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THE U.S. SUPREME COURT'S 2009 TERM

Justice Stevens's Last Round in the Access Battle

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During the 2009 Term the U.S. Supreme Court issued a number of noteworthy opinions—perhaps the most critical was a 5-to-4 decision declaring unconstitutional federal law that set limits on election advertising.[1] Aside from the possibility of a sleeper case, the Supreme Court did not make a landmark ruling affecting access to the courts. But the Court did rule on a number of access issues, including enforcement of arbitration agreements, interlocutory appeals, and attorney fees. We analyze the Court's decisions on these and other access issues. As this discussion reflects, the most significant event of the Term was the departure of Justice John Paul Stevens. His reasoned opinions and dustups with the usual five-member majority will be missed.

Arbitration

Mandatory arbitration agreements can be problematic. Individuals are often asked to sign agreements to arbitrate in order to get something that they need immediately, for example, health care or a job. The agreement to arbitrate steers disputes that may arise out of that employment or provision of health care to an arbitrator and forecloses the individual's access to the courts. There is a growing effort by employers to limit their employees' access to the courts for the resolution of workplace disputes through compulsory arbitration clauses in employment agreements. This effort was bolstered by the Supreme Court's decision in *Rent-A-Center West Incorporated v. Jackson*, a decision that could affect the ability to challenge arbitration agreements in general.[2]

Antonio Jackson filed a lawsuit against his former employer, Rent-A-Center; he alleged race discrimination and retaliation.[3] Rent-A-Center filed a motion to compel arbitration of the claims pursuant to a "Mutual Agreement to Arbitrate Claims" signed by Jackson as a condition of his employment.[4] The agreement required arbitration

[1] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). Before deciding, the U.S. Supreme Court ordered reargument and supplemental briefing. Justice Stevens "emphatically dissent[ed]" from the principal holding; he noted that, in an "unusual and inadvisable" procedure, "we have asked ourselves" to decide the case on a basis relinquished below (*id.* at 931 (Stevens, J., concurring in part and dissenting in part)).

[2] *Rent-A-Center West Incorporated v. Jackson*, 130 S. Ct. 2772 (2010).

[3] *Id.* at 2775.

[4] *Id.*

of all "past, present, or future disputes arising out of Jackson's employment with Rent-A-Center."[5] The Court, quoting from the Mutual Agreement, set forth the pertinent clause regarding enforceability:

> "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."[6]

Jackson opposed arbitration on the ground that the agreement was unenforceable under Nevada law because it was unconscionable.[7] The district court granted Rent-A-Center's motion to compel arbitration; the court found that the agreement delegated exclusive authority to the arbitrator to decide issues of the arbitration agreement's enforceability.[8] On appeal the Ninth Circuit reversed the district court. A divided panel of the Ninth Circuit held that "where 'a party challenges an arbitration agreement as unconscionable, and thus asserts he could not meaningfully assent to the agreement, the threshold determination is for the courts.'"[9]

In a 5-to-4 decision, with Justice Scalia writing for the majority, the Court reversed the Ninth Circuit and concluded that the agreement validly compelled arbitration.[10] The Court first reviewed Section 2 of the Federal Arbitration Act, which requires courts to enforce arbitration agreements according to their terms.[11] The enforcement of an arbitration agreement is subject to challenge, the Court stated, "by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"[12] The Court recognized two types of "validity" challenges to arbitration agreements: (1) a challenge "specifically" to "the validity of the agreement to arbitrate" and (2) a challenge to "the contract as a whole" (e.g., based upon claims of unconscionability).[13] In reaching its conclusion, the Court relied on language from a 1967 case interpreting the Federal Arbitration Act—a case not cited by the parties.[14] The Court could not, Justice Scalia concluded, review whether the arbitration agreement's delegation of enforceability disputes to the arbitrator was valid because Jackson did not specifically challenge the section making that delegation. Nor did the Federal Arbitration Act allow the Court to entertain Jackson's challenge to the agreement as a whole. Such a broader challenge, the Court found, had also been delegated to the arbitrator by the arbitration enforceability section.[15] The Court explained that, "unless Jackson challenged the delegation process specifically, we must treat it as valid under [Section] 2 [of the Federal Arbitration Act], and must enforce it under [Sections] 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."[16] And, after perusing the plaintiff's arguments in response to the motion to compel arbitration, the Court

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* (quoting *Rent-A-Center West Incorporated v. Jackson*, 581 F.3d 912, 917 (9th Cir. 2009)).

[10] *Id.* at 2776–81.

[11] Federal Arbitration Act, 9 U.S.C. §§1–16, 2.

[12] *Rent-A-Center West Incorporated*, 130 S. Ct. at 2776 (quoting *Doctor's Associates Incorporated* v. *Casarotto*, 517 U. S. 681, 687 (1996)).

[13] *Id.* at 2778 (quoting *Buckeye Check Cashing Incorporated v. Cardegna*, 546 U.S. 440, 444 (2006)).

[14] *Id.* (citing *Prima Paint Corporation v. Flood and Conklin Manufacturing Company*, 388 U.S. 395 (1967)).

[15] *Id.* (citing *Prima Paint*, 388 U.S. at 403–4).

[16] *Id.* at 2779.

found that the district court correctly concluded that Jackson challenged only the validity of the contract as a whole, not the delegation provision in particular.[17]

Justice Stevens, joined by three colleagues, published an acerbic dissent, noting that "[n]either petitioner nor respondent has urged us to adopt the rule the Court does today."[18] The majority's reliance upon language in a seldom-cited 1967 opinion, Stevens stated, "takes us down a different path, one neither briefed by the parties nor relied upon by the Court of Appeals."[19] He concluded that the Court "has unwisely extended a 'fantastic' and likely erroneous decision."[20]

Sovereign Immunity

The Supreme Court in *Alabama v. North Carolina* decided a skirmish among Southeastern states over the placement of a low-level radioactive waste disposal facility.[21] When it was North Carolina's turn under a regional compact to play host to the dump, the state balked. The other states participating in the compact, along with the Southeast Interstate Low-Level Radioactive Waste Management Commission, sought to enforce the compact. The case arose under the Court's original jurisdiction.[22]

Most of the Court's opinion interprets the applicable statutes and the compact itself. But North Carolina also argued that the commission's claims were barred by the Eleventh Amendment to the Constitution and principles of state sovereign immunity.[23] A seven-member majority rejected that argument. Writing for the Court, Justice Scalia relied heavily upon another original-jurisdiction case, *Arizona v. California*.[24] *Arizona* held that the Eleventh Amendment did not bar the participation of several Indian Tribes in an action against California, where the United States had already intervened and the Tribes did not seek to bring new claims against the states.[25] As in *Arizona*, participation of the commission in the action against North Carolina was not barred "so long as the Commission asserts the same claims and seeks the same relief as the other plaintiffs."[26] The Court rebuffed North Carolina's citation of recent Court opinions construing sovereign immunity as a "personal privilege" of the State: "That sovereign immunity is a personal privilege of the States says nothing about whether that privilege 'is not compromised' by an additional, non-sovereign plaintiff's bringing an entirely overlapping claim for relief that burdens the State with no additional defense or liability."[27] Chief Justice Roberts and Justice Thomas dissented from this part of the opinion; they called *Arizona* a "mistake" because the Eleventh Amendment provides "immunity from suit" and does not include a "carve-out" for overlapping, private-party suits.[28]

Interlocutory Appeal

For her first opinion as a justice on the Supreme Court, Justice Sotomayor delivered *Mohawk Industries v. Carpenter*,

[17] *Id.*

[18] *Id.* at 2781 (Stevens, J., dissenting). Justice Stevens was joined in his dissent by Justices Ginsberg, Breyer, and Sotomayor.

