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Federal Access Issues in the Supreme Court’s 2011 Term

By Gary F. Smith, Gill Deford, Jane Perkins, and Mona Tawatao

The U.S. Supreme Court’s 2011 Term will be remembered for the decision in which Chief Justice John Roberts stunned the legal and political world by upholding the constitutionality of the Obama administration’s most significant and controversial legislative achievement: the Patient Protection and Affordable Care Act of 2010.1 Besides this landmark case, the Court ruled on the usual variety of issues—including enforcement of arbitration agreements, preemption, statutory construction, and deference to administrative agencies—affecting access to the federal courts. We analyze this Term’s somewhat mixed collection of decisions on these and other access issues.

Administrative Procedure Act

In Sackett v. Environmental Protection Agency a unanimous Court expanded the ability of plaintiffs to seek judicial review of administrative agency orders via the Administrative Procedure Act.2 The U.S. Environmental Protection Agency, pursuant to its enforcement authority under the Clean Water Act, had issued a compliance order to husband and wife property owners requiring them to undertake restoration activities on their land or face daily fines of $75,000.3 The Sacketts chose to challenge the order by seeking judicial review under the Administrative Procedure Act. Both district and appellate courts dismissed the action for lack of jurisdiction. The U.S. Environmental Protection Agency had not yet “enforced” the compliance order, the courts stated, as the agency had not filed a Clean Water Act civil enforcement action against the Sacketts. Thus the order was not final agency action subject to judicial review under the Administrative Procedure Act.4

Justice Scalia’s opinion first concluded that the compliance order had “all the hallmarks of [Administrative Procedure Act] finality.”5 “In Clean Water Act enforcement cases,” the

2Sackett v. Environmental Protection Agency, 132 S. Ct. 1367 (2012); Administrative Procedure Act, 5 U.S.C. §§ 500 et seq. The Administrative Procedure Act provides for judicial review of “final agency actions for which there is no adequate remedy at law” (id. § 704).
5Sackett, 132 S. Ct. at 1371 (citing Bennett v. Spear, 520 U.S. 154, 178 (1997)).
Court observed, “judicial review ordinarily comes by way of a civil action brought by the [Environmental Protection Agency]."6 Here the property owners “cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government’s telling, an additional $75,000 in potential liability.”7 The Court rejected the government’s argument that the Clean Water Act precluded the Sacketts from seeking judicial review under the Administrative Procedure Act absent an enforcement order. Justice Scalia found nothing in the Clean Water Act sufficient to overcome the Administrative Procedure Act’s “presumption favoring judicial review of administrative action.”8 Thus Justice Scalia held that “the compliance order in this case is final agency action for which there is no adequate remedy other than Administrative Procedure Act review, and that the Clean Water Act does not preclude that review.”9

In another unanimous opinion the Court considered whether a Board of Immigration Appeals policy that resulted in the denial of relief to a resident alien facing deportation passed muster under the Administrative Procedure Act’s “arbitrary and capricious” standard of review.10 Justice Kagan observed (in an understatement) that “the legal background of this case is complex.”11 Judulang v. Holder involved complicated and overlapping statutory and regulatory strictures that govern “deportation,” “exclusion,” and “cancellation of removal” proceedings pertaining to resident aliens.12

The U.S. Department of Homeland Security brought deportation proceedings against the petitioner, a lawful permanent resident, after he was convicted of a crime. An immigration judge ordered him deported. The Board of Immigration Appeals denied petitioner’s application for relief from deportation based on its policy involving a confusing comparison of statutory categories of relief applicable to “exclusion” and “deportation” proceedings.13

The Court observed that the scope of its review under the “arbitrary and capricious” standard is narrow and that “a court is not to substitute its judgment for that of the agency.”14 Justice Kagan, however, reaffirmed that “courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking.”15 That review of agency action, she stated, “involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons.”16

After examining the justifications offered by the government in support of the nearly incomprehensible policy applied by the agency, the Court decided:

The [Board of Immigration Appeals] has flunked that test here. By hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the [Board of Immigration

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6Id. at 1372.
7Id.
8Id. at 1373.
9Id. at 1374.
11Id. at 479.
12Id. at 479–81.
13Id. at 483–84 (citing Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), repealed, 8 U.S.C. § 1229(b) (1996)).
14Id. at 483.
15Id. at 483–84.
16Id.
Appeals] has failed to exercise its discretion in a reasoned manner.17

Justice Kagan concluded that “[w]e must reverse an agency policy when we cannot discern a reason for it.”18

Deference to Administrative Agencies

The issue of judicial deference to administrative interpretations of statutory provisions surfaced this Term in two decisions. In Christopher v. Smithkline Beecham Corporation the Court considered whether a pharmaceutical sales representative was an “outside salesman” under the Fair Labor Standards Act so as to be exempt from the Act’s minimum wage and hour requirements.19 Because the plaintiff sales representatives were not paid overtime wages when they worked in excess of forty hours per week, they filed under the Act an action seeking back pay and damages. The issue presented was whether the Ninth Circuit had correctly rejected the U.S. Department of Labor’s interpretation of its own regulations.20

Justice Alito, writing for the usual conservative majority, first considered whether the Labor Department’s interpretation of its own admittedly ambiguous regulations defining “outside salesman,” which was first set forth in an amicus brief filed in 2009, should be entitled to controlling deference under Auer v. Robbins.21 While acknowledging that “Auer ordinarily calls for deference to an agency’s interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief,” the majority cautioned that “this general rule does not apply in all cases.”22 Deference is unwarranted, for example, when the agency’s interpretation “conflicts with a prior interpretation.”23 Deference is also unwarranted when the interpretation “is nothing more than a ‘convenient litigating position’” or is “‘a post hoc rationalization’ advanced by an agency seeking to defend past agency action against attack.”24

According deference to the agency’s new interpretation here, the majority noted, would “impose potentially massive liability on [the employer] for conduct that occurred well before the interpretation was announced.”25 Indeed, the Court noted, it would “result in precisely the kind of ‘unfair surprise’ against which our cases have long warned.”26 The agency’s decades-long inaction in the face of the industry’s practice of classifying its salesmen as “exempt” under the Fair Labor Standards Act suggested that it had “acquiesced” in the industry’s application of the exemption.27 The majority concluded that Auer deference was unwarranted.

