Doubting *Abood*, Finding Religion at Hobby Lobby, and More:

Civil Cases in the Supreme Court's 2013-2014 Term

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The Court's 2013-2014 Term did not begin auspiciously. In *Madigan v. Levin*[1]—the first orally argued case of the new session—the justices were slated to decide whether the Age Discrimination in Employment Act leaves employees of state and local governments free to bring age-discrimination claims under Section 1983 and the Equal Protection Clause. After a variety of procedural and substantive difficulties emerged during oral argument, however, the Court declared that its grant of certiorari had been improvident.[2] Happily, *Madigan* proved to be a quickly forgotten bump in the road. Over the following nine months, the Court handed down yet another set of important and interesting rulings in civil cases, on matters ranging from abortion clinics' buffer zones to *Younger* abstention. Like the civic leaders of Greece, New York, we will begin by turning our thoughts to prayer.

FIRST AMENDMENT: ESTABLISHMENT CLAUSE

In *Town of Greece v. Galloway*,[3] a 5-4 Court upheld Greece's practice of inviting local clergy and laypeople to open each of the town's monthly board meetings with a prayer. During the 12-year period at issue, Greece never denied a non-Christian's request to serve as a prayer-giver, but the overwhelming majority of those who were solicited by the town's staff or who volunteered on their own initiative were Christian ministers.[4] The town did not screen the prayers in advance, nor did it provide advice about the kinds of things that the prayers should or should not include. Many of the prayers were explicitly Christian in content.

Joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, Justice Kennedy found the Court's 1983 ruling in *Marsh v. Chambers*[5] all but dispositive. Upholding the Nebraska legislature's practice of beginning each day with a prayer, the *Marsh* Court had relied heavily upon its historical survey of the legislative prayer practices that prevailed from the colonial era through the following two centuries. Writing in *Town of Greece*, Justice Kennedy found that "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[6] Many of the founding-era prayers offered in Congress and elsewhere were sectarian in nature, the Court said, and so the fact that tenets of Christianity appeared prominently in many of the prayers in Greece's town meetings was not constitutionally problematic. "Once it invites prayer into the public sphere," Justice Kennedy wrote, "government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."[7] That does not necessarily mean, however, that the Constitution places no limits on the prayers' contents:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.[8]

In a portion of his opinion joined only by Chief Justice Roberts and Justice Alito, Justice Kennedy found that nonbelievers in attendance at Greece's board meetings were not psychologically coerced into participating in the prayers. Justices Thomas and Scalia wrote separately to reiterate their view that, when it comes to finding Establishment Clause violations, the only kind of coercion that matters is "actual legal coercion," where those who resist face law-backed threats of penalties.[9]

Footnotes

1. No. 12-872.
2. 134 S. Ct. 2 (2013). For an account of the difficulties, see Lyle Denniston, *Argument Recap: A Bad Way to Open a Term*, SCOTUSBLOG, Oct. 7, 2013, http://www.scotusblog.com/2013/10/argument-recap-a-bad-way-to-open-a-term.
3. 134 S. Ct. 1811 (2014).
4. During that 12-year period, only four non-Christians provided the prayers, and all four of those appeared in 2008, when the town first heard rumblings of litigation.
5. 463 U.S.783 (1983).
6. 134 S. Ct. at 1819.
7. *Id.* at 1822-23.
8. *Id.* at 1823; *see also id.* at 1824 ("Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.").
9. *Id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment); *cf.* Van Orden v. Perry, 545 U.S. 677, 693-94 (2005) (Thomas, J., concurring); Lee v. Weisman, 505 U.S. 577, 640-41 (1992) (Scalia, J., dissenting). Writing solely for himself, Justice Thomas also reiterated his view that the Establishment Clause is a "federalism provision" principally aimed at preventing Congress both from establishing a national religion and from interfering

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. She found that Greece's actions differed from those of the Nebraska legislature in *Marsh* in problematic ways but that the town could have cured the constitutional defects either by advising the prayer-givers to "speak in nonsectarian terms, common to diverse religious groups," or by ensuring that clergy representing different faiths deliver the prayers so that "the government does not identify itself with one religion or align itself with that faith's citizens."[10]

FIRST AMENDMENT: SPEECH

ABORTION CLINICS AND BUFFER ZONES

In 2007, Massachusetts made it a crime to "knowingly enter or remain on a public way or sidewalk" within 35 feet of the entrance or driveway to a facility (other than a hospital) that performs abortions.[11] The statute exempted those who were entering or leaving such a facility, those who were agents or employees of the facility and acting within the scope of their employment, certain government officials, and people who were merely passing through. Several individuals challenged the law, saying that they wished to engage abortion-seeking women in non-confrontational "sidewalk counseling" and to offer them anti-abortion literature—things that they could not do nearly as easily when categorically barred from entering the buffer zones defined by state law. In *McCullen v. Coakley*,[12] all nine justices agreed that the statute violated the First Amendment, but they were divided on the reasons.

Chief Justice Roberts wrote for the majority, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. In their judgment, the Massachusetts statute was content-neutral. The law was driven not by a desire to squelch anti-abortion speech, the Court said, but rather by the need to deal with the safety and access issues that arise when large numbers of people congregate outside abortion clinics. The majority nevertheless held the law unconstitutional because it burdened substantially more speech than was necessary to achieve the state's objectives. The Court said that the state could, for example, rely more heavily upon an unchallenged state law that makes it a crime to knowingly impede a person's entry into a clinic; it could adopt legislation modeled on the federal Freedom of Access to Clinic Entrances Act (which bans the use of force, physical obstruction, and intimidation against a person seeking reproductive services); or it could adopt legislation modeled on a New York City ordinance that makes it a crime to follow and harass a person within close proximity to an abortion clinic's entrance.

Justice Scalia concurred in the judgment, joined by Justices Kennedy and Thomas. He insisted that the statute was content-based and that strict scrutiny thus ought to be applied. "Every objective indication shows," he wrote, "that the [statute's] primary purpose is to restrict speech that opposes abortion."[13] By finding the law content-neutral, he argued, the majority had "carrie[d] forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents."[14] He conceded that he likely agreed with the majority's finding that the law was insufficiently tailored but said that he declined to join that part of the Chief Justice's opinion because he "prefer[ed] not to take part in the assembling of an apparent but specious unanimity."[15] Justice Alito similarly concurred in the judgment, finding that the statute "blatantly discriminates based on viewpoint."[16]

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CAMPAIGN FINANCE

In *McCutcheon v. FEC*,[17] the Court voted 5-4 to strike down federal aggregate limits on campaign contributions. The Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002, imposes base limits on how much an individual may contribute per election cycle to a given federal candidate, party committee, or political action committee. That legislation also imposed *aggregate* limits on how much an individual could contribute in an election cycle to all federal candidates and to certain political committees. The government's primary rationale for the aggregate limits was that they prevented donors from circumventing the base limits and from thereby triggering the same *quid pro quo* corruption concerns that the base limits were intended to address.

Wishing to make sizable contributions to federal candidates across the country and to a variety of Republican national party committees, Shaun McCutcheon bumped up against the aggregate limits during the 2011-2012 election season and believed he would encounter the same difficulty in the future. He filed suit, alleging that those limits impinged upon his First Amendment rights of speech and association. The Republican National Committee (RNC) joined the challenge, arguing that this was a welcome opportunity for the justices to reject the constitutional distinction that the Court drew in *Buckley v. Valeo*[18] between expenditures and contributions. Under *Buckley*, the Court strictly scrutinizes restrictions on campaign expenditures but reviews restrictions on campaign contributions somewhat more leniently. The RNC

with states' choices about whether to establish religions of their own. *Town of Greece*, 134 S. Ct. at 1835-37 (Thomas, J., concurring in part and concurring in the judgment).

