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★ THE SUPREME COURT'S 2012—2013 TERM ★

Restrictions on Court Access Just "Too Darn Bad"

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

[**Editor's Note:** The authors are members of the Federal Court Access Group, which consists of experienced legal aid litigators who monitor U.S. Supreme Court cases that affect low-income individuals' ability to obtain redress in federal court. In each November–December issue of Clearinghouse Review they analyze decisions from the previous term of the U.S. Supreme Court.]

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Federal court access played a critical role in resolving some of the most high-profile cases of the 2012-2013 U.S. Supreme Court Term, including cases focusing on government surveillance and bans on "same-sex marriage." While not attracting the same attention, a number of the Court's other opinions touched on court-access issues. Over the Term 26 major court-access decisions were announced, covering sovereign immunity, arbitration, deference, and the like. Of these 8 were 5-to-4 decisions and 11 were unanimous. With some topics, such as arbitration, the Roberts Court is becoming predictable, while in other areas, such as deference, the Court appears poised to revisit controlling standards. And, while the term is notable for its lack of blistering dissents in court-access cases, Justice Kagan did throw in a zinger when summarizing the majority's reaction to its closure of the courthouse doors on plaintiffs: "too darn bad." Here we summarize the major decisions and conclude with a brief preview of the year to come.

Standing

Standing was an issue in three of the most highly anticipated cases of the Term. In *Clapper v. Amnesty International USA* attorneys, human rights and media organizations, and others brought a facial constitutional challenge to a new provision of the Foreign Intelligence Surveillance Act that allows surveillance of non–"United States persons" reasonably believed to be located outside the United States.[1] The plaintiffs asserted that the provision impermissibly interfered with confidential and privileged communications in which they expected to engage with likely targets of the provision.[2] The Second Circuit had found Article III standing because the plaintiffs showed

[1] *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013) (discussing Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a).

[2] *Id.*

(1) an "objectively reasonable likelihood" that their future communications would be intercepted by operation of the challenged provision and (2) present injury due to costly and burdensome measures necessary to protect their communications.[3]

The Supreme Court reversed the Second Circuit's decision. Justice Alito stated for the majority that the fear of interception was too speculative to satisfy Article III's "actual or imminent" injury requirement, given that there was no proof as to whom the government was going to target under the challenged provision, whether the challenged provision would be the mode of surveillance selected among other alternatives, and whether the intended surveillance would pass judicial review.[4] Likewise, the Court found no present injury "[b]ecause … the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance … and fear is insufficient to create standing."[5]

On the Term's last day, June 26, 2013, the Court announced decisions in cases raising constitutional challenges to state laws defining who can marry.

The first case, *Hollingsworth v. Perry*, was decided by the Supreme Court based entirely on standing.[6] After the California Supreme Court declared that California's limitation of marriage to opposite-sex couples violated the state constitution's equal protection clause, California voters passed Proposition 8, which amended the constitution to define marriage as only between a man and a woman.[7] Two same-sex couples sued the State of California, its governor, and other public officials on the grounds that Proposition 8 violated their state and federal due process and equal protection rights. The district court allowed proponents of Proposition 8 to intervene in the case but subsequently ruled the proposition unconstitutional. Defendant state officials chose not to appeal the ruling to the Ninth Circuit. The intervenors did appeal, but the state officials did not participate. The Ninth Circuit found the intervenors had Article III standing but affirmed on the merits.[8]

Acknowledging the public debate surrounding the case, the Supreme Court majority, led by Chief Justice Roberts, explained that "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient to meet Art. III's requirements."[9] The Court agreed with the intervenors that California law conferred special status on them with regard to the initiative process but concluded that once Proposition 8 became law, the proponents retained no special status nor "'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen in California."[10] Because the intervenors had not satisfied their burden to demonstrate standing to appeal the judgment of the district court, the Court held that the Ninth Circuit lacked jurisdiction to consider the appeal. Thus the Court remanded the case to the circuit with instructions to dismiss the appeal for lack of standing, leaving the district court decision intact.[11]

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[3] *Amnesty International USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

[4] *Clapper*, 133 S. Ct. at 1147–48.

[5] *Id.* at 1152 (citation omitted).

[6] *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

[7] *Id.* at 2659 (discussing *In Re Marriage Cases*, 43 Cal. 4th 757 (2008) and Proposition 8).

[8] *Id.* at 2660.

[9] *Id.* at 2661 (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (internal quotation marks omitted)).

[10] *Id.* at 2663 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61(1992)).

[11] *Id.* at 2668.

The Court's last case for the Term, *U.S. v. Windsor* is a historic 5-to-4 opinion striking down Section 3 of the Defense of Marriage Act, which defined "marriage" as between a man and a woman for myriad federal laws and regulations.[12] Windsor was the surviving spouse of a same-sex marriage.[13] However, because of the Act, she did not qualify for the federal marital estate tax exemption. Windsor paid the estate taxes and then, alleging violation of her constitutional rights, sued for a refund.[14] The attorney general notified the speaker of the House of Representatives that the executive would not defend the constitutionality of Section 3 of the Defense of Marriage Act because the president had concluded that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny."[15] However, the executive would continue to enforce the Act and leave determination of its constitutionality to the judiciary. The lower courts permitted the Bi-Partisan Legal Advisory Group of the House to intervene but held Section 3 unconstitutional and ordered the government to refund Windsor's estate tax payment. In granting certiorari, the Court requested argument on two threshold procedural questions: (1) Does the United States' refusal to defend Windsor's constitutional challenge to the Defense of Marriage Act render the case moot? (2) Does the Bi-Partisan Legal Advisory Group have standing to appeal the case?[16]

The Court, in an opinion delivered by Justice Kennedy, held that the case was not moot because, despite the United States' refusal to defend against Windsor's claim, the United States continued to enforce the Act, notably by failing to refund Windsor's estate tax payment.[17]

The Court found Article III standing on the same factors that defeated mootness.[18] Engaging in a prudential-standing review, the Court explained that Article III imposed jurisdictional requirements, while prudential standing required judicial self-governance and restraint from deciding public disputes better addressed by other governmental institutions.[19] The Court worried that the nonadversarial aspect of the case—that the executive and Windsor agreed that the Defense of Marriage Act was unconstitutional—meant that the case lacked the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[20] However, the Court concluded that the vigorous advocacy by the Bi-Partisan Legal Advisory Group and amicus provided the requisite adverseness to overcome its prudential-standing concern. The Court addressed as proper prudential-standing considerations the unique nature of this case and the harm that would ensue if the Court failed to reach the merits—confusion among district courts about how to interpret and apply the Defense of Marriage Act and the thousand or more statutes and regulations which the Defense of Marriage Act affects, "immense" expenditure of judicial resources, and widespread and costly litigation with the "[r]ights and privileges of hundreds of thousands of persons adversely affected" hanging in the balance.[21]

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[12] *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

[13] *Id.* at 2683.

