]he propriety of removal [under 28 U.S.C. § 1441(a)] depends on whether the case originally could have been filed in federal court.”\(^{77}\) Proceeding to that question, the Court held that plaintiffs’ inclusion of federal constitutional claims meant that the case arose under federal law.\(^{78}\)

Moving to the state law claims, the Court concluded that the supplemental jurisdiction statute\(^{79}\) gave the district court the discretion to exercise jurisdiction over the appeal of the administrative decision.\(^{80}\)

The majority expressly rejected the plaintiffs’ contention that because a state judicial review proceeding was deferential to the administrative determination it was a form of appeal, rather than a civil action of which the district courts of the United States had original jurisdiction under 28 U.S.C. § 1441(a).\(^{81}\) This is “reasoning [from] an erroneous premise,”\(^{82}\) the majority emphasized, since the initial focus is not on the state claims but on the federal constitutional claims: Nothing in the jurisdictional statutes suggests that the presence of state law claims somehow alters the fact that plaintiffs’ complaints, by virtue of their federal claims, were “civil actions” within the federal courts’ “original jurisdiction.”\(^{83}\) Only after federal jurisdiction has been established from the federal claims does the focus shift to the possibility of supplementary jurisdiction over the state administrative appeal.\(^{84}\)

Although the majority noted that a federal court might decline to exercise jurisdiction over the state claims for a number of reasons,\(^{85}\) the dissent nonetheless

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\(^{73}\) Id. at 534, 537 (Ginsburg, J., dissenting).

\(^{74}\) Id. at 528–29.

\(^{75}\) Id. at 534 (Ginsburg, J., dissenting).

\(^{76}\) Id. at 528.

\(^{77}\) Id. at 529 (citation omitted).

\(^{78}\) Id.

\(^{79}\) 28 U.S.C. § 1367. This provision “combines the doctrines of pendent and ancillary jurisdiction under a common heading.” *City of Chicago,* 118 S. Ct. at 530.

\(^{80}\) *City of Chicago,* 118 S. Ct. at 529–30; see also id. at 531.

\(^{81}\) Id. at 530, quoting 28 U.S.C. § 1441(a) (internal quotes omitted).

\(^{82}\) *City of Chicago,* 118 S. Ct. at 530.

\(^{83}\) Id.

\(^{84}\) Id. at 530–31.

\(^{85}\) Id. at 533–34.
viewed the potential ramifications of the Court’s holding as extraordinary. Terming this a “cross-system” appeal, the dissent pointed out that either party might now place in federal court a challenge to state administrative action (“this standard brand of appellate review”) whenever there was federal-question or diversity jurisdiction. The consequence will be that “federal courts may now directly superintend local agencies by affirming, reversing, or modifying their administrative rulings.”

Legal services advocates wishing to ensure that cases seeking judicial review of a state agency’s actions remain in state court should therefore be careful not to include federal claims. Conversely City of Chicago also makes clear that plaintiffs may file cases seeking review of state agencies in federal court if the complaint includes a federal claim. Supplemental jurisdiction should ordinarily be available to hear the pendent state claims as well.

Wisconsin Department of Corrections v. Schacht looked at the interplay between the federal removal statute and the Eleventh Amendment. Keith Schacht, alleging that his federal Constitutional and civil rights had been violated, filed his complaint against the Department of Corrections and individual corrections officers in state court. The defendants removed the case to federal court and, once there, in their answer asserted an Eleventh Amendment immunity to the claims. The district court agreed that the Eleventh Amendment prohibited it from hearing the claims. On appeal the Seventh Circuit asked whether removal had been legally permissible and ruled that the presence of even one claim barred by the Eleventh Amendment deprived the federal court of removal jurisdiction over the entire case. It remanded the case to state court.