10. *Id.* at 1851 (Kagan, J., dissenting).
11. MASS. GEN. LAWS ch. 266, § 120E1/2(b). The statute applied only during such facilities' business hours and required that the buffer zones be "clearly marked and posted." *Id.* § 120E1/2(c).
12. 134 S. Ct. 2518 (2014).
13. *Id.* at 2544 (Scalia, J., concurring in the judgment).
14. *Id.* at 2541 (Scalia, J., concurring in the judgment).
15. *Id.* at 2548 (Scalia, J., concurring in the judgment).
16. *Id.* at 2550 (Alito, J., concurring in the judgment).
17. 134 S. Ct. 1434 (2014).
18. 424 U.S. 1 (1976).

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urged the Court to apply strict scrutiny across the board.

In a plurality opinion joined by Justices Scalia, Kennedy, and Alito, Chief Justice Roberts declined the RNC's invitation to abandon the expenditure-contribution distinction but nevertheless concluded that the aggregate limits on contributions did not adequately serve the Government's interest in avoiding *quid pro quo* corruption. The Chief Justice acknowledged that the *Buckley* Court had upheld FECA's aggregate limit, but he pointed out that the Court had only "spent a total of three sentences" on the issue and that the litigants in *Buckley* had focused most of their energies elsewhere.[19] Taking a fresh look at the matter, and pointing to a range of ways in which circumventing the base limits is either illegal or impractical (or could be made so by Congress), the plurality concluded that the aggregate limits placed unwarranted constraints on donors' First Amendment rights. The Chief Justice acknowledged that the ruling was likely to be unpopular in some circles but insisted that it flowed from the demands of the First Amendment. "If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause," Chief Justice Robert wrote, "it surely protects political campaign speech despite popular opposition."[20]

Concurring in the judgment, Justice Thomas reiterated his view that the Court should abandon *Buckley*'s distinction between contributions and expenditures and should review limitations on the former just as skeptically as it reviews limitations on the latter.[21] He nevertheless expressed satisfaction that the plurality's opinion "continues to chip away at [*Buckley*'s] footings."[22]

Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer dissented, embracing the Government's defense of the aggregate limits. "Taken together with *Citizens United v. Federal Election Commission*," he wrote, "today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."[23]

PUBLIC-SECTOR UNIONS

Two years ago, writing for a 5-4 majority in *Knox v. Service Employees International Union*,[24] Justice Alito stated in dictum that allowing state and local governments to force their employees to pay fees to unions—even if those employees are not themselves union members—raises serious First Amendment concerns. In *Harris v. Quinn*,[25] decided this past Term, litigants and their *amici* launched a full-fledged effort to persuade the Court to close that circle by overruling *Abood v. Detroit Board of Education*[26] and holding that public employees who decline to join a union have a First Amendment right to refuse to contribute to that union's expenses, even if they benefit from the union's collective-bargaining activities. Writing again for the same five-justice majority, Justice Alito declined that invitation but once again made it clear that *Abood*'s longevity is far from assured.

The dispute in *Harris* concerned individuals who work as "personal assistants" in Illinois, providing in-home care for Medicaid recipients. The personal assistants are jointly employed by the State of Illinois (which compensates them) and by Medicaid beneficiaries (who hire and supervise them). SEUI Illinois & Indiana serves as the personal assistants' exclusive bargaining representative with the state. The plaintiffs were personal assistants who declined to join the union and who objected to a requirement that they pay the union an "agency fee" to help cover the costs of collective bargaining. A ruling in the plaintiffs' favor on that point would have necessitated overruling *Abood*.

Led by Justice Alito, the Court refrained from abandoning *Abood*, choosing instead to find that precedent distinguishable. *Abood*, the Court reasoned, applies only to "full-fledged public employees," rather than to those whose work—like that of the personal assistants here—is controlled in significant ways by non-governmental employers.[27] Freed of *Abood*'s constraints, the majority found that the agency-fee requirement violated the plaintiffs' First Amendment rights by compelling them to speak. Justice Alito nevertheless devoted 13 pages of his slip opinion to dictum arguing that *Abood* was thinly reasoned and is "questionable on several grounds."[28]

Justice Kagan wrote for the dissenters, finding *Abood* indistinguishable but expressing relief that the majority stopped short of overruling that decision altogether. Recognizing that *Abood*'s future nevertheless remains in doubt, Justice Kagan insisted that it be preserved. "Our precedent about precedent, fairly understood and applied," she wrote, "makes it impossible for this Court to reverse that decision."[29] The majority dismissed Justice Kagan's discussion of *stare decisis* as "beside the point."[30]

PUBLIC EMPLOYEES' TESTIMONY

Suppose that a public employee testifies truthfully in a court proceeding about information he learned while doing

19. *McCutcheon*, 134 S. Ct. at 1446.
20. *Id.* at 1441.
21. *Cf., e.g.*, Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 412-20 (2000) (Thomas, J., dissenting).
22. *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring in the judgment).
23. *Id.* at 1465 (Breyer, J., dissenting) (citing Citizens United, Inc. v. FEC, 558 U.S. 310 (2010)).
24. 132 S. Ct. 2277 (2012).
25. 134 S. Ct. 2618 (2014).
26. 431 U.S. 209 (1977).
27. *Harris*, 134 S. Ct. at 2638.
28. *Id.* at 2632.
29. *Id.* at 2645 (Kagan, J., dissenting).
30. *Id.* at 2638 n.19.

his job but that the act of testifying is not itself among that employee's typical job responsibilities. Does the First Amendment protect the employee against any adverse action that the testimony might provoke his employer to take against him? That was the question before the Court in *Lane v. Franks*.[31] While working as the director of an Alabama-funded program, Edward Lane uncovered evidence that a member of the Alabama legislature was billing the state for work she never actually performed. When federal officials subsequently launched criminal proceedings against the legislator, Lane testified both before the grand jury and then again at trial. When Steve Franks, Lane's supervisor, terminated Lane's employment not long thereafter, Lane brought suit against Franks and others, claiming a retaliatory violation of his First Amendment rights. The Eleventh Circuit held that the First Amendment offered Lane no protection. Under *Garcetti v. Ceballos*,[32] the court of appeals reasoned, Lane was testifying as a state employee—not as a citizen—because he was testifying about information he learned during the course of his employment.

Led by Justice Sotomayor, the Court unanimously reversed, explaining that "[t]he critical question under *Garcetti* is whether the speech at issue is *itself* ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[33] The Court declined to say whether the First Amendment protects employees (such as police officers and crime-lab technicians) whose jobs do ordinarily include testifying in judicial proceedings. In a brief concurring opinion joined by Justices Scalia and Alito, Justice Thomas reiterated that that important question was reserved "for another day."[34]

VIEWPOINT DISCRIMINATION

Nearly 10 years after President George W. Bush made a last-minute change of dinner plans while campaigning in Jacksonville, Oregon, a unanimous Court in *Wood v. Moss*[35] finally resolved the dinner decision's legal consequences. Scrambling to protect the President after he decided to eat in the outdoor patio area of a local restaurant, members of the Secret Service had moved a group of protestors to a location that was a little farther away from President Bush than a group that had gathered to voice their admiration of him. The protestors alleged that the Secret Service agents had committed viewpoint discrimination in violation of the First Amendment.

