More than Marriage

Civil Cases in the Supreme Court's 2012-2013 Term

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The Supreme Court's October 2012 Term likely will be remembered best for the Justices' landmark ruling in *United States v. Windsor*, striking down Section 3 of the Defense of Marriage Act, and for the jurisdictional ruling in *Hollingsworth v. Perry* that helped to reopen the door for same-sex marriages in California. Many also will long remember *Shelby County v. Holder*, invalidating Section 4 of the Voting Rights Act and thereby freeing a number of states and localities from the preclearance requirements under which they had operated for decades. Crowded behind those headline-dominating decisions are a host of other broadly consequential rulings on issues ranging from racial preferences in higher education, to ratcheting up the requirements for voter registration, to seeking standing in federal court on the basis of anticipated injuries. I briefly review the Court's most noteworthy civil decisions here, letting a set of alphabetized headings dictate the order in which I take them up.

ADMINISTRATIVE LAW

AUER DEFERENCE

The Court's holding in *Decker v. Northwest Environmental Defense Center*[1] is not likely to be of much interest outside the world of environmental-law specialists, but the case served as a vehicle for three Justices to signal an issue of potentially enormous significance in the larger world of administrative law. *Decker* concerned a dispute about the need for National Pollutant Discharge Elimination System permits covering storm water flowing off logging roads into nearby rivers. Citing *Auer v. Robbins*,[2] the Court deferred to the Environmental Protection Agency's interpretation of its own regulations and held that permits were not required.[3] It is the continued viability of *Auer* deference that three Justices questioned.

The leading skeptic was Justice Scalia, who wrote separately to declare that "[e]nough is enough" and that the time has come "for us to presume (to coin a phrase) that an agency says in a rule what it means, and means in a rule what it says there."[4] Calling *Auer* deference "a dangerous permission slip for the arrogation of power," Justice Scalia argued that it violates "a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands."[5] Joined by Justice Alito, Chief Justice Roberts wrote separately to say that it would be inappropriate to take on the question of *Auer* deference in this case because it had not been thoroughly argued by the parties, but that the issue might indeed merit the Court's attention in the future.

CHEVRON DEFERENCE

Two months later, in *City of Arlington v. FCC*,[6] Justice Scalia led a majority of the Court in defending a different species of interpretive deference, with Chief Justice Roberts and Justices Kennedy and Alito warning in dissent about the dangers of expanding administrative agencies' already vast powers. The issue in *City of Arlington* was whether the Federal Communications Commission's interpretation of its own statutory jurisdiction was entitled to *Chevron* deference.[7] Under federal statutory law, state and local zoning authorities must respond "within a reasonable period of time" when providers of wireless telecommunications seek approval to build the towers and antennas that their services require.[8] After the FCC specified the number of days within which zoning authorities ordinarily must respond to siting applications, the City of Arlington, Texas, and other municipalities sought judicial review, arguing that the FCC lacked the authority to say what Congress meant by "reasonable period of time." The FCC contended that it held the power to resolve the ambiguity, and that its determination that it possessed this interpretive power was itself entitled to *Chevron* deference.

Writing for the majority, Justice Scalia concluded that *Chevron* deference is indeed appropriate for agencies' interpretations of statutory ambiguities concerning the scope of their own authority. He explained that the proposed distinction between jurisdictional and nonjurisdictional statutory interpretations is "a mirage,"[9] "an empty distraction,"[10] and a distinction that would require federal judges to engage in "waste[ful] . . . mental acrobatics" akin to those of a "haruspex, sifting the entrails of vast statutory schemes."[11] In every case concerning an agency's statutory interpretations, the Court said, the question is always the same: has the agency "gone

Footnotes

1. 133 S. Ct. 1326 (2013).
2. 519 U.S. 452, 461 (1997) (stating that the Court will defer to an administrative agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation") (internal quotation omitted).
3. Justice Breyer recused himself because his brother, U.S. District Judge Charles Breyer, was sitting by designation on the Ninth Circuit panel that heard the case below.
4. *Decker*, 133 S. Ct. at 1339, 1344 (Scalia, J., concurring in part and dissenting in part).
5. *Id.* at 1341 (Scalia, J., concurring in part and dissenting in part).
6. 133 S. Ct. 1863 (2013).
7. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (explaining that, when Congress delegates the administration of a federal statute to an agency but does not clearly indicate its intentions with respect to a particular issue arising under that statute, a court may not substitute its own interpretation of the statute for the reasonable interpretation of the agency itself).
8. *See* 47 U.S.C. § 332(c)(7)(B)(ii).
9. *City of Arlington*, 133 S. Ct. at 1868.
10. *Id.* at 1870.
11. *Id.* at 1870-71.

beyond what Congress has permitted it to do"?[12]

Joined by Justices Kennedy and Alito, Chief Justice Roberts dissented, expressing grave reservations about the broad scope of administrative agencies' powers in modern American government. The Chief Justice argued that, with "hundreds of federal agencies poking into every nook and cranny of [the average citizen's] daily life," the Court should be loath to expand agencies' powers still further.[13] "An agency interpretation warrants [*Chevron*] deference," the Chief Justice wrote, "only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner. Whether Congress has done so must be determined by the court on its own before *Chevron* can apply."[14]

ARBITRATION

HONORING THE FEDERAL ARBITRATION ACT

In three rulings handed down during the prior Term,[15] the Court expressed frustration with lower courts for failing to follow the requirements of the Federal Arbitration Act (FAA). In November 2012, the Court picked up where it left off by unanimously reversing a judgment of the Oklahoma Supreme Court in *Nitro-Lift Technologies, LLC v. Howard*.[16] Nitro-Lift had entered into contracts with two of its employees. Those contracts contained noncompetition clauses, as well as clauses requiring arbitration to settle any differences that might arise between the parties. After the employees left Nitro-Lift to work for a competitor, Nitro-Lift sought to enforce the noncompetition agreements through arbitration. The employees, however, went to state court seeking a declaration that the noncompetition agreements were unenforceable under state law. The Oklahoma Supreme Court found that the noncompetition agreements were "void and unenforceable as against Oklahoma's public policy."[17] In a unanimous *per curiam* ruling, the Supreme Court reversed, explaining that the FAA permitted the state courts to pass judgment on the validity of the arbitration provisions themselves, but—having accepted the trial court's determination that those provisions were valid—the Oklahoma Supreme Court improperly "assumed the arbitrator's role by declaring the noncompetition agreements null and void."[18]

[T]he Court unanimously ruled that it would be inappropriate to disturb the arbitrator's finding that class arbitration was within the scope of the parties' agreement.

CLASS ARBITRATION

In two cases last Term, the Court addressed issues relating to class arbitration. Building on the previously established principle that "a party may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so,"[19] the Court in *Oxford Health Plans LLC v. Sutter*[20] confronted a dispute between a health-insurance company and a proposed class of physicians. On two separate occasions, the insurer had asked an arbitrator to determine whether the insurer and the physicians had agreed upon class arbitration (as some of the physicians contended), and on both occasions the arbitrator determined that they had. The insurer then asked a federal court to vacate the arbitrator's determination under Section 10(a)(4) of the FAA, arguing that the arbitrator had "exceeded [his] powers."[21]

Led by Justice Kagan, the Court unanimously ruled that it would be inappropriate to disturb the arbitrator's finding that class arbitration was within the scope of the parties' agreement. The Court stressed that it was not necessarily agreeing with the arbitrator's reading of the contract.[22] Rather, the Justices' decision turned on the narrow scope of judicial review:

> All we say is that convincing a court of an arbitrator's error—even a grave error—is not enough. So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under § 10(a)(4). The potential for those mistakes is the price of agreeing to arbitration.[23]