A unanimous Supreme Court reversed the Seventh Circuit and found that the presence in an otherwise removable case of a claim that the Eleventh Amendment might bar did not destroy removal jurisdiction that would otherwise exist. The Court decided that the potential for an Eleventh Amendment bar did not deprive the federal court of jurisdiction pursuant to the removal statute, 28 U.S.C. § 1441(a), by noting that the Eleventh Amendment might be waived by the state and ignored by a federal court if not raised. Section 1441(a) allows a defendant to remove “any civil action brought in a State court of which the district courts of the United States have original jurisdiction.” The Court also discussed 28 U.S.C. § 1447(c), which provides that “iff at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” The Court decided that this section required remand only when the court lacked jurisdiction over the entire case and not simply of claims within a case.

Disappointingly the Court did not explain the fate of removed claims potentially barred by the Eleventh Amendment. In a concurring opinion Justice Kennedy suggested that by removing the case the state might be construed as waiving its Eleventh Amendment defense. He recognized, however, that this view

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86 Id. at 534 (Ginsburg, J., dissenting).
87 Id. at 534–35 (Ginsburg, J., dissenting).
88 28 U.S.C. § 1367. The supplemental jurisdiction statute does, however, permit courts to decline to exercise supplemental jurisdiction in a variety of circumstances. 28 U.S.C. § 1367(c).
90 Wisconsin Dep’t of Corrections, 116 F.3d 1151, 1152–53 (7th Cir. 1997).
91 Schacht, 118 S. Ct. at 2051.
92 In this case the federal court had original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.
93 Schacht, 118 S. Ct. at 2054.
94 Schacht did not challenge the district court’s dismissal of his claims against the state. Id. at 2049. Accordingly the Court’s discussion focused solely on whether the claims that were not barred by the Eleventh Amendment were properly removed.
95 Id. at 2054–55 (Kennedy, J., concurring).
would create tension with other statements of the Court suggesting that the sovereign immunity doctrine of the particular state determined whether the Eleventh Amendment defense had been waived.  
If the Eleventh Amendment defense were not considered waived, presumably a court would have to dismiss claims against the state or remand them back to state court. Under principles of res judicata a dismissal based on the Eleventh Amendment would be without prejudice. However, refiling in state court raises the possibility that the defendant will again remove to federal court if federal claims are present. Such a course would create a cycle of removal, dismissal, refiling, and removal until the statute of limitations put an end to the exercise. Presumably the courts would not permit such unfairness.

There is lower court authority for remanding claims subject to the Eleventh Amendment to the state court where the case is originally filed. As noted above, in Schacht, however, the Court stressed that the principal statute authorizing remands, 28 U.S.C. § 1447(c), referred to remanding "cases" rather than "claims." Nonetheless, the Court mentioned that remanding the barred claims was conceivable and did not resolve the issue. After Schacht what is certain, however, is that there will be further litigation about what happens to claims that are subject to Eleventh Amendment immunity and removed to federal court.

**IV. Legislative Immunity and Tribal Immunity**

In an unsurprising but important immunity decision, Bogan v. Scott-Harris, the Court finally resolved the question of whether local officials performing legislative functions were entitled to the same absolute immunity enjoyed by federal, state, and regional legislators. Writing for a unanimous court, Justice Thomas concluded unequivocally that they did.

The facts of the case and the partial victory for the respondent, Janet Scott-Harris, in the district and circuit courts below suggested the prospect of a different outcome on the immunity issue. Scott-Harris was the administrator of the Falls River, Massachusetts. During her tenure she received a complaint that a city employee temporarily under her supervision had made repeated racial and ethnic slurs about her colleagues. Scott-Harris prepared to terminate the employee, who then turned to local city officials to intervene. The city council conducted a hearing on the charges against the employee and ultimately accepted a settlement under which the employee was not terminated but was instead suspended without pay for 60 days.

While the political cross fire involving the employee played itself out, Mayor

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98 Id. at 2056 (citing Ford Motor Co v. Department of Treasury of Ind., 323 U.S. 459 (1945)). Of course, there may well be principles of state law suggesting that removal would constitute a waiver of sovereign immunity.


