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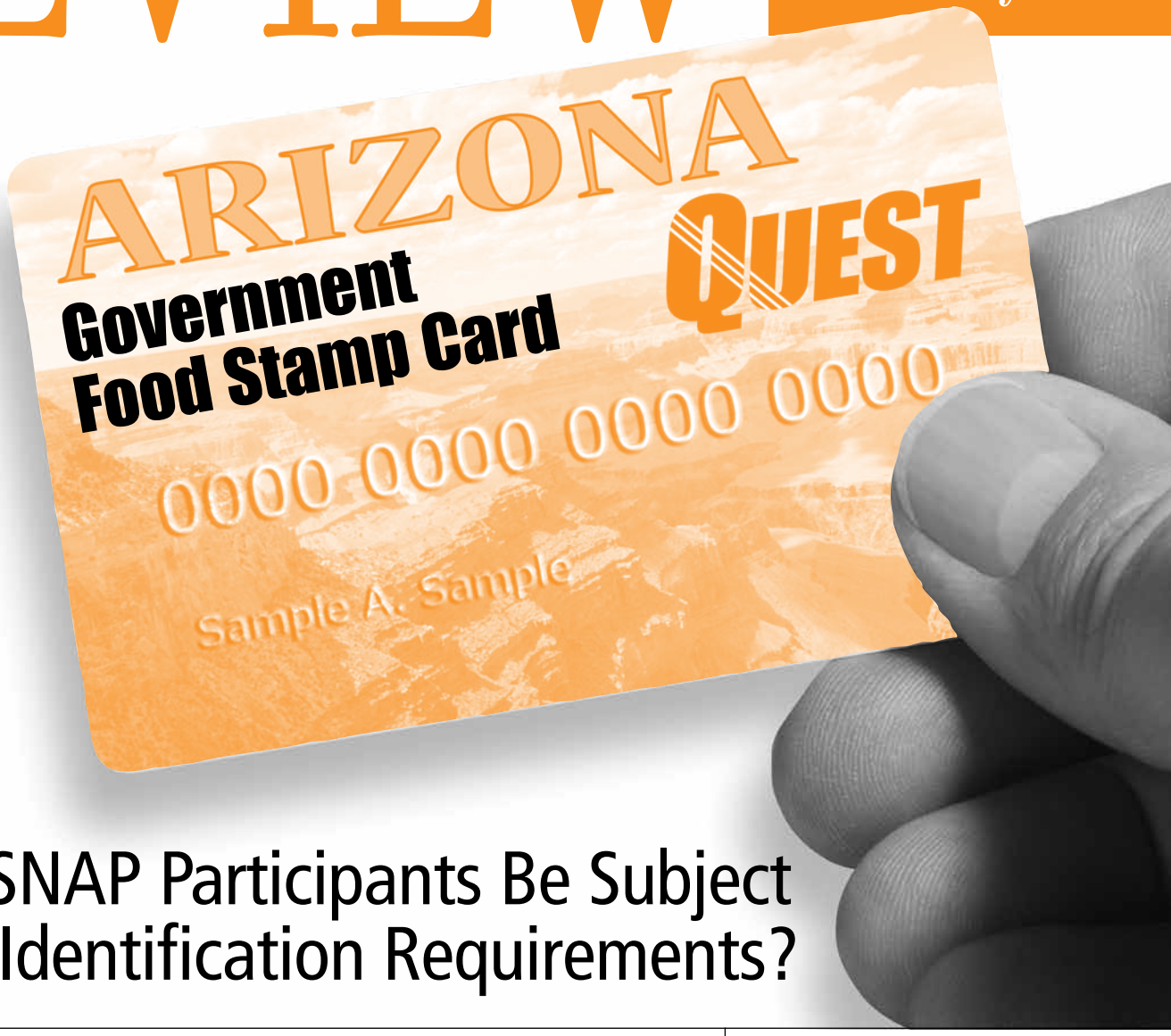

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ACCESS ISSUES IN THE U.S. SUPREME COURT'S 2010 TERM

LITIGATION IS NOT GETTING ANY EASIER

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So much has been written about the major access case of the U.S. Supreme Court's 2010 Term, *Wal-Mart Stores Incorporated v. Dukes*, that we tend to ignore the numerous other decisions that put still more obstacles in the way of plaintiffs seeking relief in federal courts.[1] The 2010 Term included the usual potpourri of decisions discussing deference, failure to state a claim, standing, preemption, and the like—and a revealing directive from Justice Kennedy concerning the importance of strict enforcement of standing requirements.

Dissenting in that same case, however, Justice Kagan announced in no uncertain terms that she would not allow the conservative majority to ride roughshod over precedent and history. While she may be the new kid on the Court, she has already made clear that the bullies will not be tolerated in silence. The present makeup of the Court does not suggest that happy days are ahead, but at least the loyal opposition still takes its obligations seriously.

Class Actions

Two decisions penned by Justice Scalia on behalf of the usual five-member majority limit the availability of class action lawsuits. In *Wal-Mart* the Court refused to allow a proposed class of 1.5 million women to proceed with allegations that *Wal-Mart*'s pay and promotion practices resulted in sex discrimination. The Court found that the plaintiffs did not establish the commonality of their claims as required by Federal Rule of Civil Procedure 23(a)(2). While the decision most severely affects large putative class actions and employment discrimination cases, it contains important discussion for anyone considering a class action case.

[1]See *Wal-Mart Stores Incorporated v. Dukes*, 131 S. Ct. 2541 (2011).

Justice Scalia began by noting that crafting questions of fact or law common to the class was easy; but he concluded that, without more, those questions were insufficient to obtain certification. Rather, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[2] In other words, "'[w]hat matters to class certification … is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'"[3] The Court reiterated the need for judges to "'probe behind the pleadings'" using a "'rigorous analysis'" that would "entail some overlap with the merits."[4]

Turning to the evidence, the Court found commonality lacking. Most critical, *Wal-Mart* had an official nondiscrimination policy. Hiring decisions were left to local supervisors, thus injecting a wide range of potentially disparate reasons for promotion and pay decisions as opposed to a "common mode of exercising discretion that pervades the entire company."[5] The dissent complained that the majority had improperly imported the requirements of Rule 23(b)(3) into its Rule 23(a)(2) analysis by requiring the plaintiffs to show that common questions of law or fact "predominate over individual questions."[6]

In *AT&T Mobility Limited Liability Company v. Concepcion* the Court held that the Federal Arbitration Act preempted California law regarding class arbitration waivers.[7] The case arose after the Concepcions purchased AT&T service, advertised as including a free phone, and were charged a sales tax for the phone. They filed against AT&T a complaint alleging false advertising, and the complaint was consolidated into a class action. AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the forced arbitration; they cited a California case, *Discover Bank v. Superior Court*, which had held that class action waivers in certain consumer contracts were unconscionable.[8]

In determining whether the *Discover Bank* rule was preempted by the Federal Arbitration Act, Justice Scalia was confronted by the problematic text of the Act itself. The Act states that arbitration provisions in commercial contracts are valid "save upon such grounds as exist at law or in equity for the revocation of any contract."[9] The *Discover Bank* rule clearly existed at law and supported revocation of the arbitration provision. Therefore the majority focused not on the text of the savings clause but on the objectives of the Federal Arbitration Act, which it described as a "'liberal federal policy favoring arbitration.'"[10] The Court contrasted arbitration, which it said "facilitate[s] streamlined proceedings" and informality, with class relief, which "requires procedural formality," provides "little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees," and "greatly increases

[2] *Id.* at 2551 (quoting *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)).

