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# Supreme Court Update: 2011-2012 Term

# Supreme Court Update: 2011-2012 Term

By Robert B. Fitzpatrick*, Robert B. Fitzpatrick, PLLC, Washington, D.C.**

## Cases Decided in the 2011-2012 Term

### CompuCredit Corp. v. Greenwood

(Arbitration - Credit Repair Organizations Act)

- 132 S. Ct. 665; 181 L. Ed. 2d 586; 2012 U.S. LEXIS 575 (Jan. 10, 2012), Docket No. 10-948.
- *Appeal from Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th Cir. 2010), *cert. granted* 131 S. Ct. 2874, 179 L. Ed. 2d 1187 (May 2, 2011).
- This case was argued on October 11, 2011.
- Question(s) Presented:
  - Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are subject to arbitration pursuant to a valid arbitration agreement.
- Holding:
  - Because the Credit Repair Organizations Act is silent on whether claims can proceed in an arbitrable forum, the Federal Arbitration Act requires the arbitration agreement to be enforced according to its terms.
- Justice Scalia delivered the opinion of the Court, in which Justices Roberts, Kennedy, Thomas, Breyer and Alito joined. Justice Sotomayor filed a concurring opinion in which Justice Kagan joined. Justice Ginsburg filed a dissenting opinion.

**SYLLABUS**

Although respondents' credit card agreement required their claims to be resolved by binding arbitration, they filed a lawsuit against petitioner CompuCredit Corporation and a division of petitioner bank, alleging, *inter alia*, violations of the Credit Repair Organizations Act (CROA). The Federal District Court denied the defendants' motion to compel arbitration, concluding that Congress intended CROA claims to be nonarbitrable. The Ninth Circuit affirmed.

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** All synopses of Supreme Court cases contained in this paper are derived from the Supreme Court's syllabi in those cases.

*Held:* Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the Federal Arbitration Act (FAA) requires the arbitration agreement to be enforced according to its terms. Pp. 2-10.

(a) Section 2 of the FAA establishes "a liberal federal policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U. S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765. It requires that courts enforce arbitration agreements according to their terms. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213, 221, 105 S. Ct. 1238, 84 L. Ed. 2d 158. That is the case even when federal statutory claims are at issue, unless the FAA's mandate has been "overridden by a contrary congressional command." *Shearson/American Express Inc. v. McMahon*, 482 U. S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185. Pp. 2-3. [*2]

(b) The CROA provides no such command. Respondents contend that the CROA's disclosure provision--which requires credit repair organizations to provide consumers with a statement that includes the sentence "'You have a right to sue a credit repair organization that violates the [Act],'" 15 U. S. C. §1679c(a)--gives consumers the right to bring an action in a court of law; and that, because the CROA prohibits the waiver of "any right of the consumer under this subchapter," §1679f(a), the arbitration agreement's waiver of the "right" to bring a court action cannot be enforced. Respondents' premise is flawed. The disclosure provision creates only a right for consumers to receive a specific statement describing the consumer protections that the law elsewhere provides, one of which is the right to enforce a credit repair organization's "liab[ility]" for "fail[ure] to comply with [the Act]." §1679g(a). That provision does not override the FAA's mandate. Its mere contemplation of judicial enforcement does not demonstrate that the Act provides consumers with a "right" to initial judicial enforcement. Pp. 3-8.

(c) At the time of the CROA's enactment in 1996, arbitration clauses such as the one [*3] at issue were no rarity in consumer contracts generally, or in financial services contracts in particular. Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest. Pp. 8-9.

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/compucredit-corp-v-greenwood/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=128935.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-948.pdf.
- For discussion and analysis of the opinion, *see*: http://www.scotusblog.com/?p=136587.
- For further analysis, *see* the following:
    - Nepveu, Julie, *U.S. Supreme Court Rejects Consumers' Right to Sue Over Credit Repair Scams*, AARP Legal Advocacy (Feb. 7, 2012), *available at*: http://www.aarp.org/money/credit-loans-debt/info-10-2011/CompuCredit-v-Greenwood.html.
    - Kramer, Liz, *CompuCredit Corp. v. Greenwood: 8-1 SCOTUS Decision Finds Credit Repair Organizations Act Does Not Preclude Arbitration*, ADR Times (Jan. 25, 2012), *available at*:

http://www.adrtimes.com/articles/2012/1/25/compucredit-corp-v-greenwood-8-1-scotus-decision-finds-credi.html.

- Lewis, John, *The Supreme Court Reaffirms Mandatory Arbitration in CompuCredit Corp. v. Greenwood: The Antidote for D.R. Horton?*, Employment Class Action Blog (Jan. 20, 2012), *available at*: http://www.employmentclassactionreport.com/arbitration/the-supreme-court-reaffirms-mandatory-arbitration-in-compucredit-corp-v-greenwood/.
- Pearl, Steven, *CompuCredit Corp. v. Greenwood: New SCOTUS Arbitration Decision May Shed Light on Future of Employment Class Action Waivers*, The California Wage and Hour Law Blog (Jan. 18, 2012), *available at*: http://cawageandhourlaw.blogspot.com/2012/01/compucredit-corp-v-greenwood-new-scotus.html.
- Leffel, Michael, *Supreme Court in CompuCredit Corp. v. Greenwood Gives Another Victory to Proponents of Arbitration*, The CFSL Bulletin (Jan. 10, 2012), *available at*: http://www.cfslbulletin.com/2012/01/10/supreme-court-in-compucredit-corp-v-greenwood-gives-another-victory-to-proponents-of-arbitration/.

## Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.

(Ministerial Exception - Rehabilitation)

- 132 S. Ct. 694; 181 L. Ed. 2d 650; 2012 U.S. LEXIS 578 (Jan. 11, 2012), Docket No. 10-553.
- *Appeal from EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010), *cert. granted* 131 S. Ct. 1783; 179 L. Ed. 2d 653 (Mar. 28, 2011).
- This case was argued on October 5, 2011.
- Question(s) Presented:
    - Whether the ministerial exception, which prohibits most employment-related lawsuits against religious organizations by employees performing religious functions, applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.
- Holding:
    - The Establishment and Free Exercise Clauses of the First Amendment bar suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. Moreover, because the respondent in this case was a minister within the meaning of the ministerial exception, the First Amendment requires dismissal of her employment discrimination suit against her religious employer.
- Chief Justice Roberts delivered the opinion for a unanimous Court. Justice Thomas filed a concurring opinion. Justice Alito filed a concurring opinion in which Justice Kagan joined.

**SYLLABUS**

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church-Missouri Synod. The Synod classifies its school teachers into two categories: "called" and "lay" "Called" teachers are regarded as having been called to their vocation by God. To be eligible to be considered "called," a teacher must complete certain academic requirements, including a course of theological study. Once called, a teacher receives the formal title "Minister of Religion, Commissioned" "Lay" teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. Although lay and called teachers at Hosanna-Tabor generally performed the same duties, lay teachers were hired only when called teachers were unavailable.

After respondent Cheryl Perich completed the required training, Hosanna-Tabor asked her to become a called teacher. Perich accepted the call and was designated a commissioned minister. In addition to teaching secular subjects, Perich taught a religion class, led her students in daily *prayer* and devotional exercises, and took her students to a weekly school-wide [*2] chapel service. Perich led the chapel service herself about twice a year.

Perich developed narcolepsy and began the 2004-2005 school year on disability leave. In January 2005, she notified the school principal that she would be able to report to work in February. The

principal responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year. The principal also expressed concern that Perich was not yet ready to return to the classroom. The congregation subsequently offered to pay a portion of Perich's health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign. In February, Perich presented herself at the school and refused to leave until she received written documentation that she had reported to work. The principal later called Perich and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights. In a subsequent letter, the chairman of the school board advised Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich's [*3] "insubordination and disruptive behavior," as well as the damage she had done to her "working relationship" with the school by "threatening to take legal action." The congregation voted to rescind Perich's call, and Hosanna-Tabor sent her a letter of termination.

Perich filed a charge with the Equal Employment Opportunity Commission, claiming that her employment had been terminated in violation of the Americans with Disabilities Act. The EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Perich intervened in the litigation. Invoking what is known as the "ministerial exception," Hosanna-Tabor argued that the suit was barred by the First Amendment because the claims concerned the employment relationship between a religious institution and one of its ministers. The District Court agreed and granted summary judgment in Hosanna- Tabor's favor. The Sixth Circuit vacated and remanded. It recognized the existence of a ministerial exception rooted in the First Amendment, but concluded that Perich did not qualify as a "minister' under the exception.

*Held:*

1. The Establishment and Free Exercise Clauses of the First Amendment [*4] bar suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. Pp. 6-15.

(a) The First Amendment provides, in *part*, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government--unlike the English Crown--would have no role in filling ecclesiastical offices. Pp. 6-10.

(b) This Court first considered the issue of government interference with a church's ability to select its own ministers in the context of disputes over church property. This Court's decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers. See *Watson v. Jones*, 80 U.S. 679, 13 Wall. 679, 20 L. Ed. 666; *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 73 S. Ct. 143, 97 L. Ed. 120; *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U. S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151. [*5] Pp. 10-12.

(c) Since the passage of Title VII of the Civil Rights Act of 1964 and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. The Court agrees that there is such a ministerial exception. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

The EEOC and Perich contend that religious organizations [*6] can defend against employment discrimination claims by invoking their First Amendment right to freedom of association. They thus see no need--and no basis--for a special rule for ministers grounded in the Religion Clauses themselves. Their position, however, is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. The Court cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

The EEOC and Perich also contend that *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, precludes recognition of a ministerial exception. But Smith involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. Pp. 13-15.

2. Because Perich was a minister within the meaning of the ministerial exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer. Pp. 15-21.

(a) The ministerial exception is not limited [*7] to the head of a religious congregation. The Court, however, does not adopt a rigid formula for deciding when an employee qualifies as a minister. Here, it is enough to conclude that the exception covers Perich, given all the circumstances of her employment. Hosanna-Tabor held her out as a minister, with a role distinct from that of most of its members. That title represented a significant degree of religious training followed by a formal process of commissioning. Perich also held herself out as a minister by, for example, accepting the formal call to religious service. And her job duties reflected a role in conveying the Church's message and carrying out its mission: As a source of religious instruction, Perich played an important part in transmitting the Lutheran faith.

In concluding that Perich was not a minister under the exception, the Sixth Circuit committed three errors. First, it failed to see any relevance in the fact that Perich was a commissioned minister. Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that

significant religious training [*8] and a recognized religious mission underlie the description of the employee's position. Second, the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich. Though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions--particularly when, as here, they did so only because commissioned ministers were unavailable. Third, the Sixth Circuit placed too much emphasis on Perich's performance of secular duties. Although the amount of time an employee spends on particular activities is relevant in assessing that employee's status, that factor cannot be considered in isolation, without regard to the other considerations discussed above. Pp. 15-19.

(b) Because Perich was a minister for purposes of the exception, this suit must be dismissed. An order reinstating Perich as a called teacher would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers. Though Perich no longer seeks reinstatement, she continues to seek frontpay, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would [*9] operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.

Any suggestion that Hosanna-Tabor's asserted religious reason for firing Perich was pretextual misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful is the church's alone. Pp. 19-20.

(c) Today the Court holds only that the ministerial exception bars an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. The Court expresses no view on whether the exception bars other types of suits. Pp. 20-21.

597 F.3d 769, *reversed*.

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc/
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=128439.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=129054.
- For discussion and analysis of the opinion, *see*: http://www.scotusblog.com/?p=136532.
- For further analysis, *see* the following:
    - McConell, Michael, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC – Post-Decision SCOTUScast*, The Federalist Society (Jan. 13, 2012), *available at*: http://www.fed-soc.org/publications/detail/hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc-post-decision-scotuscast.

- Sonne, James, *Supreme Court Update – Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, dritoday (Jan. 12, 2012), *available at*: http://dritoday.org/post/Supreme-Court-Update-Hosanna-Tabor-Evangelical-Lutheran-Church-and-School-v-EEOC.aspx.
- Warner Norcross & Judd – Appellate Practice Group, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC: The U.S. Supreme Court Reaffirms the Ministerial Exception*, JDSUPRA (Jan. 12, 2012), *available at*: http://www.jdsupra.com/post/documentViewer.aspx?fid=73e4b005-61fd-4e4e-bf0c-d7cd0acbee3d.
- Van Oort, Aaron and Wilczek, Daniel, *Supreme Court Decides Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, Faegre Baker Daniels (Jan. 11, 2012), *available at*: http://www.faegrebd.com/17732.
- Pew Forum on Religion & Public Life, *In Brief: Hosanna-Tabor v. EEOC*, PewResearchCenter (Jan. 11, 2012), *available at*: http://www.pewforum.org/Church-State-Law/The-Supreme-Court-Takes-Up-Church-Employment-Disputes-and-the-%E2%80%9CMinisterial-Exception%E2%80%9D.aspx.
- Corbin, Mala, *The Ministerial Exception Part III*, Concurring Opinions (April 12, 2011), *available at* http://www.concurringopinions.com/archives/2011/04/the-ministerial-exception-part-iii.html.
- Corbin, Mala, *Ministerial Exception Part II*, Concurring Opinions (April 6, 2011), *available at* http://www.concurringopinions.com/archives/2011/04/ministerial-exception-part-ii.html.
- Citron, Denialle and Corbin, Mala, *Corbin on the Ministerial Exception, Part I*, Concurring Opinions (March 30, 2011), *available at* http://www.concurringopinions.com/archives/2011/03/corbin-on-the-ministerial-exception-part-i.html.

- For law review articles discussing the ministerial exception, *see*:
  - Mayer, Lloyd Hitoshi, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U.L. Rev. 1137 (2009).
  - Warnick, Ashlie, *Accommodating Discrimination*, 77 U. Cin. L. Rev. 119 (2008).
  - Moreland, Michael, *A Second-Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States: Religious Free Exercise and Anti-Discrimination Law*, 70 Alb. L. Rev. 1417 (2007).
  - Hamilton, Marci, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U.L. Rev. 1099 (2004).

## KPMG v. Cocchi

(Arbitration – Class Action)

- 132 S. Ct. 23; 181 L. Ed. 2d 323; 2011 U.S. LEXIS 7924 (Nov. 7, 2011), Docket No. 10-1521.
- *Appeal from KPMG LLP v. Cocchi*, 51 So. 3d 1165; 2010 Fla. App. LEXIS 19466 (Fla. Dist. Ct. App. 2010).
- This case was not argued before the Court.
- Question Presented:
    - Whether the Florida court of appeal's refusal to compel arbitration conflicts with this Court's decisions holding that, under the Federal Arbitration Act, written agreements to arbitrate must be enforced under generally applicable state-law principles even if the result is piecemeal litigation.
- Holding:
    - *Per Curiam* - Remanded to Florida state court for consideration of whether arbitration is required for some of the claims alleged.
- For briefs and the opinion below, *see*: http://www.scotusblog.com/case-files/kpmg-llp-v-cocchi/.
- For further analysis, *see* the following:
    - Hassen, Michael, *Class Action Defense Cases – KPMG v. Cocchi: Supreme Court Reiterates Requirement That State Courts Follow Concepcion and Enforce Arbitration Agreements Under the Federal Arbitration Act (FAA)*, Class Action Defense Blog (Nov. 28, 2011), *available at*: http://classactiondefense.jmbm.com/2011/11/class_action_defense_caseskpmg.html.
    - VanBuren, Victoria, *KPMB LLP v. Cocchi – U.S. Supreme Court Holds That a Court May Not Deny Arbitration When Some of the Claims Are Nonarbitrable*, Disputing (Nov. 14, 2011), *available at*: http://www.karlbayer.com/blog/?p=16485.
    - Cole, Sarah, *Supreme Court Rules That State and Federal Courts Must Enforce Arbitration Agreements Even When Nonarbitrable Claims Are Present in Complaint*, ADR Prof Blog (Nov. 11, 2011), *available at* : http://www.indisputably.org/?p=2989.
    - Jones, Bruce, *Supreme Court Decides KPMG LLP v. Cocchi*, Faegre Baker Daniels (Nov. 8. 2011), *available at* http://www.faegrebd.com/13978.
    - Nye, Bruce, *SCOTUS To Everyone: Binding Arbitration Means Binding Arbitration, Get It?*, Cal Biz Lit (Nov. 8, 2011), *available at*: http://www.calbizlit.com/cal_biz_lit/2011/11/scotus-to-everyone-binding-arbitration-means-binding-arbitration-get-it.html.

## Marmet Health Center, Inc. v. Brown

(Federal Arbitration Act)

- 565 U.S. ____ (Feb. 21, 2012), Docket No. 11-391, *available at*: http://www.supremecourt.gov/opinions/11pdf/11-391.pdf.
- *Appeal from Brown v. Genesis Healthcare Corp*, Nos. 35494, 35546 and 35635, 2011 W. Va. LEXIS 61 (W. Va. June 29, 2011), *petition for cert. filed* (Sept. 27, 2011), Docket No. 11-391.
- Question(s) Presented:
    - Whether Section 2 of the Federal Arbitration Act preempts a state-law rule that prohibits enforcement of a pre-dispute arbitration agreement when a plaintiff asserts a personal injury or wrongful death claim.
    - Whether the West Virginia court applies its state-law unconscionability doctrine in a manner that subjected Petitioners' arbitration provisions to special scrutiny, thereby contravening the FAA.
- Holding:
    - *Per Curiam* - West Virgina's categorical prohibition of pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is contrary to the terms and coverage of the FAA.
    - Remanded to the West Virginia Court of Appeals.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/marmet-health-care-center-inc-v-brown/.
- For further analysis, *see* the following:
    - Tauber, Andrew, *United States: Supreme Court Decision Alert – February 21, 2012*, Mayer Brown (Feb. 22, 2012), *available at*: http://www.mondaq.com/unitedstates/x/165634/Appellate/Federal+Arbitration+ActPreemption+of+State+Law.
    - Jones, Bruce, *Supreme Court Decides Marmet Health Care Center, Inc. v. Brown*, Lexology (Feb. 21, 2012), *available at*: http://www.lexology.com/library/detail.aspx?g=7a37e27e-023c-4acd-b9d9-799203b33996.
    - Rgates, *Marmet Health Care Center, Inc. v. Brown*, Willamette Law Online (Feb. 21, 2012), *available at*: http://willamettelawonline.com/2012/02/marmet-health-care-center-inc-v-brown/.