Just as it had done in several prior cases, the Court assumed, without deciding, that the First Amendment creates an implied right of action for damages against federal officials. Writing for the Court, Justice Ginsburg explained that the agents were nevertheless entitled to qualified immunity because "[n]o decision of this Court so much as hinted [to the agents] that their on-the-spot action was unlawful because they failed to keep the protestors and supporters, throughout the episode, equidistant from the President."[36] The Court relied heavily upon a map that the plaintiffs had attached to their complaint, which showed that, until the Secret Service moved them, the protestors had a direct line of sight to—and were within weapons range of—the President's dining location, while a two-story building stood between the President and the spot where his supporters had gathered.

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FOURTEENTH AMENDMENT
RACE-BASED PREFERENCES IN PUBLIC UNIVERSITY ADMISSIONS

For the second consecutive year,[37] the Court handed down a major decision concerning racial preferences in public universities' admissions processes. At issue in *Schuette v. Coalition to Defend Affirmative Action*[38] was a 2006 amendment to the Michigan Constitution forbidding racial preferences in (among other things) public education. A few years earlier, the Court had upheld the University of Michigan Law School's race-conscious efforts to assemble a diverse student body, finding that the school's efforts were narrowly tailored to achieve a compelling state purpose.[39] The Court had not said that such efforts were constitutionally *required*, however, and Michigan voters opted to bring them to an end.

Citing the "political-process doctrine"—a doctrine it traced to *Hunter v. Erickson*[40] and *Washington v. Seattle School District No. 1*[41]—the *en banc* Sixth Circuit found that the Michigan amendment violated the Equal Protection Clause because it "(1) has a racial focus, targeting a policy or program that 'inures primarily to the benefit of the minority'; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process."[42]

31. 134 S. Ct. 2369 (2014).
32. 547 U.S. 410 (2006).
33. *Lane*, 134 S. Ct. at 2379 (emphasis added). The Court further held, however, that because this doctrinal matter had not been clearly settled at the time Franks took action against Lane, Franks was protected by qualified immunity.
34. *Id.* at 2384 (Thomas, J., concurring).
35. 134 S. Ct. 2056 (2014).
36. *Id.* at 2061.
37. The Court ruled in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), that when reviewing a public university's race-conscious efforts to assemble a diverse class of entering students, a court must not defer to the university's choice of means. The court "must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." *Id.* at 2420.
38. 134 S. Ct. 1623 (2014).
39. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).
40. 393 U.S. 385 (1969).
41. 458 U.S. 457 (1982).
42. Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 477 (6th Cir. 2012) (en banc) (quoting *Seattle Sch. Dist.*, 458 U.S. at 472), *rev'd sub nom.* Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014).

The plurality said that the political-process doctrine unwisely presumed that racial categories can be clearly delineated and that members of an identified racial group share common political interests.

A divided Supreme Court reversed.[43] In a plurality opinion joined by Chief Justice Roberts and Justice Alito, Justice Kennedy rejected the political-process doctrine and concluded that *Hunter* and *Seattle School District No.1* were best understood as having been decided on other grounds.[44] The plurality said that the political-process doctrine unwisely presumed that racial categories can be clearly delineated and that members of an identified racial group share common political interests. Perhaps even more fundamentally, the plurality said, "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."[45]

Joined by Justice Thomas, Justice Scalia concurred in the judgment, arguing that the plurality had stretched too far to find rationales on which the outcomes in *Hunter* and *Seattle School District No. 1* could be justified. Justice Scalia feared that lurking in the plurality's refusal to overrule those cases was a willingness to accept "the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact."[46] A party alleging racial discrimination in violation of the Equal Protection Clause must prove discriminatory purpose, Justice Scalia wrote, and those challenging Michigan's constitutional amendment "do not have a prayer of proving it here."[47]

Justice Breyer concurred in the judgment, finding it unnecessary to decide whether to embrace the political-process doctrine because, in his view, Michigan voters had not reordered the political process.[48] He concluded that the Constitution posed no obstacles to the Michigan amendment.

Joined by Justice Ginsburg, Justice Sotomayor dissented, strongly embracing the Sixth Circuit's articulation of the political-process doctrine and arguing that it demanded invalidation of the Michigan amendment. Linking the Court's contrary ruling to Chief Justice Roberts's declaration in 2007 that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[49] she insisted that this was "a sentiment out of touch with reality."[50] That claim prompted Chief Justice Roberts to file a brief concurrence, arguing that "[p]eople can disagree in good faith [about the desirability of racial preferences], but it . . . does more harm than good to question the openness and candor of those on either side of the debate."[51]

EXECUTIVE POWER: RECESS APPOINTMENTS

Ordinarily, of course, the President must obtain the Senate's "Advice and Consent" when appointing federal officers.[52] In *NLRB v. Noel Canning*,[53] the Court resolved important issues concerning the President's ability to evade Senate obstacles by exercising his power to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[54] Led by Justice Breyer, a majority of the Court reached three significant conclusions. First, the Court held that the term "Recess" in the clause just quoted refers not only to breaks that happen between formal sessions of Congress but also to breaks "of substantial length" that occur within a given formal session.[55] Between the founding and the present day, Justice Breyer explained, presidents have made "countless" recess appointments during intra-session breaks, and the Senate has never taken the position that such appointments are categorically invalid.[56] With respect to how long an intra-session break must be in order to be deemed substantial, the Court found that "a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause."[57]

Second, the Court found that the recess-appointments power applies not only to vacancies that first arise during a recess (a point on which everyone agreed) but also to vacancies that arise before a recess and that continue to exist when the Senate breaks. The majority conceded that its interpretation was in tension with the language of Article II ("Vacancies

43. Justice Kagan did not participate in the case.
44. The plurality said that *Hunter* stands for "the unremarkable principle that the State may not alter the procedures of government to target racial minorities." *Schuette*, 134 S. Ct. at 1632. As for *Seattle School District No. 1*, the plurality concluded that key passages on which the Sixth Circuit had seized "went well beyond the analysis needed to resolve the case." *Id.* at 1634.
45. *Id.* at 1637.
46. *Id.* at 1647 (Scalia, J., concurring in the judgment).
47. *Id.* at 1648 (Scalia, J., concurring in the judgment).
48. He did, however, briefly express skepticism about the doctrine. *See id.* at 1651 (Breyer, J., concurring in the judgment) ("[T]he principle that underlies *Hunter* and *Seattle* runs up against a competing principle . . . favor[ing] decisionmaking through the democratic process.").
49. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
50. *Schuette*, 134 S. Ct. at 1675 (Sotomayor, J., dissenting).
51. *Id.* at 1639 (Roberts, C.J., concurring).
52. U.S. CONST. art. II, § 2, cl. 2.
53. 134 S. Ct. 2550 (2014). The dispute in *Noel Canning* arose when the National Labor Relations Board ordered a Pepsi-Cola distributor to execute a collective-bargaining agreement with a labor union. The distributor argued that the board's order was illegitimate because three of the board's members had been invalidly appointed by President Obama during purported Senate recesses.
54. U.S. CONST. art. II, § 2, cl. 3.
55. *Noel Canning*, 134 S. Ct. at 2561.
56. *Id.* at 2564.
57. *Id.* at 2567. The Court noted that neither house of Congress is permitted to adjourn mid-session without the consent of the other for a period of "more than three days." U.S. CONST. art. I, § 5, cl. 4. "A Senate recess that is so short that it does not require the consent of the House," the majority reasoned, "is not long enough to trigger the President's recess-appointments power." *Noel Canning*, 134 S. Ct. at 2566.