[3] *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 New York University Law Review 97, 132 (2009), http://bit.ly/nagareda_class).

[4] *Id.* (quoting *Falcon*, 457 U.S. at 160). In *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974), the Supreme Court stated: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." The *Wal-Mart* majority labels this passage as "the purest dictum … contradicted by our other cases" (*id.* at 2552 n.6).

[5] *Id.* at 2554–55.

[6] *Id.* at 2565–66 (Ginsberg, J., dissenting). All nine justices agreed that the plaintiffs' claims for back pay were inappropriately certified under Rule 23(b)(2), which applies "only when a single injunction or declaratory judgment would provide relief to each member of the class" (*id.* at 2557).

[7] *AT&T Mobility Limited Liability Company v. Concepcion*, 131 S. Ct. 1740 (2011).

[8] *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (2005).

[9] Federal Arbitration Act, 9 U.S.C. § 2.

[10] *AT&T Mobility*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24 (1983)).

risks to defendants."[11] Under these circumstances, the majority held that the *Discover Bank* rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the [Federal Arbitration Act]."[12]

Deference

Continuing a decadelong trend, the Court issued a series of decisions that, for the most part, expanded the already substantial degree of deference accorded to federal agencies on questions of statutory and regulatory interpretation. In *Mayo Foundation for Medical Education and Research v. United States* the Court considered whether doctors who serve as paid medical residents are properly viewed as "students" and therefore exempted from social security payroll taxes under the Federal Insurance Contributions Act (FICA).[13] Congress excluded from the definition of employment for purposes of FICA contributions "services performed in the employ of a school, college, or university … if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university."[14] Before 2004 the U.S. Department of the Treasury had applied the exception to exempt students who work for their schools "'as an incident to and for the purpose of pursuing a course of study.'"[15] Whether an individual's work was "incident" to his studies had always been determined by "case-by-case analysis."[16]

In 2005 the Treasury Department promulgated an amended regulation adopting a categorical rule that the work of a full-time employee is not "incident to and for the purpose of pursuing a course of study."[17] This was true whether or not the employee's work had "an educational, instructional, or training aspect."[18]

The Mayo Foundation, which had treated its residents as exempt from taxes under the prior, long-standing rule, challenged the 2005 regulation as contrary to the intent of the statutory exemption.[19] Chief Justice Roberts, writing for a unanimous Court, applied the familiar two-step *Chevron* analysis.[20] In step one the court asks whether Congress has "'directly addressed the precise question at issue,'" in this case, "whether medical residents are subject to FICA."[21] The Court found that Congress had not. Typically, the Court noted, "such an ambiguity would lead us inexorably to *Chevron* step two, under which we may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'"[22]

In *Mayo Foundation*, however, the Court first had to contend with the Foundation's reliance upon *National Muffler Dealers Association Incorporated v. United States*, a pre-*Chevron* decision in which the Court had reviewed the validity of a tax regulation.[23] In *National Muffler* the Court had specifically observed that the *timing* of a regulation's promulgation and

[11] *Id.* at 1748, 1750, 1752.

[12] *Id.* at 1748.

[13] *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011).

[14] Federal Insurance Contributions Act, 26 U.S.C. § 3121(b)(10).

[15] *Mayo Foundation*, 131 S. Ct. at 709 (quoting 16 Fed. Reg. 12474 (1951) (codified at 26 C.F.R. 408.219 (1952))).

[16] *Id.*

[17] 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii).

[18] *Id.*

[19] *Mayo Foundation*, 131 S. Ct. at 708–10.

[20] *Id.* at 711 (citing *Chevron U.S.A. Incorporated v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1987)).

[21] *Id.*

[22] *Id.* (quoting *Household Credit Services Incorporated v. Pfenning*, 541 U.S. 232, 242 (2004)).

[23] *National Muffler Dealers Association Incorporated v. United States*, 440 U.S. 472 (1979).

the consistency of its application were relevant to the deference inquiry.[24] In *Mayo Foundation* both the timing (after an adverse judicial decision) and consistency of application were suspect.

The Court acknowledged that if the *National Muffler* factors were applied to *Mayo Foundation*, a court might view the Treasury Department's regulation "with heightened skepticism."[25] But, the Court stated, "[u]nder *Chevron*, … [w]e have repeatedly held that 'agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.'"[26] Moreover, the Court stated, "[w]e have found it immaterial to our analysis that a 'regulation was prompted by litigation.'"[27] Without expressly overruling *National Muffler,* the chief justice effectively rendered it a dead letter by declaring that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context."[28] He added that there was "no reason why our review of tax regulations should not be guided by agency expertise … to the same extent as our review of other regulations."[29]

The Court considered another pre-*Chevron* decision relied upon by the Mayo Foundation; that decision is also specific to the tax context. In the 1981 case the Court determined that a Treasury Department rule adopted under a general grant of legislative authority was owed less deference than a rule promulgated pursuant to a "'specific grant of authority'" to define a statutory term or carry out a statutory provision.[30] The Court in *Mayo Foundation* brushed aside that standard with the observation that its post-*Chevron* deference analysis "does not turn on whether Congress' delegation of [rule-making] authority was general or specific."[31] Applying that *Chevron* framework, the Court determined that the agency interpretation at issue "easily satisfies the second step of *Chevron*, which asks whether the Department's rule is a 'reasonable interpretation' of the enacted text."[32]

Ransom v. FIA Card Services National Association also required statutory construction.[33] In *Ransom* the Court, perhaps struggling to avoid a counterintuitive result, interpreted otherwise straightforward language in the Bankruptcy Code by reference to informal agency guidelines. The case turned on whether a debtor might claim car-ownership expenses in his discharge plan under Chapter 13 of the Bankruptcy Code.[34]

In general, the Bankruptcy Code permits a debtor, in calculating disposable income, to claim certain deductions for defined "reasonably necessary" expenses.[35] These expenses reduce the amount of the debtor's income available to creditors. Whether expenses are "reasonably necessary" is determined by looking at Internal Revenue Service (IRS) allowance standards. The Code requires the IRS to develop standardized allowance amounts for various categories of expenses, including "transportation" allowances for both "ownership costs" and "operating costs."[36]

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[24] *Id.* at 477.

[25] *Mayo Foundation*, 131 S. Ct. at 712.

[26] *Id.* (quoting *Smiley v. Citi Bank (North Dakota) National Association*, 517 U.S. 735, 741 (1996)).

[27] *Id.* (quoting *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)).

[28] *Id.* at 713.

[29] *Id.*

[30] *Id.* (quoting *Rowan Companies v. United States,* 425 U.S. 247, 253 (1981)).

[31] *Id.* at 714.

[32] *Id.* (quoting *Chevron*, 467 U.S. at 844).

