2016

Eight in the Eye of a Political Storm: Civil Cases in the Supreme Court's October 2015 Term

Todd E. Pettys
University of Iowa College of Law

Eight in the Eye of a Political Storm:

Civil Cases in the Supreme Court's October 2015 Term

Todd E. Pettys

The Court's October 2015 Term was dominated by the news of Justice Antonin Scalia's unexpected death in February 2016 and by President Barack Obama's unsuccessful battle to persuade Senate Republicans to consider his nomination of Chief Judge Merrick Garland, of the D.C. Circuit, to fill the vacancy. The loss of Justice Scalia resulted in a handful of non-precedent-setting affirmances by an equally divided Court. Those splits came on the questions of whether the First Amendment bars public-sector unions from imposing mandatory fees on non-member employees;[1] whether Texas and other states may successfully challenge the Obama Administration's decision to defer deportation of a large number of noncitizens;[2] whether to overrule *Nevada v. Hall*,[3] the 1979 case in which the Court held that a state may be sued without its consent in other states' courts;[4] whether Indian tribal courts have jurisdiction to adjudicate tort claims against non-members;[5] and whether spousal guarantors are "applicants" for credit within the meaning of the Equal Credit Opportunity Act and are thus statutorily authorized to sue creditors for marital discrimination.[6]

Four-four splits were, however, the exception rather than the rule. Both while Justice Scalia remained on the Court and continuing after his saddening death, the Court handed down precedent-setting rulings on numerous issues of broad interest, including the Court's most significant ruling on abortion rights in nearly a quarter of a century.

ABORTION

In one of the Term's most closely watched cases, the justices ruled 5-3 in *Whole Woman's Health v. Hellerstedt*[7] that two provisions of a 2013 Texas abortion law violated women's Fourteenth Amendment right to terminate their pregnancies before fetal viability. The first was a requirement that any doctor performing abortions have admitting privileges at a hospital within 30 miles of the abortion facility. Prior Texas law had been more lenient, requiring doctors either to have admitting privileges at a "local" hospital or to have "a working arrangement" with a physician who possessed such privileges. The second challenged provision required all abortion facilities to meet the minimal regulatory standards for ambulatory surgical centers. Those requirements covered a broad array of matters, ranging from the size of a clinic's staff, to the square footage of the facility, to the traffic patterns between rooms, to facilities' HVAC systems, and more. Abortion clinics in Texas argued that, far from advancing women's health as Texas claimed, these two requirements worked to women's detriment by forcing many clinics to close, thereby increasing the distances that many abortion-seeking women would have to travel and increasing the wait times for services at the remaining facilities.

The Court found both provisions unconstitutional under the undue-burden standard famously adopted by a plurality of the Court in 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[8] Writing for the majority, Justice Breyer first rejected Texas's argument that the clinics' claims were barred by claim preclusion. (That portion of the Court's ruling is summarized below under the "Federal Jurisdiction" heading.) Turning to the merits, the Court clarified *Casey*'s undue-burden standard in three important ways. First, when evaluating whether a law imposes an "undue" burden on women's ability to terminate pre-viability pregnancies, a court must evaluate not only "the burdens a law imposes on abortion access," but also the degree to which the law yields benefits.[9] Second, a court must apply a more demanding standard of review than is appropriate for run-of-the-mill economic legislation. Third, rather than defer conclusively (or nearly so) to a legislature's factual findings, a court may place "considerable weight upon evidence and argument presented in judicial proceedings."[10]

Applying those principles here, the Court concluded that both of the Texas law's challenged provisions unconstitutionally imposed undue burdens on women's right to terminate their early pregnancies. In the majority's view, the district court had reasonably concluded that the admitting-privileges requirement had not yielded any health benefits for women and had forced many of the state's clinics to close. Many doctors could not satisfy the requirement even if they wished to do so, Justice Breyer said, due to such things as their geographic distance from the nearest hospital or their inability to generate the amount of business that many hospitals require in exchange for the conferral of admitting privileges. With

Footnotes

1. Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016).
2. United States v. Texas, 136 S. Ct. 136 S. Ct. 2271 (2016). The Fifth Circuit had held that the states had standing to sue and that the Administration's actions likely violated the Administrative Procedure Act. When granting certiorari, the Supreme Court added the Take Care Clause to the mix. The Court's ultimate opinion stated only that the judgment below was "affirmed by an equally divided Court."
3. 440 U.S. 410 (1979).
4. Franchise Tax Board of California v. Hyatt, 136 S. Ct. 1277 (2016).
5. Dollar General Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 136 S. Ct. 2159 (2016).
6. Hawkins v. Community Bank of Raymore, 136 S. Ct. 1072 (2016).
7. 136 S. Ct. 2292 (2016).
8. 505 U.S. 833 (1992).
9. *Whole Woman's Health*, 136 S. Ct. at 2309.
10. *Id.* at 2310.

respect to the surgical-center requirement, the Court found that it, too, would yield no notable benefits for women, yet would reduce still further the number of abortion-performing clinics in the state. Pre-viability abortion procedures are extremely safe, Justice Breyer wrote, and any complications typically arise after the woman has already left the facility.