## Mims v. Arrow Fin. Servs., LLC

(Federal Question Jurisdiction - Telephone Consumer Protection Act)

- 132 S. Ct. 740; 2012 U.S. LEXIS 906; 23 Fla. L. Weekly Fed. S 95 (Jan. 18, 2012), Docket No. 10-1195.
- *Appeal from* 421 Fed. Appx. 920 (11th Cir. 2010), *cert. granted* 131 S. Ct. 3063, 180 L. Ed. 2d 884 (2011).
- This case was argued on November 28, 2011.
- Question(s) Presented:
    - Did Congress divest the federal district courts of their federal-question jurisdiction under 28 U.S.C. § 1331 over private actions brought under the Telephone Consumer Protection Act?
- Holding:
    - The Telephone Consumer Protection Act's grant of jurisdiction to state courts does not deprive the federal district courts of federal-question jurisdiction over private lawsuits seeking to enforce the Act.
- Justice Ginsburg delivered the opinion for a unanimous Court.

**SYLLABUS**

Consumer complaints about abuses of telephone technology--for example, computerized calls to private homes--prompted Congress to pass the Telephone Consumer Protection Act of 1991 (TCPA or Act), 47 U. S. C. §227. Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls. The Act bans certain invasive telemarketing practices and directs the Federal Communications Commission (FCC) to prescribe implementing regulations. It authorizes States to bring civil actions to enjoin prohibited practices and recover damages on their residents' behalf, 47 U. S. C. A. §227(g)(1) (Supp. 2011), and provides that jurisdiction over these state-initiated suits lies exclusively in the U. S. district courts, §227(g)(2). It also permits a private person to seek redress for violations of the Act or regulations "in an appropriate court of [a] State," "if [such an action is] otherwise permitted by the laws or rules of court of [that] State." 47 U. S. C. §§227(b)(3), (c)(5).

Petitioner Mims [*2] filed a damages action in Federal District Court, alleging that respondent Arrow, seeking to collect a debt, violated the TCPA by repeatedly using an automatic telephone dialing system or prerecorded or artificial voice to call Mims's cellular phone without his consent. Mims invoked the court's "federal question" jurisdiction, *i.e.*, its authority to adjudicate claims "arising under the . . . laws . . . of the United States," 28 U. S. C. §1331. The District Court, affirmed by the Eleventh Circuit, dismissed Mims's complaint for want of subject-matter jurisdiction, concluding that the TCPA had vested jurisdiction over private actions exclusively in state courts.

*Held:* The TCPA's permissive grant of jurisdiction to state courts does not deprive the U. S. district courts of federal-question jurisdiction over private TCPA suits. Pp. 7-18.

(a) Because federal law creates the right of action and provides the rules of decision, Mims's TCPA claim, in §1331's words, plainly "aris[es] under" the "laws . . . of the United States." Arrow agrees that this action arises under federal law, but urges that Congress vested exclusive adjudicatory authority over private TCPA actions in state courts. In [*3] cases "arising under" federal law, there is a presumption of concurrent state-court jurisdiction, rebuttable if "Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim." *Tafflin* v. *Levitt*, 493 U. S. 455, 458-459, 110 S. Ct. 792, 107 L. Ed. 2d 887. Arrow acknowledges the presumption, but maintains that §1331 creates no converse presumption in favor of federal-court jurisdiction. Instead, Arrow urges, the TCPA, a later, more specific statute, displaces §1331, an earlier, more general prescription.

Section 1331 is not swept away so easily. The principle that district courts possess federal-question jurisdiction under §1331 when federal law creates a private right of action and furnishes the substantive rules of decision endures unless Congress divests federal courts of their §1331 adjudicatory authority. See, *e.g.*, *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 642, 122 S. Ct. 1753, 152 L. Ed. 2d 871. Accordingly, the District Court retains §1331 jurisdiction over Mims's complaint unless the TCPA, expressly or by fair implication, excludes federal court adjudication. See *id.*, at 644, 122 S. Ct. 1753, 152 L. Ed. 2d 871. Pp. 7-10.

(b) Arrow's arguments do not persuade this Court that Congress eliminated §1331 jurisdiction over private TCPA [*4] actions. Title 47 U. S. C. §227(b)(3)'s language may be state-court oriented, but "the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive," *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479, 56 S. Ct. 343, 80 L. Ed. 331. Nothing in §227(b)(3)'s permissive language makes state-court jurisdiction exclusive, or otherwise purports to oust federal courts of their §1331 jurisdiction. The provision does not state that a private plaintiff may bring a TCPA action "only" or "exclusively" in state court. In contrast, 47 U. S. C. A. §227(g)(2) (Supp. 2011) vests "exclusive jurisdiction" over state-initiated TCPA suits in the federal courts. Section 227(g)(2)'s exclusivity prescription "reinforce[s] the conclusion that [47 U. S. C. §227(b)(3)'s] silence . . . leaves the jurisdictional grant of §1331 untouched. For where otherwise applicable jurisdiction was meant to be excluded, it was excluded expressly." *Verizon Md.*, 535 U. S., at 644, 122 S. Ct. 1753, 152 L. Ed. 2d 871.

Arrow argues that Congress had no reason to provide for a private action "in an appropriate [state] court," §227(b)(3), if it did not mean to make the state forum exclusive, for state courts would have concurrent jurisdiction [*5] even if Congress had said nothing at all. But, as already noted, Congress had simultaneously made federal-court jurisdiction exclusive in TCPA enforcement actions brought by state authorities, see 47 U. S. C. A. §227(g)(2) (Supp. 2011), and may simply have wanted to avoid any argument that federal jurisdiction was also exclusive for private actions. Moreover, by providing that private actions may be brought in state court "if otherwise permitted by the laws or rules of court of [the] State," 47 U. S. C. §227(b)(3), Congress arguably gave States leeway they would otherwise lack to decide whether to entertain TCPA claims.

Arrow further asserts that making state-court jurisdiction over §227(b)(3) claims exclusive serves Congress' objective of enabling States to control telemarketers whose interstate operations

evaded state law. Even so, jurisdiction conferred by 28 U. S. C. §1331 should hold firm against "mere implication flowing from subsequent legislation." *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 808, 809, n. 15, 96 S. Ct. 1236, 47 L. Ed. 2d 483. Furthermore, had Congress sought only to fill a gap in the States' enforcement capabilities, it could have provided that out-of-state telemarketing [*6] calls directed into a State would be subject to the receiving State's laws. Instead, Congress enacted detailed, uniform, federal substantive prescriptions and provided for a regulatory regime administered by a federal agency.

Arrow's reliance on a statement by Senator Hollings, the TCPA's sponsor, is misplaced. The remarks nowhere mention federal-court jurisdiction or otherwise suggest that 47 U. S. C. §227(b)(3) is intended to divest federal courts of authority over TCPA claims. Even if Hollings and other TCPA supporters expected private actions to proceed solely in state courts, their expectation would not control this Court's judgment on §1331's compass. Arrow's arguments that federal courts will be inundated by $500-per-violation TCPA claims or that defendants could use federal-court removal to force small-claims court plaintiffs to abandon suit seem more imaginary than real. Pp. 10-18.

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/mims-v-arrow-financial-services-llc/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=132523.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1195.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=132954.
- For discussion and analysis of the opinion, *see*: http://www.scotusblog.com/?p=137366.
- For further analysis, *see* the following:
    - Silverman, Ellen and Van Oort, Aaron, *Supreme Court Decides Mims v. Arrow Financial Services, LLC*, Faegre Baker Daniels (Jan. 20, 2012), *available at*: http://www.martindale.com/banking-financial-services/article_Faegre-Baker-Daniels_1420206.htm.
    - Wasserman, Howard, *Mims and Jurisdictional Clarity*, PrawfsBlawg (Jan. 19, 2012), *available at*: http://prawfsblawg.blogs.com/prawfsblawg/2012/01/mims-and-jurisdictional-clarity.html.
    - Dyal, Matt, *Mims v. Arrow Financial Services, LLC*, Willamette Online (Jan. 18, 2012), *available at*: http://willamettelawonline.com/2012/01/mims-v-arrow-financial-services-llc-2/.
    - Holland, Jesse, *Court Lets Telemarketers be Sued in Federal Court*, Associated Press (Jan. 18, 2012), *available at*: http://www.google.com/hostednews/ap/article/ALeqM5gkh0OiH-3OoGvOa2-Qb983aIb1Ug?docId=c3efe7986f9143aca1e68a52c84a5237.

## Minneci v. Pollard

(*Bivens* Complaints)

- 132 S. Ct. 617; 181 L. Ed. 2d 606; 2012 U.S. LEXIS 573 (Jan. 10, 2012), Docket No. 10-1104.
- *Appeal from Pollard v. The Geo Group, Inc.*, 629 F.3d 843 (9th Cir. 2010), *cert. granted* 131 S. Ct. 2449, 179 L. Ed. 2d 1208 (2011).
- This case was argued on November 1, 2011.
- Question(s) Presented:
    - Whether the Court should imply a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the Federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government.
- Holding:
    - Because state tort law authorizes adequate alternative damages actions in this case, no *Bivens* remedy can be implied.
- Justice Bryer delivered the opinion of the Court, in which Justices Roberts, Scalia, Kennedy, Thomas, Alito, Sotomayor and Kagan joined. Justice Scalia filed a concurring opinion in which Justice Thomas joined. Justice Ginsburg filed a dissenting opinion.

**SYLLABUS**

Respondent Pollard sought damages from employees at a privately run federal prison in California, claiming that they had deprived him of adequate medical care in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The Federal District Court dismissed the complaint, ruling that the Eighth Amendment does not imply an action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619, against a privately managed prison's personnel. The Ninth Circuit reversed.

*Held:* Because in the circumstance of this case, state tort law authorizes adequate alternative damages actions--providing both significant deterrence and compensation--no *Bivens* remedy can be implied here. Pp. 3-12.

(a) *Wilkie* v. *Robbins*, 551 U. S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389, fairly summarizes the basic considerations the Court applies here. In deciding whether to recognize a *Bivens* remedy, a court must first ask "whether [*2] any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding" damages remedy. Even absent an alternative, "a *Bivens* remedy is a subject of judgment: `the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Id.*, at 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389. In *Bivens* itself, the Court held that the Fourth Amendment implicitly authorized a court to order federal agents to pay damages to a person

injured by the agents' violation of the Amendment's strictures, 403 U. S., at 389, 91 S. Ct. 1999, 29 L. Ed. 2d 619, noting that the Fourth Amendment prohibited conduct that state law might permit, *id.*, at 392-393, 91 S. Ct. 1999, 29 L. Ed. 2d 619, and that the interests protected on the one hand by state "trespass" and "invasion of privacy" laws and on the other hand by the Fourth Amendment "may be inconsistent or even hostile," *id.*, at 394, 91 S. Ct. 1999, 29 L. Ed. 2d 619. It also stated that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *id.*, at 395, 91 S. Ct. 1999, 29 L. Ed. 2d 619, [*3] and found "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.*, at 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619. *Bivens* actions were allowed in *Davis* v. *Passman*, 442 U. S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846, for a Fifth Amendment due process claim involving gender-based employment discrimination, and in *Carlson* v. *Green*, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15, for an Eighth Amendment claim based on federal government officials' "deliberat[e] indifferen[ce]" to a federal prisoner's medical needs, *id.*, at 16, n. 1, 17, 100 S. Ct. 1468, 64 L. Ed. 2d 15. Since *Carlson*, this Court has declined to imply a *Bivens* action in several different instances. See, *e.g.*, *Bush* v. *Lucas*, 462 U. S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648, *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456.

Applying *Wilkie*'s approach here, Pollard cannot assert a *Bivens* claim, primarily because his Eighth Amendment claim focuses on a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an "alternative, existing process" capable of protecting the constitutional interests at stake. *Wilkie*, 551 U. S., at 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389. The existence of that alternative remedy constitutes a "convincing reason for the Judicial Branch to refrain from providing a new [*4] and freestanding" damages remedy. *Ibid*. Pp. 3-7.

(b) Pollard's contrary arguments are rejected. First, he claims that *Carlson* authorizes an Eighth Amendment-based *Bivens* action here, but *Carlson* involved government, not privately employed, personnel. The potential existence of an "adequate alternative, existing process" differs dramatically for public and private employees, as prisoners ordinarily can bring state tort actions against private employees, but not against public ones. Second, Pollard's argument that this Court should consider only whether federal laws provide adequate alternative remedies because of the "vagaries" of state tort law, *Carlson*, *supra*, at 23, 100 S. Ct. 1468, 64 L. Ed. 2d 15, was rejected in *Malesko*, *supra*, at 72-73, 122 S. Ct. 515, 151 L. Ed. 2d 456. Third, Pollard claims that state tort law does not provide remedies adequate to protect the constitutional interests at issue here, but California, like every other State (as far as the Court is aware), has tort law that provides for negligence actions for claims such as his. That the state law may prove less generous than would a *Bivens* action does not render the state law inadequate, and state remedies and a potential *Bivens* remedy need not be perfectly congruent. Fourth, Pollard [*5] argues that there may be similar Eighth Amendment claims that state tort law does not cover, but he offers no supporting cases. The possibility of a future case, where an Eighth Amendment claim or state law differs significantly from those at issue, provides insufficient grounds for reaching a different conclusion here. Pp. 7-12.

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/minneci-v-pollard/.

- For a preview of the argument, *see*: http://www.scotusblog.com/?p=130490.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1104.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=130803.
- For further analysis, *see* the following:
    - Volokh, Alexander, *Minneci v. Pollard – Post-Decision SCOTUScast*, The Federalist Society (Jan. 26, 2012), *available at*: http://www.fed-soc.org/publications/detail/minneci-v-pollard-post-decision-scotuscast.
    - O'Hear, Michael, *Private Prisons and Accountability*, Marquette University Law School Faculty Blog (Jan. 17, 2012), *available at*: http://law.marquette.edu/facultyblog/2012/01/17/private-prisons-and-accountability/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+MarquetteUniversityLawSchoolFacultyBlog+%28Marquette+University+Law+School+Faculty+Blog%29.
    - Jones, Bruce, *Supreme Court Decides Minneci v. Pollard*, Faegre Baker Daniels (Jan. 10, 2012), *available at*: http://www.faegrebd.com/17720.
    - Sandburg, Michael, *Supreme Court Reverses Ninth Circuit in Minneci v. Pollard*, Supreme Observer (Jan. 10, 2012), *available at*: http://www.supremeobserver.com/2012/01/10/supreme-court-reverses-ninth-circuit-in-minneci-v-pollard/.
    - Volokh, Alexander, *Minneci v. Pollard – Post-Argument SCOTUScast*, The Federalist Society (Nov. 3, 2011), *available at*: http://www.fed-soc.org/publications/detail/minneci-v-pollard-post-argument-scotuscast.

## Nat'l Meat Ass'n v. Harris

(Preemption)

- 2012 U.S. LEXIS 1062 (Jan. 23, 2012), Docket No. 10-224.
- *Appeal from Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093 (9th Cir. March 31, 2010), *cert. granted*, 131 S. Ct. 1036; 178 L. Ed. 2d 823; 2011 U.S. LEXIS 854; 79 U.S.L.W. 3419 (2011).
- This case was argued on November 9, 2011.
- Question(s) Presented:
    - Whether the Ninth Circuit correctly held that the National Meat Association ("NMA") was not entitled to a preliminary injunction on its claim that the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§601 *et seq*., expressly preempts certain provisions of California Penal Code Section 599f ("§599f"), a statute that prevents the transport, sale, slaughter, and abuse of animals too injured or sick to stand and walk on their own.
- Holding:
    - The Federal Meat Inspection Act expressly preempts a California law regulating the treatment of non-ambulatory pigs at federally inspected slaughterhouses.
- Justice Kagan delivered the opinion for a unanimous Court.

**SYLLABUS**

The Federal Meat Inspection Act (FMIA), 21 U. S. C. §601 *et seq.*, regulates a broad range of activities at slaughterhouses to ensure the safety of meat and the humane handling of animals. The Department of Agriculture's Food Safety and Inspection Service (FSIS), which administers the FMIA, has issued extensive regulations to govern the inspection of animals and meat, as well as other aspects of slaughterhouses' operations and facilities. See 9 CFR §300.1 et seq. The FSIS inspection procedure begins with an "ante-mortem" inspection of each animal brought to a slaughterhouse. If, at that inspection, a nonambulatory animal is found to suffer from a particularly severe disease or condition, it must be classified as "U. S. Condemned" and killed apart from the slaughtering facilities where food is produced. §§ 309.3, 311.1 et seq. Nonambulatory animals that are not condemned are classified as "U. S. Suspect." §309.2(b). They are set apart, specially monitored, and "slaughtered separately from other livestock." §309.2(n). Following slaughter, an inspector decides at a "post-mortem" [*2] examination which parts, if any, of the suspect animal's carcass may be processed into food for humans. See 9 CFR pts. 310, 311. FSIS regulations additionally prescribe methods for handling animals humanely at all stages of the slaughtering process, 9 CFR pt. 313, including specific provisions for the humane treatment of nonambulatory animals, 9 CFR 313.2(d).

