U.S. Supreme Court Update 2009-2010 Term

by

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Supreme Court Update: 2009-2010 Term

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Employment Cases Decided in the 2009-2010 Term

Lewis v. City of Chicago
(Statute of Limitations – Title VII)

- 2010 U.S. LEXIS 4165 (May 24, 2010).
- 528 F.3d 488 (7th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 5149 (Sept. 30, 2009), Docket No. 08-974.
- Question Presented:
    - Whether, when an employer adopts an employment practice that allegedly discriminates against African-Americans in violation of Title VII's disparate impact provision, the plaintiff must file an EEOC charge within 300 days after the announcement of the practice, or whether the plaintiff may file a charge within 300 days after the employer's use of the discriminatory practice.

- Syllabus

  In 1995, respondent the City of Chicago gave a written examination to applicants seeking firefighter positions. In January 1996, the City announced it would draw candidates randomly from a list of applicants who scored at least 89 out of 100 points on the examination, whom it designated as "well qualified." It informed those who scored below 65 that they had failed and would not be considered further. It informed applicants who scored between 65 and 88, whom it designated as "qualified," that it was unlikely they would be called for further processing but that the City would keep them on the eligibility list for as long as that list was used. That May, the City selected its first class of applicants to advance, and it repeated this process multiple times over the next six years. Beginning in March 1997, several African-American applicants who scored in the "qualified" range but had not been hired filed discrimination charges with the Equal Employment Opportunity Commission (EEOC) and received right-to-sue letters. They then filed suit, alleging (as relevant here) that the City's practice of selecting only applicants who scored 89 or above had a disparate impact on African-Americans in violation of Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e-2(k)(1)(A)(i). The District Court certified a class -- petitioners here -- of African-Americans who scored in the "qualified" range but were not hired. The court denied the

[1]This paper was prepared with the assistance of Jonathan Sandstrom Hill, an associate with Robert B. Fitzpatrick, PLLC. Mr. Sandstrom Hill is a May 2008 graduate of Georgetown University Law Center and a member of the Virginia State Bar.

City's summary judgment motion, rejecting its claim that petitioners had failed to file EEOC charges within 300 days "after the unlawful employment practice occurred," § 2000e-5(e)(1), and finding instead that the City's "ongoing reliance" on the 1995 test results constituted a continuing Title VII violation. The litigation then proceeded, and petitioners prevailed on the merits. The Seventh Circuit reversed the judgment in their favor, holding that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act -- sorting the scores into the "well qualified," "qualified," and "not qualified" categories. The later hiring decisions, the Seventh Circuit held, were an automatic consequence of the test scores, not new discriminatory acts.

Held: A plaintiff who does not file a timely charge challenging the adoption of a practice may assert a disparate-impact claim in a timely charge challenging the employer's later application of that practice as long as he alleges each of the elements of a disparate-impact claim. Pp. 4-11.

(a) Determining whether petitioners' charges were timely requires "identify[ing] precisely the 'unlawful employment practice' of which" they complain. Delaware State College v. Ricks, 449 U.S. 250, 257, 101 S. Ct. 498, 66 L. Ed. 2d 431. With the exception of the first selection round, all agree that the challenged practice here -- the City's selection of firefighter hires on the basis announced in 1996 -- occurred within the charging period. Thus, the question is not whether a claim predicated on that conduct is timely, but whether the practice thus defined can be the basis for a disparate-impact claim at all. It can. A Title VII plaintiff establishes a prima facie claim by showing that the employer "uses a particular employment practice that causes a disparate impact" on one of the prohibited bases. § 2000e-2(k). The term "employment practice" clearly encompasses the conduct at issue: exclusion of passing applicants who scored below 89 when selecting those who would advance. The City "use[d]" that practice each time it filled a new class of firefighters, and petitioners allege that doing so caused a disparate impact. It is irrelevant that subsection (k) does not address "accrual" of disparate-impact claims, since the issue here is not when the claims accrued but whether the claims stated a violation. They did. Whether petitioners proved a violation is not before the Court. Pp. 4-7.

(b) The City argues that the only actionable discrimination occurred in 1996 when it used the test results to create the hiring list, which it concedes was unlawful. It may be true that the City's adoption in 1996 of the cutoff score gave rise to a freestanding disparate-impact claim. If so, because no timely charge was filed, the City is now "entitled to treat that past act as lawful," United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 52 L. Ed. 2d 571. But it does not follow that no new violation occurred -- and no new claims could arise -- when the City later implemented the 1996 decision. Evans and later cases the City cites establish only that a Title VII plaintiff must show a "present violation" within the limitations period. For disparate-treatment claims -- which require discriminatory intent -- the plaintiff must demonstrate deliberate discrimination within the limitations period. But no such demonstration is needed for claims, such as this one, that do not require discriminatory intent. *Cf.*, *e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 640, 127 S. Ct. 2162, 167 L. Ed. 2d 982. Contrary to the Seventh

Circuit's reasoning, even if both types of claims take aim at prohibited discrimination, it does not follow that their reach is coextensive. Pp. 7-10.

(c) The City and its amici warn that this reading will result in a host of practical problems for employers and employees alike. The Court, however, must give effect to the law Congress enacted, not assess the consequences of each approach and adopt the one that produces the least mischief. Pp. 10-11.

(d) It is left to the Seventh Circuit to determine whether the judgment must be modified to the extent that the District Court awarded relief based on the first round of hiring, which occurred outside the charging period even for the earliest EEOC charge. P. 11.

528 F.3d 488, reversed and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Lewis_v._City_of_Chicago

Perdue v. Kenny A.
(Attorneys' Fees – Enhancement)

- 176 L. Ed. 2d 494, 2010 U.S. LEXIS 3481 (Apr. 21, 2010).
- 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 2664 (Apr. 6, 2009), Docket No. 08-970.
- Question Presented:
    - Whether, under 42 U.S.C. § 1988, a reasonable attorneys' fees award under a federal fee-shifting statute can ever be enhanced solely on quality of performance and results obtained when these factors already are included in the lodestar calculation.

- Syllabus

Title 42 U.S.C. § 1988 authorizes courts to award a "reasonable" attorney's fee for prevailing parties in civil rights actions. Half of respondents' $ 14 million fee request was based on their calculation of the "lodestar," i.e., the number of hours the attorneys and their employees worked multiplied by the hourly rates prevailing in the community. The other half represented a fee enhancement for superior work and results, supported by affidavits claiming that the lodestar would be insufficient to induce lawyers of comparable skill and experience to litigate this case. Awarding fees of about $ 10.5 million, the District Court found that the proposed hourly rates were "fair and reasonable," but that some of the entries on counsel's billing records were vague and that the hours claimed for many categories were excessive. The court therefore cut the lodestar to approximately $ 6 million, but enhanced that award by 75%, or an additional $ 4.5 million. The Eleventh Circuit affirmed in reliance on its precedent.

Held:

1. The calculation of an attorney's fee based on the lodestar may be increased due to superior performance, but only in extraordinary circumstances. Pp. 5-12.

(a) The lodestar approach has "achieved dominance in the federal courts." Gisbrecht v. Barnhart, 535 U.S. 789, 801, 122 S. Ct. 1817, 152 L. Ed. 2d 996. Although imperfect, it has several important virtues: It produces an award that approximates the fee the prevailing attorney would have received for representing a paying client who was billed by the hour in a comparable case; and it is readily administrable, see, e.g., Burlington v. Dague, 505 U.S. 557, 566, 112 S. Ct. 2638, 120 L. Ed. 2d 449, and "objective," Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40, thereby cabining trial judges' discretion, permitting meaningful judicial review, and producing reasonably predictable results. Pp. 5-7.

(b) This Court has established six important rules that lead to today's decision. First, a "reasonable" fee is one that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case, *see* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L. Ed. 2d 439, but that does not provide "a form of economic relief to improve the financial lot of attorneys," ibid. Second, there is a "strong" presumption that the lodestar method yields a sufficient fee. *See*, *e.g.*, id., at 564, 106 S. Ct. 3088, 92 L. Ed. 2d 439. Third, the Court has never sustained an enhancement of a lodestar amount for performance, but has repeatedly said that an enhancement may be awarded in "rare" and "exceptional" circumstances. *E.g.*, id., at 565, 106 S. Ct. 3088, 92 L. Ed. 2d 439. Fourth, "the lodestar includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee." Id., at 566, 106 S. Ct. 3088, 92 L. Ed. 2d 439. An enhancement may not be based on a factor that is subsumed in the lodestar calculation, such as the case's novelty and complexity, *see*, *e.g.*, Blum v. Stenson, 465 U.S. 886, 898, 104 S. Ct. 1541, 79 L. Ed. 2d 891, or the quality of an attorney's performance, Delaware Valley, *supra*, at 566, 106 S. Ct. 3088, 92 L. Ed. 2d 439. Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant. *E.g.*, Blum, 465 U.S., at 901, 104 S. Ct. 1541, 79 L. Ed. 2d 891. Sixth, an applicant seeking an enhancement must produce "specific evidence" supporting the award, id., at 899, 901, 104 S. Ct. 1541, 79 L. Ed. 2d 891, to assure that the calculation is objective and capable of being reviewed on appeal. Pp. 7-9.

(c) The Court rejects any contention that a fee determined by the lodestar method may not be enhanced in any situation. The "strong presumption" that the lodestar is reasonable may be overcome in those rare circumstances in which the lodestar does not adequately account for a factor that may properly be considered in determining a reasonable fee. P. 9.

(d) The Court treats the quality of an attorney's performance and the results obtained as one factor, since superior results are relevant only to the extent it can be shown that they stem from superior attorney performance and not another factor, such as inferior performance by opposing counsel. The circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation are "rare" and

"exceptional." Enhancements should not be awarded without specific evidence that the lodestar fee would not have been "adequate to attract competent counsel." Blum, *supra*, at 897, 104 S. Ct. 1541, 79 L. Ed. 2d 891. First, an enhancement may be appropriate where the method used to determine the hourly rate does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate formula takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. In such a case, the trial judge should adjust the hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate. Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. In such cases, the enhancement amount must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard interest rate to the qualifying expense outlays. Third, an enhancement may be appropriate where an attorney's performance involves exceptional delay in the payment of fees. In such a case, the enhancement should be calculated by a method similar to that used for an exceptional delay in expense reimbursement. Enhancements are not appropriate on the ground that departures from hourly billing are becoming more common. Nor can they be based on a flawed analogy to the increasingly popular practice of paying attorneys a reduced hourly rate with a bonus for obtaining specified results. Pp. 9-12.

2. The District Court did not provide proper justification for the 75% fee enhancement it awarded in this case. It commented that the enhancement was necessary to compensate counsel at the appropriate hourly rate, but the effect was to raise the top rate from $ 495 to more than $ 866 per hour, while nothing in the record shows that this is an appropriate figure for the relevant market. The court also emphasized that counsel had to make extraordinary outlays for expenses and wait for reimbursement, but did not calculate the amount of the enhancement attributable to this factor. Similarly, the court noted that counsel did not receive fees on an ongoing basis during the case, but did not sufficiently link this to proof that the delay was outside the normal range expected by attorneys who rely on § 1988 for fees. Nor did the court calculate the cost to counsel of any extraordinary and unwarranted delay. And its reliance on the contingency of the outcome contravenes Dague, *supra*, at 565, 112 S. Ct. 2638, 120 L. Ed. 2d 449. Finally, insofar as the court relied on a comparison of counsel's performance in this case with that of counsel in unnamed prior cases, it did not employ a methodology that permitted meaningful appellate review. While determining a "reasonable attorney's fee" is within the trial judge's sound discretion under § 1988, that discretion is not unlimited. The judge must provide a reasonably specific explanation for all aspects of a fee determination, including any enhancement. Pp. 12-15.

532 F.3d 1209, reversed and remanded.

- For the Decision, Briefs, and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Perdue_v._Kenny_A

Conkright v. Frommert

(ERISA – Scope of Review)

- 2010 U.S. LEXIS 3479 (Apr. 21, 2010)
- 535 F.3d 111 (2d Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 4808 (June 29, 2009), Docket No. 08-810.
- The Court is presented with two issues:
    - Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other Circuits, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.
    - Whether the Second Circuit erred in holding, in conflict with decisions of other Circuits, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

- Syllabus

  Petitioners are Xerox Corporation's plan (Plan) and the Plan's current and former administrators (Plan Administrator). Respondents are employees who left Xerox in the 1980's, received lump-sum distributions of retirement benefits earned up to that point, and were later rehired. To account for the past distributions when calculating respondents' current benefits, the Plan Administrator initially interpreted the Plan to call for an approach that has come to be known as the "phantom account" method. Respondents challenged that method in an action under the Employee Retirement Income Security Act of 1974 (ERISA). The District Court granted summary judgment for the Plan, but the Second Circuit vacated and remanded. It held that the Plan Administrator's interpretation was unreasonable and that respondents had not received adequate notice that the phantom account method would be used to calculate their benefits. On remand, the Plan Administrator proposed a new interpretation of the Plan that accounted for the time value of the money respondents had previously received. The District Court declined to apply a deferential standard to this interpretation, and adopted instead an approach proposed by respondents that did not account for the time value of money. Affirming in relevant part, the Second Circuit held that the District Court was correct not to apply a deferential standard on remand, and that the District Court's decision on the merits was not an abuse of discretion.

  Held: The District Court should have applied a deferential standard of review to the Plan Administrator's interpretation of the Plan on remand. Pp. 4-15.

  (a) This Court addressed the standard for reviewing the decisions of ERISA plan administrators in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80. Firestone looked to "principles of trust law" for guidance. Id., at 111, 109 S. Ct. 948, 103 L. Ed. 2d 80. Under trust law, the appropriate standard depends on the language of the instrument creating the trust. When a trust instrument gives the

trustee "power to construe disputed or doubtful terms, . . . the trustee's interpretation will not be disturbed if reasonable." Ibid. Under Firestone and the Plan's terms, the Plan Administrator here would normally be entitled to deference when interpreting the Plan. The Court of Appeals, however, crafted an exception to Firestone deference, holding that a court need not apply a deferential standard when a plan administrator's previous construction of the same plan terms was found to violate ERISA. Pp. 4-5.

(b) The Second Circuit's "one-strike-and-you're-out" approach has no basis in Firestone, which set out a broad standard of deference with no suggestion that it was susceptible to ad hoc exceptions. This Court held in Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 128 S. Ct. 2343, 171 L. Ed. 2d 299, that a plan administrator operating under a systemic conflict of interest is nonetheless still entitled to deferential review. In light of that ruling, it is difficult to see why a single honest mistake should require a different result. Nor is the Second Circuit's decision supported by the considerations on which Firestone and Glenn were based -- the plan's terms, trust law principles, and ERISA's purposes. The Plan grants the Plan Administrator general interpretive authority without suggesting that the authority is limited to first efforts to construe the Plan. An exception to Firestone deference is also not required by trust law principles, which serve as a guide under ERISA but do not "tell the entire story." Varity Corp. v. Howe, 516 U.S. 489, 497, 116 S. Ct. 1065, 134 L. Ed. 2d 130. Trust law does not resolve the specific question whether courts may strip a plan administrator of Firestone deference after one good-faith mistake, but the guiding principles underlying ERISA do.

ERISA represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." Aetna Health Inc. v. Davila, 542 U.S. 200, 215, 124 S. Ct. 2488, 159 L. Ed. 2d 312. Firestone deference preserves this "careful balancing" and protects the statute's interests in efficiency, predictability, and uniformity. Respondents claim that deference is less important once a plan administrator's interpretation has been found unreasonable, but the interests in efficiency, predictability, and uniformity do not suddenly disappear simply because of a single honest mistake, as illustrated by this case. When the District Court declined to apply a deferential standard of review on remand, the court made the case more complicated than necessary. Respondents' approach threatens to interject additional issues into ERISA litigation that "would create further complexity, adding time and expense to a process that may already be too costly for many [seeking] redress." Glenn, *supra*, at ___, 128 S. Ct. 2343, 171 L. Ed. 2d 299. This case also demonstrates the harm to predictability and uniformity that would result from stripping a plan administrator of Firestone deference. The District Court's interpretation does not account for the time value of money, but respondents' own actuarial expert testified that fairness required recognizing that principle. Respondents do not dispute that the District Court's approach would place them in a better position than employees who never left the company. If other courts construed the Plan to account for the time value of money, moreover, Xerox could be placed in an impossible situation in which the Plan is subject to different interpretations and obligations in different States. Pp. 5-13.

(c) Respondents claim that plan administrators will adopt unreasonable interpretations of their plans seriatim, receiving deference each time, thereby undermining the prompt resolution of benefit disputes, driving up litigation costs, and discouraging employees from challenging administrators' decisions. These concerns are overblown because there is no reason to think that deference would be required in the extreme circumstances that respondents foresee. Multiple erroneous interpretations of the same plan provision, even if issued in good faith, could support a finding that a plan administrator is too incompetent to exercise his discretion fairly, cutting short the rounds of costly litigation that respondents fear. Applying a deferential standard of review also does not mean that the plan administrator will always prevail on the merits. It means only that the plan administrator's interpretation "will not be disturbed if reasonable." Firestone, 489 U.S., at 111, 109 S. Ct. 948, 103 L. Ed. 2d 80. The lower courts should have applied the standard established in Firestone and Glenn. Pp. 13-14.

535 F.3d 111, reversed and remanded.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Conkright_v._Frommert&printable=yes

Hardt v. Reliance Standard Life Insurance Company
(Attorneys' Fees – ERISA)

- 2010 U.S. LEXIS 4164 (May 24, 2010).
- 336 Fed. Appx. 332 (4th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 538 (Jan. 15, 2010), Docket No. 09-448.
- Questions Presented:
    - Whether the Fourth Circuit erred in holding that ERISA § 502(g)(1) provides a district court discretion to award reasonable attorneys' fees only to a prevailing party.
    - Whether a party is entitled to attorneys' fees pursuant to § 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially-ordered remand requiring a redetermination of entitlement to benefits, and subsequently receives the benefits sought on remand.

- Syllabus

After medical problems forced petitioner Hardt to stop working, she filed for long-term disability benefits under her employer's long-term disability plan. Upon exhausting her administrative remedies, Hardt sued respondent Reliance, her employer's disability insurance carrier, alleging that it had violated the Employee Retirement Income Security Act of 1974 (ERISA) by wrongfully denying her benefits claim. The District Court denied Reliance summary judgment, finding that because the carrier had acted on incomplete medical information, the benefits denial was not based on substantial evidence. Though also denying Hardt summary judgment, the court stated that it found "compelling evidence" in the record that she was totally disabled and that it was inclined

to rule in her favor, but concluded that it would be unwise to do so without giving Reliance the chance to address the deficiencies in its approach. The court therefore remanded to Reliance, giving it 30 days to consider all the evidence and to act on Hardt's application, or else the court would enter judgment in Hardt's favor. Reliance did as instructed and awarded Hardt benefits. Hardt then filed a motion under 29 U.S.C. § 1132(g)(1), a fee-shifting statute that applies in most ERISA lawsuits and provides that "the court in its discretion may allow a reasonable attorney's fee and costs . . . to either party." Granting the motion, the District Court applied the Circuit's framework governing attorney's fee requests in ERISA cases, concluding, inter alia, that Hardt had attained the requisite "prevailing party" status. The Fourth Circuit vacated the fees award, holding that Hardt had failed to establish that she qualified as a "prevailing party" under the rule set forth in Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855, that a fee claimant is a "prevailing party" only if he has obtained an "enforceable judgmen[t] on the merits " or a "court-ordered consent decre[e]." The court reasoned that because the remand order did not require Reliance to award Hardt benefits, it did not constitute an enforceable judgment on the merits.

Held:

1. A fee claimant need not be a "prevailing party" to be eligible for an attorney's fees award under § 1132(g)(1). Interpreting the section to require a party to attain that status is contrary to § 1132(g)(1)'s plain text. The words "prevailing party" do not appear in the provision. Nor does anything else in § 1132(g)(1)'s text purport to limit the availability of attorney's fees to a "prevailing party." Instead, § 1132(g)(1) expressly grants district courts "discretion" to award attorney's fees "to either party." That language contrasts sharply with § 1132(g)(2), which governs the availability of attorney's fees in ERISA actions to recover delinquent employer contributions to a multiemployer plan. In such cases, only plaintiffs who obtain "a judgment in favor of the plan" may seek attorney's fees. § 1132(g)(2)(D). The contrast between these two paragraphs makes clear that Congress knows how to impose express limits on the availability of attorney's fees in ERISA cases. Because Congress failed to include in § 1132(g)(1) an express "prevailing party" requirement, the Fourth Circuit's decision adding that term of art to the statute more closely resembles "invent[ing] a statute rather than interpret[ing] one." Pasquantino v. United States, 544 U.S. 349, 359, 125 S. Ct. 1766, 161 L. Ed. 2d 619. Pp. 8-9.