100 Schacht does not hold that an action consisting solely of claims barred by the Eleventh Amendment is removable. However, it does contain language which suggests that the Eleventh Amendment is simply irrelevant to the issue of whether a case may be removed. 118 S. Ct. at 2052-53 (describing the possibility of Eleventh Amendment immunity as an event that may later affect the court's jurisdiction, rather than a jurisdictional bar that is present from the beginning of the case).

101 Id. at 2054.


103 Id. at 969.

104 Id.
Bogan prepared a city budget proposal that froze the salaries of all municipal employees and eliminated 135 city positions. The proposal included the Department of Health and Human Services, of which Scott-Harris was the sole employee. The city council eventually approved the proposal, and the mayor signed off on a city ordinance eliminating the department. The upshot was that Scott-Harris was terminated, while the errant employee she had sought to terminate for making racially offensive remarks was not.  

Scott-Harris turned to federal court to remedy her perceived wrong. Alleging that the elimination of her position was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights, she filed suit under Section 1983 against the city and several city officials. The district court before and after trial denied defense assertions of legislative immunity. Upon trial by jury a verdict was returned in favor of all defendants on the charge of racial discrimination, but the city and city officials were found liable for violations of Scott-Harris’s First Amendment rights. On appeal the First Circuit set aside the verdict against the city but upheld the judgments against Mayor Bogan and Marilyn Roderick, chair of the city council committee that promulgated the ordinance eliminating Scott-Harris’s position. While it recognized that these city officials enjoyed “absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities,” the First Circuit held that their challenged conduct was not authentically legislative.  

A unanimous Supreme Court reversed. Justice Thomas, acknowledging that the Court had left open the question whether the rule of absolute legislative immunity reached down as far as local officials, set to rest theories contrary to its application in this context:  

Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under §1983 for their legislative activities.  

The Court at least addressed the traditional distinction between discretionary legislative acts of officials to which absolute legislative immunity applies and mere ministerial acts to which it does not. Recognizing the distinction, the Court then directly answered the question of whether the actions of the local officials in this case, stripped of all considerations of intent and motive, were legislative. The Court had little trouble concluding that they were.  

On a different front the Supreme Court revisited the doctrine of sovereign immunity enjoyed by Native American tribes, a frequent issue before the Court in recent years. The result in Kiowa Tribe of Oklahoma v. Manufacturing Technologies was less significant for its ultimate legal holding and more surprising for its apparent political implications. The facts and holding in Kiowa Tribe of Oklahoma are straightforward. The tribe defaulted on an “off-reservation” $285,000 promissory note with the respondent company, which then sued the tribe in Oklahoma state court. The tribe then moved to dismiss in part on the ground of sovereign immunity from suit. The state trial court denied the motion and eventually entered judgment against the tribe. On appeal the Oklahoma Court of Appeals affirmed and held that the tribe was subject to suit for breaches of contract involving off-reservation commercial conduct.

\[105\] Id.  
\[106\] See Scott-Harris v. City of Falls River, 134 F.3d 427 (1st Cir. 1997).  
\[107\] Id. at 440.  
\[108\] Bogan, 118 S. Ct. at 970.  
\[109\] Id. at 973.  
\[111\] Id. at 1702.
The tribe sought and found solace in the Supreme Court. In a 6-3 decision it reversed the Oklahoma judgment. Writing for the majority, Justice Kennedy offered the tribe the good news that, in the absence of congressional authorization to sue or tribal waiver of immunity, the Court still adhered to the long-standing judicial doctrine of tribal sovereign immunity from suit. The immediate significance of the Kiowa Tribe case is that the Court confirmed that the doctrine of tribal sovereign immunity applied whether or not the conduct or activity at issue was governmental or commercial, or whether the conduct was on or off the reservation.