12. *Id.* at 1869.
13. *Id.* at 1879 (Roberts, C.J., dissenting). The majority did not believe its ruling expanded agencies' power. *See, e.g.*, *id.* at 1872 ("The U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction.").
14. *Id.* at 1883 (Roberts, C.J., dissenting). Justice Breyer wrote separately. Although he denominated his opinion a concurrence in part and a concurrence in the judgment, he substantively aligned himself, in part, with the dissent. *See, e.g.*, *id.* at 1876 ("The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently.").
15. CompuCredit v. Greenwood, 132 S. Ct. 665 (2012); Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201 (2012); KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011).
16. 133 S. Ct. 500 (2012) (per curiam).
17. Howard v. Nitro-Lift Technologies, LLC, 273 P.3d 20, 27 (Okla. 2011).
18. *Nitro-Lift Technologies*, 133 S. Ct. at 503.
19. Stolt-Nielsen v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (emphasis omitted).
20. 133 S. Ct. 2064 (2013).
21. 9 U.S.C. § 10(a)(4) (authorizing federal courts to vacate arbitrators' awards "where the arbitrators exceeded their powers").
22. Joined by Justice Thomas, Justice Alito filed a brief concurrence, underscoring the implausibility of the arbitrator's finding on the merits and indicating that—absent a decision like the one the insurer made here to submit the issue to the arbitrator in the first instance—courts should be reluctant to find that the availability of class arbitration is indeed an issue for arbitrators to decide. In her opinion for the Court, Justice Kagan emphasized that the Court has not yet determined whether "the availability of class arbitration is a so-called 'question of arbitrability'" that courts ordinarily can review *de novo*. *See Oxford Health Plans*, 133 S. Ct. at 2068 n.2.
23. *Id.* at 2070 (quoting E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)).

[A] majority of the court ruled in favor of Amex, stating that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."

The class-arbitration issue in *American Express Co. v. Italian Colors Restaurant*[24] proved to be more controversial. Merchants who accepted American Express (Amex) cards brought a class-action lawsuit against the company, arguing that Amex violated federal antitrust laws by using its monopoly power in the market for *charge* cards to force the merchants to pay above-market fees for transactions involving Amex *credit* cards. Amex sought to compel individual arbitration pursuant to a contractual arbitration clause, pointing out that the merchants not only had agreed to arbitrate any claims they might have against the company, but also that they had waived their ability to pursue their claims as a class. The merchants objected, arguing that their individual best-case recoveries would amount to only a fraction of the costs they each would have to incur to prove the merits of their antitrust claims. To preclude them from collectively pursuing their claims in court, they argued, thus would frustrate the purposes of the antitrust laws by effectively shielding Amex from liability.

Led by Justice Scalia, a majority of the Court ruled in favor of Amex, stating that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[25] The Court acknowledged that, in past cases, it had developed an "effective vindication" doctrine, under which a court may invalidate an arbitration agreement if it amounts to "'a prospective waiver of a party's right to pursue statutory remedies.'" [26] The Court found, however, that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[27] Joined by Justices Ginsburg and Breyer, Justice Kagan dissented, arguing that the case fell squarely within the effective-vindication doctrine.

COPYRIGHTS: THE FIRST-SALE DOCTRINE

In *Kirtsaeng v. John Wiley & Sons, Inc.*,[28] the Court finally brought clarity to the application of the first-sale doctrine to goods manufactured abroad—an issue on which it had reached an unilluminating 4-4 split in 2010.[29] Under the Copyright Act, a copyright owner generally has the exclusive right to distribute copies of the copyrighted work. Under Section 109(a) of the Act, however, the copyright owner can only control the first sale of a given copy—once someone else has become the copy's lawful owner, that new owner can sell or distribute the copy however he or she would like.

The first-sale doctrine's application to goods manufactured within the United States is clear. But what about goods manufactured abroad? Suppose, for example, that a book publisher charges more for a copyrighted textbook in one region of the world than another, and wants to prevent a profit seeker from buying copies in the inexpensive region and then selling those copies in the more expensive region at prices somewhat lower than those charged by the publisher itself. Does the first-sale doctrine cut off the publisher's ability to complain? By a 6-3 vote, the *Kirtsaeng* Court answered that question in the affirmative. Led by Justice Breyer, a majority found no evidence that, when settling upon the language of Section 109(a), Congress intended to impose a geographical restriction on the first-sale-doctrine's application.[30] Manufacturers of copyrighted works who wish to segment their international markets will now likely take their fight to Congress.

FEDERAL JURISDICTION

THE MARRIAGE CASES

The two intensely watched marriage cases that the Court decided last Term—*Hollingsworth v. Perry*[31] and *United States v. Windsor*[32]—yielded the Term's highest-profile jurisdictional rulings. The facts in *Hollingsworth* will still be fresh in most readers' minds. In the fall of 2008, California voters approved Proposition 8, banning same-sex marriage. When two same-sex couples filed a lawsuit challenging Prop 8's constitutionality, California officials refused to defend it. In place of those officials, the district court permitted Dennis Hollingsworth and others who had led the charge on Prop 8 (collectively referred to here as "Hollingsworth") to intervene as parties. Following a trial, the district court declared Prop 8 unconstitutional. When Hollingsworth appealed, the Ninth Circuit asked the California Supreme Court to weigh in on whether Hollingsworth had the power to defend Prop 8 on the state's behalf. After California's high court confirmed that he did, the Ninth Circuit took jurisdiction and affirmed the district court's ruling (albeit on grounds narrower than those that the district court had cited). The Court granted Hollingsworth's petition for certiorari, asking the parties to brief both the merits and the question of Hollingsworth's standing.

The Justices ultimately divided 5-4, although not along familiar ideological lines. Disposing of the case entirely on jurisdictional grounds, Chief Justice Roberts wrote for the majority, joined by Justices Scalia, Ginsburg, Breyer, and Kagan. The Court first determined that Hollingsworth himself had no personal stake in the case; his only interest was a generalized desire "to vindicate the constitutional validity of a

24. 133 S. Ct. 2304 (2013).
25. *Id.* at 2309.
26. *Id.* at 2310 (emphasis omitted) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985)).
27. *Id.* at 2311.
28. 133 S. Ct. 1351 (2013).
29. *See* Costco Wholesale Corp v. Omega, S.A., 131 S. Ct. 565 (2010). Justice Kagan recused herself in *Costco*.
30. Joined by Justice Kennedy and (in part) by Justice Scalia, Justice Ginsburg dissented. She argued, *inter alia*, that the Court's ruling was at odds with the position taken by the United States in international negotiations, and thus "risks undermining the United States' credibility on the world stage." *Kirtsaeng*, 133 S. Ct. at 1385 (Ginsburg, J., dissenting).
31. 133 S. Ct. 2652 (2013).
32. 133 S. Ct. 2675 (2013).

generally applicable California law."[33] Turning to the more difficult legal question, the majority found that Hollingsworth did not have standing to assert the interests of the State of California, notwithstanding the California Supreme Court's finding to the contrary. Hollingsworth had argued that he was authorized to speak as an agent of the people of California, but the Court disagreed, pointing out that Hollingsworth and his fellow Prop 8 proponents "answer to no one; they decide for themselves, with no review, what arguments to make and how to make them," they are not subject to removal, and they owe no fiduciary obligations to the people of California.[34]

Joined by Justices Thomas, Alito, and Sotomayor, Justice Kennedy dissented, arguing that the California Supreme Court's findings regarding Hollingsworth's power to speak for the state were "fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III."[35] Far from finding Hollingsworth's autonomy problematic, Justice Kennedy argued that Hollingsworth's independence was integral to California's embrace of ballot initiatives. The initiative system provides Californians with a vehicle for circumventing state officials, Justice Kennedy said, and it undermines that system "if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding."[36]

In *Windsor*, the fight was over Section 3 of the Defense of Marriage Act (DOMA). Section 3 stated that, for purposes of all federal statutory and administrative law, the term "marriage" referred only to heterosexual unions and the term "spouse" referred only to individuals joined in such unions. Pursuant to federal tax laws and DOMA, the federal government collected estate taxes totaling more than $360,000 from Edith Windsor after Windsor's female spouse died. Windsor filed suit alleging a violation of her equal-protection rights, accurately pointing out that she would not have been required to pay those federal taxes if her spouse had been a man. Just as California officials declined to defend Prop 8 in *Hollingsworth*, the Obama Administration declined to defend DOMA but said that it would continue to obey that legislation and would withhold the disputed funds pending completion of the judicial proceedings. Given the Executive's decision not to defend Section 3, the House of Representative's Bipartisan Leadership Advisory Group (BLAG) petitioned to intervene to defend the legislation.[37] The district court granted BLAG's petition, but ultimately ruled in Windsor's favor on the merits. After the Second Circuit affirmed, both the United States and BLAG petitioned for certiorari—the United States seeking affirmance and BLAG seeking reversal. The Court granted the United States' petition, asking the parties to address both the constitutionality of Section 3 and whether the Court had jurisdiction to say anything about the matter.

Joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, Justice Kennedy wrote for the majority, finding that the Court had jurisdiction. The Court distinguished between standing requirements imposed by Article III and those imposed by the Court in the name of prudence. In this case, Justice Kennedy wrote, the United States satisfied the requirements of Article III (notwithstanding its agreement with the Second Circuit and with Windsor) because the national treasury stood to lose the money that Windsor contended was rightly hers. The Court acknowledged that a prevailing party ordinarily lacks standing to appeal, but said that this was a prudential concern rather than a dictate of Article III. The Court concluded that it was appropriate to take jurisdiction because BLAG—even if not formally a proper party to the action—had provided the Court with a "sharp adversarial presentation of the issues,"[38] and vast resources would have to be spent on Section 3 litigation involving thousands of people across the country if the Court refused to hear Windsor's case. (I discuss the Court's ruling on the merits elsewhere in this overview, under the "Fifth Amendment" heading.)

Hollingsworth had argued that he was authorized to speak as an agent of the people of California, but the Court disagreed . . . .

Justice Alito filed a dissenting opinion in *Windsor*, but he agreed that the Court had jurisdiction. For Justice Alito, the key to the Court's power to hear the case lay in BLAG's intervention and vigorous advocacy on DOMA's behalf. "[I]n the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act," he wrote, "Congress both has standing to defend the undefended statute and is a proper party to do so."[39]

Finding no jurisdiction, Justice Scalia dissented, joined by Justice Thomas and, in part, by Chief Justice Roberts. Accusing the majority of making a "jaw-dropping" assertion of judicial authority,[40] Justice Scalia said that the Court had never before agreed to decide a legal question "when every party agrees with both its nominal opponent *and the court below* on that question's answer."[41] He argued that the majority "envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role."[42]

STANDING AND FUTURE INJURIES

Although overshadowed by *Hollingsworth* and *Windsor*, another broadly consequential jurisdictional ruling came down in *Clapper v. Amnesty International USA*.[43] In that case, attorneys, journalists, human-rights workers, and others sought declaratory and injunctive relief concerning 50 U.S.C.

33. *Hollingsworth*, 133 S. Ct. at 2662.
34. *Id.* at 2666.
35. *Id.* at 2668 (Kennedy, J., dissenting).
36. *Id.* at 2671 (Kennedy, J., dissenting).
37. BLAG's decision to intervene fell along party lines, with the three Republican members favoring the move and the two Democrats opposing it.
38. 133 S. Ct. at 2688.
39. *Id.* at 2714 (Alito, J., dissenting).
40. *Id.* at 2698 (Scalia, J., dissenting).
41. *Id.* at 2700 (Scalia, J., dissenting).
42. *Id.* at 2698 (Scalia, J., dissenting) (quoting the majority opinion).
43. 133 S. Ct. 1138 (2013).

In future cases, courts and litigants will scrutinize the majority's discussion of the two competing standards.

§ 1881a, a provision of the FISA Amendments Act of 2008. Under Section 1881a, the Foreign Intelligence Surveillance Court may grant the Attorney General and the Director of National Intelligence permission to conduct surveillance on the electronic communications of individuals who both are not "United States persons" and are reasonably believed to be located outside the country, even if the government does not precisely specify the locations where the surveillance will occur.[44] The plaintiffs claimed that Section 1881a violates the First and Fourth Amendments, Article III, and the separation of powers.

To demonstrate that they had standing to challenge the legislation's constitutionality, Amnesty International USA and the other plaintiffs advanced two theories of harm. First, they argued that there was an "objectively reasonable likelihood" that the government would conduct surveillance on some of the individuals with whom the plaintiffs would have future communications. Second, they said that the fear of such surveillance was already prompting them to engage in costly measures aimed at avoiding government interception, such as traveling long distances to communicate with their contacts in person.

Dividing 5-4 along familiar lines, the Court held that the plaintiffs lacked standing. Writing for the majority, Justice Alito invoked the Court's prior indication that "'threatened injury must be *certainly impending* to constitute injury in fact.'"[45] In the eyes of the majority, the plaintiffs' first theory of harm failed to meet that stringent requirement because it relied upon "a highly attenuated chain of possibilities."[46] With respect to the plaintiffs' second theory of harm, the Court found that the plaintiffs could not manufacture standing by incurring present-day costs aimed at avoiding future speculative harms. Justice Alito conceded in a footnote that some of the Court's prior standing cases used language less daunting than "certainly impending" to characterize the standard the Court uses to evaluate claims of future injuries; sometimes, he acknowledged, the Court has said there must be "a 'substantial risk' that the harm will occur."[47] The majority concluded that, "to the extent that the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' requirement," the plaintiffs had failed to meet it.[48]

Writing for the dissent, Justice Breyer concluded that the harms claimed by the plaintiffs were "as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen."[49] The dissent argued that the majority's insistence upon certainty conflicted with numerous prior cases in which federal courts have adjudicated "actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. "[50]

In future cases, courts and litigants will scrutinize the majority's discussion of the two competing standards. Did the *Clapper* Court stress the "certainly impending" language because issues of national security were at stake?[51] Or does *Clapper* instead signal that five Justices might now be inclined to demand a more compelling showing in *all* cases in which plaintiffs seek standing on the strength of feared future harm?

THE ALIEN TORT STATUTE

In *Kiobel v. Royal Dutch Petroleum Co.*,[52] the Court found that the Alien Tort Statute (ATS) does not provide jurisdiction over causes of action alleging violations of the law of nations occurring within other sovereigns' territories.[53] Relying upon the ATS for federal jurisdiction, Nigerian nationals now living in the United States had filed suit against Royal Dutch Petroleum Company and two other entities. The plaintiffs alleged that, after they began to protest the environmental effects of the defendants' oil-exploration activities in Nigeria, the defendants helped the Nigerian Government brutally maltreat the plaintiffs in violation of the law of nations.[54] Led by Chief Justice Roberts, the Court ruled that there was nothing in the text or history of the ATS to rebut the presumption against extraterritorial application of federal statutes. Joined by three colleagues, Justice Breyer concurred in the judgment, arguing that the ATS would have provided jurisdiction if (contrary to fact) the defendants' conduct had "substantially and adversely affect[ed] an important American national interest."[55]

44. The legislation defines "United States persons" as citizens of the United States, aliens lawfully admitted for permanent residence, and certain corporations and associations. *See* 50 U.S.C. § 1801(i).
45. *Clapper*, 133 S. Ct. at 1147 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990), and other authorities).
46. *Id.* at 1148. Justice Alito explained that the plaintiffs were assuming that the government would indeed attempt to target individuals with whom the plaintiffs were in contact, that the government would rely upon Section 1881a rather than another source of surveillance authority, that the Foreign Intelligence Surveillance Court would approve the government's surveillance request, that the government would successfully intercept some of the targets' communications, and that the plaintiffs would be parties to some of those intercepted communications.
47. *Id.* at 1150 n.5 (quoting Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2754-55 (2010)).
48. *Id.*
49. *Id.* at 1155 (Breyer, J., dissenting).
50. *Id.* at 1160 (Breyer, J., dissenting).
51. *Cf. id.*at 1147 ("[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs . . . .").
52. 133 S. Ct. 1659 (2013).
53. *See* 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").
54. The United States subsequently granted the plaintiffs political asylum. The plaintiffs live in the United States today.
55. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment). Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