2. A court may award fees and costs under § 1132(g)(1), as long as the fee claimant has achieved "some degree of success on the merits." Ruckelshaus v. Sierra Club, 463 U.S. 680, 694, 103 S. Ct. 3274, 77 L. Ed. 2d 938. The bedrock principle known as the American Rule provides the relevant point of reference: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise. *E.g.*, id., at 683-686, 103 S. Ct. 3274, 77 L. Ed. 2d 938. This Court's "prevailing party" precedents do not govern here because that term of art does not appear in § 1132(g)(1). Instead, the Court interprets § 1132(g)(1) in light of its precedents addressing statutes that deviate from the American Rule by authorizing attorney's fees based on other criteria. Ruckelshaus, which considered a statute authorizing a fees award if the court "determines

that such an award is appropriate," 42 U.S.C. § 7607(f), is the principal case in that category. Applying that decision's interpretive approach to 29 U.S.C. § 1132(g)(1), the Court first looks to "the language of the section," 463 U.S., at 682, 103 S. Ct. 3274, 77 L. Ed. 2d 938, which unambiguously allows a court to award attorney's fees "in its discretion . . . to either party." Ruckelshaus also lays down the proper markers to guide a court in exercising that discretion. Because here, as in the statute in Ruckelshaus, Congress failed to indicate clearly that it "meant to abandon historic fee-shifting principles and intuitive notions of fairness," 463 U.S., at 686, 103 S. Ct. 3274, 77 L. Ed. 2d 938, a fees claimant must show "some degree of success on the merits" before a court may award attorney's fees under § 1132(g)(1), *see* id., at 694, 103 S. Ct. 3274, 77 L. Ed. 2d 938. Hardt has satisfied that standard. Though she failed to win summary judgment on her benefits claim, the District Court nevertheless found compelling evidence that she is totally disabled and stated that it was inclined to rule in her favor. She also obtained the remand order, after which Reliance conducted the court-ordered review, reversed its decision, and awarded the benefits she sought. Accordingly, the District Court properly exercised its discretion to award Hardt attorney's fees. Pp. 9-13.

336 Fed. Appx. 332, reversed and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Hardt_v._Reliance_Standard_Life_Insurance_Co

Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen
(Labor Law – National Railroad Adjustment Board)

- 130 S. Ct. 584, 175 L. Ed. 2d 428, 2009 U.S. LEXIS 8943 (Dec. 8, 2009).
- 522 F.3d 746 (7th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 1385 (Feb. 23, 2009), Docket No. 08-604.
- Question Presented:
    - Whether the Railway Labor Act authorized the Seventh Circuit Court of Appeals to set aside, on due process grounds, awards for alleged violations by the National Railroad Adjustment Board.
- In a unanimous opinion written by Justice Ginsburg, the Court declined to reach that question and instead affirmed the decision below on the ground that the NRAB's refusal to adjudicate the union's claims on the basis that it lacked jurisdiction violated the Railway Labor Act.

- Syllabus

The Railway Labor Act (RLA or Act) was enacted to promote peaceful and efficient resolution of labor disputes. As amended, the Act mandates arbitration of "minor disputes" before panels composed of two representatives of labor and two of industry, with a neutral referee as tiebreaker. Union Pacific R. Co. v. Price, 360 U.S. 601, 610-613, 79 S. Ct. 1351, 3 L. Ed. 2d 1460. To supply arbitrators, Congress established the

National Railroad Adjustment Board (NRAB or Board), a board of 34 private persons representing labor and industry in equal numbers. 45 U.S.C. § 153 First (a). Before resorting to arbitration, employees and carriers must exhaust the grievance procedures in their collective-bargaining agreement (hereinafter CBA), *see* § 153 First (i), a stage known as "on-property" proceedings. As a final prearbitration step, the parties must attempt settlement "in conference" between representatives of the carrier and the grievant-employee. § 152 Second, Sixth. The RLA contains instructions concerning the place and time of conferences, but does not "supersede the provisions of any agreement (as to conferences) . . . between the parties," § 152 Sixth; in common practice the conference may be as informal as a telephone conversation. If the parties fail to achieve resolution, either may refer the matter to the NRAB. § 153 First (i). Submissions to the Board must include "a full statement of the facts and all supporting data bearing upon the disputes." Ibid. Parties may seek court review of an NRAB panel order on one or more stated grounds: "failure . . . to comply with the requirements of [the RLA], . . . failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or . . . fraud or corruption by a member of the division making the order." § 153 First (q). Courts of Appeals have divided on whether, in addition to the statutory grounds for judicial review stated in § 153 First (q), courts may review NRAB proceedings for due process violations.

After petitioner Union Pacific Railroad Co. (hereinafter Carrier) charged five of its employees with disciplinary violations, their union (hereinafter Union) initiated grievance proceedings pursuant to the CBA. The Union asserts that the parties conferenced all five disputes and the Carrier concedes that they conferenced at least two. Dissatisfied with the outcome of the on-property proceedings, the Union sought arbitration before the NRAB's First Division. Both parties filed submissions in the five cases, but neither mentioned conferencing as a disputed matter. Yet, in each case, both parties necessarily knew whether the Union and the Carrier had conferred; and the Board's governing rule, published in Circular One, which prescribes Board procedures, instructs carriers and employees to "set forth all relevant, argumentative facts," 29 CFR § 301.5(d), (e). Just prior to the hearing, one of the arbitration panel's industry representatives objected, sua sponte, that the on-property record included no proof of conferencing. The Carrier thereafter embraced that objection. The referee allowed the Union to submit evidence of conferencing. The Union did so, but it maintained that the proof-of-conferencing issue was untimely raised, indeed forfeited, as the Carrier had not objected before the date set for argument. The panel, in five identical decisions, dismissed the petitions for want of jurisdiction. The record could not be supplemented to meet the no-proof-of-conferencing objection, the panel reasoned, for as an appellate tribunal, the panel was not empowered to consider de novo evidence and arguments. The Union sought review in the Federal District Court, which affirmed the Board's decision. On appeal, the Seventh Circuit observed that the "single question" at issue was whether written documentation of the conference in the on-property record was a necessary prerequisite to NRAB arbitration, and determined that there was no such prerequisite in the statute or rules. But instead of resting its decision on the Union's primary, statute-based argument -- that the panel erred in ruling that it lacked jurisdiction over the cases -- it reversed on the ground that the NRAB's proceedings were incompatible with due process.

Held:

1. The Seventh Circuit erred in resolving the Union's appeal under a constitutional, rather than a statutory, headline. This Court granted certiorari to address whether NRAB orders may be set aside for failure to comply with due process notwithstanding § 153 First (q)'s limited grounds for review. But so long as a respondent does not "seek to modify the judgment below," true here, the respondent may "rely upon any matter appearing in the record in support of the judgment." Blum v. Bacon, 457 U.S. 132, 137, n. 5, 102 S. Ct. 2355, 72 L. Ed. 2d 728. The Seventh Circuit understood that the Union had pressed "statutory and constitutional" arguments, but observed that both arguments homed in on a "single question": is written documentation of the conference in the on-property record a necessary prerequisite to NRAB arbitration? Answering this "single question" in the negative, the Seventh Circuit effectively resolved the Union's core complaint. Because nothing in the Act elevates to jurisdictional status the obligation to conference minor disputes or to prove conferencing, a negative answer to the "single question" leaves no doubt about the Union's entitlement, in accord with § 153 First (q), to vacation of the Board's orders. Given this statutory ground for relief, there is no due process issue alive in this case, and no warrant to answer a question that may be consequential in another case. Nevertheless, the grant of certiorari here enables this Court to reduce confusion, clouding court as well as Board decisions, over matters properly typed "jurisdictional." Pp. 10-12.

2. Congress authorized the Board to prescribe rules for presenting and processing claims, § 153 First (v), but Congress alone controls the Board's jurisdiction. By refusing to adjudicate the instant cases on the false premise that it lacked "jurisdiction" to hear them, the NRAB panel failed "to conform, or confine itself, to matters [Congress placed] within the scope of [NRAB] jurisdiction," § 153 First (q). Pp. 12-17.

(a) Not all mandatory "prescriptions, however emphatic, 'are . . . properly typed "jurisdictional."'" Arbaugh v. Y & H Corp., 546 U.S. 500, 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097. Subject-matter jurisdiction properly comprehended refers to a tribunal's "'power to hear a case,'" and "'can never be forfeited or waived.'" Id., at 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097. In contrast, a "claim-processing rule" does not reduce a tribunal's adjudicatory domain and is ordinarily "forfeited if the party asserting the rule waits too long to raise the point." Kontrick v. Ryan, 540 U.S. 443, 456, 124 S. Ct. 906, 157 L. Ed. 2d 867. For example, this Court has held nonjurisdictional and forfeitable the provision in Title VII of the Civil Rights Act of 1964 requiring complainants to file a timely discrimination charge with the Equal Employment Opportunity Commission (EEOC) before proceeding to court, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234. In contrast, the Court has reaffirmed the jurisdictional character of 28 U.S.C. § 2107(a)'s time limitation for filing a notice of appeal. Bowles v. Russell, 551 U.S. 205, 209-211, 127 S. Ct. 2360, 168 L. Ed. 2d 96. Here, the requirement that parties to minor disputes, as a last chance prearbitration, attempt settlement "in conference," is imposed on carriers and grievants alike, but satisfaction of that obligation does not condition the Board's adjudicatory authority,

which extends to "all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ,'" Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 240, 70 S. Ct. 577, 94 L. Ed. 795 (quoting § 153 First (i)). When a CBA's grievance procedure has not been followed, resort to the Board would ordinarily be objectionable as premature, but the conference requirement is independent of the CBA process. Rooted in § 152, the RLA's "[g]eneral duties" section, and not moored to the NRAB's "[e]stablishment[,] . . . powers[,] and duties" set out in § 153 First, conferencing is often informal in practice, and is no more "jurisdictional" than is the presuit resort to the EEOC held nonjurisdictional and forfeitable in Zipes. And if the conference requirement is not "jurisdictional," then failure initially to submit proof of conferencing cannot be of that genre. And although the Carrier alleges that NRAB decisions support characterizing conferencing as jurisdictional, if the NRAB lacks authority to define its panels' jurisdiction, surely the panels themselves lack that authority. Furthermore, NRAB panels have variously addressed the matter. Pp. 12-15.

(b) Neither the RLA nor Circular One could plausibly be read to require, as a prerequisite to the NRAB's exercise of jurisdiction, submission of proof of conferencing. Instructions on party submissions are claim-processing, not jurisdictional, rules. The Board itself has recognized that conferencing may not be a "question in dispute," and when that is so, proof thereof need not accompany party submissions. It makes sense to exclude at the arbitration stage newly presented "data" supporting the employee's grievance, 29 CFR § 301.5(d) -- evidence the carrier had no opportunity to consider prearbitration. But conferencing is not a fact bearing on the merits of a grievance. Moreover, the RLA respects the parties' right to order for themselves the conference procedures they will follow. *See* 45 U.S.C. § 152 Sixth. Pp. 16-17.

522 F.3d 746, affirmed.

- For the Decision, Briefs, and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Union_Pacific_Railroad_Company_v._Brotherhood_of_Locomotive_Engineers_and_Trainmen_General_Committee_of_Adjustment%2C_Central_Region

Mohawk Industries v. Carpenter
(Civil Procedure – Attorney/Client Privilege – Appealibility of Interim Order)

- 130 S. Ct. 599, 175 L. Ed. 2d 458, 2009 U.S. LEXIS 8942 (Dec. 8, 2009).
- 541 F.3d 1048, 2008 U.S. App. LEXIS 18338 (11th Cir. Aug. 26, 2008), *cert. granted*, 129 S. Ct. 1041, 173 L. Ed. 2d 468, 2009 U.S. LEXIS 932 (Jan. 26, 2009), Docket No. 08-768.
- A former employee sued his former employer alleging wrongful termination and other claims. The plaintiff sought discovery relating to the employer's decision to terminate him, including the communications the employer had with its attorney in connection with the termination. The employer objected to the discovery request on the grounds of

attorney-client privilege, but the district court held that the employer had waived the privilege by producing the disputed attorney-client communications as a part of its defense in another lawsuit as proof that the employer's actions were legally proper.

- The Court did not address the substance of whether the district court's ruling was correct and instead affirmed the Eleventh Circuit's decision on the grounds that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine.
- Question Presented:
    - Whether the employer can immediately appeal a trial court's privilege / discovery ruling, or whether the employer must wait for a final judgment from the trial court before appealing.

- Syllabus

When respondent Norman Carpenter informed the human resources department of his employer, petitioner Mohawk Industries, Inc., that the company employed undocumented immigrants, he was unaware that Mohawk stood accused in a pending class action -- the Williams case -- of conspiring to drive down its legal employees' wages by knowingly hiring undocumented workers. Mohawk directed Carpenter to meet with the company's retained counsel in Williams, who allegedly pressured Carpenter to recant his statements. When he refused, Carpenter maintains in this unlawful termination suit, Mohawk fired him under false pretenses. In granting Carpenter's motion to compel Mohawk to produce information concerning his meeting with retained counsel and the company's termination decision, the District Court agreed with Mohawk that the requested information was protected by the attorney-client privilege, but concluded that Mohawk had implicitly waived the privilege through its disclosures in the Williams case. The court declined to certify its order for interlocutory appeal, and the Eleventh Circuit dismissed Mohawk's appeal for lack of jurisdiction, holding, inter alia, that the District Court's ruling did not qualify as an immediately appealable collateral order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528, because a discovery order implicating the attorney-client privilege can be adequately reviewed on appeal from final judgment.

Held: Disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine. Pp. 4-13.

(a) Courts of Appeals "have jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. "Final decisions" encompass not only judgments that "terminate an action," but also a "small class" of prejudgment orders that are "collateral to" an action's merits and "too important" to be denied immediate review, Cohen, *supra*, at 545-546, 69 S. Ct. 1221, 93 L. Ed. 1528. "That small category includes only decisions that are . . . effectively unreviewable on appeal from the final judgment in the underlying action." Swint v. Chambers County Comm'n, 514 U.S. 35, 42, 115 S. Ct. 1203, 131 L. Ed. 2d 60. The decisive consideration in determining whether a right is effectively unreviewable is whether delaying review until the entry of final judgment "would imperil a substantial public interest" or "some particular value of a high order." Will v. Hallock,

546 U.S. 345, 352-353, 126 S. Ct. 952, 163 L. Ed. 2d 836. In making this determination, the Court does not engage in an "individualized jurisdictional inquiry," Coopers & Lybrand v. Livesay, 437 U.S. 463, 473, 98 S. Ct. 2454, 57 L. Ed. 2d 351, but focuses on "the entire category to which a claim belongs," Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868, 114 S. Ct. 1992, 128 L. Ed. 2d 842. If the class of claims, taken as a whole, can be adequately vindicated by other means, "the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted," does not provide a basis for § 1291 jurisdiction. Ibid. Pp. 4-6.

(b) Effective appellate review of disclosure orders adverse to the attorney-client privilege can be had by means other than collateral order appeal, including postjudgment review. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence. Moreover, litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of immediate review apart from collateral order appeal. First, a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal involving "a controlling question of law" the prompt resolution of which "may materially advance the ultimate termination of the litigation." § 1292(b). Second, in extraordinary circumstances where a disclosure order works a manifest injustice, a party may petition the court of appeals for a writ of mandamus. Cheney v. United States Dist. Court for D. C., 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459. Another option is for a party to defy a disclosure order and incur court-imposed sanctions that, e.g., "direc[t] that the matters embraced in the order or other designated facts be taken as established," "prohibi[t] the disobedient party from supporting or opposing designated claims or defenses," or "strik[e] pleadings in whole or in part." Fed. Rule Civ. Proc. 37(b)(2). Alternatively, when the circumstances warrant, a district court may issue a contempt order against a noncomplying party, who can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment. *See*, *e.g.*, Church of Scientology of Cal. v. United States, 506 U.S. 9, 18, n. 11, 113 S. Ct. 447, 121 L. Ed. 2d 313. These established appellate review mechanisms not only provide assurances to clients and counsel about the security of their confidential communications; they also go a long way toward addressing Mohawk's concern that, absent collateral order appeals of adverse attorney-client privilege rulings, some litigants may experience severe hardship. The limited benefits of applying "the blunt, categorical instrument of § 1291 collateral order appeal" to privilege-related disclosure orders simply cannot justify the likely institutional costs, Digital Equipment, supra, at 883, 114 S. Ct. 1992, 128 L. Ed. 2d 842, including unduly delaying the resolution of district court litigation and needlessly burdening the courts of appeals, *cf.* Cunningham v. Hamilton County, 527 U.S. 198, 209, 119 S. Ct. 1915, 144 L. Ed. 2d 184. Pp. 6-12.

(c) The admonition that the class of collaterally appealable orders must remain "narrow and selective in its membership," Will, *supra*, at 350, 126 S. Ct. 952, 163 L. Ed. 2d 836, has acquired special force in recent years with the enactment of legislation designating rulemaking, "not expansion by court decision," as the preferred means for determining

whether and when prejudgment orders should be immediately appealable, Swint, *supra*, at 48, 115 S. Ct. 1203, 131 L. Ed. 2d 60. Any further avenue for immediate appeal of adverse attorney-client privilege rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides. Pp. 12-13.

541 F.3d 1048, affirmed.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Mohawk_Industries%2C_Inc._v._Carpenter.

Jones v. Harris Associates
(Executive Compensation)

- 130 S. Ct. 1418, 176 L. Ed. 2d 265, 2010 U.S. LEXIS 2926 (Mar 30, 2010).
- 527 F.3d 627 (7th Cir. 2008), *reh'g denied*, 537 F.3d 728 (7th Cir. 2008) (Posner, J. dissenting), *cert. granted*, 2009 U.S. LEXIS 1837 (Mar. 9, 2009), Docket No. 08- 586.
- Question Presented:
    - Whether the Seventh Circuit contravened the Investment Company Act in holding that a shareholder's claim that the fund's investment adviser charged an excessive fee is not cognizable under Section 36(b) of the Investment Company Act, unless the shareholder can show that the adviser misled the fund's directors who approved the fee.

- Syllabus

Petitioners, shareholders in mutual funds managed by respondent investment adviser, filed this suit alleging that respondent violated § 36(b)(1) of the Investment Company Act of 1940, which imposes a "fiduciary duty [on investment advisers] with respect to the receipt of compensation for services," 15 U.S.C. § 80a-35(b). Granting respondent summary judgment, the District Court concluded that petitioners had not raised a triable issue of fact under the applicable standard set forth in Gartenberg v. Merrill Lynch Asset Management, Inc., 694 F.2d 923, 928 (CA2): "[T]he test is essentially whether the fee schedule represents a charge within the range of what would have been negotiated at arm's-length in light of all of the surrounding circumstances . . . . To be guilty of a violation of § 36(b), . . . the adviser must charge a fee that is so disproportionately large it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." Rejecting the Gartenberg standard, the Seventh Circuit panel affirmed based on different reasoning.

Held: Based on § 36(b)'s terms and the role that a shareholder action for breach of the investment adviser's fiduciary duty plays in the Act's overall structure, Gartenberg applied the correct standard. Pp. 7-17.

(a) A consensus has developed regarding the standard Gartenberg set forth over 25 years ago: The standard has been adopted by other federal courts, and the Securities and

Exchange Commission's regulations have recognized, and formalized, Gartenberg-like factors. Both petitioners and respondents generally endorse the Gartenberg approach but disagree in some respects about its meaning. Pp. 7-9.

(b) Section 36(b)'s "fiduciary duty" phrase finds its meaning in Pepper v. Litton, 308 U.S. 295, 306-307, 60 S. Ct. 238, 84 L. Ed. 281, where the Court discussed the concept in the analogous bankruptcy context: "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." Gartenberg's approach fully incorporates this understanding, insisting that all relevant circumstances be taken into account and using the range of fees that might result from arm's-length bargaining as the benchmark for reviewing challenged fees. Pp. 9-11.