[14] *Id.* at 2684.

[15] *Id.* at 2683–84 (citation omitted).

[16] *Id.* at 2684.

[17] *Id.* at 2685.

[18] *Id.* at 2686–87.

[19] *Id.* at 2686 (citation omitted).

[20] *Id.* at 2687 (citation and internal quotation marks omitted).

[21] *Id.* at 2687–89.

Mootness

Other than *Windsor*, the Supreme Court decided cases that illustrate well the fundamental principles of mootness analysis: (1) "[a] justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed[,]"and (2) "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[22]

In *Already Limited Liability Company v. Nike Incorporated* Nike sued Already for trademark infringement, alleging that Already's athletic shoes diluted Nike's popular Air Force 1's brand.[23] Already countersued, challenging the validity of Nike's trademark. Shortly thereafter Nike issued a broad covenant not to sue, promising not to raise any trademark or unfair competition claims based on Already's then-existing or similar future shoe designs. Nike moved to dismiss the case as moot. Already opposed dismissal of its counterclaim, citing evidence that several potential investors were unwilling to invest unless Nike's trademark was invalidated and that Nike had intimidated retailers from carrying Already's shoes.[24]

The Supreme Court unanimously decided that the case was moot.[25] Chief Justice Roberts's opinion reads as a primer on mootness analysis: "Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies'"; absent the same, courts are not to decide legal disputes or expound on the law.[26] Chief Justice Roberts went on to say that "those who invoke the power of the federal court must have standing, namely, 'a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"[27] Thus "[a] case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[28]

By contrast, the Court explained, a defendant cannot render a case moot by simply ceasing the unlawful conduct. Otherwise a defendant could repeatedly restart the unlawful conduct and stop when sued "until he achieved his unlawful ends."[29] Hence "a defendant claiming that its voluntary compliance moots a case bears the formidable burden that it is absolutely clear that the allegedly unlawful behavior could not reasonably be expected to recur."[30] The Court found Nike's broad covenant met that burden because a shoe that violated the covenant could exist only "on a shelf between Dorothy's ruby slippers and Perseus's winged sandals."[31]

Genesis Health Care Corporation v. Symczyk involved a collective wage-dispute action. Laura Symczyk sued Genesis under the Fair Labor Standards Act on her own behalf and for "all other persons similarly situated."[32] Pursuant to Federal Rule of Civil Procedure 68, Genesis offered Symczyk judgment for the maximum she

[22] *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1335 (2013) (citation omitted) (case did not become moot after Environmental Protection Agency amended underlying rules because defendant logging companies remained subject under old rule to penalties for causing storm water discharges without required permits).

[23] *Already Limited Liability Company v. Nike Incorporated*, 133 S. Ct. 721 (2013).

[24] *Id.* at 725–26

[25] *Id.* at 726.

[26] *Id.* (citation omitted).

[27] *Id.* (citation omitted).

[28] *Id.* at 727 (citation and internal quotation marks omitted).

[29] *Id.*

[30] *Id.* (quoting *Friends of the Earth Incorporated v. Laidlaw Environmental Services (TOC) Incorporated*, 528 U.S. 167, 190 (2000)).

[31] *Id.* at 728–29.

[32] *Genesis Health Care Corporation v. Symczyk*, 133 S. Ct. 1523 (2013).

could have recovered for her individual claim before she sought collective action certification. Symczyk did not respond, and on Genesis' motion the district court dismissed for mootness. Although the Third Circuit had reversed the district court as to the collective action issue, the Supreme Court found both the individual and collective action claims moot.[33] The majority reasoned that mootness cases interpreting Federal Rule of Civil Procedure 23, upon which Symczyk relied, were inapposite.[34] The majority distinguished between Rule 23 class actions, in which the classes automatically attain independent legal status, once certified, and Fair Labor Standards Act cases, where collective action members must in writing opt in to attain such status.[35] Nor did the Court find applicable the "inherently transitory" doctrine, under which in certain cases class certification can "relate back" to the filing of the complaint. The Court explained that a plaintiff in a class action challenging the constitutionality of pretrial detentions, for example, "would face the considerable challenge of preserving his individual claim from mootness, since pretrial custody likely would end prior to the resolution of his claim[,] … thereby effectively insulat[ing] defendants' conduct from review."[36] Conversely, Symczyk's claim for statutory damages "cannot evade review" and was therefore not transitory.[37]

Jurisdictional Bars

In *Sebelius v. Auburn Regional Center* Medicare providers appealed their reimbursement rates to an appeals board long after the expiration of a 180-day statutory deadline for filing an appeal.[38] The Supreme Court unanimously rejected the argument that the filing deadline was a jurisdictional bar. Justice Ginsburg's opinion noted that the Court had repeatedly found that such filing deadlines were "quintessential claim-processing rules."[39] The Court reasoned that, unless Congress had "clearly stated" that a statutory limitation was "jurisdictional," the statutory limitation should not be so characterized.[40] In this case the Medicare provision lacked the requisite congressional intent. As evidence that the statute was not jurisdictional, the Court pointed out that in the 1970s the secretary of health and human services had promulgated regulations that allowed hospitals three years to file an appeal for good cause shown.[41] The Court refused to apply equitable tolling to administrative appeals of the type at issue here.[42]

Preemption

Preemption is a frequent subject for this Supreme Court, and, with seven noteworthy cases, this Term was no exception. What is surprising is the ease with which these cases were resolved—most were unanimous decisions, and only one case reflected the Court's typical 5-to-4 split.

Wos v. E.M.A. revisits preemption in the Medicaid context.[43] A North Carolina statute established an irrebuttable presumption that up to one-third of the damages recovered by a beneficiary must be paid to the state to reimburse it

[33] *Id.* at 1528–29. This action by the U.S. Supreme Court leaves a split among the circuits as to the effect of unaccepted Rule 68 offers.