Justice Thomas dissented, reiterating his longstanding rejection of a constitutional right to abortion and charging the majority with ratcheting up the undue-burden standard to something approaching strict scrutiny. Joined by Chief Justice Roberts and Justice Thomas, Justice Alito dissented on the procedural grounds described under this summary's "Federal Jurisdiction" heading.

ADMINISTRATIVE LAW

Grateful to the Court for reminding us that our car dealerships' service advisors might be paid partially or even entirely on commission, we turn to *Encino Motorcars, LLC v. Navarro*.[11] At issue in that case was whether those service advisors are entitled to overtime pay under the Fair Labor Standards Act. In 2011—having taken the view for more than two decades that service advisors were statutorily exempt from the FLSA's overtime-pay benefits—the Department of Labor shifted course, issuing a rule stating that service advisors did not fall within that exemption and thus were entitled to overtime pay. Commission-paid service advisors at a Mercedes-Benz dealership sued their employer, arguing that the dealership had unlawfully failed to pay them overtime when they worked more than 40 hours per week. The Ninth Circuit ruled in favor of the service advisors, finding that the FLSA was ambiguous and that the department's interpretation of the statute was entitled to *Chevron* deference.[12] The Supreme Court vacated and remanded. Led by Justice Kennedy, the Court held that the department had failed to provide a reasoned explanation for changing its interpretation of the FLSA and that the Ninth Circuit thus should not defer to that interpretation when discerning the statute's requirements. The department's failure to explain its shift was especially troubling here, Justice Kennedy said, "because of decades of industry reliance on the [d]epartment's prior policy."[13] Joined by Justice Alito in dissent, Justice Thomas agreed that deference was unwarranted but argued that remand was unnecessary because service advisors are "salesmen primarily engaged in the selling of services for automobiles" and thus fall squarely within the statutory exemption.[14]

Those seeking an introduction to the markets through which the nation's electric power is priced and distributed will want to read *FERC v. Electric Power Supply Association*.[15] The chief issue in the case was whether the Federal Energy Regulatory Commission has been statutorily authorized to regulate the compensation that wholesale market operators pay to large-scale users of electricity for reducing their consumption during periods of heavy demand. The Court held, 7-2, that the agency does have that authority. Devotees of administrative law will take at least passing interest in the Court's treatment of *Chevron* deference. The justices all agreed that the relevant statutory provisions spoke unambiguously to the issue and that *Chevron* deference was thus unwarranted.[16] Justice Kagan (leading the majority) and Justice Scalia (leading the dissent) nevertheless disagreed about what those statutory provisions unambiguously said.

[T]he Court held that the department had failed to provide a reasoned explanation for changing its interpretation of the FLSA . . . .

EQUAL PROTECTION

In *Evenwel v. Abbott*,[17] the eight-member Court rejected two Texas voters' claim that the Equal Protection Clause requires states to apportion their state legislative districts based upon the total number of eligible voters in each district, rather than—as has long been the norm in Texas and across the country—upon each district's total number of residents. Observing on behalf of the majority that the Fourteenth Amendment requires states to apportion their *federal* congressional districts based upon total population, Justice Ginsburg concluded that the same amendment does not "simultaneously prohibit[] States from apportioning their own legislative districts on the same basis."[18] She explained that, "[b]y ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation."[19]

Although Texas had defended its total-population model, it also had argued that the Equal Protection Clause left it free to decide whether to apportion its legislative districts based upon total population or total number of eligible voters. The majority declined to say whether Texas could indeed shift to an eligible-voter model if it wished to do so. Concurring in the judgment, Justice Thomas embraced Texas's argument, concluding that the Constitution gives states "significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government."[20] Justice Alito similarly concurred in the judgment. While stopping short of saying whether he agreed with Justice Thomas's conclusion, he argued that the fact that the Fourteenth Amendment appor-

11. 136 S. Ct. 2117 (2016).
12. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
13. *Encino Motorcars*, 136 S. Ct. at 2126.
14. *Id.* at 2129 (Thomas, J., dissenting).
15. 136 S. Ct. 760 (2016). They might also enjoy reading *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), a case involving wholesale electricity transactions. The Court held in *Hughes* that federal law preempted a Maryland regulatory program.
16. *Compare Electric Power Supply Ass'n*, 136 S. Ct. at 773 n.5 *with id.* at 785 (Scalia, J., dissenting).
17. 136 S. Ct. 1120 (2016).
18. *Id.* at 1129.
19. *Id.* at 1132.
20. *Id.* at 1133 (Thomas, J., concurring in the judgment).

[T]he Court voted 4-3 . . . to uphold the University of Texas's efforts to increase racial diversity among its undergraduates.

tions federal House seats based upon total population does not tell us anything meaningful about whether states may apportion their own legislative districts on a different basis.

