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The U.S. Supreme Court's 2013–2014 Term

Both Divided and Unanimous

BY MONA TAWATAO, GILL DEFORD, JANE PERKINS, AND GARY F. SMITH

Editor's Note: *The authors are members of the Federal Court Access Group of experienced legal aid litigators monitoring U.S. Supreme Court cases affecting low-income individuals' ability to obtain redress in federal court. In each November–December or January–February issue of* Clearinghouse Review *they analyze decisions from the previous Term of the Court.*

The U.S. Supreme Court's 2013–2014 Term came with its share of 5-to-4 decisions, many of which are emblematic of the Court's deep ideological divide. The high profile and controversial *Burwell v. Hobby Lobby Stores*, which impedes access to affordable contraception, and potentially other critical health care services and treatment, is one such decision.[1] But, as the constitutional law scholar Erwin Chemerinsky observed, most unique about the Term is the unusually high proportion—65 percent—of unanimous albeit mostly pedestrian decisions.[2] Here we analyze a wide variety of those opinions—many unanimous, some divided—that implicate access to the federal courts.

Statutory Construction

As usual, many of the Court's decisions required it to engage in exercises of statutory construction, ranging from the use of dictionary definitions to far more complex efforts to discern the intent underlying ambiguous legislative language. A number of these cases raised no disagreement among the justices. For example, in *Octane Fitness v. ICON Fitness*, the Federal Circuit had determined that the Patent Act's fee-shifting provision, authorizing awards of attorney fees to prevailing parties in "exceptional cases," was applicable only to cases that were "both brought in subjective bad faith and objectively baseless" or involved "litigation misconduct of an independently sanctionable magnitude."[3]

When the denial of the prevailing defendant's fee motion—and the validity of the Federal Circuit's standard—came before the Court, Justice Sotomayor's unanimous opinion found the plain meaning of the statutory term to be "patently" clear (pun no doubt intended).[4] After consulting three different dictionaries, the Court determined that the adjective "exceptional" in Section 285 simply means "uncommon," "rare," or "not ordinary."[5] The Court concluded that "[t]he Federal Court's formulation is overly rigid" in its insistence upon "independently sanctionable conduct" to justify a fee award and fails to accord the flexibility to impose fees where "a party's unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so 'exceptional' as to justify an award of fees."[6]

In *Sandifer v. U.S. Steel* the Court, again unanimously, resolved a dispute over the meaning of the term "changing clothes."[7] The Federal Labor Standards Act provides that employees should be compensated for time incurred, at the beginning and end of the work day, for activities incident to, and required for, their work, such as "changing clothes" (commonly known as "donning and doffing" time).[8] The Federal Labor

1 *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (see *Burwell v. Hobby Lobby Stores*, 573 U.S. 1 (2014)). See also Susan Berke Fogel, *Hobby Lobby vs. Female Patients and Their Doctors*, Al Jazeera America (July 1, 2014).

2 Erwin Chemerinsky, *U.S. Supreme Court Term in Review: A Harbinger of Things to Come*, California Bar Journal (Aug. 2014).

3 *Octane Fitness v. ICON Fitness*, 134 S. Ct. 1749, 1756–57 (2014) (citing 35 U.S.C. § 285).

4 *Id.* at 1755.

5 *Id.*

6 *Id.* at 1756–57.

7 *Sandifer v. U.S. Steel*, 134 S. Ct. 870 (2014).

8 Federal Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*; *Sandifer*, 134 S. Ct. at 875–76 (citing 29 C.F.R. § 790.7 (2013)).

The Court, again unanimously, resolved a dispute over the meaning of the term "changing clothes."

Standards Act also permits employees and their unions to agree to exclude such time from compensation in their collective bargaining agreements.[9] In this case, union members employed by U.S. Steel, which had a collective bargaining agreement excluding "donning and doffing" time from compensation, sued for back pay for time incurred in putting on and taking off twelve specific items of protective gear, including flame-retardant jackets, leggings, boots, hard hats, work gloves, safety glasses, ear plugs, and respirators.[10] Plaintiffs contended that the items at issue did not fall within the statutory definition of "clothes" and should not be subject to the collective bargaining agreement's exclusion from compensation.[11]

This time Justice Scalia was the one who turned to several dictionaries (using editions, he noted, which were in circulation around the time the relevant Federal Labor Standards Act provisions were adopted in the mid-20th century) to resolve the dispute.[12] Plaintiffs' preferred dictionary definition of "clothes," that is, "whatever covering is worn for decency and comfort," necessarily excluded, plaintiffs argued, "items designed to protect against workplace hazards."[13] Justice Scalia, observing that "'protection' and 'comfort' are not incompatible, and often synonymous," rejected this argument: "We see no basis for the proposition that the unmodified term 'clothes' somehow omits protective clothing."[14]

While Justice Scalia conceded that three of the twelve disputed items—protective glasses, earplugs, and respirators—did *not* fit with his definition of "clothes," he observed that the lower courts had found the time necessary to "don and doff" those items to be *de minimis*.[15] Concluding "it is most unlikely that Congress meant [the Federal Labor Standards Act] to convert federal judges into time-study professionals," he declined to try and calculate the donning and doffing time associated with those three items in order to render it compensable.[16]

In yet another unanimous resolution of a disputed issue of statutory intent the Court considered in *POM Wonderful v. Coca Cola* "the intersection and complementarity of two federal laws."[17] POM Wonderful, which makes and sells pomegranate juice products, including a pomegranate-blueberry juice blend, sued Coca Cola, which makes a juice blend prominently labeled as "pomegranate blueberry" juice, but which actually contains only 0.3% pomegranate juice and 0.2% blueberry juice.[18] POM Wonderful alleged that Coca Cola's overall label design amounted to "false and misleading" advertising, and constituted "unfair competition," in violation of the Lanham Act.[19] Coca-Cola argued that its compliance with another federal law—the juice percentages/ingredient disclosure provisions of the Food, Drug and Cosmetic Act—precluded those unfair competition claims based on the same label at issue.[20]

Justice Kennedy, writing for the Court, applied traditional tools of statutory interpretation to conclude that "[n]othing in the text, history, or structure of the [Food, Drug and Cosmetic Act] or the Lanham Act shows the congressional purpose or design to forbid" Lanham Act suits, brought by competitors, to challenge food and beverage labels which also are regulated by (and even may comply with) the consumer protection provisions of the Food, Drug and Cosmetic Act.[21]

The unanimity with which the Court construed the statutes at issue in the above decisions did not extend to cases presenting more contentious underlying substantive issues; the cases divided the justices along more familiar ideological lines.[22]

As in its 2011–2012 Term, one of the most anticipated and controversial decisions this Term involved the Patient Protection and Affordable Care Act of 2010.[23] In *Hobby Lobby Stores* a deeply divided Court ruled that the Affordable Care Act regulations mandating provision of certain contraceptives in an employer

9 29 U.S.C. § 203(o).