[34] *Id.* at 1529–30.

[35] *Id.* at 1530.

[36] *Id.*

[37] *Id.*

[38] *Sebelius v. Auburn Regional Center*, 133 S. Ct. 817 (2013).

[39] *Id.* at 825.

[40] *Id.* at 824 (citing 42 U.S.C. § 1395oo(a)(3), governing appeals to Provider Reimbursement Review Board).

[41] *Id.* (citing 42 C.F.R. § 405.1841(b) (2007)).

[42] *Id.* at 828–29.

[43] *Wos v. E.M.A.*, 133 S. Ct. 1391 (2013) (discussing 42 U.S.C. § 1396p(a)(1) and applying *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006)).

for payments made for the beneficiary's medical treatment.[44] In a 6-to-3 opinion, Justice Kennedy wrote for the majority that "[a]n irrebuttable, one-size-fits-all statutory presumption is incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses."[45] The Court emphasized that states must comply with the terms of the Medicaid antilien provisions even if they find them "wasteful, time consuming, and costly."[46]

What is perhaps most notable about this case is what it did not discuss. Last Term, the Court agreed to decide whether Medicaid providers and beneficiaries had a claim under the supremacy clause to challenge a state law as inconsistent with the Medicaid Act. The Court ultimately remanded the case, *Douglas v. Independent Living Center of Southern California*, on other grounds to the Ninth Circuit and did not decide the preemption issue.[47] However, in a four-member dissent, Chief Justice Roberts argued that spending-clause enactments such as Medicaid could not be enforced through the supremacy clause.[48] In light of *Douglas*, many Court watchers commented on the ease with which *E.M.A.* was decided.[49] The majority neither questioned the availability of a supremacy-clause cause of action nor mentioned *Douglas*.

In *Arizona v. Inter Tribal Council of Arizona* the Court assessed the interplay between federal and state voter registration requirements.[50] The Constitution's elections clause empowers Congress to preempt state regulations governing the "Times, Places and Manner" of holding federal congressional elections.[51] Pursuant thereto, the National Voting Rights Act requires states to "accept and use" a uniform federal form developed by the Election Assistance Commission to register voters for federal elections.[52] The federal form requires voters to declare their citizenship under penalty of perjury but does not require documentary evidence of citizenship. In a 7-to-2 vote, the Supreme Court struck down Arizona's imposition of a proof-of-citizenship requirement without the Election Assistance Commission's agreement as preempted by the National Voting Rights Act.

Writing for the majority, Justice Scalia rejected the state's argument for a presumption against preemption. That rule of construction, according to Justice Scalia, is simply inapplicable because the elections clause explicitly empowers Congress to "make or alter" state election regulations. Thus any law enacted pursuant to the elections clause "necessarily displaces" state law.[53] And, while acknowledging that the National Voting Rights Act's requirement that states "accept and use" the federal form is susceptible of multiple interpretations, Justice Scalia found that allowing Arizona to do anything other than both accept and use only the federal form as approved by the Election Assistance Commission would be incompatible with the Act's "neighboring provisions" and its objective of increasing voter registration.[54]

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[44]*Id.* at 1398 (citing N.C. Gen. Stat. Ann. § 108A-57 (2011)).

[45]*Id.* at 1399.

[46]*Id.* at 1401.

[47]*Douglas v. Independent Living Center of Southern California*, 132 S. Ct. 1204 (2012).

[48]*Id.* at 1211 (Roberts, C.J., dissenting). Justice Alito joined the majority in *E.M.A.* and the dissent in *Douglas*.

[49]See, e.g., Rochelle Bobroff, *Supreme Court's Decision in* Wos v. E.M.A. *Rebuts Reasoning of* Douglas v. Independent Living Center of Southern California Inc. *Dissent*, 47 Clearinghouse Review 109 (July–Aug. 2013).

[50]*Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013) (discussing 42 U.S.C. § 1973gg).

[51]U.S. Const. art. I, § 4, cl. 1.

[52]*Inter Tribal Council*, 133 S. Ct. at 2254.

[53]*Id.* at 2256.

[54]*Id.* at 2255–56.

This brings us to the Court's 5-to-4 decision in *Mutual Pharmaceutical Company v. Bartlett*.[55] Karen Bartlett was prescribed the generic drug Sulindac, manufactured by Mutual Pharmaceutical, for shoulder pain. She quickly developed toxic epidermal necrolysis, which stripped away 60 percent to 65 percent of her body tissue, leaving her severely disfigured and nearly blind. At the time of her prescription, the drug's label did not specifically warn of toxic epidermal necrolysis. Bartlett, asserting design-defect claims under New Hampshire law, sued the manufacturer.

Writing for the majority, Justice Alito held that state-law claims were preempted. The Court noted that Sulindac could not be redesigned because it already is only a one-molecule drug. As a result, the Court found, Bartlett had to be arguing that the state law imposed a duty on Mutual to strengthen Sulindac's warning. However, this claim was preempted by the Federal Food, Drug, and Cosmetic Act and the Court's decision in *PLIVA v. Mensing*.[56] *PLIVA* concluded that to comply with the Act's drug-labeling requirements while simultaneously updating and modifying labeling to avoid state-based negligence claims was impossible for a generic manufacturer. Thus state-law claims based on inadequate warning labels against generic manufacturers are preempted. The majority rejected Bartlett's claim that compliance with both federal and state laws was not impossible because the company could stop selling its drugs in New Hampshire:

> We reject this "stop-selling" rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be all but meaningless.[57]

The remaining preemption cases were unanimously decided. Two concern the preemptive scope of the Federal Aviation Administration Authorization Act of 1994, which prohibits state laws or provisions that have the "force and effect of law related to a price, route, or service of any motor carriers … with respect to the transportation of property" (commonly called "F-quad-A preemption").[58] *Dan's City Used Cars Incorporated v. Pelkey* arose after Dan's City—unbeknownst to Pelkey—towed his car from his apartment's parking lot following a snowstorm.[59] At the time Pelkey was confined to his bed with a serious medical condition that ultimately resulted in his admission to the hospital for amputation of his left foot; while hospitalized he suffered a heart attack. In the days following his discharge from the hospital, Pelkey's attorney located the car and informed Dan's City that Pelkey wanted to reclaim it. However, Dan's City auctioned the car to a third party. Pelkey sued Dan's City; he alleged violations of New Hampshire consumer protection laws that establish requirements for disposal of stored vehicles.

