The U.S. Supreme Court's 2014 Term

High- and Low-Profile Decisions with Lurking Access Issues

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With the Patient Protection and Affordable Care Act on the line again and same-sex marriage up for review, the U.S. Supreme Court's 2014 Term featured two very high-profile cases. The decisions resolving those issues also included significant content under the broadly defined rubric of access to federal courts. In addition, as always, many decisions that did not attract public attention raised important access issues. One of those, which analyzed the supremacy clause, may suggest increasing difficulty for Medicaid recipients and perhaps beneficiaries of other Social Security Act programs to bring challenges to their programs' policies and practices. Here we summarize the new developments in statutory construction, deference, *stare decisis*, and the other issues of federal practice that can present either barriers or pathways to reaching the merits of federal court claims.

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Statutory Construction and *Chevron* Deference

In *King v. Burwell*, by a comfortable 6-to-3 margin, the Court upheld the ability of limited-income individuals to use a health insurance Exchange established under the Affordable Care Act to obtain tax credits to assist with their health insurance premiums.[1] In so doing, the Court also produced a useful discussion on statutory construction.

The Affordable Care Act requires an Exchange to operate in each state and says that an Exchange will be operated by the federal government in any state that does not operate its own Exchange. Premium assistance was not available in federal Exchange states, plaintiffs contended, because the Act notes that the tax credits are available to individuals in an "Exchange established by the State."[2] That key phrase is ambiguous, Chief Justice Roberts, writing for the majority, determined. Significantly, however, he refused to apply "*Chevron* deference" to the challenged Internal Revenue Service regulations because the question before the Court involved "deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."[3]

This refusal to defer to agency rulemaking makes *King* a case of important statutory construction. The refusal also means that a subsequent administration cannot change the availability of premium tax credits by replacing the challenged regulation. That change must come from Congress.

While citing traditional rules of statutory construction, the Chief Justice's opinion is most notable in basing its analysis on an independent assessment of what the statute means.[4] The first page of the opinion, for example, does not discuss the wording of

1 *King v. Burwell*, 135 S. Ct. 2480 (2015).

2 26 U.S.C. §§ 36B(b)(2)(A) (2013) (cross-referencing 42 U.S.C. § 18031 (2013) (defining "Exchange")).

3 *King*, 135 S. Ct. at 2489 (citations and internal quotation marks omitted).

4 *Id.*

the disputed phrase or its legislative history but rather cites amicus briefs from health insurance plans and economics scholars to explain how past state health reform efforts failed because they did not include an individual mandate and premium tax credits to assure affordability.[5] Rather than parsing words, the Court assessed the phrase in the context of Congress' primary purposes when enacting the Affordable Care Act. As explained by the Court, the Act's purpose is to make health insurance available to Americans by making it more affordable and to stabilize health insurance markets through guaranteed insurance requirements. Premium tax credits, the Court determined, were an essential component of this scheme.

The *King* Court also drew the commonsense conclusion that Congress would not have had such a critical Affordable Care Act feature as the state-operation requirement turn on the "ultimate ancillary provision: a sub-sub-sub section of the Tax Code" that could be found only through "a winding path of connect-the-dots-provisions."[6] The Chief Justice summarized: "A fair reading of legislation demands a fair understanding of the legislative plan."[7]

In an exasperated dissent, Justice Scalia took great issue with the "judge-empowering approach" of the majority, accusing it of engaging in "interpretive jiggery-pokery."[8]

In a second case raising *Chevron* deference, the Court again declined to defer to a federal agency.[9] On this occasion, however, the Court worked within the *Chevron* framework, which requires a reviewing court to give controlling weight to an administrative agency's reasonable construction of an ambiguous statute.[10]

The case involved a Clean Air Act provision that directs the U.S. Environmental Protection Agency (EPA) to regulate power plants only if it concludes that regulation is "'appropriate and necessary.'"[11] The EPA concluded that the regulation was both appropriate and necessary but refused to consider cost when making its decision.