(c) Gartenberg's approach also reflects § 36(b)'s place in the statutory scheme and, in particular, its relationship to the other protections the Act affords investors. Under the Act, scrutiny of investment adviser compensation by a fully informed mutual fund board, *see* Burks v. Lasker, 441 U.S. 471, 482, 99 S. Ct. 1831, 60 L. Ed. 2d 404, and shareholder suits under § 36(b) are mutually reinforcing but independent mechanisms for controlling adviser conflicts of interest, *see* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 541, 104 S. Ct. 831, 78 L. Ed. 2d 645. In recognition of the disinterested directors' role, the Act instructs courts to give board approval of an adviser's compensation "such consideration . . . as is deemed appropriate under all the circumstances." § 80a-35(b)(1). It may be inferred from this formulation that (1) a measure of deference to a board's judgment may be appropriate in some instances, and (2) the appropriate measure of deference varies depending on the circumstances. Gartenberg heeds these precepts. *See* 694 F.2d at 930. Pp. 11-12.

(d) The Court resolves the parties' disagreements on several important questions. First, since the Act requires consideration of all relevant factors, § 80a-35(b)(2), courts must give comparisons between the fees an investment adviser charges a captive mutual fund and the fees it charges its independent clients the weight they merit in light of the similarities and differences between the services the clients in question require. In doing so, the Court must be wary of inapt comparisons based on significant differences between those services and must be mindful that the Act does not necessarily ensure fee parity between the two types of clients. However, courts should not rely too heavily on comparisons with fees charged mutual funds by other advisers, which may not result from arm's-length negotiations. Finally, a court's evaluation of an investment adviser's fiduciary duty must take into account both procedure and substance. Where disinterested directors consider all of the relevant factors, their decision to approve a particular fee agreement is entitled to considerable weight, even if the court might weigh the factors differently. *Cf.* Lasker, 441 U.S., at 486, 99 S. Ct. 1831, 60 L. Ed. 2d 404. In contrast, where the board's process was deficient or the adviser withheld important information, the court must take a more rigorous look at the outcome. Id., at 484, 99 S. Ct. 1831, 60 L. Ed. 2d 404. Gartenberg's "so disproportionately large" standard, 694 F.2d at 928, reflects Congress' choice to "rely largely upon [independent] 'watchdogs' to protect shareholders interests," Lasker, *supra*, at 482, 99 S. Ct. 1831, 60 L. Ed. 2d 404. Pp. 12-16.

(e) The Seventh Circuit erred in focusing on disclosure by investment advisers rather than the Gartenberg standard, which the panel rejected. That standard may lack sharp analytical clarity, but it accurately reflects the compromise embodied in § 36(b) as to the appropriate method of testing investment adviser compensation, and it has provided a workable standard for nearly three decades. Pp. 16-17.

527 F.3d 627, vacated and remanded.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Jones%2C_et_al.%2C_v._Harris_Associates

City of Ontario v. Quon
(Privacy)

- 2010 U.S. LEXIS 4972 (June 17, 2010).
- 529 F.3d 892 (9th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 9058 (Dec. 14, 2009), Docket No. 08-1332.
- Questions Presented:
    - Whether a SWAT team member has a reasonable expectation privacy in text messages transmitted on his SWAT pager, where the municipal police department had an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.
    - Whether individuals who sent text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

- Syllabus

Petitioner Ontario (hereinafter City) acquired alphanumeric pagers able to send and receive text messages. Its contract with its service provider, Arch Wireless, provided for a monthly limit on the number of characters each pager could send or receive, and specified that usage exceeding that number would result in an additional fee. The City issued the pagers to respondent Quon and other officers in its police department (OPD), also a petitioner here. When Quon and others exceeded their monthly character limits for several months running, petitioner Scharf, OPD's chief, sought to determine whether the existing limit was too low, *i.e.,* whether the officers had to pay fees for sending work-related messages or, conversely, whether the overages were for personal messages. After Arch Wireless provided transcripts of Quon's and another employee's August and September 2002 text messages, it was discovered that many of Quon's messages were not work related, and some were sexually explicit. Scharf referred the matter to OPD's internal affairs division. The investigating officer used Quon's work schedule to redact from his transcript any messages he sent while off duty, but the transcript showed that few of his on-duty messages related to police business. Quon was disciplined for violating OPD rules.

He and the other respondents -- each of whom had exchanged text messages with Quon during August and September -- filed this suit, alleging, *inter alia*, that petitioners violated their Fourth Amendment rights and the federal Stored Communications Act (SCA) by obtaining and reviewing the transcript of Quon's pager messages, and that Arch Wireless violated the SCA by giving the City the transcript. The District Court denied respondents summary judgment on the constitutional claims, relying on the plurality opinion in O'Connor v. Ortega, 480 U.S. 709, to determine that Quon had a reasonable expectation of privacy in the content of his messages. Whether the audit was nonetheless reasonable, the court concluded, turned on whether Scharf used it for the improper purpose of determining if Quon was using his pager to waste time, or for the legitimate purpose of determining the efficacy of existing character limits to ensure that officers were not paying hidden work-related costs. After the jury concluded that Scharf's intent was legitimate, the court granted petitioners summary judgment on the ground they did not violate the Fourth Amendment. The Ninth Circuit reversed. Although it agreed that Quon had a reasonable expectation of privacy in his text messages, the appeals court concluded that the search was not reasonable even though it was conducted on a legitimate, work-related rationale. The opinion pointed to a host of means less intrusive than the audit that Scharf could have used. The court further concluded that Arch Wireless had violated the SCA by giving the City the transcript.

Held: Because the search of Quon's text messages was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the Ninth Circuit erred by concluding otherwise. Pp. 7-17.

(a) The Amendment guarantees a person's privacy, dignity, and security against arbitrary and invasive governmental acts, without regard to whether the government actor is investigating crime or performing another function. Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 613-614. It applies as well when the government acts in its capacity as an employer. Treasury Employees v. Von Raab, 489 U.S. 656, 665. The Members of the O'Connor Court disagreed on the proper analytical framework for Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because "some [government] offices may be so open . . . that no expectation of privacy is reasonable," a court must consider "[t]he operational realities of the workplace" to determine if an employee's constitutional rights are implicated. 480 U.S., at 718. Second, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." Id., at 725-726. JUSTICE SCALIA, concurring in the judgment, would have dispensed with the "operational realities" inquiry and concluded "that the offices of government employees . . . are [generally] covered by Fourth Amendment protections," id., at 731, but he would also have held "that government searches to retrieve work-related materials or to investigate violations of workplace rules -- searches of the sort that are regarded as reasonable and normal in the private-employer context -- do not violate the . . . Amendment," id., at 732. Pp. 7-9.

(b) Even assuming that Quon had a reasonable expectation of privacy in his text messages, the search was reasonable under both O'Connor approaches, the plurality's and JUSTICE SCALIA's. Pp. 9-17.

(1) The Court does not resolve the parties' disagreement over Quon's privacy expectation. Prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations of employees using employer-provided communication devices. Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve. Because it is therefore preferable to dispose of this case on narrower grounds, the Court assumes, *arguendo,* that: (1) Quon had a reasonable privacy expectation; (2) petitioners' review of the transcript constituted a Fourth Amendment search; and (3) the principles applicable to a government employer's search of an employee's physical office apply as well in the electronic sphere. Pp. 9-12.

(2) Petitioners' warrantless review of Quon's pager transcript was reasonable under the O'Connor plurality's approach because it was motivated by a legitimate work-related purpose, and because it was not excessive in scope. See 480 U.S., at 726. There were "reasonable grounds for [finding it] necessary for a noninvestigatory work-related purpose," ibid., in that Chief Scharf had ordered the audit to determine whether the City's contractual character limit was sufficient to meet the City's needs. It was also "reasonably related to the objectives of the search," ibid., because both the City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or, on the other hand, that the City was not paying for extensive personal communications. Reviewing the transcripts was an efficient and expedient way to determine whether either of these factors caused Quon's overages. And the review was also not "excessively intrusive." Ibid. Although Quon had exceeded his monthly allotment a number of times, OPD requested transcripts for only August and September 2002 in order to obtain a large enough sample to decide the character limits' efficaciousness, and all the messages that Quon sent while off duty were redacted. And from OPD's perspective, the fact that Quon likely had only a limited privacy expectation lessened the risk that the review would intrude on highly private details of Quon's life. Similarly, because the City had a legitimate reason for the search and it was not excessively intrusive in light of that justification, the search would be "regarded as reasonable and normal in the private-employer context" and thereby satisfy the approach of JUSTICE SCALIA's concurrence, id., at 732. Conversely, the Ninth Circuit's "least intrusive" means approach was inconsistent with controlling precedents. See, *e.g.,* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 663. Pp. 12-16.

(c) Whether the other respondents can have a reasonable expectation of privacy in their text messages to Quon need not be resolved. They argue that because the search was unreasonable as to Quon, it was also unreasonable as to them, but they make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as

to them. Given this litigating position and the Court's conclusion that the search was reasonable as to Quon, these other respondents cannot prevail. Pp. 16-17.

529 F.3d 892, reversed and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=City_of_Ontario_v._Quon

New Process Steel v. N.L.R.B.
(Labor Law – Quorum of NLRB)

- 2010 U.S. LEXIS 4973 (June 17, 2010).
- 564 F.3d 840 (7th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 7788 (Nov. 2, 2009), Docket No. 08-1457.
- Question Presented:
  - Whether the National Labor Relations Board has authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board"?
- On April 16, 2010, the parties were directed to file supplemental briefs addressing what effect, if any, President Obama's appointments to the Board might have on the case. These briefs were filed on April 26, 2010.

- Syllabus

The Taft-Hartley Act increased the size of the National Labor Relations Board (Board) from three members to five, see 29 U.S.C. § 153(a), and amended § 3(b) of the National Labor Relations Act to increase the Board's quorum requirement from two members to three and to allow the Board to delegate its authority to groups of at least three members, see § 153(b). In December 2007, the Board -- finding itself with only four members and expecting two more vacancies -- delegated, *inter alia,* its powers to a group of three members. On December 31, one group member's appointment expired, but the others proceeded to issue Board decisions for the next 27 months as a two-member quorum of a three-member group. Two of those decisions sustained unfair labor practice complaints against petitioner, which sought review, challenging the two-member Board's authority to issue orders. The Seventh Circuit ruled for the Government, concluding that the two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated its powers.

Held: Section 3(b) requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board. Pp. 4-14.

(a) The first sentence of § 3(b), the so-called delegation clause, authorizes the Board to delegate its powers only to a "group of three or more members." This clause is best read to require that the delegee group *maintain* a membership of three in order for the delegation to remain valid. First, that is the only way to harmonize and give meaningful

effect to all of § 3(b)'s provisions: (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group. This reading is consonant with the Board quorum requirement of three participating members "at all times," and it gives material effect to the delegation clause's three-member rule. It also permits the vacancy clause to operate to provide that vacancies do not impair the Board's ability to take action, so long as the quorum is satisfied. And it does not render inoperative the group quorum provision, which continues to authorize a properly constituted three-member delegee group to issue a decision with only two members participating when one is disqualified from a case. The Government's contrary reading allows two members to act as the Board *ad infinitum*, dramatically undercutting the Board quorum requirement's significance by allowing its permanent circumvention. It also diminishes the delegation clause's three-member requirement by permitting a *de facto* two-member delegation. By allowing the Board to include a third member in the group for only one minute before her term expires, this approach also gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board's full power be vested in no fewer than three members. Second, had Congress intended to authorize two members to act on an ongoing basis, it could have used straightforward language. The Court's interpretation is consistent with the Board's longstanding practice of reconstituting a delegee group when one group member's term expired. Pp. 4-9.

(b) The Government's several arguments against the Court's interpretation -- that the group quorum requirement and vacancy clause together permit two members of a three-member group to constitute a quorum even when there is no third member; that the vacancy clause establishes that a vacancy in the *group* has no effect; and that reading the statute to authorize the Board to act with only two members advances the congressional objective of Board efficiency -- are unconvincing. Pp. 9-14.

564 F.3d 840, reversed and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=New_Process_Steel_v._National_Labor_Relations_Board.

Non-Employment Cases Decided in the 2009-2010 Term

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.
(Arbitration)

- 2010 U.S. LEXIS 3672 (Apr. 27, 2010)
- 548 F.3d 85 (2d Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 4345 (June 15, 2009), Docket No. 08-1198.

- Questions Presented:
    - Whether imposing class arbitration on parties whose arbitration clauses are silent on the issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

- Syllabus:

  Petitioner shipping companies serve much of the world market for parcel tankers -- seagoing vessels with compartments that are separately chartered to customers, such as respondent (AnimalFeeds), who wish to ship liquids in small quantities. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party. The charter party that AnimalFeeds uses contains an arbitration clause. AnimalFeeds brought a class action antitrust suit against petitioners for price fixing, and that suit was consolidated with similar suits brought by other charterers, including one in which the Second Circuit subsequently reversed a lower court ruling that the charterers' claims were not subject to arbitration. As a consequence, the parties in this case agree that they must arbitrate their antitrust dispute. AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services. The parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, who would be bound by rules (Class Rules) developed by the American Arbitration Association following Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414. One Class Rule requires an arbitrator to determine whether an arbitration clause permits class arbitration. The parties selected an arbitration panel, designated New York City as the arbitration site, and stipulated that their arbitration clause was "silent" on the class arbitration issue. The panel determined that the arbitration clause allowed for class arbitration, but the District Court vacated the award. It concluded that the arbitrators' award was made in "manifest disregard" of the law, for had the arbitrators conducted a choice-of-law analysis, they would have applied the rule of federal maritime law requiring contracts to be interpreted in light of custom and usage. The Second Circuit reversed, holding that because petitioners had cited no authority applying a maritime rule of custom and usage against class arbitration, the arbitrators' decision was not in manifest disregard of maritime law; and that the arbitrators had not manifestly disregarded New York law, which had not established a rule against class arbitration.

  Held: Imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. Pp. 7-23.

  (a) The arbitration panel exceeded its powers by imposing its own policy choice instead of identifying and applying a rule of decision derived from the FAA or from maritime or New York law. Pp. 7-12.

  (1) An arbitration decision may be vacated under FAA § 10(a)(4) on the ground that the arbitrator exceeded his powers, "only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice,'" Major League Baseball Players Assn. v. Garvey, 532 U.S. 504, 509, 121 S. Ct.

1724, 149 L. Ed. 2d 740 (per curiam), for an arbitrator's task is to interpret and enforce a contract, not to make public policy. P. 7.

(2) The arbitration panel appears to have rested its decision on AnimalFeeds' public policy argument for permitting class arbitration under the charter party's arbitration clause. However, because the parties agreed that their agreement was "silent" on the class arbitration issue, the arbitrators' proper task was to identify the rule of law governing in that situation. Instead, the panel based its decision on post-Bazzle arbitral decisions without mentioning whether they were based on a rule derived from the FAA or on maritime or New York law. Rather than inquiring whether those bodies of law contained a "default rule" permitting an arbitration clause to allow class arbitration absent express consent, the panel proceeded as if it had a common-law court's authority to develop what it viewed as the best rule for such a situation. Finding no reason to depart from its perception of a post-Bazzle consensus among arbitrators that class arbitration was beneficial in numerous settings, the panel simply imposed its own conception of sound policy and permitted class arbitration. The panel's few references to intent do not show that the panel did anything other than impose its own policy preference. Thus, under FAA § 10(b), this Court must either "direct a rehearing by the arbitrators" or decide the question originally referred to the panel. Because there can be only one possible outcome on the facts here, there is no need to direct a rehearing by the arbitrators. Pp. 7-12.

(b) Bazzle did not control resolution of the question whether the instant charter party permits arbitration to proceed on behalf of this class. Pp. 12-17.

(1) No single rationale commanded a majority in Bazzle, which concerned contracts between a commercial lender and its customers that had an arbitration clause that did not expressly mention class arbitration. The plurality decided only the question whether the court or arbitrator should decide whether the contracts were "silent" on the class arbitration issue, concluding that it was the arbitrator. Justice Steven’s opinion bypassed that question, resting instead on his resolution of the questions of what standard the appropriate decisionmaker should apply in determining whether a contract allows class arbitration, and whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand. Pp. 12-15.

(2) The Bazzle opinions appear to have baffled these parties at their arbitration proceeding. For one thing, the parties appear to have believed that Bazzle requires an arbitrator, not a court, to decide whether a contract permits class arbitration, a question addressed only by the plurality. That question need not be revisited here because the parties expressly assigned that issue to the arbitration panel, and no party argues that this assignment was impermissible. Both the parties and the arbitration panel also seem to have misunderstood Bazzle as establishing the standard to be applied in deciding whether class arbitration is permitted. However, Bazzle left that question open. Pp. 15-17.

(c) Imposing class arbitration here is inconsistent with the FAA. Pp. 17-23.

(1) The FAA imposes rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion." Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488. The FAA requires that a "written provision in any maritime transaction" calling for the arbitration of a controversy arising out of such transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and permits a party to an arbitration agreement to petition a federal district court for an order directing that arbitration proceed "in the manner provided for in such agreement," § 4. Thus, this Court has said that the FAA's central purpose is to ensure that "private agreements to arbitrate are enforced according to their terms." Volt, 489 U.S., at 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488. Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must "give effect to the [parties'] contractual rights and expectations." Ibid. The parties' "intentions control," Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444, and the parties are "generally free to structure their arbitration agreements as they see fit," Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57, 115 S. Ct. 1212, 131 L. Ed. 2d 76. They may agree to limit the issues arbitrated and may agree on rules under which an arbitration will proceed. They may also specify with whom they choose to arbitrate their disputes. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 289, 122 S. Ct. 754, 151 L. Ed. 2d 755. Pp. 17-20.

(2) It follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Here, the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached "no agreement" on that issue. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent. It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491. But an implicit agreement to authorize class action arbitration is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate. The differences between simple bilateral and complex class action arbitration are too great for such a presumption. Pp. 20-23.

548 F.3d 85, reversed and remanded.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Stolt-Nielsen_S.A.%2C_et_al._v._AnimalFeeds_International_Corp.

Merck & Co., Inc. v. Reynolds
(Statute of Limitations – Securities Fraud)

- 2010 U.S. LEXIS 3671 (Apr. 27, 2010).

- 543 F.3d 150 (3rd Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 3913 (May 26, 2009), Docket No. 08-905.
- The issue before the Court in this case is whether under the "inquiry notice" standard applicable to federal securities fraud claims, the statute of limitations does not begin to run until an investor receives evidence of scienter.

- Syllabus:

  On November 6, 2003, respondent investors filed a securities fraud action under § 10(b) of the Securities Exchange Act of 1934, alleging that petitioner Merck & Co. knowingly misrepresented the heart-attack risks associated with its drug Vioxx. A securities fraud complaint is timely if filed no more than "2 years after the discovery of the facts constituting the violation" or 5 years after the violation. 28 U.S.C. § 1658(b). The District Court dismissed the complaint as untimely because the plaintiffs should have been alerted to the possibility of Merck's misrepresentations prior to November 2001, more than 2 years before the complaint was filed, and they had failed to undertake a reasonably diligent investigation at that time. Among the relevant circumstances were (1) a March 2000 "VIGOR" study comparing Vioxx with the painkiller naproxen and showing adverse cardiovascular results for Vioxx, which Merck suggested might be due to the absence of a benefit conferred by naproxen rather than a harm caused by Vioxx (the naproxen hypothesis); (2) an FDA warning letter, released to the public on September 21, 2001, saying that Merck's Vioxx marketing with regard to the cardiovascular results was "false, lacking in fair balance, or otherwise misleading"; and (3) pleadings filed in products-liability actions in September and October 2001 alleging that Merck had concealed information about Vioxx and intentionally downplayed its risks. The Third Circuit reversed, holding that the pre-November 2001 events did not suggest that Merck acted with scienter, an element of a § 10(b) violation, and consequently did not commence the running of the limitations period.

  Held:

  1. The limitations period in § 1658(b)(1) begins to run once the plaintiff actually discovered or a reasonably diligent plaintiff would have "discover[ed] the facts constituting the violation" -- whichever comes first. In the statute of limitations context, "discovery" is often used as a term of art in connection with the "discovery rule," a doctrine that delays accrual of a cause of action until the plaintiff has "discovered" it. The rule arose in fraud cases but has been applied by state and federal courts in other types of claims, and legislatures have sometimes codified this rule. When "discovery" is written directly into a statute, courts have typically interpreted the word to refer not only to actual discovery, but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know. Congress intended courts to interpret the word "discovery" in § 1658(b)(1) similarly. That statute was enacted after this Court determined a governing limitations period for private § 10(b) actions, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321, concluding that such actions "must be commenced within one year after the discovery of the facts constituting the violation . . . ," id., at 364, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (emphasis added).