Dan's City argued that the Federal Aviation Administration Authorization Act preempted Pelkey's claims because they were "related to … the transportation of property." The Supreme Court disagreed. While acknowledging that the words "related to" have been found to have broad preemptive purpose, the Court emphasized that this "does not mean that the sky is the limit … else for all practical purposes pre-emption would never run its course."[60] Rather, the Act's language "massively limits" the scope of the preemption. That a state law relates to the

[55]*Mutual Pharmaceutical Company v. Bartlett*, 133 S. Ct. 2466 (2013).

[56]*Id.* at 2475 (citing *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011)).

[57]*Id.* at 2477.

[58]Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c)(1).

[59]*Dan's City Used Cars Incorporated v. Pelkey*, 133 S. Ct. 1769 (2013).

[60]*Id.* at 1778 (citation and internal quotation marks omitted).

prices, routes, or services of a motor carrier "in any capacity" is not sufficient; "the law must also concern a motor carrier's transportation of property."[61] The New Hampshire law was not preempted because it related only to the disposal of a towed vehicle, not to the transportation of property.

By contrast, *American Trucking Associations v. City of Los Angeles* held that the Federal Aviation Administration Authorization Act preempted provisions in concession agreements between the City of Los Angeles and trucking companies doing business in the Port of Los Angeles.[62] The city developed the concession agreements in response to environmental groups' concerns over pollution and safety issues associated with short-haul drayage trucks operating at the port. One provision required companies to submit off-street parking plans for each truck not in service, and another required trucks to display placards with phone numbers for reporting environmental and safety concerns. Trucking companies wanting to operate drayage trucks at the port were required to enter the concession agreements, which were enforceable through fines and prison sentences.

The American Trucking Associations argued that the Federal Aviation Administration Authorization Act preempted the two provisions. The city responded that the concession agreements were "private agreements" that did not have the "force and effect of law" as required by the Act.[63] The Court easily sided with the American Trucking Associations. The agreement was not a stand-alone contract; rather the agreement reflected "classic regulatory authority," functioning as "part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment."[64] Such action, the Court concluded, has "'the force and effect of law' if anything does."[65]

The next preemption case, *Hillman v. Maretta*, arose after Warren Hillman died unexpectedly, leaving his ex-spouse, rather than his current wife, as the beneficiary of his Federal Employees' Group Life Insurance policy.[66] According to the Federal Employees' Group Life Insurance Act, upon an employee's death, the life insurance benefits are to be paid in "order of preference" and, first, to the beneficiary designated by the employee in a signed and witnessed writing filed with the government—in this case Hillman's ex-wife.[67] By contrast, a Virginia law provided the current Mrs. Hillman with a cause of action against the former spouse for the proceeds of the policy.[68]

Justice Sotomayor, writing for the Court, concluded that the Federal Employees' Group Life Insurance Act preempted the Virginia law. In a brief but helpful discussion of "conflict preemption" principles, the opinion notes that a conflict occurs "when compliance with both federal and state regulations is impossible" or when the state law stands as an obstacle to the execution of the full "purpose and objectives of Congress."[69] Mrs. Hillman's case raised arguments related to "purpose and objectives" preemption. The Court found that the Act intended insurance proceeds to belong to the named beneficiary and no other; thus the Virginia statute interfered with Congress' objectives because it directed that the proceeds ac-

[61] *Id.* at 1778–79.

[62] *American Trucking Associations v. City of Los Angeles*, 131 S. Ct. 2096 (2013).

[63] *Id.* at 2102.

[64] *Id.* at 2013.

[65] *Id.*

[66] *Hillman v. Maretta*, 133 S. Ct. 1943 (2013).

[67] Federal Employees' Group Life Insurance Act, 5 U.S.C. § 8705(a).

[68] *See* Va. Code Ann. § 20-111.1 (2011).

[69] *Hillman*, 133 S. Ct. at 1949–50 (citations omitted).

tually belonged to someone else.[70] While agreeing with the Court's conclusion, Justice Thomas wrote separately to complain that a court should find preemption only when the "ordinary meaning of duly enacted federal law effectively repeals contrary state law"; the "purpose and objectives" framework engages the Court in a "freewheeling inquiry" that "is an illegitimate basis for finding the preemption of state law."[71]

The seventh noteworthy preemption case, *Nitro-Lift Technologies v. Howard*, illustrates the breadth of the Supreme Court's preemption jurisprudence under the Federal Arbitration Act, which makes arbitration clauses in contracts '"valid, irrevocable, and enforceable.'"[72] The Oklahoma Supreme Court had decided that the existence of an arbitration clause in a noncompetition agreement did not prohibit judicial review of the underlying agreement and that the agreement was null and void.[73] In a per curiam decision issued without briefing beyond the certiorari petition and without oral argument, the Supreme Court found that the Oklahoma Supreme Court had ignored the Federal Arbitration Act's status as "the supreme Law of the Land" and that, when the court voided the agreement, it improperly assumed the arbiter's role.[74] Oklahoma argued that a specific state law addressing the validity of a noncompetition covenant should prevail over a general statute favoring arbitration. However, the Supreme Court easily rejected this notion and stated that "[t]here is no general-specific exception to the Supremacy Clause."[75]

Arbitration

In addition to *Nitro-Lift*, the Supreme Court reaffirmed its commitment to strict enforcement of arbitration agreements in *American Express Company v. Italian Colors Restaurant*.[76] In *Italian Colors* the Court considered whether a contractual waiver of "class arbitration" was enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal law claim exceeded the maximum potential recovery.[77] Alleging antitrust violations, a group of merchants had sued American Express. With the company each merchant had contracts that included a mandatory arbitration clause stipulating that no disputes or claims could "be arbitrated on a class action basis."[78] Arguing against the waiver, the plaintiffs demonstrated that proving their claims would cost hundreds of thousands of dollars, while the maximum recovery for an individual plaintiff would be $38,549.[79]

In a 5-to-4 decision, Justice Scalia reiterated that under the Federal Arbitration Act "courts must rigorously enforce arbitration agreements according to their terms."[80] The Court found no evidence of any "contrary congressional command" sufficient to override this mandate either in the antitrust laws or in the class action provisions of the Federal Rules of Civil Procedure.[81] The majority also rejected plaintiffs' invocation of a judge-made exception to the Act which allows courts to invalidate agreements that "prevent the 'effective vindication' of a federal

[70] *Id.* 1951–54.