While acknowledging *Chevron*'s deferential standard, Justice Scalia's majority opinion, which stressed that *Chevron* requires agencies to "operate within the bounds of reasonable interpretation," concluded that the EPA "strayed far beyond those bounds" when it read the statute to mean that it could ignore cost.[12] Although the Court has often decided interpretive disputes by relying on the dictionary, Justice Scalia determined that he did not need a dictionary to understand the "capaciousness" of the phrase "appropriate and necessary," for the word "appropriate" is the "classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors."[13]

The Court's other statutory construction cases followed more traditional paths, as illustrated by *Yates v. United States*.[14] That case arose when Yates, a commercial fisherman, was cited for possessing a stash of red grouper below regulation size. Before returning to shore, Yates tossed the undersized fish overboard and replaced them with bigger fish. Shore side, a wildlife officer remeasured the fish, and, discovering the bait-and-switch, charged Yates with violating the Sarbarnes-Oxley Act, which provides that a person may be fined or imprisoned up to 20 years if he "'knowingly alters, destroys, mutilates, … or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence'" a federal investigation.[15]

To discern the meaning of the phrase "tangible object," Justice Ginsburg's plurality opinion (joined by the Chief Justice and Justices Breyer and Sotomayor, with Justice Alito concurring in the judgment) offers a mini-treatise on statutory construction; Justice Ginsburg explained as follows:

- The words of a statute generally take their ordinary, dictionary meaning unless they are terms of art.[16] However, the meaning of terms in a statute is decided not only by the language itself but also by the context in which the language is used and the broader context of the statute as a whole. Thus "identical language may convey varying content when used in different statutes."[17]
- A statute's captions and title (here "Criminal penalties for altering documents"), while not controlling, may supply clues to congressional intent.[18]
- Statutes should not be read so as to render other provisions superfluous. Here a broad reading of "tangible object" would cause the words "record" and "document" to have little role in the statute.[19]
- The "principle of *noscitur a sociis*—a word is known by the company it keeps"

5 *Id*. at 2486.

6 *Id*. at 2495.

7 *Id*. at 2496.

8 *Id*. at 2500, 2505 (Scalia, J., dissenting).

9 *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699 (2015).

10 See *Chevron U.S.A. Incorporated v. Natural Resources Defense Council Incorporated*, 467 U.S. 837, 842–43 (1984).

11 *Michigan*, 135 S. Ct. at 2707 (quoting 42 U.S.C. § 7412(n)(1)(A)).

12 *Id*. (citation and internal quotation marks omitted).

13 *Id*. (citation and internal quotation marks omitted).

14 *Yates v. United States*, 135 S. Ct. 1074 (2015).

15 *Id*. at 1078 (quoting 18 U.S.C. § 1519 (2013)).

16 *Id*. at 1081–82.

17 *Id*. at 1082 (citations omitted); see also *id*. at 1083 ("words are chameleons, which reflect the color of their environment") (citation and internal quotation marks omitted).

18 *Id*. at 1083–84.

19 *Id*. at 1085. The Court cited the rule against surplussage in at least two other decisions during the Term: *Young v. United Parcel Service Incorporated*, 135 S. Ct. 1338, 1352 (2015), and *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1132 (2015).

allows a court to ascribe meanings to words that are consistent with other parts of the statute.[20] Here "tangible object" was the last in a list of terms that began with "record or document" and thus takes a similar meaning.[21]

- Another canon, *ejusdem generis*, ensures that a general word will not render a specific word useless. Had Congress intended "tangible object" to include "physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to 'record' or 'document.'"[22]

Writing for the four dissenters, Justice Kagan found the majority's recitation of statutory canons to be a "fishing expedition [that] comes up empty."[23] She argued that "tangible object" should have its regular meaning because Congress had not supplied an alternative definition; relying on Dr. Seuss, she would have found the ordinary meaning to include a "discrete thing that possesses physical form."[24]