Furthermore, the Court declined to accord the agency even that lesser measure of deference traditionally permitted under Skidmore v. Swift.28 The agency’s interpretation of its regulations, even under Skidmore’s standard, was “quite unpersuasive.”29

17Id. at 484.
18Id. at 490.
20Id. at 2165.
22Christopher, 132 S. Ct. at 2166.
23Id.
24Id. (quoting Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988); Auer, 519 U.S. at 462).
25Christopher, 132 S. Ct. at 2167.
26Id. (quoting Long Island Care at Home Limited. v. Coke, 551 U.S. 158, 170–71 (2007)).
27Id. at 2168.
29Christopher, 132 S. Ct. at 2169–70 (discussing Skidmore, 323 U.S. at 140).
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Concluding that the agency’s “interpretation is neither entitled to Auer deference nor persuasive in its own right,” the majority turned to “traditional tools” of statutory construction to determine whether the plaintiffs were exempt from the Labor Act’s overtime requirements because they were “outside salesm[e]n.” After reviewing the specific statutory language at issue and the statutory scheme as a whole, the majority held that the pharmaceutical salesmen “qualify as outside salesmen under the most reasonable interpretation” of the statute and the regulations.

Justice Breyer, writing in dissent for the liberal wing of the Court, concluded that the plaintiffs should not be exempt as “outside salesm[e]n,” from the Act’s mandatory overtime provisions. Significantly, however, the dissent agreed with the majority’s determination to “not give the [agency’s] current interpretative view any especially favorable weight,” in “light of important, near-contemporaneous differences in the [government’s] views as to the meaning of relevant Labor Department regulations.”

The Court was more willing to defer to agency interpretation in Astrue v. Capato, a case arising under the Social Security Act with unusual factual circumstances. Eighteen months after her husband’s death from cancer, Karen Capato, “[w]ith the help of in vitro fertilization, … gave birth to her husband’s twins.” Karen applied for social security survivors’ benefits for each of the twins. The Social Security Administration denied her application because the twins did not, in its view, meet the statutory definition of “child[ren]” of their predeceased father. The Social Security Administration relied upon a statutory section directing it to apply state intestacy law to determine whether each applicant qualified as a “child” of the wage earner. The Social Security Administration concluded that because no one disputed that children conceived subsequent to their father’s death would not qualify as “child[ren]” under Florida’s intestacy law, the Capato twins were not eligible for survivors’ benefits.

Writing for a unanimous Court, Justice Ginsburg turned to the familiar standard set forth in Chevron USA v. National Resources Defense Council to review the agency’s interpretation of the statute. The Court observed that the Social Security Administration’s interpretation was consistently applied, was set forth in long-standing regulations published after notice-and-comment rulemaking, and was neither “arbitrary or capricious in substance, nor manifestly contrary to the statute.”

Accordingly, while lamenting the

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30 Id. at 2170.
31 Id. at 2174.
32 Id. at 2175 (Breyer, J., dissenting).
33 Id.
35 Id. at 2025.
36 Id. at 2026 (citing Social Security Act, 42 U.S.C. §§ 416(e), 416(h)(2), 416(h)(3)(c) (2012)).
37 Id. at 2030–31 (citing 42 U.S.C. § 416(h)(2)(A) (2012)).
38 Id. at 2030 (citing Price v. Price, 114 Fla. 233, 235 (1934)).
40 Astrue, 132 S. Ct. at 2033–34 (quoting Mayo Foundation for Medical Education and Research v. United States, 131 S. Ct. 704, 711 (2011)).
41 Id. at 2026.
“tragic circumstances” that gave rise to this case, the Court remanded for denial of the application for survivors’ benefits.

**Statutes of Limitations/Procedural Defaults**

The Court issued two decisions which may make it easier for litigants to avoid dismissal of their claims due to procedural missteps. Both cases arose in the context of postconviction petitions for habeas corpus relief but may have broader application to civil litigation. In *Maples v. Thomas* an Alabama death-row inmate, Maples, filed a habeas corpus petition in state court.\(^42\) While the habeas corpus petition was pending in the state trial court, Maples’s attorneys—pro bono attorneys from a large New York law firm—left the law firm and astonishingly “did not inform Maples of their departure and consequent inability to serve as his counsel. Nor did they seek the Alabama trial court’s leave to withdraw. Neither they nor anyone else moved for the substitution of counsel able to handle Maples’s case.”\(^43\)

Subsequently the Alabama court entered an order denying Maples’s state habeas corpus petition. The court clerk mailed the order to Maples’s New York attorneys of record; the firm’s mailroom returned the order unopened. The court clerk took no further action, and Maples’s time for filing an appeal of the order expired. Maples eventually learned of his plight as a result of correspondence with the state attorney general’s office. His belated efforts through new counsel to extend the time for appeal were unsuccessful.\(^44\)

In opposing Maples’s subsequent petition for federal habeas corpus relief, the state contended that because he did not timely appeal from the trial court’s order denying his claims on the merits, he had committed a “procedural default” which forfeited those claims.\(^45\) The lower courts agreed.

In a 7-to-2 decision written by Justice Ginsburg the Supreme Court reversed the dismissal of the federal habeas petition. The Court acknowledged the “general rule” that negligence on the part of a petitioner’s attorney cannot qualify as “cause” sufficient to excuse a procedural default.\(^46\) The “general rule” rests on the theory that the attorney is the petitioner’s agent, “and under ‘well-settled principles of agency law,’ the principal bears the risk of negligent conduct on the part of his agent.”\(^47\) However, “a markedly different situation is presented” when the attorney causes the default not through negligence or deficient performance, but by utter “abandonment.”\(^48\) In such a situation, “[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of the word.”\(^49\)

The majority concluded that, “through no fault of his own, Maples lacked the assistance of any authorized attorney during the forty-two days Alabama allows for noticing an appeal from the trial court’s denial of post-conviction relief.”\(^50\) Moreover, “he had no reason to suspect that, in reality, he had been reduced to pro se status.”\(^51\) Under such “extraordinary circumstances,” “no just system would lay the default at Maples’ death-cell door.”\(^52\)

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\(^{43}\) *Id.* at 917.