Since then, Courts of Appeals deciding the matter have held that "discovery" occurs both when a plaintiff actually discovers the facts and when a hypothetical reasonably diligent plaintiff would have discovered them. In 2002, Congress repeated Lampf's critical language in enacting the present limitations statute. Normally, when Congress enacts statutes, it is aware of relevant judicial precedent. See, e.g., Edelman v. Lynchburg College, 535 U.S. 106, 116-117, 122 S. Ct. 1145, 152 L. Ed. 2d 188, and n. 13. Given the history and precedent surrounding the use of "discovery" in the limitations context generally as well as in this provision, the reasons for making this assumption are particularly strong here. Merck's claims are evaluated accordingly. Pp. 8-12.

2. In determining the time at which "discovery" occurs, terms such as "inquiry notice" and "storm warnings" may be useful insofar as they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating. But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation," including scienter -- irrespective of whether the actual plaintiff undertook a reasonably diligent investigation. Pp. 12-17.

(a) Contrary to Merck's argument, facts showing scienter are among those that "constitut[e] the violation." Scienter is assuredly a "fact." In a § 10(b) action, it refers to "a mental state embracing intent to deceive, manipulate, or defraud," Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194, n. 12, 96 S. Ct. 1375, 47 L. Ed. 2d 668, and "constitut[es]" an important and necessary element of a § 10(b) "violation." See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319, 127 S. Ct. 2499, 168 L. Ed. 2d 179. Because the scienter element of § 10(b) fraud cases has special heightened pleading requirements, see 15 U.S.C. § 78u-4(b)(2), unless a § 10(b) complaint sets out facts showing that it is more likely than not that the defendant acted with the relevant intent, the claim will fail. It would frustrate the very purpose of the discovery rule codified in § 1658(b)(1) if the limitations period began to run regardless of whether a plaintiff had "discover[ed]" any facts suggesting scienter. Pp. 12-14.

(b) The Court also rejects Merck's argument that, even if "discovery" requires facts related to scienter, facts that tend to show a materially false or misleading statement (or material omission) are ordinarily sufficient to show scienter. Where § 10(b) is at issue, the relation of factual falsity and state of mind is more context specific. For instance, an incorrect prediction about a firm's future earnings, by itself, does not automatically show whether the speaker deliberately lied or made an innocent error. Hence, "discovery" of additional scienter-related facts may be required. The statute's inclusion of an unqualified bar on actions instituted "5 years after such violation," § 1658(b)(2), should diminish Merck's fear that this requirement will give life to stale claims or subject defendants to liability for acts taken long ago. P. 14.

(c) And the Court cannot accept Merck's argument that the limitations period begins at "inquiry notice," meaning the point where the facts would lead a reasonably diligent plaintiff to investigate further, because that point is not necessarily the point at which the plaintiff would already have "discover[ed]" facts showing scienter or other "facts

constituting the violation." The statute says that the plaintiff's claim accrues only after the "discovery" of those latter facts. It contains no indication that the limitations period can sometimes begin before "discovery" can take place. Merck also argues that determining when a hypothetical reasonably diligent plaintiff would have "discover[ed]" the necessary facts is too complicated for judges to undertake. But courts applying the traditional discovery rule have long had to ask what a reasonably diligent plaintiff would have known and done in myriad circumstances and already undertake this kind of inquiry in securities fraud cases. Pp. 14-17.

3. Prior to November 6, 2001, the plaintiffs did not discover, and Merck has not shown that a reasonably diligent plaintiff would have discovered, "the facts constituting the violation." The FDA's September 2001 warning letter shows little or nothing about the here-relevant scienter, i.e., whether Merck advanced the naproxen hypothesis with fraudulent intent. The FDA itself described the hypothesis as a "possible explanation" for the VIGOR results, faulting Merck only for failing sufficiently to publicize the less favorable alternative, that Vioxx might be harmful. The products-liability complaints' general statements about Merck's state of mind show little more. Thus, neither these circumstances nor any of the other pre-November 2001 circumstances reveal "facts" indicating the relevant scienter. Pp. 17-19.

543 F.3d 150, affirmed.

- For the Decision, Briefs, and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Merck_%26_Co.%2C_Inc.%2C_et_al._v._Richard_Reynolds%2C_et_al

Graham County Soil & Water v. United States ex rel. Wilson [Graham County II]
(False Claims Act – "Public Disclosure")

- 130 S. Ct. 1396, 176 L. Ed. 2d 225, 2010 U.S. LEXIS 2927 (Mar. 30, 2010).
- 528 F.3d 292 (4th Cir. 2008), *cert. granted*, 129 S. Ct. 2824, 174 L. Ed. 2d 551, 2009 U.S. LEXIS 4548 (June 22, 2009), Docket No. 08-304.
- In Graham County II, the Court is presented, for the first time, with the opportunity to interpret the "public disclosure" provision in Section 3730(e)(4)(A) of the False Claims Act.
- Question Presented:
    - Whether allegations of fraud publically disclosed in a state (as opposed to a federal) administrative investigation or audit report are "publically disclosed" for purposes of the FCA.

- Syllabus

The False Claims Act (FCA) authorizes both the Attorney General and private qui tam relators to recover from persons who make false or fraudulent payment claims to the United States, but it bars qui tam actions based upon the public disclosure of allegations

or transactions in, inter alia, "a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A). Here, federal contracts provided that two North Carolina counties would remediate areas damaged by flooding and that the Federal Government would shoulder most of the costs. Respondent Wilson, then an employee of a local government body involved in this effort, alerted local and federal officials about possible fraud. Both the county and the State issued reports identifying potential irregularities in the contracts' administration. Subsequently, Wilson filed a qui tam action, alleging, as relevant here, that petitioners, county conservation districts and local and federal officials, knowingly submitted false payment claims in violation of the FCA. The District Court ultimately dismissed for lack of jurisdiction because Wilson had not refuted that her action was based upon allegations publicly disclosed in the county and state reports, which it held were "administrative" reports under the FCA's public disclosure bar. In reversing, the Fourth Circuit concluded that only federal administrative reports may trigger the public disclosure bar.

Held: The reference to "administrative" reports, audits, and investigations in § 3730(e)(4)(A) encompasses disclosures made in state and local sources as well as federal sources. Pp. 4-21.

(a) Section 3730(e)(4)(A) specifies three categories of disclosures that can deprive federal courts of jurisdiction over qui tam suits. The language at issue is contained in the second category (Category 2). Pp. 4-5.

(b) The FCA's plain text does not limit "administrative" to federal sources. Because that term modifies "report, hearing, audit, or investigation" in a provision about "the public disclosure" of fraud on the United States, it is most naturally read to describe government agency activities. But since "administrative" is not itself modified by "federal," there is no immediately apparent basis for excluding state and local agency activities from its ambit. The interpretive maxim *noscitur a sociis* -- "a word may be known by the company it keeps," Russell Motor Car Co. v. United States, 261 U.S. 514, 519, 43 S. Ct. 428, 67 L. Ed. 778, 58 Ct. Cl. 708 -- does not support the Fourth Circuit's more limited view. In Category 2, "administrative" is sandwiched between the federal terms "congressional" and "[GAO]," but these items are too few and too disparate to qualify as "a string of statutory terms," S. D. Warren Co. v. Maine Bd. of Environmental Protection, 547 U.S. 370, 378, 126 S. Ct. 1843, 164 L. Ed. 2d 625, or "items in a list," Beecham v. United States, 511 U.S. 368, 371, 114 S. Ct. 1669, 128 L. Ed. 2d 383, for noscitur a sociis purposes. Furthermore, evaluating "administrative" within the public disclosure bar's larger scheme, the Court observes that Category 2's terms are themselves sandwiched between phrases in Category 1 ("criminal, civil, or administrative hearing") and Category 3 ("news media") that are generally understood to include nonfederal sources; and Category 1 contains the same term ("administrative") that is at issue. Even if Category 1 were best understood to refer to adjudicative proceedings and Category 2 to legislative or quasi-legislative activities, state and local administrative sources of a legislative-type character are presumably just as public, and just as likely to put the Federal Government on notice of a potential fraud, as state and local administrative hearings of an adjudicatory character. The FCA's overall federal focus shines no light on the specific

question whether the public disclosure bar extends to nonfederal contexts. And the fact that state legislative sources are not included in § 3730(e)(4)(A) carries no clear implications for the status of state administrative sources. Pp. 5-12.

(c) The legislative record does not support an exclusively federal interpretation of "administrative." The current § 3730(e)(4)(A) was enacted to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits. How exactly the statute came to strike this balance as it did is uncertain, as significant substantive changes -- including the introduction of "administrative" in Category 2 -- were inserted without floor debate or other discussion, as "technical" amendments. Though Congress wanted "to strengthen the Government's hand in fighting false claims," Cook County v. United States ex rel. Chandler, 538 U.S. 119, 133-134, 123 S. Ct. 1239, 155 L. Ed. 2d 247, and encourage more qui tam suits, it also determined to bar a subset of those suits that it deemed unmeritorious or downright harmful. The question here concerns that subset's precise scope; and on that matter, the record is all but opaque, leaving no "evident legislative purpose" to guide resolution of this discrete issue, United States v. Bornstein, 423 U.S. 303, 310, 96 S. Ct. 523, 46 L. Ed. 2d 514. Pp. 12-18.

(d) Respondent's additional arguments in favor of limiting "administrative" to federal sources are unpersuasive. Pp. 18-20.

528 F.3d 292, reversed and remanded.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Graham_County_Soil_%26_Water_Conservation_Dist._v._U.S._ex_rel._Wilson

Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.
(Civil Procedure – Class Actions)

- 130 S. Ct. 1431, 176 L. Ed. 2d 311, 2010 U.S. LEXIS 2929 (Mar. 31, 2010).
- 549 F.3d 137 (2nd Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 3340 (May 4, 2009), Docket No. 08-1008.
- Question Presented:
    - Whether a state statute barring class actions for violation of a state law is enforceable even when claims based on those state laws are pursued in federal court under Rule 23.

- Syllabus

After respondent Allstate refused to remit the interest due under New York law on petitioner Shady Grove's insurance claim, Shady Grove filed this class action in diversity to recover interest Allstate owed it and others. Despite the class action provisions set forth in Federal Rule of Civil Procedure 23, the District Court held itself deprived of jurisdiction by N.Y. Civ. Prac. Law Ann. § 901(b), which precludes a class action to

recover a "penalty" such as statutory interest. Affirming, the Second Circuit acknowledged that a Federal Rule adopted in compliance with the Rules Enabling Act, 28 U.S.C. § 2072, would control if it conflicted with § 901(b), but held there was no conflict because § 901(b) and Rule 23 address different issues -- eligibility of the particular type of claim for class treatment and certifiability of a given class, respectively. Finding no Federal Rule on point, the Court of Appeals held that § 901(b) must be applied by federal courts sitting in diversity because it is "substantive" within the meaning of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Held: The judgment is reversed, and the case is remanded.

549 F.3d 137, reversed and remanded.

JUSTICE SCALIA delivered the opinion of the Court with respect to PARTS I and II-A, concluding that § 901(b) does not preclude a federal district court sitting in diversity from entertaining a class action under Rule 23. Pp. 3-12.

(a) If Rule 23 answers the question in dispute, it governs here unless it exceeds its statutory authorization or Congress's rulemaking power. Burlington Northern R. Co. v. Woods, 480 U.S. 1, 4-5, 107 S. Ct. 967, 94 L. Ed. 2d 1. Pp. 3-4.

(b) Rule 23(b) answers the question in dispute -- whether Shady Grove's suit may proceed as a class action -- when it states that "[a] class action may be maintained" if certain conditions are met. Since § 901(b) attempts to answer the same question, stating that Shady Grove's suit "may not be maintained as a class action" because of the relief it seeks, that provision cannot apply in diversity suits unless Rule 23 is ultra vires. The Second Circuit's view that § 901(b) and Rule 23 address different issues is rejected. The line between eligibility and certifiability is entirely artificial and, in any event, Rule 23 explicitly empowers a federal court to certify a class in every case meeting its criteria. Allstate's arguments based on the exclusion of some federal claims from Rule 23's reach pursuant to federal statutes and on § 901's structure are unpersuasive. Pp. 4-6.

(c) The dissent's claim that § 901(b) can coexist with Rule 23 because it addresses only the remedy available to class plaintiffs is foreclosed by § 901(b)'s text, notwithstanding its perceived purpose. The principle that courts should read ambiguous Federal Rules to avoid overstepping the authorizing statute, 28 U.S.C. § 2072(b), does not apply because Rule 23 is clear. The dissent's approach does not avoid a conflict between § 901(b) and Rule 23 but instead would render Rule 23 partially invalid. Pp. 6-12.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE SOTOMAYOR, concluded in Parts II-B and II-D:

(a) The Rules Enabling Act, 28 U.S.C. § 2072, not Erie, controls the validity of a Federal Rule of Procedure. Section 2072(b)'s requirement that federal procedural rules "not abridge, enlarge or modify any substantive right" means that a Rule must "really regulat[e] procedure, -- the judicial process for enforcing rights and duties recognized by

substantive law and for justly administering remedy and redress for disregard or infraction of them," Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S. Ct. 422, 85 L. Ed. 479. Though a Rule may incidentally affect a party's rights, it is valid so long as it regulates only the process for enforcing those rights, and not the rights themselves, the available remedies, or the rules of decision for adjudicating either. Rule 23 satisfies that criterion, at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants. Allstate's arguments asserting § 901(b)'s substantive impact are unavailing: It is not the substantive or procedural nature of the affected state law that matters, but that of the Federal Rule. See, e.g., id., at 14, 61 S. Ct. 422, 85 L. Ed. 479. Pp. 12-16.

(b) Opening federal courts to class actions that cannot proceed in state court will produce forum shopping, but that is the inevitable result of the uniform system of federal procedure that Congress created. P. 22.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE and JUSTICE THOMAS, concluded in Part II-C that the concurrence's analysis -- under which a Federal Rule may displace a state procedural rule that is not "bound up" or "sufficiently intertwined" with substantive rights and remedies under state law -- squarely conflicts with Sibbach's single criterion that the Federal Rule "really regulat[e] procedure," 312 U.S., at 13-14, 61 S. Ct. 422, 85 L. Ed. 479. Pp. 16-22.

JUSTICE STEVENS agreed that Federal Rule of Civil Procedure 23 must apply because it governs whether a class must be certified, and it does not violate the Rules Enabling Act in this case. Pp. 1-22.

(a) When the application of a federal rule would "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), the federal rule cannot govern. In rare cases, a federal rule that dictates an answer to a traditionally procedural question could, if applied, displace an unusual state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. Examples may include state laws that make it significantly more difficult to bring or to prove a claim or that function as limits on the amount of recovery. An application of a federal rule that directly collides with such a state law violates the Rules Enabling Act. Pp. 1-13.

(b) N. Y. Civ. Prac. Law Ann. § 901(b), however, is not such a state law. It is a procedural rule that is not part of New York's substantive law. Pp. 17-22.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Shady_Grove_Orthopedic_Associates%2C_P.A._v._Allstate_Insurance_Company

Hertz Co. v. Friend
(Civil Procedure – Federal Jurisdiction)

- 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 2010 U.S. LEXIS 1897 (Feb. 23, 2010).
- 297 Fed. Appx. 690 (9th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 4258 (June 8, 2009), Docket No. 08-1107.
- Question Presented:
    - Where is a corporation's "principal place of business"?
    - Hertz argued that the principal place of business is wherever the corporate headquarters are located; whereas respondents contended that if the principal place of business simply meant company headquarters, Congress would have so provided.

- Syllabus

  Respondents, California citizens, sued petitioner Hertz Corporation in a California state court for claimed state-law violations. Hertz sought removal to the Federal District Court under 28 U.S.C. §§ 1332(d)(2), 1441(a), claiming that because it and respondents were citizens of different States, §§ 1332(a)(1), (c)(1), the federal court possessed diversity-of-citizenship jurisdiction. Respondents, however, claimed that Hertz was a California citizen, like themselves, and that, hence, diversity jurisdiction was lacking under § 1332(c)(1), which provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." To show that its "principal place of business" was in New Jersey, not California, Hertz submitted a declaration stating, among other things, that it operated facilities in 44 States, that California accounted for only a portion of its business activity, that its leadership is at its corporate headquarters in New Jersey, and that its core executive and administrative functions are primarily carried out there. The District Court concluded that it lacked diversity jurisdiction because Hertz was a California citizen under Ninth Circuit precedent, which asks, inter alia, whether the amount of the corporation's business activity is "significantly larger" or "substantially predominates" in one State. Finding that California was Hertz's "principal place of business" under that test because a plurality of the relevant business activity occurred there, the District Court remanded the case to state court. The Ninth Circuit affirmed.

  Held:

  1. Respondents' argument that this Court lacks jurisdiction under § 1453(c) -- which expressly permits appeals of remand orders such as the District Court's only to "court[s] of appeals," not to the Supreme Court, and provides that if "a final judgment on the appeal" in a court of appeals "is not issued before the end" of 60 days (with a possible 10-day extension), "the appeal shall be denied" -- makes far too much of too little. The Court normally does not read statutory silence as implicitly modifying or limiting its jurisdiction that another statute specifically grants. *E.g.*, Felker v. Turpin, 518 U.S. 651, 660-661, 116 S. Ct. 2333, 135 L. Ed. 2d 827. Here, replicating similar, older statutes, § 1254 specifically gives the Court jurisdiction to "revie[w] . . . [b]y writ of certiorari" cases that are "in the courts of appeals" when it grants the writ. The Court thus interprets § 1453(c)'s "60-day" requirement as simply requiring a court of appeals to reach a decision within a specified time -- not to deprive this

Court of subsequent jurisdiction to review the case. *See*, *e.g.*, Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 466-467, 67 S. Ct. 798, 91 L. Ed. 1024. Pp. 4-5.

2. The phrase "principal place of business" in § 1332(c)(1) refers to the place where a corporation's high level officers direct, control, and coordinate the corporation's activities, i.e., its "nerve center," which will typically be found at its corporate headquarters. Pp. 5-19.

(a) A brief review of the legislative history of diversity jurisdiction demonstrates that Congress added § 1332(c)(1)'s "principal place of business" language to the traditional state-of-incorporation test in order to prevent corporations from manipulating federal-court jurisdiction as well as to reduce the number of diversity cases. Pp. 5-10.

(b) However, the phrase "principal place of business" has proved more difficult to apply than its originators likely expected. After Congress' amendment, courts were uncertain as to where to look to determine a corporation's "principal place of business" for diversity purposes. If a corporation's headquarters and executive offices were in the same State in which it did most of its business, the test seemed straightforward. The "principal place of business" was in that State. But if those corporate headquarters, including executive offices, were in one State, while the corporation's plants or other centers of business activity were located in other States, the answer was less obvious. Under these circumstances, for corporations with "far-flung" business activities, numerous Circuits have looked to a corporation's "nerve center," from which the corporation radiates out to its constituent parts and from which its officers direct, control, and coordinate the corporation's activities. However, this test did not go far enough, for it did not answer what courts should do when a corporation's operations are not far-flung but rather limited to only a few States. When faced with this question, various courts have focused more heavily on where a corporation's actual business activities are located, adopting divergent and increasingly complex tests to interpret the statute. Pp. 10-13.

(c) In an effort to find a single, more uniform interpretation of the statutory phrase, this Court returns to the "nerve center" approach: "[P]rincipal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. In practice it should normally be the place where the corporation maintains its headquarters -- provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings. Pp. 13-19.

(i) Three sets of considerations, taken together, convince the Court that the "nerve center" approach, while imperfect, is superior to other possibilities. First, § 1332(c)(1)'s language supports the approach. The statute's word "place" is singular, not plural. Its word "principal" requires that the main, prominent, or most important place be chosen. *Cf.*, *e.g.*, Commissioner v. Soliman, 506 U.S. 168, 174, 113 S. Ct. 701, 121 L. Ed. 2d 634. And the fact that the word "place" follows the words "State where" means that the "place" is a place within a State, not the State itself. A corporation's "nerve center," usually its main headquarters, is a single place. The public often considers it the corporation's main place of business. And it is a place within a State. By contrast, the application of a more general business activities test has led some courts, as in the present case, to look, not at a particular

place within a State, but incorrectly at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are significantly larger than in the next-ranking State. Second, administrative simplicity is a major virtue in a jurisdictional statute. Sisson v. Ruby, 497 U.S. 358, 375, 110 S. Ct. 2892, 111 L. Ed. 2d 292. A "nerve center" approach, which ordinarily equates that "center" with a corporation's headquarters, is simple to apply comparatively speaking. By contrast, a corporation's general business activities more often lack a single principal place where they take place. Third, the statute's legislative history suggests that the words "principal place of business" should be interpreted to be no more complex than an earlier, numerical test that was criticized as too complex and impractical to apply. A "nerve center" test offers such a possibility. A general business activities test does not. Pp. 14-17.