A *qui tam* action filed by an individual who claimed that his employer had fraudulently billed the government raised two questions.[25] The first was whether the Wartime Suspension of Limitations Act, which suspends the running of the statute of limitations applicable to any offense, applies only to criminal charges or to both criminal and civil claims, such as a *qui tam* complaint.[26] The text, structure, and history of the Wartime Suspension of Limitations Act show, the Court, through Justice Alito, unanimously concluded, that the Act applies only to criminal offenses. Looking to definitions contained in various dictionaries at the time the Act was drafted, the Court concluded that the word "offense" was most commonly used to refer to crimes.[27] Title 18 of the U.S. Code, of which the Wartime Suspension of Limitations Act is a part, uses the term hundreds of times but never clearly denotes a civil offense, the Court also noted.[28] The Act's history supported the Court's conclusion. Previous versions of the Wartime Suspension of Limitations Act used the word "offense" and indisputably applied to crimes. Accordingly the Court found that "[t]he retention of the same term in the later laws suggests that no fundamental alteration was intended."[29]

Second, the Court assessed the False Claims Act's "first-to-file" provision, which precludes an individual from filing a *qui tam* action based on the facts underlying a "pending action."[30] Relying on dictionary definitions, the Court concluded that "pending" refers to an action that remains undecided or is awaiting a decision. Accordingly the first-to-file rule bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed.[31] To the contention that the word "pending" was shorthand for the "first filed action" and that the first filed action would remain pending even after it was dismissed, the Court stated that that reading "does not comport with any known usage of the term 'pending'" and would mean that "*Marbury v. Madison* … is still 'pending.' So is the trial of Socrates."[32]

Another decision with elements of statutory construction arose after Samantha Elauf, a practicing Muslim, applied for a job with a clothing store.[33] The job interviewer informed her supervisor that she thought Elauf might be wearing a headscarf for religious reasons and asked whether this would violate the company dress code. The interviewer was instructed not to hire Elauf, who then claimed a violation of Title VII.

In Justice Scalia's decision for himself and six colleagues, the Court held that Title VII's disparate treatment provision requires an applicant to show only that her need for an accommodation was a motivating factor in the employer's decision, not that the employer had actual knowledge of her need.[34] Justice Scalia based the Court's opinion on the Title VII words that are tied to employer motive, making it unlawful for an employer "'to fail … to hire … any individual … because of such individual's … religion.'"[35] Title VII does not impose a knowledge requirement, in contrast to other federal statutes, such as the Americans with Disabilities Act, the Court noted.[36] The Court refused to impose a knowledge requirement because that would require "add[ing] words to the law to produce what is thought to be a desirable result. That

The Court construed the Fair Housing Act to allow disparate impact claims.

20 *Yates*, 135 S. Ct. at 1085.

21 *Id.*

22 *Id.* at 1087.

23 *Id.* at 1094 (Kagan, J., dissenting).

24 *Id.* at 1091 (citing Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (1960)).

25 *Kellogg Brown & Root Services v. United States ex rel. Carter*, 135 S. Ct. 1970, 1971 (2015).

26 *Id.* at 1974.

27 *Id.* at 1976.

28 *Id.* at 1976–77.

29 *Id.* at 1977.

30 *Id.* at 1978.

31 *Id.*

32 *Id.* at 1979.

33 *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Incorporated*, 135 S. Ct. 2028 (2015).

34 *Id.* at 2032.

35 *Id.* at 2031 (quoting 42 U.S.C. § 2000e-2(a)(1)).