[19] *Id.* at 2785.

[20] *Id.* (citing *Prima Paint*, 388 U.S. at 407 (Black, J., dissenting)).

[21] *Alabama v. North Carolina*, 130 S. Ct. 2295 (2010).

[22] *See* U.S. Const., art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

[23] *Alabama*, 130 S. Ct. at 2314.

[24] *Arizona v. California*, 460 U.S. 605 (1983).

[25] *Alabama*, 130 S. Ct. at 2314 (citing *Arizona*, 460 U.S. 605 (1983)).

[26] *Id.*

[27] *Id.* at 2315 (quoting *Arizona,* 460 U.S. at 614; distinguishing *Alden v. Maine*, 527 U.S. 706 (1999) and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999)).

[28] *Id.* at 2318 (Roberts, C.J., concurring in part and dissenting in part).

holding that discovery orders requiring disclosure of information allegedly protected by the attorney-client privilege are not immediately appealable.[29] The unanimous decision resolved a circuit split.[30]

Although final decisions are what typically trigger an appeal, the Court developed a collateral order doctrine as announced in *Cohen v. Beneficial Industrial Loan Corporation*.[31] The collateral order doctrine allows interlocutory review for a "small class" of rulings that (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment.[32] Justice Sotomayor's decision focused on the third prong of the doctrine. She concluded that there were adequate avenues for review of a discovery order regarding attorney-client privilege apart from collateral appeal, including requesting certification under 28 U.S.C. § 1292(b); petitioning the court of appeals for a writ of mandamus; and defying the order and incurring sanctions, which can be directly appealed.[33] In analyzing whether the third prong applies, the Court looks at whether the "class of claims" can be adequately vindicated by other means and not whether an individual, particular injustice can be averted, the Court emphasized in reaching its conclusion.[34] The Court noted that the need to keep the interlocutory class small had acquired special force in recent years. Congress amended the Rules Enabling Act in 1990 to authorize the Court to adopt rules for interlocutory appeals, and that process warranted "full respect" from the Court.[35]

Statutes of Limitations

This Term's cases included a decision that discusses limitations periods and equitable tolling: *Dolan v. United States*.[36] In *Dolan* the Supreme Court examined an unusual timeline prescribed by the Mandatory Victims' Restitution Act, which requires federal courts in criminal cases to "set a date for the final determination [for restitution] of the victim's losses, not to exceed ninety days after sentencing."[37] After sentencing the criminal defendant, the district court below set a date for the restitution hearing that was three months after the ninety-day deadline had expired.[38] The defendant argued at the restitution hearing that the court lacked the authority to impose a restitution order.[39] The district court disagreed and imposed a restitution order; on appeal the Tenth Circuit affirmed.[40] Certiorari was granted to resolve a circuit conflict.[41]

Justice Breyer, writing for a five-member majority, began his opinion by helpfully describing three types of judicial deadlines and the consequences which obtain

[29] *Mohawk Industries v. Carpenter*, 130 S. Ct. 599 (2009).

[30] *Id.* at 604 n.1.

[31] *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949).

[32] *Mohawk Industries*, 130 S. Ct. at 604 (citing *Cohen*, 337 U.S. 541 (1949)).

[33] *Id.* at 607–8; see 28 U.S.C. § 1292(b).

[34] *Id.* at 605–6.

[35] *Id.* at 609 (quoting *Swint v. Chambers County Commission*, 514 U.S. 35, 42 (1995)). While stopping short of calling for *Cohen* to be overruled, Justice Thomas wrote separately to express strong support for making changes through the adoption of rules pursuant to the Rules Enabling Act and not through Court opinions (*id.* at 609–12 (Thomas, J., concurring in part and concurring in the judgment)).

[36] *Dolan v. United States*, 130 S. Ct. 2533 (2010).

[37] Section 206(a) of the Mandatory Victim's Restitution Act of 1996, 18 U.S.C. § 3664(d)(5).

[38] *Dolan,* 130 S. Ct. at 2537.

[39] *Id*.

[40] *Id.*

[41] *Id.*

when these deadlines are not met.[42] The first category involves statutory timelines that impose "jurisdictional conditions upon, for example, a court's authority to hear a case, to consider pleadings, or to act upon motions that a party seeks to file."[43] The "expiration of a 'jurisdictional' deadline prevents the court from permitting or taking the action" at issue.[44] The Court went on to say: "The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons."[45]

The second category of deadlines involves "more ordinary 'claims-processing rules,' rules that do not limit a court's jurisdiction, but rather regulate the timing of motions or claims brought before the court."[46] In such cases, unless a party alerts the court that the deadline has been missed, the party forfeits the deadline's protection.[47] The third category of deadlines is the deadline that "seeks speed by creating a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take action to which the deadline applies if the deadline is missed."[48]

After examining the language and purposes of the Mandatory Victims' Restitution Act, the majority concluded that its time limitation fit into the third category of limitations: "The fact that a sentencing court misses the statute's 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution."[49] The Court cited several considerations in support of its conclusion, including that the Mandatory Victims' Restitution Act specified no consequences for noncompliance with the deadline and that the primary harm from a missed deadline would fall upon the victims of crime who were the intended beneficiaries of the Act and who were not responsible for the default.[50]

Relation Back Under Rule 15

In an opinion that Justice Sotomayor authored and that would have been unanimous but for Justice Scalia's dislike of one authority relied on, the Supreme Court resolved the tension among the circuits over the extent of Rule 15(c)(1)(C)(ii) of the Federal Rules of Civil Procedure.[51] *Krupski v. Costa Crociere S.p.A.* involved a slip-and-fall on a cruise ship, which led to a timely filed complaint against Costa Cruise Lines.[52] Unfortunately for the plaintiff, Costa Cruise Lines was merely the North American agent for the actual carrier, Costa Crociere, an Italian corporation.[53] After the limitations period had expired, the American company informed Krupski's attorney that the wrong defendant had been sued. Upon the filing of an amended complaint, Costa Crociere moved to dismiss on the ground that the amended complaint did not relate back and was therefore untimely.[54] The district

[42] *Id.* at 2538–39.