[33] *Ransom v. FIA Card Services National Association*, 131 S. Ct. 716 (2011).

[34] *Id.* at 722–23.

[35] 11 U.S.C. § 707(b)(2)(A)(ii)(I).

[36] *Ransom*, 131 S. Ct. at 722.

In this case the debtor claimed a transportation monthly allowance for "ownership cost." The problem arose because the debtor owned his car outright and had no *actual* ownership costs with respect to lease or loan expenses.[37] Neither the Bankruptcy Code nor the applicable IRS standards incorporated by reference in the Code indicated that the debtor must have actual ownership costs in order to claim the ownership allowance. However, the IRS also had issued "explanatory guidelines" to its standardized allowances that made clear that "individuals who have a car but make no loan or lease payments" were not to claim the ownership allowance.[38]

Justice Kagan, writing for an eight-member majority, defined the Court's task as interpreting the statutory phrase "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expenses specified under the [IRS Standards]."[39] The Court focused on the word "applicable." After consulting the dictionary, the Court concluded that an expense amount was "applicable" to the debtor only if a particular deduction was "appropriate" for him in light of his "financial circumstances."[40] A deduction is "appropriate," the Court found, only if the debtor "has costs corresponding to the category covered by the table."[41]

The Court bolstered this somewhat unsatisfying textual analysis in two ways. First, it incorporated by reference the IRS guidelines, which it described as an "insightful and pervasive (albeit not controlling)" interpretation of the statutory IRS Standards.[42] Second, the Court invoked what it said was an important underlying purpose of the Bankruptcy Code: "to ensure that debtors repay creditors to the extent they can."[43]

In addition to according significant deference to agency interpretations of *statutory* questions, the Court in two decisions continued its practice of giving near-conclusive weight to agency interpretations of ambiguous *regulations*. Both cases involved the application of the Court's 1997 ruling in *Auer v. Robbins*.[44] In *Auer* the Court held that it would defer to an agency's interpretation of its own regulations unless the interpretation was "plainly erroneous or inconsistent with the regulation," or there was any other "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[45]

Each of the two cases presented disputed interpretations of complex agency regulations.[46] In both, the Court deferred to the agency's interpretation of its regulation as set forth in an amicus brief.[47] In the first, *Chase Bank USA National Association v. McCoy*, the opinion by Justice Sotomayor for the unanimous Court accorded deference to the Federal Reserve Board's interpretation of a Truth-in-Lending Act credit card regulation. While acknowledging that the consumer's contrary argument "ha[d] some force" and that the agency's interpretation was "not commanded by the text of the regula-

[37] *Id.* at 723.

[38] *Id.* at 726.

[39] *Id.* at 724 (citing 11 U.S.C. § 707(b)(2)(A)(ii)(I)).

[40] *Id.* at 724.

[41] *Id.*

[42] *Id.* at 726 n.7.

[43] *Id.* at 727.

[44] *Auer v. Robbins*, 519 U.S. 452 (1997).

[45] *Id.* at 461, 462 (citation and internal quotation marks omitted).

[46] *Chase Bank USA National Association v. McCoy*, 131 S. Ct. 871 (2011); *Talk America Incorporated v. Michigan Bell Telephone Company*, 131 S. Ct. 2254 (2011).

[47] *Chase Bank*, 131 S. Ct. at 877; *Talk America*, 131 S. Ct. at 2261.

tion," the Court nevertheless upheld the Board's interpretation because it was "reasonable."[48]

In *Talk America Incorporated v. Michigan Bell Telephone Company* the Court again accepted the agency's interpretation of its own regulations as set forth in an amicus brief filed by the United States.[49] At issue were Federal Communications Commission regulations promulgated pursuant to the Telecommunications Act. Citing both *Auer* and *Chase Bank*, Justice Thomas, writing for all but Justice Kagan who did not participate, upheld the commission's position because it was not "plainly erroneous or inconsistent with the regulations."[50]

While noting that the Federal Communications Commission was "advancing a novel interpretation" of its long-standing regulation, the Court declared that "novelty alone is not a reason to refuse deference."[51] The Court rejected the petitioner's contention that deference to an agency position set forth in a legal brief might "'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'"[52] To the contrary, the Court was persuaded that "[w]e are not faced with a *post-hoc* rationalization by Commission counsel of agency action that is under judicial review."[53]

Failure to State a Claim

Although the Court did not expressly elaborate on its 2007 and 2009 decisions in *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal* in the 2010 Term, it did suggest a possible deemphasis of the most restrictive interpretations of those decisions.[54]

In *Matrixx Initiatives Incorporated v. Siracusano* the Court unanimously affirmed the Ninth Circuit, and that may be the most startling aspect of the decision.[55] In this securities fraud case both the Supreme Court and the Ninth Circuit rejected the decision of the district court, which had held that the plaintiff investors had failed to state a claim under Rule 8 of the Rules of Civil Procedure. Justice Sotomayor examined reports available to the defendant pharmaceutical company that allegedly established a connection between the company's most successful drug and a side effect. Based on these reports, the Court concluded that

> these allegations suffice to "raise a reasonable expectation that discovery will reveal evidence" satisfying the materiality requirement, *Bell Atlantic Corp. v. Twombly*, … and to "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," [*Ashcroft v.*] *Iqbal* …. Viewing the allegations of the complaint as a whole, the complaint alleges facts suggesting a significant risk to the commercial viability of Matrixx's leading product.[56]

The Court reversed the dismissal of a complaint in another decision examining the requirements of Rule 8. In *Skinner v. Switzer* Justice Ginsburg, writing for the six-Justice majority, summarized the standard for that analysis.[57] Two things

[48]*Chase Bank*, 131 S. Ct. at 879.

[49]*Talk America*, 131 S. Ct. at 2257 n.1.

[50]*Id.* at 2261.

[51]*Id.* at 2263.

[52]*Id.* (quoting *Christensen v. Harris County,* 529 U.S. 576, 588 (2000)).

[53]*Id.* (citing *Auer*, 519 U.S. at 462).

[54]*Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

[55]*Matrixx Initiatives Incorporated v. Siracusano*, 131 S. Ct. 1309 (2011), aff'g, 585 F.3d 1167 (9th Cir. 2009).

[56]*Id.* at 1323.

[57]*Skinner v. Switzer*, 131 S. Ct. 1289 (2011).

are notable about this decision. The Court does not mention either *Twombly* or *Iqbal* anywhere and, in summarizing the law on Rule 8, relies instead on older decisions and on a legal treatise:

> Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was "not whether [Skinner] will ultimately prevail" on his procedural due process claim, see *Scheuer v. Rhodes*, 416 U.S. 232, 236 … (1974), but whether his complaint was sufficient to cross the federal court's threshold, see *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 … (2002)…. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible "short and plain" statement of the plaintiff's claim, not an exposition of his legal argument. See 5 C. Wright & A. Miller, Federal Practice & Procedure § 1219, pp. 277–278 (3d ed. 2004 and Supp. 2010).[58]

Whether the Court is attempting to cut back on the more restrictive readings of *Twombly* and *Iqbal* is impossible to know, of course. But that the Court does not seem to be applying those decisions in as extreme a fashion as some had feared that it might is heartening.