36 *Id.* at 2032–33 (contrasting 42 U.S.C. § 12112(b)(5)(A)).

is Congress's province. We construe Title VII's silence as exactly that: silence."[37]

The Court construed the Fair Housing Act to allow disparate impact claims.[38] Justice Kennedy's opinion for the 5-to-4 majority determined that the Fair Housing Act used wording similar to two other antidiscrimination provisions focusing on the consequences of the employer's actions and not merely on his mind-set and that the Court had already condoned disparate impact claims.[39] The opinion deemed it of "crucial importance" that by 1988, when the Fair Housing Act was amended, all nine federal courts of appeals to have addressed the question had concluded that the Fair Housing Act encompassed disparate impact claims.[40] The Court found that "Congress was aware of this unanimous precedent" and "made a considered judgment to retain the relevant statutory text."[41]

Due Process and Equal Protection

Marriage is a fundamental right that extends to same-sex couples under the due process and equal protection clauses of the Fourteenth Amendment, a 5-to-4 majority, led by Justice Kennedy, held in the landmark *Obergefell v. Hodges* decision.[42] With regard to the determination of whether a right is a fundamental liberty protected under the due process clause, Justice Kennedy wrote that "[h]istory and tradition guide and discipline the inquiry but do not set its outer boundaries."[43] He elaborated that the proper method of analysis "respects our history and learns from it without allowing the past alone to rule the present"; he relied on *Lawrence v. Texas*, in which the Court held that criminalizing consensual sex between adults of the same sex was unconstitutional, thus overruling *Bowers v. Hardwick*.[44]

Applying these "tenets," Justice Kennedy explained that "the Court has long held the right to marry is protected by the Constitution [and has] reiterated that the right to marry is fundamental under the Due Process Clause."[45] He acknowledged that, in its marriage decisions, the Court presumed an opposite-sex relationship and indeed had ruled in 1972 that exclusion of same-sex couples from marriage did not raise a substantial federal question.[46] However, the majority opinion explained, "more instructive precedents" reveal four "principles and traditions" that demonstrate why the reasons underlying the fundamental right to marry under the Constitution should "apply with equal force to same-sex couples."[47]

The first principle is that "the right to personal choice regarding marriage is inherent in the concept of individual

37 *Id*. at 2033.

38 *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Incorporated*, 135 S. Ct. 2507 (2015).

39 *Id*. at 2516–18 (citing *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)).

40 *Texas Department of Housing and Community Affairs*, 135 S. Ct. at 2519 (citations omitted).

41 *Id*. The majority pointedly found support for its conclusion in a book on statutory construction coauthored by Justice Scalia, who dissented in this case: "'If a word or phrase has been … given a uniform interpretation by inferior courts …, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'" (*id*. at 2520 (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 322 (2012))).

42 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

43 *Id*. at 2589.

44 *Id*. See *Lawrence v. Texas*, 530 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

45 *Obergefell*, 135 S. Ct. at 2598 (citations omitted).

46 *Id*. (referencing *Baker v. Nelson*, 409 U.S. 810 (1972)).

47 *Id*. at 2598–99.

autonomy," akin to choices about contraception and procreation.[48]

The second "is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[49] This principle is exemplified by the *Griswold v. Connecticut* decision, which described marriage as a right "'older than the Bill of Rights,'" "'sacred,'" and "'an association for as noble a purpose as any involved in our prior decisions.'"[50]

Third, the right to marry "safeguards children and families."[51] The tie between marriage and child-rearing is "'a central part of the liberty protected by the Due Process Clause.'"[52] Further, giving "legal structure to their parents' relationship … allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'"[53] To stigmatize as "lesser" the "hundreds of thousands of children … being raised by [same-sex] couples" by prohibiting their parents from marrying would conflict with this central principle of marriage.[54]

The fourth principle is marriage's historic status as "'the foundation of the family and of society, without which there would be neither civilization nor progress.'"[55] From marriage's central place in the social order flow many "governmental rights, benefits, and responsibilities," including "medical decision making authority;

48 *Id*. at 2599.

49 *Id*.

50 *Id*. at 2599–2600 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

51 *Id*. at 2600.

52 *Id*. (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1977)).

53 *Id*. (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013)).

54 *Id*.

55 *Id*. at 2601 (quoting *Maynard v. Hill*, 125 U.S. 190, 213 (1888)).