10 *Sandifer*, 134 S. Ct. at 896.

11 *Id*. at 874.

12 *Id*. at 876–77.

13 *Id*. at 877 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 507 (2d ed. 1950)).

14 *Sandifer*, 134 S. Ct. at 877.

15 *Id*.

16 *Id*. at 880.

17 *POM Wonderful v. Coca-Cola*, 134 S. Ct. 2228, 2233 (2014). The decision is independently notable for its complete absence of footnotes.

18 *Id*. These percentages were also disclosed, in much smaller print on the product label; most of the blend consisted of far less expensive apple and grape juice (*id*.).

19 *Id*. at 2234–35 (citing Lanham Trademark Act, 15 U.S.C. § 1125).

20 *POM Wonderful*, 134 S. Ct. at 2235 (citing Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq*.).

21 *Id*. at 2233.

22 See, e.g., *Abramski v. United States*, 134 S. Ct. 2259 (2014), one of this Term's high-profile cases due to its subject matter—gun control—in which Justice Kagan, writing for the majority, and Justice Scalia spar over whether Abramski, in purchasing a firearm for his uncle who actually qualified to buy the gun directly, should have been criminally prosecuted for misrepresenting that he (Abramski) was the actual transferee of the purchase. The majority answered "Yes."

23 Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 1119 (2010). See *National Federation of Independent Businesses v. Sebelius*, 124 S. Ct. 2566 (2012) (upholding constitutionality of Affordable Care Act).

health insurance plan "substantially burdened" the exercise of religion, as practiced by the (family-member) owners and officers of closely held for-profit corporations, and that the government had failed to demonstrate, under the Religious Freedom Restoration Act, that the contraceptive mandate constituted the "least restrictive means" of achieving "a compelling governmental interest."[24]

The central question of statutory interpretation in Justice Alito's majority opinion (joined by the Chief Justice and Justices Scalia, Thomas, and Kennedy), and the issue that provoked the most strident objections from the dissenters, involved not the text of the Affordable Care Act but the Religious Freedom Restoration Act's provision that prohibits "the Government [from] substantially burden[ing] a *person's exercise of religion*" unless the government "demonstrates that application of the burden to *the person*" is the least restrictive means of achieving a compelling governmental interest.[25] Compliance with certain provisions of the Affordable Care Act's contraceptive mandate would violate the religious beliefs of some individual owners of the two closely held corporations which filed suit—this point was not disputed. However, the mandate itself obviously was applicable only to the *corporations*, and the government argued that the protections of the Religious Freedom Restoration Act, by its plain terms, did not extend to a for-profit corporation's "exercise of religion."[26]

The majority responded to this textual problem with two arguments. First, Justice Alito turned to the Dictionary Act, a seldom-cited statute intended to serve as a kind of glossary of generic legislative terms, which can be consulted "[i]n determining the meaning of any Act of Congress unless the context dictates otherwise."[27] According to the Dictionary Act, the word "person" can "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[28] Justice Alito then observed that courts had "entertained [Religious Freedom Restoration Act] and free exercise [of religion] claims brought by non-profit corporations" as well as individuals, and concluded that "no conceivable definition of the term ['person'] includes natural persons and non-profit corporations, but not for-profit corporations."[29]

Justice Ginsberg predicted that the Court's expansion of the Religious Freedom Restoration Act claims to for-profit corporations will wreak "havoc."

Justice Ginsberg, in dissent, dismissed the majority's reference to the Dictionary Act which, she emphasized, controls "only where 'context' does not 'indicate otherwise,'" and here, she asserted, there "is no support [in the case law under the Religious Freedom Restoration Act or the Free Exercise Clause] for the notion "that the statute's reference to a 'person's exercise of religion'" possibly can "pertain to for-profit corporations."[30] The dissent pointed out that while long ago the Court recognized the free exercise rights of "non-profit corporations," as Justice Alito repeatedly characterized them, in fact *all* such organizations were *religious* nonprofit organizations, that is, *churches* and other religion-based "organizations which exist to foster the interests of persons subscribing to the same religious faith."[31] Indeed, "[u]ntil this litigation, no decision of this Court recognized a for-profit corporation's qualifications for a religious exception from a generally applicable law."[32] Responding to the majority's observation that some for-profit entities "may support charitable causes and use their funds for religious ends," Justice Ginsberg was unmoved: "The Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill."[33]

Justice Ginsberg predicted that the Court's expansion of the Religious Freedom Restoration Act claims to for-profit corporations will wreak "havoc" by "invit[ing] for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith."[34] Her list of laws subject to such potential "religious exemption" requests is troubling: prohibitions against discrimination based on race, marital status, gender and sexual orientation, as well as objections to regulations and requirements pertaining to blood transfusions, vaccinations, antidepressants, and numerous other medical and public-health issues.[35] The majority's "nothing to worry

24 *Hobby Lobby Stores*, 134 S. Ct. at 2767 (citing Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*).

25 42 U.S.C. §§ 2000bb-1(a)–(b) (emphasis supplied).

26 *Hobby Lobby Stores*, 134 S. Ct. at 2768.

27 *Id.* (citing Rules of Construction, 1 U.S.C. § 1) (both majority and dissent referred to 1 U.S.C. § 1 as Dictionary Act).

28 1 U.S.C. § 1.

29 *Hobby Lobby Stores*, 134 S. Ct. at 2769.

30 *Id.* at 2793–94 (Ginsberg, Breyer, Sotomayor, and Kagan, JJ., dissenting).

31 *Id.*

32 *Id.* at 2794.

33 *Id.* at 2796.

34 *Id.* at 2787, 2798. Justice Ginsberg noted that, although the two companies in this case were closely held corporations, the majority's "logic extends to corporations of any size, public or private" (*id.* at 2797).