In *Harris v. Arizona Independent Redistricting Commission*,[21] the Court unanimously rejected a group of Arizona voters' argument that the state's newly drawn legislative districts violated the Equal Protection Clause. Under the districting scheme adopted in the wake of the 2010 census, most of Arizona's Democrat-leaning districts were relatively underpopulated, and most of the state's Republican-leaning districts were relatively overpopulated. The population deviation between the largest and smallest districts was less than 10%, however, and so the law presented the challengers with an especially steep climb. Led by Justice Breyer, the Court concluded that the small population differences were the result of efforts by the state's redistricting commission "to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party."[22]

With Justice Kagan recused, the Court voted 4-3 in *Fisher v. University of Texas*[23] to uphold the University of Texas's efforts to increase racial diversity among its undergraduates. The university fills most of its entering class each year with Texas students who were within the top 10% of their high schools' graduating classes.[24] For the balance of each entering class, the university considers applicants based upon a wide range of factors, one of which is race. Abigail Fisher—an unsuccessful applicant—challenged the latter portion of the university's admissions program, arguing that it violated her and other Caucasian applicants' equal-protection rights.

The case reached the Supreme Court the first time three years ago. On that occasion, the Court voted 7-1 to remand to the Fifth Circuit. The justices concluded that, contrary to the rigorous demands of strict scrutiny, the lower court had inappropriately deferred to the university's choice of means for achieving its goal of having a racially diverse student body. On remand, the Fifth Circuit ruled in the university's favor.

With Justice Kennedy leading the four-member majority in this second wave of the litigation, the Court affirmed in a narrowly written opinion. Emphasizing that the university's admissions program "is *sui generis*" and that there are little available data to illuminate the degree to which the top-10% program was itself providing the university with satisfactory racial diversity at the time Fisher applied, the Court concluded that remanding for further fact-finding would have little upside. "[A] remand," Justice Kennedy wrote, "would do nothing more than prolong a suit that has already persisted for eight years and cost the parties on both sides significant resources."[25] The Court found that the university had articulated clear objectives, that there was at least some evidence that the top-10% program was not fully achieving those objectives at the time Fisher applied, and that the university had tried in good faith to identify other, less race-conscious means of achieving the degree of racial diversity that it deemed educationally desirable. The Court also made it clear, however, that the university was not forever off the hook. The Court stressed "the University's continuing obligation to satisfy the burden of strict scrutiny."[26] Indeed, Justice Kennedy wrote that, by continually evaluating the data it had begun to gather in response to this long-running litigation, the university "has a special opportunity to learn and to teach" regarding the impact of race-conscious admissions policies in higher education.[27] Joined by Chief Justice Roberts and Justice Thomas in dissent,[28] Justice Alito charged the majority with failing to insist that the university carry the heavy justificatory burden that strict scrutiny imposes.

EQUITABLE TOLLING

In a unanimous ruling penned by Justice Alito, the Court in *Menominee Indian Tribe of Wisconsin v. United States*[29] rejected a tribe's request for equitable tolling of the six-year statute of limitations imposed by the Contract Disputes Act of 1978. The parties and the court below had agreed that the appropriate test for evaluating the tribe's request was laid out in the Court's 2010 ruling in *Holland v. Florida*: equitable tolling is appropriate only if the claimant "establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'"[30] Three features of the *Menominee Indian Tribe* ruling are likely to be of broad interest. First, the Court explained that *Holland* articulates two essential considerations, such that neither can be ignored or discounted even when the arguments for the other are particularly strong. Second, the Court said that the "extraordinary circumstances" inquiry focuses on "matters outside [the claimant's] control."[31] Third, Justice Alito dropped a footnote observing that *Holland* was a habeas case, that the Court has never held that *Holland* governs all equitable-tolling requests outside the habeas context, and that there was no need here to decide whether *Holland* applies in non-habeas cases because (a) the tribe could not even meet *Holland* and (b) the tribe had not argued that a more lenient test was appropriate.

21. 136 S. Ct. 1301 (2016).
22. *Id.* at 1307.
23. 136 S. Ct. 2198 (2016).
24. The Texas legislature adopted the top-10% program in the late 1990s in response to earlier Fourteenth Amendment litigation against the university. As the Court pointed out, there is no doubt that the state adopted that program—at least in part—for race-conscious purposes, but Fisher did not challenge it.
25. *Id.* at 2209.
26. *Id.* at 2209-10.
27. *Id.* at 2214.
28. Justice Thomas also filed a one-paragraph dissent, reiterating his opposition to race-conscious admissions policies.
29. 136 S. Ct. 750 (2016).
30. *Id.* at 755 (quoting Holland v. Florida, 560 U.S. 631, 649 (2010)).
31. *Id.* at 756 (internal quotations omitted).