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adoption rights; [and] the rights and benefits of survivors."[56] Denying same-sex couples this constellation of marriage-related benefits creates "intolerable" instability and inequality for same-sex couples and "lock[s] [them] out of a central institution of the Nation's society."[57]

The *Obergefell* majority declined to follow the approach in *Washington v. Glucksberg*, which was championed by the defendant state officials and "called for a careful description of fundamental rights."[58] The majority disagreed that the plaintiffs were seeking "a new and nonexistent right to same-sex marriage."[59] It noted that, in the right-to-marry decisions and gay-and-lesbian-rights decisions, the Court had not defined rights by "who exercised them in the past" because "received practices could serve as their own continued justification and new groups could not invoke rights once denied."[60]

The majority further found that "the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples."[61] Thus, the Court held, "the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry."[62] The majority described the "profound" connection between the rights of liberty and equality as reflected in the Court's right-to-marry cases, notably *Loving v. Virginia*, in which the Court found racial classification as a bar to marriage "'so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, [as] surely to deprive all the State's citizens of liberty without due process of law.'"[63] Further, the Court noted its earlier reliance on the "interlocking nature of these constitutional safeguards" to invalidate laws that imposed gender-based inequality in opposite-sex marriage and to protect the rights of gays and lesbians.[64]

In his dissenting opinion, which was joined only by Justice Thomas, Justice Scalia let loose an unprecedented invective against the majority. "This practice of constitutional revision by an unelected committee of nine," he raged, "always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."[65]

56 *Id*.

57 *Id*. at 2601–2.

58 *Id*. at 2602 (internal quotation marks omitted) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

59 *Id*. (citation and internal quotation marks omitted).

60 *Id*.

61 *Id*. at 2604.

62 *Id*.

63 *Id*. at 2603 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

64 *Id*. at 2604.

65 *Id*. at 2627 (Scalia, J., dissenting). Justice Scalia foreshadowed this tirade in his plurality opinion in *Kerry v. Din*, 135 S. Ct. 2128 (2015), the Court's other decision on marriage and due process this Term; the decision was issued just eleven days before *Obergefell*. He cautioned in *Kerry* that "conferring constitutional status upon a previously unrecognized liberty … required a careful description of the asserted fundamental liberty interest, as well as a demonstration that the interest is objectively, deeply rooted in this Nation's history and tradition … such that neither liberty nor justice would exist if [it was] sacrificed" (*id*. at 2134 (internal quotation marks and citation omitted)).

Whether the four more conservative members of the Court can find another vote in support of this position, and then attempt to apply it to the long-established enforcement rights of Medicaid and other Social Security Act beneficiaries, is an unanswered question.

The Supremacy Clause: Cause of Action and Preemption

In a case of potentially great significance to advocates for recipients of public benefits, the Court settled one point unanimously: the supremacy clause does not provide a cause of action to force a state to comply with federal law. Exactly when and why a state may nevertheless be enjoined to comply, however, remain something of a mystery.

In *Armstrong v. Exceptional Child Center Incorporated* the specific issue before the Court was whether providers of home health care could invoke the supremacy clause to supply a cause of action for enforcing a Medicaid rate-setting provision.[66] No cause of action emanates from the supremacy clause, the majority opinion, written by Justice Scalia and joined in the main by Justice Breyer but not Justice Kennedy, concluded with ease. The clause "instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so."[67] Justice Sotomayor's opinion for the four dissenters did not dispute that resolution.[68]

The majority and dissent also agreed that, notwithstanding the lack of a supremacy clause cause of action, equitable relief might still be available: "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action.... It is a judge-made remedy."[69] Neither the majority nor the dissent explained the genesis of the cause of action that would allow for equitable relief in this circumstance, but both wings of the Court clearly stated the potential availability of equitable relief.