35 *Id.* at 2804–5.

about" response to these concerns, she concluded, has led it into a "minefield."[36]

In another highly controversial case this Term, the Court, for the first time, interpreted the meaning of the Constitution's recess appointments clause, which authorizes the president "to fill up all Vacancies that may happen during the Recess of the Senate...."[37] The case arose when a Pepsi-Cola distributor, Noel Canning, asked the Court of Appeals for the District of Columbia to set aside a National Labor Relations Board decision on the grounds that three of the five board members had been invalidly appointed by the president during a three-day adjournment in the Senate's *pro forma* sessions. In *National Labor Relations Board v. Canning* all nine justices agreed that the appointments were invalid.[38] Writing for five justices, Justice Breyer further defined the scope of the recess appointments clause and concluded that (1) the words "the recess of the Senate" apply to both an intersession recess (i.e., a break between formal sessions of Congress) and an intrasession recess (e.g., a summer recess during a session); (2) the phrase "vacancies that may happen" refers to vacancies that come into existence during a recess and vacancies that arise prior to a recess but continue to exist during the recess; and (3) a three-day recess during *pro forma* sessions adopted by the Senate is too short a time to bring the recess within the scope of the clause.[39]

Justice Breyer's decision is supported by lengthy discussion of Founding-era understandings of the clause, gleaned from Founding-era dictionaries, statements and letters by the Founders, and historical executive and legislative branch memoranda. The opinion also places "significant weight upon historical practices[,] ... compromises and working arrangements" that the elected branches have developed over 200 years; the opinion notes that the Court has treated practice as "an important interpretive factor even when the nature or longevity of that practice is subject to dispute and even when that practice began after the founding era."[40] This aspect of the opinion caused Justice Scalia to write a lengthy concurring opinion that reads more like a dissent.[41] While agreeing with Justice Breyer that appointments during a three-day Senate break are invalid, he strongly disagrees with the remainder of the majority analysis. Not surprisingly, Justice Scalia makes textual arguments that support his point of view and particularly objects to the majority's reliance on long-term practices to establish, in effect, an "adverse-possession theory of executive authority."[42]

Abstention

State attorneys have increasingly moved federal courts to abstain when there is an ongoing state proceeding. In one of the most important cases of the Term, the Court clarified abstention doctrine in a way that will reduce the frequency of these motions.

Seeking to overturn a decision by the Iowa Utilities Board, Sprint Communications filed a state court petition for review of the Iowa Utilities Board decision and a federal case based on the Telecommunications Act. Citing *Younger v. Harris*, the Eighth Circuit affirmed the district court's decision to abstain in light of the state-court suit.[43] The Eighth Circuit read Supreme Court precedent to require *Younger* abstention whenever "an ongoing state judicial proceeding ... implicates important state interests, and ... the state proceedings provide adequate opportunity to raise [federal] challenges."[44] The Eighth Circuit concluded that the state's interests in regulating and enforcing state utility rates met that test.[45]

In *Sprint Communications v. Jacobs* the Supreme Court unanimously rejected the Eighth Circuit's formulation of *Younger* abstention because *Younger* abstention could apply to "virtually all parallel state and federal proceedings, at least where a party could identify a plausible important state action."[46] Justice Ginsburg's opinion sets clear boundaries for *Younger* abstention.

To begin, Justice Ginsburg notes that federal courts have a "virtually unflagging" duty to hear cases: "In the main, federal courts are obligated to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state-court proceeding involves the same subject matter."[47]

Younger requires abstention when there is a parallel criminal or quasi-criminal case pending in state court, the Supreme Court acknowledged. However, the Court reminded us, *Younger* demands "exceptional" circumstances and thereafter limits these to three situations: ongoing state criminal proceedings; civil enforcement proceedings where the state has filed a formal complaint against the federal plain-

36 *Id.* at 2805. While the Court's debate over the merits of the Religious Freedom Restoration Act claim is well worth reading, it is beyond our scope here, and we leave that analysis to other commentators.

37 U.S. Const. art. II, § 2, cl. 2.

38 *National Labor Relations Board v. Canning*, 134 S. Ct. 2550 (2014).

39 *Id.* at 2556–57.

40 *Id.* at 2559–60.

41 *Id.* at 2592–2618 (Scalia, J., dissenting).

42 *Id.* at 2592.

43 See *Sprint Communications v. Jacobs*, 690 F.3d 864 (8th Cir. 2012) (citing *Younger v. Harris*, 401 U.S. 37 (1971)), rev'd, 134 S. Ct. 584 (2013) .

44 *Id.* at 867 (citing *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423, 432 (1982)).

45 *Id.* at 868.

46 *Sprint Communications v. Jacobs*, 134 S. Ct. 584, 593 (2013).

47 *Id.* at 591, 588 (citations omitted).

tiff for wrongdoing (commonly following a state investigation); and civil proceedings involving orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.[48] Sprint Communications' state-court case involved none of these exceptions; rather, the Iowa Utilities Board's adjudicative authority was invoked to settle a civil dispute between two parties and not to sanction Sprint for commission of a wrongful act.[49] In another clarification, the Court discarded the "coercive-remedial" inquiry being used by some courts of appeals to decide abstention requests: "Though we referenced this dichotomy once in a footnote … we do not find the inquiry necessary or inevitably helpful, given the susceptibility of the designations to manipulation."[50]

Standing/Ripeness

In *Susan B. Anthony List v. Driehaus* pro-life advocacy groups filed a preenforcement challenge to a state statute authorizing "any person" to file a complaint with the Ohio Elections Commission; the advocacy groups alleged "false statements" about a candidate during a political campaign.[51] The Supreme Court took the case to decide whether the plaintiffs had standing at the preenforcement stage; the Court unanimously concluded that they did.

The issue actually arose during the 2010 election cycle when Susan B. Anthony List posted billboards and stories saying that Cong. Steve Driehaus voted for taxpayer-funded abortions when he voted for the Patient Protection and Affordable Care Act. The congressman filed a complaint with the Election Commission, which in turn found probable cause that a violation had occurred. When he lost the election, Driehaus withdrew his complaint. Meanwhile, Susan B. Anthony List and another pro-life group filed suit in federal court; they alleged that the Ohio statute was unconstitutional. Although the election cycle had ended, Susan B. Anthony List alleged that it still had Article III standing because its speech regarding the candidate had been chilled and it intended to engage in substantially similar activity in future elections.[52]

The Supreme Court began its analysis by restating the requirements for Article III standing: injury in fact, causal connection between the injury and the complained-of conduct, and likelihood that the injury will be redressed by a decision.[53] The Court focused its attention on injury in fact. Whether framed as standing or ripeness, the analysis "boils down to the same question"—whether the plaintiff has shown that the injury complained of is "concrete and particularized" and "actual or imminent, not 'conjectural' or hypothetical," the Court noted.[54] According to the Court, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."[55] The Court concluded that the plaintiffs had alleged sufficient injury for Article III standing because (1) Susan B. Anthony List alleged an intent to engage in the same course of conduct in future elections; (2) Susan B. Anthony List's intended conduct was arguably proscribed by the state statute it challenged; and (3) there was a substantial risk of future enforcement—either through burdensome administrative proceedings or possibly criminal proceedings.[56]