COVENANTS NOT TO SUE

In *Already, LLC v. Nike, Inc.*,[56] the Court unanimously ruled that a defendant's counterclaim had been mooted by the plaintiff's covenant not to sue. Nike had initiated the litigation, alleging that two lines of shoes marketed by Already infringed a Nike trademark. Already counterclaimed, contending that Nike's trademark was invalid. Months later, Nike gave Already a "Covenant Not to Sue," promising not to bring any claim against Already concerning Already's existing designs or any future designs that are "colorable imitations" of Already's existing products. On the strength of that covenant, Nike moved to dismiss not only its own claim, but Already's counterclaim, as well. Already resisted, contending that there was still a live dispute between the parties.

Writing for the full Court, Chief Justice Roberts identified the relevant test: "[O]ur cases have explained that 'a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'"[57] The Court found that Nike had satisfied that burden here. By its very terms, the covenant was "unconditional[]" and "irrevocabl[e],"[58] and Already had failed to identify any realistic circumstance in which it might infringe upon Nike's trademark and yet not be protected by the covenant.

THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

In *Chafin v. Chafin*,[59] the Court addressed a jurisdictional matter concerning the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) and its domestic implementing legislation, the International Child Abduction Remedies Act (ICARA). The Convention aims to ensure "the prompt return of children wrongfully removed to or retained in any Contracting State."[60] ICARA gives state and federal courts concurrent jurisdiction to grant a petition for a child's return to the country in which he or she "was habitually resident immediately before the [wrongful] removal or retention."[61] In *Chafin*, the district court had ruled that Mr. Chafin was wrongfully retaining his daughter in the United States and that the girl's country of habitual residence was Scotland, where she previously had lived with her mother, Ms. Chafin. Within hours of the ruling, Ms. Chafin and her daughter were on a plane bound for Scotland. Mr. Chafin appealed to the Eleventh Circuit, but the appellate court dismissed the appeal as moot, reasoning that it was powerless to secure the child's return from a foreign country.

The Court unanimously reversed. Writing for the Court, Chief Justice Roberts explained that whether the appellate court could secure the child's return to the United States was a matter separate from whether the Chafins' dispute continued to present a live controversy. "Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it," the Chief Justice wrote, "but such uncertainty does not typically render cases moot."[62]

In *Chafin* v. *Chafin*, the Court addressed a jurisdictional matter concerning the Hague Convention . . . and its domestic implementing legislation . . . .

THE CLASS ACTION FAIRNESS ACT

In *Standard Fire Insurance Co. v. Knowles*,[63] the Court unanimously held that a would-be class-action plaintiff cannot defeat federal jurisdiction under the Class Action Fairness Act (CAFA) by stipulating, before class certification, that the class will seek damages less than CAFA's $5 million jurisdictional threshold. Writing for the Court, Justice Breyer acknowledged that, by stipulating to damages that fall below the applicable amount-in-controversy requirement, an individual plaintiff can indeed defeat federal jurisdiction. The difference here, Justice Breyer explained, was that the named plaintiff lacked the authority to bind absent members of the proposed class because the class had not yet been certified.

MOOTNESS AND OFFERS OF JUDGMENT

Whether *Genesis Healthcare Corp. v. Symczyk*[64] merits mention here depends in part on whether Justice Kagan was right when, in dissent, she advised readers to "[f]eel free to relegate the majority's decision to the furthest reaches of your mind: The situation it addresses should never arise again."[65] Readers may decide for themselves. Laura Symczyk filed a "collective action"[66] on behalf of herself and other employees, charging that their employer had violated the Fair Labor Standards Act by refusing to compensate them for some of the time they had worked. The employer served an offer of judgment upon Symczyk, offering to pay all of her damages, fees, and costs, but Symczyk declined to accept. The employer then moved to dismiss the case as moot. The Third Circuit found that Symczyk's individual claim was indeed moot but that the larger collective action was not. When the employer took the case to the Supreme Court, Symczyk failed to seek certiorari on the Third Circuit's finding that her individual claim no longer presented a live controversy.

Writing for the five-member majority, Justice Thomas said

56. 133 S. Ct. 721 (2013).
57. *Id.* at 727 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 190 (2000)).
58. *Id.* at 728.
59. 133 S. Ct. 1017 (2012).
60. Art. 1, S. Treaty Doc. No. 99-11, at 7.
61. *See id.* Art. 3; *see also* 42 U.S.C. § 11603(a) (granting concurrent jurisdiction to federal and state courts); *id.* § 11603(d) (directing courts to decide these cases "in accordance with the Convention").
62. *Chafin*, 133 S. Ct. at 1025.
63. 133 S. Ct. 1345 (2013).
64. 133 S. Ct. 1523 (2013).
65. *Id.* at 1533 (Kagan, J., dissenting).
66. Collective actions under the Fair Labor Standards Act bear a resemblance to class actions but are a different procedural animal. *See* 29 U.S.C. § 216(b) (authorizing "one or more employees [to sue] for and in behalf of himself or themselves and other employees similarly situated").

Although the Court did not hold that same-sex couples have a constitutional right to marry, there is much in the Court's decision that could easily lay the groundwork for such a ruling . . . .

that, given Symczyk's failure to preserve her right to challenge the lower court's mootness ruling, the Court would assume, without deciding, that her individual claim was indeed moot. Because no other employee had opted in as a plaintiff, Justice Thomas wrote, Symczyk's entire lawsuit "became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action."[67] Writing for the four dissenters, Justice Kagan argued that the starting premise of the Court's ruling was "bogus" because Symczyk's refusal to accept her employer's offer of judgment did not suffice to moot her individual claim: after Symczyk refused to accept the offer, she continued to have the same personal stake in the litigation that she had before the offer of judgment was made. Because cases like Symczyk's should never become moot in the future, she wrote, courts should "never need to reach the issue the majority resolves."[68] Justice Kagan passed along some advice: "[A] friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home."[69]

FIFTH AMENDMENT: DOMA AND SAME-SEX MARRIAGE

As explained above in the summary of the Court's leading jurisdictional rulings this past Term, Justice Kennedy joined with the Court's four Democratic appointees in *Windsor*, ruling that the Court had jurisdiction to adjudicate the constitutionality of Section 3 of the Defense of Marriage Act (DOMA). The same coalition of Justices concluded that Section 3 was unconstitutional. Justice Kennedy devoted several paragraphs to the proposition that, "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[70] The majority ultimately concluded, however, that it was unnecessary to decide whether Section 3 violated constitutional principles of federalism. Instead, the Court used its observations about states' traditional prerogatives to help fuel its finding that Section 3 violated the Fifth Amendment's Due Process Clause and its implicit principles of equality.

The majority found that states choosing to recognize same-sex marriages had conferred upon those couples "a dignity and status of immense import."[71] Through DOMA, Justice Kennedy wrote, Congress had sought "to injure the very class [that New York and other states recognizing same-sex marriages have sought] to protect."[72] In the eyes of the majority, "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" helped to reveal that both the purpose and the effect of that legislation was "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[73] Justice Kennedy said that Section 3 "demeans" same-sex couples and "humiliates" their children.[74] Such legislation, the Court found, violates the protections afforded to same-sex couples by the Fifth Amendment. Although the Court did not hold that same-sex couples have a constitutional right to marry, there is much in the Court's decision that could easily lay the groundwork for such a ruling further down the road.