[71] *Id.* at 1955 (Thomas, J., concurring).

[72] *Nitro-Lift Technologies v.* Howard, 133 S. Ct. 500, 503 (2012) (quoting 9 U.S.C. § 2).

[73] *Id.* at 501 (citing Okla. Stat. tit. 15, § 219A (2011)).

[74] *Id.* at 503 (quoting U.S. Const. art. VI, cl. 2).

[75] *Id.* at 504.

[76] *American Express Company v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

[77] *Id.* at 2307 (citing 9 U.S.C. § 2).

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2309 (quotations and citations omitted).

[81] *Id.* (citation omitted).

statutory right."[82] Emphasizing that this exception is intended to prevent a "waiver of a party's *right to pursue* statutory remedies," the Court asserted that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[83]

Justice Kagan, joined by Justices Breyer and Ginsburg, filed a biting dissent: "Here is the nutshell version of this case …. The monopolist gets to use its monopoly power to insist on a contract effectively denying its victims of all legal recourse. And here is the nutshell of today's opinion, admirably flaunted rather than camouflaged: Too darn bad."[84]

Stipulations

In *Standard Fire Insurance Company v. Knowles* the Supreme Court resolved confusion created by artful pleading designed to avoid federal jurisdiction over large class actions.[85] The Class Action Fairness Act of 2005 gives federal courts original jurisdiction over class actions if the class has more than 100 members, the parties are "minimally diverse," and the amount in controversy exceeds $5,000,000.[86] In calculating the jurisdictional amount, "the claims of the individual class members shall be aggregated."[87]

Greg Knowles filed this proposed class action in state court to resolve a dispute over payouts of insurance claims.[88] He also submitted an affidavit on behalf of the "class" stipulating that he would not seek damages for the class "in excess of $5,000,000 in the aggregate."[89] After the defendant, citing the Class Action Fairness Act, removed the case, the plaintiff, arguing that the amount in controversy fell below the statutory limit, sought remand.

Justice Breyer, for a unanimous court, determined that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified."[90] While reaffirming the general right of plaintiffs to avoid removal "by stipulating to amounts at issue that fall below the federal jurisdictional requirement," the Court concluded that because "the stipulation at issue can only tie [plaintiff's] hands," and cannot bind the rest of the class, the complaint was properly removed to federal court.[91]

Statutory Construction and Deference

In five cases the Supreme Court ventured into statutory construction and its cousin, deference. The latter category includes a case with useful discussions about the history and rationale of "*Chevron* deference" and another with strong hints that "*Auer* deference" may be on the way out. The three other decisions, while breaking no new ground, show the importance of parsing statutory language carefully.

In *City of Arlington, Texas v. Federal Communications Commission* the specific issue was "whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 … (1984)."[92] Writing for a six-Justice major-

[82] *Id.* at 2310 (citation omitted).

[83] *Id.*

[84] *Id.* at 2313 (Kagan, J., dissenting).

[85] *Standard Fire Insurance Company v. Knowles*, 133 S. Ct. 1345 (2013).

[86] Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2), (d)(5)(B).

[87] *Id.* §§ 1332(d)(1)(D), (d)(6).

[88] *Standard Fire Insurance*, 133 S. Ct. at 1348.

[89] *Id.*

[90] *Id.* (citation omitted).

[91] *Id.*

[92] *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863, 1866 (2013).

ity, Justice Scalia used the case as a primer on *Chevron* deference, which requires a reviewing court to accept an agency's interpretation if it "'is based on a permissible construction of the statute.'"[93] Offering a practical premise for *Chevron*, he theorized that it

> provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the court but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.[94]

He explained that, in the agency context, the distinction between jurisdictional and nonjurisdictional issues was a false one: "Both their power to act and how they act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires."[95]

Justice Scalia added that, with those labels discarded, "it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."[96] Using unusual language, he directed lower-court judges not to waste their time on the inquiry: "The federal judge as haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as 'jurisdictional,' is not engaged in reasoned decisionmaking."[97]

The majority resorted to reliance on a fictional fiend to support its determination to stifle the "false dichotomy between 'jurisdictional' and 'nonjurisdictional' agency interpretations": "Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself."[98] Justice Scalia posited that, by wrongly relying on the jurisdictional label, judges would inevitably undermine *Chevron*.[99]

Three members of the Court who usually agree with Justice Scalia supported the metaphorical Hound. The Chief Justice's dissent for himself and Justices Kennedy and Alito discussed at length the history and rationale of *Chevron* deference.[100] Based on his review of precedent, Chief Justice Roberts concluded that "we do not defer to an agency's interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide."[101] He acknowledged the majority's fear of the "Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive," but he expressed his own concern about "the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies."[102] The Chief Justice's solution was for courts to decide "that Congress has given interpretive authority to the agency.... We do not leave it to the agency to decide when it is in charge."[103]

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[93] *Id.* at 1868 (quoting *Chevron U.S.A. Incorporated v. Natural Resources Defense Council Incorporated*, 467 U.S. at 843).

[94] *Id.* (citation omitted).

[95] *Id.* at 1869.

[96] *Id.* at 1871 (citation omitted).

[97] *Id.*

[98] *Id.* at 1872–73.

[99] *Id.* at 1873.

[100] *Id.* at 1877–83 (Roberts, C.J., dissenting).

[101] *Id.* at 1883.

[102] *Id.* at 1886.