[43] *Id.* at 2538 (citing *Reed Elsevier Incorporated v. Muchnick*, 130 S. Ct. 1237, 1243–44 (2010) (for discussion of the term "jurisdictional").

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 2539.

[50] *Id.* at 2539–40.

[51] Fed. R. Civ. P. 15(c)(1)(C)(ii). Justice Scalia rejected the Court's reliance on the Notes of the Advisory Committee to the Federal Rules of Civil Procedure (*Dolan*, 130 S. Ct. at 2498 (Scalia, J., concurring in part and concurring in the judgment)).

[52] *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485 (2010).

[53] *Id.* at 2490–91.

[54] *Id.* at 2491.

court agreed, and the Eleventh Circuit affirmed.[55]

The main aspect of the rule at issue was the requirement that, to relate back, the newly named defendant "'knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.'"[56] In applying the rule, the Court of Appeals assessed the plaintiff's knowledge, which was in error. The Supreme Court stated, "Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known …, not what the *plaintiff* knew or should have known at the time of the filing of her original complaint."[57]

The Court pointed out that this reading of the rule is consistent both with the purpose of the rule's "relation back" and with the history of Rule 15(c)(1)(C). The purpose is "to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits."[58] Rule 15(c) was added in 1966 after many social security beneficiaries had lost their right to sue after naming as defendants the wrong agency or agency head and not discovering their mistake until after the statute of limitations had run out: "[T]he Advisory Committee clearly meant their filings to qualify as mistakes under the Rule."[59]

The Court also repudiated any suggestion that a district judge has the discretion to deny "relation back" if the plaintiff delays in filing the amended complaint. The rule has "an exclusive list of requirements for relation back," and the plaintiff's diligence is not one of them.[60] The Court stated that "the Rule mandates relation back once the Rule's requirements are satisfied."[61] The absence of discretion in the relation-back rule contrasts sharply, the Court noted, with the district court's discretion to allow a complaint to be amended under Rule 15(a).[62]

The short of it is that this decision sets the standard for application of the relation-back doctrine under Rule 15(c)(1)(C)(ii): "relation back … depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading."[63]

Mootness

In *Alvarez v. Smith* a unanimous Supreme Court decided that the case was moot.[64] At issue in *Alvarez* was an Illinois forfeiture law that permits a police officer to seize without a warrant movable property, such as a car, used to facilitate a crime. Under the law the state has nearly five months to begin judicial forfeiture proceedings, during which it can keep the property.[65] Six individuals filed suit in federal court after the police seized their property. They claimed that the state law violated the due process clause

[55] *Id.* at 2491–92.

[56] *Id.* at 2493 (quoting Fed. R. Civ. P. 15(c)(1)(C)(ii)).

[57] *Id.*

[58] *Id.* at 2494.

[59] *Id.* at 2495.

[60] *Id.* at 2496.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 2490. The Court reversed the lower courts and held that the Italian company should have known that Krupski had made a mistake in not naming it in the original complaint and that therefore the amended complaint related back and was timely (*id.* at 2497–98).

[64] *Alvarez v. Smith*, 130 S. Ct. 576 (2009).

[65] *Id.* at 578 (citing 720 Ill. Comp. Stat. 570/505 (2008)).

in the U.S. Constitution by denying them a speedy postseizure hearing and sought declaratory and injunctive relief.[66] The district court dismissed the case, but the Seventh Circuit decided the appeal in the plaintiffs' favor. The Seventh Circuit held that the statute's procedures showed "insufficient concern for the due process right of the plaintiffs," given the potential length of time between the seizure of the property and the opportunity to contest the seizure.[67] The Supreme Court granted review.

At oral argument counsel for both sides confirmed that there was no longer any dispute about ownership or possession of the seized property. The Court found the case moot because there was no longer an "actual controversy" between the parties about possession of the underlying property.[68]

None of the exceptions to mootness applied, the Court found. The plaintiffs pointed out that they had sought class certification. This was "beside the point," the Court stated, because the district court had denied the plaintiffs' certification motion and the plaintiffs had not appealed that denial.[69] The plaintiffs could not show that the case was capable of repetition yet evading review because "nothing suggests that the individual plaintiffs will likely again prove subject to the State's seizure procedures."[70] Because subsequent plaintiffs could bring suit and bring a damages action in addition to seeking prospective relief, the forfeiture procedures did not evade review either.[71]

The "less easy" decision for the Court was whether mootness should lead to vacatur of the circuit court's decision.[72] The statute authorizing vacatur allows for a flexible approach.[73] When a case becomes moot, the Court normally vacates the lower-court judgment to "clear[] the path for future relitigation."[74] The Court identified an exception to that rule in *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*: when mootness results from "settlement" rather than "happenstance."[75] When there is a settlement, "the 'losing party has voluntarily forfeited his legal remedy … [and] thereby surrender[ed] his claim to the equitable remedy of vacatur.'"[76]

The plaintiffs, wanting the circuit court's due process decision to stand, argued that the case had settled because the defendants had agreed after the case was filed to return all of plaintiffs' property. The Court rejected that argument and found that the seized property had been returned in the normal course of proceedings, with the lawsuit playing no significant role. As a result, the case fell on the happenstance side of the line, and the circuit court decision was vacated.[77]

Justice Stevens dissented to this part of the opinion. According to him, the general rule is against vacating appellate judgments that become moot as a result of settlement. He pointed out that *Bancorp* placed the burden on the party seeking vacatur to demonstrate both mootness and entitlement to this

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[66]See U.S. Const. amend. XIV, § 1.

[67]*Id.* at 579 (quoting *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008) (Case No. 07-1599)).

[68]*Id.* at 580.

[69]*Id.*

[70]*Id.* at 581.

[71]*Id.*

[72]*Id.*

[73]28 U.S.C. § 2106.

[74]*Alvarez*, 130 S. Ct. at 581 (quoting *United States v. Munsingwear Incorporated*, 340 U.S. 36, 40 (1950)).

[75]*Id.* (quoting *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994)).

[76]*Id.* (quoting *U.S. Bancorp*, 513 U.S. at 25) (alteration by the Court).

[77]*Id.* at 581–82.