ERISA

Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA) states that the fiduciaries of a covered plan may sue a participant for "appropriate equitable relief . . . to enforce . . . the terms of the plan."[32] In *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*,[33] a participant in a covered health-benefits plan was injured by a drunk driver, prompting the plan to pay significant medical costs. After the participant obtained a sizable settlement from the driver's insurance company, the plan sued the participant to enforce his contractual obligation to reimburse the plan for the costs it had paid. The Court held that, to the extent the participant had already dissipated the settlement funds by spending them on nontraceable items (like food or travel), the relief that the plan sought was not "equitable" in nature and so could not be enforced under Section 502(a)(3). Examining "standard equity treatises," the Court found that, before 1938 (when the law and equity courts merged), "a plaintiff could ordinarily enforce an equitable lien only against specifically identified funds that remain in the defendant's possession or against traceable items that the defendant purchased with the funds (*e.g.*, identifiable property like a car)."[34] In a short dissent, Justice Ginsburg argued that the Court's "bizarre" ruling was the outgrowth of a poorly reasoned decision that the Court handed down more than a decade earlier.[35]

FALSE CLAIMS ACT

In *Universal Health Services, Inc. v. United States*,[36] a mental-health facility operated by Universal Health Services had submitted Medicaid claims for counseling services that it provided for a teenage girl. After the girl died due to complications from a medication that the facility had prescribed, the girl's mother and stepfather learned that some of the employees who provided mental-health treatment to the girl and others were unlicensed to do so. The mother and stepfather filed a *qui tam* action under the False Claims Act, relying upon an "implied false certification" theory of liability. They alleged that, when seeking reimbursement from the federal government, Universal Health had represented that specific types of professionals provided specific types of services but failed to reveal its noncompliance with state licensing laws and other legal requirements. Led by Justice Thomas, the Court unanimously rejected Universal Health's contention that the plaintiffs' claim should be dismissed. The Court held that False Claims Act plaintiffs can rely upon the implied certification theory when both (1) the defendant's claim for federal reimbursement "does not merely request payment, but also makes specific representations about the goods or services provided," and (2) "the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[37]

FEDERAL JURISDICTION
CLAIM PRECLUSION

As described above under the "Abortion" heading, the Court struck down two provisions of a 2013 Texas abortion law in *Whole Woman's Health v. Hellerstedt*[38]—one concerning admitting privileges at hospitals and one concerning the sophistication of abortion clinics' facilities. Before reaching the merits of the clinics' claims, the Court first had to confront Texas's argument that the claims were barred due to some of the clinics' participation in an earlier, unsuccessful challenge to the 2013 law. Led by Justice Breyer, the five-member majority rejected Texas's argument. The Court first concluded that the attack on the admitting-privileges requirement did not present "'the very same claim'" that the clinics had raised in the prior litigation.[39] Particularly when "'important human values'" are at stake,[40] the Court concluded, the emergence of new facts can change a previously presented claim to a sufficient degree to render it a new claim for claim-preclusion purposes. Here, many clinics had closed following the earlier litigation, and those closures substantially strengthened the plaintiffs' claim by demonstrating the legislation's consequences. With respect to the statute's requirements concerning the sophistication of the abortion clinics' facilities, the Court found no merit in Texas's argument that the claim was barred because the clinics could have raised—but did not raise—that claim in the earlier litigation. "The Court has never suggested," Justice Breyer wrote, "that challenges to two different statutory provisions that serve two different functions must be brought in a single suit."[41] Justice Breyer said that treating every enacted statute "as a single transaction" that must be litigated by a challenger in one fell swoop "would encourage a kitchen-sink approach to any litigation challenging the validity of statutes," an "outcome [that] is less than optimal—not only for litigants, but for courts."[42]

Particularly when "important human values" are at stake, . . . the emergence of new facts can change a previously presented claim . . . to render it a new claim for claim-preclusion purposes.

Joined by Chief Justice Roberts and Justice Thomas in a lengthy dissent, Justice Alito criticized the majority's conclusions. In these justices' view, the majority had brazenly allowed the clinics to relitigate their attack on the admitting-privileges requirement. It is "a cardinal rule," Justice Alito wrote, that "a plaintiff who loses in a first case cannot later bring the same

32. 29 U.S.C. § 1132(a)(3)
33. 136 S. Ct. 651 (2016).
34. *Id.* at 658.
35. *Id.* at 662 (Ginsburg, J., dissenting) (criticizing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002)).
36. 136 S. Ct. 1989 (2016).
37. *Id.* at 2001.
38. 136 S. Ct. 2292 (2016).
39. *Id.* at 2305 (quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001)).
40. *Id.* (quoting The Restatement (Second) of Judgments, § 24, comment *f* (1980)).
41. *Id.* at 2308.
42. *Id.*

Plaintiffs . . . received a boost from the Court's ruling in *Campbell-Ewald Co. v. Gomez*, although the boost may prove to be fleeting.