The Court brushed off an argument that the case was nonjusticiable based on "prudential ripeness" factors—whether the factual record was sufficiently developed and whether hardship would result from dismissal at this stage. While refusing to decide whether prudential ripeness has any "continuing vitality," the justices did note "some tension" between a finding of Article III injury in fact and prudential ripeness, given that a federal court's obligation to hear and decide cases within its jurisdiction is "virtually unflagging."[57]

Summary Judgment

In *Tolan v. Cotton*, a per curiam opinion, the Court vacated from the Fifth Circuit an opinion that had granted qualified immunity from suit to a police officer.[58] The case arose when the officer observed a sport utility vehicle turning quickly and, after keying in the wrong license plate number, believed the car to be stolen. When the driver, Robbie Tolan, parked the car in front of his parent's home, the officer asked him to lie on the ground. Robbie's parents came onto the front porch and told the officer they owned the car. Another officer drove up and roughly pushed Mrs. Tolan. When Robbie protested, the officer shot him three times. Granting summary judgment to the police officer, the Fifth Circuit said the officer had the right to use deadly force because the front porch was "dimly-lit," Tolan's mother "refus[ed] orders to remain quiet and calm," Robbie's protest amounted to a "verba[l] threa[t]," and Robbie was "moving to intervene in" the

48 *Id*. at 588 (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)).

49 *Id*. at 593.

50 *Id*. n.6.

51 *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338 (2014) (quoting Ohio Rev. Code Ann. § 3517.21(B)).

52 *Id*. at 2339–40.

53 *Id*. at 2341 (citing *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

54 *Id*. at 2341 n.5 (citations omitted).

55 *Id*. (quoting *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)).

56 *Id*. at 2343–46.

57 *Id*. at 2347 (quoting *Lexmark International Incorporated v. Static Control Components Incorporated*, 134 S. Ct. 1377, 1386 (2014)).

58 See *Tolan v. Cotton*, 134 S. Ct. 1861 (2014).

officer's handling of his mother.[59] Testimony from the Tolans and others at the scene contradicted these key findings.[60]

The Supreme Court intervened because "the opinion below reflect[ed] a clear misapprehension of summary judgment standards."[61] By failing to credit evidence that contradicted its key factual conclusions, the lower court improperly "weigh[ed] the evidence and resolved disputed issues in favor of the moving party."[62] The Court concluded that the Fifth Circuit failed to adhere to the axiom that, when ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.[63] The case marks the first time in 10 years that the Supreme Court ruled against a police officer in a qualified immunity case.[64]

Class Actions

The Supreme Court also unanimously reversed the Fifth Circuit in *Mississippi ex rel. Hood v. AU Optronics Corporation*, holding that when the Mississippi attorney general sued in state court to confront harms suffered by the state and its residents, the suit could not be removed to federal court under the federal Class Action Fairness Act.[65] The attorney general's complaint alleged that AU Optronics restricted competition and raised prices on liquid crystal displays in violation of state antitrust and consumer protection laws. The state sought injunctive relief, punitive damages, and restitution for its own purchases of liquid crystal displays and those of state citizens.[66] Filing a notice to remove the case to federal court, AU Optronics argued that the case was governed by the Class Action Fairness Act, which authorizes removal of "mass actions," defined as "any civil action … in which 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."[67] The appellate court concluded that "mass actions" included real parties in interest, such as the unnamed state residents who purchased liquid crystal displays; the appellate court allowed the case to remain in federal court.

Writing for the Supreme Court, Justice Sotomayor reversed the Fifth Circuit decision. Justice Sotomayor noted that the case was filed by one plaintiff, the Mississippi Attorney General; that the Class Action Fairness Act expressly conditions removal on "100 or more persons" who are plaintiffs; and that when the Class Action Fairness Act intends a provision to include unnamed parties in interest, it says so.[68]

Sovereign Immunity

In *Michigan v. Bay Mills Indian Community* the Supreme Court ruled 5-to-4 that tribal sovereign immunity barred Michigan's suit against the Bay Mills tribe for alleged illegalities at a Bay Mills casino located off tribal lands.[69] The majority, consisting of Justices Kagan, Kennedy, Breyer, Sotomayor, and the Chief Justice, concluded that the Court had "no roving license" to disregard clear language in the Indian Gaming Regulatory Act "simply on the view that … Congress must have intended something broader."[70] The Indian Gaming Regulatory Act allows gaming on tribal lands—casino games, slot machines, and the like—in compliance with a compact the tribe has negotiated with the state and, in turn, authorizes the state to bring suit to enjoin gaming activities "located on Indian lands" and conducted in violation of the compact.[71] Noting that the complained of activities occurred off Indian lands, Justice Kagan's opinion reaffirms the long-standing premise that Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority" and, as such, are subject to "plenary control by Congress."[72] Thus, unless and until Congress amends the Indian Gaming Regulatory Act to apply to activities located off Indian lands, the Bay Mills tribe has immunity from suits aimed at commercial activities conducted off Indian lands. In reaching its conclusion, the Court noted that the state still had a "panoply of tools" at its disposition to regulate tribal gaming activities; suing the tribal officials themselves and negotiating compacts with a clear and unambiguous waiver of tribal sovereign immunity are among such tools.[73]

Forum Selection and Venue

When a subcontractor filed suit in Texas rather than in the parties' contractually agreed-upon Virginia, Justice Alito, writing for a unanimous Court, took the opportunity to expound on forum-selection clauses, venue, the *forum non conveniens* doctrine; 28 U.S.C. §§ 1391, 1404(a) and 1406(a); and Federal Rule of Civil Procedure 12(b)(3).[74] Despite Alito's trek through the wilds of transfer law, the case will probably

59 *Id*. at 1863–65.

60 *Id*. at 1866–67.

61 *Id*. at 1868.

62 *Id*. at 1866 (quoting *Anderson v. Liberty Lobby Incorporated*, 477 U.S. 242, 249 (1986)) (internal quotations omitted).

63 *Id*. (quoting *Anderson*, 477 U.S. at 255).

64 See Will Baude, Tolan v. Cotton—*When Should the Supreme Court Interfere in 'Factbound' Cases?*, Washington Post (May 7, 2014).

65 See *Mississippi ex rel. Hood v. AU Optronics Corporation*, 134 S. Ct. 736 (2014).

66 *Id*. at 740.

67 Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)(B)(i).

68 *Id*. at 742.

69 See *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).

70 *Id*. at 2034 (internal quotations omitted).

71 Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii).

72 *Id*. at 2030 (citation omitted).

73 *Id*. at 2035.