that may *happen during* the Recess of the Senate") but found that a broad reading best served the framers' purpose of ensuring that the President can obtain the services of officers when the Senate is not available to confirm their appointments. The majority also relied heavily upon the fact that "[t]he tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison" and has been followed over the ensuing generations on scores of occasions.[58]

Finally, the Court held that, when calculating the length of a recess, *pro forma* sessions cannot be ignored. During the roughly month-long break at issue in this case, the Senate held twice-weekly *pro forma* sessions. President Obama had made the challenged appointments roughly in the middle of that month-long break, one day after one *pro forma* session and two days before the next. If the Court had disregarded those *pro forma* sessions, the Senate's break easily would have been long enough to trigger the President's recess-appointments power. The Court found, however, that "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."[59] As a result, the challenged appointments in this case were made during a Senate break of only three days—a period not long enough to bring the recess-appointments power into play.

Joined by Chief Justice Roberts and Justices Thomas and Alito, Justice Scalia concurred only in the judgment. In his view, the recess-appointments power only comes into play during breaks between formal sessions of Congress and applies only "to vacancies that arise during the recess in which they are filled."[60] Looking ahead to future separation-of-powers disputes, Justice Scalia worried that the majority's "adverse-possession theory of executive power . . . will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds."[61]

RELIGIOUS FREEDOM RESTORATION ACT

In their final public sitting of the Term, the Court handed down one of the year's most highly anticipated rulings. The issue in *Burwell v. Hobby Lobby Stores, Inc.*,[62] was whether the Religious Freedom Restoration Act (RFRA) spares closely held for-profit corporations from the federal requirement that they provide their employees with health-insurance coverage for federally approved forms of birth control that the corporations' owners regarded as methods of abortion.[63] By a 5-4 margin, the Court held that RFRA does indeed lift that requirement from those corporations' shoulders.[64]

In an opinion by Justice Alito, the Court first found that for-profit corporations are "persons" within the meaning of the statute.

RFRA states that the federal government cannot "substantially burden" a person's exercise of religion unless it can show "that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest."[65] In an opinion by Justice Alito, the Court first found that for-profit corporations are "persons" within the meaning of the statute. The Dictionary Act explicitly includes corporations in that term's definition, the Court said, and there is nothing about RFRA's context that suggests Congress intended a narrower definition to apply. The Department of Health and Human Services had conceded during the litigation that nonprofit corporations can be persons and can exercise religion within the meaning of RFRA, and the Court could find no persuasive reason to believe Congress intended otherwise with respect to corporations that seek a profit.

Having found RFRA applicable, the majority determined that the contraception mandate substantially burdens the exercise of religion by the plaintiff corporations and their owners because, if they ignored the mandate, the companies faced substantial annual fines. Assuming (rather than finding) that the contraception mandate furthered compelling governmental interests, the majority then determined that there were less restrictive means of achieving the government's objectives. The federal government itself, for example, could assume the cost of providing the corporations' female employees with full contraception coverage. Or the government could make available to closely held for-profit corporations the same accommodation that it already provides to nonprofit organizations with religious objections to the contraception mandate—namely, permit them to certify that they object to certain forms of contraception, thereby triggering a duty on the part of their insurance providers or third-party administrators to exclude those forms of contraception from the entities' group health-insurance coverage and to provide separate payments for those contraceptive services.[66] The majority stressed that its decision "concerned solely . . . the contraceptive mandate" and "should not be understood to hold that an insurance-coverage mandate

58. *Id.* at 2570.
59. *Id.* at 2574.
60. *Id.* at 2606 (Scalia, J., concurring in the judgment). The majority replied that Justice Scalia's reading of the Constitution "would render illegitimate thousands of recess appointments reaching all the way back to the founding era." *Id.* at 2577.
61. *Id.* at 2618 (Scalia, J., concurring in the judgment).
62. Nos. 13-354, 13-356, 2014 U.S. LEXIS 4505 (June 30, 2014).
63. The birth-control methods to which the corporations objected were two kinds of morning-after pills and two kinds of intrauterine devices, all of which can terminate fertilized eggs' development.
64. The three closely held for-profit corporations before the Court were Conestoga Wood Specialties, Hobby Lobby Stores, Inc., and Mardel.
65. 42 U.S.C. §§ 2000bb-1(a), (b).
66. The majority reserved judgment, however, on whether this approach would itself violate RFRA—a reservation that would acquire great prominence just days after *Hobby Lobby Stores* came down. On July 3, 2014, the Court granted Wheaton College's application for an order temporarily shielding it from having to follow the precise certification process prescribed by the government for nonprofit organizations with religious objections to the contraception mandate. That order drew a sharp dissent from the Court's three female justices. *See* Wheaton College v. Burwell, No. 13A1284, __ S Ct. __, 2014 WL 3020426 (July 3, 2014).

Companies with substantial business operations in multiple states will be heartened by the Court's ruling in *Daimler AG v. Bauman*.

must necessarily fall if it conflicts with an employer's religious beliefs."[67] Justice Kennedy emphasized the decision's narrow scope in a separate concurrence.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. Justice Ginsburg argued that the majority's decision would place significant burdens upon thousands of women who worked for the plaintiff corporations and who desired the forms of contraception to which their employers objected. She found no reason to believe that Congress intended such a result, noting (in a portion of her opinion joined only by Justice Sotomayor) that "[u]ntil this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA."[68] Even if RFRA did apply, Justice Ginsburg wrote, the contraception mandate did not substantially burden the plaintiffs' exercise of religion because neither the corporations nor their owners were themselves required to purchase or provide the contraceptives at issue, and because women and their health-care providers—not the corporations or their owners—would be the ones deciding whether the contraception was desirable. By issuing what she regarded as "a decision of startling breadth,"[69] she warned that the Court was "ventur[ing] into a minefield."[70]

FEDERAL JURISDICTION

FORUM-SELECTION CLAUSES

In *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*,[71] the Court clarified when and how forum-selection clauses should be enforced. When a dispute erupted between Virginia-based Atlantic Marine Construction and Texas-based J-Crew Management, J-Crew filed suit in the Western District of Texas, rather than in the Eastern District of Virginia as prescribed by a forum-selection clause in the parties' contract. Atlantic Marine moved to dismiss the case altogether under Section 1406(a) or under Rule 12(b)(3) of the Federal Rules of Civil Procedure or, in the alternative, to transfer the case to Virginia under 28 U.S.C. § 1404(a). The District Court denied both motions, and the Fifth Circuit affirmed.