"extraordinary remedy."[78] According to Justice Stevens, that burden was not met. Justice Stevens also argued that the Court had been "overhasty in deciding to review this case" and, when it realized the case was moot, it should have dismissed the writ of certiorari as improvidently granted, a path that would have allowed the appellate decision to stand.[79]

Rule 23 in a Diversity Action, the Rules Enabling Act, and *Erie*

In three lengthy opinions—the sometimes-majority, sometimes-plurality opinion by Justice Scalia, the concurrence by Justice Stevens, and the dissent by Justice Ginsburg (joined by the unusual lineup of Justices Kennedy, Breyer, and Alito)—the Supreme Court wrestled with an arguable conflict between Rule 23 of the Federal Rules of Civil Procedure and a New York law that precluded class actions in the circumstances of the case.[80] The opinions in *Shady Grove Orthopedic Associates Professional Association v. Allstate Insurance Company* read like legal histories and dueling law review articles.[81] With luck, their publication will terminate any future need for treatises on *Erie Railroad Company v. Tompkins* and the Rules Enabling Act.[82]

Allstate did not pay on time insurance benefits that it owed Shady Grove Orthopedics Associates for care that Shady Grove had provided to a patient. Allstate then refused to pay the statutory interest that had accrued on the overdue benefits. Shady Grove filed in federal court a diversity action seeking recovery of the interest on behalf of itself and the class of all entities to which Allstate had refused to pay interest.[83] The district and appellate courts dismissed the lawsuit. The Court reversed the Second Circuit, with a potentially extreme impact: "The Court today approves Shady Grove's attempt to transform a $500 case into a $5,000,000 award, although the State creating the right to recover has proscribed this alchemy."[84] Justice Ginsburg's reference in her dissent—and the crux of the issue—was a New York law that prohibits a lawsuit from proceeding as a class action if the suit seeks penalties, in this case the statutory interest.[85]

In a portion of Justice Scalia's opinion that speaks for a majority, the Court concluded that the language of Rule 23 dictated that it controlled whether a suit would proceed as a class action.[86] The Court held definitively that when the requirements of Rule 23 were met, the case must be certified to proceed as a class action. Rule 23 "by its terms," the Court stated, "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."[87] Speaking thereafter only for a plurality, Justice Scalia, turning to *Erie* first, determined that *Erie* did not apply in this case.[88] Justice Scalia next determined that Rule 23, like other rules allowing multiple claims or parties, passed muster under the Rules Enabling Act, which prohibits the Supreme Court from promulgating

[78] *Id.* at 584 (Stevens, J., concurring in part and dissenting in part).

[79] *Id.*

[80] FED. R. CIV. P. 23.

[81] *Shady Grove Orthopedic Associates Professional Association v. Allstate Insurance Company*, 130 S. Ct. 1431 (2010).

[82] *See Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938); Rules Enabling Act, 28 U.S.C. §§ 2071–2077, 2072.

[83] *Shady Grove*, 130 S. Ct. at 1436–37.

[84] *Id.* at 1460 (Ginsburg, J., dissenting).

[85] *Id.* at 1437 (majority opinion) (discussing N.Y. C.P.L.R. 901(b)).

[86] *Id.* at 1437–42.

[87] *Id.* at 1437; *see also id.* at 1438. The Court explains that "[t]he discretion suggested by Rule 23[(b)]'s 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes" (*id.*).

[88] "*Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules" (*id.* at 1442 (plurality opinion)).

rules that "'abridge, enlarge or modify any substantive right.'"[89] Justice Scalia rejected the relevance of the substantive nature or purpose of the state law at issue. If a federal rule regulates procedure, he stated, then "it is authorized by [Section] 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights."[90]

Justice Stevens in his concurring opinion disagreed with the plurality's reading of the Rules Enabling Act but reached the same result. His complicated and lengthy analysis boiled down to a belief that the Rules Enabling Act requires determining whether a substantive state right is affected by the federal procedural rule.[91] He concluded that the New York law, which is part of the state's procedural code, should be viewed as procedural since there was no compelling indication to the contrary. "In order to displace a federal rule," he stated, "there must be more than just a possibility that the state rule is different than it appears."[92] Accordingly Justice Stevens cast the fifth vote to uphold the applicability of Rule 23 under the Rules Enabling Act.

Stipulated Facts

One of the Term's notable cases was *Christian Legal Society v. Martinez*, which involved the Christian Legal Society's challenge to Hasting Law School's "all-comers" policy.[93] That policy requires registered student organizations to accept anyone into membership even if they do not share the beliefs of the organization.[94] Registered student organizations gain access to law school perks, such as e-mail and school facilities. The school rejected the society as a registered student organization because the society barred from membership students on the basis of their religion and sexual orientation. The society filed a federal complaint claiming that the all-comers policy violated the group's First Amendment rights to free speech, expressive association, and exercise of religion.[95]

A 5-to-4 majority of the Supreme Court rejected the society's claim. The majority's resolution of a preliminary, nonconstitutional issue made rejection of the society's substantive argument inevitable. The society urged the Court to review the law school's policy as targeting solely those groups whose beliefs are based on religion or disapproval of a particular sexual behavior, while leaving other associations, for example, a "political group," free to limit membership.[96] The problem for the society was that this assertion ran "headlong into the stipulation of facts it had jointly submitted with Hastings at the summary judgment stage of the case."[97] In that stipulation the society specified that the all-comers policy required registered student organizations to "allow *any* student to participate, … regardless of status or beliefs. Thus, for example, the Hastings Democratic Caucus may not bar students holding Republican political beliefs…."[98]

Writing for the majority, Justice Ginsberg first noted that the district court's local rules deemed stipulated facts to be "undisputed."[99] Justice Ginsberg rejected

[89] *Id.* at 1442 (quoting 28 U.S.C. § 2072(b)).

[90] *Id.* at 1444.

[91] *Id.* at 1452–54 & nn.8, 9 (Stevens, J., concurring in part and concurring in the judgment).

[92] *Id.* at 1460.

[93] *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010).

[94] *Id.* at 2978.

[95] *Id.* at 2980–81.

[96] *Id.* at 2982.

[97] *Id.*

[98] *Id.* (quoting app. 221 (Joint Stipulation ¶ 18)) (emphasis added by the Court) (citations omitted by Court) (alteration by the Court).

[99] *Id.*

the society's "unseemly attempt to escape from the stipulation."[100] She stated:

> [Factual stipulations are] binding and conclusive …, and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, … or to maintain a contention contrary to the agreed statement, … or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted.[101]

The lesson from the case: Take care when crafting stipulations of fact.