[103] *Id.*

In *Decker v. Northwest Environmental Defense Center,* where the underlying issue was a determination by the Environmental Protection Agency (EPA), the decision turned on the Court's deference to the agency's interpretation of its own regulation.[104] In the relevant portion of Justice Kennedy's opinion, which was joined by all eight Justices participating except Justice Scalia, the Court repeated the standard language generally known as *Auer* deference: "When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation."[105] Since the interpretation at issue was "a permissible one," whether it was "the best one" was irrelevant and the EPA's reading was upheld.[106]

Of potentially greater significance, however, are the signals sent by the concurrence and the partial dissent. In the former, the Chief Justice, joined by Justice Alito, agreed that "serious questions" had been raised about the principles set forth in *Auer* and that issue was "a basic one going to the heart of administrative law."[107] However, he declined to reconsider *Auer* in the instant case because that possibility had been raised only in a footnote in one brief.[108] Justice Scalia was not so reticent. In a lengthy opinion, he detailed how the Court's "cases have not put forward a persuasive justification for *Auer* deference."[109] In light of the Chief Justice's pointed observation that "[t]he bar is now aware that there is some interest in reconsidering" *Auer* deference, the deferential approach to the interpretation of regulations seems almost certain to be on the Court's docket soon.[110]

Two of the straightforward statutory construction cases, both unanimous, illustrate that lawyers and courts should look very closely at the precise language that Congress selects.

Stating the question presented in *Sebelius v. Cloer* would seem to suggest the answer: "The question … is whether an untimely petition [for compensation] can garner an award of attorney's fees."[111] Surprisingly, it can.

The issue arose out of an unusual attorney fees statute. The National Childhood Vaccine Injury Act of 1986 allows an award of fees after even an unsuccessful petition for compensation for a vaccine injury "if that petition 'was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.'"[112] When Dr. Cloer's petition for relief under the Act was denied as untimely, she sought an award of fees.

Justice Sotomayor's opinion focused on the ordinary meaning of the word "filed" because, assuming the other criteria are satisfied, fee eligibility is tied to "'a petition filed under section 300aa-11.'"[113] The statute thus renders the actual filing of the petition the critical event: "Nothing … suggests that the reason for the subsequent dismissal of a petition, such as its untimeliness, nullifies the initial filing of that petition."[114]

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[104]*Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013).

[105]*Id.* at 1337 (internal quotation marks and citations omitted). This extremely deferential standard derives its name from *Auer v. Robbins*, 519 U.S. 452 (1997).

[106]*Id.*

[107]*Id.* at 1339 (Roberts, C.J., concurring).

[108]*Id.*

[109]*Id.* at 1340 (Scalia, J., concurring in part and dissenting in part).

[110]*Id.* at 1339 (Roberts, C.J., concurring).

[111]*Sebelius v. Cloer*, 133 S. Ct. 1886, 1890 (2013).

[112]*Id.* (quoting 42 U.S.C. § 300aa-15(e)(1)).

[113]*Id.* at 1893 (quoting 42 U.S.C. §§ 300aa-15e(1), (3)).

[114]*Id.*

The opinion noted that Congress could easily have added a caveat requiring timely filing, but it did not do so. The Court also pointed out that some portions of the National Childhood Vaccine Injury Act specifically require compliance with the limitations period, thus emphasizing that compliance is not a factor for fee eligibility.[115] And the opinion rejected the applicability of two canons of construction that the government pushed: strict construction of waivers of sovereign immunity and the presumption favoring long-established common-law principles.[116] "These 'rules of thumb' give way when the words of a statute are unambiguous, as they are here."[117]

When all is said and done, the somewhat surprising resolution was that the ordinary meaning of "filed" controlled. The government's arguments could not dislodge that simple reality of statutory construction.

At issue in the second unanimous decision was the law enforcement proviso, a provision of the Federal Tort Claims Act that waives sovereign immunity for a discrete class of intentional torts committed by law enforcement officers.[118] Justice Thomas explained for the Court that the statute sets out three requirements for the waiver to be applicable: the claim must arise out of one of the six named torts, the claim must be "related to the 'acts or omissions' of an 'investigative or law enforcement officer,'" and the officer must be "'acting within the scope of his office or employment.'"[119]

Although the statutory text offered no additional qualifications, "[a] number of lower courts have nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso."[120] The Third Circuit had held that the only actionable tortuous conduct was that committed by federal officers in the course of executing a search, seizing evidence, or making an arrest. Since this case involved an allegation of sexual assault by correctional officers, that court had determined that sovereign immunity was not waived.

The Supreme Court rejected this approach out of hand, finding no support in the statutory text. The relevant

> provision focuses on the *status* of persons whose conduct may be actionable, not the types of activities that may give rise to a tort claim against the United States .... The plain text confirms that Congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority.[121]

As did Justice Sotomayor in the *Cloer* decision, Justice Thomas explained that Congress could have limited the scope of the proviso further but did not do so: "We, therefore, decline to read such a limitation into unambiguous text."[122]

Thus the Court ruled unanimously in favor of two claimants who would probably not be considered sympathetic by a majority of this Court—a losing plaintiff seeking a fee award and a prisoner alleging sexual assault by correctional officers—because the statutory language, as parsed through the canons of construction, simply did not permit contrary results.

In *Adoptive Couple v. Baby Girl*, one of the saddest cases of the Term—regardless of

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[115] *Id.* at 1894.

[116] *Id.* at 1895.

[117] *Id.* at 1896 (internal quotation marks and citation omitted).

[118] *Millbrook v. United States*, 133 S. Ct. 1441, 1443 (2013).

[119] *Id.* at 1444–45 (quoting 28 U.S.C. §§ 2680(h) and 1346(b)(1), respectively).

[120] *Id.* at 1445.

[121] *Id.*

[122] *Id.* at 1446.

one's view of the outcome—the majority and dissent engaged in what might be called dueling canons of construction. Justice Alito, writing for a one-vote majority but with Justice Breyer on his team and Justice Scalia playing for the dissent, focused on several discrete words in the Indian Child Welfare Act, while Justice Sotomayor embraced a broader approach.[123] The consequence of the majority's ruling is that a 3-year-old child who had been removed from her adoptive parents and placed with her biological father at age 27 months was to be sent back to her adoptive parents.[124]

The complicated fact situation essentially reduces to Biological Father, a member of the Cherokee Nation, believing that he had relinquished the rights to a daughter over whom he had never exercised custody only to Birth Mother, to whom he was not married, and then when he was notified of the child's adoption by a non-Indian couple, attempting to invoke the Indian Child Welfare Act to stop the adoption. There was no dispute that the preconditions for the Act's applicability were satisfied, and the South Carolina courts interpreted the statute to prohibit the adoption, thus requiring Baby Girl to be removed from Adoptive Couple and given to Biological Father.[125]