The bad news for Native American tribes is the overt concession by the majority and the flat-out assertion by the dissent that the doctrine of tribal sovereign immunity is of questionable value and validity. Much of the majority opinion is a summation of the judicial origins of the doctrine, which, while long recognized and settled, is admitted to have developed almost by accident. The Court stated that the doctrine was premised on a case that was not a reasoned statement of doctrine and for which there were reasons to doubt the wisdom of perpetuating it. No doubt, Native American tribes will take limited comfort in a majority opinion that "these considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule." Having decided to punt on abrogation, the majority left it to Congress to rectify the problems and inequities ostensibly caused by the doctrine.

The three-member dissent written by Justice Stevens agreed with the majority that to repudiate the doctrine entirely was now too late, but he resisted the further expansion of the doctrine to provide immunity from suit for off-reservation conduct. Justice Stevens had three criticisms. First, the Court is performing what is essentially a legislative act that preempts state power. Second, adoption of the expanded rule of immunity is an anomaly. Justice Stevens asked, "Why should an Indian tribe enjoy broader immunity than the States, the Federal government, and foreign nations?" Third, the rule is unjust because it leaves injured parties without a remedy against tribal sovereigns, even in instances where the tribe engaged in voluntary contractual relationships.

V. Standing and Ripeness

Three decisions this term about standing are of note. In National Credit Union Administration v. First National Bank & Trust Co., the Court in a 5-4 decision ruled on prudential standing and, depending on whom one believes, the Court may or may not have "eviscerated[the] zone-of-interests requirement." The majority, in an opinion by Justice Thomas, at least attempted to clarify the standard for analyzing that element of standing.

The decision grew out of a suit by several banks against the federal agency that administers the Federal Credit Union Act. The suit challenged the agency's decision to allow credit unions a more expansive membership and thereby greater competition with banks. The court noted

112 Id. at 1705.
113 Id.
114 See id. at 1705-8 (Stevens, J., dissenting).
115 Id. at 1703.
116 Id. at 1704.
117 Id.
118 Id. at 1705.
119 Id.
120 Id. at 1705-8 (Stevens, Thomas, and Ginsburg, JJ., dissenting).
121 See id. at 1708.
123 Id. at 940 (O'Connor, J., dissenting). Cf. id. at 936 n.7 ("[c]ontrary to the dissent's contentions, . . . our formulation does not 'eviscerate[,] or 'abolish[,] the zone of interests requirement'.")
that, in addition to the constitutional requirement of an injury in fact, a "prudential standing" requirement of section 10(a) of the Administrative Procedure Act that "the interest sought to be protected . . . must be arguably within the zone of interests to be protected or regulated by the statute . . . in question" must be met by plaintiffs. The majority then toured the Court's "prudential standing" decisions of the last thirty years in search of a clear rule.

After this review, which is a useful guide to understanding the arcana of prudential standing, the Court offered a two-step reformulation of the test:

[In applying the "zone of interests" test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests "arguably . . . to be protected" by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them.]

That Congress' goal was to limit the markets available to federal credit unions was at least arguable, the Court concluded, although Congress might not have specifically intended to benefit commercial banks through the statute at issue. Since plaintiffs also had an interest in limiting the markets that credit unions might serve, their interests arguably fell within the "zone of interests" protected by the statute. The majority emphasized that whether the legislation was directed at the competitive interests of commercial banks was unimportant and that Congress under its precedents did not specifically intend to protect commercial banks in enacting the Federal Credit Union Act was irrelevant.