Led by Justice Alito, the Court unanimously reversed. The justices agreed with the courts below that the forum-selection clause did not render venue in Texas "wrong" or "improper" and that dismissal under Section 1406(a) or Rule 12(b)(3) was thus unwarranted.[72] With respect to the motion to transfer, however, the Court concluded that when a federal civil litigant moves to transfer a case in accordance with a forum-selection clause, "[o]nly under extraordinary circumstances unrelated to the convenience of the parties should [the] § 1404(a) motion be denied."[73] The plaintiff bears the burden of demonstrating that the forum-selection clause should be disregarded due to public-interest concerns, the Court said, and J-Crew had not carried that burden here.[74]

PERSONAL JURISDICTION

Companies with substantial business operations in multiple states will be heartened by the Court's ruling in *Daimler AG v. Bauman*.[75] Argentinian plaintiffs had filed a federal suit in California against Daimler AG (Daimler), a German company. The plaintiffs argued that Daimler was subject to general jurisdiction in California due to the operations in that state of Mercedes-Benz USA (MBUSA), a Daimler subsidiary.[76] The Ninth Circuit held that MBUSA was Daimler's agent for jurisdictional purposes, that MBUSA's California contacts were thus attributable to Daimler, and that those contacts were sufficient to subject Daimler to general jurisdiction.

The Supreme Court reversed. In an opinion for eight members, Justice Ginsburg first found that the Ninth Circuit's agency analysis was too lenient because it "appear[ed] to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate."[77] More significantly, the Court found that, even if MBUSA's California contacts were attributable to Daimler, it would violate the Due Process Clause to subject Daimler to general jurisdiction there. While acknowledging that a company could be subject to general jurisdiction in states other than those of its place of incorporation and principal place of business, the Court recoiled from the suggestion that Daimler was subject to general jurisdiction in every state where MBUSA had a significant presence. "Such exorbitant exercises of all-purpose jurisdiction," Justice Ginsburg wrote, "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"[78]

67. *Hobby Lobby Stores*, 2014 U.S. LEXIS 4505, at *86-87.
68. *Id.* at *117 (Ginsburg, J., dissenting).
69. *Id.* at *97 (Ginsburg, J., dissenting).
70. *Id.* at *154 (Ginsburg, J., dissenting).
71. 134 S. Ct. 568 (2013).
72. *Id.* at 577-79. The Court reserved judgment on whether dismissal was appropriate under Rule 12(b)(6), an issue not briefed by the parties. *See id.* at 580.
73. *Id.* at 581.
74. The Court further explained that, "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." *Id.* at 582.
75. 134 S. Ct. 746 (2014).
76. MBUSA distributed Daimler vehicles to dealerships throughout the United States, including California.
77. *Daimler AG*, 134 S. Ct. at 760.
78. *Id.* at 761-62 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). Justice Sotomayor preferred to ground the Court's judgment on the finding that it would be unreasonable to allow a California-based court to take jurisdiction in this instance, "given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available." *Id.* at 764 (Sotomayor, J., concurring in the judgment).

The Court again underscored the limitations on federal courts' jurisdictional reach in *Walden v. Fiore*.[79] Anthony Walden was a Georgia police officer who had been deputized by the Drug Enforcement Administration (DEA) to work at the Hartsfield-Jackson Atlanta International Airport. Suspecting illegal drug activity, Walden seized roughly $97,000 in cash that Gina Fiore and Keith Gipson were carrying with them while changing planes in Atlanta en route from Puerto Rico to Nevada. Fiore and Gipson explained that they were professional gamblers and that the cash represented their "bank" and lawful winnings. Walden and his colleagues were unpersuaded, however, and so Fiore and Gipson returned home to Nevada empty-handed. After months of wrangling, the DEA finally returned the money. Fiore and Gipson then filed a *Bivens* action against Walden in federal district court in Nevada, alleging (among other things) that he had resisted the funds' return by filing a false affidavit with the U.S. Attorney in Georgia. Walden moved to dismiss, arguing that he was not subject to personal jurisdiction in Nevada. The Ninth Circuit rejected Walden's argument, but the Supreme Court unanimously embraced it.

Writing for the Court, Justice Thomas explained that, under the familiar "minimum contacts" analysis, a federal court must focus on "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[80] The Ninth Circuit had erred, the Court said, by focusing on Walden's knowledge that Fiore and Gipson resided in Nevada and on the fact that those two plaintiffs suffered foreseeable harm in that state, rather than on Walden's actual contacts with Nevada. Fiore and Gipson

> lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where [they] chose to be at a time when they desired to use the funds seized by [Walden]. [They] would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had.[81]

The Court acknowledged Fiore and Gipson's warning that this ruling could "bring about unfairness in cases where intentional torts are committed via the Internet or other electronic media," but the justices said they were leaving "questions about virtual contacts for another day."[82]

PRUDENTIAL STANDING AND THE "ZONE OF INTERESTS"

Over the past few decades, the Court had occasionally indicated that whether a plaintiff falls within the "zone of interests" that Congress intended to protect with a given statute is a jurisdictional issue concerning "prudential" or "statutory" standing.[83] Taking their cue from those and other precedents, the parties in *Lexmark International, Inc. v. Static Control Components, Inc.*[84] used the jurisdictional language of standing when framing their disagreement about whether Static Control could bring a false-advertising claim against Lexmark under the Lanham Act.[85] Writing for a unanimous Court, Justice Scalia explained that whether a plaintiff falls within a statute's zone of interests is really just a question of whether the plaintiff has a federal cause of action. It is "misleading" to call that a question of standing, Justice Scalia wrote, "since the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case."[86]

Justice Thomas explained that, under the familiar "minimum contacts" analysis, a federal court must focus on "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."

The dispute in *Lexmark* thus raised "a straightforward question of statutory interpretation: Does the cause of action [provided in the Lanham Act] extend to plaintiffs like Static Control?"[87] The Court concluded that it did. Sweeping aside alternative formulations devised by the lower courts, Justice Scalia and his colleagues held that a party has a false-advertising claim under the Lanham Act if the defendant's "deception of consumers causes them to withhold trade from the plaintiff" and thus inflicts upon the plaintiff an "economic or reputational injury flowing directly from the deception wrought by the defendant's advertising."[88]

STANDING AND RIPENESS

With one important exception, the Court's ruling in *Susan B. Anthony List v. Driehaus*[89] was unremarkable. Susan B. Anthony List (SBAL)—an organization that opposes abortion—filed a federal action for declaratory and injunctive

79. 134 S. Ct. 1115 (2014).
80. *Id.* at 1122.
81. *Id.* at 1125.
82. *Id.* at 1125 n.9.
83. *See, e.g.*, Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 97 (1998) (statutory standing); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)) (prudential standing).
84. 134 S. Ct. 1377 (2014).
85. Static Control alleged that Lexmark made false statements about its own products and about those manufactured by Static Control.
86. *Id.* at 1387 n.4 (internal quotation omitted). The Court dropped an additional footnote to address, in dictum, one other self-inflicted misunderstanding. The jurisdictional ban on "generalized grievances" flows from the requirements of Article III, Justice Scalia explained, rather than—as the Court had elsewhere indicated—from the Court's assessment of prudential concerns. *See id.* at 1387 n.3.
87. *Id.* at 1388.
88. *Id.* at 1391.
89. 134 S Ct. 2334 (2014).

In a pair of rulings handed down on the same day in early June, the Court unanimously and pointedly reversed the Federal Circuit on patent matters.

relief, arguing that its First Amendment rights were violated by an Ohio statute rendering it a crime to make false statements about candidates for public office. SBAL had already run into trouble with state officials when it ran a political advertisement asserting that then-Congressman Steven Driehaus voted in favor of taxpayer-funded abortions, and it feared it would encounter similar trouble in future elections. In an opinion by Justice Thomas, the Court unanimously found that SBAL faced an injury that was sufficiently imminent to satisfy the requirements of Article III.