\(^{44}\) *Id.* at 920–21.

\(^{45}\) *Id.*

\(^{46}\) *Id.* at 922.

\(^{47}\) *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991)).

\(^{48}\) *Id.* at 922–23.

\(^{49}\) *Id.* at 923 (quoting *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010)) (Alito, J., concurring in part and concurring in judgment).

\(^{50}\) *Id.* at 927.

\(^{51}\) *Id.*

\(^{52}\) *Id.* at 927, 917.
In another 7-to-2 opinion authored by Justice Ginsburg the Court considered whether a federal appellate court had the authority to raise on its own motion a procedural defense which the defendant had expressly declined to pursue in the lower court. In *Wood v. Milyard* a district court reviewing a habeas corpus petition instructed the state defendant to address the affirmative defenses of timeliness and exhaustion of state remedies. The state, after analyzing the issue of whether the petition had been timely filed (complicated by several intervening “tolling” events), responded that it was “not challenging, but do[es] not concede, the timeliness of the petition.” Accordingly the district court did not address the issue of timeliness but dismissed the petition’s claims on the merits.

On appeal the Tenth Circuit Court of Appeals ordered the parties to brief the timeliness question. Concluding that it had the authority to raise the issue on its own motion, notwithstanding the position taken by the defendant below, the Tenth Circuit dismissed the petition as time-barred without addressing the merits of the claim.

The Supreme Court observed that, “[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant’s answer or an amendment thereto,”. Furthermore, once it is forfeited, an affirmative defense is “excluded from the case” and, “as a rule, cannot be asserted on appeal.” In “exceptional cases” an appellate court has discretion to consider a procedural defense “inadvertently overlooked” by the State in the district court. But that discretion should not, concluded the Court, be invoked to raise a procedural defense which the defendant deliberately chose not to present to the trial court.

### Causes of Action

The Court considered two cases involving causes of action, but only one resulted in a decision on that point. In *Minneci v. Pollard* the issue was whether the Court should imply a *Bivens* action against employees of a privately operated federal prison. That the answer was no is not surprising in light of the Court’s increasing lack of enthusiasm for *Bivens*. In the second case, *Douglas v. Independent Living Center of Southern California Incorporated* the Court sidestepped the issue and remanded on other grounds.

In *Minneci* Justice Breyer, writing for eight members of the Court, continued the Court’s long-standing policy of not extending *Bivens* beyond the two decisions handed down in the decade following the *Bivens* decision. Citing its most recent decision, the majority reiterated that the *Bivens* inquiry should be distilled into two considerations: whether the existence of an alternative process for protecting constitutional interests suggests that the federal courts should refrain from creating another remedy, and, even if no other remedy exists, whether a federal court should create a remedy when acting as a common-law tribunal.

The majority opinion rejected the plaintiff’s reliance on *Carlson v. Green*, a 1980 case in which the Court created a *Bivens* remedy against prison personnel. In *Carlson* the prison personnel were feder-
al employees, not employees of a private firm. Since prisoners may bring state-law tort actions against private employees, the distinction in employment status is critical.\textsuperscript{63} The Court rejected the plaintiff’s contention that the Court may not take into account state remedies and may consider alternative federal remedies only. The Court also disagreed that the state remedies were not adequate to protect the federal constitutional interests at issue.

As for state remedies, that the state remedy was not as robust as a \textit{Bivens} action would be, Justice Breyer noted, was not determinative: “[T]he question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations.”\textsuperscript{64} Finding that standard satisfied, the Court concluded that a federal remedy should not be implied and that the prisoner should seek relief under state tort law.

In \textit{Douglas} the issue initially presented to the Court was whether Medicaid recipients and providers have a cause of action against a state under the supremacy clause to enforce the federal Medicaid statute.\textsuperscript{65} In the consolidated action, plaintiffs brought suit challenging California’s Medicaid state plan amendments on the ground that they violated federal Medicaid requirements codified in Section 1396a(a)(3)(A) of Title 42.\textsuperscript{66} The lower courts had held that the supremacy clause of the U.S. Constitution authorized a cause of action to preempt the state law. After oral argument in the Supreme Court, however, the responsible federal agency—not a party to the action—changed its position and approved the amendments.

Justice Breyer, writing for a five-Justice majority that included Justice Kennedy, determined that that intervening event changed the focus of the case. The issue changed from the state’s alleged violation of the Medicaid statute to the validity of the federal agency’s action under the Administrative Procedure Act. Consequently the majority did not reach the issue of whether the supremacy clause provided a cause of action. Instead the majority vacated the lower-court decisions and remanded, presumably so that the plaintiffs could amend their complaint to bring an action under the Administrative Procedure Act against the federal agency.\textsuperscript{67}

The Chief Justice’s dissenting opinion opined that the supremacy clause did not provide a cause of action because Congress had made clear in the Medicaid statute that it did not intend to authorize such an action.\textsuperscript{68}

\textbf{Jurisdiction}

The Court considered two cases raising federal court jurisdictional issues. In the first, \textit{Gonzalez v. Thaler}, Justice Sotomayor’s opinion for the eight-Justice majority reviewed several aspects of the habeas corpus provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996.\textsuperscript{69} Under the statute a habeas corpus petitioner must obtain a certificate of appealability in order to appeal a final order.\textsuperscript{70} The certificate is issued.

\begin{footnotesize}
\begin{enumerate}
\item Minneci, 132 S. Ct. at 623.
\item Id. at 625.
\item Douglas, 132 S. Ct. at 1208.
\item Id. at 1211; see also id. at 1215 (Roberts, C.J., dissenting) (“I understand the Court to suggest that [the suits] should morph into [Administrative Procedure Act] actions.”).
\item Id. at 1213 (Roberts, C.J., dissenting).
\end{enumerate}
\end{footnotesize}
Because the appellate judge who issued the certificate of appealability failed to include in the certificate the specific constitutional right at issue, the Court had to determine whether the Anti-Terrorism and Effective Death Penalty Act’s “specific issue” requirement was jurisdictional.