Justice Alito carefully perused several words of several sections of the Indian Child Welfare Act. In deciding that Biological Father's parental rights could be terminated, he zeroed in on the reference to "continued custody" in the provision restricting termination of those rights. After reciting several dictionary definitions of "continued," he held that "[t]he phrase 'continued custody' … refers to custody that a parent already has (or at least had at some point in the past). As a result, [25 U.S.C.] § 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child."[126]

A second provision relied on by the lower courts to preclude the termination of Biological Father's rights requires the adopting couple to provide remedial services "to prevent the breakup of the Indian family."[127] Again relying on the dictionary, the majority opinion concluded that there had been no "breakup" in this context because, at the time of the adoption, no relationship existed between Baby Girl and Biological Father: "In such a situation, the 'breakup of the Indian family' has long since occurred, and § 1912(d) is inapplicable."[128]

Justice Alito considered Section 1915(a), which, when termination of parental rights is authorized, provides for an order of preference for adoption among Indian families.[129] He explained that since only Adoptive Couple sought to adopt the child, the preferences for adoption by an Indian were inapplicable and therefore did not bar a non-Indian couple from adopting an Indian child.[130]

Thus, by closely parsing individual words, Justice Alito concluded that "the plain text" of the Indian Child Welfare Act allowed termination of Biological Father's parental rights.[131]

In a dissent that is considerably longer than the majority opinion, Justice Sotomayor belittled Justice Alito's focus on individual words and noted that "the majority begins its analysis by plucking out

[123]*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

[124]On remand, the South Carolina Supreme Court ordered the lower court to enter an order finalizing the adoption by Adoptive Couple (*Adoptive Couple v. Baby Girl*, 2013 WL 3752641, at *3 (S.C. July 17, 2013)).

[125]*Adoptive Couple*, 133 S. Ct. at 2559.

[126]*Id.* at 2560 (footnote omitted).

[127]Indian Child Welfare Act, 25 U.S.C. § 1912(d).

[128]*Adoptive* Couple, 133 S. Ct. at 2562.

[129]*Id.* at 2564.

[130]*Id.* at 2564–65.

[131]*Id*. at 2565.

of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it. That is not how we ordinarily read statutes."[132] Rather, she contended, it is "[b]etter to start at the beginning and consider the operation of the statute as a whole."[133] The dissent thus undertook a comprehensive review of the Indian Child Welfare Act's purpose, content, and structure and dismissed Justice Alito's analysis as "hollow literalism."[134]

Adoptive Couple offers no new insight into the canons of construction, but it does illustrate how different analytical approaches—focusing on individual words versus the holistic method—can lead directly to contrary results.

Unconstitutional Conditions

In a case raising familiar echoes for advocates of programs funded by the Legal Services Corporation, the Supreme Court considered the validity of a federal program requirement that compelled recipients, as a condition of funding, to adopt a policy that they contended violated their free speech rights. *Agency for International Development v. Alliance for Open Society International Incorporated* concerned a United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 provision that bars funding to an organization '"that does not have a policy explicitly opposing prostitution and sex trafficking.'"[135]

Chief Justice Roberts opened the majority's analysis by observing that "[a]s a general matter if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds."[136] However, the Court acknowledged that a condition might permissibly limit federally funded activities but unconstitutionally infringe upon the rights of the grantee to engage in the restricted activities with nonfederal funds. The Court noted that it had upheld restrictions on abortion services in a federal family planning program so long as the fund recipient could engage in constitutionally protected activities through affiliated programs "that are separate and independent from the [federally funded] project."[137] However, the existence of such "affiliates" could not remedy the First Amendment problem here: "Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own."[138] The Court concluded that because "[t]he Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program," it infringes upon the recipients' First Amendment rights.[139]

Sovereign Immunity

United States v. Bormes unanimously rejected an artful pleading that sought to avoid the Supreme Court's rigorous standards for finding a waiver of sovereign immunity.[140] James X. Bormes, an attorney, filed a class action seeking damages against the United States; he alleged that the payment system used by the federal courts for processing filing fees violated

[132] *Id.* at 2572 (Sotomayor, J., dissenting).

[133] *Id.* at 2573.

[134] *Id.* at 2585.

[135] *Agency for International Development v. Alliance for Open Society International Incorporated*, 133 S. Ct. 2321, 2324 (2013) (quoting United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7631(f)).

[136] *Agency for International Development*, 133 S. Ct. at 2329.

[137] *Id*. at 2330 (discussing *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)).

[138] *Id*. at 2331.

[139] *Id*. at 2332. Cf. *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 548 (2001) (although Congress was not required to fund legal services attorneys at all, if it did so, it could not structure program to "insulate its own laws from legitimate political challenge" by foreclosing challenges to so-called welfare-reform statutes).

[140] *United States v. Bormes*, 133 S. Ct. 12 (2012).

the Fair Credit Reporting Act.[141] The Act defines a "person" who may be liable for violations of the Act to include "government or government subdivision or agency."[142] However, the Court has held that consent to sue the United States must be "unequivocally expressed."[143] Anticipating a sovereign immunity defense to his Fair Credit Reporting Act claim, Bormes also alleged jurisdiction under the Little Tucker Act, which gives district courts jurisdiction over a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation … or upon any express or implied contract with the United States."[144]

The Federal Circuit held that, regardless of whether the Fair Credit Reporting Act *itself* contained a sufficient waiver of sovereign immunity, the Little Tucker Act provided government consent to be sued, and the Fair Credit Reporting Act "can be fairly interpreted as mandating compensation by the Federal Government for the [alleged] damages sustained."[145] In other words, the two statutes operating together defeated the government's sovereign immunity defense.