The FMIA's preemption clause, §678, precludes states from imposing requirements that are "within the scope" of the FMIA, relate to slaughterhouse "premises, facilities and operations," and are "in addition to, or different than those made under" the FMIA. In 2008, California amended its penal code to provide that no slaughterhouse shall "buy, sell, or receive a nonambulatory animal"; "process, butcher, or sell meat or products of nonambulatory animals for human consumption"; or "hold a nonambulatory animal without taking immediate action to

humanely euthanize the animal." §§ 599f(a)--(c). Petitioner National Meat Association (NMA), a trade association representing meatpackers and processors, sued to enjoin enforcement of §599f against swine slaughterhouses, arguing that the FMIA preempts application of the state law. The District [*3] Court agreed, and granted the NMA a preliminary injunction. The Ninth Circuit reversed, holding that §599f is not preempted because it regulates only "the kind of animal that may be slaughtered," not the inspection or slaughtering process itself.

*Held:* The FMIA expressly preempts §599fs application against federally inspected swine slaughterhouses. Pp. 6-14.

(a) The FMIA's preemption clause sweeps widely, and so blocks the applications of §599f challenged here. The clause prevents a State from imposing any additional or different--even if nonconflicting--requirements that fall within the FMIA's scope and concern slaughterhouse facilities or operations. Section 599f imposes additional or different requirements on swine slaughterhouses: Where under federal law a slaughterhouse may take one course of action in handling a nonambulatory pig, under state law the slaughterhouse must take another. For example, when a pig becomes injured and thus nonambulatory sometime after delivery to a slaughterhouse, §599f(c) prohibits the slaughterhouse from "hold[ing]" the pig without immediately euthanizing it; and §599f(b) prohibits the slaughterhouse from "process[ing]" or "butcher[ing]" the animal [*4] to make food. By contrast, the FMIA and its regulations allow a slaughterhouse to hold (without euthanizing) any nonambulatory animal that has not been condemned, and to process and butcher such an animal's meat, subject to an FSIS official's approval at post-mortem inspection. Similarly, when a pig is nonambulatory at the time of delivery, §599f(a) prohibits a slaughterhouse from "receiv[ing]" or "buy[ing]" the pig. But the FMIA and its regulations expressly allow slaughterhouses to purchase nonambulatory pigs. See 21 U. S. C. §644; 9 CFR §325.20(c). And the FSIS inspection regime clearly contemplates that slaughterhouses will receive nonambulatory animals. So §599f substitutes a new regulatory regime for the one the FMIA prescribes.

Respondent Humane Society argues that §599f(a)'s ban on purchasing nonambulatory animals escapes preemption because it would not be preempted if applied to purchases occurring off slaughterhouse premises. But the record does not disclose whether §599f(a) ever applies beyond the slaughterhouse gate, much less how an application of that kind would affect a slaughterhouse's operations. Moreover, even if the State could regulate off-site purchases, it does [*5] not follow that on-site purchases would escape preemption, because the FMIA's preemption clause expressly focuses on slaughterhouse "premises, facilities and operations." And while the Humane Society is correct that the FMIA does not normally regulate slaughterhouse sales activities, §599fs sales ban serves to regulate how slaughterhouses must handle nonambulatory pigs on their premises. Its effect is to make sure that slaughterhouses remove nonambulatory pigs from the production process. It is therefore preempted by the FMIA. Pp. 6-10.

(b) Also rejected is the broad argument that §599fs challenged provisions fall outside the FMIA's scope because they exclude a class of animals from the slaughtering process, while the FMIA extends only to "animals that are going to be turned into meat." In fact, the FMIA regulates animals on slaughterhouse premises that will never be turned into meat. For example, the Act's implementing regulations exclude many classes of animals from the slaughtering process, *e.g.*,

swine with hog cholera, 9 CFR §309.5(a). The argument that §599fs exclusion avoids the FMIA's scope because it is designed to ensure the humane treatment of pigs, rather than meat safety, [*6] misunderstands the FMIA's scope. The FMIA addresses not just food safety, but humane treatment, as well. See, e.g., 21 U. S. C. §§ 603, 610(b). Pp. 11-14.

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/national-meat-association-v-brown/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=131263.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-224.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=131647.
- For discussion and analysis of the opinion, *see*: http://www.scotusblog.com/?p=137592.
- For further analysis, *see* the following:
    - Ohlendorf, John, *National Meat Association v. Harris – Post-Decision SCOTUScast*, The Federalist Society (Feb. 2, 2012), *available at* http://www.fed-soc.org/publications/detail/national-meat-association-v-harris-post-decision-scotuscast.
    - Stevens, Shawn, *Supreme Court Update – National Meat Association v. Harris*, dritoday (Jan. 24, 2012), *available at* http://dritoday.org/post/Supreme-Court-Update-National-Meat-Association-v-Harris.aspx.
    - Reuters, *Supreme Court Overturns California Slaughterhouse Law*, MSNBC.com (Jan. 23, 2012), *available at* http://www.msnbc.msn.com/id/46106915/ns/us_news/t/supreme-court-overturns-california-slaughterhouse-law/#.Tzqcr8hZdXU.

## Perry v. Davis; Perry v. Perez

(Voting Rights Act - Section 5)

- 2012 U.S. LEXIS 908 (Jan. 20, 2012), Docket Nos. 11-713, 11-714, 11-715.
- *Appeal from Perez v. Perry*, Nos. 11-cv-360 (lead case), 11-cv-261, 11-cv-490, 11-cv-592, 11-cv-615, 11-cv-635, 11-cv-788 (consolidated cases), 2011 U.S. Dist. LEXIS 135834 (W.D. Tex. Nov. 25, 2011).
- Question(s) Presented:
    - The power of a federal court to impose a new legislative districting plan for federal elections, when the state's plan has not obtained required preclearance in Washington.
- Holding:
    - *Per Curiam* – The Court returned interim redistricting maps for further consideration.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/perry-v-perez/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=135989.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-713.pdf.
- For discussion and analysis of the opinion, *see*: http://www.scotusblog.com/?p=137440.

## Reynolds v. United States

(Standing)

- 2012 U.S. LEXIS 911; 23 Fla. L. Weekly Fed. S 110 (Jan. 23, 2012), Docket No. 10-6549.
- *Appeal from United States v. Reynolds*, 380 Fed. Appx. 125 (3d Cir. 2010), c*ert. granted* 131 S. Ct. 1043, 178 L. Ed. 2d 862 (Jan. 24, 2011).
- This case was argued on October 3, 2011.
- Question(s) Presented:
    - Does a sex offender convicted before enactment of the Sex Offender Registration and Notification Act ("SORNA") have standing to contest the validity of the Interim Rule, issued by the Attorney General pursuant to the authority granted in 42 U.S.C. § 16913(d) of the Act, specifying SORNA's applicability to such offenders?
- Holding:
    - The Sex Offender Registration Act does not require pre-Act offenders to register before the Attorney General validly specifies that the Act's registration provisions apply to them.
- Justice Bryer delivered the opinion of the Court, joined by Justices Roberts, Kennedy, Thomas, Alito, Sotomayor and Kagan. Justice Scalia filed a dissenting opinion in which Justice Ginsburg joined.

**SYLLABUS**

The federal Sex Offender Registration and Notification Act (Act) requires convicted sex offenders to provide state governments with, and to update, information, *e.g.*, names and current addresses, for state and federal sex offender registries. It is a crime if a person who is "required to register under [the Act]" and who "travels in interstate . . . commerce" knowingly "fails to register or update a registration." 18 U. S. C. §2250(a). The Act defines "sex offender" to include offenders who were convicted before the Act's effective date, 42 U. S. C. §16911(1), and says that "the Attorney General shall have the authority to specify the applicability of the [registration] requirements" to pre-Act offenders, §16913(d). The Act, which seeks to make more uniform and effective a patchwork of pre-Act federal and 50 state registration systems, became law in July 2006. In February 2007, the Attorney General promulgated an Interim Rule specifying that the Act applies to all pre-Act offenders. He has since promulgated further rules, regulations, and specifications.

Petitioner Reynolds, a pre-Act offender, registered in Missouri [*2] in 2005 but moved to Pennsylvania in September 2007 without updating the Missouri registration or registering in Pennsylvania. He was indicted for failing to meet the Act's registration requirements between September 16 and October 16, 2007. He moved to dismiss the indictment on the ground that the Act was not applicable to pre-Act offenders during that time, arguing that the Attorney General's February 2007 Interim Rule was invalid because it violated the Constitution's "nondelegation" doctrine and the Administrative Procedure Act's notice and comment requirements. The District Court rejected on the merits of Reynolds' legal attack on the Interim Rule, but the Third Circuit

rejected his argument without reaching the merits, concluding that the Act's registration requirements applied to pre-Act offenders even in the absence of a rule by the Attorney General. Thus, it found, the Interim Rule's validity made no legal difference in the outcome.

*Held:* The Act does not require pre-Act offenders to register before the Attorney General validly specifies that the Act's registration provisions apply to them. Pp. 6-13.

(a) This conclusion is supported by a natural reading of the Act's text, [*3] which consists of four statements. *Statement One* says that "[a] sex offender shall register, and keep the registration current." *Statement Two* says that, generally, the offender must initially register before completing his "sentence of imprisonment." *Statement Three* says that the sex offender must update a registration within three business days of any change of "name, residence, employment, or student status." *Statement Four* says that "[t]he Attorney General shall have the authority to specify the applicability of the requirements . . . to sex offenders convicted before the enactment of" the Act. §16913. Read naturally, the *Fourth Statement* modifies the *First.* It deals specifically with a subset (pre-Act offenders) of the *First Statement*'s broad general class (all sex offenders) and thus should control the Act's application to that subset. See *Gozlon-Peretz* v. *United States,* 498 U. S. 395, 407, 111 S. Ct. 840, 112 L. Ed. 2d 919. Also, by giving the Attorney General authority to specify the Act's "applicability," not its "nonapplicability," the *Fourth Statement* is more naturally read to confer authority to apply the Act, not authority to make exceptions. This reading efficiently resolves what may have been Congress' [*4] concern about the practical problems of applying the new registration requirements to a large number of pre-Act offenders, which could have been expensive and might not have proved feasible to do immediately. It might have thought that such concerns warranted different treatment for different categories of pre-Act offenders. And it could have concluded that it was efficient and desirable to ask the Justice Department, charged with responsibility for implementation, to examine pre-Act offender problems and to apply the new requirements accordingly. This reading also takes Congress to have filled potential lacunae (created by related Act provisions) in a manner consistent with basic criminal law principles. The *Second Statement*, *e.g.*, requires a sex offender to register before completing his prison term, but says nothing about when a pre-Act offender who has left prison is to register. An Attorney General ruling could diminish such uncertainties, helping to eliminate the kind of vagueness and uncertainty that criminal law must seek to avoid. Pp. 6-9.

(b) The Government's three principal contrary arguments--that the Court's reading conflicts with the Act's purpose of establishing a national [*5] registration system that includes pre-Act offenders; that the Court's reading could lead to an absurdly long implementation delay; and that the Act should be read to apply the requirements immediately and on their own to all pre-Act offenders to avoid the possibility that the Attorney General, who has, but is not required to use, "the authority to specify" requirements, might take no action--are unpersuasive. Some lower courts have read the Attorney General's authority to apply only to pre-Act sex offenders who are unable to comply with the statute's "initial registration" requirements, but that is not what the Act says. Pp. 9-13.

(c) Because the Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies, the question whether the Attorney General's Interim Rule is a valid specification matters in this case. P. 13.

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/reynolds-v-united-states/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=128447.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-6549.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=129062.
- For discussion and analysis of the opinion, *see*: http://www.scotusblog.com/?p=137852.
- For further analysis, *see* the following:
    - Bogan, Brad, *SORNA's Registration Requirements Do Not Apply to Pre-Act Sex Offenders Until AG Validly Specifies That They Do Apply*, Fifth Circuit Blog (Jan. 30, 2012), *available at*: http://circuit5.blogspot.com/2012/01/sornas-registration-requirements-do-not.html.
    - O'Hear, Michael, *The Retroactive Reach of SORNA*, Life Sentences Blog (Jan. 26, 2012), *available at*: http://www.lifesentencesblog.com/?p=4338.
    - Berman, Douglas, *SCOTUS Sorts Through Applicability of SORNA in Reynolds*, MoritzLaw (Jan. 23, 2012), *available at*: http://sentencing.typepad.com/sentencing_law_and_policy/2012/01/scotus-sorts-through-applicability-of-sorna-in-reynolds.html.

## United States v. Jones

(Fourth Amendment)

- 2012 U.S. LEXIS 1063; 23 Fla. L. Weekly Fed. S 102 (Jan. 23, 2012), Docket No. 10-1259.
- *Appeal from United States v. Maynard*, 615 F.3d 544 (D.C. Cir. Aug. 6, 2010), *cert. granted* 131 S. Ct. 3064, 180 L. Ed. 2d 885 (2011).
- This case was argued on November 8, 2011.
- Question(s) Presented:
    - Whether the warrantless use of a tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment; and
    - Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.
- Holding:
    - Attaching a GPS device to a vehicle and then using the device to monitor the vehicle's movements constitutes a search under the Fourth Amendment.
    - Judgment of lower court affirmed in an opinion by Justice Scalia on January 23, 2012. Justice Sotomayor filed a concurring opinion. Justice Alito also filed a concurring opinion, which was joined by Justices Ginsburg, Breyer, and Kagan. The five concurring members of the Court do not resolve the question of whether the search was reasonable in this case.
- Justice Scalia delivered the opinion of the Court, in which Justices Roberts, Kennedy, Thomas and Sotomayor joined. Justice Sotomayor filed a concurring opinion. Justice Alito filed an opinion concurring in the judgment in which Justices Ginsburg, Breyer and Kagan joined.

**SYLLABUS**

The Government obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

*Held:* The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. Pp. 3-12.

(a) The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, [*2] against unreasonable searches and seizures:" Here, the Government's

physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted. Pp. 3-4.

(b) This conclusion is consistent with this Court's Fourth Amendment jurisprudence, which until the latter half of the 20th century was tied to common-law trespass. Later cases, which have deviated from that exclusively property-based approach, have applied the analysis of Justice Harlan's concurrence in *Katz v. United States*, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576, which said that the Fourth Amendment protects a person's "reasonable expectation of privacy," id., at 360, 88 S. Ct. 507, 19 L. Ed. 2d 576. Here, the Court need not address the Government's contention that Jones had no "reasonable expectation of privacy," because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U. S. 27, 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94. *Katz* did not repudiate [*3] the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test. See *Alderman v. United States*, 394 U. S. 165, 176, 89 S. Ct. 961, 22 L. Ed. 2d 176; *Soldal v. Cook County*, 506 U. S. 56, 64, 113 S. Ct. 538, 121 L. Ed. 2d 450. *United States v. Knotts*, 460 U. S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55, and *United States v. Karo*, 468 U. S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530--post-Katz cases rejecting Fourth Amendment challenges to "beepers," electronic tracking devices representing another form of electronic monitoring--do not foreclose the conclusion that a search occurred here. *New York v. Class*, 475 U. S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81, and *Oliver v. United States*, 466 U. S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214, also do not support the Government's position. Pp. 4-12.

(c) The Government's alternative argument--that if the attachment and use of the device was a search, it was a reasonable one--is forfeited because it was not raised below. P. 12.

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/united-states-v-jones/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=131095.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=131423.
- For discussion and analysis of the opinion, *see*: http://www.scotusblog.com/?p=137614.
- For further analysis, *see* the following:
    - Haberman, Michael, *Tracking Employees by GPS: Better Have a Good Policy*, Omega HR Solutions (Feb. 14, 2012), *available at*: http://omegahrsolutions.com/2012/02/tracking-employees-by-gps-better-have-a-good-policy.html.
    - de Silva, R Tamara, *United States v. Jones: Constitutional Rights and Technology*, Law Offices of R. Tamara de Silva (Feb. 4, 2012), *available at*: http://www.desilvalawoffices.com//Chicago-Litigation/2012/February/United-States-v-Jones-Constitutional-Rights-and-.aspx.