74 *Atlantic Marine Construction Company v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013).

be transferred to Virginia, as the parties originally agreed. This is because the Court was "not aware of any exceptionally arcane features of Texas contract law that are likely to defy comprehension by a federal judge sitting in Virginia."[75]

The first step was to determine whether 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3) authorized dismissal of the case because venue was "wrong" or "improper." Resolution of that issue did not involve the forum-selection clause but depended solely on whether the case fell into one of the three categories of proper venue set out in Section 1391(b): "If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under § 1406(a)."[76] Implicitly concluding that venue was proper where the case was filed, Justice Alito noted that the "fallback option" provided by the third paragraph of Section 1391(b) "ensures that so long as a federal court has personal jurisdiction over the defendant, venue will always lie somewhere."[77]

The Court then turned to Section 1404(a), which gives a district court discretion to transfer a case "to any district or division to which all parties have consented," thus allowing the forum-selection clause to be invoked. "Section 1404(a)," Justice Alito explained, "is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer."[78] Accordingly courts should use the same balancing-of-interests test under Section 1404(a) as they would under *forum non conveniens*.

75 *Id.* at 584.

76 *Id.* at 577.

77 *Id.* at 578.

78 *Id.* at 580 (citation omitted).

With the forum-selection clause finally in its sights, the Court explained that a different analytical approach is used for a motion pursuant to either Section 1404(a) or *forum non conveniens* when a forum-selection clause is at issue. In the absence of such a clause, a court would balance several factors to determine whether transfer is appropriate.[79] But the presence of such a clause requires a three-part adjustment of the district court's analysis.

First, the plaintiff's choice of forum or "plaintiff's venue privilege" no longer carries any weight because "when a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its 'venue privilege' before a dispute arises."[80] Second, the court should ignore arguments about the parties' private interests and should consider only public-interest factors: "Because those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases."[81] Third, by filing in a forum contrary to its contractual obligation, the plaintiff loses the original venue's potentially advantageous choice-of-law rules: "The court in the contractually selected venue should not apply the law of the transferor venue to which the parties waived their right."[82]

79 *Id.* at 581.

80 *Id.* at 582.

81 *Id.*

Thus the Supreme Court drew the logical conclusion that forum-selection clauses, usually the result of considerable give-and-take, should usually trump other considerations. The Court found that "[i]n all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain."[83]

Chevron Deference and Deference to a Long-Ago Position

Trying to interpret one of the most convoluted statutory schemes imaginable, the Justices divided three ways in applying *Chevron*, creating a particularly unusual split.[84]

The issue was whether the Board of Immigration Appeals had correctly interpreted a portion of the "aged-out" provision of the Child Status Protection Act.[85] The Act was intended to correct for the problem of an alien who was a minor when a family member petitioned for an immigrant visa and would have become eligible for a visa

82 *Id.* at 583 (footnote omitted).

83 *Id.*

84 *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014). See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

85 *Scialabba*, 134 S. Ct. at 2196–97.

when that family member obtained the visa but who reached the age of 21 before that event occurred.[86] Since the statute ranks several categories of potential immigrants based on their relationship to the sponsoring citizen or legal permanent resident, the issue became whether the relevant statute applied to one or all categories.[87]

Justice Kagan, writing for Justices Kennedy and Ginsburg, viewed the relevant provision, 8 U.S.C. § 1153(h)(3), not as ambiguous but as dealing with the "issue in divergent ways. We might call the provision Janus-faced. Its first half looks in one direction, toward the sweeping relief the respondents propose .... But ... the section's second half looks another way, toward a remedy that can apply to only a subset of those beneficiaries ...."[88] Faced with this apparent conundrum, she determined that the Court had to defer under *Chevron* step 2, noting in conclusion that "[t]his was the kind of case *Chevron* was built for."[89]

Although agreeing with the result, the Chief Justice, partnered with Justice Scalia, could not have disagreed more on the applicability of *Chevron*: "Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense."[90] Since they viewed the clauses of Section 1153(h)(3) as complementary, *Chevron* step 2 was triggered instead by the failure of the second clause to delineate "which petitions can 'automatically be converted.'"[91]

The main dissenting opinion, by Justice Sotomayor, discerned neither conflict nor ambiguity in the two clauses of Section 1153(h)(3).[92] Although largely agreeing with Justice Sotomayor, Justice Alito dissented separately. He made a point, however, of agreeing with the Chief Justice that conflicting clauses should not be resolved under *Chevron* step 2, thereby evening the score on that issue at 3-all.[93]

In two highly technical cases reviewing the efforts of the Environmental Protection Agency (EPA) to control greenhouse gases and to allocate responsibility for pollution in one state causing harm in other states, the Court carefully applied *Chevron*. In the first, Justice Scalia's opinion for the conservative wing of the Court constructs from earlier decisions a useful summary of how *Chevron* fits with a key canon of statutory construction:

> Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation. And reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole. A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. Thus, an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference.[94]

With that statement as guidance, the majority concluded that the EPA had gone too far because an agency's authority "to resolve some questions left open by Congress ... does not include a power to revise clear statutory terms that turn out not to work in practice."[95]

In the other environmental case, Justice Ginsburg, on behalf of a 6-to-2 majority, rejected the appellate court's rewriting of the statute.[96] She stated that "a reviewing court's task is to apply the text of the statute, not to improve upon it" and that "[t]he practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text," thus echoing Justice Scalia's similar statement in *Utility Air Regulatory Group*.[97] In according *Chevron* deference under step 2, the majority "read Congress' silence as a delegation of authority to EPA to select from among reasonable options."[98] Tracking *Chevron* closely, the decision concluded that the option chosen by the EPA was "a 'reasonable' way of filling the 'gap left open by Congress.'"[99]

In a case not involving Chevron, but employing an approach akin to deference, Chief Justice Roberts, on behalf of all but Justice Sotomayor, skewered the federal

86 *Id*. at 2199–2200.

87 *Id*. at 2200–2201. This recitation vastly oversimplifies the complexity of the scheme, which, judging from her several sarcastic references, apparently frustrated Justice Kagan, author of the plurality opinion. After summarizing the several categories, she gave this advice: "(A word to the wise: Dog-ear this page for easy reference, because these categories crop up regularly throughout this opinion.)" (*id*. at 2197). Discussing 8 U.S.C. § 1153(h), she offered "[t]he full text of these three paragraphs ... for the masochists among this opinion's readers" (*id*. at 2200 n.8). And, observing the applicability of *Chevron* deference to "a complex statutory scheme," she noted parenthetically that "[t]hose hardy readers who have made it this far will surely agree with the 'complexity' point" (*id*. at 2203).