Although the majority termed its disagreement with the dissent as semantics, the dissent viewed the new formulation in drastic terms: "Every litigant who establishes injury in fact under Article III will automatically satisfy the zone-of-interests requirement, rendering the zone-of-interests test ineffectual." Indeed, the majority opinion places extraordinary emphasis on the word "arguably" from the zone-of-interests test. The word, whether alone or as part of a shorthand, was repeated often throughout the majority decision. Consequently whatever the precise contours of the zone-of-interests test, and even if the dissent overstated the result, plaintiffs appear to have gained increased leeway to demonstrate that the statute on which they are relying may be stretched to provide a litigating hook. At the very least, National Credit Union Administration offers useful language to fight some of the standing battles that agencies regularly force.

The Court continued to adhere to this broad view of "prudential standing" requirements in another decision issued

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124 id. at 933.
127 National Credit Union Admin., 118 S. Ct. at 933.
128 See id. at 933–35.
129 Id. at 935; see also id. at 936 n.7.
130 Id. at 935–36.
131 Id.
132 Id. at 938.
133 Id. at 936 n.7.
134 Id. at 941 (O'Connor, J., dissenting).
135 As one court has since noted: "This analysis focuses, not on those wholel Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects." Moya Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1075 (D.C. Cir. 1998).
later in the term. In *Federal Election Commission v. Akins* [136] the Court by a 6-to-3 majority allowed voters to challenge a decision by the Federal Election Commission that the American Israel Public Affairs Committee was not subject to the disclosure and reporting requirements of federal election laws. [137] Plaintiffs—political opponents of the committee—filed with the commission a complaint stating that the American Israel Public Affairs Committee was a "political committee" and was thus required to disclose its membership, contributions, and expenditures. [138] The commission rejected the complaint, and plaintiffs filed suit. [139]

Noting that the statute provided a right of action to "aggrieved" parties, the majority concluded that voters who had unsuccessfully filed complaints with the commission were "aggrieved" by the commission’s rejection of their complaint. [140] Writing for the Court, Justice Breyer noted that "[h]istory associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested." [141] The Court relied on this statutory language to distinguish cases generally prohibiting parties from challenging administrative decisions not to take enforcement action. [142]

*Akins* also addressed the standing requirements of Article III. The Court concluded that denial of access to information about the American Israel Public Affairs Committee’s political expenditures constituted a sufficiently concrete grievance to satisfy Article III. [143] Justice Breyer wrote that "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress

of constitutional power to authorize its vindication in the federal courts." [144]

In *Steel Co. v. Citizens for a Better Environment*, [145] however, the Court took a narrower approach to standing under Article III; it reemphasized that the relief sought must provide redress for the plaintiffs’ injury. In *Steel Co.*, the Court considered whether plaintiffs, under the citizen-suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), [146] could challenge a steel manufacturer’s past failure to report timely the presence of hazardous waste and toxic chemicals. Prior to the lawsuit’s filing, the steel company filed seven years’ worth of overdue environmental reports. [147] Plain-

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[137] Id.
[138] Id. at 1781–82.
[139] Id.
[140] Id. at 1783.
[141] Id. The Court concluded that the plaintiff voters were arguably within the zone of interests protected by the statute because the statute sought to give voters the information at issue. Id. at 1783–84.
[142] Id. at 1787. E.g., in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court concluded that administrative decisions concerning enforcement are traditionally committed to the discretion of the agency and are therefore not subject to judicial review under the Administrative Procedure Act. See 470 U.S. at 832. In dissent Justice Scalia noted how the Court’s holding departed from the general rule that parties may not sue an executive agency for failure to enforce a rule against a third party. *Akins*, 118 S. Ct. at 1789 (Scalia, J., dissenting). He disagreed that the plaintiffs were "aggrieved" within the meaning of the statute. Id.
[143] *Akins*, 118 S. Ct. at 1786.
[144] Id. Not surprisingly the dissent found the plaintiffs’ injury to be too generalized to satisfy the requirements for standing. Id. at 1791.
[147] *Steel Co.*, 118 S. Ct. at 1009.
tiffs did not allege a continuing violation or an imminence of future violations.\textsuperscript{148} However, they did seek an award of penalties for the past violations, as provided for by EPCRA.\textsuperscript{149}