- Swire, Peter, *A Reasonableness Approach to Searches After the Jones GPS Tracking Case*, Stanford Law Review, 64 Stan. L. Rev. Online 57 (Feb. 2, 2012), *available at*: http://www.stanfordlawreview.org/online/privacy-paradox/searches-after-jones.
- McCrum, Michael, *Road Still Foggy After Supreme Court's GPS Tracking Case*, Texas Federal Criminal Law Blog (Jan. 30, 2012), *available at*: http://www.texasfederalcriminallawblog.com/2012/01/road-still-foggy-after-supreme-courts-gps-tracking-case.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+TexasFederalCriminalLawBlogCom+%28Texas+Federal+Criminal+Law+Blog%29.
- Crump, Catherine, *Supreme Court GPS Ruling: Bringing the 4th Amendment Into the 21st Century*, Blog of Rights (Jan. 26, 2012), *available at*: http://www.aclu.org/blog/technology-and-liberty/supreme-court-gps-ruling-bringing-4th-amendment-21st-century.
- Brown, Michael, *Supreme Court Rules That GPS Tracking Violated Suspect's Fourth Amendment Rights in United States v. Jones*, Texas Criminal Lawyer Blog (Jan. 25, 2012), *available at*: http://www.texascriminallawyerblog.com/2012/01/supreme-court-rules-that-gps-tracking-violated-suspects-fourth-amendment-rights-in-united-states-v-j.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+TexasCriminalLawyerBlogCom+%28Texas+Criminal+Lawyer+Blog%29.
- Grabel, Scott, *Supreme Court Unanimously Determines Warrant Necessary For GPS Tracking in United States v. Jones*, Michigan Criminal Lawyers Blog (Jan. 24, 2012), *available at*: http://www.michigancriminallawyers-blog.com/2012/01/supreme-court-unanimously-determines-warrant-necessary-for-gps-tracking-in-united-states-v-jones.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+MichiganCriminalLawyersBlogCom2+%28Michigan+Criminal+Lawyers+Blog%29.
- Levin, Lori, *United States Supreme Court Rules the Installation of a GPS Device is a Search Under the 4th Amendment*, Lori G. Levin, Attorney at Law (Jan. 23, 2012), *available at*: http://www.lorilevinlaw.com/2/post/2012/01/united-states-supreme-court-rules-the-installation-of-a-gps-device-is-a-search-under-the-4th-amendment.html.
- Rosen, Rebecca, *Why the Jones Supreme Court Ruling on GPS Tracking is Worse Than it Sounds*, The Atlantic (Jan. 23, 2012), *available at*: http://www.theatlantic.com/technology/archive/2012/01/why-the-jones-supreme-court-ruling-on-gps-tracking-is-worse-than-it-sounds/251838/.
- Law Offices of Peter Mesich, *In People v. Jones, the Supreme Court Decides if Fourth Amendment Privacy Protects Citizens from No-Warrant GPS Tracking Devices Being Placed on Cars – Part 2*, San Diego DUI Lawyer Blog (Dec. 2, 2011), *available at*: http://www.sandiegoduilawyer-blog.com/2011/12/in-people-v-jones-the-supreme-court-decides-if-fourth-amendment-privacy-protects-citizens-from-no-wa-

1.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+SanDiegoDuiLawyerBlogCom1+%28San+Diego+DUI+Lawyer+Blog%29.

## Valladolid v. Pacific Operations Offshore, LLP

(Outer Continental Shelf Lands Act – Statutory Construction – Causation)

- 132 S. Ct. 680; 181 L. Ed. 2d 675; 2012 U.S. LEXIS 577 (Jan. 11, 2012), Docket No. 10-507.
- *Appeal from Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126 (9th Cir. May 13, 2010), *cert. granted* 131 S. Ct. 1472, 179 L. Ed. 2d 298 (Feb. 22, 2011).
- This case was argued on October 11, 2011.
- Question(s) Presented:
    - When the Outer Continental Shelf Lands Act, 43 U.S.C., §§ 1331-1356, provides that workers are eligible for compensation for "any injury occurring as the result of operations conducted on the outer Continental Shelf," under what circumstances is an outer continental shelf worker (or his heir) who is injured on land eligible for compensation?
- Holding:
    - The Outer Continental Shelf Lands Act extends coverage for injury occurring as the result of operations conducted on the outer continental shelf to an employee who can establish a substantial nexus between his injury and his employer's extractive operations on the shelf.
- Justice Thomas delivered the opinion of the Court, joined by Justices Roberts, Kennedy, Ginsburg, Breyer, Sotomayor and Kagan. Justice Scalia filed an opinion concurring in part and concurring in the judgment, in which Justice Alito joined.

**SYLLABUS**

Petitioner Pacific Operators Offshore, LLP (Pacific), operates two drilling platforms on the Outer Continental Shelf (OCS) off the California coast and an onshore oil and gas processing facility. Employee Juan Valladolid spent 98 percent of his time working on an offshore platform, but he was killed in an accident while working at the onshore facility. His widow, a respondent here, sought benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. §901 et seq., pursuant to the Outer Continental Shelf Lands Act (OCSLA), which extends LHWCA coverage to injuries "occurring as the result of operations conducted on the [OCS]" for the purpose of extracting natural resources from the shelf, 43 U. S. C. §1333(b). The Administrative Law Judge dismissed her claim, reasoning that §1333(b) did not cover Valladolid's fatal injury because his accident occurred on land, not on the OCS. The Labor Department's Benefits Review Board affirmed, but the Ninth Circuit reversed. Rejecting tests used by the Third and the Fifth Circuits, the Ninth Circuit concluded [*2] that a claimant seeking benefits under the OCSLA "must establish a substantial nexus between the injury and extractive operations on the shelf."

*Held:* The OCSLA extends coverage to an employee who can establish a substantial nexus between his injury and his employer's extractive operations on the OCS. Pp. 3-14.

(a) The Courts of Appeals have offered competing interpretations of §1333(b)'s scope. According to the Third Circuit, because Congress intended LHWCA coverage to be expansive,

§1333(b) extends to all injuries that would not have occurred "but for" operations on the OCS. Thus, an employee who worked on a semisubmersible drill rig, but who died in a car accident on his way to board a helicopter to be flown to the rig, was eligible for benefits because he would not have been injured but for his traveling to the rig. In contrast, the Fifth Circuit has concluded that Congress intended to establish "a brightline geographic boundary," extending §1333(b) coverage only to employees whose injuries or death occurred on an OCS platform or the waters above the OCS. Under its "situs-of-injury" test, a welder injured on land while constructing an offshore oil platform was ineligible for §1333(b) [*3] benefits. In the decision below, the Ninth Circuit held that §1333(b) extends coverage to injured workers who can establish a "substantial nexus" between their injury and extractive operations on the OCS. The Solicitor General offers a fourth interpretation, which would provide coverage for off-OCS injuries only to those employees whose duties contribute to operations on the OCS and who perform work on the OCS itself that is substantial in both duration and nature. Pp. 3-6.

(b) Contrary to Pacific's position, the Fifth Circuit's "situs-of-injury" test is not the best interpretation of §1333(b). Pp. 6-12.

(1) Nothing in the text of §1333(b) suggests that an injury must occur on the OCS. The provision has only two requirements: The extractive operations must be "conducted on the [OCS]," and the employee's injury must occur "as the result of" those operations. If, as Pacific suggests, the purpose of §1333(b) was to geographically limit the scope of OCSLA coverage to injuries that occur on the OCS, Congress could easily have achieved that goal by omitting from §1333(b) the words "as the result of operations conducted." Moreover, Congress' decision to specify situs limitations in other [*4] subsections, but not in §1333(b), indicates that it did not intend to so limit §1333(b). This conclusion is not foreclosed *by* *Herb's Welding, Inc. v. Gray*, 470 U. S. 414, 105 S. Ct. 1421, 84 L. Ed. 2d 406, or *Offshore Logistics, Inc. v. Tallentire*, 477 U. S. 207, 106 S. Ct. 2485, 91 L. Ed. 2d 174, neither of which held that §1333(b) coverage was limited to on-OCS injuries. Section 1333(b)'s text also gives no indication that Congress intended to exclude OCS workers who are eligible for state benefits from LHWCA coverage. To the contrary, the LHWCA scheme incorporated by the OCSLA explicitly anticipates that injured employees might be eligible for both state and federal benefits. Pp. 6-10.

(2) Also unpersuasive is Pacific's alternative argument that §1333(b) imports the LHWCA's strict situs-of-injury requirement, which provides benefits only for injuries occurring "upon the navigable waters" of the United States, 33 U. S. C. §903(a). It is unlikely that Congress intended to restrict the scope of the OCSLA workers' compensation scheme through a nonintuitive and convoluted combination of two separate legislative Acts. In addition, under Pacific's alternative theory, LHWCA coverage would not be extended to the navigable waters above the shelf. Thus, even [*5] employees on a crew ship immediately adjacent to an OCS platform who are injured in a platform explosion would be excluded from §1333(b) coverage. That view cannot be squared with §1333(b)'s language. Pp. 11-12.

(3) Pacific's policy concerns also cannot justify an interpretation of §1333(b) that is inconsistent with the OCSLA's text. P. 12.

(c) Neither the Solicitor General's status-based inquiry nor the Third Circuit's "but for' test are

compatible with §1333(b). The Solicitor General's inquiry has no basis in the OCSLA's text, because §1333(b)'s "occurring as the result of operations" language plainly suggests causation. And when taken to its logical conclusion, the Third Circuit's test, though nominally based on causation, is essentially a status-based inquiry because it would extend coverage to all employees of a business engaged in extracting natural resources from the OCS, no matter where those employees work or what they are doing at the time of injury. Because LHWCA coverage was extended only to injuries "occurring as the result of operations conducted on the [OCS]," §1333(b)'s focus should be on injuries resulting from those "operations." Pp. 12-14.

(d) The Ninth Circuit's [*6] "substantial-nexus" test is more faithful to §1333(b)'s text. This Court understands that test to require the injured employee to establish a significant causal link between his injury and his employer's on-OCS extractive operations. The test may not be the easiest to administer, but Administrative Law Judges and courts should be able to determine if an injured employee has established the required significant causal link. Whether an employee injured while performing an off-OCS task qualifies will depend on the circumstances of each case. It was thus proper for the Ninth Circuit to remand this case for the Benefits Review Board to apply the "substantial-nexus" test. P. 14.

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/pacific-operations-offshore-llp-v-valladolid/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=128400.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-507.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=129890.
- For discussion and analysis of the opinion, *see*: http://www.scotusblog.com/?p=136690.
- For further analysis, *see* the following:
    - Murakami, Mark, *SCOTUS Rules on OCSLA Case – Pacific Operators Offshore, LLP v. Valladolid*, hawaiioceanlaw.com (Jan. 20, 2012), *available at*: http://www.hawaiioceanlaw.com/hawaiioceanlaw/2012/01/pacific-operators-offshore-llp-v-valladolid.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Hawaiioceanlawcom+%28Hawaiioceanlaw.com%29.
    - Epstein, Richard, *Pacific Operators Offshore, LLP v. Valladolid – Post-Decision SCOTUScast*, The Federalist Society (Jan. 17, 2012), *available at*: http://www.fed-soc.org/publications/detail/pacific-operators-offshore-llp-v-valladolid-post-decision-scotuscast.
    - Smith, Allen, *Supreme Court Rejects Site-of-Injury Test in OCSLA Case*, SHRM (Jan. 12, 2012), *available at*: http://www.shrm.org/LegalIssues/FederalResources/Pages/OCSLA.aspx.
    - Jones, Bruce, *Supreme Court Decides Pacific Operators Offshore, LLP v. Valladolid*, Faegre Baker Daniels (Jan. 11, 2012), *available at*: http://www.faegrebd.com/17731.
    - Dyal, Matt, *Pacific Operators Offshore, LLP v. Valladolid*, Willamette Law Online (Jan. 11, 2012), *available at*: http://willamettelawonline.com/2012/01/pacific-operators-offshore-llp-v-valladolid/.

## Remanded For Reconsideration

### Branch Banking & Trust v. Gordon

(Class Action)

- 132 S. Ct. 577; 181 L. Ed. 2d 418; 2011 U.S. LEXIS 8155 (Nov. 14, 2011) (*remanded for reconsideration in light of AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740; 179 L. Ed. 2d 742; 2011 U.S. LEXIS 3367 (April 27, 2011)).
- Remand:
    - On remand, (*Gordon v. Branch Banking and Trust*, No. 09-15399; 2012 U.S. App. LEXIS 1713 (11th Cir. Jan. 31, 2012) the Eleventh Circuit vacated the judgment of the district court and remanded the case to the district court for reconsideration in light of *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740; 179 L. Ed. 2d 742; 2011 U.S. LEXIS 3367 (April 27, 2011).
- *Appeal from Gordon v. Branch Banking and Trust*, 419 Fed. Appx. 920; 2011 U.S. App. LEXIS 6275 (11th Cir. March 28, 2011), *cert. granted and judgment entered*, 132 S. Ct. 577; 181 L. Ed. 2d 418; 2011 U.S. LEXIS 8155 (Nov. 14, 2011), Docket No. 11-282.
- This case was not argued before the Court.
- Question(s) Presented:
    - Whether the judgment below should be vacated and the case remanded for further consideration in light of *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740; 179 L. Ed. 2d 742; 2011 U.S. LEXIS 3367 (April 27, 2011)).
- For certiorari stage documents and the opinion below, *see*: http://www.scotusblog.com/2011/11/relist-and-hold-watch-4/.

### Chinese Daily News v. Wang

(Overtime Pay – Class Action – Preemption)

- 132 S. Ct. 74; 181 L. Ed. 2d 1; 2011 U.S. LEXIS 6743 (Oct. 3, 2011) (*remanded for reconsideration in light of Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541; 180 L. Ed. 2d 374; 2011 U.S. LEXIS 4567 (June 20, 2011)).
- Remand:
    - On remand, *Wang v. Chinese Daily News, Inc.*, No. 08-55483, Docket No. 96 (9th Cir. Nov. 8, 2011), the Ninth Circuit ordered the parties to file supplemental briefs in light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541; 180 L. Ed. 2d 374; 2011 U.S. LEXIS 4567 (June 20, 2011).
- *Appeal from Wang v. Chinese Daily News, Inc.*, 623 F.3d 743 (9th Cir. Sept. 27, 2010), *cert. granted and judgment entered*, 132 S. Ct. 74; 181 L. Ed. 2d 1; 2011 U.S. LEXIS 6743 (Oct. 3, 2011), Docket No. 10-1202.
- This case was not argued before the Court.
- Question(s) Presented:
    - Can claims for monetary relief be certified under Rule 23(b)(2), which by its terms is limited to injunctive or corresponding declaratory relief, and if so, under what circumstances?

    - Is a state law claim on behalf of an opt-out class, based on alleged misconduct identical to that prohibited in the FLSA, preempted by federal law because of direct conflict in the federal and state remedial schemes?
    - If state law is not preempted, does a District Court exceed its authority under 28 U.S.C. § 1367 by exercising supplemental jurisdiction over the state claim?
- For further analysis, *see* the following:
    - Kralowec, Kimberly, *U.S. Supreme Court Issues "Grant and Transfer" Order in Wang v. Chinese Daily News*, The UCL Practitioner (Oct. 20, 2011), *available at*: http://www.uclpractitioner.com/2011/10/us-supreme-court-issues-grant-and-transfer-order-in-wang-v-chinese-daily-news.html.
    - Kun, Michael, Musolino, Regina and Olsen, Aaron, *Vacating Chinese Daily News, The U.S. Supreme Court Signals That Wal-Mart Extends to Wage-Hour Cases*, Wage & Hour Defense Blog (Oct. 17, 2011), *available at*: http://www.wagehourblog.com/2011/10/articles/vacating-chinese-daily-news-the-us-supreme-court-signals-that-walmart-extends-to-wagehour-cases/.
    - Hunton & Williams, LLP, *The U.S. Supreme Court Signals That Wal-Mart Stores, Inc. v. Dukes Applies to Wage and Hour Class Actions*, Hunton Employment & Labor Perspectives (Oct. 14, 2011), *available at*: http://www.huntonlaborblog.com/tags/wang-v-chinese-daily-news/.
    - Van Vleck, Brian, *Does Wal-Mart v. Dukes Impact California Wage and Hour Claims – U.S. Supreme Court Vacates Certification Order in Chinese Daily News v. Wang*, California Workforce Resource Blog (Oct. 4, 2011), *available at*: http://www.vtzlawblog.com/2011/10/articles/class-actions/does-walmart-v-dukes-impact-california-wage-and-hour-claims-us-supreme-court-vacates-certification-order-in-chinese-daily-news-v-wang/.
    - Pearl, Steve, *Wang v. Chinese Daily News: SCOTUS Vacates Judgment, Remands for Reconsideration in Light of Dukes*, The California Wage and Hour Blog (Oct. 4, 2011), *available at*: http://cawageandhourlaw.blogspot.com/2011/10/wang-v-chinese-daily-news-scotus.html.
    - Mersol, Greg, *Supreme Court Vacates $7.7 Million Wage and Hour Judgment in Light of Dukes*, Employment Class Action Blog (Oct. 4, 2011), *available at*: http://www.employmentclassactionreport.com/flsa/supreme-court-vacates-77-million-wage-and-hour-judgment-in-light-of-dukes/.
    - The Womble Carlyle Team, *A Touch of Class?*, Fair Labor Standards Act Law (Oct. 4, 2011), *available at*: http://flsa.blogspot.com/2011/10/touch-of-class.html.

## Sonic-Calabasas A Inc. v. Moreno

(Arbitration)

- 132 S. Ct. 496, 181 L. Ed. 2d 242 (Oct. 31, 2011) (*remanded for reconsideration in light of AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740; 179 L. Ed. 2d 742; 2011 U.S. LEXIS 3367 (April 27, 2011)).
- Remand:
    - On remand, *Sonic-Calabasas A, Inc. v. Moreno*, No. S174475; 2012 Cal. LEXIS 871 (Jan. 11, 2012), the Supreme Court of California ordered supplemental

briefing in light of *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740; 179 L. Ed. 2d 742; 2011 U.S. LEXIS 3367 (April 27, 2011).