(ii) While there may be no perfect test that satisfies all administrative and purposive criteria, and there will be hard cases under the "nerve center" test adopted today, this test is relatively easier to apply and does not require courts to weigh corporate functions, assets or revenues different in kind, one from the other. And though this test may produce results that seem to cut against the basic rationale of diversity jurisdiction, accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system. Pp. 17-18.

(iii) If the record reveals attempts at jurisdictional manipulation -- for example, that the alleged "nerve center" is nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat -- the courts should instead take as the "nerve center" the place of actual direction, control, and coordination, in the absence of such manipulation. Pp. 18-19.

(d) Although petitioner's unchallenged declaration suggests that Hertz's "nerve center" and its corporate headquarters are one and the same, and that they are located in New Jersey, not in California, respondents should have a fair opportunity on remand to litigate their case in light of today's holding. P. 19.

297 Fed. Appx. 690, vacated and remanded.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Hertz_Corporation_v._Friend

Mac's Shell Service, Inc. v. Shell Oil Products Company, LLC
Shell Oil Products Company v. Mac's Shell Service
(Constructive Termination – Franchise Agreement)

- 130 S. Ct. 1251, 176 L. Ed. 2d 36, 2010 U.S. LEXIS 2203 (Mar. 2, 2010).
- 524 F.3d 33 (1st Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 4454 (June 15, 2009), Docket No. 08-240.

- 524 F.3d 33 (1st Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 4411 (June 15, 2009), Docket No. 08-372.
- Question Presented:
    - Under what circumstances a service station operator may bring suit against an oil refiner or distributor for "constructive termination" and/or "constructive nonrenewal" of a franchisee's lease under the Petroleum Marketing Practices Act?

- Syllabus

  Together with No. 08-372, Shell Oil Products Co. LLC et al. v. Mac's Shell Service, Inc., et al., also on certiorari to the same court.

  Petroleum Marketing Practices Act (Act) limits the circumstances in which franchisors may "terminate" a service-station franchise or "fail to renew" a franchise relationship. 15 U.S.C. §§ 2802, 2804. Typically, the franchisor leases the service station to the franchisee and permits the franchisee to use the franchisor's trademark and purchase the franchisor's fuel for resale. § 2801(1). As relevant here, service-station franchisees (dealers) filed suit under the Act, alleging that a petroleum franchisor and its assignee had constructively "terminate[d]" their franchises and constructively "fail[ed] to renew" their franchise relationships by substantially changing the rental terms that the dealers had enjoyed for years, increasing costs for many of them. The dealers asserted these claims even though they had not been compelled to abandon their franchises, and even though they had been offered and had accepted renewal agreements. The jury found against the franchisor and assignee, and the District Court denied their requests for judgment as a matter of law. The First Circuit affirmed as to the constructive termination claims, holding that the Act does not require a franchisee to abandon its franchise to recover for such termination, and concluding that a simple breach of contract by an assignee of a franchise agreement can amount to constructive termination if the breach resulted in a material change effectively ending the lease. However, the court reversed as to the constructive nonrenewal claims, holding that such a claim cannot be maintained once a franchisee signs and operates under a renewal agreement.

  Held:

  1. A franchisee cannot recover for constructive termination under the Act if the franchisor's allegedly wrongful conduct did not compel the franchisee to abandon its franchise. Pp. 6-15.

  (a) The Act provides that "no franchisor . . . may . . . terminate any franchise," except for an enumerated reason and after giving written notice, § 2802(a)-(b), and specifies that "'termination' includes cancellation," § 2801(17). Because it does not further define those terms, they are given their ordinary meanings: "put [to] an end" or "annul[ed] or destroy[ed]." Thus, the Act prohibits only franchisor conduct that has the effect of ending a franchise. The same conclusion follows even if Congress used "terminate" and "cancel" in their technical, rather than ordinary, senses. This conclusion is also consistent with the general understanding of the constructive termination doctrine as applied in analogous

legal contexts -- e.g., employment law, *see* Pennsylvania State Police v. Suders, 542 U.S. 129, 141-143, 124 S. Ct. 2342, 159 L. Ed. 2d 204 -- where a termination is deemed "constructive" only because the plaintiff, not the defendant, formally ends a particular legal relationship -- not because there is no end to the relationship at all. Allowing franchisees to obtain relief for conduct that does not force a franchise to end would ignore the Act's scope, which is limited to the circumstances in which franchisors may terminate a franchise or decline to renew a franchise relationship and leaves undisturbed state-law regulation of other types of disputes between petroleum franchisors and franchisees, see § 2806(a). This conclusion is also informed by important practical considerations, namely, that any standard for identifying those breaches of contract that should be treated as effectively ending a franchise, even though the franchisee continues to operate, would be indeterminate and unworkable. Pp. 6-12.

(b) The dealers' claim that this interpretation of the Act fails to provide franchisees with protection from unfair and coercive franchisor conduct that does not force an end to the franchise ignores the availability of state-law remedies to address such wrongful conduct. The Court's reading of the Act is also faithful to the statutory interpretation principle that statutes should be construed "in a manner that gives effect to all of their provisions," United States ex rel. Eisenstein v. City of New York, 556 U.S. ___, ___, 129 S. Ct. 2230, 173 L. Ed. 2d 1255 because this interpretation gives meaningful effect to the Act's preliminary injunction provisions and its alternative statute-of-limitations accrual dates. Pp. 12-14.

2. A franchisee who signs and operates under a renewal agreement with a franchisor may not maintain a constructive nonrenewal claim under the Act. The Act's text leaves no room for such an interpretation. It is violated only when a franchisor "fail[s] to renew" a franchise relationship for an enumerated reason or fails to provide the required notice, see § 2802, and it defines "fail to renew" as a "failure to reinstate, continue, or extend the franchise relationship," § 2801(14). A franchisee that signs a renewal agreement cannot carry the threshold burden of showing a "nonrenewal of the franchise relationship," § 2805(c), and thus necessarily cannot establish that the franchisor has violated the Act. Signing their renewal agreements "under protest" did not preserve the dealers' ability to assert nonrenewal claims. When a franchisee signs a renewal agreement -- even "under protest" -- there has been no "fail[ure] to renew," and thus no violation of the Act. The Act's structure and purpose confirm this interpretation. Accepting the dealers' contrary reading would greatly expand the Act's reach. Pp. 15-19.

524 F.3d 33, reversed in part, affirmed in part, and remanded.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Mac%E2%80%99s_Shell_Service%2C_Inc._v._Shell_Oil_Products_Company%3B_Shell_Oil_Products_Company_v._Mac%E2%80%99s_Shell_Service.

Yousuf v. Samantar

(Foreign Sovereign Immunities Act)

- 2010 U.S. LEXIS 4378 (June 1, 2010).
- 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 5139 (Sept. 30, 2009), Docket No. 08-1555.
- Questions Presented:
    - Whether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act extends to an individual acting in his official capacity on behalf of a foreign states and whether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity for acts taken in the individual's former capacity as an official acting on behalf of a foreign state.

- Syllabus

  Respondents, who were persecuted by the Somali government during the 1980's, filed a damages action alleging that petitioner, who then held high level government positions, exercised command and control over the military forces committing the abuses; that he knew or should have known of these acts; and that he aided and abetted in their commission. The District Court concluded that it lacked subject-matter jurisdiction and granted petitioner's motion to dismiss the suit, resting its decision on the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), which provides that a "foreign state shall be immune from the jurisdiction" of both federal and state courts except as provided in the Act, 28 U.S.C. § 1604. The Fourth Circuit reversed, holding that the FSIA does not apply to officials of a foreign state.

  Held: The FSIA does not govern petitioner's claim of immunity. Pp. 4-20.

  (a) Under the common-law doctrine of foreign sovereign immunity, see Schooner Exchange v. McFaddon, 11 U.S. 116, 7 Cranch 116, 3 L. Ed. 287, if the State Department granted a sovereign's diplomatic request for a "suggestion of immunity," the district court surrendered its jurisdiction, Ex parte Peru, 318 U.S. 573, 581, 587, 63 S. Ct. 793, 87 L. Ed. 1014 . If the State Department refused, the court could decide the immunity issue itself. Id., at 587, 63 S. Ct. 793, 87 L. Ed. 1014. In 1952, the State Department moved from a policy of requesting immunity in most actions against friendly sovereigns to a "restrictive" theory that confined immunity "to suits involving the foreign sovereign's public acts." Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 487, 103 S. Ct. 1962, 76 L. Ed. 2d 81. Inconsistent application of sovereign immunity followed, leading to the FSIA, whose primary purposes are (1) to endorse and codify the restrictive theory, and (2) to transfer primary responsibility for deciding "claims of foreign states to immunity" from the State Department to the courts. § 1602. This Act now governs the determination whether a foreign state is entitled to sovereign immunity. Pp. 4-7.

  (b) Reading the FSIA as a whole, there is nothing to suggest that "foreign state" should be read to include an official acting on behalf of that state. The Act specifies that a foreign state "includes a political subdivision . . . or an agency or instrumentality" of that state, § 1603(a), and specifically delimits what counts as an "agency or instrumentality,"

§ 1603(b). Textual clues in the "agency or instrumentality" definition -- "any entity" matching three specified characteristics, ibid. -- cut against reading it to include a foreign official. "Entity" typically refers to an organization; and the required statutory characteristics -- e.g., "separate legal person," § 1603(b)(1) -- apply awkwardly, if at all, to individuals. Section 1603(a)'s "foreign state" definition is also inapplicable. The list set out there, even if illustrative rather than exclusive, does not suggest that officials are included, since the listed defendants are all entities. The Court's conclusion is also supported by the fact that Congress expressly mentioned officials elsewhere in the FSIA when it wished to count their acts as equivalent to those of the foreign state. Moreover, other FSIA provisions -- e.g., § 1608(a) -- point away from reading "foreign state" to include foreign officials. Pp. 7-13.

(c) The FSIA's history and purposes also do not support petitioner's argument that the Act governs his immunity claim. There is little reason to presume that when Congress codified state immunity, it intended to codify, *sub silentio,* official immunity. The canon of construction that statutes should be interpreted consistently with the common law does not help decide the question whether, when a statute's coverage is ambiguous, Congress intended it to govern a particular field. State and official immunities may not be coextensive, and historically, the Government has suggested common-law immunity for individual officials even when the foreign state did not qualify. Though a foreign state's immunity may, in some circumstances, extend to an individual for official acts, it does not follow that Congress intended to codify that immunity in the FSIA. Official immunity was simply not the problem that Congress was addressing when enacting that Act. The Court's construction of the Act should not be affected by the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law. This case, where respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is governed by the common law because it is not a claim against a foreign state as defined by the FSIA. Pp. 13-19. (d) Whether petitioner may be entitled to common-law immunity and whether he may have other valid defenses are matters to be addressed in the first instance by the District Court. P. 20.

552 F.3d 371, affirmed and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Samantar_v._Bashe_Abdi_Yousuf%2C_et_al

Berghuis v. Smith
(Jury Exclusion – Race)

- 130 S. Ct. 1382, 176 L. Ed. 2d 249, 2010 U.S. LEXIS 2925 (Mar. 30, 2010).
- 543 F.3d 326 (6th Cir. 2008), *cert. granted*, 130 S. Ct. 48, 174 L. Ed. 2d 631, 2009 U.S. LEXIS 5145 (Sep. 30, 2009), Docket No. 08-1402.
- Question Presented:

- Whether the U.S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under Duren where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which this Court has never applied and which four circuits have specifically rejected.

- Syllabus

Criminal defendants have a Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community. *See* Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690. To establish a prima facie violation of the fair-cross-section requirement, a defendant must prove that: (1) a group qualifying as "distinctive" (2) is not fairly and reasonably represented in jury venires, and (3) "systematic exclusion" in the jury-selection process accounts for the underrepresentation. Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579.

At voir dire in the Kent County Circuit Court trial of respondent Smith, an African-American, the venire panel included between 60 and 100 individuals, only 3 of whom, at most, were African-American. At that time, African-Americans constituted 7.28% of the County's jury-eligible population, and 6% of the pool from which potential jurors were drawn. The court rejected Smith's objection to the panel's racial composition, an all-white jury convicted him of second-degree murder and felony firearm possession, and the court sentenced him to life in prison with the possibility of parole.

On order of the Michigan Court of Appeals, the trial court conducted an evidentiary hearing on Smith's fair-cross-section claim. The evidence at the hearing showed, inter alia, that under the juror-assignment order in effect when Smith's jury was empaneled, the County assigned prospective jurors first to local district courts, and, only after filling local needs, made remaining persons available to the countywide Circuit Court, which heard felony cases like Smith's. Smith calls this procedure "siphoning." The month after Smith's voir dire, however, the County reversed course and adopted a Circuit-Court-first assignment order. It did so based on the belief that the district courts took most of the minority jurors, leaving the Circuit Court with a jury pool that did not represent the entire County. The trial court noted two means of measuring the underrepresentation of African-Americans on Circuit Court venires. First, the court described the "absolute disparity" test, under which the percentage of African-Americans in the jury pool (6%) is subtracted from the percentage of African-Americans in the local, jury-eligible population (7.28%). According to this measure, African-Americans were underrepresented by 1.28%. Next, the court set out the "comparative disparity" test, under which the absolute disparity (1.28%) is divided by the percentage of African-Americans in the jury-eligible population (7.28%). The quotient (18%) indicated that, on average, African-Americans were 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list. In the 11 months after Kent County discontinued the district-court-first assignment policy, the comparative disparity, on

average, dropped from 18% to 15.1%. The hearing convinced the trial court that African-Americans were underrepresented on Circuit Court venires. But Smith's evidence, the trial court held, was insufficient to prove that the juror-assignment order, or any other part of the jury-selection process, had systematically excluded African-Americans. The court therefore rejected Smith's fair-cross-section claim.

The state intermediate appellate court reversed and ordered a new trial with jurors selected under the Circuit-Court-first assignment order. Reversing in turn, the Michigan Supreme Court concluded that Smith had not established a prima facie Sixth Amendment violation. This Court, the state High Court observed, has specified no preferred method for measuring whether representation of a distinctive group in the jury pool is fair and reasonable. The court noted that lower federal courts had applied three tests: the absolute and comparative disparity tests and a standard deviation test. Adopting a case-by-case approach allowing consideration of all three means of measuring underrepresentation, the court found that Smith had failed to establish a legally significant disparity under any measurement. Nevertheless giving Smith the benefit of the doubt on underrepresentation, the court determined that he had not shown systematic exclusion.

Smith then filed a federal habeas petition. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) prohibits federal habeas relief unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). Finding no infirmity in the Michigan Supreme Court's decision when assessed under AEDPA's standards, the District Court dismissed Smith's petition. The Sixth Circuit reversed. The Court of Appeals ruled, first, that courts should use the comparative disparity test to measure underrepresentation where, as here, the allegedly excluded group is small. The court then held that Smith's comparative disparity statistics demonstrated that African-Americans' representation in County Circuit Court venires was unfair and unreasonable. It next stated that Smith had shown systematic exclusion. In accord with the Michigan intermediate appellate court, the Sixth Circuit believed that the district-court-first assignment order significantly reduced the number of African-Americans available for Circuit Court venires. Smith was entitled to relief, the Sixth Circuit concluded, because no important state interest supported the district-court-first allocation system.

Held: The Sixth Circuit erred in ruling that the Michigan Supreme Court's decision "involv[ed] an unreasonable application o[f] clearly established Federal law," § 2254(d)(1). Duren hardly establishes -- no less "clearly" so -- that Smith was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. Pp. 10-16.

(a) The Duren defendant readily met all three parts of the Court's prima facie test when he complained of the dearth of women in a county's jury pool. First, he showed that women in the county were both "numerous and distinct from men." 439 U.S., at 364, 99

S. Ct. 664, 58 L. Ed. 2d 579. Second, to establish underrepresentation, he proved that women were 54% of the jury-eligible population, but accounted for only 26.7% of those summoned for jury service, and only 14.5% of those on the postsummons weekly venires from which jurors were drawn. Id., at 364-366, 99 S. Ct. 664, 58 L. Ed. 2d 579. Finally, to show the "systematic" cause of the underrepresentation, he pointed to Missouri's law permitting any woman to opt out of jury service and to the manner in which the county administered that law. This Court noted that "appropriately tailored" hardship exemptions would likely survive a fair-cross-section challenge if justified by an important state interest, id., at 370, 99 S. Ct. 664, 58 L. Ed. 2d 579, but concluded that no such interest could justify the exemption for each and every woman, id., at 369-370, 99 S. Ct. 664, 58 L. Ed. 2d 579. Pp. 10-11.

(b) Neither Duren nor any other decision of this Court specifies the method or test courts must use to measure underrepresentation. Each of the three methods employed or identified by the courts below -- absolute disparity, comparative disparity, and standard deviation -- is imperfect. Absolute disparity and comparative disparity measurements can be misleading where, as here, members of the distinctive group compose only a small percentage of the community's jury-eligible population. And it appears that no court has relied exclusively on a standard deviation analysis. Even absent AEDPA's constraint, this Court would have no cause to take sides here on the appropriate method or methods for measuring underrepresentation. Although the Michigan Supreme Court concluded that Smith's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests, the court nevertheless gave Smith the benefit of the doubt on underrepresentation in order to reach the issue ultimately dispositive in Duren: To the extent underrepresentation existed, was it due to "systematic exclusion"? *See* Duren, 439 U.S., at 364, 99 S. Ct. 664, 58 L. Ed. 2d 579. Pp. 11-13.

(c) Smith's evidence gave the Michigan Supreme Court little reason to conclude that the district-court-first assignment order had any significant effect on the representation of African-Americans on Circuit Court venires. Although the record established that some County officials believed that the assignment order created racial disparities, and the County reversed the order in response, the belief was not substantiated by Smith's evidence. He introduced no evidence that African-Americans were underrepresented on the Circuit Court's venires in significantly higher percentages than on the District Court for Grand Rapids, which had the County's largest African-American population. He did not address whether Grand Rapids had more need for jurors per capita than any other district in Kent County. And he did not compare the African-American representation levels on Circuit Court venires with those on the Federal District Court venires for the same region. *See* Duren, 439 U.S., at 367, n. 25, 99 S. Ct. 664, 58 L. Ed. 2d 579. Smith's best evidence of systematic exclusion was the decline in comparative underrepresentation, from 18 to 15.1%, after Kent County reversed its assignment order. But that evidence indicated no large change and was, in any event, insufficient to prove that the original assignment order had a significantly adverse impact on the representation of African-Americans on Circuit Court venires. Pp. 13-14.

(d) In addition to renewing his "siphoning" argument, Smith urges that a laundry list of factors -- e.g., the County's practice of excusing prospective jurors without adequate proof of alleged hardship, and the refusal of County police to enforce orders for prospective jurors to appear -- combined to reduce systematically the number of African-Americans appearing on jury lists. No "clearly established" precedent of this Court supports Smith's claim. Smith urges that one sentence in Duren, 439 U.S., at 368-369, 99 S. Ct. 664, 58 L. Ed. 2d 579, places the burden of proving causation on the State. But Smith clipped that sentence from its context: The sentence does not concern the demonstration of a prima face case; instead, it speaks to what the State might show to rebut the defendant's prima facie case. The Michigan Supreme Court was therefore far from "unreasonable," § 2254(d)(1), in concluding that Duren first and foremost required Smith himself to show that the underrepresentation complained of was due to systematic exclusion. This Court, furthermore, has never "clearly established" that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim. Rather, the Taylor Court "recognized broad discretion in the States" to "prescribe relevant qualifications for their jurors and to provide reasonable exemptions." 419 U.S., at 537-538, 95 S. Ct. 692, 42 L. Ed. 2d 690. And in Duren, the Court understood that hardship exemptions resembling those Smith assails might well "survive a fair-cross-section challenge." 439 U.S., at 370, 99 S. Ct. 664, 58 L. Ed. 2d 579. Pp. 14-16.