Preemption

The Court issued a handful of preemption decisions with subject matter that ranged from vaccines and generic drugs to seat belts and undocumented aliens. The Court tackled both the issues of express and implied preemption. The opinions are difficult to reconcile because the majority's rationale differs from one case to the next (even though the composition of the majority may not differ).

In *Bruesewitz v. Wyeth Limited Liability Company* the Court held, on a 6-to-2 vote, that the National Childhood Vaccine Injury Act preempted design-defect claims against vaccine manufacturers brought by plaintiffs injured by a vaccine's side effects.[59] As Justice Scalia's majority opinion points out, Congress enacted the Act to bring stability to a vaccine market plagued by tort litigation. The Act creates a no-fault compensation system that is funded by an excise tax on each vaccine dose. As a *quid pro quo*, manufacturers enjoy tort-liability protections from damages arising from injury or death resulting from "'side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.'"[60]

The Bruesewitzes sued the vaccine manufacturer under state-tort theories; the Bruesewitzes alleged that the vaccine's defective design caused their daughter's disabilities and that the Act did not protect defendants. They argued that the Act's tort-liability protections applied only to defective manufacturing and inadequate directions or warnings, not design defects. The Court, however, read the Act to provide that, if a vaccine was properly manufactured and contained proper warnings, any remaining side effects, including those resulting from design defects, were deemed to have been unavoidable.[61] Thus, according to the majority, the text and structure of the vaccine Act preempted the state-law claim.

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[58]*Id.* at 1296. The reference to *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1074), and particularly to the cited page lends itself to the serious reading of tea leaves. *Scheuer* offers one of the classic statements for evaluating the sufficiency of a complaint and quotes crucial and oft-cited language from *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), for the appropriate standard, 416 U.S. at 236. That very language from *Conley* was attacked in *Twombly* and rejected: "[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement" (*Twombly*, 550 U.S. at 563). Thus citing the page in *Scheuer* where the Court in 1974 discussed the standard and quoted the *Conley* language may be significant, especially because *Scheuer* was not even mentioned in *Iqbal*, the follow-up to *Twombly*.

[59]*Bruesewitz v. Wyeth Limited Liability Company*, 131 S. Ct. 1068 (2011).

[60]*Id.* at 1074 (quoting the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-22(b)(1)).

[61]*Id.* at 1075.

PLIVA Incorporated v. Mensing involved a dispute between individuals and a generic drug manufacturer.[62] Plaintiffs' long-term use of the generic drug metoclopramide for their digestive problems resulted in tardive dyskinesia, a serious neurological disorder.[63] The plaintiffs filed suit in state court; they claimed that the generic manufacturer had violated its duty under state products liability and tort laws to use an adequate warning label. The manufacturer removed the case to federal court and argued that the state-law claims were preempted by federal regulations requiring generic manufacturers to use the same warning labels as brand-name manufacturers. The Supreme Court sided with the manufacturers in a 5-to-4 decision by Justice Thomas.

All the Justices agreed that generic and brand-name drugs must contain the same warning labels. The plaintiffs argued that the generic manufacturers had to propose stronger warning labels to the Food and Drug Administration (FDA) when, as they argued was true in their case, the accumulated evidence established the need. Deferring to the FDA's interpretation of the labeling requirements, however, the *PLIVA* majority decided that—even assuming the generic manufacturers were required to request the stronger warning label—the state laws were preempted. According to the majority, for the generic manufacturers to meet the state-law requirement of updating the warning label and simultaneously meeting the federal requirement that they use the same labeling as the corresponding brand-name drug was impossible.[64] The dissent vigorously responded that the majority invented "new principles of pre-emption law out of thin air" and pointed out that the Court had reached the opposite conclusion two years ago when it allowed individuals to sue brand-name manufacturers on state-law failure-to-warn grounds.[65]

In *Chamber of Commerce of the United States v. Whiting* the five-member conservative majority upheld an Arizona statute that authorizes the revocation or suspension of licenses of employers who knowingly or intentionally employ undocumented immigrants.[66] The Court stated at the outset that the federal Immigration and Nationality Act established a comprehensive scheme for regulating immigration. To that end, the Court stated, the federal law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ … unauthorized aliens."[67] The Court also found that the state law fit squarely within the Act's savings clause for state licensing laws and thus was neither expressly nor impliedly preempted by the federal statute. The Court found "no basis in law, fact, or logic" for the argument that the state law was not a licensing law because it operated only to suspend or revoke licenses rather than to grant them.[68]

The Chamber of Commerce relied on congressional history that supported a narrow definition of licensing to bolster its argument of express preemption. The Court flatly rejected that approach and stated that "Congress's 'authoritative statement is the statutory text, not the legislative history.'"[69] As for the implied preemption claim, the Court refused to conduct a "freewheeling judicial inquiry" and concluded that the Chamber of Commerce failed to meet the "high threshold" for implied preemption.[70]

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[62]*PLIVA Incorporated v. Mensing*, 131 S. Ct. 2567 (2011).

[63]*Id.* at 2572.

[64]*Id.* at 2577–79.

[65]*Id.* at 2582 (Sotomayor, J., dissenting) (discussing *Wyeth v. Levine*, 555 U.S. 555 (2009)).

[66]*Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011).

[67]Immigration and Nationality Act, 8 U.S.C. § 1324a(h)(2).

[68]*Whiting*, 131 S. Ct. at 1979.

[69]*Id.* at 1980 (quoting *Exxon Mobil Corporation v. Allapattah Services Incorporated*, 545 U.S. 546, 568 (2005)).

[70]*Id.* at 1985.

The Court in *Williamson v. Mazda Motor of America Incorporated* unanimously concluded that preemption was "not a significant objective" of a federal motor vehicle safety-standard regulation.[71] Following a fatal car accident, plaintiffs sued in state court seeking to impose tort liability on the car manufacturer for installing only a lap belt in the rear seat of the car. The manufacturer sought dismissal arguing that the state law conflicted with and was thus preempted by federal regulation. The regulation gives car manufacturers the choice of installing either lap belts or lap-and-shoulder belts on rear seats. The Court relied heavily on the U.S. solicitor general's argument against preemption to reject the manufacturer's argument; the Court concluded, "There is 'no reason to suspect that the Solicitor General's representation of [the U.S. Department of Transportation's] views reflects anything other than the agency's fair and considered judgment in the matter.'"[72]

Defining Jurisdictional Rules

In an 8-to-0 decision the Court concluded that the deadline for filing appeals from the Board of Veterans' Appeals to the Court of Appeals for Veterans Claims was not jurisdictional.[73] The decision in *Henderson v. Shinseki* is significant because Justice Alito attempted to lay out a road map for determining when a rule is jurisdictional. Since labeling a rule "jurisdictional" can have "drastic" consequences, understanding where and how the "line" should be drawn is particularly important.[74]

Justice Alito explained that rules that "govern[ ] a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction" are jurisdictional, while others, "even if important and mandatory … should not be given the jurisdictional brand."[75] The latter includes "claim-processing rules," which are "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[76] Congress can establish, however, that even a claim-processing rule is jurisdictional.[77]

The Court rejected the government's contention that all statutory deadlines for civil appeals are jurisdictional. Thus the Court's decision in *Bowles v. Russell*, in which it found that the deadline for seeking an extension of time to file a civil notice of appeal was jurisdictional, was not controlling here.[78]

The Court noted several factors indicating that Congress did not intend the rule setting the deadline for appeal from the Board of Veterans' Appeals to be jurisdictional. First, although the statutory language used to set the deadline is mandatory, it "'does not speak in jurisdictional terms.'"[79] Second, Congress placed the appeal deadline requirement in a subchapter entitled "Procedure" rather than in a subchapter called "Organization and Jurisdiction."[80] "[W]hat is most telling here," the Court stated, "are the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims."[81] The Court found that, unlike the ordinary

[71] *Williamson v. Mazda Motor of America Incorporated*, 131 S. Ct. 1131, 1134 (2011).