- *Appeal from Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659; 247 P.3d 130; 121 Cal. Rptr. 3d 58 (Cal. Feb. 24, 2011), *cert. granted and judgment entered* 132 S. Ct. 496, 181 L. Ed. 2d 242 (Oct. 31, 2011), Docket No. 10-1450.
- Question(s) Presented:
  - Can a mandatory employment arbitration agreement be enforced prior to the conclusion of an administrative proceeding conducted by the Labor Commissioner concerning an employee's statutory wage claim?
  - Was the Labor Commissioner's jurisdiction over employee's statutory wage claim divested by the Federal Arbitration Act under *Preston v. Ferrer* (2008), 128 S. Ct. 978, 169 L.Ed.2d 917?
- For further analysis, *see* the following:
  - Zaller, Anthony, *Can Employees Agree to Waive Berman Hearings in Arbitration Agreements?*, California Employment Law Report (Dec. 22, 2011), *available at*: http://www.californiaemploymentlawreport.com/tags/soniccalabasas-a-inc-v-moreno/.
  - Kralowec, Kimberly, *California Supreme Court to Construe Concepcion: Sonic-Calabasas A, Inc. v. Moreno*, The UCL Practitioner (Dec. 5, 2011), *available at*: http://www.uclpractitioner.com/2011/12/california-supreme-court-to-construe-concepcion-sonic-calabasas-a-inc-v-moreno.html.
  - Lathrop, Tony, *From Class Action Waivers to State Administrative Hearings Waivers: How Far is the Reach of Concepcion?*, LitigationBlog (Nov. 18, 2011), *available at*: http://blogs.mvalaw.com/litigation-law-blog/2011/11/18/from-class-action-waivers-to-state-administrative-hearing-waivers-how-far-is-the-reach-of-concepcion/.
  - Covell, Rebecca, *Supreme Court Vacates California Ruling on Arbitration Agreements*, the National Law Review (Nov. 14, 2011), *available at*: http://www.natlawreview.com/article/supreme-court-vacates-california-ruling-arbitration-agreements.
  - Pearl, Steven, *Sonic-Calabasas A, Inc. v. Moreno: SCOTUS Vacates and Remands to California Supreme Court*, The California Wage and Hour Law Blog (Nov. 9, 2011), *available at*: http://cawageandhourlaw.blogspot.com/2011/11/sonic-calabasas-inc-v-moreno-scotus.html.

## Cases Dismissed by Agreement

### Magner v. Gallagher

(Disparate Impact Under Fair Housing Act)

- *Dismissed by agreement of the parties pursuant to Supreme Court Rule 64.1*, 2012 U.S. LEXIS 1069 (Feb. 14, 2012).

- *Appeal from Magner v. Gallagher*, 619 F.3d 823 (8th Cir. Sept. 1, 2010), *cert granted* 132 S. Ct. 548, 181 L. Ed. 2d 395 (Nov. 7, 2011), Docket No. 10-1032.
- This case is scheduled for argument on February 29, 2012.
- Questions Presented:
    - Whether disparate impact claims are cognizable under the Fair Housing Act; and, if so, what test should be used to analyze them.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/magner-v-gallagher/.
- For further analysis, *see* the following:
    - City Hall Scoop, *Civil Rights Groups Applaud St. Paul's Supreme Pull-Out, Wall Street Journal Blows a Raspberry*, TwinCities.com (Feb. 14, 2012), *available at*: http://blogs.twincities.com/cityhallscoop/tag/magner-vs-gallagher/.
    - Thompson, Joshua, *Magner v. Gallagher Dismissed*, PLF Liberty Blog, (Feb. 10, 2012), *available at*: http://blog.pacificlegal.org/2012/magner-v-gallagher-dismissed/.
    - Denniston, Lyle, *Fair Housing Case Dismissed*, SCOTUSblog (Feb. 10, 2012), *available at*: http://www.scotusblog.com/?p=138799.
    - Shapiro, Ilya, *Magner v. Gallagher*, CATO Institute (Dec. 29, 2011), *available at*: http://www.cato.org/pub_display.php?pub_id=13977.
    - Curry, Kerry, *Supreme Court to Hear Fair Housing Case That Could Impact Mortgage Industry*, Housingwire (Nov. 18, 2011), *available at*: http://www.housingwire.com/2011/11/18/supreme-court-to-hear-fair-housing-case-that-could-impact-mortgage-industry.

## Cases Awaiting Argument and/or Decision – 2011-2012 Term

### Arizona v. United States

(Immigration)

- *Appeal from U.S. v. Arizona*, 641 F.3d 339 (9th Cir. April 11, 2011), *cert. granted* 132 S. Ct. 845; 181 L. Ed. 2d 547; 2011 U.S. LEXIS 8850 (Dec. 12, 2011), Docket No. 11-182.
- This case is scheduled for argument on April 25, 2012.
- Question(s) Presented:
    - Whether federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt four provisions of S.B. 1070 on their face.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/arizona-v-united-states/.

### Christopher v. SmithKline Beecham Corp.

(Fair Labor Standards Act)

- *Appeal from Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383; 2011 U.S. App. LEXIS 2834 (9th Cir. Feb. 14, 2011), *cert. granted* 132 S. Ct. 760; 181 L. Ed. 2d 480; 2011 U.S. LEXIS 8505 (Nov. 28, 2011), Docket No. 11-204.
- This case is scheduled for argument on April 16, 2012.

- Question(s) Presented:
    - Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and
    - Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/christopher-v-smithkline-beecham-corp/.
- For discussion and analysis of this circuit split, *see*:
    - http://www.overtimeadvisor.com/2011/02/articles/overtime-pay/should-pharmaceutical-sales-representatives-be-paid-overtime-it-depends-on-where-theyre-located-for-now/;
    - http://aalrremploymentlawblog.blogspot.com/2011/02/9th-circuit-holds-pharmaceutical.html
- For further analysis, *see* the following:
    - Beck, Leland, *Interpreting Regulations During Litigation: Rethinking Agency Deference II*, Federal Regulations Advisor (Feb. 6, 2012), *available at*: http://www.fedregsadvisor.com/2012/02/06/changing-regulations-during-litigation-rethinking-agency-deference-i/.
    - Beck, Leland, *Interpreting Regulations During Litigation: Rethinking Agency Deference II*, Federal Regulations Advisor (Feb. 6, 2012), *available at*: http://www.fedregsadvisor.com/2012/02/06/interpreting-regulations-during-litigation-rethinking-agency-deference-ii/.
    - Pearl, Steve, *Christopher v. SmithKline Beecham: SCOTUS Grants Review in Pharmaceutical Sales Rep Action*, The California Wage and Hour Law Blog (Dec. 15, 2011), *available at*: http://cawageandhourlaw.blogspot.com/2011/12/christopher-v-smithkline-beecham-scotus.html.
    - Garland, David and Weiner, Douglas, *U.S. Supreme Court Grants Review of the "Outside Sales" Exemption Found Applicable to Pharmaceutical Sales Representatives*, Wage & Hour Defense Blog (Dec. 1, 2011), *available at*: http://www.wagehourblog.com/tags/christopher-v-smithkline-beech/.
    - Frisch, Andrew, *U.S.S.C.: Court Grants Certiorari to PSRs on Appeal of 9th Circuit Decision Holding Pharma Reps Exempt Under the FLSA's Outside Sales Exemption*, Overtime Law Blog (Nov. 29, 2011), *available at*: http://flsaovertimelaw.com/2011/11/29/u-s-s-c-court-grants-certiorari-to-psrs-on-appeal-of-9th-circuit-decision-holding-pharma-reps-exempt-under-the-flsas-outside-sales-exemption/.

## Coleman v. Maryland Court of Appeals

(FMLA Self-Care Leave Provision)

- *Appeal from Coleman v. Md. Ct. App.*, 626 F.3d 187 (4th Cir. Nov. 10, 2010), *cert. granted* 131 S. Ct. 3059; 180 L. Ed. 2d 884; 2011 U.S. LEXIS 4972 (June 27, 2011), Docket No. 10-1016.
- This case was argued on January 11, 2012.
- Question(s) Presented:

    - In passing the Family and Medical Leave Act, as the Court recognized in *Nevada Department of Human Resources v. Hibbs*, Congress intended to eliminate gender discrimination in the granting of sick leave. Its purpose and findings are supported by the legislative record. The question presented for review is: Whether Congress constitutionally abrogated states' Eleventh Amendment immunity when it passed the self-care leave provision of the Family and Medical Leave Act.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/coleman-v-maryland-court-of-appeals/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=135826.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1016.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=136843.
- For further analysis, *see* the following:
    - Price Foley, Elizabeth, *Coleman v. Maryland Court of Appeals – Post-Argument SCOTUScast*, The Federalist Society (Jan 18, 2012), *available at*: http://www.fed-soc.org/publications/detail/coleman-v-maryland-court-of-appeals-post-argument-scotuscast.
    - Crawford, Sarah, *Supreme Court to Decide State Workers' Rights Under FMLA*, ACSblog (Jan. 11, 2012), *available at*: http://www.acslaw.org/acsblog/all/coleman-v.-maryland-court-of-appeals.
    - McCann, Laurie, Osborne, Tom, and Kohrman, Dan, *AARP Asks Supreme Court to Uphold Family and Medical Leave Act Protections for State Employees*, AARP Foundation (Jan. 11, 2012), *available at*: http://www.aarp.org/work/employee-rights/info-01-2012/Coleman-v-Maryland-Ct-of-Appeals.html.
    - Gans, David, *Coleman v. Maryland Court of Appeals*, Constitutional Accountability Center (Jan. 11, 2012), *available at*: http://theusconstitution.org/cases/coleman-v-maryland-court-appeals.
    - American Civil Liberties Union, *Coleman v. Maryland Court of Appeals*, ACLU Online (Sept. 28, 2011), *available at*: http://www.aclu.org/womens-rights/coleman-v-maryland-court-appeals.

## Elgin v. Dep't of the Treasury, et al.

(Civil Service Reform Act Preclusion)

- *Appeal from* 641 F.3d 6; 2011 U.S. App. LEXIS 7336 (1st Cir. April 8, 2011), *cert granted* 132 S. Ct. 453; 181 L. Ed. 2d 292; 2011 U.S. LEXIS 7552 (Oct. 7, 2011), Docket No. 11-45.
- This case is scheduled for argument on February 27, 2012.
- Question(s) Presented:
    - Whether the Civil Service Reform Act impliedly precludes federal district courts from having jurisdiction over constitutional claims for equitable relief brought by federal employees.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/elgin-v-dept-of-the-treasury/.

- For a preview of the argument, *see*: http://www.scotusblog.com/?p=129780.

## Federal Aviation Admin. v. Cooper

(Actual Damages – Privacy Act)

- *Appeal from Cooper v. Fed. Aviation Admin.*, 622 F.3d 1016 (9th Cir. Sept. 16, 2010), *cert. granted* 131 S. Ct. 3025; 180 L. Ed. 2d 843; 2011 U.S. LEXIS 4686 (June 20, 2011), Docket No. 10-1024.
- This case was argued on November 30, 2011.
- Question(s) Presented:
    - Whether a plaintiff who alleges only mental and emotional injuries can establish "actual damages" within the meaning of the civil remedies provision of the Privacy Act, 5 U.S.C. 552a(g)(4)(A).
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/federal-aviation-administration-v-cooper/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=132685.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1024.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=132685.
- For further analysis, *see* the following:
    - Peltz-Steele, Richard, *Federal Aviation Administration v. Cooper – Post-Argument SCOTUScast*, The Federalist Society (Dec. 9, 2011), *available at*: http://www.fed-soc.org/publications/detail/federal-aviation-administration-v-cooper-post-argument-scotuscast.
    - Monotreme, *Supreme Court Watch: Federal Aviation Administration v. Cooper*, Logarchism (Nov. 30, 2011), *available at*: http://www.logarchism.com/2011/11/30/supreme-court-watch-federal-aviation-administration-v-cooper/.
    - Electronic Privacy Information Center, *FAA v. Cooper – Concerning Emotional Injury as Harm Under the Privacy Act*, epic.org, *available at*: http://epic.org/amicus/cooper/.

## Filarsky v. Delia

(Internal Investigations – Qualified Immunity)

- *Appeal from Delia v. City of Rialto*, 621 F.3d 1069 (9th Cir. Sept. 9, 2010), *cert. granted* 132 S. Ct. 70; 180 L. Ed. 2d 939; 2011 U.S. LEXIS 5204 (Sept. 27, 2011), Docket No. 10-1018.
- This case was argued on January 17, 2012.
- Question(s) Presented:
    - Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a private lawyer rather than a government employee.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/filarsky-v-delia/.

- For a preview of the argument, *see*: http://www.scotusblog.com/?p=136814.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1018.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=137377.
- For further analysis, *see* the following:
    - Dcpetterson, *Supreme Court Watch: Filarsky v. Delia*, Logarchism (Jan. 17, 2012), *available at*: http://www.logarchism.com/2012/01/17/supreme-court-watch-filarsky-v-delia/.
    - Nahmod, Sheldon, *Certiorari Granted in Filarsky v. Delia: Private Attorney Immunity Under Section 1983*, Nahmod Law (Oct. 10, 2011), *available at*: http://nahmodlaw.com/2011/10/10/certiorari-granted-in-filarsky-v-delia-private-attorney-immunity-under-section-1983/.

## First American Financial Corp. v. Edwards

(Standing)

- *Appeal from Edwards v. First Am. Corp.*, 610 F.3d 514; 2010 U.S. App. LEXIS 12610 (9th Cir. June 21, 2010), *cert. granted* 131 S. Ct. 3022; 180 L. Ed. 2d 843; 2011 U.S. LEXIS 4668 (June 20, 2011), Docket No. 10-708.
- This case was argued on Nov. 28, 2011.
- Question(s) Presented:
    - Whether a private purchaser of real estate settlement services has standing to sue under Article III, § 2 of the United States Constitution.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/first-american-financial-corp-v-edwards/?wpmp_switcher=desktop.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=132413.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-708.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=132949.
- For further analysis, *see* the following:
    - Massarson Ross, Mary and Ballentine, Hilary, *First American Financial Corp. v. Edwards: The Battle For Standing Without "Actual Injury"*, Thompson Reuters News & Insught (Dec. 9, 2011), *available at*: http://newsandinsight.thomsonreuters.com/Legal/Insight/2011/12_-_December/First_American_Financial_Corp__v__Edwards__The_battle_for_standing_without_%E2%80%98actual_injury%E2%80%99/.
    - Walsh, Kevin, *First American Financial Corp. v. Edwards – Post-Argument SCOTUScast*, The Federalist Society (Dec. 8, 2011), *available at*: http://www.fed-soc.org/publications/detail/first-american-financial-corp-v-edwards-post-argument-scotuscast.

## Hall v. United States

(Section 1399 of the Internal Revenue Code)

- *Appeal from United States v. Hall*, 617 F.3d 1161 (9th Cir. 2010), *cert. granted* 131 S. Ct. 2989; 180 L. Ed. 2d 820; 2011 U.S. LEXIS 4460 (June 13, 2011), Docket No. 10-875.
- This case was argued on November 29, 2011.
- Question(s) Presented:
    - Does Section 1399 of the Internal Revenue Code, which provides that a bankruptcy filing other than an individual Chapter 7 or individual Chapter 11 does not give rise to a "separate taxable entity," mean that the capital gains income tax incurred as a result of the sale of a family farm by petitioners, who had filed a Chapter 12 bankruptcy petition, is not a Bankruptcy Code administrative expense owed by the bankruptcy estate and payable under a bankruptcy reorganization plan?
    - In other words: Whether capital gains taxes created by the sale of a family farm during a Chapter 12 bankruptcy proceeding are payable as an administrative expense under the bankruptcy reorganization plan.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/hall-v-united-states/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=132611.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-875.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=133052.

## Kiobel v. Royal Dutch Petroleum Co.

(Alien Tort Statute - Foreign Corporation Immunity)

- *Appeal from* 621 F.3d 111; 2010 U.S. App. LEXIS 19382 (Sept. 17, 2010), *cert. granted* 132 S. Ct. 472; 181 L. Ed. 2d 292; 2011 U.S. LEXIS 7522 (Oct. 17, 2011), Docket No. 10-1491.
- This case is scheduled for argument on February 28, 2012.
- Question Presented:
    - Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.
    - Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals provisions provides, or if corporations may be sued in the same manner as any other private party defendant under the AT for such egregious violations, as the Eleventh Circuit has explicitly held.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/?wpmp_switcher=desktop.
- For further analysis, *see* the following: http://www.scotusblog.com/?p=129758.
- *See Mohamad v. Rajoub*, below.
- For further analysis, *see* the following:

- Ccrjustice, *Kiobel v. Royal Dutch Petroleum Co.*, Center for Constitutional Rights (Feb. 13, 2012), *available at*: http://ccrjustice.org/ourcases/current-cases/kiobel.
- Cato Institute, *Brief of Amicus Curiae – the CATO Institute in Support of Respondents*, jdsupra (Feb. 3, 2012), *available at*: http://www.jdsupra.com/post/documentViewer.aspx?fid=90bbc50e-96f0-4ca8-bbed-ae09470d1b7c.
- IHRC, *Kiobel v. Royal Dutch Petroleum Co.*, International Human Rights Clinic at Harvard Law School (Oct. 17, 2011), *available at*: http://harvardhumanrights.wordpress.com/criminal-justice-in-latin-america/alien-tort-statute/kiobel-v-royal-dutch-petroleum-co/.
- Archer, Judith and O'Connell, Sarah, *Kiobel v. Royal Dutch Petroleum Co.*, Royal Dutch Shell PLC .com (Feb. 19, 2011), *available at*: http://royaldutchshellplc.com/2011/02/19/kiobel-v-royal-dutch-petroleum-co/.