Statutory Construction

The Supreme Court in *Graham County Soil and Water Conservation District v. United States ex rel. Wilson* again engaged in one of its favorite topics: statutory construction.[102] The Court considered the meaning of a 1986 amendment to the Civil War–era False Claims Act that narrowed the scope of the Act's whistle-blower provision.[103] The False Claims Act authorizes both the U.S. attorney general and private whistle-blowers to sue persons making false or fraudulent claims for payment from the United States. The so-called public disclosure bar of the False Claims Act precludes private plaintiffs from recovery under the Act if the facts underlying the claims were previously disclosed in public forums.[104] Included in the bar are public forums such as "a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation…."[105]

In *Graham County* the private plaintiff, Wilson, was an employee of a county agency that had entered into contracts with the U.S. Department of Agriculture.[106] Wilson suspected that the agency was fraudulently administering the contracts and contacted local and state officials, who subsequently issued several reports identifying irregularities.[107] The district court dismissed the plaintiff's False Claims Act suit on the ground that it was based on the information disclosed in these public "administrative reports."[108] Wilson appealed the district court's decision to the Fourth Circuit, which reversed the district court and concluded that the public disclosure bar applied only to *federal* administrative reports.[109] The Supreme Court granted certiorari to resolve a conflict in the circuits.[110]

In a 7-to-2 decision written by Justice Stevens the Court reversed the Fourth Circuit and held that "administrative reports, audits, and investigations" encompassed public disclosures made by state and local, as well as federal, sources.[111] The Court noted that the Fourth Circuit acknowledged that "there is nothing inherently federal about the word 'administrative'" and conceded that the False Claims Act did not define

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[100] *Id.* at 2984.

[101] *Id.* at 2983 (quoting 83 C.J.S. *Stipulations* § 93 (2000) (alteration by the Court)).

[102] *Graham County Soil and Water Conservation District v. United States ex rel. Wilson,* 130 S. Ct. 1396 (2010).

[103] False Claims Act, 31 U.S.C. §§ 3729–3733, 3730(e)(4) & n.2.

[104] *Id.* § 3730(e)(4) & n.2.

[105] *Id.*

[106] *Graham County*, 130 S. Ct. at 1400.

[107] *Id.*

[108] *Id.* at 1401.

[109] *Id.* (citing *United States ex rel. Wilson* v. *Graham County Soil and Water Conservation District*, 528 F.3d 292, 301 (4th Cir. 2008)).

[110] *Id.* at 1401.

[111] *Id.* at 1400.

the term.[112] The Fourth Circuit nevertheless applied the interpretative maxim *noscitur a socii* to conclude that the public disclosure bar provision was triggered *only* by federal reports.[113] The maxim literally translated means "it is known by its associates."[114] But, according to Justice Stevens, the maxim is more commonly expressed as "a word may be known by the company it keeps."[115] The Fourth Circuit had reasoned that "the placement of the term 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations."[116] Justice Stevens rejected application of the maxim and decided that "[a] list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating."[117]

Turning to the legislative history, Justice Stevens concluded that "the drafting history of the public disclosure bar" raised more questions than it answered.[118] Although the public disclosure bar was designed to "strike a balance between encouraging private persons to root out fraud, and stifling parasitic lawsuits" based on publicly available information, the bar's precise role in striking this balance "is a matter of considerable uncertainty."[119] The plaintiff, supported by the United States as *amicus curiae*, gave weight to a floor remark by a lead sponsor of the statute. The sponsor's remark could be interpreted as indicating that the public disclosure bar was limited to federal sources. Justice Stevens found the remark to be ambiguous.[120] Similarly Justice Stevens dismissed a letter that was sent by the primary House and Senate sponsors to the attorney general in 1999 and that squarely stated that the authors did not intend disclosures in nonfederal administrative reports to bar private actions. "Needless to say," Justice Stevens stated, "this letter does not qualify as legislative 'history,' given that it was written 13 years after the amendments were enacted. It is consequently of scant or no value for our purposes."[121]

Justice Sotomayor, joined by Justice Breyer, filed a brief dissent, registering particular disagreement with the Court's refusal to credit the arguments submitted by the United States as *amicus curiae* on behalf of the plaintiff: "I would not so readily dismiss the formal representation of the Executive Branch entity with responsibility for, and practical experience in, litigating [False Claim Act] claims on behalf of the United States."[122] Justice Scalia concurred in the majority's result but wrote separately to underscore his decades-long position that evidence of legislative history or congressional intent has no role to play in the judicial task of statutory construction.[123]

Later in the Term the Court decided a case which turned upon a narrow question of interpretation of the Foreign Sovereign

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[112] *Id*. at 1402 (quoting *Graham County*, 528 F.3d at 302).

[113] *Id*. (quoting *Graham County*, 528 F.3d at 302–5).

[114] *Id*. at 1402 (quoting Black's Law Dictionary 1160 (9th ed. 2009)).

[115] *Id*. at 1402 (quoting *Russell Motor Car Company v. United States*, 261 U.S. 514, 519 (1923)).

[116] *Id*. at 1403 (quoting *Graham County*, 528 F.3d at 302).

[117] *Id.* at 1403.

[118] *Id*. at 1407.

[119] *Id*.

[120] *Id*. at 1408.

[121] *Id.* at 1408–9.

[122] *Id.* at 1417 (Sotomayor, J., dissenting).

[123] *Id.* at 1411 (Scalia, J., concurring in part, and concurring in the judgment). See also *Milavetz, Gallop, and Milavetz Professional Association v. United States*, 130 S. Ct. 1324, 1341 (2010) (Scalia, J., concurring in part and concurring in the judgment).

Immunities Act of 1976.[124] In *Samantar v. Yousuf* a number of Somalian natives filed a damages action against Mohamed Ali Samantar, who held various high government offices in Somalia and allegedly authorized horrific acts of torture and murder against plaintiffs and their families.[125] The claims were brought pursuant to the federal Torture Victim Protection Act and the Tort Claims Act.[126] In an unremarkable exercise in traditional statutory construction, Justice Stevens concluded that the Foreign Sovereign Immunities Act's grant of immunity to foreign *states* did not extend to individual *officials* of such states even if the officials were sued in their official capacities.[127]

Justice Scalia filed a separate concurrence again ridiculing the Court's examination of legislative history and stating in part, "[L]egislative history is almost never the real reason for the Court's decision—and make-weights do not deserve a lot of the Court's time."[128] He scolded Justice Stevens for "needlessly inject[ing] into the opinion a mode of analysis that not all of the Justices consider valid."[129] Justice Stevens, perhaps worn down by twenty-four years of dissenting and concurring opinions in which Justice Scalia incessantly jabbed the same needle, finally rose to the bait, quoting Justice Byron White to offer this mild retort:

> As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into the past. We suspect that the practice will likewise reach well into the future.[130]

Civil Rights

Lewis v. City of Chicago concerned the legality of the process by which Chicago hired firefighters.[131] The city administered a written test to 26,000 applicants in July 1995. In January 1996 the city announced that the applicants would be placed into three categories based on their scores: (1) well qualified (scoring 89–100); (2) qualified (scoring 65–88); and (3) not qualified (scoring below 65). The city then selected those applicants who would move on to the next phase of hiring by randomly picking names from the pool of applicants who scored in the top category. Applicants who scored in the "not qualified" category were rejected outright. Applicants placed in the "qualified" category were advised that their names would be placed on a list for future consideration but that they were unlikely to be called for further processing.[132] Over the next six years, the city

[124]Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §§1330, 1332, 1391(f), 1602–1611.