case simply because it has now gathered better evidence."[43] Regarding the claim challenging Texas's demands concerning the facilities, Justice Alito insisted that the clinics had waived that claim by failing to assert it in the prior lawsuit. Far from being unrelated to one another, he argued, the clinics' two claims concerned provisions of the same bill, justified by the state on the same grounds, imposing the same kinds of alleged burdens.[44]

CLASS ACTIONS

Plaintiffs—particularly those attempting to lead class actions—received a boost from the Court's ruling in *Campbell-Ewald Co. v. Gomez*,[45] although the boost may prove to be fleeting. The plaintiff in that case aimed to bring a class action against a federal contractor for sending unwanted text messages in alleged violation of the Telephone Consumer Protection Act.[46] Before the plaintiff moved for class certification, and without admitting liability, the contractor offered to pay the plaintiff all of the statutory damages to which he alleged he was personally entitled. The plaintiff rejected the offer. Did the contractor's settlement offer moot the case? Led by Justice Ginsburg, the Court ruled that a live controversy remained and that the lawsuit could proceed. Under basic principles of contract law, Justice Ginsburg explained, the contractor's rejected settlement offer "remained only a proposal, binding neither [party]," leaving the parties with the adversity that Article III demands.[47] The Court also signaled, however, a strategy by which defendants might try to moot cases in the future: "We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."[48]

Chief Justice Roberts and Justices Scalia and Alito dissented, arguing that there was no live case or controversy because the contractor—a multimillion-dollar company—had promised to pay the plaintiff's personal statutory damages in full, and it "would be mere pettifoggery to argue that [the contractor] might not make good on that promise."[49] Picking up on the question that the majority had reserved for future resolution, the dissenters stated that, in future cases, defendants could successfully get around the problem of rejected settlement offers simply by handing over a sum of money sufficient to cover all of the plaintiff's claimed damages.

Class-action plaintiffs prevailed in *Tyson Foods, Inc. v. Bouaphakeo*.[50] In that case, employees at a pork-processing plant sued for unpaid overtime compensation, arguing that donning and doffing protective equipment was integral to their jobs and that the time they spent on those tasks pushed their total hours worked beyond 40 per week. The amount of time that each employee spent donning and doffing the equipment varied, but—based upon observations of some employees—an expert witness for the class had calculated the average amount of time that those activities consumed. The employer resisted certification of the class, arguing that the time variances among employees rendered the plaintiffs' claims too dissimilar to warrant class-wide resolution. In an opinion by Justice Kennedy, the Court ruled that class certification was appropriate. The Court relied heavily upon the fact that the employer had failed to keep records of the time that each employee spent donning and doffing the equipment. In light of that failure, the Court said, employees suing individually would have been entitled to rely upon the expert's calculations when attempting to prove the amount of time that they individually had spent on those tasks. If employees could rely upon those calculations when suing individually, the Court said, then they could rely upon them when suing as a class.

DIVERSITY JURISDICTION

Writing for a unanimous Court in *Americold Realty Trust v. Conagra Foods, Inc.*,[51] Justice Sotomayor reiterated the Court's position that, for diversity-jurisdiction purposes, an unincorporated entity's citizenship is determined by the citizenship of all of its members—including, here, the shareholders of an unincorporated real-estate investment trust. The Court rejected the suggestion that any entity that has the word "trust" in its name "possesses the citizenship of its trustees alone, not its shareholder beneficiaries as well."[52]

STANDING

In *Spokeo, Inc. v. Robins*,[53] the Court elaborated on the "concreteness" inquiry that Article III's case-or-controversy requirement necessitates when evaluating whether a plaintiff has standing to sue in federal court. Spokeo provides an online search engine that offers information about individuals. Thomas Robins sued Spokeo under the Fair Credit Reporting Act (FCRA), alleging that Spokeo provided inaccurate information about his marital status, his age, his employment status, and other matters, and that Spokeo was thus liable for damages under the FCRA. The Ninth Circuit held that Robins had standing, but, in an opinion by Justice Alito, the 6-2 Court remanded for further consideration of the issue.

Justice Alito explained that, while the Ninth Circuit had properly asked whether Robins had alleged a "particularized"

43. *Id.* at 2335.
44. *Id.* at 2341 (Alito, J., dissenting).
45. 136 S. Ct. 663 (2016).
46. In addition to the ruling recounted above, the Court held that, when they do work for the federal government, contractors do not share the government's qualified immunity.
47. *Id.* at 670. Justice Thomas concurred in the judgment, preferring to ground the Court's reasoning in the common-law doctrine of tenders rather than in modern contract-law principles.
48. *Id.* at 672.
49. *Id.* at 680 (Roberts, C.J., dissenting).
50. 136 S. Ct. 1036 (2016).
51. 136 S. Ct. 1012 (2016).
52. *Id.* at 1016.
53. 136 S. Ct. 1540 (2016).

injury—that is, an injury that he had personally suffered—it failed to ask whether Robins's alleged injury was sufficiently "concrete." To satisfy the concreteness requirement, the Court said, Robins's alleged injury "must be *de facto*; that is, it must actually exist."[54] Even if Spokeo violated the FCRA when presenting inaccurate information about Robins, therefore, Robins could sue in federal court only if Spokeo's alleged statutory violation harmed him or created a "material risk of harm."[55] It might violate the FCRA to inaccurately report a person's zip code, Justice Alito explained by way of example, but, absent other facts in such a case, "[i]t is difficult to imagine how" that error would harm the person.[56] Joined by Justice Sotomayor, Justice Ginsburg dissented, arguing that a remand was unnecessary because Robins had already alleged facts establishing a sufficiently concrete injury in the form of damage to his efforts to secure a job.