88 *Id*. Subsection 1153(h)(3) reads in relevant part: "If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

89 *Scialabba*, 134 S. Ct. at 2207, 2213.

90 *Id*. at 2214 (Roberts, C.J., concurring in the judgment) (footnote omitted).

91 *Id*. at 2215 (quoting 8 U.S.C. § 1153(h)(3)).

92 *Id*. at 2217 (Sotomayor, J., dissenting).

93 *Id*. at 2216 (Alito, J., dissenting).

94 *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427, 2442 (2014) (internal quotation marks, citations, ellipses, and brackets omitted).

95 *Id*. at 2446 (citation omitted).

96 *Environmental Protection Agency v. EME Homer City Generation*, 134 S. Ct. 1584 (2014).

97 *Id*. at 1600, 1601 (internal quotation marks, brackets, and citations omitted).

98 *Id*. at 1604 (citation omitted).

99 *Id*. at 1607 (quoting *Chevron*, 467 U.S. at 866).

government for a convenient change in position: "The Government loses th[e] argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago."[100] The decision analyzed an 1875 statute involving rights-of-way granted to railroads in the American West. The Chief Justice's decision reads for several pages as a primer on how the West was won.[101]

When the railroad that ended up with the right-of-way at issue abandoned it, a property owner over whose land the railroad had run claimed that the right-of-way was only an easement.[102] The government contended, however, "that the 1875 Act granted the railroads something more than an easement, reserving an implied reversionary interest in that something more to the United States."[103] The Supreme Court rejected that argument because the government had argued in a 1942 case that rights-of-way "granted under the 1875 Act were easements."[104] Property law has long recognized that "if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land."[105]

The United States could not avoid this result by contending that the 1875 Act allowed it to retain a reversionary interest because *Great Northern Railroad v. United States* had already defined a right-of-way as an easement.[106] The Court held the government to its original argument: "We decline to endorse such a stark change in position."[107]

Contractual Statute of Limitations

In another unanimous decision, by Justice Thomas in this instance, the Court considered the propriety of a contractual statute of limitations.[108] Although the case arose in the context of a claim under the Employee Retirement Income Security Act of 1974, the case has significance generally for statutes of limitations to which the parties agree, especially in insurance industry claims.

Because the Employee Retirement Income Security Act does not include a statute of limitations, the plan established a three-year period, with the commencement date set for when the "proof of loss" was due.[109] Because the proof of loss was due before the accrual date, which is when the plan's internal review process has been exhausted by the issuance of a final decision, the plaintiff contended that the statute of limitations violated the general rule that the limitations period should not begin to run until the cause of action accrued.[110] Rejecting that contention, the Court stated that the parties could agree to any "reasonable" limitations period.[111]

Justice Thomas explained that although limitations periods often commence with the date when the plaintiff may sue, this is not a hard-and-fast rule. He found the contractual agreement created by the plan to be "the critical aspect of this case."[112] That agreement, he added, "necessarily allows parties to agree not only to the length of a limitations period but also to its commencement."[113]

The decision notes two exceptions to the presumption in favor of the agreed-upon limitations period: it cannot be "unreasonably short" and there cannot be a controlling statute to the contrary.[114] In the case at issue, the first exception was not applicable because, although the mandatory period of exhaustion cut into the length of time available to file the lawsuit, there was still sufficient time to file and no indication that the time frame would be shorter in a typical case.[115]

The second exception was apparently pushed hard by the United States as amicus curiae, which contended that the Employee Retirement Income Security Act's overall remedial scheme would be undercut by the limitations period.[116] The Court rejected this argument based on its reading of the Employee Retirement Income Security Act's internal remedial structure.[117] The Court did note, however, that in the rare case where internal review lasted beyond the limitations period, a court had equitable remedies at its disposal to allow a case to proceed: waiver or estoppel if the administrator's conduct was the cause of the delay or equitable tolling if there were extraordinary circumstances.[118]

In its final point, the Court reemphasized the critical importance of the parties' contracting to create a statute of limitations. Justice Thomas rejected the contention that a court should import state-law rules on tolling the limitations period during the exhaustion process: "[T]he parties have adopted a limitations period by contract.

100 *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1264 (2014).

101 See *id*. at 1260–62.

102 *Id*. at 1264.

103 *Id*.

104 *Id*. (citing *Great Northern Railroad v. United States*, 315 U.S. 262 (1942)).

105 *Id*. at 1265 (citation omitted).

106 *Id*. at 1268.

107 *Id*.

108 *Heimeshoff v. Hartford Life & Accident Insurance Company*, 134 S. Ct. 604 (2013).

109 *Id*. at 610.

110 *Id*.

111 *Id*.

112 *Id*. at 611.

113 *Id*.

114 *Id*. at 612.

115 *Id*. at 612–13 & n.4.

116 *Id*. at 613.

117 *Id*. at 613–15.

118 *Id*. at 615.

Under these circumstances, where there is no need to borrow a state statute of limitations there is no need to borrow concomitant state tolling rules."[119]

Standard of Review

In *Highmark Incorporated v. Allcare Health Management System* Justice Sotomayor laid out the basic rule for determining the proper standard of review: "Traditionally, decisions on 'questions of law' are 'reviewable de novo,' decisions on 'questions of fact' are 'reviewable for clear error' and decisions on 'matters of discretion' are reviewable for 'abuse of discretion.'"[120] The question before the Court was whether the Federal Circuit applied the proper standard of review when it partially reversed the district court's award of attorney fees to Highmark under Section 285 of the Patent Act.[121] As detailed above in the discussion of *Octane Fitness v. ICON Fitness*, Section 285 allows fee shifting in "exceptional cases," essentially patent cases in which the sanctioned party has engaged in very, very bad conduct.[122] Relying on similar cases in which the Court had deemed abuse of discretion to be the proper standard of review—a case that involved a fee-shifting statute under the Equal Access to Justice Act and a case regarding the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure—the Court concluded that likewise "the determination whether a case is 'exceptional' under § 285 is a matter of discretion."[123] Hence, in yet another unanimous ruling, the Court held that the Federal Circuit should have applied an abuse-of-discretion rather than the de novo standard in reviewing the district court's fee award under Section 285.[124]