Chief Justice Roberts filed a brief dissent, emphasizing that the Court was not reaching the question of whether a state today may refuse to permit same-sex marriages. Justice Alito also dissented, joined in relevant part by Justice Thomas, arguing that the majority's analysis was driven by an ill-founded conception of substantive due process and that "the Constitution simply does not speak to the issue of same-sex marriage."[75] The most strongly worded dissent, however, was filed by Justice Scalia and joined in relevant part by Justice Thomas. Justice Scalia accused the majority of deciding the case based upon a confused hash of pronouncements regarding federalism, due process, and equality, which ultimately boiled down to an indefensible conception of substantive due process. Justice Scalia argued that Section 3 should be given nothing more stringent than rational-basis review and that it could easily survive it, based upon such governmental objectives as avoiding difficult choice-of-law issues and honoring prior Congresses' legislative intentions. He said that the majority had merely supplanted what it saw as a "hateful moral judgment" with a morality that the majority deemed "superior,"[76] and he unhappily predicted that a majority of the Court will later follow the path foreshadowed by much of Justice Kennedy's language and flatly demand that all states permit same-sex couples to marry.

FIRST AMENDMENT: SPEECH

By a 6-2 vote in *Agency for International Development v. Alliance for Open Society International, Inc.*,[77] the Court invalidated a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the Leadership Act). Through that legislation, the federal government provides billions of dollars to nongovernmental organizations to help globally combat the ailments signified in the statute's title. As a condition of receipt of Leadership Act funds, however, Congress required grant-seeking organizations to adopt "a policy explicitly opposing prostitution and sex trafficking."[78] A group of domestic organizations challenged the law, explaining that while they did not favor prostitution, they

67. *Genesis Healthcare Corp.*, 133 S. Ct. at 1529.
68. *Id.* at 1535 (Kagan, J., dissenting).
69. *Id.* at 1534 (Kagan, J., dissenting).
70. 133 S. Ct. 2675, 2689-90 (2013).
71. *Id.* at 2692.
72. *Id.* at 2693.
73. *Id.*
74. *Id.* at 2694.
75. *Id.* at 2716 (Alito, J., dissenting).
76. *Id.* at 2709 (Scalia, J., dissenting).
77. 133 S. Ct. 2321 (2013). Justice Kagan recused herself.
78. 22 U.S.C. § 7631(f).

feared that adopting the required policy would alienate some of the governments and prostitutes with whom they worked.

With Chief Justice Roberts writing for the majority, the Court held that the challenged condition violated the organizations' First Amendment speech rights. Chief Justice Roberts explained that, in some cases, an organization that objects to a condition on the receipt of federal funds is left to secure its own remedy by simply declining the funds, while in other cases the Court has found that funding conditions unconstitutionally burden recipients' speech rights. Acknowledging that the line between the two classes of cases "is hardly clear," the Court said that the distinction "is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[79] Here, the Court found that the spending condition went beyond defining Congress's program, by trying to restrict what a grant recipient could say "when participating in activities on its own time and dime."[80]

Joined by Justice Thomas, Justice Scalia dissented, arguing that "a central part of the Government's HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal."[81] The "real evil" of the majority's ruling, Justice Scalia wrote, is that it exposes the federal government to lawsuits whenever it "distinguish[es] between [grant] applicants on a relevant ideological ground."[82]

FOURTEENTH AMENDMENT: AFFIRMATIVE ACTION

Proponents of race-conscious admissions decisions at public colleges and universities may have breathed at least a shallow sigh of relief when—more than eight months after oral argument—the Court in *Fisher v. University of Texas at Austin* finally handed down its ruling.[83] By using a race-neutral admissions calculus and by automatically offering admission to all high-school students graduating in the top 10% of their respective classes, the university had been achieving a measure of diversity in its undergraduate population.[84] Concluding that it needed still more racial diversity to achieve its objectives, the university added race to the array of factors that it would explicitly consider when making at least some of its admissions decisions. Abigail Fisher, a white applicant, was thereafter denied admission and filed suit.

Rather than strike down the university's use of race in its admissions decisions (as many predicted), the Court opted by a 7-1 vote to remand the case to the Fifth Circuit for a second look.[85] Writing for the Court, Justice Kennedy pointed out that the parties had not asked the Justices to overrule *Grutter v. Bollinger*,[86] the 2003 case in which the Court approved of the University of Michigan Law School's consideration of race among a constellation of other diversity factors when making its admissions decisions. Thus taking that ruling "as given for purposes of deciding this case,"[87] Justice Kennedy explained that the Fifth Circuit had failed to apply the level of scrutiny that *Grutter* demands. The lower court acted within *Grutter*'s framework when it showed deference to the university's conclusion that a racially diverse student body was essential to its educational mission, Justice Kennedy said, but the appellate court erred when it similarly deferred to the university's choice of means by which to achieve that goal. The Fifth Circuit had limited its means-related inquiry to determining merely whether the university's decision to use "'race as a factor in admissions was made in good faith.'"[88] When it comes to assessing the university's choice of means, the Court held, "the University receives no deference. . . . The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[89]

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In a lengthy concurrence, Justice Thomas reiterated his opposition to *Grutter* and argued that, if a court were to apply genuine strict scrutiny, "it would require Texas either to close the University or to stop discriminating against applicants based on their race."[90] Justice Thomas drew parallels between the arguments that the university advanced and the arguments that defenders of racial segregation put forward in the 1950s. Justice Ginsburg filed a lone dissent, stating that it was clear to her that the university was acting fully within *Grutter*'s parameters.

PATENTS: HUMAN GENES

Can a patent be obtained on some of your genes once they have been isolated from the surrounding DNA material in which they appear? No, because those isolated genes remain products of nature. Can a patent be obtained on synthetically created DNA? Perhaps, because it is not naturally occurring. So held the Court in *Association for Molecular Pathology v. Myriad*

79. *Agency for Int'l Dev.*, 133 S. Ct. at 2328.
80. *Id.* at 2330; *see also id.* ("By requiring recipients to profess a specific belief, the [condition] goes beyond defining the limits of the federally funded program to defining the recipient.").
81. *Id.* at 2333 (Scalia, J., dissenting).
82. *Id.* at 2335 (Scalia, J., dissenting).
83. 133 S. Ct. 2411 (2013).
84. In the last year in which those two admissions methods were used, for example, the University secured an entering class of undergraduates that was 4.5 percent African-American and 16.9 percent Hispanic.
85. Justice Kagan did not participate.
86. 539 U.S. 306 (2003).
87. 133 S. Ct. at 2417. In a one-paragraph concurrence, Justice Scalia—who continues to oppose *Grutter*—said that he "join[ed] the Court's opinion in full" for the very reason that the parties had not asked the Court to revisit *Grutter* here. *Id.* at 2422 (Scalia, J., concurring).
88. *Id.* at 2420 (quoting Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 236 (2011)).
89. *Id.*
90. *Id.* at 2426 (Thomas, J., concurring).

Myriad's synthetically created DNA material . . . was potentially patentable because "the lab technician unquestionably creates something new when [producing it]."