Justice Sotomayor first reiterated that there was a “clear-statement principle” for distinguishing between jurisdictional and nonjurisdictional provisions. A rule is jurisdictional, she stated, “if the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional. But if Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.”

The majority agreed with the parties that the Anti-Terrorism and Effective Death Penalty Act’s requirement that a petitioner obtain a certificate of appealability was jurisdictional and that the requirement that the petitioner make a “substantial showing” was not jurisdictional. From that premise, the Court deduced that the requirement that the issuing judge state the specific constitutional issue was not jurisdictional either. In a summary sentence that Justice Scalia derided in his solitary dissent, the majority concluded that “[a] defective [certificate of appealability] is not equivalent to the lack of any [certificate of appealability].”

The Court rejected the contention that all mandatory rules are jurisdictional and stated that “mere proximity” to a jurisdictional provision “will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle.” The majority also refused to accept the state’s analogizing of the certificate of appealability to a notice of appeal, the contents of which are jurisdictional. To distinguish between the two types of documents, the Court pointed to the Advisory Committee Note to Rule 3 of the Federal Rules of Appellate Procedure. The Advisory Committee note, which sets out the necessary contents for a notice of appeal, had been cited by the Supreme Court in a previous case to establish the notice’s jurisdictional nature.

This reference prompted an additional opportunity for hyperbole and ridicule by the dissenter.

Justice Ginsburg’s opinion on behalf of a unanimous Court in Mims v. Arrow Financial Services Incorporated is a useful history of the federal-question jurisdiction statute and a primer for when it may be invoked. Under the Telephone Consumer Protection Act of 1991, federal courts have exclusive jurisdiction over state-initiated suits while private individuals are explicitly permitted to bring suit in state court. The question for the Court

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71 Id. § 2253(c)(2).
72 Id. § 2253(c)(3).
73 Gonzalez, 132 S. Ct. at 647.
74 Id. at 649.
75 Id. at 648 (quoting Arbaugh v. Y and H Corporation, 546 U.S. 500, 515–16 (2006)).
76 Id. at 649.
77 Id.; see also id. at 657 (Scalia, J., dissenting) (terming that statement “absurd”).
78 Id. at 651.
79 Id. at 651–52 (citing Torres v. Oakland Scavenger Company, 487 U.S. 312, 318 (1988)).
80 Id. at 652 (citing Torres, 487 U.S. at 315–16).
81 Since an Advisory Committee Note is equivalent to legislative history, Justice Scalia postulated that legislative history could be cited to “waive the sovereign immunity of the United States,” adding, “Today’s opinion is in this respect a time-bomb” (id. at 662 (Scalia, J., dissenting)).
83 Mims, 132 S. Ct. at 744.
was whether state courts had exclusive jurisdiction over private actions. To answer that question, the Court first stated the overriding rule: “[W]hen federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under [Section] 1331. That principle endures unless Congress divests federal courts of their [Section] 1331 adjudicatory authority.”

Justice Ginsburg could find no indication that Congress had divested the federal courts in the Telephone Consumer Protection Act. First, “it is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.” Second, although Congress knows how to divest courts of Section 1331 jurisdiction, the legislature included no language in the Act to accomplish that end. Third, none of the defendant’s suggested policy rationales for limiting jurisdiction to state court was sufficient to overcome the presumption in favor of Section 1331 jurisdiction. And, fourth, the statements of the legislation’s sponsor carried no weight: “[T]he views of a single legislator, even a bill’s sponsor, are not controlling.” In short, the decision resoundingly endorsed “the familiar default rule: Federal courts have [Section] 1331 jurisdiction over claims that arise under federal law.”

Statutory Construction

In contrast to past Terms, the Court this Term delved deeply into the realm of statutory construction, reviewing and repeating (and repeating again) many of the canons that the federal courts employ to interpret statutory language. In Taniguchi v. Kan Pacific Saipan Limited the issue was whether prevailing parties may recover the cost of interpreters translating documents. The Court Interpreters Act allows costs for the “compensation of interpreters” but does not define “interpreter.” Justice Alito’s path to a negative conclusion for the six-member majority led him through a series of the canons.

First, the old standby: “When a term goes undefined in a statute, we give the term its ordinary meaning.” By its reliance on dictionaries contemporaneous with the amendment that added “compensation of interpreters,” the Court indicated that “ordinary meaning” referred to the meaning at the time the phrase was added. Only one timely dictionary definition supported defining “interpreter” to include one who translates documents. That gave rise to another canon: “That a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense.” Based on his review of the relevant dictionaries, Justice Alito concluded that “[a]ny definition of a word that is absent from many dictionaries and is deemed obsolete in others is hardly a common or ordinary meaning.”

Since “interpreter” could include document translators, however, another canon was implicated: a possible but not ordinary meaning of the word “does not control unless the context in which the

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84Id. at 748–49.
85Id. at 749 (quoting United States v. Bank of New York and Trust Company, 296 U.S. 463, 479 (1936)).
86Id. at 749–50. The example cited to prove that Congress is capable of that action is Social Security Act, 42 U.S.C. § 405(h), which explicitly divests federal courts of Section 1331 jurisdiction over Social Security Act claims.
87Mims, 132 S. Ct. at 752.
88Id. at 753.
93Id. at 2003.
94Id.
word appears indicates that it does.”95 A review of the context convinced the majority, however, that “interpreter” applied only to those who translate orally.96 In parsing the relevant statutory provisions and their use of the word “interpreter,” the Court hit upon still another canon: “[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.”97 Furthermore, the relevant context did not include the practice of federal courts before and after the “compensation of interpreters” language was added. The Court concluded: “We think the statutory context in which the word ‘interpreter’ appears is a more reliable guide to its meaning.”98

Authoring two decisions for a unanimous Court, Justice Scalia also added to the anthology of canons. One case, Freeman v. Quicken Loans Incorporated, questioned whether the phrase “portion, split, or percentage” in a nearly incomprehensible section of the Real Estate Settlement Procedures Act could be interpreted to refer to the entire amount at issue.99 The majority opinion began with the “ordinary meaning” rule (which Justice Scalia referred to as “normal usage”) and a reliance on dictionary definitions to conclude that “portion, split, or percentage” could not mean the entire amount.100 For confirmation, Justice Scalia turned to the “commonsense canon of noscitur a sociis—which counsels that a word is given more precise content by the neighboring words with which it is associated.”101 Thus, although “portion” and “percentage” could in some instances refer to the whole, the insertion of “split” between them precluded that resolution.102