## Kloeckner v. Solis

(Mixed Case)

- *Appeal from Klockner v. Solis*, 639 F.3d 834 (8th Cir. May 13, 2011), *cert. granted* 181 L. Ed. 2d 805; 2012 U.S. LEXIS 583 (Jan. 13, 2012), Docket No. 11-184.
- This case is not yet scheduled for argument.
- Question(s) Presented:
  - If the Merit Systems Protection Board decides a mixed case without determining the merits of a discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/kloeckner-v-solis/.
- For further analysis, *see* the following:
  - D'Agostino, Debra, *Attorney Debra D'Agostino Comments on Federal Employment Case Klockner v. Solis*, The Federal Practice Group (Jan. 31, 2012), *available at*: http://www.myfederalemployeeattorney.com/Employment-Law-Blog/2012/January/Attorney-Debra-DAgostino-comments-on-federal-emp.aspx.

## Knox v. Serv. Employees Int'l Union, Local 1000

(First Amendment: Union Fees)

- *Appeal from Knox v. Serv. Employees Int'l Union*, 628 F.3d 1115 (9th Cir. Dec. 10, 2010), *cert. granted* 131 S. Ct. 3061; 180 L. Ed. 2d 884; 2011 U.S. LEXIS 4827 (June 27, 2011).
- This case was argued on January 10, 2012.
- Question(s) Presented:
  - May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction?

    - May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?
    - In other words: Does the First Amendment give state employees the right to decline to pay union dues used for political advocacy by the union?
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/knox-v-service-employees-intl-union-local-1000/.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1121.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=136669.
- For further analysis, *see* the following:
    - Jones, Michael, *Knox v. Service Employees Int'l Union, Local 1000*, Willamette Law Online (Jan. 31, 2012), *available at*: http://willamettelawonline.com/2012/01/knox-v-service-employees-intl-union-local-1000/.
    - Sandburg, Michael, *Collection of Union Dues is Disputed in Knox v. Service Employees International Union*, Supreme Observer (Jan. 5, 2012), *available at*: http://www.supremeobserver.com/2012/01/05/collection-of-union-dues-is-disputed-in-knox-v-service-employees-international-union/.
    - Turoff, Tracy, *How Much Notice Must a Union Provide to Workers Before Spending Dues on Political Expenses?*, Roetzel & Andress (July 8, 2011), *available at*: http://ralawemployment.blogspot.com/2011/07/how-much-notice-must-union-provide-to.html.
    - Lambremont, Jack, *Supreme Court to Decide Constitutionality of Public Sector Union's Assessment of Fees on Non-Members to Fund Political Activity*, Labor Relations Counsel (June 29, 2011), *available at*: http://www.laborrelationscounsel.com/unfair-labor-practices/supreme-court-to-decide-constitutionality-of-public-sector-unions-assessment-of-fees-on-non-members/.

## Kurns v. R.R. Friction Prods. Corp.

(Preemption)

- *Appeal from Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392 (3d Cir. 2010), *cert. granted* 131 S. Ct. 2959, 180 L. Ed. 2d 244 (June 6, 2011), Docket No. 10-879.
- This case was argued on November 9, 2011.
- Question(s) Presented:
    - Did Congress intend the Federal Railroad Safety Acts to preempt state-law based tort lawsuits?
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/kurns-v-railroad-friction-products-corp/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=131419.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-879.pdf.

- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=131419.
- For further analysis, *see* the following:
    - Lehrkind, Molly, *Kurns v. Railroad Friction Products Corp.*, Willamette Law Online (Nov. 9, 2011), *available at*: http://willamettelawonline.com/2011/11/kurns-v-railroad-friction-products-corp/.
    - Markowitz, Eric, *5 Supreme Court Cases Entrepreneurs Should Watch*, Inc. (Oct. 7, 2011), *available at*: http://www.inc.com/articles/201110/5-supreme-court-cases-entrepreneurs-should-watch.html.

## Mohamad v. Rajoub

(Torture Victim Protection Act)

*See Kiobel v. Royal Dutch Petroleum*, above.

- *Appeal from* 634 F.3d 604 (D.C. Cir. March 18, 2011), *cert. granted* 132 S. Ct. 454; 181 L. Ed. 2d 292; 2011 U.S. LEXIS 7581 (Oct. 17, 2011), Docket No. 11-88.
- This case is scheduled for argument on February 28, 2012.
- Question(s) Presented:
    - Whether the Torture Victim Protection Act of 1991 permits actions against defendants that are not natural persons.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/mohamad-v-rajoub/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=129758.
- *See Kiobel v. Royal Dutch Petroleum*, above.
- For further analysis, *see* the following:
    - Bernabe, Alberto, *Mohamad v. Rajoub – "The Other Case" Granted by the Supreme Court & the Corporate Liability Scorecard so Far*, Torts Blog (Oct. 18, 2011), *available at*: http://bernabetorts.blogspot.com/2011/10/mohamad-v-rajoub-other-case-granted-by.html.
    - Lehrkind, Molly, *Mohamad v. Rajoub*, Willamette Law Online (Oct. 17, 2011), *available at*: http://willamettelawonline.com/2011/10/mohamad-v-rajoub/.
    - Herz, Rick, *Can Corporations be Sued for Human Rights Abuses? In 2012, Supreme Court Will Decide*, EarthRights International (Oct. 17, 2011), *available at*: http://www.earthrights.org/blog/can-corporations-be-sued-human-rights-abuses-2012-supreme-court-will-decide.
    - Alford, Roger, *Supreme Court Grants Cert. in Kiobel and Mohamad*, Opinion Juris (Oct. 17, 2011), *available at*: http://opiniojuris.org/2011/10/17/supreme-court-grants-cert-in-kiobel-and-rajoub/.

## Roberts v. Sea-Land Servs.

(Longshore Act)

- *Appeal from Roberts v. Dir., Office of Workers' Comp. Programs*, 625 F.3d 1204 (9th Cir. Nov. 10, 2010), *cert. granted* 132 S. Ct. 71; 180 L. Ed. 2d 939; 2011 U.S. LEXIS 5193 (Sept. 27, 2011), Docket No. 10-1399.

- This case was argued on January 11, 2012.
- Question(s) Presented:
    - Whether the phrase "those newly awarded compensation during such period" in Longshore Act § 6(c), applicable to all classes of disability except permanent total, can be read to mean "those first entitled to compensation during such period," regardless of when it is awarded.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/roberts-v-sea-land-services/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=136494.
- For a transcript of the oral argument, *see*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1399.pdf.
- For a discussion of oral argument, *see*: http://www.scotusblog.com/?p=136864.

## Taniguchi v. Kan Pac. Saipan

(Interpreter Costs)

- *Appeal from Taniguchi v. Kan Pac. Saipan, Ltd.*, 633 F.3d 1218 (9th Cir. March 8, 2011) *cert. granted* 132 S. Ct. 71; 180 L. Ed. 2d 939; 2011 U.S. LEXIS 5197 (Sept. 27, 2011), Docket No. 10-1472.
- This case is scheduled for argument on February 21, 2012.
- Question(s) Presented:
    - Whether costs incurred in translating written documents are compensation of interpreters and may therefore be awarded to the prevailing party in a federal lawsuit under 28 U.S.C. §1920(6).
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/taniguchi-v-kan-pacific-saipan-ltd/.
- For a preview of the argument, *see*: http://www.scotusblog.com/?p=138651.
- For further analysis, *see* the following:
    - Ingber, Matthew, *Litigation: Lost in Translation*, InsideCounsel (Oct. 6, 2011), *available at*: http://www.insidecounsel.com/2011/10/06/litigation-lost-in-translation.
    - Olsen, Michelle, *Update to Circuit Split Watch (Cert Grant)*, Appellate Daily (Sept. 17, 2011), *available at*: http://appellatedaily.blogspot.com/2011/09/update-to-circuit-split-watch-cert.html.

## United States v. Bormes

(Sovereign Immunity and Fair Credit Reporting Act)

- *Appeal from Bormes v. United States*, 626 F.3d 574 (Fed. Cir. Nov. 16, 2010), *cert. granted* 181 L. Ed. 2d 806; 2012 U.S. LEXIS 584 (Jan. 13, 2012), Docket No. 11-192.
- This case is not yet scheduled for argument.
- Question(s) Presented:

    - Whether the Little Tucker Act, 28 U.S.C. § 1346(a)(2), waives the sovereign immunity of the United States with respect to damages actions for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/united-states-v-bormes/?wpmp_switcher=desktop.
- For further analysis, *see* the following:
    - Jimenez, Adriana, *United States v. Bormes*, Willamette Law Journal (Jan. 17, 2012), *available at*: http://willamettelawonline.com/2012/01/united-states-v-bormes/.

## Cases Awaiting Argument and/or Decision – 2012-2013 Term

### Fisher v. Univ. of Texas at Austin

(Affirmative Action)

- *Appeal from Fisher v. Univ. of Tx. At Austin*, 644 F.3d 301 (5th Cir. June 17, 2011), *cert. granted* (Feb. 21, 2012), Docket No. 11-345.
- Question(s) Presented:
    - Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin/.
- For further analysis, *see* the following:
    - Staff News, *Will Supreme Court Hear Fisher v. Texas?*, DDCE Central (Feb. 10, 2012), *available at*: http://blogs.utexas.edu/ddcecentral/2012/02/10/will-supreme-court-hear-fisher-v-texas/#more-5579.
    - Kahlenberg, Richard, *Waiting on Fisher v. Texas*, The Chronicle of Higher Education (Feb. 9, 2012), *available at*: http://chronicle.com/blogs/innovations/waiting-on-fisher-v-texas/31576.
    - Von Spakovsky, Hans, *The University of Texas and Racial Preferences*, National Review Online (Sept. 19, 2011), *available at*: http://www.nationalreview.com/articles/277519/university-texas-and-racial-preferences-hans-von-spakovsky.
    - Thompson, Joshua, *Fisher v. University of Texas at Austin: Could the Supreme Court Revisit its Decision in Grutter?*, The Federalist Society (Sept. 12, 2011), *available at*: http://www.fed-soc.org/publications/detail/fisher-v-university-of-texas-at-austin-could-the-supreme-court-revisit-its-decision-in-grutter.
    - Thompson, Joshua, *University of Texas is Flouting the Constitution With Race-Based Admissions*, Pacific Legal Foundation, *available at*: http://www.pacificlegal.org/page.aspx?pid=1069.

## Petition Pending

### America v. Mills

(Settlement Agreement)

- *Appeal from America v. Mills*, 643 F.3d 330; 395 U.S. App. D.C. 416; 2011 U.S. App. LEXIS 13905 (D.C. Cir. July 8, 2011), *petition for cert. filed* (Jan. 6, 2012), Docket No. 11-855.
- Question Presented:
    - When an employer breaches a neutral reference provision by providing negative information, can it escape liability for the breach by persuading the fact-finder that accompanying positive comments canceled out the negative statements so that the entire reference was, "on balance," neutral?

### Bowie v. Maddox

(First Amendment)

- *Appeal from Bowie v. Maddox*, 653 F.3d 45 (D.C. Cir. Aug. 31, 2011), *petition for cert filed* (November 29, 2011), Docket No. 11-670.
- Question(s) Presented:
    - Whether a government employee who provides truthful sworn testimony (or declines to give false sworn testimony) about facts related to his job in connection with an official proceedings may be deprived of first amendment protection for his speech on the ground that it was made "pursuant to his official duties," under *Garcetti v. Caballos*.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/bowie-v-maddox/.

### Bowoto v. Chevron

(Torture Victim Protection Act)

- *Appeal from Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. Sept. 10, 2010), *petition for cert. filed* (June 20, 2011), Docket No. 10-1536.
- Question(s) Presented:
    - Whether corporations and other legal entities may be sued for torture and extrajudicial killing under the Torture Victim Protection Act of 1991.
- For certiorari stage documents and the opinion below, *see*: http://www.scotusblog.com/2011/10/petitions-to-watch-conference-of-october-14-2011/.

### Byrne v. Jackler

(*Garcetti*)

- *Appeal from Jackler v. Byrne*, 658 F.3d 225 (2d Cir. July 22, 2011), *petition for cert. filed* (Oct. 20, 2011), Docket No. 11-517.

- Question(s) Presented:
    - May a government employer, free of First Amendment liability, discipline an employee for his refusal to prepare a job-related report?
    - Is there an exception to *Garcetti v. Ceballos* for law enforcement employees?
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/byrne-v-jackler/.

## Caritas Christi v. Pruell

(Preemption)

- *Appeal from Pruell v. Caritas Christi*, 645 F.3d 81; 2011 U.S. App. LEXIS 14331 (1st Cir. July 14, 2011), *petition for cert filed* (Dec. 5, 2011), Docket No. 11-690.
- Question(s) Presented:
    - Is there federal question jurisdiction in a noncertified putative class action where it is apparent from the face of the complaint that Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, completely preempts the claims of putative class members but not the claims of the named plaintiffs?

## Clarksburg Nursing Home & Rehabilitation Center, LLC v. Marchio

(FAA)

- *Appeal from Brown v. Genesis Healthcare Corp.*, Nos. 35494, 35546 and 35635; 2011 W. Va. LEXIS 61 (W. Va. June 29, 2011), *petition for cert. filed* (Sept. 27, 2011), Docket No. 11-391.
- Question(s) Presented:
    - Whether Section 2 of the Federal Arbitration Act preempts a state-law rule prohibiting the enforcement of a pre-dispute arbitration agreement when a plaintiff asserts a personal injury or wrongful death claim.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/clarksburg-nursing-home-rehabilitation-center-llc-v-marchio/.

## Comcast Corp. v. Behrend

(Class Action)

- *Appeal from Behrend v. Comcast Corp.*, 655 F.3d 182; 2011 U.S. App. LEXIS 17524 (3d Cir. Aug. 23, 2011), *petition for cert. filed* (Jan. 11, 2012), Docket No. 11-864.
- Question(s) Presented:
    - May a district court certify a class action without resolving "merits arguments" that bear on Fed. R. Civ. P. 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)?

## Doe v. Roman Catholic Archdiocese of St. Louis

(Establishment Clause)

- *Appeal from Doe v. Roman Catholic Archdiocese of St. Louis*, 347 S.W.3d 588; 2011 Mo. App. LEXIS 918 (Mo. Ct. App. July 5, 2011), *petition for cert. filed* (Jan. 3, 2012), Docket No. 11-840.
- Question(s) Presented:
    - Whether the First Amendment shields religious organizations from accountability for negligence and negligent supervision and retention of their employees who sexually abuse children.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/john-doe-ap-v-roman-catholic-archdiocese-of-st-louis/.

## Marina Point Dev. Co. v. Center For Biological Diversity

(Attorney's Fees)

- *Appeal from Center for Biological Diversity v. Marina Point Dev. Assoc.*, No. 10-55086; 2011 U.S. App. LEXIS 16451 (9th Cir. Aug. 4, 2011).
- Question(s) Presented:
    - Whether courts can properly award attorney's fees and costs under fee-shifting statutes that limit such awards to "appropriate" circumstances when, as here, the matter becomes moot on appeal, the judgment of this district court is vacated and undone, and the plaintiff ultimately accomplishes nothing?
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/marina-point-development-co-v-center-for-biological-diversity/.

## Mountaire Farms, Inc. v. Perez

(Donning and Doffing)

- *Appeal from Perez v. Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. June 7, 2012), *petition for cert. filed* (October 3, 2011), Docket No. 11-497.
- Question(s) Presented:
    - Whether donning and doffing generic safety and sanitary gear is "preliminary or postliminary activity" excluded from compensable time under the Portal Act or is instead "integral and indispensable" to an employee's work and thus compensable or, alternatively, either compensable itself as "work" or not compensable as "not work;"
    - Whether compensable time is measured from the time an employee first obtains the first piece of generic safety and sanitary gear, through the time the employee last disposes of the last piece of gear;
    - Whether compensable time is measured as the mean time for performing the subject activity, rather than the "minimum time reasonably necessary" for accomplishing the activity; and

    - Whether the Fourth Circuit's aggregation of time increments across plaintiffs, work-weeks, and work-years conflicts with this Court's prior precedents creating a de minimis exception to the Fair Labor Standards Act.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/montaire-farms-inc-v-perez/.
- For further analysis, *see* the following:
    - Risk Media Solutions, *Workers Want Pay For "Donning and Doffing" Uniforms and Protective Gear*, Risk Media Solutions (Dec. 19, 2011), *available at*: http://riskmediasolutions.com/news-item?i=513.
    - The HR Specialist, *When Workers Must Wear Special Gear, Beware Lawsuit if You Don't Pay for "Donning & Doffing"*, BusinessManagement (Sept. 18, 2012), *available at*: http://www.businessmanagementdaily.com/14128/when-workers-must-wear-special-gear-beware-lawsuit-if-you-dont-pay-for-donning-doffing.
    - Hansberry, Matthew, *The Latest on Donning and Doffing Under the FLSA: to Pay or Not to Pay*, Employment Essentials (Sept. 7, 2011), *available at*: http://www.sjlaboremploymentblog.com/latest-donning-doffing-under-flsa-to-pay-or-not-to-pay/.
    - A., Diane, *Donning and Doffing Again in the News*, Time For Business (June 29, 2011), *available at*: http://www.timeforbusinessblog.com/2011/donning-doffing-again.php.