543 F.3d 326, reversed and remanded.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Berghuis_v._Smith

United States v. Marcus
(Constitutional Law – Ex Post Facto Clause)

- 2010 U.S. LEXIS 4163 (May 24, 2010).
- 538 F.3d 97 (2nd Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 7338 (Oct. 13, 2009), Docket No. 08-1341.
- This case was argued on February 24, 2010.
- Question Presented:
    - Whether the court of appeals departed from this Court's interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an asserted ex post facto violation whether "there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct."

- Syllabus

Respondent Marcus was convicted of engaging in forced labor and sex trafficking between January 1999 and October 2001. On appeal, he pointed out for the first time that the federal statutes he violated did not become law until October 2000. Thus, he claimed,

the indictment and evidence permitted at trial allowed a jury to convict him exclusively on the basis of preenactment conduct in violation of the *Ex Post Facto* Clause. He conceded that he had not raised this objection in the District Court, but argued that because the constitutional error was plain, his conviction must be set aside. The Second Circuit agreed and vacated the conviction. In doing so, the court held that, even in the case of a continuing offense, retrial is necessary if there is "any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." The court noted that this was "true even under plain error review."

Held: The Second Circuit's plain-error standard conflicts with this Court's interpretation of the plain-error rule. An appellate court may recognize a "plain error that affects substantial rights," even if that error was "not brought" to the district court's "attention." Fed. Rule Crim. Proc. 52(b). This Court's cases interpret this rule such that an appellate court may, in its discretion, correct an error not raised at trial only when the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The standard the Second Circuit applied in this case is inconsistent with the third and fourth of these criteria. To begin, it is irreconcilable with the criterion that the error "affec[t] the appellant's substantial rights," Puckett v. United States, 556 U.S. ___, ___, 129 S. Ct. 1423, 173 L. Ed. 2d 266, 275. This condition requires the error to be prejudicial, meaning that there is a reasonable probability that the error affected the trial's outcome, not that there is "*any possibility*," however remote, that the jury could have convicted based exclusively on preenactment conduct.

Nor does this error fall within the category of "structural errors" that may "affect substantial rights" regardless of their actual impact on an appellant's trial. Id., at ___, 129 S. Ct. 1423, 173 L. Ed. 2d 266, 278. Here, a jury instruction might have minimized or eliminated the risk that Marcus would have been convicted based solely on preenactment conduct. A reviewing court should find it no more difficult to assess the failure to give such an instruction than to assess numerous other instructional errors previously found nonstructural, *see*, *e.g.*, Hedgpeth v. Pulido, 555 U.S. ___, 129 S. Ct. 530, 172 L. Ed. 2d 388 *(per curiam)*. The Court further rejects Marcus' argument that the error at issue should be labeled an *Ex Post Facto* Clause violation, and that all such violations should be treated as special, structural errors warranting reversal without a showing of prejudice. As an initial matter, the Government never argued that the statute that criminalized Marcus' conduct applied retroactively, and Marcus' claim is thus properly brought under the Due Process, and not the *Ex Post Facto,* Clause. Moreover, we see no reason why errors similar to the one at issue in this case, taken as a class, would automatically affect substantial rights without a showing of prejudice.

In any event, the Second Circuit's "any possibility," however remote, standard also cannot be reconciled with the criterion that "the error seriously affec[t] the fairness, integrity or public reputation of judicial proceedings." Puckett, *supra,* at ___, 129 S. Ct. 1423, 173 L. Ed. 2d 266, 271 (internal quotation marks omitted). Under the Second

Circuit's approach, a retrial would be required even where the evidence supporting conviction consists of a few days of preenactment conduct along with several continuous years of identical postenactment conduct. Given the tiny risk that a jury would base its conviction in these circumstances on the few preenactment days alone, such an error is most unlikely to cast serious doubt on the fairness, integrity, or public reputation of the judicial system. Pp. 3-8.

538 F.3d 97, reversed and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=United_States_v._Marcus

Hemi Group, LLC v. City of New York
(Standing)

- 130 S. Ct. 983, 175 L. Ed. 2d 943, 2010 U.S. LEXIS 768 (Jan. 25, 2010).
- 541 F.3d 425 (2nd Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 3310 (Oct. 20, 2009), Docket No. 08-969.
- Question Presented:
    - Whether a city government meets the Racketeer Influenced and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its "business or property" by alleging non-commercial injury resulting from non-payment of taxes by non-litigant third parties.

- Syllabus

Respondent New York City taxes the possession of cigarettes. Petitioner Hemi Group, based in New Mexico, sells cigarettes online to residents of the City. Neither state nor city law requires out-of-state sellers such as Hemi to charge, collect, or remit the City's tax; instead, the City must recover its tax on out-of-state sales directly from the purchasers. But the Jenkins Act, 15 U.S.C. §§ 375-378, requires out-of-state sellers to submit customer information to the States into which they ship cigarettes, and New York State has agreed to forward that information to the City. That information helps the City track down cigarette purchasers who do not pay their taxes. Against that backdrop, the City filed this lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that Hemi's failure to file the Jenkins Act reports with the State constituted mail and wire fraud, which are defined as "racketeering activit[ies]," 18 U.S.C. § 1961(1), subject to enforcement under civil RICO, § 1964(c). The District Court dismissed the claims, but the Second Circuit vacated the judgment and remanded. Among other things, the Court of Appeals held that the City's asserted injury -- lost tax revenue -- came about "by reason of" the predicate mail and wire frauds. It accordingly determined that the City had stated a valid RICO claim.

Held: The judgment is reversed, and the case is remanded.

541 F.3d 425, reversed and remanded.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court in part, concluding that because the City cannot show that it lost tax revenue "by reason of" the alleged RICO violation, it cannot state a RICO claim. Pp. 5-15.

(a) To establish that an injury came about "by reason of" a RICO violation, a plaintiff must show that a predicate offense "not only was a 'but for' cause of his injury, but was the proximate cause as well." Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532. Proximate cause for RICO purposes should be evaluated in light of its common-law foundations; it thus requires "some direct relation between the injury asserted and the injurious conduct alleged." Ibid. A link that is "too remote," "purely contingent," or "indirec[t]" is insufficient. Id., at 271, 274, 112 S. Ct. 1311, 117 L. Ed. 2d 532.

The City's causal theory cannot satisfy RICO's direct relationship requirement. Indeed, the causal link here is far more attenuated than the one the Court rejected as "purely contingent" and "too remote" in Holmes. Id., at 271, 112 S. Ct. 1311, 117 L. Ed. 2d 532. According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, it could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected. As the Court reiterated in Holmes, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step," id., at 271-272, 112 S. Ct. 1311, 117 L. Ed. 2d 532, and that "general tendency" applies with full force to proximate cause inquiries under RICO, *e.g.*, ibid. Because the City's causation theory requires the Court to move well beyond the first step,that theory cannot satisfy RICO's direct relationship requirement.

The City's claim suffers from the same defect as the RICO claim rejected in Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458-461, 126 S. Ct. 1991, 164 L. Ed. 2d 720, where the conduct directly causing the harm was distinct from the conduct giving rise to the fraud, *see* id., at 458, 126 S. Ct. 1991, 164 L. Ed. 2d 720. Indeed, the disconnect between the asserted injury and the alleged fraud in this case is even sharper. In Anza, the same party had both engaged in the harmful conduct and committed the fraudulent act. Here, the City's theory of liability rests not just on separate actions, but separate actions carried out by separate parties. The City's theory thus requires that the Court extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first place if they decided not to pay taxes they were legally obligated to pay. Put simply, Hemi's obligation

was to file Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi. The Court has never before stretched the causal chain of a RICO violation so far, and declines to do so today. *See*, *e.g.*, id., at 460-461, 126 S. Ct. 1991, 164 L. Ed. 2d 720. Pp. 5-9.

(b) The City attempts to avoid this conclusion by characterizing the violation not merely as Hemi's failure to file Jenkins Act reports with the State, but as a more general systematic scheme to defraud the City of tax revenue. But if the City could escape the proximate-cause requirement merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct, the Court's RICO proximate cause precedent would become a mere pleading rule. That precedent makes clear that "the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.'" Anza, supra, at 457, 126 S. Ct. 1991, 164 L. Ed. 2d 720. Because the only fraudulent conduct alleged here is a violation of the Jenkins Act, the City must, but cannot, show that Hemi's failure to file the Jenkins Act reports led directly to its injuries.

The City also errs in relying on Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012. There, the plaintiffs' causation theory was "straightforward": The causal link in Bridge involved a direct and easily identifiable connection between the fraud at issue and the plaintiffs' injury, id., at ___, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 ; the plaintiffs there "were the only parties injured by petitioners' misrepresentations," id., at ___, 128 S. Ct. 2131, 2144, 170 L. Ed. 2d 1012, 1027; and there were "no independent factors that account[ed] for [the] injury," id., at ___, 128 S. Ct. 2131, 2144, 170 L. Ed. 2d 1012, 1027. The City's theory in this case is anything but straightforward: Multiple steps separate the alleged fraud from the asserted injury. And in contrast to Bridge, where there were "no independent factors that account[ed] for [the plaintiffs'] injury," id., at ___, 128 S. Ct. 2131, 2144, 170 L. Ed. 2d 1012, 1027, here there certainly were: The City's theory of liability rests on the independent actions of third and even fourth parties. Pp. 10-14.

- For the Decision, Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Hemi_Group%2C_LLC_v._City_of_New_York

Alvarez v. Smith
(Constitutional Law - Due Process)

- 130 S. Ct. 576, 175 L. Ed. 2d 447, 2009 U.S. LEXIS 8941 (Dec. 8, 2009).
- 524 F.3d 834, 2008 U.S. App. LEXIS 9523 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 1401, 173 L. Ed. 2d 582, 2009 U.S. LEXIS 1434 (Feb. 23, 2009), Docket No. 08-351.
- Questions Presented:
    - In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place,

should district courts apply the "speedy trial" test employed in United States v. $8,850, 461 U.S. 555 (1983) and Barker v. Wingo, 407 U.S. 514 (1972) or the three-part due process analysis set forth in Mathews v. Eldridge, 424 U.S. 319 (1976).

- In light of this Court's holding in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992), may a court of appeals order a district court to enter permanent injunctive relief enjoining the application of a State statute based simply upon Plaintiffs' allegations in a complaint, where the parties are not at issue as no answer was filed in the district court and no evidence was ever heard in that court.

- Syllabus

Illinois law provides for forfeiture of movable personal property used to facilitate a drug crime, permits police to seize the property without a warrant, and allows the State to keep the property nearly five months before beginning judicial forfeiture proceedings. Respondents, six individuals who had cars and cash seized under that law, brought this federal civil rights action, claiming that the failure of the State to provide a speedy postseizure hearing violated the federal Due Process Clause. The District Court dismissed the case based on Circuit precedent, but, on appeal, the Seventh Circuit departed from that precedent and ruled for respondents. This Court granted certiorari to review the Seventh Circuit's due process determination, but at oral argument the Court learned that all of the actual property disputes between the parties had been resolved.

Held:

1. The case is moot. The Constitution permits this Court to decide legal questions only in the context of actual "Cases" or "Controversies," Art. III, § 2, and an actual controversy must exist at all stages of review, not just when the complaint is filed, Preiser v. Newkirk, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272. Here there is no longer any actual controversy regarding ownership or possession of the underlying property. There is no claim for damages before this Court; there is no properly certified class or dispute over class certification; and this case does not fit within the category of cases that are "capable of repetition" while "evading review." Only an abstract dispute about the law remains. Pp. 4-6.

2. The judgment below is vacated. In moot cases, this Court normally vacates the lower court judgment, which clears the path for relitigation of the issues and preserves the rights of the parties, while prejudicing none by a preliminary decision. United States v. Munsingwear, Inc., 340 U.S. 36, 40, 71 S. Ct. 104, 95 L. Ed. 36. Where mootness is the result of settlement rather than happenstance, however, the losing party forfeits the equitable remedy of vacatur. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 25, 115 S. Ct. 386, 130 L. Ed. 2d 233. This case more closely resembles mootness through happenstance than through settlement. In Bancorp, the party seeking review caused the mootness by voluntarily settling the issue contested throughout the litigation. Here, the Court believes that the presence of the federal case played no significant role in the termination of plaintiffs' state-court forfeiture proceedings.

Plaintiffs' forfeiture cases took place with no procedural link to the case before this Court; apparently terminated on substantive grounds in their ordinary course; and, to the Court's knowledge, no one raised the procedural question at issue here in those cases. This Court therefore concludes that it should follow its ordinary practice and order vacatur. Pp. 6-9.

524 F.3d 834, vacated and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Alvarez_v._Smith

United States v. Comstock
(Constitutional Law – Necessary and Proper Clause)

- 2010 U.S. LEXIS 3879 (May 17, 2010).
- 551 F.3d 274 (4th Cir. Jan. 8, 2009), *cert. granted* 129 S. Ct. 2828, 174 L. Ed. 2d 551, 2009 U.S. LEXIS 4695 (June 22, 2009), Docket No. 08-1224.
- Question Presented:
    - Whether Congress had the constitutional authority to enact 18 U.S.C.§ 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

- Syllabus

Federal law allows a district court to order the civil commitment of a mentally ill, sexually dangerous federal prisoner beyond the date he would otherwise be released. 18 U.S.C. § 4248. The Government instituted civil-commitment proceedings under § 4248 against respondents, each of whom moved to dismiss on the ground, *inter alia,* that, in enacting the statute, Congress exceeded its powers under the Necessary and Proper Clause, U.S. Const., Art. I, § 8, cl. 18. Agreeing, the District Court granted dismissal, and the Fourth Circuit affirmed on the legislative-power ground.

Held: The Necessary and Proper Clause grants Congress authority sufficient to enact § 4248. Taken together, five considerations compel this conclusion. Pp. 5-22.

(1) The Clause grants Congress broad authority to pass laws in furtherance of its constitutionally enumerated powers. It makes clear that grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the enumerated power's "beneficial exercise," *e.g.,* McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 413, 418, 4 L. Ed. 579, and that Congress can "legislate on that vast mass of incidental powers which must be involved in

the constitution," id., at 421, 17 U.S. 316, 4 L. Ed. 579. In determining whether the Clause authorizes a particular federal statute, there must be "means-ends rationality" between the enacted statute and the source of federal power. Sabri v. United States, 541 U.S. 600, 605, 124 S. Ct. 1941, 158 L. Ed. 2d 891. The Constitution "addresse[s]" the "choice of means" "primarily . . . to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." Burroughs v. United States, 290 U.S. 534, 547-548, 54 S. Ct. 287, 78 L. Ed. 484. Thus, although the Constitution nowhere grants Congress express power to create federal crimes beyond those specifically enumerated, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, or to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others, Congress possesses broad authority to do each of those things under the Clause. Pp. 5-9.

(2) Congress has long been involved in the delivery of mental health care to federal prisoners, and has long provided for their civil commitment. See, *e.g.,* Act of Mar. 3, 1855, 10 Stat. 682; Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241-4247. A longstanding history of related federal action does not demonstrate a statute's constitutionality, see, *e.g.,* Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 678, 90 S. Ct. 1409, 25 L. Ed. 2d 697, but can be "helpful in reviewing the substance of a congressional statutory scheme," Gonzales v. Raich, 545 U.S. 1, 21, 125 S. Ct. 2195, 162 L. Ed. 2d 1, and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests. Section 4248 differs from earlier statutes in that it focuses directly upon persons who, due to a mental illness, are sexually dangerous. Many of these individuals, however, were likely already subject to civil commitment under § 4246, which, since 1949, has authorized the postsentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise). The similarities between § 4246 and § 4248 demonstrate that the latter is a modest addition to a longstanding federal statutory framework. Pp. 9-14.

(3) There are sound reasons for § 4248's enactment. The Federal Government, as custodian of its prisoners, has the constitutional power to act in order to protect nearby (and other) communities from the danger such prisoners may pose. Moreover, § 4248 is "reasonably adapted" to Congress' power to act as a responsible federal custodian. United States v. Darby, 312 U.S. 100, 121, 61 S. Ct. 451, 85 L. Ed. 609. Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct," § 4247(a)(6), would pose an especially high danger to the public if released. And Congress could also have reasonably concluded that a reasonable number of such individuals would likely not be detained by the States if released from federal custody. Congress' desire to address these specific challenges, taken together with its responsibilities as a federal custodian, supports the conclusion that § 4248 satisfies "review for means-end rationality," Sabri, *supra,* at 605, 124 S. Ct. 1941, 158 L. Ed. 2d 891. Pp. 14-16.

(4) Respondents' contention that § 4248 violates the Tenth Amendment because it invades the province of state sovereignty in an area typically left to state control is rejected. That Amendment does not "reserve to the States" those powers that are "delegated to the United States by the Constitution," including the powers delegated by the Necessary and Proper Clause. *See*, *e.g.,* New York v. United States, 505 U.S. 144, 159, 112 S. Ct. 2408, 120 L. Ed. 2d 120. And § 4248 does not "invade" state sovereignty, but rather requires *accommodation* of state interests: Among other things, it directs the Attorney General to inform the States where the federal prisoner "is domiciled or was tried" of his detention, § 4248(d), and gives either State the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to State custody, § 4248(d)(1). In Greenwood v. United States, 350 U.S. 366, 375-376, 76 S. Ct. 410, 100 L. Ed. 412, the Court rejected a similar challenge to § 4248's predecessor, the 1949 statute described above. Because the version of the statute at issue in *Greenwood* was *less* protective of state interests than § 4248, *a fortiori*, the current statute does not invade state interests. Pp. 16-18.

(5) Section 4248 is narrow in scope. The Court rejects respondents' argument that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. *See*, *e.g.,* McCulloch, *supra*, at 417, 17 U.S. 316, 4 L. Ed. 579. Nor will the Court's holding today confer on Congress a general "police power, which the Founders denied the National Government and reposed in the States." United States v. Morrison, 529 U.S. 598, 618, 120 S. Ct. 1740, 146 L. Ed. 2d 658. Section § 4248 has been applied to only a small fraction of federal prisoners, and its reach is limited to individuals already "in the custody of the" Federal Government, § 4248(a). Thus, far from a "general police power," § 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system. *See* New York, *supra,* at 157, 112 S. Ct. 2408, 120 L. Ed. 2d 120. Pp. 18-22.

The Court does not reach or decide any claim that the statute or its application denies equal protection, procedural or substantive due process, or any other constitutional rights. Respondents are free to pursue those claims on remand, and any others they have preserved. P. 22.

551 F.3d 274, reversed and remanded.

- For Briefs and Other Relate Documents, *see*: http://www.scotuswiki.com/index.php?title=United_States_v._Comstock

Krupski v. Costa Crociere S.P.A.
(Civil Procedure – Rule 15 – Relation Back)

- 2010 U.S. LEXIS 4567 (June 7, 2010).
- 330 Fed. Appx. 892 (11th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 539 (Jan. 15, 2010), Docket No. 09-337.

- This case was argued on April 21, 2010.
- Question Presented:
    - Whether Fed. R. Cir. P. 15(c)(1)(C) – which permits an amended complaint to "relate back," for limitation purposes, when the amendment corrects a "mistake concerning the proper party's identity" – permits "mistakes" where the plaintiff had imputed knowledge of the identity of the added defendant prior to filing suit.

- Syllabus

  Petitioner Krupski sought compensation for injuries she suffered on a cruise ship. Her passenger ticket, which was issued by Costa Cruise Lines, identified respondent Costa Crociere S. p. A. as the carrier; required an injured party to submit to the carrier or its agent written notice of a claim; required any lawsuit to be filed within one year of the injury; and designated a specific Federal District Court as the exclusive forum for lawsuits such as Krupski's. The front of the ticket listed Costa Cruise's Florida address and made references to "Costa Cruises." After Krupski's attorney notified Costa Cruise of her claims but did not reach a settlement, Krupski filed a diversity negligence action against Costa Cruise. Over the next several months -- after the limitations period had expired -- Costa Cruise brought Costa Crociere's existence to Krupski's attention three times, including in its motion for summary judgment, in which it stated that Costa Crociere was the proper defendant. Krupski responded and moved to amend her complaint to add Costa Crociere as a defendant. The District Court denied Costa Cruise's summary judgment motion without prejudice and granted Krupski leave to amend. After she served Costa Crociere with an amended complaint, the court dismissed Costa Cruise from the case. Thereafter, Costa Crociere -- represented by the same counsel as Costa Cruise -- moved to dismiss, contending that the amended complaint did not satisfy the requirements of Federal Rule of Civil Procedure 15(c), which governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus timely even though it was filed outside an applicable limitations period. The Rule requires, *inter alia,* that within the Rule 4(m) 120-day period for service after a complaint is filed, the newly named defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C)(ii). The District Court found this condition fatal to Krupski's attempt to relate back. It concluded that she had not made a mistake about the proper party's identity because, although Costa Cruise had disclosed Costa Crociere's role in several court filings, she nonetheless delayed for months filing an amended complaint. The Eleventh Circuit affirmed, finding that Krupski either knew or should have known of Costa Crociere's identity as a potential party because she furnished the ticket identifying it to her counsel well before the limitations period ended. It was therefore appropriate to treat her as having chosen to sue one potential party over another. Additionally, the court held that relation back was not appropriate because of Krupski's undue delay in seeking to amend the complaint.