Since this interpretation suggested the possibility that all three words had the same meaning, Justice Scalia then had to ponder the applicability of another canon, the Court’s “general reluctance to treat statutory terms as surplusage.”103 This was not a problem, however, as we learned that “the canon against surplusage merely favors that interpretation which avoids surplusage....and petitioners’ interpretation no more achieves that end than ours does.”104

In his second foray into the world of statutory construction, Justice Scalia dealt with a complex aspect of Chapter 11 bankruptcy law, the details of which are unnecessary to understanding the canon on which the Court relied. The short of it is that “the specific governs the general.”105 That is particularly true,” Justice Scalia stated, “where ... Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.”106 The decision noted that this “general/specific canon” is most frequently used when a general permission or prohibition is contradicted by a specific permission or prohibition.107 Justice

95Id. at 2004.
96Id.
97Id. at 2004–5 (internal quotation marks and citations omitted). In another decision, Justice Sotomayor, noting that a presumption is “surely at its most vigorous when a term is repeated within a given sentence,” also relied on the presumption (Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1708 (2012) (quoting Brown v. Gardner, 513 U.S. 115 (1994)).
98Taniguchi, 132 S. Ct. at 2005 n.5.
100Id. at 2042 & nn.6–8 (2012).
101Id. at 2042 (quoting United States v. Williams, 553 U.S. 285, 294 (2008)).
102Id.
103Id. (internal quotation marks and citation omitted).
104Id. at 2403 (citation omitted).
106Id. at 2071 (quoting Varity Corporation v. Howe, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)).
107Id.
Scalia went on to say: “To eliminate the contradiction, the specific provision is construed as an exception to the general one.”108 This applies as well when a general authorization and a specific authorization appear in the same statute: “There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one, violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.”109

Justice Scalia added a note of caution: “[T]he general/specific canon is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction.”110 Finding no such indications in this situation, the Court allowed the general/specific canon to control the outcome.

Justice Sotomayor’s main contribution to the genre came in Roberts v. Sea-Land Services Incorporated, a decision interpreting a provision of the Longshore and Harbor Workers’ Compensation Act.111 Under that statute, disability compensation is calculated by using the national average weekly wage in the fiscal year in which the beneficiary is “newly awarded compensation.”112 The issue presented to the Court was whether “newly awarded compensation” referred to the date on which the employee became disabled and therefore entitled to benefits or to the date when a formal order of award was made.113 Since in this case the latter event occurred five years after the disability began, the difference in the possible annual benefit payments was substantial.

To reach the eight-member majority’s conclusion that the correct answer is the date that the disability commenced, Justice Sotomayor started with the well-traveled “ordinary meaning” rule but could not discern the correct meaning in isolation.114 She then took the traditional next step to the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”115 Using this rule, Justice Sotomayor gleaned some insight into the meaning of the statutory language. In many instances no formal order of award is ever issued, and this led to another canon: “We will not construe [the section of the statute at issue] in a manner that ‘renders it entirely superfluous in all but the most unusual circumstances.’”116

Still more canons were unloaded when Justice Sotomayor considered the plaintiff’s arguments. Despite the presumption in favor of identical words in a statute having the same meaning, she found no significance in that “award” meant, in other portions of the statute, a formal award: “[W]e find the presumption overcome because several provisions of the Act would make no sense if ‘award’ were read as [plaintiff] proposes.”117 Furthermore, since Congress limited the definition of award to “formal award” in one part of the statute, but not in the part here at issue, plaintiff’s argument

108Id.

109Id. (quoting D. Ginsberg and Sons Incorporated v. Popkin, 285 U.S. 204, 208 (1932)).

110Id. at 2072.


112Id. at 1354.

113Id. at 1355.

114Id. at 1356–57.

115Id. at 1357 (quoting Davis v. Michigan Department of Treasury, 489 U.S. 803, 809 (1989). In another decision emphasizing context, Justice Kagan, for the unanimous Court, observed, reminiscent of Pres. Bill Clinton’s ruminations on the meaning of “is”: “Truth be told, the answer to the general question ‘What does “not an” mean?’ is ‘It depends’: The meaning of the phrase turns on its context” (Caraco Pharmaceutical Laboratories Limited v. Novo Nordisk A/S, 132 S. Ct. 1670, 1681 (2012))).

116Id. at 1358 (quoting TRW Incorporated v. Andrews, 534 U.S. 19, 29 (2001)).

117Id. at 1360.
failed because of still another canon, “the 'duty to give effect, if possible, to every clause and word of a statute.'”

**Preemption**

The Supreme Court recognizes three ways for federal law to preempt state law under the supremacy clause of the Constitution. First, Congress can expressly preempt state law. Second, federal law preempts a state law when the scope of the federal law indicates that Congress intended its enactment to occupy the field exclusively (called “field preemption”). And, third, federal law preempts a state law to the extent that the state law is in an irreconcilable conflict with, or an obstacle to the fulfillment of, federal law.

The 2011–12 Court applied all three types of preemption.

**National Meat Association v. Harris** asked whether the Federal Meat Inspection Act expressly preempted a California law prescribing how slaughterhouses must treat nonambulatory pigs. The Act states that a state may not impose any requirements that fall within the Act’s requirements: “with respect to premises, facilities and operations of any establishment at which inspection is provided under … this Act, which are in addition to, or different than those made under this Act.”

The Federal Meat Inspection Act and its implementing regulations prescribe how slaughterhouses must handle and slaughter animals, providing specific (and graphic) instructions for the sequestration, monitoring, and slaughtering of nonambulatory animals. The applicable regulations apply from the moment a truck carrying livestock “enters, or is in line to enter,” a slaughterhouse. The challenged California law prohibits, among other practices, slaughterhouses from buying, selling, or receiving a nonambulatory animal or processing any part of such animal for human consumption.