Preemption

In *Northwest Incorporated v. Ginsberg,* a class action brought over the effective cancellation of a customer's frequent flyer membership with Northwest Airlines, a unanimous Court held that the federal Airline Deregulation Act preempted a state-law contractual claim for breach of the implied covenant of good faith and fair dealing if the state claim sought to enlarge the contractual obligations voluntarily adopted between the parties.[125] The Court based its ruling in part on the predecessor statute—the Federal Aviation Act—having a "saving" clause preserving state statutory and common-law remedies, whereas the Airline Deregulation Act includes a preemption provision *preventing* states from enacting legislation that would undo the Act's aim—deregulation of the airlines industry.[126] The Act's preemption provision prohibits states and state-level entities from enacting or enforcing "a law, regulations, *or provision having the force and effect of law related to* a price, service, or route of an air carrier that may provide air transportation under this subpart."[127] The Court began its analysis by looking back at its two earlier decisions on the Airline Deregulation Act.[128] In *Morales v. Trans World Airlines* the Court read the Act's "key phrase 'related to' [as] express[ing] a 'broad preemptive purpose[,]" and thus held that the Act preempted the state consumer protection laws at issue there.[129] In *American Airlines v. Wolens* the Court again found the Act preempted a state law consumer fraud statute but not the state breach of contract claims that concerned "privately ordered obligations," as opposed to state-enacted laws, regulations, or provisions.[130]

The Court then rejected customer Ginsberg's argument that the Act's preemption provision applied only to "statutes and provisions" and not to common-law claims, such as the covenant of good faith and fair dealing.[131] The Court relied on a long line of cases in which it had interpreted the term "provisions" to include common-law claims.[132] The legislative history of the Act also figured in the Court's decision in two ways. First, the Court found the savings clause carried over from the Act's predecessor statute to be relatively weak, compared to savings clauses in other statutory schemes.[133] Second, the Court concluded that "[e]xempting common-law claims would … disserve the central purpose of the [Americans with Disabilities Act] [deregulatory] aim" and would improperly place "form" over "effect."[134] And, third, on the central question of whether the covenant of good faith and fair dealing is actually a state law and not just an understanding between the parties, the Court concluded that because "parties cannot contract out of the covenant" and Minnesota law imposes the covenant on virtually *all* contracts, the covenant is a state law and therefore preempted.[135]

Adding insult to injury, Justice Alito scolded that plaintiff Ginsberg's "claim of ill treatment by Northwest might have

119 *Id*. at 616.

120 *Highmark Incorporated v. Allcare Health Management System*, 134 S. Ct. 1744 (2014) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988))

121 See U.S. Patent Act, 35 U.S.C. § 285.

122 *Highmark*, 134 S. Ct. at 1746.

123 *Id*. at 1748, (citing *Pierce*, 487 U.S. at 559, and *Cooter & Gell v. Hartmarx Corporation* 496 U.S. 384, 405 (1990)).

124 *Highmark*, 134 S. Ct. at 1749.

125 *Northwest Incorporated v. Ginsberg*, 134 S. Ct. 1422, 1427 (2014).

126 *Id*. at 1428.

127 Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (emphasis added).

128 *Northwest*, 134 S. Ct. at 1428.

129 *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992).

130 *American Airlines v. Wolens*, 513 U.S. 219, 228–29 (1995).

131 *Northwest*, 134 S. Ct. at 1429.

132 *Id*. (citations omitted).

133 *Id*. at 1430 (distinguishing *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), upon which customer Ginsberg relied).

134 *Id*. at 1432.

135 *Id*. at 1432–33.

been vindicated if he had pursued his breach-of-contract claim after its dismissal by the District Court[,]" as opposed to proceeding solely on his good faith and fair dealing claim, which enlarged his contractual agreement with Northwest.[136]

Timeliness of Filing

In *Lozano v. Montoya Alvarez* the Court considered whether the doctrine of equitable tolling could be applied to allow filing of a tardy Petition for Return of Child pursuant to the Hague Convention, as implemented by Congress through the International Child Abduction Remedies Act, when the tardiness is due to the abducting parent's concealment of the child.[137] In 2009 Montoya Alvarez fled the United Kingdom, where she had resided with Lozano and their child; she ultimately landed with the child New York.[138] Lozano did not locate Montoya Alvarez and the child until 2010, sixteen months after the child's removal from the United Kingdom and four months after the applicable one-year deadline for filing the petition for return of the child had expired.[139] There was some evidence in the case that Lozano abused Montoya Alvarez and the child.[140] The lower courts declined to extend the one-year period by equitable tolling, and the Court affirmed unanimously.[141]

Justice Thomas explained that "equitable tolling pauses the running of … a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action."[142] And, since the equitable tolling doctrine "extends a discrete limitations period set by Congress, whether equitable tolling is available is fundamentally a question of statutory intent."[143] Justice Thomas wrote that the statutory intent inquiry must begin with the understanding that Congress "legislate[s] against a background of common-law adjudicatory principles[,]" including the long-established principle of equitable tolling.[144] Thus, said Justice Thomas, there is a presumption that equitable tolling applies when (1) "the period in question is a statute of limitations" and (2) "if tolling is consistent with the statute."[145]

Because the Hague Convention is a treaty and not a federal statute adopted within the common-law context including the principle of equitable tolling, the Court had to look at the intent of the parties, namely, the signatory nations.[146] The Court concluded that the parties did not intend for equitable tolling to apply to the Hague Convention.[147] Moreover, the Court found it "particularly inappropriate to deploy this background principle of American law when interpreting a treaty" since by its nature a treaty is a multilateral agreement among nations as opposed to a congressional act.[148]

With regard to whether the one-year period at issue is a true statute of limitations, Justice Thomas concluded it is not because it does not establish the time by which a claimant must bring an action and does not establish the parties' respective rights and liabilities with certainty.[149] Rather, under the International Child Abduction Remedies Act, even after the one year expires to bring the Petition for Return of the child, the court must order the return of the child, "unless it is demonstrated that the child is now settled," thus opening the possibility for further adjudication regarding the child's interest in settlement.[150]

In a sharp dissent, Justice Ginsberg, joined by Justice Breyer, interpreted Section 9658 as providing a uniform federally prescribed discovery rule trumping state statutes of repose.

In *CTS Corporation v. Waldburger* the Court considered whether a statute of repose, the less understood, more limiting younger cousin of the statute of limitations, is preempted under Section 9658 of the Comprehensive Environmental Response, Compensation, and Liability Act.[151] Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act to add Section 9658 following a Senate Committee report recommending that states adopt the "discovery" rule—that state toxic tort claims accrue when a plaintiff discovers or could have reasonably discovered the injury—given the "long latency periods involved in harms caused by toxic substances."[152] In 2009 landowners sued electronic manufacturer CTS Corporation under the Comprehensive Environmental Response, Compensation, and Liability Act

136 *Id*. at 1433.

137 *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224–29 (2014). See also 42 U.S.C. § 11603.

138 *Id*. at 1230.

139 *Id*.

140 *Id*.

141 *Id*. at 1226 (Alito, Breyer, and Sotomayor, JJ., concurring).