There lay the rub. The Court concluded that the relief sought in the complaint was insufficient to satisfy the case-and-controversy requirement of Article III.\textsuperscript{150} The Court unanimously agreed that the case should be dismissed but strongly disagreed on how this conclusion should be reached. Justice Scalia, writing the opinion of the court, cited the “absolute purity of the rule that Article III jurisdiction is always an antecedent question.”\textsuperscript{151} He opined that plaintiffs lacked standing to sue because they failed under \textit{Lujan v. Defenders of Wildlife}\textsuperscript{152} to show a likelihood that the requested relief would redress the alleged injury.\textsuperscript{153} None of the relief sought and none that the court could envision as appropriate “would serve to reimburse [plaintiffs] for losses caused by the late reporting, or to eliminate any effects of that late reporting upon [them].”\textsuperscript{154} More pointedly, the Court concluded that plaintiffs’ demand for payment of civil penalties authorized under EPCRA did not confer standing because such financial penalties were not payable to them:

[The civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties—the only damages authorized by EPCRA—are payable to the United States Treasury. In re-

Justice Scalia observed that this “psychic satisfaction” that justice would be served did not confer redressability.\textsuperscript{155}

Justices Stevens, Souter, and Ginsburg concurred with the judgment but not with Justice Scalia’s approach. They would have ruled that plaintiffs failed to state a cause of action because Congress never intended EPCRA to confer federal jurisdiction over citizen suits for wholly past violations.\textsuperscript{156}

The Court also issued two significant decisions on ripeness. In \textit{Ohio Forestry Association v. Sierra Club} the Court held that a federal agency’s adoption of a plan that makes it more likely that harm will occur to plaintiffs does not make the agency’s action ripe for court review.\textsuperscript{158}

The Sierra Club challenged the U.S. Forest Service’s adoption, for Ohio’s Wayne National Forest, of a land and resource management plan that made logging more likely to occur. Before logging could occur, however, the Forest Service had to follow additional procedural requirements, including specifying a site, conducting an environmental analysis, and giving affected parties notice and an opportunity to be heard.\textsuperscript{159}

In a unanimous opinion the Court ruled that the Forest Service’s decision was not ripe for review because under

\textsuperscript{148} \textit{id. at} 1019.
\textsuperscript{149} \textit{id. at} 1018.
\textsuperscript{150} \textit{See id. at} 1018–19.
\textsuperscript{151} \textit{id. at} 1016.
\textsuperscript{153} \textit{See Steel Co.}, 118 S. Ct. at 1016–20.
\textsuperscript{154} \textit{id. at} 1018.
\textsuperscript{155} \textit{id. at} 1019.
\textsuperscript{156} \textit{id. at} 1031.
\textsuperscript{157} \textit{Ohio Forestry Ass’n v. Sierra Club}, 118 S. Ct. 1665 (1998).
\textsuperscript{158} \textit{id. at} 1668–89.
the rule in *Abbott Laboratories v. Gardner* it failed to satisfy the three-prong test for ripeness. Under *Abbott Laboratories* to determine ripeness a court must consider whether (1) delayed review would cause hardship to the plaintiffs; (2) judicial intervention would inappropriately interfere with further administrative action; and (3) the courts would benefit from further factual development of the issues presented. In *Ohio Forestry Association* the Court ruled that Sierra Club must wait until harm is more imminent and certain because the plan itself did not authorize logging.

If anything, *Ohio Forestry Association* is a humbling lesson on the importance of carefully drafted pleadings. The Court ruled that it could not consider the Sierra Club’s admittedly meritorious arguments regarding other ways in which plaintiffs were suffering immediate harm because those other ways were not mentioned in the complaint or briefs previously submitted to the lower courts. As a practical matter, the result in *Ohio Forestry Association* also suggests that it will be difficult to bring legal challenges to broad plans, as opposed to piecemeal decisions implementing such plans, notwithstanding that to demonstrate the cumulative adverse impact of the individual decisions may be difficult.