  Held: Relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or timeliness in seeking to amend the pleading. Pp. 7-18.

(a) The Rule's text does not support the Eleventh Circuit's decision to rely on the plaintiff's knowledge in denying relation back. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known Costa Crociere's identity as the proper defendant, but whether Costa Crociere knew or should have known during the Rule 4(m) period that it would have been named as the defendant but for an error. The plaintiff's information is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. It would be error to conflate knowledge of a party's existence with the absence of mistake. That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. Making a deliberate choice to sue one party over another while understanding the factual and legal differences between the two parties may be the antithesis of making a mistake, but that does not mean that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. A plaintiff might know that the prospective defendant exists but nonetheless choose to sue a different defendant based on a misunderstanding about the proper party's identity. That kind of deliberate but mistaken choice should not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied. This reading is consistent with relation back's purpose of balancing the defendant's interests protected by the statute of limitations with the preference of the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. It is also consistent with the history of Rule 15(c)(1)(C). And it is not foreclosed by Nelson v. Adams USA, Inc., 529 U.S. 460, 120 S. Ct. 1579, 146 L. Ed. 2d 530. Pp. 7-13.

(b) The Eleventh Circuit also erred in ruling that Krupski's undue delay in seeking to file, and in eventually filing, an amended complaint justified its denial of relation back under Rule 15(c)(1)(C). The Rule plainly sets forth an exclusive list of requirements for relation back, and the plaintiff's diligence is not among them. Moreover, it mandates relation back once its requirements are satisfied; it does not leave that decision to the district court's equitable discretion. Its mandatory nature is particularly striking in contrast to the inquiry under Rule 15(a), which gives a district court discretion to decide whether to grant a motion to amend a pleading before trial. *See* Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222. Rule 15(c)(1)(C) permits a court to examine a plaintiff's conduct during the Rule 4(m) period, but only to the extent the plaintiff's postfiling conduct informs the prospective defendant's understanding of whether the plaintiff initially made a "mistake concerning the proper party's identity." The plaintiff's postfiling conduct is otherwise immaterial to the relation-back question. Pp. 13-15.

(c) Under these principles, the courts below erred in denying relation back. Because the original complaint (of which Costa Crociere had constructive notice) made clear that Krupski meant to sue the company that "owned, operated, managed, supervised and controlled" the ship on which she was injured and also indicated (mistakenly) that Costa Cruise performed those roles, Costa Crociere should have known that it avoided suit within the limitations period only because of Krupski's misunderstanding about which "Costa" entity was in charge of the ship -- clearly a "mistake concerning the proper party's identity." That Krupski may have known the ticket's contents does not foreclose

the possibility that she nonetheless misunderstood crucial facts regarding the two companies' identities. Especially because the face of the complaint plainly indicated such a misunderstanding, respondent's contention that it was entitled to think she made no mistake is not persuasive. Moreover, respondent has articulated no strategy that it could reasonably have thought Krupski was pursuing in suing a defendant that was legally unable to provide relief. Nothing in Krupski's conduct during the Rule 4(m) period suggests that she failed to name Costa Crociere because of anything other than a mistake. The interrelationship between Costa Cruise and Costa Crociere and their similar names heighten the expectation that Costa Crociere should suspect a mistake when Costa Cruise is named in a complaint actually describing Costa Crociere's activities. In addition, Costa Crociere's own actions contributed to passenger confusion over "the proper party": The front of the ticket advertises that "Costa Cruises" has achieved a certification of quality without clarifying which "Costa" company is meant. And as shown in similar lawsuits, Costa Crociere is evidently well aware that the difference between it and Costa Cruise can be confusing for passengers. Pp. 15-18.

330 Fed. Appx. 892, reversed and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Krupski_v._Costa_Crociere

Astrue v. Ratliff
(Attorneys' Fees - Ownership)

- 2010 U.S. LEXIS 4763 (June 14, 2010).
- 540 F.3d 800 (8th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 5148 (Sept. 30, 2009), Docket No. 08-1322.
- Question Presented:
    - Whether an award of fees and other expenses under the Equal Access to Justice Act is payable to the payable to the prevailing party's attorney, and therefore is subject to an offset for a pre-existing debt owed by the prevailing party to the United States.

- Syllabus

Respondent Ratliff was Ruby Kills Ree's attorney in Ree's successful suit against the United States Social Security Administration for Social Security benefits. The District Court granted Ree's unopposed motion for attorney's fees under the Equal Access to Justice Act (EAJA), which provides, *inter alia,* that "a court shall award to a prevailing party . . . fees and other expenses . . . in any civil action . . . brought by or against the United States." 28 U.S.C. § 2412(d)(1)(A). Before paying the fees award, the Government discovered that Ree owed the United States a debt that predated the award. Accordingly, it sought an administrative offset against the award under 31 U.S.C. § 3716, which subjects to offset all "funds payable by the United States," § 3701(a)(1), to an individual who owes certain delinquent federal debts, see § 3701(b), unless, *e.g.,* payment

is exempted by statute or regulation. See, *e.g.,* § 3716(e)(2). The parties to this case have not established that any such exemption applies to § 2412(d) fees awards, which, as of 2005, are covered by the Treasury Department's Offset Program (TOP). After the Government notified Ree that it would apply TOP to offset her fees award against a portion of her debt, Ratliff intervened, challenging the offset on the grounds that § 2412(d) fees belong to a litigant's attorney and thus may not be used to satisfy the litigant's federal debts. The District Court held that because § 2412(d) directs that fees be awarded to the "prevailing party," not to her attorney, Ratliff lacked standing to challenge the offset. The Eighth Circuit reversed, holding that under its precedent, EAJA attorney's fees are awarded to prevailing parties' attorneys.

Held: A § 2412(d)(1)(A) attorney's fees award is payable to the litigant and is therefore subject to an offset to satisfy the litigant's pre-existing debt to the Government. Pp. 3-11.

(a) Nothing in EAJA contradicts this Court's longstanding view that the term "prevailing party" in attorney's fees statutes is a "term of art" that refers to the prevailing litigant. See, *e.g.*, *UI*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855. That the term has its usual meaning in subsection (d)(1)(A) is underscored by the fact that subsection (d)(1)(B) and other provisions clearly distinguish the party who receives the fees award (the litigant) from the attorney who performed the work that generated the fees. The Court disagrees with Ratliff's assertion that subsection (d)(1)(A)'s use of the verb "award" nonetheless renders § 2412(d) fees payable directly to a prevailing party's attorney. The dictionaries show that, in the litigation context, the transitive verb "award" has the settled meaning of giving or assigning *by* judicial decree. Its plain meaning in subsection (d)(1)(A) is thus that the court shall "give or assign by . . . judicial determination" to the "prevailing party" (here, Ree) attorney's fees in the amount sought and substantiated under, *inter alia*, subsection (d)(1)(B). That the prevailing party's attorney may have a beneficial interest or a contractual right in the fees does not alter this conclusion. Pp. 3-6.

(b) The Court rejects Ratliff's argument that other EAJA provisions, combined with the Social Security Act (SSA) and the Government's practice of paying some EAJA fees awards directly to attorneys in Social Security cases, render § 2412(d) at least ambiguous on the question presented here, and that these other provisions resolve the ambiguity in her favor. Even accepting that § 2412(d) is ambiguous [cedilla] the provisions and practices Ratliff identifies do not alter the Court's conclusion. Subsection (d)(1)(B) and other provisions differentiate between attorneys and prevailing parties, and treat attorneys on par with other service providers, in a manner that forecloses the conclusion that attorneys have a right to direct payment of subsection (d)(1)(A) awards. Nor is the necessity of such payments established by the SSA provisions on which Ratliff relies. That SSA fees awards are payable directly to a prevailing claimant's attorney, see 42 U.S.C. § 406(b)(1)(A), undermines Ratliff's case by showing that Congress knows how to create a direct fee requirement where it desires to do so. Given the stark contrast between the language of the SSA and EAJA provisions, the Court is reluctant to interpret subsection (d)(1)(A) to contain a direct fee requirement absent clear textual evidence that such a requirement applies. Such evidence is not supplied by a 1985 EAJA amendment requiring that, "where the claimant's attorney receives fees for the same work under both

[42 U.S.C. § 406(b) and 28 U.S.C. § 2412(d)], the . . . attorney [must] refun[d] to the claimant the amount of the smaller fee." See note following § 2412. Ratliff's argument that this recognition that an attorney will sometimes "receiv[e]" § 2412(d) fees suggests that subsection (d)(1)(A) should be construed to incorporate the same direct payments to attorneys that the SSA expressly authorizes gives more weight to "recei[pt]" than the term can bear: The ensuing reference to the attorney's obligation to "refund" the smaller fee to the claimant demonstrates that the award belongs to the claimant in the first place. Moreover, Ratliff's reading is irreconcilable with the textual differences between the two Acts. The fact that the Government, until 2006, frequently paid EAJA fees awards directly to attorneys in SSA cases in which the prevailing party had assigned the attorney her rights in the award does not alter the Court's interpretation of the Act's fees provision. That some such cases involved a prevailing party with outstanding federal debts is unsurprising, given that it was not until 2005 that the TOP was modified to require offsets against attorney's fees awards. And as Ratliff admits, the Government has since discontinued the direct payment practice except in cases where the plaintiff does not owe a federal debt and has assigned her right to fees to the attorney. Finally, the Court's conclusion is buttressed by cases interpreting and applying 42 U.S.C. § 1988, which contains language virtually identical to § 2412(d)(1)(A)'s. See, *e.g.*, Evans v. Jeff D., 475 U.S. 717, 730-732, 106 S. Ct. 1531, 89 L. Ed. 2d 747, and n. 19. Pp. 6-11.

540 F.3d 800, reversed and remanded.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Astrue_v._Ratliff

Stop the Beach Nourishment, Inc. v. Florida Department of Environmental Protection
(Constitutional Law – Judicial Taking)

- 2010 U.S. LEXIS 4971 (June 17, 2010).
- 998 So. 2d 1102 (Fla. 2008), *cert. granted*, 2009 U.S. LEXIS 4458 (June 15, 2009), Docket No. 08-1151.
- This case was argued on December 2, 2009.
- Questions Presented:
    - The Florida Supreme Court invoked “nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Supreme Court's decision cause a "judicial taking“ proscribed by the Fifth and Fourteenth Amendments to the United States Constitution.
    - Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.
    - Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the

due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

- Syllabus

Florida owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore. The mean high-water line is the ordinary boundary between private beachfront, or littoral property, and state-owned land. Littoral owners have, *inter alia,* rights to have access to the water, to use the water for certain purposes, to have an unobstructed view of the water, and to receive accretions and relictions (collectively, accretions) to the littoral property. An accretion occurs gradually and imperceptibly, while a sudden change is an avulsion. The littoral owner automatically takes title to dry land added to his property by accretion. With avulsion, however, the seaward boundary of littoral property remains what it was: the mean high-water line before the event. Thus, when an avulsion has added new land, the littoral owner has no right to subsequent accretions, because the property abutting the water belongs to the owner of the seabed (ordinarily the State).

Florida's Beach and Shore Preservation Act establishes procedures for depositing sand on eroded beaches (restoration) and maintaining the deposited sand (nourishment). When such a project is undertaken, the State entity that holds title to the seabed sets a fixed "erosion control line" to replace the fluctuating mean high-water line as the boundary between littoral and state property. Once the new line is recorded, the common law ceases to apply. Thereafter, when accretion moves the mean high-water line seaward, the littoral property remains bounded by the permanent erosion-control line.

Respondents the city of Destin and Walton County sought permits to restore 6.9 miles of beach eroded by several hurricanes, adding about 75 feet of dry sand seaward of the mean high-water line (to be denominated the erosion-control line). Petitioner, a nonprofit corporation formed by owners of beachfront property bordering the project (hereinafter Members) brought an unsuccessful administrative challenge. Respondent the Florida Department of Environmental Protection approved the permits, and this suit followed. The State Court of Appeal concluded that the Department's order had eliminated the Members' littoral rights (1) to receive accretions to their property and (2) to have their property's contact with the water remain intact. Concluding that this would be an unconstitutional taking and would require an additional administrative requirement to be met, it set aside the order, remanded the proceeding, and certified to the Florida Supreme Court the question whether the Act unconstitutionally deprived the Members of littoral rights without just compensation. The State Supreme Court answered "no" and quashed the remand, concluding that the Members did not own the property supposedly taken. Petitioner sought rehearing on the ground that the Florida Supreme Court's decision effected a taking of the Members' littoral rights contrary to the Fifth and Fourteenth Amendments; rehearing was denied.

Held: The judgment is affirmed.

998 So. 2d 1102, affirmed.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, IV, and V, concluding that the Florida Supreme Court did not take property without just compensation in violation of the Fifth and Fourteenth Amendments. Pp. 24-29.

(a) Respondents' arguments that petitioner does not own the property and that the case is not ripe were not raised in the briefs in opposition and thus are deemed waived. Pp. 24-25.

(b) There can be no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral property owners had rights to future accretions and to contact with the water superior to the State's right to fill in its submerged land. That showing cannot be made. Two core Florida property-law principles intersect here. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and of littoral landowners. Second, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. Prior Florida law suggests that there is no exception to this rule when the State causes the avulsion. Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for ownership purposes. The right to accretions was therefore subordinate to the State's right to fill. Pp. 25-27.

(c) The decision below is consistent with these principles. Cf. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-1029. It did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the beach-restoration project because of the doctrine of avulsion. Relying on dicta in the Florida Supreme Court's *Sand Key* decision, petitioner contends that the State took the Members' littoral right to have the boundary always be the mean high-water line. But petitioner's interpretation of that dictum contradicts the clear law governing avulsion. One cannot say the Florida Supreme Court contravened established property law by rejecting it. Pp. 27-29.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded in Parts II and III that if a court declares that what was once an established right of private property no longer exists, it has taken that property in violation of the Takings Clause. Pp. 7-24.

(a) Though the classic taking is a transfer of property by eminent domain, the Clause applies to other state actions that achieve the same thing, including those that recharacterize as public property what was previously private property, see Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163-165. The Clause is not addressed to the action of a specific branch or branches. It is concerned simply with the act, not with the governmental actor. This Court's precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment,

and in fact suggest the contrary. See PruneYard Shopping Center v. Robins, 447 U.S. 74, Webb's Fabulous Pharmacies, *supra.* Pp. 7-20.

(b) For a judicial taking, respondents would add to the normal takings inquiry the requirement that the court's decision have no "fair and substantial basis." This test is not obviously appropriate, but it is no different in this context from the requirement that the property owner prove an established property right. Respondents' additional arguments -- that federal courts lack the knowledge of state law required to decide whether a state judicial decision purporting to clarify property rights has instead taken them; that common-law judging should not be deprived of needed flexibility; and that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the Rooker-Feldman doctrine, see Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416, District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 -- are unpersuasive. And petitioner's proposed "unpredictability test" -- that a judicial taking consists of a decision that "constitutes a sudden change in state law, unpredictable in terms of relevant precedents," Hughes v. Washington, 389 U.S. 290, 296 (Stewart, J., concurring) -- is misdirected. What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was well established. Pp. 20-24.

Justice Kennedy, joined by JUSTICE SOTOMAYOR, agreed that the Florida Supreme Court did not take property without just compensation, but concluded that this case does not require the Court to determine whether, or when, a judicial decision determining property owners' rights can violate the Takings Clause. If and when future cases show that the usual principles, including constitutional ones that constrain the judiciary like due process, are inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented. Pp. 1-10.

JUSTICE BREYER, joined by JUSTICE GINSBURG, agreed that no unconstitutional taking occurred here, but concluded that it is unnecessary to decide more than that to resolve this case. Difficult questions of constitutional law -- *e.g.,* whether federal courts may review a state court's decision to determine if it unconstitutionally takes private property without compensation, and what the proper test is for evaluating whether a state-court property decision enacts an unconstitutional taking -- need not be addressed in order to dispose "of the immediate case." Whitehouse v. Illinois Central R. Co., 349 U.S. 366, 373. Such questions are better left for another day. Pp. 1-3.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Stop_the_Beach_Renourishment%2C_Inc._v._Florida_Department_of_Environmental_Protection

Cases Awaiting Decision – 2009-2010 Term (as of June 17, 2010)

Rent-A-Center, West, Inc. v. Jackson
(Arbitration – Unconscionability – Role of Court and Arbiter)

- 581 F.3d 912 (9th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 537 (Jan. 15, 2010), Docket No. 09-497.
- This case was argued on April 26, 2010.
- Question Presented:
    - Whether the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act ("FAA") is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Rent-A-Center_v._Jackson

Granite Rock Co. v. Int'l Bhd. of Teamsters
(Labor Law – Non-Signatory to CBA)

- 546 F.3d 1169 (9th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 4863 (June 29, 2009), Docket No. 08-1214.
- This case was argued on January 19, 2010.
- Question Presented:
    - Whether federal courts have jurisdiction to determine collective bargaining agreement formation and whether a §301(a) action is available against a union that is not a direct signatory to the collective bargaining agreement.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Granite_Rock_Company_v._International_Brotherhood_of_Teamsters%2C_et_al

United States v. Skilling
(Constitutionality of "Honest Services" Statute)

- 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 7359 (Oct. 13, 2009), Docket No. 08-1394.
- This case was argued on March 1, 2010.
- Question Presented:
    - Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, and, if not, whether the statute is unconstitutionally vague.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Skilling_v._United_States

Weyhrauch v. United States
(Constitutionality of "Honest Services" Statute)

- 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 4787 (June 29, 2009), Docket No. 08-1196.
- This case was argued on December 8, 2009.
- Question Presented:
    - Whether 18 U.S.C. § 1346, by criminalizing denials of "the intangible right of honest services," mandates the creation by the federal courts of a federal common law defining the disclosure obligations of state government officials.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Weyhrauch_v._United_States

Morrison v. National Australia Bank
(Extraterritoriality)

- 547 F.3d 167 (2nd Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 8694 (Nov. 30, 2009), Docket No. 08-1191.
- This case was argued on March 29, 2010.
- Questions Presented:
    - Whether the antifraud provisions of the United States securities laws extend to transnational frauds where: (a) the foreign-based parent company conducted substantial business in the United States, its American Depository Receipts were traded on the New York Stock Exchange and its financial statements were filed with the Securities Exchange Commission ("SEC"); and (b) the claims arose from a massive accounting fraud perpetrated by American citizens at the parent company's Florida-based subsidiary and were merely reported from overseas in the parent company's financial statements.
    - Whether this Court, which has never addressed the issue of whether subject matter jurisdiction may extend to claims involving transnational securities fraud, should set forth a policy to resolve the three-way conflict among the circuits (i.e., District of Columbia Circuit versus the Second, Fifth and Seventh Circuits versus the Third, Eighth and Ninth Circuits).
    - Whether the Second Circuit should have adopted the SEC's proposed standard for determining the proper exercise of subject matter jurisdiction in transnational securities fraud cases, as set forth in the SEC's amicus brief submitted at the request of the Second Circuit, and whether the Second Circuit should have adopted the SEC's finding that subject matter jurisdiction exists here due to the "material and substantial conduct in furtherance of" the securities fraud that occurred in the United States.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Morrison_v._National_Australia_Bank

Christian Legal Society v. Martinez
(Constitutional Law – Freedom of Religion)

- No. 06-15956 (9th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 8842 (Dec. 7, 2009), Docket No. 08-1371.
- This case was argued on April 19, 2010.
- Question Presented:
    - Whether the Ninth Circuit erred when it held, in contrast to the Seventh Circuit's decision in Christian Legal Society v. Walker, 453 F.3d 853 (2006), that the Constitution permits a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Christian_Legal_Society_v._Martinez.