The Supreme Court unanimously held that the Federal Meat Inspection Act preempted the state law. The federal act, the Court stated, “covers not just conflicting, but also different or additional state requirements,” while the state law imposes “at every turn” “additional or different requirements.” Moreover, because the federal law regulates slaughterhouses’ handling and treatment of nonambulatory pigs from the moment they are delivered to the end of the meat production process, the state law, which regulates “the same thing, at the same time, and in the same place,” was preempted.

**Kurns v. Railroad Friction Products Corporation** involved field preemption. The widow of a railroad employee who died of mesothelioma after working with asbestos-filled locomotive parts distributed by defendant brought suit raising state tort claims for design defect and failure to warn.

The Supreme Court held that the state claims were preempted by the Locomotive Inspection Act—a result that left the widow with no remedy. Citing the doc-

118Id. at 1362 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

119U.S. CONST. art. VI, cl. 2.


121Id. at 969 (quoting Federal Meat Inspection Act, 21 U.S.C. § 678).


123*National Meat Association*, 132 S. Ct. at 970 (quoting *CAL. PENAL CODE ANN.* § 599f (West 2010)).

124Id. at 971, 970.

125Id. at 975.


127Id. at 1265 (discussing Locomotive Inspection Act, 49 U.S.C. § 20701). See also id. at 2175 (Sotomayor, Ginsburg, Breyer, JJ., concurring in part and dissenting in part) (noting petitioners were left “without a remedy”).
trine of *stare decisis*, the Court applied an eighty-five-year-old case, *Napier v. Atlantic Coast Line Railroad Company*.

*Napier* held that the Locomotive Inspection Act’s general delegation of regulatory authority to the federal transportation agency manifested congressional intent to occupy the entire field of regulating locomotive equipment. The decision is notable because it does not adhere to the Court’s recent preemption law, which has required a federal statute to proscribe much more if it is to oust all of state law from a field. As pointed out by Justice Kagan, “viewed through the lens of modern preemption law, *Napier* is an anachronism”; nevertheless, and over the objection of three dissenters, the Court rejected all attempts to distinguish or overrule *Napier*.

In the final case, *Arizona v. United States*, the Court found that federal law preempted most of the challenged provisions of an Arizona law designed to deter the entry and presence of unlawful immigrants in the state. The most curious aspect of the case is Justice Scalia’s dissent, which assessed the preemption question based, in part, on statements made by President Obama at a news conference held after the case was argued.

The majority’s preemption analysis was fairly straightforward. Observing that “[i]mmigration policy can affect trade, investment, tourism and diplomatic relations for the entire nation,” the Court initially reaffirmed the “broad, undoubted” power of the federal government over the subject of immigration and the status of “aliens.” The Court then assessed each of the challenged provisions. The Court concluded that federal law “has occupied” the “entire field” of alien registration, and thus that portion of Arizona law making it a crime for an individual to fail willfully to have an alien registration document was preempted.

The Court next considered the Arizona law’s provision making it a crime for an unauthorized alien to apply for or perform work. That, too, was preempted, the Court decided, finding that the state law “stands as an obstacle” to enforcement of federal law, the latter of which primarily regulates employers, not potential employees.

On these same grounds, the Court found that federal law preempted the state from authorizing state officers to make warrantless arrests based on their suspicion that the individual committed an offense that makes him removable from the United States.

By contrast, the Court refused to find that federal law preempted the state law’s requirement that officers attempt to determine the immigration status of persons they stop, detain, or arrest if they have a reasonable suspicion that such persons are in the country illegally. Stating that the accepted way of performing these checks is to consult with federal Immigration Control and Enforcement officials, Justice Kennedy found that the federal scheme “leaves room for a policy requiring state officials to contact [Immigration Control and Enforcement] as a routine matter.”

Noting that the state law had not yet taken effect, the Court did leave open the possibility for preemption and constitutional challenges once the law is implemented.

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129Kurns, 132 S. Ct. at 1270 (Kagan, J. concurring); compare id. at 1268 with id. at 1272 (Justice Sotomayor arguing that Napier’s preempted field was physical composition of locomotive equipment) (Sotomayor, Ginsburg, Breyer, JJ., concurring in part and dissenting in part).


131Id. at 2521 (Scalia, J., concurring in part and dissenting in part).

132Id. at 2498 (citing U.S. Const. art. I, § 8, cl. 4, and the federal government’s “inherent power as sovereign”).

133Id. at 2502.


135Id. at 2507.

136Id. at 2508.

137Id. at 2510.
Arbitration

The Federal Arbitration Act makes arbitration agreements “valid, irrevocable, and enforceable,” unless there are grounds in law or equity for revocation of the contract. The Court has held that this provision of the Act establishes “a liberal federal policy favoring arbitration agreements.”

In three cases the Court maintained its strong allegiance to arbitration agreements. In Compucredit Corporation v. Greenwood a business which marketed credit cards to individuals with poor credit histories promised to improve their credit rating. Cardholders filed against Compucredit a class action lawsuit alleging that the company charged initial finance and monthly fees despite a promise that no deposits would be required, refused to assist in rebuilding credit, and failed to disclose, in writing, consumer rights. Citing the Federal Arbitration Act and the mandatory arbitration clause in an insert incorporated by reference into the contract signed by the cardholder, Compucredit moved to compel arbitration.

Cardholders argued that the Credit Repair Organizations Act barred enforcement of the contract’s arbitration clause. The 1996 Credit Repair Organizations Act was enacted to protect individuals, particularly those with “limited economic means,” from unfair and deceptive trade practices of credit repair companies, such as Compucredit. The Act includes an express “right to sue” provision, sets out the factors the court must consider when determining damages, and renders void “any waiver” of the Act’s protections and rights. Credit repair companies are required by the Act to inform consumers in writing of their right to sue, and the Act dictates every word of that written statement.