Of greater interest are the Court's closing remarks concerning the prudential requirements of ripeness. The Sixth Circuit had found the case unripe, reasoning that SBAL would not suffer undue hardship if adjudication of its constitutional claims were delayed and that the factual record concerning SBAL's future political advocacy was insufficiently developed. The Court cast at least a modicum of doubt on "the continuing vitality" of those prudential requirements, noting that they are "'in some tension with our recent reaffirmation of the principle that "a federal court's obligation to hear and decide" cases within its jurisdiction "is virtually unflagging."'"[90] But the Court found that it did not yet need to resolve that tension because those prudential requirements were "easily satisfied here."[91]

YOUNGER ABSTENTION

Emphasizing federal courts' "virtually unflagging" obligation to adjudicate cases within their jurisdiction,[92] the Court in *Sprint Communications, Inc. v. Jacobs* clarified the limits of the abstention doctrines eponymously associated with *Younger v. Harris*.[93] The dispute arose from Sprint's claim that federal law preempted Iowa's regulation of intrastate access charges for certain calls placed over the Internet. An Iowa administrative agency had rejected that claim. While that ruling was under review in an Iowa court, Sprint filed a federal suit against the agency. The Eighth Circuit concluded that abstention was appropriate, reasoning that *Younger* abstention is warranted whenever "(1) there is an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges."[94]

Led by Justice Ginsburg, the Court unanimously found that the Eighth Circuit's criteria swept too broadly. The Court previously had indicated that *Younger* abstention is appropriate if there are parallel state proceedings of one of three kinds: criminal prosecutions, civil enforcement proceedings, or "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions."[95] Stressing that *Younger* abstention "extends to th[os]e three exceptional circumstances, but no further,"[96] the *Sprint Communications* Court explained that civil enforcement proceedings render *Younger* abstention appropriate only if those proceedings are "'akin to a criminal prosecution'" in the sense that they were initiated by a state actor (typically following an investigation) to sanction a party for wrongful conduct.[97] The justices found those circumstances absent here.

COPYRIGHTS

In *American Broadcasting Companies, Inc. v. Aereo, Inc.*,[98] the Court ruled 6-3 that Aereo was violating copyrights held by television broadcasters, producers, and others in broadcast television programs. For a monthly fee, Aereo's technology enables a person to watch broadcast television programs on Internet-connected devices. Upon receiving a request for a specific program from a prospective viewer, Aereo devotes one of its thousands of tiny antennae to the task of pulling down the selected program's broadcast signal for that viewer; it saves a copy of that program on its hard drive (in a file dedicated to that viewer) and then, with only a several-second delay behind the original broadcast, it streams the program to the viewer in an Internet-compatible format. Led by Justice Breyer, a majority of the Court found that, with technological updates, Aereo was replicating processes used by community antenna television (CATV) systems—systems that the Court had found permissible in a pair of rulings in 1968 and 1974,[99] prompting Congress to amend the Copyright Act in 1976. Under those 1976 amendments, the Court held, Aereo was violating the copyright holders' exclusive right to publicly perform the copyrighted works.[100]

Joined by Justices Thomas and Alito, Justice Scalia dissented. He argued that, because "Aereo's automated system does not relay any program, copyrighted or not, until a sub-

90. *Id.* at 2347 (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013))).
91. *Id.*
92. Sprint Commc'ns v. Jacobs, 134 S. Ct. 584, 591 (2013) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).
93. 401 U.S. 37 (1971).
94. Sprint Commc'ns, Inc. v. Jacobs, 690 F.3d 864, 867 (8th Cir. 2012) (citing Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)), *rev'd*, 134 S. Ct. 584 (2013).
95. New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368 (1989).
96. *Sprint Commc'ns*, 134 S. Ct. at 593-94 (internal quotation omitted).
97. *Id.* at 592 (quoting Huffman v. Pursue, 420 U.S. 592, 604 (1975)).
98. 134 S. Ct. 2498 (2014).
99. *See* Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).
100. In their quest to fend off competitors, broadcasters are hardly out of the woods. *See* Emily Steel, *After Ruling, Aereo's Rivals Prepare to Pounce*, N.Y. Times, June 30, 2014, at B1.

scriber selects the program and tells Aereo to play it," Aereo was not itself performing the works.[101] Justice Scalia reserved judgment on whether Aereo could be held "secondarily" liable under the Act for facilitating copyright infringements by others.

PATENTS

In a pair of rulings handed down on the same day in early June, the Court unanimously and pointedly reversed the Federal Circuit on patent matters. In *Limelight Networks, Inc. v. Akamai Technologies, Inc.*[102]—a case concerning a patented method of delivering electronic data—the Court held that a party cannot be held liable for inducing patent infringement under 35 U.S.C. § 271(b) if no one has directly infringed the patent in violation of 35 U.S.C. § 271(a) or some other statutory provision. The Court said that, in reaching a contrary conclusion on the facts of this case, "[t]he Federal Circuit's analysis fundamentally misunderstands what it means to infringe a method patent."[103]

In *Nautilus, Inc. v. Biosig Instruments, Inc.*,[104] the Court held that a patent is not void for indefiniteness if the "patent's claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty."[105] By finding the definiteness requirement met if a patent's claims are not "insolubly ambiguous," the Court said, the Federal Circuit had adopted a test that was not "'probative of the essential inquiry'" and was "breed[ing] lower court confusion."[106]

SECURITIES FRAUD

In *Chadbourne & Parke LLP v. Troice*,[107] the Court held that the plaintiffs' state-law class actions were not precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA). One of several measures aimed at curbing "perceived abuses of the class-action vehicle in litigation involving nationally traded securities,"[108] SLUSA prohibits state-law class actions alleging "a misrepresentation or omission of material fact *in connection with* the purchase or sale of a covered security."[109] "Covered securities" consist primarily of those traded on national exchanges.[110] The plaintiffs here alleged that they had purchased certificates of deposit on the strength of the issuer's fraudulent assurance that their funds would be invested, at least in part, in nationally traded securities. The defendants contended that SLUSA precluded the plaintiffs' class actions.

[A] majority of the court declined Halliburton's suggestion that the Court make it more difficult for private securities-fraud plaintiffs to prove reliance upon defendants' material misrepresentations.