142 *Id*. at 1231–32.

143 *Id*. at 1232 (citations omitted).

144 *Id*. (quoting *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104, 108 (1991); other citations omitted).

145 *Id*. (citation omitted).

146 *Id*.

147 *Id*.

148 *Id*. at 1232.

149 *Id*. at 1234–35.

150 *Id*. (citations omitted).

151 *CTS Corporation v. Waldburger*, 134 S. Ct. 2175 (2014).

152 *Id*. at 2180–81.

for environmental harms caused by the corporation's operation of a plant and storage of hazardous chemicals on or adjacent to their land.[153] The corporation had sold the subject land in 1987 "on the promise that it was environmentally sound."[154] Relying on a North Carolina statute of repose barring tort actions brought more than 10 years after a defendant's "last culpable act," the corporation asserted that its last such act, if any, took place the year it sold the land, 24 years before the action was filed.[155] The corporation prevailed on a motion to dismiss, but a divided Fourth Circuit reversed; in turn the Court reversed.[156]

Writing for the 7-to-2 majority, Justice Kennedy began: "[T]he case turns on whether § 9658 makes a distinction between state-enacted statutes of limitation and statutes of repose."[157] He explained that "a statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'"[158] By contrast, "[a] statute of repose … puts an outer limit on the right to bring a civil action"[159] The latter, the opinion states, "is "not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered."[160] Further distinguishing the two types of statutory time bars, Justice Kennedy instructed, are their respective purposes and the party which each targets.[161] Statutes of limitations promote fairness by encouraging plaintiffs to bring timely actions before '"evidence has been lost, memories have faded, and witnesses have disappeared.'"[162] By contrast, Justice Kennedy continued, the rationale underlying statutes of repose, while also encouraging timely actions, is analogous to the "fresh start" afforded parties via discharge in bankruptcy and the double jeopardy clause '"reflect[ing] legislative decisions' … 'that … there should be a specific time beyond which a defendant should no longer be subject to protracted liability.'"[163] Further distinguishing the two statutes, the opinion continues, is that, unlike with statutes of limitation, statutes of repose are not subject to equitable tolling, "even in extraordinary circumstances as beyond a plaintiff's control."[164] The opinion then embarks on a Byzantine preemption analysis of Section 9658 and concludes that it does not preempt North Carolina's statute of repose.[165]

In a sharp dissent, Justice Ginsberg, joined by Justice Breyer, interpreted Section 9658 as providing a uniform federally prescribed discovery rule trumping state statutes of repose.[166] She laments what in her view is the majority's tortured preemption analysis and overemphasis on the limitations-repose distinction, thereby undermining the very purpose of the Comprehensive Environmental Response, Compensation, and Liability Act: "Instead of encouraging prompt identification and remediation of toxic contamination before it can kill, the Court's decision gives contaminators an incentive to conceal the hazards they have created until the repose period has run its full course."[167]

Finality of Judgment and Timeliness of Appeal

Is a decision on the merits final when an attorney-fee motion has yet to be ruled upon? The Court answered with a resounding "yes" in *Ray Haluch Gravel Company v. Central Pension Fund of the International Union of Operating Engineers and Participating Employers*.[168] Various employee benefit funds sued Haluch; they claimed contributions owed under the Employee Retirement Income Security Act.[169] The district court issued a ruling on the merits on June 17, 2011, in favor of the funds, but for a lesser amount than was sought, and a subsequent ruling on July 25 awarding the funds $34,688 on the funds' motion for fees and costs.[170]

153 *Id*. at 2180.
154 *Id*. at 2181.
155 *Id*.
156 *Id*. at 2180–81.
157 *Id*. at 2182.
158 *Id*. (quoting Black's Law Dictionary 1546 (9th ed. 2009)).
159 *Id*.
160 *Id*. at 2182–83 (quoting 54 C.J.S. Limitations of Actions § 7 at 24 (2010)).
161 *Id*. at 2183–84.
162 *Id*. at 2183 (quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348–49 (1944)).
163 *Id*. (quoting *Jones v. Thomas*, 491 U.S. 376, 392 (1989)).
164 *Id*. (citation omitted).
165 *Id*. at 2188–89.
166 *Id*. at 2191 (Ginsberg, J., dissenting).
167 *Id*.
168 *Ray Haluch Gravel Company v. Central Pension Fund of International Union of Operating Engineers and Participating Employers*, 134 S. Ct. 773, 777 (2014).
169 *Id*. at 778.
170 *Id*.

The funds appealed both rulings on August 15.[171] Haluch argued that the appeal was untimely under the 30-day deadline imposed by Rule 4 of the Federal Rules of Appellate Procedure; the funds argued that final judgment occurred on July 25.[172]

Siding with Haluch, a unanimous court led by Justice Kennedy set forth some basic rules: (1) under 28 U.S.C. § 1291, decisions of district courts must be final for federal appeals courts to have jurisdiction; and (2) timeliness of a notice of appeal is a jurisdictional requirement.[173] The Court then extended its holding in *Budinich v. Becton Dickinson and Company*—that a decision is "final" for purposes of Section 1291 even when the matter of *statutory* fees has yet to be determined—to Haluch, where the funds sought fees based on a *contractual* provision.[174] The Court was unmoved by the funds' main argument—that contractual fee provisions, unlike those arising from statute, give rise to a claim for contract damages and thus, go to the merits of a case—since the Court had rejected such distinction in *Budinich*.[175]

With the Court set to decide cases this Term on controversial issues such as voting rights and religious expression, will the upward trend in unanimous decisions continue?[176] In any case, the Court has agreed to hear several cases on federal court access questions, including preemption, timeliness, and appealability.[177] We will monitor the 2014–2015 Term and report on those access cases most relevant to public interest federal court practice.

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171 *Id*.

172 *Id*.

173 *Id*. at 779, (citing *Bowles v. Russell*, 127 S. Ct. 2360 (2007)).

174 *Id*. at 779–80 (citing *Budinich v. Becton Dickinson and Company*, 486 U.S. 196, 202 (1988)).

175 *Id*. at 780.

176 See *Alabama Legislative Black Caucus v. Alabama*, 134 S. Ct. 694 (2013) (race-based redistricting); and *Reed v. Town of Gilbert, Arizona*, 134 S. Ct. 2900 (2014) (religious discrimination).

177 See *Oneok Incorporated v. Learjet*, 134 S. Ct. 2899 (2014) (preemption); *Jesinoski v. Countrywide Home Loans*, 134 S. Ct. 1935 (2014) (statute of limitations); *Gelboim v. Bank of America Corporation*, 134 S. Ct. 2876 (2014) (appealability).

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