[72] *Id.* at 1139 (quoting *Geier v. American Honda Motor Company*, 529 U.S. 861, 884 (2000)).

[73] *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011).

[74] *Id*. at 1202.

[75] *Id*. at 1203.

[76] *Id*.

[77] *Id*.

[78] *Bowles v. Russell*, 551 U.S. 205 (2007) (discussed in *Henderson*, 131 S. Ct. at 1203–1204).

[79] *Henderson*, 131 S. Ct. at 1204 (quoting *Zipes v. Trans World Airlines Incorporated*, 455 U.S. 385, 394 (1982)).

[80] *Id*. at 1205.

[81] *Id.*

civil litigation in *Bowles*, Congress intended the veterans' claims system to assist veterans.[82] The Court held that, given that overall context, the deadline for filing the appeal was not jurisdictional.[83]

Third-Party Beneficiary Claims

In *Astra USA Incorporated v. Santa Clara County, California,* the Supreme Court held that health care facilities funded through Section 340B of the Public Health Service Act could not bring third-party suits against drug manufacturers for violating Pharmaceutical Pricing Agreements—agreements that are made between the manufacturers and the secretary of the U.S. Department of Health and Human Services.[84] Plaintiffs argued that defendant manufacturers charged them more for drugs than allowed in the Pharmaceutical Pricing Agreements.

The parties agreed that Congress did not authorize a private cause of action for health care facilities in Section 340B itself. The Court's 8-to-0 opinion refused to grant the facilities a private third-party cause of action to enforce the Pharmaceutical Pricing Agreements. Writing for the Court, Justice Ginsberg explained that the agreements were unusually detailed and prescriptive: they did not reflect negotiated agreements but rather "simply incorporate statutory obligations" of the drug manufacturers and the secretary of health and human services.[85] The agreements reflect the secretary's calculations of the manufacturers' actual drug pricing, a complex process, whose details are protected from public disclosure. The opinion repeatedly defers to the solicitor general's brief, which argued that Section 340B specifically authorized the secretary, and no others, to enforce the agreements and drug pricing.[86]

Congressional intent was the question, and Congress placed the secretary in control: "That control could not be maintained were potentially thousands of covered entities permitted to bring suits alleging errors in manufacturers' price calculations."[87]

State Sovereign Immunity

The Court issued a trio of cases that focus on state sovereignty. *Sossamon v. Texas* held that Texas did not waive its sovereign immunity from private lawsuits for damages when it accepted federal funds under the Religious Land Use and Institutionalized Persons Act.[88] Sossamon, an inmate in the Texas correctional system, sued the state under the Act for monetary and injunctive relief after he was prevented from attending religious services while serving disciplinary cell restriction.

Justice Thomas, writing for the six-Justice majority, began by noting that "federal jurisdiction over suits against 'unconsenting states was not contemplated by the Constitution.'"[89] Thus the test for deciding if a state waives its sovereign immunity "is a stringent one."[90] It depends on whether the waiver is "'unequivocally expressed' in the text of

[82]*Id.* at 1205–6.

[83]*Id.* at 1206.

[84]*Astra USA Incorporated v. Santa Clara County, California*, 131 S. Ct. 1342 (2011). Section 340B of the Public Health Service Act, 42 U.S.C. § 256b, imposes ceilings on prices that drug manufacturers may charge for medications sold to certain health care facilities such as public hospitals and community health centers.

[85]*Id.* at 1348.

[86]*Id.* at 1345. Enforcement is currently handled through "informal procedures," but the Patient Protection and Affordable Care Act directs the secretary of the U.S. Department of Health and Human Services to develop formal procedures for administrative resolutions that will be subject to judicial review under the Administrative Procedure Act (*id.* at 1346 (citing 42 U.S.C. § 256b(d)(3)(A))).

[87]*Id.* at 1345.

[88]*Sossamon v. Texas*, 131 S. Ct. 1651 (2011).

[89]*Id.* at 1657–58 (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996)).

[90]*Id.* at 1658 (quoting *College Savings Bank v. Florida Prepaid Postsecondary Expense Board*, 527 U.S. 666, 675 (1999)).

the relevant statute."[91] Because of this, a "waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign.'"[92]

The Religious Land Use and Institutionalized Persons Act includes an express private cause of action: "A person may assert a violation of [the Act] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[93] According to the Court, the authorization of "'[a]ppropriate relief' does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can 'be certain that the State in fact consents' to such a suit."[94] Citing a dictionary and precedent, the Court observed that "appropriate relief" is an open-ended, ambiguous term that is context-dependent. The majority noted that "where a statute is susceptible of multiple plausible interpretations, including one preserving immunity, we will not consider a State to have waived its sovereign immunity."[95]

The Court turned to Sossamon's argument that Section 1003 of the Rehabilitation Act Amendments of 1986 independently put the states on notice of damages actions. Section 1003 expressly authorizes legal and equitable remedies against participating states for violations of the Rehabilitation Act, Title VI of the Civil Rights Act, and "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."[96] The Court expressed doubt that "a residual clause like the one in § 1003 could constitute an unequivocal textual waiver."[97] The Court also concluded that the Act did not prohibit "discrimination" but rather prohibited burdens on religious exercise.[98] Dissenting Justices Sotomayor and Breyer pointed out that the majority decision was directly at odds with Court precedent.[99]

In *Virginia Office for Protection and Advocacy v. Stewart* an independent state agency—the Virginia Office for Protection and Advocacy—sued another state agency in federal court to obtain treatment records of patients who died or were injured in state-run mental hospitals.[100] James Stewart, the official responsible for administering the hospitals, moved to dismiss the case on grounds of Eleventh Amendment immunity.

Writing for six members of the Court, Justice Scalia allowed the case to proceed under the *Ex parte Young* exception to sovereign immunity. *Ex parte Young* allows federal courts to decide complaints against state officials that allege ongoing violations of federal law and seek prospective relief.[101] The Court found no basis in precedent for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff. Rather, the proper focus is the "'*effect* of the relief sought.'"[102] Here there was no argument that the relief sought threatened to in-

[91] *Id.* at 1658 (quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984)).

[92] *Id.* at 1658 (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

[93] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-2(a).