FULL FAITH AND CREDIT

In a *per curiam* opinion, the Court in *V.L. v. E.L.*[57] ruled that the Alabama Supreme Court had unconstitutionally failed to afford full faith and credit to a Georgia superior court's ruling. The Georgia court had entered an adoption decree allowing the non-birth partner in a lesbian couple to adopt her partner's natural child. After the family moved to Alabama, the couple's relationship ended, and the natural mother allegedly refused to allow her former partner to visit the child. Faced with a petition for visitation rights, the Alabama Supreme Court held that the Georgia superior court had lacked subject-matter jurisdiction to enter the adoption decree and that the non-birth parent thus had no legal right to visitation. The U.S. Supreme Court reversed. While it is true that a state court need not afford full faith and credit to a judgment issued by a court lacking subject-matter jurisdiction, the justices said, there is a strong presumption that the prior court did have subject-matter jurisdiction, and that presumption had not been overcome here.

In *Franchise Tax Board of California v. Hyatt*,[58] the Court held that the Full Faith and Credit Clause barred Nevada from "award[ing] damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances."[59] By adopting "a special rule of law applicable only in lawsuits against its sister States,"[60] Justice Breyer wrote for the majority, Nevada had evinced impermissible hostility to California and its sovereign prerogatives.

JURIES

Suppose a federal trial judge discharges a jury in a civil case and then, moments later, realizes that an error of some sort has been made in the jury's verdict. Does the court have the power to rescind its discharge order and reassemble the jury for additional work? In *Dietz v. Bouldin*,[61] the Court ruled 6-2 that it does. The jury in *Dietz* had awarded the plaintiff no damages, even though the parties had stipulated that the defendant was liable to the plaintiff for damages exceeding $10,000. The court realized the error minutes after discharging the jury, a period of time in which one juror had already left the courthouse. The district court brought the jurors back and asked them to correct the mistake. Affirming the Ninth Circuit, the Court held that, in civil cases, district courts possess the inherent power to rescind discharge orders and recall juries to correct errors in their verdicts. Writing for the majority, Justice Sotomayor emphasized that—given the risk that jurors will be tainted by their contacts with the outside world—judges should exercise this power with caution. Among the factors that a district court ought to consider are whether jurors have spoken with non-jurors; whether jurors have overheard conversations among non-jurors about the strength of the evidence; the length of time separating the discharge and the recall; whether the verdict was met with a discernable emotional response in the courtroom; and whether jurors have accessed their smartphones or other Internet-connected devices. The Court emphasized that it was not deciding here whether district judges possess a comparable power in criminal cases. Joined by Justice Kennedy in dissent, Justice Thomas endorsed a bright-line rule barring any use of the jury once it has been discharged.

[T]he Court held that, in civil cases, district courts possess the inherent power to rescind discharge orders and recall juries to correct errors in their verdicts.

RELIGIOUS FREEDOM RESTORATION ACT

Zubik v. Burwell[62] initially appeared likely to produce one of the most legally and politically controversial rulings of the year. The Court had been slated to decide whether the federal government violated the Religious Freedom Restoration Act of 1993 (RFRA) when it required a set of employers to provide their female employees with health-care coverage for all FDA-approved forms of birth control—including such things as intrauterine devices, which prevent a fertilized egg from implanting in the uterus—unless those employers declared their religiously grounded opposition in a form submitted to the government or to their insurers. The employers challenging the requirement claimed that, in violation of RFRA, the federal scheme substantially burdened the exercise of their religion without adequate justification. In these employers' view, the federal regulations required them to be complicit in providing women with access to birth-control methods that were equivalent to abortion.

Although those of us outside the Court cannot be certain, it is possible that Justice Scalia's death in February 2016, reduc-

54. *Id.* at 1548 (internal quotation omitted).
55. *Id.* at 1550.
56. *Id.*
57. 136 S. Ct. 1017 (2016).
58. 136 S. Ct. 1277 (2016).
59. *Id.* at 1281. As noted in this article's introductory paragraph, the justices split 4-4 on whether to overrule its precedent allowing a state to be sued without its consent in the courts of other states.
60. *Id.* at 1283.
61. 136 S. Ct. 1885 (2016).
62. 136 S. Ct. 1557 (2016).