Finally in *Calderon v. Ashmus* the Court dismissed as unripe a lawsuit seeking a declaratory judgment as to whether California had complied with certain provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) that would enable it to impose a 180-day statute of limitations on federal habeas corpus review death penalty cases. Under the Act, states that establish a mechanism for the appointment and compensation of competent counsel to capital defendants in postconviction proceedings may take advantage of an expedited review procedure, including a shortened time period for seeking review, for federal habeas petitions. California’s attorney general announced that the state considered itself in compliance with these conditions and that it therefore intended to take advantage of the expedited review procedure. Plaintiffs, a class of death row inmates, filed suit seeking a declaration that California was not in compliance with the conditions of the antiterrorism act and thus could not insist on limiting prisoners to a 180-day filing period.

The Court held the case to be nonjusticiable until California actually sought to invoke the 180-day filing limit. Justice Rehnquist wrote for a unanimous court and rejected the inmates’ argument that California’s assertion of an intent to apply the 180-day rule effectively imposed the rule because an inmate could not afford to miss the deadline to test whether California was entitled to insist on the shorter filing period. The Court viewed the fact that California’s claim placed inmates in a difficult dilemma to be of no moment.

Justices Breyer and Souter concurred in the Court’s opinion and added that because the antiterrorism act also subjected amendments to petitions to the shortened filing period, California’s compliance could be tested by an inmate seeking to amend a timely petition.

Thus an inmate need not miss the 180-day deadline to litigate the issue.

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161 *Ohio Forestry Ass’n*, 118 S. Ct. at 1670–72.
162 *Abbott Labs.*, 387 U.S. at 148–49.
163 *Ohio Forestry Ass’n*, 118 S. Ct. at 1670.
164 *Id.* at 1672–73.
168 *Id.* at 1699.
169 *Id.* at 1700 (Breyer, J., concurring).
VI. Conclusion

These twelve Supreme Court decisions are some of the most important cases decided this term for poverty law advocates concerned about their clients’ access to federal courts. Looking to the next term, the Court carried over at least one case (in which certiorari has been granted) that places a significant federal court access issue on the Court’s docket. Ortiz v. Fibreboard\textsuperscript{170} is an asbestos class action case in which the Court is expected to expound further upon issues it addressed last year in Amchem Products v. Windsor.\textsuperscript{171} In Fibreboard the Fifth Circuit reaffirmed a large class action settlement, distinguishing Amchem on the ground that the class in Fibreboard had been certified under Rule 23(b)(1) rather than the provision at issue in Amchem, which was Rule 23(b)(3).\textsuperscript{172} Accordingly the Court will be called upon to examine some of the broader implications of Amchem.

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\textbf{Fifth Clearinghouse Web Site Discussion}

The fifth in the Clearinghouse’s Web site discussion series is based upon “The Supreme Court’s 1997–98 Term: The Texas Interest on Lawyers’ Trust Account Case and Others Affecting Access to Justice.” The article’s authors, Gill Deford, Matthew Diller, Deborah Goldberg, Brian Lawlor, Jane Perkins, and Yolanda Vera, go on line to the Clearinghouse Web site to answer questions about Supreme Court cases such as Phillips v. Washington Legal Foundation, the decision regarding Interest on Lawyers’ Trust Account funds. Enter www.nclslplp.org to view discussion messages, respond to them, and add your own. The discussion is now open.

\textsuperscript{170}Ortiz v. Fibreboard, No. 97-1704 (cert. granted June 22, 1998); see In re Asbestos Litigation, 134 F.3d 668 (5th Cir. 1998).

\textsuperscript{171}Amchem Products v. Windsor, 117 S. Ct. 2231 (1997).

\textsuperscript{172}In re Asbestos, 134 F.3d at 668.