A majority of the justices rejected the defendants' argument, finding that "[a] fraudulent misrepresentation or omission is not made 'in connection with' . . . a 'purchase or sale of a covered security' unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a 'covered security.'"[111] In this case, the only entity that was making decisions about whether to buy or sell covered securities was one of the alleged fraudsters—the bank that issued the certificates of deposit. Because their state-law claims fell beyond the reach of SLUSA's preclusion provision, the plaintiffs were allowed to proceed.[112]

In *Halliburton Co. v. Erica P. John Fund*,[113] a majority of the Court declined Halliburton's suggestion that the Court make it more difficult for private securities-fraud plaintiffs to prove reliance upon defendants' material misrepresentations. Under the Court's 1988 ruling in *Basic Inc. v. Levinson*,[114] investors are allowed to invoke a rebuttable presumption of reliance—a presumption that is grounded in the assumption that the price of a stock reflects all publicly available information about that stock, including fraudulent statements made by company officials. In an opinion by Chief Justice Roberts, the Court found that Halliburton's arguments against the *Basic* framework were not sufficiently persuasive to overcome the weight of *stare decisis*.[115] Joined by Justices Scalia and Alito, Justice Thomas concurred only in the judgment, finding that "[l]ogic, economic realities, and our subsequent jurisprudence have undermined the foundations of the *Basic* presumption, and *stare decisis* cannot prop up the façade that remains."[116]

101. *American Broadcasting Companies*, 134 S. Ct. at 2514 (Scalia, J., dissenting).
102. 134 S. Ct. 2111 (2014).
103. *Id.* at 2117.
104. 134 S. Ct. 2120 (2014).
105. *Id.* at 2129.
106. *Id.* at 2130 (quoting Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17, 40 (1997)).
107. 134 S. Ct. 1058 (2014).
108. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81 (2006).
109. 15 U.S.C. § 78bb(f)(1) (emphasis added).
110. *See id.* §§ 78bb(f)(5)(E) and 77r(b)(1)-(2) (defining the types of securities falling within SLUSA's ambit).
111. *Chadbourne & Parke*, 134 S. Ct. at 1066.
112. Justices Kennedy and Alito dissented, arguing that the Court's narrow reading of SLUSA's preclusion provision will permit proliferation of state-law class actions, forcing defendants to defend against multiple suits in various state fora. This state-law litigation will drive up legal costs for market participants and the secondary actors, such as lawyers, accountants, brokers, and advisers, who seek to rely on the stability that results from a national securities market regulated by federal law.
Id. at 1074 (Kennedy, J., dissenting).
113. 134 S. Ct. 2398 (2014).
114. 485 U.S. 224 (1988).
115. The news for Halliburton was not all bad. The Court held that defendants must be permitted to try to rebut the *Basic* presumption of reliance at the class-certification stage, rather than having to wait until trial. The Fifth Circuit had ruled to the contrary.
116. *Halliburton Co.*, 134 S. Ct. at 2418 (Thomas, J., concurring in the judgment).

In *CTS Corp. v. Waldburger*, the Court found important differences between statutes of limitation and statutes of repose.

SUPREMACY CLAUSE: PREEMPTION

In *Northwest, Inc. v. Ginsberg*,[117] the Court took up the claim of Rabbi S. Binyomin Ginsberg, whom Northwest Airlines had terminated from its frequent-flyer program after the airlines concluded that Ginsberg was "abusing" the program by (among other things) complaining too frequently about such matters as delayed luggage delivery. Ginsberg claimed that, by terminating him on those grounds, Northwest had breached its duty of good faith and fair dealing. Northwest contended, however, that Ginsberg's state-law claim was preempted by the Airline Deregulation Act of 1978 (ADA), which explicitly preempts any state "law, regulation, or other provision having the force and effect of law related to [an air carrier's] price, route, or service."[118]

With Justice Alito writing for the Court, the justices unanimously found Ginsberg's claim preempted. The Court observed that states vary with respect to how they view the duty on which Ginsberg's claim relied. In some states, the duty of good faith and fair dealing is regarded as springing from contracting parties' reasonable expectations, while in other states the duty is imposed upon parties pursuant to the community's public-policy judgments. When it comes to ADA preemption, the source of the duty makes all the difference. If a state regards the duty as flowing from the contracting parties' reasonable expectations, the Court said, then the duty is essentially imposed by the parties themselves and falls outside the terms of the ADA's preemption provision. But if the duty is imposed upon the parties by the state—as it was here—then the duty flows from a "law, regulation, or other provision having the force and effect of law" and so is explicitly preempted by the ADA.

In *CTS Corp. v. Waldburger*,[119] the Court found important differences between statutes of limitations and statutes of repose. Twenty-four years after CTS Corporation sold property on which it had operated an electronics plant in North Carolina, Peter Waldburger and others filed a state-law action against CTS, alleging they had been harmed by toxic chemicals CTS had stored there. North Carolina's statute of repose shielded tort defendants from lawsuits brought more than 10 years after their last culpable act. CTS sought the protection of that statute, saying that its last culpable act was its sale of the plant more than two decades earlier. Waldburger argued, however, that North Carolina's statute of repose was preempted by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Writing for a 7-2 majority, Justice Kennedy found no preemption. He explained that a statute of limitations typically establishes a period within which a harmed individual must sue after being injured or discovering that he or she has been harmed, while a statute of repose "puts an outer limit on the right to bring a civil action," typically measured "from the date of the last culpable act or omission of the defendant."[120] Justice Kennedy pointed out that CERCLA's preemption provision explicitly refers to states' statutes of limitations but says nothing explicitly about states' statutes of repose. A congressionally commissioned study group had acknowledged those two different kinds of state statutes and had urged state lawmakers to remove both sets of obstacles for future plaintiffs. Rather than await state action, however, Congress opted to legislate—and when it did, it adopted a preemption provision that dealt only with state statutes of limitations, evidently opting to leave the fate of state statutes of repose in state lawmakers' hands.[121]

TRIBAL SOVEREIGN IMMUNITY

In a 5-4 ruling that did not break along familiar lines, the Court ruled in *Michigan v. Bay Mills Indian Community*[122] that Bay Mills—a federally recognized Indian tribe—was protected by tribal sovereign immunity against an action brought against it by the State of Michigan. Michigan had alleged that, by opening a casino off tribal lands, the Tribe had violated both the federal Indian Gaming Regulatory Act (IGRA) and a compact that the state and Bay Mills entered in 1993.

Joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor, Justice Kagan took as her starting premises that Indian tribes are subject to Congress's "plenary control" as "'domestic dependent nations,'" yet enjoy sovereign immunity to the extent Congress has chosen not to abrogate it.[123] She then pointed out that IGRA partially abrogates the tribes' immunity for actions brought in federal court concerning certain gaming activities "located on Indian lands"[124] but lacks a comparable provision concerning gaming activities *off* Indian lands. "This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear [statutory] language," Justice Kagan wrote, and is "still less" empowered to rewrite statutes "when the consequence would be to expand an abrogation of immunity."[125]

Likely recognizing that its abrogation argument was not airtight, Michigan had urged the Court to hold that tribal sovereign immunity does not extend in the first instance to legal actions concerning tribes' commercial activities off tribal lands. The Court had rejected that very proposition in its 1998 ruling in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[126] however, and the Court declined to backtrack here. Cit-

117. 134 S. Ct. 1422 (2014).
118. 49 U.S.C. § 41713(b)(1).
119. 134 S. Ct. 2175 (2014).
120. *Id.* at 2182.
121. Joined by Justice Breyer, Justice Ginsburg dissented, arguing that the majority's reading of the statute thwarted Congress's desire to ensure that plaintiffs would not be barred from bringing suit when it takes many years for harm suffered from environmental contamination to manifest itself.
122. 134 S. Ct. 2024 (2014).
123. *Id.* at 2030 (quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991)).
124. 25 U.S.C. § 2710(d)(7)(A)(ii).
125. *Bay Mills*, 134 S. Ct. at 2034.
126. 523 U.S. 751 (1998).

ing the principle of *stare decisis* as "a foundation stone of the rule of law,"[127] the majority concluded that Congress is now the appropriate entity to decide whether the policy course charted in *Kiowa* remains desirable.