[125]*Samantar v. Yousuf*, 130 S. Ct. 2278, 2282–83 (2010). The defendant was, when the complaint was filed, a resident of Virginia (*id*. at 2283).

[126]Torture Victim Protection Act, 28 U.S.C. § 1350 note; Alien Tort Claims Act, 28 U.S.C. § 1350.

[127]*Samantar*, 130 S. Ct. at 2292–93.

[128]*Id.* at 2294 (Scalia, J., concurring in the judgment); see also *id.* at 2293 (Alito, J., concurring and Thomas, J., concurring in part and concurring in the judgment).

[129]*Id*. at 2293 (Scalia, J., concurring in the judgment).

[130]*Id*. at 2287 n.9 (majority opinion) (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 611–12 n.4 (1991)) (alteration in the original) (citations omitted).

[131]*Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).

[132]*Id*. at 2196.

went through nine periods of hiring, in each case never exhausting the pool of applicants in the "well qualified" category.[133]

On March 31, 1997, Crawford Smith, an African American applicant who scored in the "qualified" range and had not been hired, filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Five other applicants followed suit. Plaintiffs alleged that the city's practice of selecting only those applicants who scored 89 or above caused, in violation of Title VII of the Civil Rights Act of 1964, a disparate impact upon African Americans.[134] The EEOC issued "right to sue" letters, and all six applicants filed a class action lawsuit against the city.[135]

The city moved for summary judgment on the ground that the plaintiffs had failed to file their administrative discrimination charges within 300 days after their claims accrued, as required by the Act.[136] In the city's view the claims accrued no later than January 1996 when the city first adopted the sorting process.[137]

Denying the motion, the district court concluded that "the City's 'on-going reliance' upon the 1995 test results constituted a 'continuing violation' of Title VII."[138] The city stipulated that the scoring cutoff had a "severe disparate impact against African-Americans" but argued that it was justified by business necessity.[139] The district court rejected that defense, ruled for the plaintiffs, and ordered various measures of equitable and monetary relief.[140] Reversing the district court on appeal, the Seventh Circuit held that the suit was untimely because plaintiffs failed to file their EEOC charges within 300 days of the city's announcement of the scoring categories and selection process. That announcement, the Seventh Circuit found, was "the only discriminatory act."[141]

Writing for a unanimous Court, Justice Scalia framed the question as follows:

> [W]hether a plaintiff who does not file a timely charge challenging the *adoption* of a practice—here, an employer's decision to exclude employment applicants who did not achieve a certain score on an examination—may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice.[142]

The Court had little trouble answering this question in the affirmative.[143] Analyzing the statutory term "employment practice," the Court found it "clear that the term encompasses the conduct of which petitioners complain: the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance."[144] The city "made use of the practice," the Court went on to say, "each time it filled a new class of firefighters."[145]

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[133] *Id.*

[134] *Id.* (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, 2000e-2(k)(1)(A)(i)).

[135] *Id.* at 2196.

[136] *Id.* (citing 42 U.S.C. § 2000e-5(e)(1)).

[137] *Id.*

[138] *Id.* (quoting Appendix to Petition for Certiorari 45a).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 2195.

[143] *Id.* at 2197.

[144] *Id.* at 2198.

[145] *Id.*

Enforcing Injunctive Relief

In *Salazar v. Buono* the Supreme Court considered the standard that a lower court was to use when enforcing an injunction it had entered.[146] The Court's analysis is quite twisted—perhaps because it concerns two topics that children are taught to avoid at the dinner table: religion and politics. The case began about ten years ago, when Buono, a National Park Service employee, filed a First Amendment challenge to the presence of a Latin cross on federal land.[147] The cross had been erected in 1934 by private citizens at Sunrise Rock in the Mojave Desert, at least in part to honor soldiers who died in World War I.[148] Finding that the presence of the cross on federal land "conveyed the impression of governmental endorsement of religion," the district court in 2002 permanently enjoined the government from permitting the cross to be displayed in the Sunrise Rock area.[149] The Ninth Circuit affirmed the injunction, the government did not seek review, and the judgment became final.

Meanwhile, Congress passed a statute directing the secretary of the interior to transfer the land on which the cross stood to the Veterans of Foreign Wars with a proviso that if not maintained as a World War I memorial the property would revert to the government.[150] Buono returned to the district court to challenge the statute as a violation of the injunction. Finding the intent of the statute illegitimate, the district court, affirmed by the Ninth Circuit, granted Buono's motion to enforce the injunction and permanently enjoined the government from implementing the statute.[151] The Supreme Court accepted review.

Justice Kennedy's plurality opinion reversed and remanded the case to the district court. As an initial matter the Supreme Court determined that Buono had Article III standing to maintain the action.[152] The Court rejected the government's argument (accepted by Justices Scalia and Thomas) that Buono was seeking to expand, rather than enforce, the injunction and thus needed to establish anew his standing to obtain the relief sought.[153] The Court pointed out that Buono's standing turned on the alleged injury that prompted him to seek relief in the first place, while the government's argument was about the merits of the district court's order.[154]

Turning to the merits, Justice Kennedy noted that injunctive relief "is not granted as a matter of course" and found the district court had taken "insufficient account of the context in which the [land-transfer] statute was enacted and the reasons for its passage."[155] Justice Kennedy reprimanded the district court for viewing the statute as an attempt to "evade" the injunction.[156] He remanded the case so that the district court could

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[146]*Salazar v. Buono*, 130 S. Ct. 1803 (2010).

[147]U.S. Const. amend. I.

[148]Justice Kennedy's plurality opinion says that the public "gathered regularly at Sunrise Rock to pay their respects" (*Salazar*, 130 S. Ct. at 1817). Justice Stevens points out, however, that, according to the record, the public gatherings were for Easter sunrise services (*id.* at 1838 n.9 (Stevens, J., dissenting)).

[149]*Id.* at 1812.

[150]*Id.* at 1813 (citing Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1100 (2003), 16 U.S.C. §§ 410aaa-456 note, 431 note).

[151]*Id.* at 1814.

[152]U.S. Const. art. III.

[153]*Salazar v. Buono*, 130 S. Ct. 1803, 1815 (discussing government's argument); see also *id.* at 1825–26 (Scalia, J., concurring in the judgment) (arguing that "a plaintiff cannot ask a court to expand an existing injunction unless he has standing to seek the additional relief" (*id.* at 1826)).

[154]*Id.* at 1815 (plurality opinion).

[155]*Id.* at 1816.