Free Enterprise Fund v. Public Company Accounting Oversight Board
Constitutional Law – Separation of Powers

- 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 3580 (May 18, 2009), Docket No. 08- 861.
- This case was argued on December 7, 2009.
- Questions Presented:
    - Whether the Sarbanes-Oxley Act of 2002 violates the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board ("PCAOB") with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it "deems best for the public interest".
    - Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the Securities and Exchange Commission ("SEC"), where the SEC lacks any Authority to supervise those members personally, to remove the members for any policy related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product.
    - If PCAOB members are inferior officers, whether the Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a "Department" under Freytag v. Commissioner, 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are not the "Head" of the SEC.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Free_Enterprise_Fund_and_Beckstead_and_Watts%2C_LLP_v._Public_Company_Accounting_Oversight_Board

Doe v. Reed
(Constitutional Law – Free Speech)

- 586 F.3d 671 (11th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 536 (Jan. 15, 2010), Docket No. 09-559.
- This case was argued on April 28, 2010.
- The district court granted a preliminary injunction protecting against public disclosure, as opposed to private disclosure to the government only, of those signing a petition to put a referendum on the ballot ("petition signers"). The Ninth Circuit reversed, concluding that the district court based its decision on an incorrect conclusion of law when it determined that public disclosure of petition signers is subject to, and failed, strict scrutiny.
- Questions Presented:
    - Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers.
    - Whether compelled public disclosure of identifying information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Doe_v._Reed

Cert. Granted for 2010-2011 Term

NASA v. Nelson
(Privacy)

- 530 F.3d 865 (9th Cir. 2008), *cert. granted*, 2010 U.S. LEXIS 2298 (Mar. 8, 2010), Docket No. 09-530.
- Questions Presented:
    - Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. 552a.
    - Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the reference's response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. 552a.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=National_Aeronautics_and_Space_Administration_v._Nelson

Staub v. Proctor Hospital

(Employment Discrimination – Imputing Liability – Cat's Paw)

- 560 F.3d 647 (7th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 3333 (Apr. 19, 2010), Docket No. 09-400.
- Question Presented:
    - In what circumstances may an employer be held liable based on the unlawful intent of officials who cause or influenced but did not make the ultimate employment decision.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Staub_v._Proctor_Hospital

Kasten v. Saint-Gobain Performance Plastics Corp.
(FLSA – Retaliation)

- 570 F.3d 834 (9th Cir. 2009), *Reh'g denied by*, *Reh'g, en banc, denied*, 585 F.3d 310 (7th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 2654 (Mar. 22, 2010), Docket No. 09-834.
- Question Presented:
    - Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. §215(a)(3)?
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Kasten_v._Saint-Gobain_Performance_Plastics_Corp

Los Angeles County v. Humphries
(Attorneys' Fees)

- 554 F.3d 1170 (9th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 1114 (Feb. 22, 2010), Docket No. 09-350.
- Questions Presented:
    - Are claims for declaratory relief against a local public entity subject to the requirement of Monell v. Department of Social Services, 436 U.S. 658 (1978) that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom or practice attributable to the local public entity as determined by the First, Second, Fourth and Eleventh Circuits, or are such claims exempt from Monell's requirement as determined by the Ninth Circuit?
    - May a plaintiff be a prevailing party under 42 U.S.C. §1988 for purposes of a fee award against a local public entity based upon a claim for declaratory relief where the plaintiff has not demonstrated that any constitutional violation was the result of a policy, custom or practice attributable to the public entity under Monell?
    - May a plaintiff be a prevailing party on a claim for declaratory relief for purposes of a fee award under 42 U.S.C. §1988 where there is neither a formal order nor judgment granting declaratory relief, nor any other order altering the legal relationship between the parties in a way that directly benefits the plaintiff?

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Los_Angeles_County_v._Humphries

Snyder v. Phelps
(Freedom of Speech)

- 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 2280 (Mar. 8, 2010), Docket No. 09-751.
- In this case, the 4th Circuit two judge majority (Judge King writing for himself and Judge Duncan) upheld the First Amendment right of individuals to picket the funeral of a homosexual Marine who died in Iraq, the pickets using the funeral as a platform to gain media attention for their anti-homosexual message. Judge King aptly quoted from a 1993 decision by Judge Hall of that court in which Judge Hall stated that judges defending the Constitution "must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people." Kopf v. Skyrm, 993 F.2d 374, 380 (4th Cir. 1993) (internal quotation marks omitted).
- As there were four votes on the Supreme Court to take cert. in this case, one must be concerned that the Court is prepared to create a major exception to the First Amendment.
- Questions Presented:
    - The Fourth Circuit reversed a jury determination in favor of Albert Snyder ("Snyder") for the intentional harm perpetrated against him by Fred W. Phelps, Sr., Westboro Baptist Church, Incorporated, Rebekah A. Phelps-Davis and Shirley L. Phelps- Roper (collectively, "Phelps"). Snyder's claim arose out of Phelps' intentional acts at Snyder's son's funeral. Specifically the claims were: (1) intentional infliction of emotional distress, (2) invasion of privacy and (3) civil conspiracy. These claims were dismissed by the Fourth Circuit notwithstanding that (a) Hustler Magazine, Inc. v. Falwell does not apply to private versus private individuals; (b) Snyder was a "captive" audience; (c) Phelps specifically targeted Snyder and his family; (d) Snyder proved that he was intentionally harmed by clear and convincing evidence; and (e) Phelps disrupted Snyder's mourning process. The Fourth Circuit's decision gives no credence to Snyder's personal stake in honoring and mourning his son and ignores Snyder's right to bury his son with dignity and respect.
    - Three questions are presented:
        1. Does Hustler Magazine, Inc. v. Falwell apply to a private person versus another private person concerning a private matter?
        2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?
        3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

- Because Snyder sought punitive damages, he was required to prove his case by clear and convincing evidence. Furthermore, Snyder was required to prove actual malice. Snyder carried his burden on both issues.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Snyder_v._Phelps

Sossamon v. Texas
Cardinal v. Metrish
(Constitutional Law – 11th Amendment)

- 560 F.3d 316 (5th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 4266 (Mary 24, 2010), Docket No. 08-1438.
- 564 F.3d 794 (6th Cir. 2009), Docket No. 09-109.
- Question Presented:
  - Whether states and state officials may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act.
- On November 2, 2009, the Court requested the opinion of the Solicitor General on whether to grant certiorari. The Solicitor General filed the brief amicus curiae of the United States on March 18, 2010.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Sossamon_v._Texas

AT&T Mobility v. Concepcion

- 584 F.3d 849 (9th Cir. Oct. 27, 2009), *cert. granted*, 2010 U.S. LEXIS 4309 (May 24, 2010), Docket No. 09-893.
- Question Presented:
  - Whether the Federal Arbitration Act preempts states from conditioning the enforcement of an arbitration agreement on the availability of particular procedures — here, class-wide arbitration — when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=AT%26T_Mobility_v._Concepcion

Mayo Foundation for Medical Education and Research v. United States

- 568 F.3d 675 (8th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 4390 (June 1, 2010).
- Question Presented:
  - Whether the Treasury Department can categorically exclude all medical residents and other full-time employees from the definition of "student" in 26 U.S.C. § 3121(b)(10), which exempts from Social Security taxes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university."?

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Mayo_Foundation_for_Medical_Education_and_Research_v._United_States

Cert. Denied or Case Settled

Pollitt v. Health Care Service Corp.
(Preemption)

- 558 F.3d 615 (7th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 7402 (Oct. 13, 2009), dismissed as settled 2010 U.S. LEXIS 1901 (Feb. 24, 2010), Docket No. 09-38.
- Question Presented:
  - Whether the Federal Employees Health Benefits Act, 5 U.S.C. § 8902(m)(1), preempts a state court lawsuit filed against a government contractor administering such benefits?
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Health_Care_Service_v._Pollitt

U.S. v. Textron
(Work-Product Privilege)

- 577 F.3d 21 (1st Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 4373 (May 24, 2010), Docket No. 09-750.
- Question Presented in the Cert. Petition:
  - Whether the work-product privilege in Federal Rule of Civil Procedure 26(b)(3), which protects documents that are "prepared in anticipation of litigation or for trial," is limited to documents that are prepared for use in litigation.
- Petition for Cert. is available at: http://taxprof.typepad.com/files/textron-cert.-petition.pdf
- The United State's Brief in Opposition is available at: http://taxprof.typepad.com/files/textron-brief.pdf
- Reply Brief for the Petitioner is available at: http://taxprof.typepad.com/files/textron-reply-brief.pdf
- The eleven Amicus Briefs filed in this case are available at: http://taxprof.typepad.com/taxprof_blog/2010/01/textron.html

Standard Insurance Co. v. Lindeen
(ERISA – Banning Discretionary Clauses)

- 584 F.3d 837 (9th Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 4079 (May 17, 2010), Docket No. 09-830.
- Questions Presented in the Cert. Petition:
  - Whether a state rule banning discretionary clauses, with the sole purpose and effect of dictating universal *de novo* review by the federal courts of Employee Retirement Income Security Act benefits decisions, is preempted by ERISA.

    - Whether the states may eliminate the option of a deferential federal court standard of review that Congress made available to the creators of ERISA plans.
- Petition for Cert. is available at: http://www.scotusblog.com/wp-content/uploads/2010/05/lindeen_pet.pdf
- Respondent's Brief in Opposition is available at: http://www.scotusblog.com/wp-content/uploads/2010/05/09-885_bio.pdf
- Petitioner's Reply Brief is available at: http://www.scotusblog.com/wp-content/uploads/2010/05/09-830_reply.pdf

Gregory v. Dillard's
(Section 1981)

- 565 F.3d 464 (8th Cir.), *cert. denied*, 2009 U.S. LEXIS 8243 (Nov. 16, 2009), Docket No. 09-322.
- Question Presented in the Petition for Writ of Certiorari:
    - To set forth a claim under 42 U.S.C. § 1981 in the retail context, must a minority shopper claim and show that the retailer actively and intentionally obstructed his efforts, making the shopper's purchase impossible, or does the equal "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" provision of the statute prohibit racial harassment and race based surveillance that interferes with the making of the contract but does not actually prevent its formation?
- Petition for Cert. is available at: http://law.psu.edu/_file/Gregory%20v_%20Dillards.pdf
- Respondent's Brief in Opposition is available at: http://law.psu.edu/_file/Civil_Rights/Gregory_Brief_In_Opposition.pdf
- Petitioner's Reply Brief is available at: http://law.psu.edu/_file/Civil_Rights/Gregory_Reply.pdf

Coffee Beanery, Ltd. v. WW, LLC
(Arbitration – Manifest Disregard)

- 300 Fed. Appx. 415 (6th Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 6800 (Oct. 5, 2009), Docket No. 08-1396.
- Questions Presented in Petition for Writ of Certiorari:
    - Is manifest disregard of the law a valid common-law or statutory ground for vacating an arbitration award under the Federal Arbitration Act?
    - Did the Sixth Circuit err in vacating the arbitration award in this case for manifest disregard of the law?
- Petition for Cert. available at: http://www.scotusblog.com/wp-content/uploads/2009/09/08-1396_pet.pdf
- Brief in Opposition to Cert. available at: http://www.scotusblog.com/wp-content/uploads/2009/09/08-1396_bio.pdf
- Petitioner's Reply available at: http://www.scotusblog.com/wp-content/uploads/2009/09/08-1396_cert_rep.pdf

- Brief amicus curiae of International Franchise Association available at: http://www.scotusblog.com/wp-content/uploads/2009/09/08-1396_cert_amicus.pdf

Grain v. Trinity Health
(Arbitration – Manifest Disregard)

- 551 F.3d 374 (6th Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 6803 (Oct. 5, 2009), Docket No. 08-1446.
- Question Presented in Petition for Writ of Certiorari:
    - Does a federal district court have the authority pursuant to Wilko v. Swan, 346 U.S. 427 (1953) (overruled on other grounds), Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989), to modify an arbitration award based upon the "manifest disregard of the law" standard when the arbitrators, in a restricted submission, do not apply the particular law for resolving the dispute specified by the parties in their pre-dispute arbitration agreement?
- Petition for Cert. available at: http://www.scotusblog.com/wp-content/uploads/2009/09/08-1446_pet.pdf
- Brief in Opposition to Cert. available at: http://www.scotusblog.com/wp-content/uploads/2009/09/08-1446_bio.pdf

DTD Enters., Inc. v. Wells
(Civil Procedure – Class Actions)

- No. L-9012-07 (N.J. Sup. Ct. App. Div. May 9, 2008) (order granting plaintiff's motion for class certification), *cert. denied*, 2009 U.S. LEXIS 7158 (Oct. 13, 2009), Docket No. 08-1407.
- Question Presented:
    - Whether directing a class action defendant to pay the entire cost of notice to a class simply because the defendant could afford to pay while the plaintiff could violates the due process.
- In denying cert., Justice Sotomayor joined Justice Kennedy and Chief Justice Roberts to raise serious constitutional concerns in ordering the dating service to shoulder the costs of notifying class members in this lawsuit concerning "matchmaking." In relevant part, the Justices stated: "[t]o the extent that New Jersey law allows a trial court to impose the onerous costs of class notification on a defendant simply because of the relative wealth of the defendant and without any consideration of the underlying merits of the suit, a serious due process question is raised."
- The full text of this statement is available printed in the petition denying cert., 2009 U.S. LEXIS 7158 (Oct. 13, 2009).

Townes v. Jarvis

(Iqbal – Pleading Standards)

- 577 F.3d 543 (4th Cir. 2009), *cert. denied*, 176 L. Ed. 2d 363, 2010 U.S. LEXIS 2651 (Mar. 22, 2010), Docket No. 09-729.
- Question Presented, as stated in the Petition for Cert.:
    - Whether the holding of Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002), which clarified the pleading requirements for intentional discrimination cases, still good law after this Court's decision in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).
- Petition for Cert. is available at: http://www.scotusblog.com/wp-content/uploads/2010/03/09-729_pet.pdf
- Respondent's Brief in Opposition to Cert. is available at: http://www.scotusblog.com/wp-content/uploads/2010/03/09-729_bio.pdf
- Petitioner's Reply is available at: http://www.scotusblog.com/wp-content/uploads/2010/03/09-729_reply.pdf

Pending Cert. Petitions (as of June 17, 2010)

Thompson v. North American Stainless
(Associational Retaliation)

- 567 F.3d 804 (6th Cir. 2008) *en banc*, Docket No. 09-291.
- On December 9, 2009, the Court requested the opinion of the Solicitor General. On May 25, 2010, the Solicitor General filed a brief recommending that the Court deny cert.
- Question Presented:
    - Whether a third party is afforded protection under the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), based solely upon his association with an employee who has engaged in protected activity.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Thompson_v._North_American_Stainless

U.S. Chamber of Commerce v. Candelaria
(Preemption)

- 558 F.3d 856 (9th Cir. 2008), Docket No. 09-115.
- On November 2, 2009, the Court requested the opinion of the Solicitor General on whether to grant certiorari. On May 28, 2010, the Solicitor General filed a brief advising the Court to grant cert. limited only to the first question presented.
- Questions Presented in Petition for Writ of Certiorari:
    - Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

- Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.
- Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Chamber_of_Commerce_of_the_United_States_v._Candelaria

Virginia Office for Protection and Advocacy v. Reinhard
(Constitutional Law - 11th Amendment)

- 568 F.3d 110 (4th Cir. 2009), Docket No. 09-529.
- On January 19, 2010, the Court requested the opinion of the Solicitor General on whether to grant certiorari. On May 21, 2010, the Solicitor General filed a brief in favor of granting cert.
- Question Presented in Cert. Petition:
  - Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of Ex parte Young.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Virginia_Office_for_Protection_and_Advocacy_v._Reinhard

Pfizer v. Abdullahi
(Alien Tort Claims Act)

- 562 F.3d 163 (2nd Cir. 2009), Docket No. 09-34.
- On November 2, 2009, the Court requested the opinion of the Solicitor General on whether to grant certiorari. On May 28, 2010, the Solicitor General filed a brief in favor of denying cert.
- Question Presented:
  - Whether the Alien Tort Claims Act's jurisdiction can extend to a private actor based on alleged state action by a foreign government when there is no allegation that the government knew of or participated in the specific acts by the private actor claimed to have violated international law.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?search=pfizer&go=Go

Golden Gate Rest. Ass'n v. San Francisco
(Constitutional Law)

- 546 F.3d 639 (9th Cir. 2009), Docket No. 08-1515.
- On October 5, 2009, the Court requested the opinion of the Solicitor General on whether to grant certiorari. On May 28, 2010, the Solicitor General filed a brief in favor of denying cert.
- Question Presented:
    - Whether ERISA section 514(a), 29 U.S.C. § 1144(a), preempts local laws that mandate ongoing employer contributions for employee health-benefits, or alternative payments to a local government, and extensive recordkeeping and reporting and disclosure requirements.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Golden_Gate_Restaurant_Association_v._San_Francisco

Simmons v. Galvin
(Voting Rights Act – Ex Post Facto Clause)

- 575 F.3d 24 (1st Cir. 2009), Docket No. 09-920.
- On May 3, 2010, the Court requested the Solicitor General's opinion on whether to grant cert. The Solicitor General has not yet filed a brief
- The Questions Presented in the Cert. Petition:
    - Whether Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, applies to state felon disenfranchisement laws that result in discrimination on the basis of race.
    - Whether the Massachusetts felon disenfranchisement scheme established in 2000 violates the Ex Post Facto Clause of the United States Constitution as applied to those Massachusetts felons who were incarcerated and yet had the right to vote prior to 2000.
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Simmons_v._Galvin

Holy See v. Doe
(Foreign Sovereign Immunities Act)

- 557 F.3d 1066 (9th Cir. Mar. 3, 2009), Docket No. 09-1.
- On November 26, 2009, the Court requested the Solicitor General's opinion on whether to grant cert. On May 21, 2010, the Solicitor General filed a brief in favor of either granting cert., vacating the 9th Circuit's decision and remanding to the 9th Circuit for further consideration, or, in the alternative, denying cert.
- Question Presented in the Cert. Petition:
    - Whether the Foreign Sovereign Immunity Act's tort exception confers jurisdiction when the tortious act itself falls outside the scope of employment but state law extends vicarious liability based upon non-tortious precursor conduct falling within the scope of employment.

- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Holy_See_v._Doe

Ortho Biotech Products v. United States ex rel. Duxbury
(False Claims Act – Public Disclosure – Pleadings Standards)

- 579 F.3d 13 (1st Cir. Aug. 12, 2009), Docket No. 09-654.
- On February 22, 2010, the Court requested the opinion of the Solicitor General on whether to grant certiorari. On May 19, 2010, the Solicitor General filed a brief in favor of denying cert.
- Questions Presented in the Cert. Petition:
    - Whether a federal court lacks subject-matter jurisdiction over a qui tam suit under the False Claims Act that repeats publicly disclosed allegations from prior litigation, when the FCA relator did not provide the government with information on the suit's allegations before the public disclosure.
    - Whether an FCA relator, alleging that the defendant induced a third party to submit false or fraudulent claims, can satisfy Rule 9(b) of the Federal Rules of Civil Procedure without identifying a single false or fraudulent claim, but merely by alleging facts sufficient "to strengthen the inference of fraud beyond possibility."
- For Briefs and Other Related Documents, *see*: http://www.scotuswiki.com/index.php?title=Ortho_Biotech_Products_v._United_States_ex_rel._Duxbury

Cases of Interest Not Yet Before the Court

Dukes v. Wal-Mart Stores, Inc.
(Class Actions – Class Certification)

- 603 F.3d 571 (9th Cir. Apr. 26, 2010) (*en banc*).
- In a 6-5 opinion authored by Judge Michael Hawkins, the 11th Circuit affirmed the district court's class certification of a class of all women employed by Wal-Mart any time after December 26, 1998.

Sahyers v. Prugh, Holliday & Karatinos, P.L.
(FLSA – Attorneys Fees)

- 560 F.3d 1241 (11th Cir. Mar. 3, 2009), *reh'g en banck denied*, 2010 U.S. App. LEXIS 7655 (11th Cir. Apr. 14, 2010).
- A panel of the Eleventh Circuit, in an opinion written by Chief Judge Edmondson, affirmed the district court's denial of plaintiff's petition for attorneys' fees in her successful FLSA lawsuit on the ground that plaintiff's counsel, prior to filing suit against a law firm, "made absolutely no effort—no phone call; no email; no letter—to inform them of Plaintiff's impending claim much less to resolve this dispute before filing suit."