The Court's ruling in *Kiowa* provided the focal point of Justice Thomas's dissent. Joined by Justices Scalia, Ginsburg, and Alito, he argued that *Kiowa* was "unsupported by any rationale . . . , inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty."[128] Emphasizing that tribal immunity is a doctrine of the Court's—not Congress's—creation, Justice Thomas believed the majority's reluctance to overturn *Kiowa* was misplaced. In the 16 years since *Kiowa* was decided, he wrote, tribes' gaming revenues had "more than tripled," giving rise to numerous concerns that—at least when arising from tribes' commercial activities off tribal lands—states should be free to address without having to deal with the obstacles that tribal immunity poses.[129]

Justice Scalia filed a separate, one-paragraph opinion, expressing regret for having joined the majority in *Kiowa* and saying that the Court itself should "clean up [the] mess that I helped make," rather than leave that task to Congress.[130] Justice Ginsburg also filed a short separate opinion, drawing an unfavorable connection between the Court's broad construction of tribal immunity in *Kiowa* and the Court's expansive rulings in other cases concerning *states*' sovereign immunity. She predicted that "[n]either brand of immoderate, judicially confirmed immunity . . . will have staying power."[131]

OTHER NOTABLE RULINGS

In *Ray Haluch Gravel Co. v. Central Pension Fund*,[132] the Court unanimously held that "[w]hether [a] claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal."[133] In the case before it, the Court thus ruled that the 30-day clock for filing a notice of appeal began to run when the district court issued its ruling on the merits, rather than when the district court subsequently ruled on a motion for attorney's fees.

In *Mississippi ex rel. Hood v. AU Optronics Corp.*,[134] the Court unanimously held that a civil suit does not qualify as a "mass action" under the Class Action Fairness Act of 2005—and so is not removable from state to federal court under that legislation's mass-action provisions[135]—when a state is the lone named plaintiff in a lawsuit aimed at redressing injuries suffered by many of that state's citizens.

[T]he Court . . . ruled that the 30-day clock for filing a notice of appeal begins to run when the district court issued its ruling on the merits, rather than when [it] subsequently ruled on a motion for attorney's fees.

Contributing to what cannot be a good public-relations story for the Coca-Cola Company, the Court held in *POM Wonderful LLC v. Coca-Cola Co.*[136] that POM Wonderful—the producer of a pomegranate-blueberry juice blend—could bring a Lanham Act unfair-competition suit against Coca-Cola for prominently placing the words "pomegranate blueberry" on the label of a product that, in reality, contains only miniscule amounts of those juices. The Ninth Circuit had ruled that POM Wonderful's suit was precluded by the Food, Drug, and Cosmetic Act, but the Court unanimously reversed, finding that "the FDCA and the Lanham Act complement each other in the federal regulation of misleading food and beverage labels."[137]

In *Lawson v. FMR LLC*,[138] the Court held that a whistleblower-protecting provision of the Sarbanes-Oxley Act of 2002 extends not only to the employees of public companies but also to the employees of those companies' contractors and subcontractors.

Pointing out that equitable tolling is available only when it comports with the lawmakers' intent, the Court in *Lozano v. Montoya Alvarez*[139] held that the parties to the Hague Convention on the Civil Aspects of International Child Abduction did not want courts to toll the one-year period after which it becomes more difficult for a parent to secure the return of a child who was taken to a different country by the other parent.

Citing the familiar *Chevron*-deference framework,[140] the Court in *EPA v. EME Homer City Generation, L.P.*,[141] upheld the Environmental Protection Agency's cost-efficiency formula for determining the amount of air pollution that an upwind state must eliminate to bring downwind states into compliance with air-quality standards established pursuant to the Clean Air Act.

The EPA received a mostly favorable split decision in *Utility Air Regulatory Group v. EPA*.[142] Piecing together the results handed down by a splintered Court, one finds that the EPA

127. *Bay Mills*, 134 S. Ct. at 2036.
128. *Id.* at 2045 (Thomas, J., dissenting).
129. *Id.* at 2050 (Thomas, J., dissenting).
130. *Id.* at 2045 (Scalia, J., dissenting).
131. *Id.* at 2056 (Ginsburg, J., dissenting).
132. 134 S. Ct. 773 (2014).
133. *Id.* at 777.
134. 134 S. Ct. 736 (2014).
135. *See* 28 U.S.C. § 1332(d)(11) (stating the conditions under which a "mass action" may be removed to federal court, and defining a "mass action" as a civil action in which, among other things, "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact").
136. 134 S. Ct. 2228 (2014).
137. *Id.* at 2233. Justice Breyer took no part in the case.
138. 134 S. Ct. 1158 (2014).
139. 134 S. Ct. 1224 (2014).
140. *See* Chevron, U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-44 (1984).
141. 134 S. Ct. 1584 (2014).
142. 134 S. Ct. 2427 (2014). As Justice Scalia observed when announcing the decision from the bench, the EPA got most—but not all—of what it wanted in the case. *See* Adam Liptak, *With Limits, Justices Allow the U.S. to Curb Power-Plant Gases*, N.Y. TIMES, June 24, 2014, at 8.

currently lacks statutory authority to impose permitting requirements on stationary entities based solely on their potential to emit large amounts of greenhouse gases, but that the agency may require stationary entities to employ "best available control technology" for greenhouse-gas emissions if those entities already are subject to permitting requirements for more conventional pollutants.

In *United States v. Quality Stores, Inc.*,[143] the Court unanimously concluded that severance payments made to involuntarily terminated employees are taxable wages under the Federal Insurance Contributions Act.

Rejecting the reasoning of several lower federal appellate courts, the Court unanimously held in *Fifth Third Bancorp v. Dudenhoeffer*[144] that fiduciaries of employee-stock-ownership plans are not entitled to a special presumption that they have behaved prudently.

LOOKING AHEAD

At the time of this writing, the Court already has slated a wide range of significant cases for its 2014-2015 docket. The issues it intends to confront include, among others, the constitutionality of redistricting efforts in Alabama;[145] the constitutionality of a state's effort to tax all of the income of its residents, including income earned and taxed in other states;[146] the evidentiary requirements for removal from state to federal court;[147] whether a state prison's ban on beards violates the Religious Land Use and Institutionalized Persons Act of 2000;[148] whether and how a court may enforce the Equal Employment Opportunity Commission's statutory duty to try to conciliate discrimination claims before filing suit;[149] whether federal agencies may revise their interpretive rules without a notice-and-comment period;[150] how to determine whether a city's sign ordinance is content-based or content-neutral;[151] whether the deadlines for filings claims under the Federal Tort Claims Act are subject to equitable tolling;[152] and the scope of employers' duty to accommodate pregnant employees under the Pregnancy Discrimination Act.[153]

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143. 134 S. Ct. 1395 (2014). Justice Kagan did not participate in the case.
144. 134 S. Ct. 2459 (2014).
145. Alabama Democratic Conference v. Alabama, No. 13-1138; Alabama Legislative Black Caucus v. Alabama, No. 13-895.
146. Comptroller v. Wynne, No. 13-485.
147. Dart Cherokee Basin Operating Co., LLC v. Owens, No. 13-719.
148. Holt v. Hobbs, No. 13-6827.
149. Mach Mining v. EEOC, No. 13-1019.
150. Nickols v. Mortgage Bankers Ass'n, No. 13-1052; Perez v. Mortgage Bankers Ass'n, No. 13-1041.
151. Reed v. Town of Gilbert, No. 13-502.
152. United States v. June, No. 13-1075; United States v. Wong, No. 13-1074.
153. Young v. United Parcel Service, No. 12-1226.