[94] *Sossamon v. Texas*, 131 S. Ct. at 1658 (quoting *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680 (1999)).

[95] *Id.* at 1659.

[96] Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7(a)(1).

[97] *Sossamon*, 131 S. Ct. at 1662.

[98] *Id.*

[99] *Id.* at 1665–66 (Sotomayor, J., dissenting).

[100] *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632 (2011).

[101] See, *e.g., Verizon Maryland Incorporated v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002) (describing *Ex parte Young*, 209 U.S. 123 (1908)).

[102] *Virginia Office for Protection and Advocacy*, 131 S. Ct. at 1639 (quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 107 (1984)).

vade Virginia's sovereignty. As the Court repeatedly noted, everyone agreed that the requested injunction could properly be awarded at the request of a private party.[103]

Of slightly more interest to the Court was the "lack of historical precedent" for a case in which one state agency sues another state agency.[104] The Court observed that "[n]ovelty … is often the consequence of past constitutional doubts."[105] But the majority found no reason to believe that the unusual context of the case presented any question other than whether the odd prerequisites for one state agency to sue another were met: a federal right that one agency possesses against the other agency and the unencumbered authority to sue the other.[106] In his dissent the chief justice, joined by Justice Alito, compared the plaintiff agency's actions to "cannibalism" and "patricide" and argued that to be sued by a "brother [rather] than [by] a stranger" was a greater affront to state dignity.[107]

In *Bond v. United States* the Court unanimously held that a private citizen had prudential standing to challenge a federal statute on grounds that Congress exceeded its authority under the Tenth Amendment and intruded on state sovereignty when it enacted the statute.[108] Justice Kennedy's opinion found standing because "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable."[109] The Court rejected reliance on *Tennessee Electric Power Company v. Tennessee Valley Authority* because that opinion had conflated the concepts of "standing" and "cause of action."[110] While acknowledging that the two concepts "can be difficult to keep separate," the Court clarified that "the question whether a plaintiff states a claim for relief 'goes to the merits,'" while standing concerns the "justiciability of the dispute."[111]

Standing

In the Term's major decision on standing Justice Kennedy, writing for the traditional five-Justice majority, undercut years of case law in the narrow context of taxpayer standing in establishment clause cases.[112] At issue in *Arizona Christian School Tuition Organization v. Winn* was an Arizona law that gives tax credits for contributions to school tuition organizations.[113] The school tuition organizations use the contributions to fund scholarships for students attending private schools, "many of which are religious."[114] Some Arizona residents challenged the tax credit as a violation of the establishment clause; the residents based their standing on their status as taxpayers. While it affirmed the "general rule against taxpayer standing," the majority devoted most of its attention to examining whether the taxpayers met the sole exception to that rule, which is set out in *Flast v. Cohen*.[115]

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[103] *Id.* at 1640.

[104] *Id.* at 1641.

[105] *Id.* at 1642.

[106] *Id.*

[107] *Id.* at 1649 (Roberts, C.J., dissenting).

[108] *Bond v. United States*, 131 S. Ct. 2355 (2011).

[109] *Id.* at 2364.

[110] *Id.* at 2361–62 (discussing *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U.S. 118 (1939)).

[111] *Id.* at 2362.

[112] *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1450 (2011).

[113] *Id.* at 1440.

[114] *Id.*

[115] *Flast v. Cohen*, 392 U.S. 83 (1968).

The Court reviewed *Flast*, which had upheld the standing of taxpayers to challenge a federal statute that allowed federal expenditures to support instruction in religious schools.[116] It then embarked on a disingenuous attempt to distinguish tax credits from expenditures, thus precluding the present taxpayers from relying on the *Flast* exception. The main distinction, Justice Kennedy explained, is that contributions to school tuition organizations are made by taxpayers spending their own money, as opposed to money that has been collected from the taxpayers.[117] Citizens are not forced to make contributions as they were in *Flast*, where the money came out of the General Treasury funds. Furthermore, unlike in *Flast*, the Court explained, the taxpayers in the instant situation cannot satisfy the causation and redressability requirements of standing: the injury is not traceable to the government, and any injunction limiting the operation of the tax credits would not remedy the harm.[118]

The Court also rejected the taxpayers' argument that those benefitting from tax credits are effectively paying their state income tax to school tuition organizations:

> [W]hat matters under *Flast* is whether sectarian [school tuition organizations] receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience.... [C]ontributions yielding [school tuition organization] tax credits are not owed to the State and, in fact, pass directly from taxpayers to the private organizations. [The taxpayers'] contrary position assumes that income should be treated as if it were government property even it has not come into the tax collector's hands.[119]

The majority found unpersuasive that, in several post-*Flast* establishment clause cases, the Court had reached the merits: "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."[120]

Perhaps the most chilling aspect of the majority decision, however, is the Court's statement of the increasing importance of strict enforcement of the standing requirements: "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so."[121] The Court's more conservative wing would appear to view the limitations imposed by the standing doctrine on federal judges as of greater import than the relief that those judges were presumably sworn in to provide.

As noted, Justice Kagan's dissent is a forceful attack on every aspect of the majority opinion and a repudiation of its transparently result-oriented rationale. She notes that the majority opinion represents a break from nearly half a century's precedent, that the "novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent," and that "the Court's arbitrary distinction threatens to eliminate *all* occasions for a taxpayer to contest the government's monetary support of religion."[122] And that's just the first page. Her rejection of the majority's position goes

[116] *Arizona Christian School Tuition Organization*, 131 S. Ct. at 1445–47.

[117] *Id*. at 1447.

[118] *Id*. at 1447–48. Although joining the majority opinion, Justice Scalia, along with Justice Thomas, would go further and "repudiate that misguided decision [*Flast*] and enforce the Constitution" (*id*. at 1450 (Scalia, J., concurring)).

[119] *Id*. at 1448.

[120] *Id*.

[121] *Id*. at 1449.

[122] *Id*. at 1450 (Kagan, J., dissenting).

on for twelve more pages of the *Supreme Court Reporter*.

Justice Kagan may not be in a position to foil the Roberts Court's attempt to undercut long-standing precedents, but she has certainly staked out her willingness to call them on it.

Employment

The Court issued two decisions expanding federal court protection for victims of workplace retaliation. In *Thompson v. North American Stainless* the petitioner Thompson and his fiancée worked for the same employer.[123] The employer terminated Thompson three weeks after his fiancée filed a sex discrimination charge against the employer with the Equal Employment Opportunity Commission (EEOC).[124] Thompson filed his own EEOC charge and subsequently a lawsuit in federal court; the lawsuit claimed that the employer had fired him in order to retaliate against his fiancée for filing her discrimination charge.[125]

In another unanimous opinion, Justice Scalia reversed the lower courts and reinstated Thompson's claims.[126] Taking the allegations in the complaint to be true, the Court framed the issues in terms of two questions. Did the employer's firing of Thompson constitute unlawful retaliation under Title VII? And, if so, "does Title VII grant Thompson a cause of action" for such retaliation?[127]

With respect to the first question, the Court had "little difficulty" concluding that the employer's alleged retaliatory firing of the petitioner violated Title VII.[128] The Court found that Title VII's "antiretaliation provision must be construed to cover a broad range of employer conduct" and "prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[129] The Court found it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancé would be fired."[130] Although the employer raised various hypothetical "line-drawing problems concerning the types of relationships entitled to protection," the Court declined the invitation to create any bright lines.[131]

Turning to the second and "more difficult" question, the Court determined that, under the circumstances presented, the petitioner qualified as a "person aggrieved" under the standing provisions of Title VII.[132] After some reflection concerning the appropriate standard applicable to this provision, the Court concluded that a "person aggrieved" for purposes of Title VII standing was any plaintiff who "falls within the 'zone of interests' sought to be protected by the statutory provision" at issue.[133] The Court concluded that here the petitioner was "well within the zone of interest sought to be protected by Title VII" and therefore was "a person aggrieved with standing to sue."[134]

In *Kasten v. Saint-Gobain Performance Plastics Corporation* the Court expanded the antiretaliation protections of the Fair

[123] *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011).