## Nucor Corp. v. Bennett

(Race – "Me, too" Evidence – Admissibility)

- *Appeal from Bennett v. Nucor Corp.*, 656 F.3d 802; 2011 U.S. App. LEXIS 19395 (8th Cir. Sept. 22, 2011), *petition for cert. filed* (Jan. 20, 2012), Docket No. 11-917.
- Question(s) Presented:
    - Are hostile environment cases exempt from the rule announced in *Spring/United Mgmt. Co. v. Mendelson*, 552 U.S. 376 (2008), prohibiting the adoption of a per se rule of admissibility for "me, too" evidence?
    - Should the U.S. Supreme Court provide guidelines for lower courts for the exercise of their discretion under Fed. R. Evid. 403 regarding the admissibility of third-party allegations of prior acts of discrimination and "me, too" evidence in hostile environment cases, including consideration of whether such allegations are stale, howl they were ultimately resolved, whether the current plaintiffs observed the alleged conduct, whether the same facilities or decision makers were involved, whether the non-parties and the plaintiffs were similarly situated, or whether the alleged conduct was of the same nature as the subject of the plaintiffs' claims?
- For further analysis, *see* the following:
    - Conley, TJ, *Steel Yourselves: It's the End of the Line for an 8-Year-Old Class Action*, Minnesota Litigator (Sept. 26, 2011), *available at*: http://www.minnesota-litigator.com/2011/09/26/steel-line-8yearold-class-action/.
    - Hagan Cain, Robyn, *No Discretion Abuse in Workplace Racial Discrimination Case*, FindLaw (Sept. 23, 2011), *available at*: http://blogs.findlaw.com/eighth_circuit/2011/09/no-discretion-abuse-in-workplace-racial-discrimination-case.html.

## Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich

(Class Actions – Certification – Superiority Requirement)

- *Appeal from Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618; 2011 U.S. App. LEXIS 16624 (6th Cir. Aug. 12, 2011), *petition for cert. filed* (Jan. 18, 2012), Docket No. 11-901.
- Question(s) Presented:
  - Whether a district court is precluded from certifying a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when, at the time of the certification decision, the legal question common to the class has already been resolved.
  - Whether, under Federal Rule of Civil Procedure 23(b)(3), a court may consider, as a reason to deny class certification, the financial or other public policy consequences that may arise if the class members' claims are meritorious and litigated on a class basis.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/pipefitters-local-636-insurance-fund-v-blue-cross-blue-shield-of-michigan/.
- For further analysis, *see* the following:
  - Woodruff, Erica, *Pipefitters Local 636 Insurance Fund: Superiority of a Class Action Does Not Rest on the Similarity of the Claims*, TheRacetotheBottom.org (Nov. 4, 2011), *available at*: http://www.theracetothebottom.org/home/2011/11/4/pipefitters-local-636-insurance-fund-superiority-of-a-class.html.
  - Campbell, Drew, *Class Dismissed: Pipefitters Steamed*, Bricker & Eckler (Aug. 23, 2011), *available at*: http://www.bricker.com/publications-and-resources/publications-and-resources-details.aspx?Publicationid=2236.
  - Trask, Andrew, *Never Assume Superiority – Pipefitters Local 636 Insurance Fund v. Blue Cross Blue Shield of Michigan*, Lexology (Aug. 23, 2011), *available at*: http://www.lexology.com/library/detail.aspx?g=40c404d8-5c37-4876-b84e-8ad19ae18bfc.

## Prince of Peace Lutheran Church v. Linklater

(Ministerial Exception)

- *Appeal from Prince of Peace Lutheran Church v. Linklater*, 421 Md. 664; 28 A.3d 1171; 2011 Md. LEXIS 574 (Md. Sept. 21, 2011), *petition for cert. filed* (Jan. 23, 2012), Docket No. 11-923.
- Question(s) Presented:
  - Does the ministerial exception, as unanimously recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 80 U.S.L.W. 4056 (2012), extend to other statutory employment discrimination claims involving the employment relationship between minister and church or ecclesiastical matters of church governance?
- For further analysis, *see* the following:

- Schetelich, Thomas, *Maryland Court Clarifies Ministerial Exception for Churches*, The Best Way to do Business (Dec. 26, 2011), *available at*: http://www.christianpronet.net/?p=520.
- BLR, Inc., *Former Church Music Director in Maryland Alleges Sexual Harassment*, Society for Human Resource Management (Oct. 26, 2011), *available at*: http://www.shrm.org/LegalIssues/StateandLocalResources/Pages/FormerChurchMusicDirector.aspx.
- Arbogast, Gregory, *Ministerial Exception Does Not Exempt Churches From Workplace Harassment Claims*, Maryland Defense Counsel, Inc. Sept. 21, 2011), *available at*: http://www.mddefensecounsel.org/cases/prince.html.

## Probert v. Family Centered Services of Alaska, Inc.

(FLSA)

- *Appeal from Probert v. Family Centered Cervices of Alaska, Inc.*, 651 F.3d 1007; 2011 U.S. App. LEXIS 12691 (9th Cir. June 23, 2011), *petition for cert. filed* (Nov. 16, 2011), Docket No. 11-617.
- Question(s) Presented:
  - Does the Fair Labor Standards Act apply to the petitioners' homes, which provide care for severely emotionally disturbed children, including (a) whether institutions must provide "treatment" in order for it to be "care" within the meaning of the act, and (b) whether homes that provide care to severely emotionally disturbed children are "institutions" as required by the act?
- For further analysis, *see* the following:
  - Unpaid Overtime Blog, *Alaska Residence Managers Petition Supreme Court to Reverse FLSA Coverage*, Unpaid Overtime Blog (Dec. 9, 2011), *available at*: http://unpaidovertimeblog.com/2011/12/alaska-residence-managers-petition-supreme-court-to-reverse-flsa-coverage/.
  - Frisch, Andrew, *9th Cir.: Group Home Housing "Severely Emotionally Disturbed" Children Not An "Institution Primarily Engaged in the Care of the Sick, the Aged, Mentally Ill"*, Overtime Law Blog (June 25, 2011), *available at*: http://flsaovertimelaw.com/2011/06/25/9th-cir-group-home-housing-severely-emotionally-disturbed-children-not-an-%E2%80%9Cinstitution-primarily-engaged-in-the-care-of-the-sick-the-aged-mentally-ill/.

## Vance v. Ball State University

(Race – Supervisor Liability Rule)

- *Appeal from Vance v. Ball State Univ.*, 646 F.3d 461; 2011 U.S. App. LEXIS 11195 (7th Cir. June 3, 2011), *petition for cert. filed* (Oct. 31, 2011), Docket No. 11-556.
- The Court invited the Solicitor General to file a brief in this case expressing the views of the United States, 565 U.S. ____ (Feb. 21, 2012).

- This case seeks clarification of when an employer may be held legally to blame for sexual harassment by a co-employee of the victim who has some workplace control over the victim's daily chores.
- Question(s) Presented:
    - Does the supervisor liability rule under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998), apply to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or is it limited to those harassers who have the power to hire, fire, demote, promote, transfer, or discipline their victim?
- For further analysis, *see* the following:
    - Montgomery, Jenny, *7th Circuit Affirms Dismissal of Hostile Work Environment Claim*, The Indiana Lawyer (June 3, 2011), *available at*: http://www.theindianalawyer.com/7th-circuit-affirms-dismissal-of-hostile-work-environment-claim/PARAMS/article/26478.

### Zurn Pex, Inc. v. Cox

(Class Certification)

- *Appeal from In re: Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. July 6, 2011), *petition for cert. filed* (December 15, 2011), Docket No. 11-740
- Question(s) Presented:
    - When a party proffers expert testimony in support of or in opposition to a motion for class certification, may the district court rely on the testimony in ruling on the motion without conducting a full and conclusive examination of its admissibility under Federal Rule of Evidence 702 and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* ?
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/zurn-pex-inc-v-cox/.
- For further analysis, *see* the following:
    - Ambrogi, Robert, *Court at Odds Over "Daubert" Use at Class Stage*, BullsEye (July 26, 2011), *available at*: http://www.ims-expertservices.com/blog/2011/courts-at-odds-over-daubert-use-at-class-stage/.

## Cert. Denied

### Applebees Int'l, Inc. v. Fast

(FLSA "Tip Credit")

- *Cert. denied*, 2012 U.S. LEXIS 709; 80 U.S.L.W. 3425 (Jan. 17, 2012), Docket No. 11-425.
- *Appeal from Fast v. Applebees Int'l, Inc.*, 638 F.3d 872; 2011 U.S. App. LEXIS 8178 (8th Cir. April 21, 2011).
- Question(s) Presented:

    - Whether an employer loses the benefit of the "tip credit" provided by the Fair Labor Standards Act toward its minimum-wage obligations for employees who regularly receive tips if a tipped employee spends more than twenty percent of his time performing duties that are related to his occupation but are not by themselves directed toward producing tips.
    - Whether the deference that the Eighth Circuit paid to the Department of Labor's informal interpretation of its regulation conflicts with the decisions of this Court and other courts of appeals and impermissibly allowed the agency to issue de facto a new regulation under the guise of interpreting an earlier one.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/applebees-international-inc-v-fast/.
- For further analysis, *see* the following:
    - Miller & Martin PLLC, *A New Federal Court Decision Regarding Tipped Employees*, JDSupra (Jan. 27, 2012), *available at*: http://www.jdsupra.com/post/documentViewer.aspx?fid=f3ec886b-efed-419a-a8b4-ca7ea1c168fa.
    - Redmond, Wesley, *Application of the Tip Credit and Potential Retaliation Implications*, Baker Donelson (July 1, 2011), *available at*: http://www.bakerdonelson.com/application-of-the-tip-credit-and-potential-retaliation-implications-06-30-2011/.

## Bonds v. Sebelius

(Internal Complaints)

- *Cert. denied*, 132 S. Ct. 398; 181 L. Ed. 2d 255; 2011 U.S. LEXIS 7306 (Oct. 11, 2011), Docket No. 10-1447.
- *Appeal from Bonds v. Leavitt*, 629 F.3d 369; 2011 U.S. App. LEXIS 4 (4th Cir. Jan 3, 2011).
- Question(s) Presented:
    - Whether a federal employee's internal complaints regarding the purported discriminatory treatment of African-American participants in a federally funded clinical drug trial qualifies as activity that is protected against retaliatory personnel actions by the federal-sector provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.
- Hunton, Bernadette, *A Cognizable Title VII Retaliation Claim Requires a Complaint of Employment Discrimination*, Kollman & Saucier (Oct. 19, 2011), *available at*: http://www.kollmanlaw.com/quick/quickOctober2011.html.

## California Grocers Assoc. v. City of Los Angeles

(Los Angeles Worker Retention Ordinance)

- *Cert. denied*, 2012 U.S. LEXIS 1016; 80 U.S.L.W. 3440 (Jan. 23, 2012), Docket No. 11-615.
- *Appeal from California Grocers Assoc. v. City of Los Angeles*, 52 Cal. 4th 177; 254 P.3d 1019; 127 Cal. Rptr. 3d 726; 2011 Cal. LEXIS 7067 (Cal. July 18, 2011).

- Question(s) Presented:
    - Is the Los Angeles Worker Retention Ordinance (WRO), which forces firms that acquire certain existing stores to hire employees exclusively from the previous owner's workforce, and forbids them from discharging such workers for 90 days except "for cause"—but which provides an "opt-out" for employers that agree to a superseding collective bargaining agreement—preempted by the NLRA?
- For briefs, the opinion below and related documents, *see*: https://www.scotusblog.com/case-files/cases/california-grocers-association-v-city-of-los-angeles/.
- For further analysis, *see* the following:
    - Ofgang, Kenneth, *Supreme Court Upholds L.A. Grocery Worker Retention Ordinance*, Metropolitan News-Enterprise (July 19, 2011), *available at*: http://www.metnews.com/articles/2011/groc071911.htm.
    - The Complex Litigator, *California Grocers Association of Los Angeles Holds That City May Regulate Wholesale Replacement of a Workforce After Purchase of a Business*, The Complex Litigator (July 18, 2011), *available at*: http://www.thecomplexlitigator.com/post-data/2011/7/18/california-grocers-association-v-city-of-los-angeles-holds-t.html.

## Consolidated Rail Corp. v. Battaglia

(FELA Causation)

- *Cert. denied*, 131 S. Ct. 3088; 2011 U.S. LEXIS 4999 (June 28, 2011), Docket No. 10-75.
- *Appeal from Battaglia v. Conrail*, 2009 Ohio 5505; 2009 Ohio App. LEXIS 4639 (Oct. 16, 2009) (*discretionary appeal denied by Battaglia v. Conrail*, 921 N.E.2d 248; 124 Ohio St. 3d 1477; 2010 Ohio 354 (Feb. 10, 2010)).
- Question(s) Presented:
    - Whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, requires that the plaintiff prove proximate causation as an element of a claim for damages.
    - Whether the imposition of liability under FELA based upon exposure to *any* diesel exhaust conflicts with this Court's decisions requiring courts to defer to a federal agency's interpretation of its own safety regulation.
- For Briefs and the opinion below, *see*: https://www.scotusblog.com/2010/08/notable-petitions-28/.

## Diaz v. California

(Search and Seizure)

- *Cert. denied*, 132 S. Ct. 94; 181 L. Ed. 2d 23; 2011 U.S. LEXIS 6632 (Oct. 3, 2011), Docket No. 10-1231.
- *Appeal from People v. Diaz*, 244 P.3d 501; 51 Cal. 4th 84; 2011 Cal. LEXIS 1 (Cal. Jan. 3, 2011).
- Question(s) Presented:

    - Are cell phone text messages "items immediately associated with the person of the arrestee" within the meaning of *United States v. Edwards* (1974) 415 U.S. 800, thus permitting law enforcement to search incident to arrest the data stored in a seized cell phone approximately 90 minutes after arrest during a police station interrogation?
    - Do this Court's holdings in *Edwards*, which involved a delayed search of defendant's clothing, and *United States v. Robinson* (1973) 414 U.S. 218, which involved a contemporaneous search of a closed container on defendant's person, permit a delayed search incident to arrest of the data stored in a cell phone seized from defendant and reduced to exclusive government control?
- For further analysis, *see* the following:
    - Smith, Phillip, *California Supreme Court Okays Text Message Searches in Drug Arrests*, StoptheDrugWar.org (Jan. 5, 2011), *available at*: http://stopthedrugwar.org/chronicle/2011/jan/05/california_supreme_court_okays_t.

## Dellinger v. Science Applications Int'l. Corp.

(Retaliation – FLSA)

- *Cert. denied*, 565 U.S. ___ (Feb. 21, 2012), Docket No. 11-598.
- *Appeal from Dellinger v. Science Applications Int'l Corp.*, 649 F.3d 226; 2011 U.S. App. LEXIS 16635 (4th Cir. Aug. 12, 2011).
- Question(s) Presented:
    - Does the anti-retaliation provision in Section 15(a)(3) of the Fair Labor Standards Act apply to retaliation by an employer against a job applicant?
    - Is the private cause of action provided by Section 16(b) of the FLSA available to a job applicant who is retaliated against by the employer?

## Equal Employment Opportunity Comm'n v. Peabody W. Coal Co.

(Employment Discrimination – Secretary of Interior as "Required Party")

- *Cert. denied*, 132 S. Ct. 91; 181 L. Ed. 2d 21; 2011 U.S. LEXIS 6753 (Oct. 3, 2011), Docket No. 10-981.
- *Appeal from Equal Employment Opportunity Comm'n v. Peabody Western Coal Co.*, 610 F.3d 1070; 2010 U.S. App. LEXIS 12899 (June 23, 2010).
- Question Presented:
    - Is the Secretary of the Interior a "required party," within the meaning of Rule 19(a)(1), to an action by the EEOC against a private employer, when the challenged conduct was undertaken pursuant to a federally approved mining lease between the employer and an Indian tribe but no federal agency is a party to the lease?
- For a previous related ruling by the Ninth Circuit, s*ee Equal Employment Opportunity Commission v. Peabody Western Coal Co.*, 400 F.3d 774; 2005 U.S. App. LEXIS 19742 (9th Cir. 2005).

- *See also* related cases *Navajo Nation v. Employment Opportunity Commission* and *Peabody Western Coal Co. v. Equal Employment Opportunity Commission.*
- For briefs, the opinion below and related documents, *see*:
- http://www.scotusblog.com/case-files/cases/equal-employment-opportunity-commission-v-peabody-western-coal-company/.

## Farmers Ins. Co. of Oregon v. Strawn

(Class Action)

- *Cert. denied*, 2012 U.S. LEXIS 987; 80 U.S.L.W. 3440 (Jan. 23, 2012), Docket No. 11-445.
- *Appeal from Strawn v. Farmers Ins. Co. of Ore.*, 350 Ore. 336; 258 P.3d 1199; 2011 Ore. LEXIS 444 (Or. May 19, 2011).
- Question(s) Presented:
    - Whether the Due Process Clause prohibits a state court from relieving class members of their burden to prove a longstanding and fundamental element of liability—here, individual reliance in a fraud claim—thereby depriving the defendant of its right to assert an individualized defense to a class action.
    - Whether this Court's rule – that only a "firmly established and regularly followed" state-law procedural bar can foreclose consideration of a federal constitutional claim – prohibits a state court from invoking a concededly unprecedented procedural rule to avoid consideration of a due process challenge to a punitive damages award.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/farmers-insurance-company-of-oregon-v-strawn/.
- For further analysis, *see* the following:
    - National Chamber Litigation Center, *Farmers Insurance Co., et al., v. Mark Strawn*, U.S. Chamber of Commerce, *available at*: http://www.chamberlitigation.com/farmers-insurance-co-et-al-v-mark-strawn.