Justice Breyer explained [that] retaliation based upon mistaken beliefs can deter employees from engaging in constitutionally protected activities just as surely as retaliation based upon accurate perceptions.

ing the Court from nine members to a tie-susceptible eight, influenced the justices' disposition of the case. The attorneys presented their oral arguments on March 23, 2016. Six days later, the Court issued an order requesting additional briefing on whether a regulatory arrangement that the justices proposed—one that would not require the employers to submit a form setting the birth control-coverage process into motion—would be acceptable to the parties. After the employers and the government responded favorably to the Court's suggestion, the justices voted unanimously not to address the merits of the employers' RFRA claim. Instead, in a *per curiam* ruling, the Court vacated the lower courts' decisions and remanded for further proceedings, expressing its expectation that the courts of appeals would "allow the parties sufficient time to resolve any outstanding issues between them."[63] Joined by Justice Ginsburg, Justice Sotomayor filed a concurring opinion, urging the lower courts not to draw any inferences from the Court's actions about the justices' assessment of the merits of the employers' RFRA claim.

SECOND AMENDMENT

In a *per curiam* decision, the Court in *Caetano v. Massachusetts*[64] rejected the Supreme Judicial Court of Massachusetts's reasons for upholding a state ban on stun guns. Contrary to the Court's reasoning in 2008's *District of Columbia v. Heller*,[65] the Massachusetts court had relied upon the fact that stun guns were not commonly used at the time of the Second Amendment's ratification and the fact that stun guns are not useful in modern military warfare. The Court remanded the case for a proper application of the law. Concurring in the judgment, Justice Alito (joined by Justice Thomas) argued that, rather than remanding, the Court simply should have ruled that the possession of stun guns is constitutionally protected because those weapons are "commonly possessed by law-abiding citizens for lawful purposes today."[66]

SPEECH

Suppose you work for a state or local government and your supervisor believes—contrary to fact—that you have exercised your First Amendment freedoms of speech and political association in a particular way. If your employer retaliates against you based upon its misperception, do you have a Section 1983 action against it? Under the Court's 6-2 ruling in *Heffernan v. City of Paterson*,[67] you do. Jeffrey Heffernan, a police officer, alleged that he was given a less desirable work assignment because his supervisors mistakenly believed he was supporting the incumbent mayor's opponent in an upcoming election. In an opinion written by Justice Breyer, the Court held that

> [w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.[68]

After all, Justice Breyer explained, retaliation based upon mistaken beliefs can deter employees from engaging in constitutionally protected activities just as surely as retaliation based upon accurate perceptions. Joined by Justice Alito in dissent, Justice Thomas argued that Heffernan's claim should fail because Heffernan had not actually exercised his First Amendment right to speak in favor of (or to associate with) the mayor's political opponent.

TITLE VII

Under a regulation promulgated by the Equal Employment Opportunity Commission, a federal employee wishing to sue for employment discrimination under Title VII must first consult with an Equal Employment Opportunity counselor. The regulation requires the employee to contact the counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."[69] Resolving a circuit split, the Court ruled in *Green v. Brennan*[70] that, for a constructive-discharge claim, "the matter alleged to be discriminatory" includes the employee's resignation, with the result that the 45-day limitations period begins to run on the day the employee resigns.

Of potentially broader interest is the disagreement among the justices about whether Title VII creates a freestanding cause of action for constructive discharge. Led by Justice Sotomayor, a majority of the Court concluded that it does. Justice Thomas argued in dissent that, rather than create an independent legal claim, the doctrine of constructive discharge was designed merely to broaden the range of remedies that employees who have quit their jobs may seek when complaining of workplace discrimination. Concurring in the judgment, Justice Alito staked out a middle-ground position. In his view, the doctrine permits an independent cause of action "when an employer subjects an employee to intolerable working conditions with the specific discriminatory *intent* of forcing the employee to quit."[71] Absent such intent, Justice Alito wrote, the constructive-discharge doctrine only ensures that, when suing an employer for discriminatory acts, an employee who

63. *Id.* at 1560.
64. 136 S. Ct. 1027 (2016).
65. 544 U.S. 570 (2008).
66. *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring in the judgment) (emphasis omitted).
67. 136 S. Ct. 1412 (2016).
68. *Id.* at 1418.
69. 29 C.F.R. § 1614.105(a)(1).
70. 136 S. Ct. 1769 (2016).
71. *Id.* at 1785 (Alito, J., concurring in the judgment).

has quit his or her job "can recover, as damages for the underlying discrimination, all damages that would be available for formal discharge but which are normally unavailable to employees who voluntarily quit."[72]

In *CRST Van Expedited, Inc. v. EEOC*,[73] the Court unanimously ruled that a Title VII defendant can qualify as a "prevailing party" within the meaning of Title VII's fee-shifting provision[74] even when a district court's dismissal of the action against it is grounded in legal reasons having nothing to do with the merits of the plaintiff's claim. The Court declined to say—and thus left for possible determination on remand—whether a Title VII defendant can be a prevailing party for fee-shifting purposes if the favorable judgment that it obtains does not preclude further proceedings.