[124] *Id.* at 867.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 868 (quoting *Burlington Northern and Santa Fe Railway Company v. White*, 548 U.S. 53, 68 (2006)).

[130] *Id.*

[131] *Id.*

[132] *Id.* at 869 (citing 42 U.S.C. § 2000e-5(f)(1)).

[133] *Id.* at 870 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990)).

[134] *Id.*

Labor Standards Act of 1938.[135] Plaintiff Kasten had made numerous oral complaints to his employer that the employer's failure to compensate employees adequately for "donning and doffing" time (time spent putting on and taking off required work clothes and safety gear) violated the Fair Labor Standards Act.[136] After he was fired, Kasten contended that his discharge violated the Fair Labor Standards Act's antiretaliation strictures. The Act states that employers may not "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in such proceeding…."[137]

Justice Breyer, writing for a six-member majority, stated that "[t]he sole question presented is whether an 'oral complaint of a violation of the Fair Labor Standards Act' is 'protected conduct under the Act's anti-retaliation provision.'"[138] The statute protects employees who have "filed any complaint."[139] The majority observed that this critical phrase, "considered in isolation, may be open to competing interpretations," requiring a specific analysis of whether the term "filed" was intended to encompass both oral and written complaints.[140]

As the majority framed it, the proper construction of a statute "'depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.'"[141] Turning to the "text of the statute," the Court reviewed various dictionary definitions of the word "filed," as well as the apparent meaning of the word both elsewhere in the Fair Labor Standards Act and in the antiretaliation sections of other statutes.[142] The Court concluded that the text alone could not provide a conclusive answer to the question of interpretation because the word "filed" could not be understood to either exclude or include oral complaints.[143]

Turning for assistance to other interpretive materials, the Court found various indications, both in the legislative history of the Fair Labor Standards Act and in the history of the National Labor Relations Board's enforcement of it, that Congress generally intended the antiretaliation provision to "provide 'broad rather than narrow protection to the employee.'"[144] The Court added that the Fair Labor Standards Act's remedial purposes cautioned against "narrow, grudging interpretations of its language."[145] The Court agreed with the employer that "the statute requires fair notice" of a complaint."[146] But, the Court observed, "a fair notice require-

[135] *Kasten v. Saint-Gobain Performance Plastics Corporation,* 131 S. Ct. 1325 (2011).

[136] *Id*. at 1329.

[137] Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

[138] *Kasten*, 131 S. Ct. at 1330 (quoting Petition for Certitorari at i).

[139] Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

[140] *Kasten*, 131 S. Ct. at 1331.

[141] *Id*. at 1330–31 (quoting *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006)).

[142] *Id*. at 1332–33.

[143] *Id*. at 1333.

[144] *Id*. at 1334 (quoting *National Labor Relations Board v. Scrivener*, 405 U.S. 117, 122 (1972)).

[145] *Id*. at 1334 (quoting *Tennessee Coal, Iron and Railroad Company v. Muscoda Local 123*, 321 U.S. 590, 597 (1944)). The Court also noted that, in the years prior to the passage of the Fair Labor Standards Act, the illiteracy rate among workers covered by the Act was relatively high, prompting the Court to doubt that Congress would "want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers" (*id.* at 1333).

[146] *Id*. at 1334.

ment does not necessarily mean that [the] notice be in writing."[147]

The majority gave "a degree of weight" to the views of two federal enforcement agencies on the language at issue, the U.S. Department of Labor and the EEOC.[148] While acknowledging that these agency views were not expressed through formal rulemaking, the Court observed that they were long-standing, reasonable, consistent with the statute, and reflective of "careful consideration" rather than "post-hoc rationalization."[149]

In *Schindler Elevator Corporation v. United States ex rel. Kirk* the majority again engaged in an extensive and disputed exercise in statutory interpretation, this time resulting in a narrowing of potential federal "whistleblower" claims under the False Claims Act.[150] The False Claims Act gives private parties the right to bring an action on behalf of the United States against defendants who "submit false or fraudulent" claims for payment to the federal government.[151] The parties are permitted to retain specified amounts of any monies recovered on behalf of the United States.[152] In an effort to discourage "parasitic" litigation, the Act forecloses suits that are "'based upon the public disclosure of allegations or transactions ... in a congressional, administrative, or Government [Accountability] Office report, hearing, audit, or investigation.'"[153]

Here plaintiff supported his allegations that the defendant had submitted false and fraudulent payment claims to the United States with Labor Department responses to Freedom of Information Act requests.[154] The responses indicated that the defendant elevator company had failed to comply with federal contracting reporting requirements.[155] In its motion to dismiss, the defendant alleged that the action was barred because the Freedom of Information Act responses constituted administrative "reports" within the meaning of the False Claim Act's public disclosure bar.[156]

Writing for a five-member majority, Justice Thomas began his statutory construction analysis with an effort to define the "ordinary meaning" of the word "report."[157] He concluded that "report" connoted merely "notification" (or an "account," or an "announcement") of "information," or "facts or proceedings."[158] The majority rejected the analysis employed by the Second Circuit as too narrowly focused upon "the immediately surrounding words" of the text, inappropriately excluding "the rest of the statute."[159] The Court deemed it self-evident that a "written agency response to a [Freedom of Information Act] re-

[147] *Id*. at 1335.

[148] *Id*.

[149] *Id*. (citation and internal quotation marks omitted). In a somewhat startling dissent, Justice Scalia, joined by Justice Thomas, declared his belief that the law did not apply to complaints (oral or written) made to the employer but only to those filed with a court or agency (*id*. at 1337 (Scalia, J., dissenting)). Justice Scalia also ridiculed the majority's citation to "so-called *Skidmore* deference" as a disingenuous effort to continue "the Court's on-going obfuscation of this once-clear area of administrative law" (*id*. at 1340, 1340 n.5).

[150] *Schindler Elevator Corporation v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011).

[151] *Id*. at 1889–90 (citing 31 U.S.C. § 3729(a)).

[152] *Id*.

[153] *Id*. at 1889 (quoting 31 U.S.C. § 3730(e)(4)(A)).

[154] *Id*. at 1890.

[155] *Id*.

[156] *Id*.

[157] *Id*. at 1891.

[158] *Id*.