## Harden v. Wicomico County, Md.

(Retaliation)

- *Cert. denied*, 181 L. Ed. 2d 735; 2012 U.S. LEXIS 158 (Jan. 9, 2012), Docket No. 11-470.
- *Appeal from Harden v. Wicomico County, Md.*, 436 Fed. Appx. 143; 2011 U.S. App. LEXIS 13031 (4th Cir. June 23, 2011).
- Question(s) Presented:
    - Does reinstatement of an employee with backpay preclude that employee from proving a *prima facie* case of retaliation and obtaining compensatory relief under Title VII's retaliation provision?
- For the opinion below, *see*: http://law.justia.com/cases/federal/appellate-courts/ca4/10-1734/101734.u-2011-06-23.html.
- For further analysis, *see* the following:

- The HR Specialist, *Not All Employee Online Musings Are "Protected"*, BusinessManagement (Sept. 28, 2011), *available at*: http://www.businessmanagementdaily.com/19827/not-all-employee-online-musings-are-protected.

## HCP, Inc. v. Ventas, Inc.

(Damages)

- *Cert. denied*, 132 S. Ct. 572; 181 L. Ed. 2d 418; 2011 U.S. LEXIS 8079 (Nov. 9, 2011), Docket No. 11-547.
- *Appeal from* 647 F.3d 291; 2011 U.S. App. LEXIS 9941 (6th Cir. May 17, 2011).
- Question(s) Presented:
  - Whether, in a diversity case, the standard for reviewing sufficiency of the evidence under Federal Rule of Civil Procedure 50 is governed by federal law or instead by state law.
  - Whether it is permissible under Rule 54(b) to order entry of partial final judgment on compensatory damages and to remand for a new trial solely on punitive damages for the same claim.
  - Whether the Seventh Amendment prevents a federal court from splitting a single claim between two juries by ordering a new trial solely on punitive damages.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/hcp-inc-v-ventas-inc/.
- For further analysis, *see* the following:
  - Khula, Bruce, *Sixth Circuit Upholds $101 Million Jury Verdict*, Sixth Circuit Appellate Blog (May 19, 2011), *available at*: http://www.sixthcircuitappellateblog.com/recent-cases/sixth-circuit-upholds-101-million-jury-verdict/.

## HCR ManorCare Inc. v. Zouhary

(Opt-In Procedure)

- *Cert. denied*, 2012 U.S. LEXIS 959; 80 U.S.L.W. 3440 (Jan. 23, 2012), Docket No. 11-658.
- *Appeal from unpublished opinion* (6th Cir. Sept. 28, 2011).
- Question(s) Presented:
  - Is the two-step process by which district courts decide whether to notify potential plaintiffs of their right to opt-in to a collective action subject to Section 16(b) of the Fair Labor Standards Act in conflict with the joinder requirements of the Federal Rules of Civil Procedure, superficially Fed. R. Civ. P. 20 and/or 23?

## Lawyer v. Verizon Commc'ns, Inc.

(Fair Labor Standards Act)

- *Cert. denied*, 132 S. Ct. 426; 181 L. Ed. 2d 262; 2011 U.S. LEXIS 7432 (Oct. 11, 2011), Docket No. 11-258.

- *Appeal from Lawyer v. Verizon Commc'ns, Inc.*, 434 Fed. Appx. 240; 2011 U.S. App. LEXIS 10740 (4th Cir. May 27, 2011).

## N&D Investment Corp. v. Galdames

(FLSA)

- *Cert. denied*, 565 U.S. ____ (Feb. 21, 2012), Docket No. 11-732.
- *Appeal from Galdames v. N & D Investment Corp.*, 432 Fed. Appx. 801; 2011 U.S. App. LEXIS 12705 (11th Cir. June 23, 2011).
- Question(s) Presented:
    - Is an illegal alien who: (a) obtains employment through the use of fraudulent social security documents, (b) works for the employer for 2-3 years, (c) fails to pay income taxes on the monies received from the employer, and (d) is an illegal alien at the time the suit is filed and while on trial, an "employee" entitled to recover under the Fair Labor Standards Act for overtime, or is such an individual precluded from bringing suit by the in pari delicto doctrine?
- For further analysis, *see* the following:
    - FairLaw Firm, *Undocumented Workers Are Entitled to Overtime Pay and Minimum Wages*, FairLaw Firm (Aug. 30, 2011), *available at*: http://www.fairlawattorney.com/2011/flsa-protects-undocumented-workers/.
    - Maverick, Peter, *Federal Court Overrules Employers Argument*, People's Law Guide (Aug. 29, 2011), *available at*: http://www.browardbar.org/articles/federal-court-overrules-employers-argument.html.

## Navajo Nation v. Equal Employment Opportunity Comm'n

(Hiring Preference – Abrogation of Sovereign Immunity)

- *Cert. denied*, 132 S. Ct. 91; 181 L. Ed. 2d 21; 2011 U.S. LEXIS 6753 (Oct. 3, 2011), Docket No. 10-981.
- *Appeal from Equal Employment Opportunity Comm'n v. Peabody Western Coal Co.*, 610 F.3d 1070; 2010 U.S. App. LEXIS 12899 (June 23, 2010).
- Questions Presented:
    - May the sovereign immunity of the United States and of a federally recognized Indian tribe, preserved in Title VII of the 1964 Civil Rights Act, be abrogated by application of Fed. R. Civ. P. 14 and 19?
    - May a court use Rule 14 to permit or require a party to implead the secretary of the interior in a case in which the applicable statute does not confer a right of contribution?
- For a previous related ruling by the Ninth Circuit, s*ee Equal Employment Opportunity Commission v. Peabody Western Coal Co.*, 400 F.3d 774; 2005 U.S. App. LEXIS 19742 (9th Cir. 2005).
- *See also* related cases *Peabody Western Coal Co. v. Equal Employment Opportunity Commission* and *Equal Employment Opportunity Commission v. Peabody Western Coal Co.*

## Opp v. Office of the State's Attorney of Cook County

(Definition of Employee at Policymaking Level)

- *Cert. denied*, 132 S. Ct. 92; 181 L. Ed. 2d 22; 2011 U.S. LEXIS 6893 (Oct. 3, 2011), Docket No. 10-1163.
- *Appeal from Opp v. Office of the State's Atty.*, 630 F.3d 616; 2010 U.S. App. LEXIS 26318 (7th Cir. Dec. 29, 2010).
- Question Presented:
    - For the purposes of the Age Discrimination in Employment Act, who is a worker at the policymaking level?
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/opp-v-office-of-the-states-attorney-of-cook-county/.
- For further analysis, *see* the following:
    - FindLaw Staff, *Opp. v. Office of the State's Attorney of Cook County*, U.S. Seventh Circuit Blog (Dec. 30, 2010), *available at*: http://blogs.findlaw.com/seventh_circuit/2010/12/opp-v-office-of-the-states-attorney-of-cook-county-09-3714.html.

## Peabody W. Coal Co. v. Equal Employment Opportunity Comm'n

(Employment Discrimination – Impleader of Secretary of Interior)

- *Cert. denied*, 132 S. Ct. 91; 181 L. Ed. 2d 21; 2011 U.S. LEXIS 6753 (Oct. 3, 2011), Docket No. 10-981.
- *Appeal from Equal Employment Opportunity Comm'n v. Peabody Western Coal Co.*, 610 F.3d 1070; 2010 U.S. App. LEXIS 12899 (9th Cir. June 23, 2010).
- Question(s) Presented:
    - When the EEOC contends that conduct required by a tribal coal mining lease provision mandated by the secretary of the interior violates Title VII of the 1964 Civil Rights Act, which expressly bars the EEOC from suing the Secretary to enforce Title VII, does Fed. R. Civ. P. 14 permit the coal mining lessee or the tribal lessor to implead the secretary as a third-party defendant?
- For a previous related ruling by the Ninth Circuit, s*ee Equal Employment Opportunity Commission v. Peabody Western Coal Co.*, 400 F.3d 774; 2005 U.S. App. LEXIS 19742 (9th Cir. 2005).
- *See also* related cases *Navajo Nation v. Employment Opportunity Commission* and *Equal Employment Opportunity Commission v. Peabody Western Coal Co.*

## Peninsula Sch. Dist. v. D.P.

(IDEA)

- *Cert. denied*, 565 U.S. ___ (Feb. 21, 2012), Docket No. 11-539.
- *Appeal from Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123 (9th Cir. March 18, 2010).
- Question(s) Presented:

    - Under the Individuals with Disabilities Education Act (IDEA), what is the test for determining whether a plaintiff is "seeking relief that is also available under [IDEA]," thereby triggering the Act's requirement that the plaintiff exhaust administrative remedies before filing suit?
    - When a plaintiff is in part "seeking relief also available under [IDEA]," must that plaintiff first exhaust the administrative remedies available under IDEA before pursuing any federal claim?
    - May a court reject a properly supported summary judgment motion and allow the non-moving party to amend its complaint to assert facts that contradict sworn deposition testimony?
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/peninsula-school-district-v-d-p/.
- For further analysis, *see* the following:
    - Walsh, Mark, *Court Revives Suit Over School Isolation Room*, School Law (Aug. 1, 2011), *available at*: http://blogs.edweek.org/edweek/school_law/2011/08/court_revives_suit_over_school.html.
    - Wrightslaw, *9th Circuit Blocks Isolation Room Lawsuit*, The Wrightslaw Way (June 24, 2010), *available at*: http://www.wrightslaw.com/blog/?p=2606.
    - Pertinent Inquiry, *Education or Abuse? – Payne v. Peninsula School District*, Pertinent Inquiry (April 13, 2010), *available at*: http://pertinent-inquiry.blogspot.com/2010/04/education-or-abuse-payne-v-peninsula.html.

## Philip Morris v. Scott

(Class Action)

- *Cert. denied*, 131 S. Ct. 3057; 180 L. Ed. 2d 886; 2011 U.S. LEXIS 4834 (June 27, 2011) (*denying cert. after a stay of more than nine months issued in Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1; 177 L. Ed. 2d 1040; 2010 U.S. LEXIS 5738 (Sept. 24, 2010)), Docket No. 10-735.
- *Appeal from Scott v. Am. Tobacco Co.*, 36 So. 3d 1046; 2010 La. App. LEXIS 569 (La.App. 4 Cir., April 23, 2010).
- Question(s) Presented:
    - Whether the Due Process Clause prevents state courts from employing the class-action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims.
- For further analysis, *see* the following:
    - Dodson, Scott, *Squeezing Class Actions*, SCOTUSblog (Aug. 30, 2011), *available at*: http://www.scotusblog.com/2011/08/squeezing-class-actions/.
    - Denniston, Lyle, *Wal-Mart Sequel Pushed*, SCOTUSblog, (June 21, 2011), *available at*: http://www.scotusblog.com/2011/06/wal-mart-sequel-pushed/.

## Rhodes v. E.I. du Pont de Nemours and Co.

(Class Action)

- *Cert. denied*, 132 S. Ct. 499; 181 L. Ed. 2d 347; 2011 U.S. LEXIS 7899 (Oct. 31, 2011), Docket No. 11-156.
- *Appeal from Rhodes v. E.I. du Pont de Nemours and Co.*, 636 F.3d 88; 2011 U.S. App. LEXIS 7199 (April 8, 2011).
- Question(s) Presented:
    - Whether the Court should resolve a circuit split regarding whether putative class representatives maintain standing to appeal denial of class certification when the representatives voluntarily dismiss their individual claims but maintain their personal stake in the outcome of the appeal?
    - Whether a federal court predicting the content of state substantive law in a diversity case should be permitted to apply a conclusive presumption against recognizing any theory of liability that has not explicitly been recognized by a state's highest court where there is persuasive evidence that the state's high court would recognize that theory?
- For more information and the case below, *see*: http://environmentalappealscourt.blogspot.com/2011/04/rhodes-v-ei-du-pont-de-nemours-and.html.
- For further analysis, *see* the following:
    - WIMS, *Rhodes v. E.I. du Pont de Nemours and Company*, Environmental – Appeals Court Blog (April 25, 2011), *available at*: http://environmentalappealscourt.blogspot.com/2011/04/rhodes-v-ei-du-pont-de-nemours-and.html.

## Sergeants Benevolent Ass'n Health and Welfare Fund v. Eli Lilly and Co.

(Causation – Drug Company Fraud – Class Certification)

- *Cert. denied*, 131 S. Ct. 3062; 180 L. Ed. 2d 903; 2011 U.S. LEXIS 4918 (June 27, 2011), Docket No. 10-1173.
- *Appeal from UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121; 2010 U.S. App. LEXIS 18959 (2d Cir. Sept. 10, 2010).
- Questions Presented:
    - Whether the court of appeals erred in relying on the causation analysis in the Chief Justice's partial opinion for the Court in *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), to hold – contrary to this Court's unanimous decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008) -- that petitioners could not establish the causation element of their RICO claim because the presence of prescribing physicians in the chain of causation constituted an intervening factor breaking the link between respondent's fraudulent marketing and petitioners' foreseeable injuries.
    - Whether, alternatively, this petition should be held for *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403 (U.S. granted Jan. 7, 2011), and disposed of in light of the Court's decision in that case, because the court below -- like the Fifth Circuit in *Halliburton* -- based its denial of class certification on the conclusion that petitioners could not establish the causation element of their claim on the merits

- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/sergeants-benevolent-assn-health-and-welfare-fund-v-eli-lilly-and-co/.

## Skechers U.S.A., Inc. v. Tomlinson

(CAFA)

- *Cert. denied*, 132 S. Ct. 551; 181 L. Ed. 2d 410; 2011 U.S. LEXIS 8029 (Nov. 7, 2011), Docket No. 11-287.
- *Appeal from Tomlinson v. Skechers U.S.A., Inc.*, Case No. 5:11-cv-05042-JLH (8th Cir. June 21, 2011).
- Question(s) Presented:
  - Whether a class action that is removed under the Class Action Fairness Act of 2005 (CAFA) and indisputably involves a potential class recovery exceeding $5 million may be remanded on the ground that the named plaintiff has purported to waive any recovery for class members above the jurisdictional threshold.
- For briefs, the opinion below and related documents, *see*: http://www.scotusblog.com/case-files/cases/skechers-u-s-a-inc-v-tomlinson/.

## Thomas v. Alcoser

(Class Action)

- *Cert. denied*, 132 S. Ct. 518; 181 L. Ed. 2d 350; 2011 U.S. LEXIS 7890 (Oct. 31, 2011), Docket No. 11-308.
- *Appeal from Alcoser v. Thomas*, No. S191255; 2011 Cal. LEXIS 5907 (Cal. June 8, 2011).
- Question(s) Presented:
  - Whether the Due Process Clause prevents state courts from employing the class-action device to eliminate fundamental substantive protections that would otherwise apply to adjudications of class members' individual claims – in particular, to eliminate the requirement that absent class members introduce evidence of reliance on an alleged misrepresentation.

## Tomlinson v. El Paso Corp.

(ERISA)

- *Cert. denied*, 565 U.S. ____ (Feb. 21, 2012), Docket No. 11-795.
- *Appeal from Tomlinson v. El Paso Corp.*, 653 F.3d 1281 (10th Cir. Aug. 11, 2011).
- Question(s) Presented:
  - Is the Treasury Department's interpretation of its regulations on back loading from a "period of zero accruals" entitled to deference under *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007)?
  - Are periods of "wear-away" in retirement benefits that discriminate based on age exempted from the Age Discrimination in Employment Act §§ 4(a) and 4(i)'s

protections and the U.S. Supreme Court's ruling on disparate impact in *Smith v. Jackson, Miss.*, 544 U.S. 228 (2005)?

- For the opinion below, *see*: http://www.ca10.uscourts.gov/opinions/10/10-1385.pdf.
- For further analysis, *see* the following:
  - Nadel, Darren, *Pension Court Ruling Comes Down, Provides New Guidance*, ebn (Oct. 21, 2011), *available at*: http://ebn.benefitnews.com/news/cash-balance-elpaso-tomlinson-employment-act-2718833-1.html.

## Cases of Interest Not Yet Before the Court

### LaRoque v. Holder

(Voting Rights Act - Section 5)

- 2011 U.S. Dist. LEXIS 147064; No. 10-0561 (D.D.C. Dec. 22, 2011).
- On appeal to the D.C. Circuit, No. 11-5349.
- *See also Shelby v. Holder.*

### Shelby v. Holder

(Voting Rights Act – Section 5)

- 2011 U.S. Dist. LEXIS 107305; No. 10-0651 (D.D.C. Sept. 21, 2011).
- On appeal to the D.C. Circuit, No. 11-5256.
- *See also LaRoque v. Holder*.

### Western Tradition Partnership, Inc. v. State of Montana

(State Interest)

- 2011 MT 328; 363 Mont. 220; 2011 Mont. LEXIS 440 (Mt. Dec. 30, 2011).
- The U.S. Supreme Court granted an application to stay the decision of the Montana Supreme Court pending the filing and disposition of a writ for certiorari, Docket No. 11A762 (Feb. 17, 2012).
- Montana Supreme Court Holding:
  - Montana had demonstrated a "compelling state interest" sufficient to justify a ban nearly identical to the one struck down by the Supreme Court in *Citizen's United*.
- For the opinion of Montana Supreme Court, *see*: http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/Mont-SCt-ruling-12-30-11.pdf.
- For further analysis, *see* the following:
  - Dean, John, *The Montana Supreme Court Arguably Flouts the Citizens United Ruling: Will It Be Reversed?*, Verdict (Jan. 27, 2012), *available at*: http://verdict.justia.com/2012/01/27/the-montana-supreme-court-arguably-flouts-the-citizens-united-ruling.