Genetics, Inc.[91] With respect to the naturally occurring genes that Myriad Genetics had isolated—genes that are powerfully associated with breast and ovarian cancer when mutations occur within them—the Court found that "Myriad did not create anything. To be sure, it found an important and useful gene [two of them, actually], but separating that gene from its surrounding genetic material is not an act of invention."[92] Myriad's synthetically created DNA material, however, was potentially patentable because "the lab technician unquestionably creates something new when [producing it]."[93]

SOVEREIGN IMMUNITY: THE LAW-ENFORCEMENT PROVISO

In *Millbrook v. United States*,[94] the Court resolved a circuit split concerning the "law enforcement proviso" of the Federal Tort Claims Act (FTCA).[95] Kim Millbrook alleged that, while in the custody of the Federal Bureau of Prisons, correctional officers sexually assaulted him. He filed suit against the federal government under the FTCA, which waives the government's sovereign immunity from a wide range of tort suits. The government claimed immunity, arguing that, under the statute's law-enforcement proviso, the government is liable for its law-enforcement officers' intentional torts only when those torts occur in the course of executing a search, seizing evidence, or making an arrest, none of which was the case here. The Third Circuit accepted the government's argument and dismissed the case. The Court unanimously reversed and reinstated Millbrook's claim, finding no basis in the statute's plain text for the Third Circuit's interpretation. The Court held that the law-enforcement proviso's waiver of immunity "extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest."[96]

SUPREMACY CLAUSE: PREEMPTION

VOTER REGISTRATION AND PROOF OF CITIZENSHIP

Three preemption rulings particularly merit mention.[97] In *Arizona v. Inter Tribal Council of Arizona, Inc.*,[98] the Court found that the National Voter Registration Act of 1993 preempted Arizona's requirement that an individual present documentary proof of citizenship when registering to vote. The nation's standard voter-registration form requires an applicant to swear under penalty of perjury that he or she is a United States citizen. Arizona went further by demanding a copy of the applicant's passport, birth certificate, or other documentary proof of citizenship. Led by Justice Scalia, a majority of the Court found Arizona's requirement preempted.[99]

Justice Scalia nevertheless explained for the majority that the door is not necessarily closed on Arizona's effort to insist upon documentation of citizenship. The Court categorically declared that the Elections Clause gives the states—not Congress—the power to determine who may vote. (That is a significant holding in its own right.[100]) The Court further observed that, under federal law, a state may ask the federal government's Election Assistance Commission (EAC) to supplement the standard voter-registration form with additional requirements aimed at helping the state determine whether a given applicant meets the state's prescribed voter qualifications. Arizona can thus ask the EAC to amend the registration form used in Arizona by requiring documentary proof of citizenship.[101] If the EAC refuses to approve the state's request, the

91. 133 S. Ct. 2107 (2013).
92. *Id.* at 2117.
93. *Id.* at 2119. I say "potentially" because the Court stated in a footnote that it was not deciding whether the synthetically created DNA at issue met the other requirements of patentability. *See id.* at n.9. The Court merely held that the synthetically created DNA was not a "product of nature" and so did not trip over that particular patent-law obstacle.
94. 133 S. Ct. 1441 (2013).
95. *See* 28 U.S.C. § 2680(h) (stating, in pertinent part, that the government waives its immunity from assault-and-battery claims based upon the "acts or omissions of investigative or law enforcement officers of the United States Government").
96. *Millbrook*, 133 S. Ct. at 1446.
97. There were others. In *Mutual Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013), for example, the Court ruled 5-4 that the Federal Food, Drug, and Cosmetic Act preempts "state-law design-defect claims that turn on the adequacy of a drug's warnings." *Id.* at 2470.
98. 133 S. Ct. 2247 (2013).
99. Justice Scalia was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. He also was joined in relevant part by Justice Kennedy, who wrote separately to express disagreement with the majority about the applicability of the presumption against preemption to federal legislation promulgated under the Elections Clause. The majority found the presumption inapplicable. Justice Kennedy cautioned against treating the Elections Clause differently from other constitutional delegations of federal power. Justices Thomas and Alito filed separate dissents, rejecting the majority's finding of preemption.
100. *See* Marty Lederman, *Pyrrhic Victory for Federal Government in Arizona Voter Registration Case?*, SCOTUSBLOG, June 17, 2013, http://www.scotusblog.com/2013/06/pyrrhic-victory-for-federal-government-in-arizona-voter-registration-case ("This unanimous holding resolves a long-unresolved question about Congress's power to determine who may vote in federal elections. . . ."). Professor Lederman argues that a number of enacted and proposed federal laws may now be constitutionally suspect. *See, e.g.*, *id.* ("The holding would . . . appear to preclude any future efforts to enact a federal statute restricting state felon disenfranchisement laws.").
101. Indeed, Arizona already sought such permission back in 2005, but the EAC's commissioners divided 2-2 on how to respond and so the request was not approved. Arizona did not follow that (in)action with a petition for judicial review. The Court stated that it was not aware of any reason why Arizona could not refile its request with the EAC, with the hope of securing a favorable ruling.

Court said, then the Administrative Procedures Act authorizes the state to seek judicial review.[102] In their separate dissents, Justices Thomas and Alito pointed out the not-insignificant complication that the EAC currently does not have any members, and so might not be in the business of fielding states' requests. The majority responded by suggesting that, if the EAC remains defunct, Arizona "might" be able either to obtain mandamus relief or "to assert a constitutional right to demand concrete evidence of citizenship apart from the [standard federal form]."[103]

MEDICAID AND TORT RECOVERIES

In *Wos v. E.M.A.*,[104] the Court held that a state's

> irrebuttable, one-size-fits-all statutory presumption [that a given percentage of a Medicaid beneficiary's tort recovery was allocated for medical expenses and thus is owed to the state] is incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses.[105]

The Court thus found that federal law preempted North Carolina's irrebuttable presumption that one-third of a Medicaid beneficiary's tort recovery was for medical costs. Joined by Justices Scalia and Thomas, Chief Justice Roberts argued in dissent that neither Congress nor the Department of Health and Human Services had ever clearly stated "that segregating medical expenses from a lump-sum recovery must be done on a case-specific, after-the-fact basis, rather than pursuant to a general rule spelled out in advance."[106]

LIFE-INSURANCE BENEFICIARIES

In *Hillman v. Maretta*,[107] all of the Justices agreed (albeit for differing reasons) that the Federal Employees' Group Life Insurance Act (FEGLIA), which creates a life-insurance program for federal employees, preempted a Virginia statutory provision concerning the rightful ownership of life-insurance proceeds. FEGLIA states that an employee may designate a beneficiary "in a signed and witnessed writing" and that any change of beneficiary must be made in writing and filed with the federal government.[108] A Virginia statute stated, however, that divorce automatically terminates a life-insurance-beneficiary designation benefiting the former spouse. The Virginia legislation further stated that, if the termination-upon-divorce provision were preempted, then the person who would have received the insurance benefits absent the preemption had a cause of action against the former spouse. Warren Hillman (a federal employee) designated his then-spouse Judy Maretta as his FEGLIA beneficiary, but he failed to change the designation after the marriage ended and he married Jacqueline Hillman. After Warren died and the government paid the insurance proceeds to Judy, Jacqueline filed an action against her pursuant to the Virginia statute. The parties agreed that FEGLIA preempted Virginia's termination-upon-divorce provision but disagreed about the fate of the provision that purported to make Judy liable to Jacqueline for the proceeds she had received.

[A]ll of the Justices agreed . . . that the Federal Employees' Group Life Insurance Act . . . preempted a Virginia statutory provision concerning the rightful ownership of life-insurance proceeds.