[159] *Id*. at 1892.

quest falls within the ordinary meaning of 'report.'"[160] The Court dismissed as inconclusive legislative history brought to its attention by the plaintiff (and the dissent). The Court also offered a brief rebuttal to some of the policy-related arguments raised in support of the Court of Appeals' contrary analysis.[161]

The majority concluded that the documents disclosed under the Freedom of Information Act were "reports within the meaning of the public disclosure bar" and thus could not form the basis for an action under the False Claims Act.[162]

Appeals and Summary Judgment

In *Ortiz v. Jordan* defendants filed a motion for summary judgment claiming qualified immunity to Section 1983 claims.[163] The motion was denied, the case went to trial, and defendants lost. Defendants sought to appeal the denial of summary judgment. The Court decided that when denial of the defendants' motion for summary judgment was followed by the defendants' loss at trial, the subsequent appeal could only be from the decision at trial.

Defendants claiming qualified immunity are allowed an immediate appeal of a denial of summary judgment when the denial is based on the law rather than on disputed facts.[164] In *Ortiz* the denial of summary judgment was based on disputed facts, and defendants did not appeal the denial until after the trial was held.[165] Accordingly the appeal was from the trial verdict, not the denial of summary judgment. "'Once trial has been had,'" the Court stated, "'the availability of official immunity should be determined by the trial record, not the pleadings nor the summary judgment record.'"[166] The Court's decision reversed the decision of the Sixth Circuit, which had followed its normal practice of considering the denial of summary judgment on the qualified immunity defense as part of the appeal and which had concluded on that limited record that the defendants were entitled to immunity.[167]

Stay

In a case that attracted international attention, *Leal Garcia v. Texas*, the Court refused to grant a stay of execution to a Mexican national whose conviction for murder was allegedly obtained in violation of the Convention on Consular Relations.[168] The International Court of Justice had found in 2004 that the United States had violated the Vienna Convention by failing to inform the Mexican national that he had the right to consular assistance. The United States, as an amicus, asked the Court for a stay on the ground that a Senate bill fashioned in response to the International Justice Court's decision, if passed, might allow the prisoner to launch a collateral attack on the judgment.

In a 5-to-4 per curiam decision, the majority rejected the request. The majority held first that "we are doubtful that it is ever appropriate to stay a lower court judgment in light of unenacted legislation. Our task is to rule on what the law is, not what it might eventually be."[169]

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[160] *Id.* at 1893.

[161] *Id.* at 1893–95.

[162] *Id.* at 1896. The dissenting opinion evidenced particular concern for the policy implications raised by the majority's analysis, which rendered the issue "worthy of Congress' attention" (*id.* at 1898 (Ginsberg, J., dissenting)).

[163] *Ortiz v. Jordan*, 131 S. Ct. 884 (2011).

[164] *Id.* at 891.

[165] *Id.*

[166] *Id.* at 889 (quoting 5A Charles Alan Wright et al., Federal Practice and Procedure § 3914.10, at 684 (2d ed.1992 & Supp. 2010)).

[167] *Id.* at 888–89.

[168] *Leal Garcia v. Texas*, 131 S. Ct. 2866 (2011).

[169] *Id.* at 2867.

Even if a stay could be based on unenacted legislation, the Court stated, this case did not present the equities for that remedy. Too much time had passed, the Court noted, between the ruling of the international court and the introduction of legislation to comply with the court's ruling. Furthermore, the president's plea based on foreign policy considerations was unavailing. The Court has "no authority to stay an execution in light of an 'appeal of the President' … presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim."[170]

Other Issues: Mootness, Law of the Case, Fees for a Prevailing Defendant

In other cases of interest, the Court reiterated the viability of the major exception to the mootness doctrine known as "capable of repetition, yet evading review."[171] In another case that broke no new ground, the Court described the law-of-the-case doctrine and explained that it "'does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice.'"[172] In its only foray into the issue of attorney fees, the Court held that a prevailing defendant was allowed to recover fees from the plaintiff under 42 U.S.C. § 1988 only for frivolous claims.[173]

■ ■ ■

The upcoming term includes at least one potential blockbuster, a case that could impose significant obstacles to enforcement actions against beneficiaries of spending clause programs, such as Medicaid. The Court has granted certiorari in a Ninth Circuit case involving a challenge to a state Medicaid policy; when a government official is the petitioner is always a bad sign, but especially so in this instance because the solicitor general had urged the Court not to grant the petition.[174] The focus is on the plaintiffs' use of the supremacy clause to preempt a state law that arguably conflicts with the federal Medicaid Act.[175] If the Court agrees with California, over thirty years of enforcement, during which time all twelve geographical federal appellate courts have applied supremacy clause preemption to state Medicaid laws, could be upended. The case is scheduled to be the first argued in the 2011 Term.

And, of course, another kind of access case—access to health care—also is just over the horizon and may make the Court's docket in the 2011 Term. Given that the Sixth Circuit upheld the Patient Protection and Affordable Care Act, the Eleventh Circuit invalidated the Act's individual mandate, and two other circuits are wrestling with the law, there is a real possibility that the Supreme Court will reach that issue in the 2011 Term.[176] At a minimum, the Court will probably have to confront a traditional array of access issues, such as standing and mootness, before considering the merits.[177]

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[170]*Id*. at 2868 (quoting *Leal Garcia*, 131 S. Ct. at 2871 (Breyer, J., dissenting)). Justice Breyer in his dissent had expressed concern about the majority's failure to honor the President's appeal on a matter of foreign policy (*id*. at 2870 (Breyer, J., dissenting)).

[171]*Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011) (citation and internal quotation marks omitted).

[172]*Pepper v. United States*, 131 S. Ct. 1229, 1250–51 (2011) (quoting *Agostini v. Felton*, 521 U.S. 203, 236 (1977)).

[173]*Fox v. Vice*, 131 S. Ct. 2205, 2218 (2011).

[174]See *Maxwell-Jolly v. Independent Living Center of Southern California Incorporated*, 131 S. Ct. 992 (2011).

[175]Adding to the unease about the case is that the U.S. solicitor general's amicus brief to the Court on the merits stakes out a strong position in favor of the state and against supremacy clause preemption in the Medicaid context.

[176]See *Thomas More Law Center v. Obama*, No. 10-2388, 2011 WL 2556039 (6th Cir. June 29, 2011), petition for cert. filed, No. 11-117 (July 27, 2011); *Florida v. U.S. Department of Health and Human Services*, Nos. 11-11021, 11-11067, 2011 WL 3519178 (11th Cir. Aug. 12, 2011), petitions for cert. filed, Nos., 11-393 and 11-398 (Sept. 28, 2011) and No. 11-400 (Sept. 27, 2011).

[177]See, e.g., *Thomas More Law Center*, 2011 WL 2556039, at*2–*6.

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- ☐ None of the above

What is the size of your organization?

- ☐ 100+ staff members
- ☐ 51–99 staff members
- ☐ 26–50 staff members
- ☐ 1–25 staff members
- ☐ Not applicable

Please e-mail this form to subscriptions@povertylaw.org.
Or fax this form to Ilze Hirsh at 312.263.3846.

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