OTHER NOTABLE RULINGS

In a terse *per curiam* ruling in *James v. City of Boise*,[75] the justices reminded the Supreme Court of Idaho that state courts are bound by the U.S. Supreme Court's interpretations of federal statutes, including 42 U.S.C. § 1988, the fee-shifting statute at issue here.

In *Sheriff v. Gillie*,[76] the Court unanimously found no violation of the Fair Debt Collection Practices Act when, pursuant to Ohio law, special counsel retained by the state's attorney general used the attorney general's letterhead to communicate with debtors who owed money to the state for such things as unpaid university tuition and medical bills.

In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*,[77] the Court held that Section 27 of the 1934 Securities Exchange Act—a provision that gives federal district courts exclusive jurisdiction of all suits "brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder"[78]—establishes the same jurisdictional test that courts deploy when determining whether a case "arises under" federal law within the meaning of 28 U.S.C. § 1331.

In *OBB Personenverkehr AG v. Sachs*,[79] the Court held that a suit against an Austrian-owned railway was barred by the Foreign Sovereign Immunities Act. The plaintiff had purchased a Eurail pass in the United States, then was injured while trying to board a train in Austria. Rejecting the plaintiff's contention that the statute was not an obstacle because her claim was "based upon a commercial activity carried on in the United States,"[80] the Court found that "the conduct constituting the gravamen of [the plaintiff's] suit plainly occurred abroad."[81]

Focusing once again on geographic concerns, the Court held in *RJR Nabisco, Inc. v. European Community*[82] that some of the Racketeer Influenced and Corrupt Organizations Act's provisions have an extraterritorial reach but that private parties have a cause of action under that legislation only if they have suffered injuries within the United States.

In *Bank Markazi v. Peterson*,[83] the Court held that Congress did not violate the separation of powers when it enacted legislation aimed at helping to ensure that specified assets would be available to satisfy the plaintiffs' judgments against the Islamic Republic of Iran. Joined by Justice Sotomayor in dissent, Chief Justice Roberts argued that "Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory."[84]

In *Kirtsaeng v. John Wiley & Sons, Inc.*,[85] the Court unanimously ruled that, when determining whether to award attorney's fees in copyright cases, a district court should give substantial (but not exclusive) weight to the objective reasonableness of the legal position that the losing party took.

LOOKING AHEAD

The fact that the Court will continue to have a tie-susceptible total of eight members when the October 2016 Term begins has not deterred the justices from placing a large number of broadly significant civil cases on its docket. In the coming Term, the Court will aim to bring clarity to numerous issues, including (among others) the permissible role of race in drawing legislative districts;[86] the power of federal courts to confer citizenship as a remedy for equal-protection violations, and the distinctions that Congress may and may not make when determining the citizenship of children born abroad to American citizens;[87] the power of a federal appellate court to review a district court's denial of class certification;[88] the statutory preconditions for holding an executive office in an acting capacity;[89] the power of a state to exclude churches and other religious organizations from a program aimed at installing safety flooring on playgrounds;[90] and the kind of injury required to obtain relief under the Fair Housing Act.[91]

Professor Todd E. Pettys is the H. Blair and Joan V. White Chair in Civil Litigation at the University of Iowa College of Law. He regularly teaches courses on constitutional law and federal courts, as well as a Supreme Court seminar. He joined the Iowa faculty in 1999.

72. *Id.* at 1787 (Alito, J., concurring in the judgment) (internal quotation and brackets omitted).
73. 136 S. Ct. 1642 (2016).
74. 42 U.S.C. § 2000e–5(k).
75. 136 S. Ct. 685 (2016).
76. 136 S. Ct. 1594 (2016).
77. 136 S. Ct. 1562 (2016).
78. 15 U.S.C. § 78aa(a).
79. 136 S. Ct. 390 (2015).
80. 28 U.S.C. § 1605(a)(2).
81. *OBB Personenverkehr AG*, 136 S. Ct. at 396.
82. 136 S. Ct. 2090 (2016).
83. 136 S. Ct. 1310 (2016).
84. *Id.* at 1330 (Roberts, C.J., dissenting).
85. 136 S. Ct. 1979 (2016).
86. Distinct issues regarding race are presented in two separate cases: Bethune-Hill v. Virginia State Board of Elections (No. 15-680) and McCrory v. Harris (No. 15-1262).
87. Lynch v. Morales-Santana (No. 15-1191).
88. Microsoft Corp. v. Baker (No. 15-457).
89. NLRB v. SW General (No. 15-1251).
90. Trinity Lutheran Church of Columbia v. Pauley (No. 15-577).
91. Distinct Bank of America Corp. v. City of Miami (No. 15-1111) and Wells Fargo & Co. v. City of Miami (No. 15-1112).