[156]*Id.* at 1817.

conduct an inquiry giving due respect to the legislative branch of government and consider relief less drastic than a complete invalidation of the statute.[157] What is most striking about this decision is that a majority of the Court simply did not like the original injunction. Thus, to paraphrase Justice Stevens's dissent, the Court worked to reopen what was closed.[158]

Relief from Judgment Under Rule 60(b)(4)

A bankruptcy case gave the Supreme Court an opportunity to state the circumstances in which Rule 60(b)(4) of the Federal Rules of Civil Procedure, which allows relief from judgment when "the judgment is void," is applicable.[159] The underlying case, *United Student Aid Funds Incorporated v. Espinosa*, involved a bankruptcy court's approval of a Chapter 13 debtor's plan to repay only the principal of a student loan and obtain a discharge of the interest.[160] Informed of the plan, the creditor did not object. The bankruptcy court approved the plan without holding the required adversary proceeding to determine whether the debtor had met the "undue hardship" requirement for discharging a student loan. Furthermore, the debtor did not serve the creditor with the summons and complaint required for an adversarial hearing.[161] Based on these errors, the creditor sought to set aside the judgment as void under Rule 60(b)(4).

Writing for a unanimous Court, Justice Thomas began his analysis with an emphatic statement on the meaning of Rule 60(b)(4) that will undoubtedly be the cited standard for years to come. Relying primarily on *Black's Law Dictionary*, other treatises, and appellate decisions (rather than on Supreme Court precedent), he wrote:

> A void judgment is a legal nullity.... [A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule.
>
> "A judgment is not void," for example, "simply because it is or may have been erroneous." Similarly, a motion under Rule 60(b)(4) is not a substitute for a timely appeal. Instead, *Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.*[162]

In applying this standard to the creditor's arguments, the Court made clear how difficult obtaining Rule 60(b)(4) relief is. The Court noted that only the most extreme jurisdictional defect—one "in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction"—is sufficient to render a judgment void.[163] In this case, however, neither the bankruptcy court's failure to find "undue hardship" nor its failure to make that finding in an adversary proceeding was jurisdictional.[164] Consequently the Court declined to delve into an "arguable basis" analysis or to isolate the precise circumstances in which a jurisdictional error could render a judgment void.[165]

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[157] *Id.* at 1820.

[158] *Id.* at 1836 (Stevens, J., dissenting).

[159] FED. R. CIV. P. 60(b)(4).

[160] *United Student Aid Funds Incorporated v. Espinosa*, 130 S. Ct. 1367 (2010).

[161] *Id.* at 1374–75.

[162] *Id.* at 1377 (citations omitted) (emphasis added).

[163] *Id.* at 1377 (quoting *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)).

[164] *Id.* at 1377–78.

[165] *Id.* at 1377.

Attorney Fees

On the attorney-fee front, the Supreme Court issued three decisions. Two of them are contrary to the interests of lower-income people and their counsel.

In *Astrue v. Ratliff* the Court issued a decision that was disappointing but not surprising.[166] The Court considered the prevailing-party language of the Equal Access to Justice Act (EAJA) and ruled unanimously that the fee was payable to the plaintiff, not to the attorney.[167] As a direct consequence, the fee is subject to the government's administrative offset program for a preexisting debt, which became applicable to fee awards in January 2005.[168] Even when fee rights are assigned to the attorney, the attorney may receive a smaller fee than the court intended when it awarded the fees.

Justice Thomas's analysis for the Court is straightforward and predictable. He noted that Section 204(d)(1)(A) of the EAJA directed courts to award the fee to "a prevailing party" and that that expression "is a 'term of art' that refers to the prevailing litigant."[169] Justice Thomas found nothing in the statutory scheme of the EAJA to suggest a different result.[170] Plaintiff's contention that the statute's use of the word "award" indicated that the fee was to be paid directly to the attorney was rejected as contrary to the plain meaning of the word.[171]

Even assuming that the statutory language was ambiguous, the Court declined to accept the contention that other statutory sections and practices suggested that the fee should not be paid to the litigant.[172] That the government had paid EAJA fees directly to lawyers, for example, was deemed unpersuasive. The Court found that until 2005 such fees were not subject to the offset program and, when there was an assignment of rights, there was no reason not to pay the award to an attorney.[173]

Justice Sotomayor, in a concurring opinion that Justices Ginsburg and Stevens signed onto, joined the Court's opinion but implied that Congress should amend the EAJA to ensure that attorneys receive their fees and low-income plaintiffs continue to have access to attorneys.[174]

The second adverse attorney-fee decision, *Perdue v. Kenny A.*, generated considerable publicity but, as a practical matter, will affect relatively few cases.[175] As the facts of the case illustrate, however, when applicable the case will have a considerable impact. In the case the district court's fee award under Section 1988 was reduced by $4.5 million (though still leaving plaintiffs' attorneys with about $6 million).[176]

The precise issue before the Court was whether a fee calculated by using the lodestar method (multiplying hours worked by prevailing rates) could be enhanced for superior performance.[177]

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[166] *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010).

[167] Equal Access to Justice Act § 204(d), 28 U.S.C. § 2412(d). A disquieting aspect of the case is that Solicitor General Elena Kagan, now Justice Kagan, argued for the government (*id.* at 2523). One hopes that this action reflects her desire to hone her oral argument skills on a relatively straightforward appeal rather than suggesting a prejudice against fee-shifting statutes and attorneys who invoke them.

[168] *Astrue*, 130 S. Ct. at 2524; see 31 C.F.R. § 285.5(e)(5).

[169] *Astrue*, 130 S. Ct. at 2525; Equal Access to Justice Act § 204(d)(1)(A), 28 U.S.C. 2412(d)(1)(A).

[170] *Astrue*, 130 S. Ct. at 2525–27.

[171] *Id.* at 2526.

[172] *Id.* at 2527–29.

[173] *Id.* at 2528–29.

[174] *Id.* at 2532–33 (Sotomayor, J., concurring).

[175] *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010).

[176] *Id.* at 1670; Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.

[177] *Perdue*, 130 S. Ct. at 1669.

The answer, agreed to by all the Justices, was—technically—yes. But, for Justice Alito and the four other members of the Court who joined his opinion, the real answer was somewhere between highly unlikely and no. The majority observed that enhancements should be "rare" and "exceptional" and that applying the lodestar method results in a presumptively reasonable fee.[178] Lest the point not be clear, Justice Alito added this ominous statement: "[W]e have never sustained an enhancement of a lodestar amount for performance…."[179]

The majority directed its attention to establishing that the lodestar amount will almost certainly be all that successful attorneys may expect, with the district court's decision as the poster child for all that is wrong with a contrary result. As Justice Breyer pointed out in his partial dissent, the narrow issue for which the Court granted the petition was whether a lodestar calculation could ever be enhanced for performance. Having answered that question in the affirmative, the majority chose to take on a question not presented: whether the district court correctly enhanced the fee in this case.[180] In its determination to squelch any possibility that a district court would ever again award an enhancement, the Court majority reached around the court of appeals to hold that the district judge had abused his discretion. The Court did this instead of simply reversing the Eleventh Circuit's decision, which had affirmed the district court on the grounds that the district court had not abused its discretion.[181]

In his concluding paragraph Justice Alito largely confessed to his real motivation. Paying lip service to the "important public purpose" served by Section 1988, he noted that fees were usually paid from limited government coffers.[182] Consequently "money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services."[183] In other words, every dollar paid to an attorney acting in the public interest is wasted.