The Supreme Court, with only Justice Ginsburg dissenting, reversed the Ninth Circuit’s decision in favor of the consumers. Justice Scalia’s majority opinion acknowledged that other federal law could override the Federal Arbitration Act. But the Credit Repair Organizations Act is not that law. Justice Scalia found the Credit Repair Organizations Act’s repeated use of terms such as “action,” “class action,” and “court” to be “utterly commonplace” in the creation of civil causes of action and insufficient to establish the “contrary congressional command overriding the [Federal Arbitration Act].” He cited the Court’s recent Federal Arbitration Act opinions “recogniz[ing] that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.” Justice Scalia admitted that none of the statutes previously reviewed by the Court contained a provision voiding “any waiver” of the consumer’s rights, as does the Credit Repair Organizations Act. Nevertheless, Justice Scalia reasoned, if the Credit Repair Organizations Act’s cause-of-action provision mentioning judicial enforcement does not create a right to initial judicial enforcement, “the waiver of initial judicial enforcement is not the waiver of a ‘right of the consumer.’”

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142Id. § 1679(a).
143Id. § 1679(f)–(g).
144Id. § 1679(c).
146Id. at 671 (citing Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 28 (1991)) (forcing arbitration despite cause of action created by Age Discrimination in Employment Act).
147Id. at 671.
Justice Scalia forcefully rejected the argument that the arbitration mandate was affected by the written disclosure statement that Congress required Compucredit to provide cardholders. He concluded that the section requiring a written disclosure statement provided no rights to the consumer. Instead the section “imposes an obligation on credit repair organizations to supply consumers with a specific statement set forth … in the statute.”148 He went on to say that “[t]he only consumer right it creates is the right to receive the statement.”149 At this point, if Congress wants to make mandatory arbitration invalid, apparently Congress must say so explicitly.150

The other Federal Arbitration Act cases were decided per curiam. Marmet Health Care Center Incorporated v. Brown held that the Federal Arbitration Act preempted a West Virginia policy prohibiting arbitration of personal injury or wrongful death claims against nursing homes.151 Pointing out that the Federal Arbitration Act makes no exception for such claims, the Court held that the Federal Arbitration Act’s “‘emphatic federal policy in favor of arbitral dispute resolution’ preempts ‘categorical rule[s] prohibiting arbitration.’”152

In KPMG v. Cocchi a Florida state court had allowed the case to proceed after finding that two of the four claims in the complaint were not subject to arbitration.153 The Supreme Court remanded the case for a determination of whether the other claims were arbitrable; the Court held that the Federal Arbitration Act required a motion to compel arbitration to be granted even when the result would be the “inefficient maintenance of separate proceedings in different forums.”154

Retroactivity

In Vartelas v. Holder the Court considered the retroactive effect of that section of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 governing “admission” to the United States.155 The petitioner Vartelas became a lawful permanent resident of the United States in 1989. In 1994 he pleaded guilty to conspiring to create counterfeit checks—a felony. The law at that time permitted lawful permanent residents who took “innocent, casual, and brief excursions” abroad to return to the United States without going through any special procedures, unlike those seeking first-time entry into the United States.156 The Act abolished this distinction and required persons from both categories to gain “admission” into the United States, meaning “lawful entry … into the United States after inspection and authorization by an immigration officer.”157

In 2003 Vartelas took a brief trip to Greece to visit his aging parents, as he had done regularly before and after the Act’s passage, without incident. Upon his return, he was classified as an inadmissible alien because of his 1994 conviction and because his crime involved moral turpitude. He was placed in removal proceedings and subsequently ordered re-

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148Id. at 670.
149Id.
150Compare id. at 672 (quoting explicit antiarbitration statutes) with id. at 675 (Sotomayor and Kagan, JJ, concurring) (noting congressional intent should be determined from text of statute, its legislative history, or inherent conflict between arbitration and statute’s underlying purpose) and id. at 680 (Ginsburg, J., dissenting) (same).
152Id. at 26–27 (quoting Dean Witter Reynolds Incorporated v. Byrd, 470 U.S. 213, 217 (1985)).
154Id. at 1484 (quoting Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963)).
155Id. (citing Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1101(a)(13)(A)).
moved from the United States. He filed a motion with the Bureau of Immigration Appeals to reopen the removal proceedings on the ground that the Act’s admission provision could operate only prospectively, not retroactively. The board’s denial of his motion was affirmed by the Second Circuit, finding that Vartelas had not relied on the pre-Act legal regime when he committed the crime.

In a 6-to-3 decision, the Supreme Court reversed the Second Circuit decision. Justice Ginsburg’s majority opinion rested heavily on *Landsgraf v. USI Film Products*, and the legal principle that “courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity.” That maxim, the Court emphasized, is rooted in “legal doctrine centuries older than our Republic.” The Act, the Court noted, does not mention retroactivity in the provision covering admission. By contrast, other provisions of the Act “expressly direct retroactive application.” Accordingly the majority applied the “classic formulation … for determining when retrospective application of a law would collide with [the presumption against retroactive legislation],” namely, whether retrospective application would “attach a new disability, in respect to transactions or considerations already passed.”

While emphasizing that reliance on prior law was “not a necessary predicate for invoking the antiretroactivity principle,” the Court observed that nevertheless Vartelas likely relied on the immigration law in effect at the time he pleaded guilty to his crime and that such reliance “strengthens the case for reading a newly enacted law prospectively.” The Court held that “[t]he impact of Vartelas’ brief travel abroad on his permanent resident status is therefore determined not by [the Act], but by the legal regime in force at the time of his conviction.”

**Equal Protection**

In *Armour v. Indianapolis* the Court granted rare review of an equal protection case involving rational-basis constitutional analysis. In 2005 the city of Indianapolis introduced a new financing scheme changing the way homeowners funded residential sewer projects. Under the old scheme, homeowners were given the option of paying their assessment in a lump sum up front or in installments over time. In one particular project under the old scheme, 38 of 180 homeowners opted to pay their assessment in a lump sum. When the new financing scheme was adopted, the city forgave the future payments owed by the remaining homeowners who had opted to pay in installments but did not refund the lump-sum payers. Most of the lump-sum payers sued the city in state court under the federal equal protection clause for the city’s refusal to provide the requested refunds.