Led by Justice Sotomayor, a majority of the Court found that Virginia's assignment of a cause of action to Jacqueline conflicted with the policies and purposes underlying FEGLIA. The Court reasoned that one of Congress's purposes was to ensure that the "duly named beneficiary will receive the insurance benefits and be able to make use of them."[109] Because Virginia's assignment of a cause of action undermined that federal purpose, the Court found it preempted.[110]

TAKINGS: LAND-USE PERMITS

A well-known pair of sibling cases—*Nollan*[111] and *Dolan*[112]—operates to ensure that a governmental body cannot use its power to grant or withhold land-use permits to get for free what the Takings Clause would otherwise require it to pay just compensation to obtain. *Nollan* and *Dolan* do that constitutional work by establishing that a government cannot condition its approval of a land-use permit on the landowner's willingness to surrender an interest in his or her property, unless there is a "nexus" and "rough proportionality" between the condition that the government wishes to impose and the effects that the landowner's proposed new land use is expected to have. The application of *Nollan* and *Dolan* to conditions demanding the relinquishment of an interest in *real* property is clear. But what if the government instead demands that the

102. Noting that the EAC recently granted a comparable request by Louisiana, the Court said that it might be arbitrary for the agency to deny Arizona's request.
103. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2260 n. 10. The possibility of obtaining relief from the EAC led the Court to conclude that it did not yet need to resolve the constitutional issue. In his dissent, Justice Thomas expressed strong sympathy for the view that Arizona is constitutionally entitled to demand documentary proof of citizenship, but he stopped short of conclusively embracing that position.
104. 133 S. Ct. 1391 (2013).
105. *Id.* at 1399.
106. *Id.* at 1405 (Roberts, C.J., dissenting).
107. 133 S. Ct. 1943 (2013).
108. 5 U.S.C. § 8705(a).
109. *Hillman*, 133 S. Ct. at 1950.
110. Justice Thomas concurred in the judgment, reiterating his view that preemption analysis should remain strictly confined to a search for conflicts between the texts of state and federal laws. Justice Alito similarly concurred in the judgment, arguing that FEGLIA should not be accorded preemptive effect when (unlike in this case) it is indisputably clear that the deceased did not want his or her original beneficiary designation under FEGLIA to be honored.
111. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
112. Dolan v. City of Tigard, 512 U.S. 374 (1994).

In a pair of rulings . . ., the Court construed Title VII in ways that many employers are likely to celebrate and many . . . plaintiffs are likely to lament.

landowner pay money? Do the nexus and rough-proportionality tests still apply?

Dividing 5-4 along familiar lines, the Court answered that question affirmatively in *Koontz v. St. Johns River Water Management District*.[113] The government in that case demanded that a permit seeker either reduce the size of his proposed development or pick up the tab for mitigation projects (such as replacing culverts or filling in ditches) on other properties to which the landowner had no connection. "Mindful of the special vulnerability of land use permit applicants to extortionate demands for money," Justice Alito and his colleagues in the majority concluded that *Nollan* and *Dolan* should apply to governmental demands for real property and money alike.[114] Writing for the dissenters, Justice Kagan argued that takings concerns are absent when a government demands the payment of money rather than the transfer of an interest in real property, and she warned that the majority's ruling threatens to "turn[] a broad array of local land-use regulations into federal constitutional questions."[115]

TITLE VII

In a pair of rulings handed down on the final Monday of the Term, the Court construed Title VII in ways that many employers are likely to celebrate and many employment-discrimination plaintiffs are likely to lament.

In *Vance v. Ball State University*,[116] with Justice Alito writing for the majority, the Court ruled 5-4 that a person is a "supervisor" for purposes of Title VII—and that his or her actions can thus create vicarious liability for the employer under Title VII—only when the person has been authorized by the employer to make significant changes in the plaintiff's employment status (such as by hiring, firing, demoting, or transferring the plaintiff).

In *University of Texas Southwestern Medical Center v. Nassar*,[117] with Justice Kennedy writing for the majority, the Court ruled 5-4 that a plaintiff bringing a retaliation claim against an employer under Title VII must prove that retaliation for the plaintiff's opposition to workplace discrimination was a but-for cause of the adverse employment action that he or she suffered. Based on its reading of the text, structure, and history of Title VII, the Court refused to adopt the lesser requirement that a plaintiff prove only that retaliation was one of multiple motivating factors for the employer's actions.

Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg dissented in both cases. In *Vance*, she argued that the Court's precedents made clear that "harassment by an employee with power to direct subordinates' day-to-day work activities should trigger vicarious employer liability."[118] In *Nassar*, she argued that the majority had undermined Congress's effort to provide employees with strong protection against retaliation for trying to vindicate their workplace rights. Justice Ginsburg closed both of her dissents with a plea to Congress to restore what she believed was Title VII's intended meaning.

VOTING RIGHTS ACT: SECTION 4 AND PRECLEARANCE

In its penultimate public session of the Term, a closely divided Court in *Shelby County v. Holder*[119] produced a monumental ruling on the Voting Rights Act of 1965 (the Act). Section 5 of the Act required certain states and localities to obtain the approval of the United States Attorney General or a three-judge federal court before making any changes in their voting laws or procedures. The point of the preclearance requirement was to ensure that a given jurisdiction's proposed changes did not serve as intended or unintended vehicles for racial discrimination in that jurisdiction's electoral affairs. Section 4 provided the coverage formula for determining which states and localities were subject to Section 5's preclearance requirement.[120] As it had for roughly four decades, Section 4 targeted jurisdictions based on data (such as voter-registration and voter-turnout figures) from the late 1960s and early 1970s. In 2006, opting to leave that coverage formula unchanged, Congress extended the Act's preclearance regime for an additional 25 years.

The Court in *Shelby County* declared Section 4's coverage formula unconstitutional. Writing for the five-member majority, Chief Justice Roberts repeatedly invoked the opinion he wrote for the Court four years earlier in *Northwest Austin Municipal Utility District No. One v. Holder*.[121] In that case, the Court in dictum had expressed skepticism about the constitutionality of the Act's preclearance system, stating that "the Act imposes current burdens and must be justified by current needs."[122] Congress took no action in the interim, however, and the *Shelby County* Court concluded that the time had come for the Justices to respond.

Chief Justice Roberts stated that the Act's preclearance

113. 133 S. Ct. 2586 (2013).
114. *Id.* at 2603.
115. *Id.* at 2612 (Kagan, J., dissenting).
116. 133 S. Ct. 2434 (2013).
117. 133 S. Ct. 2517 (2013).
118. *Vance*, 133 S. Ct. at 2459 (Ginsburg, J., dissenting).
119. 133 S. Ct. 2612 (2013).
120. Wholly apart from this preclearance regime, Section 2 of the Act makes it illegal for a jurisdiction to use any "voting qualification[,] . . . standard, practice, or procedure" that amounts to racial discrimination. 42 U.S.C. § 1973(a). Section 2 was not at issue in *Shelby County*, and its constitutionality is not seriously questioned. But for a variety of reasons—such as that Section 2 places the burden of proof on the party alleging discrimination, Section 2 often provides a vehicle for relief only after racial discrimination has occurred, and those bent on discrimination have historically been remarkably imaginative in finding ever-new ways to carry out their discriminatory intentions—many civil-rights leaders have long regarded Sections 4 and 5 of the Act as critical to the legislation's success in helping to eradicate racial discrimination in voting.
121. 557 U.S. 193 (2009).
122. *Id.* at 203.

regime sat in strong tension with two constitutional principles: states ordinarily regulate their own elections and the federal government ordinarily must treat the states as "equal sovereign[s]," making no distinctions between them.[123] Under the Act, the Court explained, "[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own,"[124] and nine states and several additional jurisdictions are singled out for a preclearance requirement that other states and localities can wholly ignore. Chief Justice Roberts said that Section 4's coverage formula "is based on decades-old data and eradicated practices,"[125] pointing out, for example, that in the covered jurisdictions today, there no longer is any significant difference in voter-turnout rates among whites and African-Americans. The Court stopped short of striking down Section 5's preclearance requirement,[126] but held that Section 5 must remain idle unless and until Congress devises a coverage formula "based on current conditions."[127]

Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg dissented. Invoking mere rationality review,[128] she argued that Congress had gone to extraordinary lengths in 2006 to assess the continuing problem of racial discrimination in the jurisdictions captured by Section 4's coverage formula, and that the factual record made it clear—including in Shelby County itself—that Congress had ample reasons to keep Section 4's coverage formula in force. "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes," she wrote, "is like throwing away your umbrella in a rainstorm because you are not getting wet."[129]

OTHER NOTABLE RULINGS

In *Maracich v. Spears*,[130] the Court held that the Driver's Privacy Protection Act of 1994 (DPPA) does not permit attorneys to obtain or use individuals' personal information from a state's department of motor vehicles for the "predominant purpose" of soliciting possible clients. In an opinion by Justice Kennedy, the majority found that allowing attorneys to use drivers' personal information to solicit clients would substantially undermine Congress's goal of protecting individuals' privacy.