As noted, Justice Breyer was not pleased that the Court, "which is twice removed from the litigation underlying the fee determination," went after the district judge.[184] Concluding that the district court judge did not abuse his discretion, Justice Breyer made the point (that seems obvious from any rational discussion of the case) that "if the facts and circumstances that I have described are even roughly correct, then it is fair to ask: If this is not an exceptional case, what is?"[185]

The good news on attorney fees came in a case considering the Employee Retirement Income Security Act of 1974 (ERISA).[186] Because of the unusual nature of that statute's fee provision, which gives the court the discretion to award fees to either party, the decision will have only a limited impact outside the employee benefits arena and will probably

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[178]*Id*. at 1673.

[179]*Id*. Justice Thomas's concurrence took a similarly pessimistic view: "[T]he lodestar calculation will in *virtually every case* already reflect all indicia of attorney performance relevant to a fee award" (*id*. at 1678 (Thomas, J., concurring) (emphasis added)); see also *id.* at 1677 (Kennedy, J., concurring) (emphasizing that enhancements simply will not happen).

[180]See *id*. at 1678 (Breyer, J., concurring in part and dissenting in part).

[181]See *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260 (N.D. Ga. 2006), aff'd, 532 F.3d 1209, reh'g en banc denied, 547 F.3d 1319 (11th Cir. 2008).

[182]*Perdue*, 130 S. Ct. at 1676–77.

[183]*Id*. at 1677.

[184]*Id*. at 1678 (Breyer, J., concurring in part and dissenting in part).

[185]*Id*. at 1683.

[186]Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, 1132(g)(1).

have no effect on EAJA or Section 1988 fee litigation.[187]

In *Hardt v. Reliance Standard Life Insurance Company* the plaintiff, after exhausting her administrative remedies, brought suit in federal district court seeking to overturn the denial of ERISA benefits.[188] The district court denied cross-motions for summary judgment and remanded with a threat that if the insurance company did not consider all evidence during its review of plaintiff's application for benefits under the ERISA plan, the court would enter judgment for the plaintiff. On remand the insurance company again reviewed the plaintiff's application and, not surprisingly, found in the plaintiff's favor. The plaintiff sought and was awarded attorney fees under the ERISA by the district court. The Fourth Circuit reversed the fee award on the ground that plaintiff was not a prevailing party.[189] The two issues before the Supreme Court were whether the ERISA allows the award of fees only to a "prevailing party" and what standards are to be used in awarding those fees.

On the first question, Justice Thomas, speaking for a unanimous Court, answered in the negative. His reasoning was simple: "The words 'prevailing party' do not appear in [the ERISA fee] provision."[190] Justice Thomas excoriated the Fourth Circuit for inserting a "prevailing party" standard into the statute: "[T]he Court of Appeals' decision adding that term of art to a fee-shifting statute from which it is conspicuously absent more closely resembles 'inventing a statute rather than interpreting one.'"[191]

On the second question, the Court first noted that most of its decisions were not useful precedent for a case involving a fee statute without a prevailing-party standard.[192] The Court then pivoted to a decision interpreting the Clear Air Act's standard for awarding fees; the standard is "'whenever [a court] determines that such an award is appropriate.'"[193] The Court in *Ruckelshaus v. Sierra Club* had found that the standard for awarding fees under the Clean Air Act should be "some degree of success on the merits, a standard that is something more than "'trivial success on the merits' or a 'purely procedural victor[y].'"[194] With no explanation as to why it had settled on the Clean Air Act standard, the Court imported it as the ERISA fee standard.

With its ready-made standard in place, the Court concluded that, given the nature of the district court's directive to the insurance company, Hardt had "achieved some success on the merits" and therefore the district court had not abused its discretion in awarding fees.[195] The Court left for another day "whether a remand order, without more, constitutes 'some success on the merits' sufficient to make a party eligible for attorney fees under [the ERISA]."[196]

■ ■ ■

The 2009 Term was marked by its relative calm on the court-access front. Next year could be different. For example, the Su-

[187]ERISA's fee provision, 29 U.S.C. § 1132(g)(1) states: "In any action under this subchapter … by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

[188]*Hardt v. Reliance Standard Life Insurance Company*, 130 S. Ct. 2149 (2010).

[189]*Id.* at 2154–55. The Court of Appeals followed the interpretation of "prevailing party" set out in *Buckhannon Board and Care Home Incorporated v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001).

[190]*Id.* at 2156.

[191]*Id.* (quoting *Pasquantino v. United States*, 544 U.S. 349, 359 (2005)).

[192]*Id.* at 2157.

[193]*Id.* (quoting the Clean Air Act, 42 U.S.C. § 7607(f)) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)).

[194]*Id.* at 2158 (quoting *Ruckelshaus*, 463 U.S. at 694, 688 n. 9).

[195]*Id.* at 2159.

[196]*Id.*

preme Court will decide a sovereign immunity case that could narrow application of the *Ex parte Young* exception, which allows prospective injunctive relief against state officials.[197] The Court has also requested the solicitor general's opinion on whether it should grant certiorari in *Maxwell-Jolly v. Independent Living of Southern California*.[198] The Ninth Circuit decision allowed Medicaid providers and recipients to bring a preemption claim to enjoin a state law that conflicted with a federal Medicaid Act provision.[199] In recent years advocates for low-income people have increasingly relied on preemption claims, particularly to enforce provisions of federal spending-clause enactments. Thus the Court's treatment of this petition for certiorari will be closely watched.

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[197]See *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009), cert. granted sub nom. *Virginia Office for Protection and Advocacy v. Stewart*, 130 S. Ct. 3493 (2010); *Ex parte Young*, 209 U.S. 123 (1908).

[198]*Maxwell-Jolly v. Independent Living Center of Southern California*, 130 S. Ct. 3349 (May 24, 2010) (see Case No. 09-958 for order).

[199]*Independent Living Center of Southern California Incorporated v. Shewry*, 543 F.3d 1050 (9th Cir. 2008), sub nom. *Independent Living Center of Southern California v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009), 590 F.3d 725 (9th Cir. 2009).

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