Justice Breyer, writing the 6-to-3 opinion for the Court, rejected the homeowners’ claims. The city’s new financing scheme, the Court noted, did not involve a suspect classification or fundamental right but rather concerned a tax classification that was “local, economic, social and commercial” in nature. Thus the scheme would be analyzed under the rational-basis test, the lowest level of constitu-

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158 Id. at 1486 (quoting *Landsgraf v. USI Film Products*, 511 U.S. 244, 263 (1994)).
159 Id. (quoting *Landsgraf*, 511 U.S. at 265).
160 Id. at 1487.
161 Id. at 1486–87 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814)).
162 Id. at 1491.
163 Id. at 1484. Three dissenters, led by Justice Scalia, argued that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 regulated petitioner’s (post-Act) return to the United States, not his (pre-Act) conviction, and generously suggested he simply could have chosen to stay in Greece (id. at 1485 (Scalia, J., dissenting)).
165 Id. at 2079. The plaintiffs took their claims to the Indiana Supreme Court and lost.
166 Id. at 2080.
Under this standard the city’s scheme would not violate the equal protection clause “as long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” The city argued that to provide refunds and to continue to collect from installment payers (some of whom had thirty-year plans) would be administratively onerous and expensive. The city projected that the administrative costs of debt collection would actually outstrip funds collected. Based on the established principle that “administrative considerations can ordinarily justify a tax-related distinction,” and precedent supporting making a distinction between future obligations and past payments, the Court found that the city’s proffered justification passed the rational-basis test.

Prudential Standing and Sovereign Immunity

In Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak the Court addressed standing and sovereign-immunity barriers that the federal government raised in defense to a suit brought under the Administrative Procedure Act. The Band of Pottawatomi Indians requested that the secretary of the U.S. Department of the Interior acquire land in rural Michigan on which the band intended to construct a casino. The secretary did so pursuant to Section 465 of the federal Indian Reorganization Act. An owner of an adjacent property, Patchak, sued, alleging that the secretary lacked the authority under the Administrative Procedure Act to acquire the property because the band was not a federally recognized tribe when the Indian Reorganization Act became law in 1934. The Band intervened on the government’s side.

In an 8-to-1 decision, the Court held that the property owner had prudential standing to challenge the secretary’s land acquisition and that the federal government had waived its sovereign immunity.

To sue under the Administrative Procedure Act, a party must establish not only Article III standing, requiring a case or controversy that can be resolved through legal action, but also prudential standing. To show prudential standing the plaintiff must assert an interest that is “arguably within the zone of interests to be protected or regulated by the statute’ that [plaintiff] says was violated.” The prudential standing test “is not intended to be especially demanding.” Indeed, the Court went on to say, “we have always conspicuously included the word ‘arguably’ in the test to indicate that the benefit of any doubt goes to the plaintiff.”

Applying this liberal test, the Court rejected the government’s and the band’s argument that because Section 465 covered land acquisitions and Patchak’s alleged injuries related to the land’s use as a casino, Patchak’s asserted economic, environmental, and aesthetic interests were not within Section 465’s zone of interests. The Court analyzed Section 465’s “context and purpose” and found that Section 465 functioned as a primary mechanism to foster tribal economic development. This finding was bolstered by applicable government regulations re-

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167Id. at 2080–81.
168Id. at 2080 (quoting Federal Communications Commission v. Beech Communications, 508 U.S. 307, 313 (1993)).
169Id. at 2081–82. Chief Justice Roberts, writing for three dissenters, likened the scheme at issue to the one raised in Allegheny Pittsburgh Coal Company v. Commission of Webster County, 488 U.S. 336, 345–46 (1989), a rare decision in which a locality’s tax was invalidated under the rational-relationship test (Armour v. Indianapolis, 132 S. Ct. at 2081–82 (Roberts, C.J., dissenting)).
171Id. at 2203 (citing Indian Reorganization Act, 25 U.S.C. § 465).
172Id. at 2210 (citing Association of Data Processing Services Organizations Incorporated v. Camp, 397 U.S. 150, 153 (1970)).
173Id. (quoting Clarke v. Securities Industry Association, 479 U.S. 388, 399 (1987)).
174Id.
175Id. at 2211.
quiring the secretary of the Department of the Interior to acquire land with an eye to its eventual use, keeping in mind any potential land-use conflicts. The Court concluded that Patchak’s land-use interests fell within the ambit of Section 465 and he had standing to sue under the Administrative Procedure Act.

The government and the Band were likewise unsuccessful in barring the suit on sovereign-immunity grounds. Generally plaintiffs may not use the Administrative Procedure Act to effect an end-run around statutes that otherwise limit suits against the government. The government and the Band offered the Quiet Title Act as a statute that, while allowing suits against the government to contest title, contained an exception disallowing such suits regarding certain Indian lands. While the majority found the statute inapplicable, the lone dissenter, Justice Sotomayor, warned that the majority had created in the Administrative Procedure Act’s sovereign-immunity protections a huge hole that would, among other results, “impose a substantial burden on the Government.”

Mootness

In California public-sector unions that are “agency shops” (unions that represent all employees) may bill nonunion members for “chargeable expenses” such as nonpolitical union services but may not compel nonmembers to pay for political or ideological projects. In Knox v. Service Employees International Union Local 1000 a class of nonunion members alleged that the defendant union violated their First Amendment rights by charging them, without their consent, for a political project (the union’s campaign opposing two state ballot initiatives). After the Supreme Court granted certiorari, the union offered a full refund to all class members and moved to dismiss the case as moot.

In rejecting the mootness claim, the seven-member majority, led by Justice Alito, viewed “with a critical eye” what it characterized as the union’s “postcertiorari maneuvers designed to insulate a decision from review.” The Court applied the established principle that “voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case was dismissed.” The Court agreed with the plaintiff class that the union’s refund notice, with its many “‘conditions, caveats and confusions,’” including disallowing refund applications by fax or e-mail, appeared to be intended to reduce the number of refund seekers. Noting that even small remaining interests in the outcome of the litigation could overcome a mootness challenge, the majority held that a live controversy remained.

176Id. at 2204–5 (citing Administrative Procedure Act, 5 U.S.C. § 702).
177Quiet Title Act, 28 U.S.C. § 2409a.
178Id. at 2218 (Sotomayor, J., dissenting).
180Id. at 2285–86.
181Id. at 2287 (emphasis added).
182Id.
183Id. (quoting Brief for Petitioners in Opposition to Motion to Dismiss 19, Knox v. Westly, No. 2:05-cv-02198-MCE-KJM (E.D. Cal. March 28, 2008)).
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