Justice Scalia's opinion rejected this effort to bootstrap the Little Tucker Act's general waiver of sovereign immunity, which was created simply to provide a judicial avenue to enforce monetary claims against the United States, into a sovereign immunity waiver applicable to specific substantive remedial statutes.[146] The Tucker Acts, explained the Court, "do not themselves create substantive rights, but are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law."[147] While the Tucker Acts "supplied the missing ingredient for an action against the United States for breach of monetary obligations not otherwise judicially enforceable," they are "displaced … when a law assertedly imposing monetary liability on the United States contains its own judicial remedies."[148] Turning to the Fair Credit Reporting Act, the Court found that the statute "creates a detailed remedial scheme" which "sets out a carefully circumscribed, timelined, plaintiff-specific cause of action" and further describes the scope of potential remedies, the range of potential defendants, and a specific standard for liability.[149] The Court concluded that plaintiff may not "mix and match FCRA's provisions with the Tucker Act's immunity waiver to create an action against the United States."[150]

Title VII

The Supreme Court decided two cases that will make it more difficult for workers to prove employment discrimination under Title VII of the Civil Rights Act of 1964.[151] In each case the 5-to-4 alignment of justices was identical, with Justices Ginsburg, Breyer, Sotomayor, and Kagan on the losing end. In *University of Texas Southwestern Medical Center v. Nassar* Justice Kennedy's majority opinion distinguished statutory claims of discrimination "because of … [the employee's] race, color, religion, sex, or national origin," as proscribed by 42 U.S.C.

[141] *Id.* at 15 (citing Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*.).

[142] 15 U.S.C. § 1681(a)(b).

[143] *Bormes*, 133 S. Ct. at 16 (citation and quotation marks omitted).

[144] *Id*.; Little Tucker Act, 28 U.S.C. § 1346.

[145] *Bormes v. United States*, 626 F.3d 574 (Fed. Cir. 2010); 28 U.S.C. § 1346.

[146] *Bormes*, 133 S. Ct. at 16–17.

[147] *Id.* at 17 (citation omitted); Tucker Acts, 28 U.S.C. §§ 1491, 1346.

[148] *Bormes*, 133 S. Ct at 18.

[149] *Id*. (citation omitted).

[150] *Id*. at 19.

[151] Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-2.

§ 2000e-2(a), from statutory claims of adverse employment practices taken "because of" retaliation for an employee's *complaints* about discrimination, as proscribed by Section 2000e-3(a).[152] To prove claims of discrimination based on the employee's "status," the complainant need only show that the characteristic at issue (race, sex, etc.) was a "motivating factor" in the adverse action.[153] After a lengthy analysis, however, the majority, over a vociferous dissent, concluded that *retaliation* claims must meet a stricter standard of causation—i.e., that "but for" an intent to retaliate, the employer would not have taken the adverse action.[154]

In *Vance v. Ball State University* it was Justice Alito's turn to enrage the dissenters with a majority opinion that restrictively defined "supervisor," for purposes of Title VII vicarious liability, to include only persons "empowered to take tangible employment actions against the victim, i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[155] This definition precluded the inclusion of "coworkers" who lack the above-cited powers but nevertheless have authority "to direct an employee's daily work activities."[156]

Attorney Fees and Costs

In *Lefemine v. Wideman* the Supreme Court issued a per curiam opinion summarily reversing the denial of attorney fees to an abortion protestor plaintiff.[157] The Court simply restated its "well-established" prevailing party standards under 42 U.S.C. § 1988 and then succinctly applied them to the injunctive relief won by the plaintiff: "Contrary to the Fourth Circuit's view, the [district court's] ruling worked the requisite 'material alteration" in the parties' relationship …. Before the ruling, the police intended to stop [plaintiff] from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner."[158]

Marx v. General Revenue Corporation considered whether costs could be awarded to a prevailing defendant in a Fair Debt Collection Practices Act case absent a finding that the plaintiff brought the case "in bad faith and for the purposes of harassment."[159] Plaintiff, supported by the United States as amicus curiae, contended that the Act's specific statutory provision for attorney fees "and costs," upon a finding of bad faith, displaced the general cost award directions in Federal Rule of Civil Procedure 54(d)(1), which provides that costs "should be allowed to the prevailing party" unless some other provision of law "provides otherwise."[160]

In a 7-to-2 decision the Court rejected the plaintiff's "expressio unius" contention that the specific provision for costs creates a "negative implication" that costs are *not* available in any other circumstances and read the reference to "costs" at the end of the critical statutory sentence as merely "confirming" the existing cost provisions of Rule 54.[161]

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[152]*University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2523–24 (2013).

[153]*Id*. at 2523 (citing 42 U.S.C. § 2000e-2(m)). This standard, which appears in the statute, was undisputed.

[154]*Id*. at 2533–34.

[155]*Vance v. Ball State University*, 133 S. Ct. 2434, 2443 (2013) (citation and internal quotation marks omitted).

[156]*Id*. at 2443–44. The dissent, supported by the United States as amicus, upbraided the majority for failure to accord any deference to Equal Employment Opportunity Commission Guidance, which included "coworkers" who "direct" the work of others within the definition of "supervisors" (*id*. at 2455 (Ginsburg, J., dissenting)).

[157]*Lefemine v. Wideman*, 133 S. Ct. 9 (2012).

[158]*Id*. at 11.

[159]*Marx v. General Revenue Corporation*, 133 S. Ct. 1166 (2012) (citing 15 U.S.C. §§ 1692k, 1692k(a)(3)); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p.

[160]*Marx* at 1173–75.

[161]*Id*. at 1175.

In affirming the cost award, the majority was forced to respond to the argument of plaintiff (and the United States and the two dissenters) that the Court's interpretation rendered the statutory phrase "and costs" superfluous since it simply restates the preexisting cost-shifting rule. The best retort Justice Thomas could summon was to note that "[t]he canon against surplusage is not an absolute rule."[162]

■ ■ ■

Like other Courts, the Roberts Court is interested in making its mark on federal court jurisprudence. The Court is already set to decide during the 2013–2014 Term cases that involve court access, including arbitration, preemption, and statutory construction and deference.[163] The Court has also agreed to tackle some controversial subjects, including prayer in public meetings and presidential authority to make recess appointments, that could, if this past Term is any indication, involve—or even turn on—access to court issues.[164] The Federal Court Access Group will monitor the Court's Term and report on the cases next year.

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[162]*Id.* at 1178.

[163]*BG Group P.L.C. v. Republic of Argentina*, 133 S. Ct. 2795 (2013) (arbitration); *Northwest Incorporated. v. Ginsberg*, 133 S. Ct. 2387 (2013) (preemption); *Mayorkas v. Cuellar De Osorio*, 133 S. Ct. 2853 (2013) (statutory construction and deference).

[164]*Town of Greece, New York v. Galloway*, 133 S. Ct. 2388 (2013) (prayer); *National Labor Relations Board v. Noel Canning*, 133 S. Ct. 2861 (2013) (recess appointments).

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