In *McBurney v. Young*,[131] the Court unanimously held that neither the Privileges and Immunities Clause of Article IV nor the dormant Commerce Clause barred Virginia from limiting the benefits of its Freedom of Information Act to Virginia citizens.

In *Adoptive Couple v. Baby Girl*,[132] the Court construed key provisions of the Indian Child Welfare Act of 1978 in favor of a non-Indian couple who had adopted a girl of partially Indian descent, and against the girl's biological father, who initially showed no interest in acting as the girl's parent and who had never had custody of the child until, in the girl's 27th month, a state court ordered the adoptive couple to transfer the child to him.

[T]he Court construed key provisions of the Indian Child Welfare Act of 1978 in favor of a non-Indian couple who had adopted a girl of partially Indian descent . . . .

In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, [133] the Court held that proof of the materiality of a defendant's alleged misrepresentations is not a prerequisite to class certification in a federal securities-fraud action. Amgen had taken the contrary position, arguing that proof of materiality at the class-certification stage is necessary to satisfy Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." The Court explained that because the issue of materiality is adjudicated under an objective standard, the issue's resolution is certain to be common to all class members.

In *FTC v. Actavis, Inc.*,[134] the Court helped to clear the way for the Federal Trade Commission to bring antitrust actions against patent holders and alleged patent infringers (usually, if not always, the makers of brand-name and generic pharmaceuticals, respectively) who enter into "pay to delay" (or "reverse payment") agreements. In such an agreement, an alleged patent infringer agrees to accept financial payment from the patent holder in exchange for delaying its effort to bring the allegedly infringing product to market.

In *Lefemine v. Wideman*,[135] the Court held that obtaining an injunction ordering a defendant to comply with the Constitution can be sufficient to change the legal relationship between the litigants and thereby render the plaintiff a "prevailing party" entitled to attorney's fees under 42 U.S.C. § 1988.

LOOKING AHEAD

The Court will tackle a number of interesting and broadly consequential issues next Term. In one of its most widely anticipated cases, the Court in *NLRB v. Noel Canning*[136] will

123. *Shelby County*, 133 S. Ct. at 2624.
124. *Id.*
125. *Id.* at 2627.
126. In a concurring opinion, Justice Thomas said that he would have preferred to strike down Section 5's preclearance requirement as well, forecasting that it is "inevitable" that Section 5 will be found unconstitutional if Congress ever settles upon a new coverage formula. *Id.* at 2632 (Thomas, J., concurring).
127. *Id.* at 2631.
128. The majority did not explicitly identify the standard of review it applied. *Cf. Northwest Austin*, 557 U.S. at 204 (noting that the two leading candidates were rational-basis review and review for congruence and proportionality, and declining to choose between them). The majority did state, however, that Congress behaved "irrational[ly]" when it opted in 2006 not to update Section 4's coverage formula. *Shelby County*, 133 S. Ct. at 2631.
129. *Shelby County*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).
130. 133 S. Ct. 2191 (2013).
131. 133 S. Ct. 1709 (2013).
132. 133 S. Ct. 2552 (2013).
133. 133 S. Ct. 1184 (2013).
134. 133 S. Ct. 2223 (2013).
135. 133 S. Ct. 9 (2012) (per curiam).
136. No. 12-1281.

take up an ongoing battle between the White House and some in the Senate concerning the ability of the President to make recess appointments during recesses that occur within a single enumerated session of the Senate, to make recess appointments to fill vacancies that exist (but did not arise) during a recess, and to make recess appointments when the Senate is convening every three days in pro forma sessions.

Affirmative action will make another prominent appearance on the Court's docket, when the Court in *Schuette v. Coalition to Defend Affirmative Action*[137] considers the constitutionality of Michigan's ban on the use of race and sex in admissions decisions at that state's public colleges and universities.

Campaign finance will also likely return to the headlines, when the Court in *McCutcheon v. Federal Election Commission*[138] considers the constitutionality of the Bipartisan Campaign Reform Act's biennial limits on how much money a person can contribute to federal political candidates and to noncandidate committees.

The Court will have an opportunity in *Town of Greece v. Galloway*[139]—a case involving prayers at legislative sessions—to bring greater clarity to its famously tangled Establishment Clause jurisprudence.

In *McCullen v. Coakley*,[140] the Court will consider whether Massachusetts has committed viewpoint discrimination in violation of the First Amendment's Speech Clause by the way in which it regulates who may enter and speak in areas located near the entrances to abortion-performing clinics.

In *Bond v. United States*[141]—a case involving the Chemical Weapons Convention, alleged marital infidelities, and the malicious placement of harmful chemicals on mailboxes and doorknobs—the Court will be asked to decide whether the Chemical Weapons Convention Implementation Act reaches the petitioner's conduct and, if it does, whether Congress exceeded its delegated powers by (on the petitioner's account) authorizing federal criminal prosecutions for conduct that the Constitution reserves for state and local officials to address.

In *Madigan v. Levin*,[142] the Court will confront a circuit split on whether employees of state and local governments may avoid the remedial regime set forth in the Age Discrimination in Employment Act by bringing age-discrimination actions under 42 U.S.C. § 1983 and the Equal Protection Clause.

Those who enjoy the complexities of federal jurisdictional law will find at least five cases to celebrate next Term. In one of multiple consumer-protection actions across the country alleging price-fixing by makers of liquid-crystal display (LCD) panels, the Court in *Mississippi ex rel. Hood v. AU Optronics Corp.*[143] will be asked to resolve a circuit split on whether a state's *parens patriae* action is removable to federal court as a "mass action" under the Class Action Fairness Act. In *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*,[144] the Court will consider the degree to which federal courts and litigants are bound by forum-selection agreements. In *Sprint Communications Co. v. Jacobs*,[145] the Court will take on the task of clarifying the application of *Younger* abstention in civil cases.[146] In a sequel to *Kiobel*, the Court in *DaimlerChrysler AG v. Bauman*[147] will determine whether a foreign corporation may be sued in the United States under the Alien Tort Statute based solely on the presence in this country of one of that corporation's subsidiaries. In *Walden v. Fiore*,[148] the Court will determine whether the Constitution and the general federal-venue statute permit a Georgia police officer to be sued in Nevada for conduct in which he allegedly engaged in Georgia after confronting the plaintiffs on suspicion of drug activity at Atlanta's Hartsfield-Jackson International Airport.

Other issues on the Court's docket for the coming Term include the standing requirements for bringing a false-advertising claim under the Lanham Act;[149] the cognizability of disparate-impact claims under the Fair Housing Act;[150] the conditions under which airlines and their employees enjoy immunity under the Aviation and Transportation Security Act when reporting potential security threats to the Transportation Security Administration;[151] and a trio of cases concerning the Securities Litigation Uniform Standards Act,[152] among many others.

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137. No. 12-682.
138. No. 12-536.
139. No. 12-696.
140. No. 12-1168.
141. No. 12-158.
142. No. 12-872.
143. No. 12-1036.
144. No. 12-929.
145. No. 12-815
146. *See generally* Younger v. Harris, 401 U.S. 37 (1971).
147. No. 11-965.
148. No. 12-574.
149. Lexmark International, Inc. v. Static Control Components, Inc. (No. 12-873).
150. Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc. (No. 11-1507).
151. Air Wis. Airlines Corp. v. Hoeper (No. 12-315). More specifically, the Justices will determine whether it is proper for a court to deny immunity under the ATSA without first determining that the statements made to the TSA were materially false.
152. Chadbourn & Parke LLP v. Troice (No. 12-79); Proskauer Rose LLP v. Troice (No. 12-88); Willis of Colorado, Inc. v. Troice (No. 12-86).