At the same time, however, the majority recognized that access to equitable relief could be circumscribed by Congress: "The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."[70] Again, the dissenters agreed with that position.[71]

The majority and dissent disagreed only on whether, in *this* instance, Congress had foreclosed the right to equitable relief. Justice Scalia's opinion cited two aspects of the Medicaid statute to determine that injunctive relief was not available for enforcing the provision at issue, 42 U.S.C. § 1396a(a)(30)(A) (2013). The first was that Congress' sole remedy for a state's failure to comply with federal Medicaid requirements was the withholding of funds from the state.[72] "[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[73] While that enforcement provision alone might not be sufficient to preclude equitable relief, the majority added, "it does so when combined with the judicially unadministrable nature of § 30(A)'s text. It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate."[74]

The dissent rejected both rationales offered by the majority. Justice Sotomayor observed inter alia that its opinion "threatens the vitality of our *Ex parte Young* jurisprudence [and] identifies only a single prior decision ... in which we have ever discerned such congressional intent to foreclose equitable enforcement of a statutory mandate."[75]

In a disturbing coda (which was not joined by Justice Breyer, thus precluding it from achieving majority status), Justice Scalia also rejected an argument that had not been offered by the providers: the Medicaid statute itself provides a cause of action.[76] Noting that "Spending Clause legislation like Medicaid is much in the nature of a contract," he doubted that providers could be "intended beneficiaries ... of the Medicaid agreement."[77] Whether the four more conservative members of the Court can find another vote in support of this position, and then attempt to apply it to the long-established enforcement rights of Medicaid and other Social Security Act beneficiaries, is an unanswered question. Thus, at its most basic, *Exceptional Child* tells us only that providers cannot

66 *Armstrong v. Exceptional Child Center Incorporated*, 135 S. Ct. 1378, 1383 (2015).

67 *Id.*

68 *Id.* at 1391 (Sotomayor, J., dissenting).

69 *Id.* at 1384 (citation omitted). See *id.* at 1390 (Sotomayor, J., dissenting) (citing *Ex parte Young*, 209 U.S. 123 (1908), as "[p]erhaps the most famous exposition of this principle").

70 *Id.* at 1385.

71 *Id.* at 1392 (Sotomayor, J., dissenting).

72 *Id.* at 1385 (citing 42 U.S.C. § 1396c).

73 *Id.* (citation and internal quotation marks omitted).

74 *Id.* Justice Breyer's concurrence elaborated on why § (30)(A) was inappropriate for enforcement and emphasized its role as a rate-setting mechanism (*id.* at 1388–90 (Breyer, J., concurring in part and concurring in the judgment)).

75 *Id.* at 1392 (Sotomayor, J., dissenting).

76 *Id.* at 1387.

77 *Id.* (internal quotation marks omitted).

enforce 42 U.S.C. § 1396a(a)(30)(A), but its potential ramifications are chilling.

The other supremacy clause case this Term is a more traditional type, as the Court wrestled with whether a federal law preempted state-law antitrust lawsuits.[78] Although neither the federal law at issue (the Natural Gas Act) nor the resolution of the case itself is particularly relevant to public interest practice, some of the discussion is helpful in understanding preemption doctrine.

Writing for a seven-member majority, Justice Breyer offered a primer on preemption. The supremacy clause, he explained, allows Congress to "pre-empt, *i.e.*, invalidate, a state law through federal legislation," either explicitly or implicitly.[79] Congress may accomplish this either through "field" preemption or "conflict" preemption. The former represents an effort "to foreclose any state regulation in the *area*," that is, "Congress has forbidden the State to take action in the *field* that the federal statute pre-empts."[80] The latter exists when complying with both state and federal law is impossible or when state law presents an obstacle to Congress' objectives: "In either situation, federal law must prevail."[81] The case itself raised only field preemption.[82]

Statutory Timelines

In two decisions the Court interpreted statutory timelines and limitations periods for the benefit of plaintiffs seeking judicial enforcement of federal rights. In the first, the dispute required an interpretation of the Truth in Lending Act, which gives borrowers the right to rescind certain loans for up to three years after the transaction is consummated.[83] The plaintiff homeowners, who refinanced their home with a loan from the defendant mortgage company, mailed a letter, exactly three years after the loan was consummated, exercising their right to rescind the loan.[84] In the ensuing litigation to enforce the rescission, the lower courts held that the homeowners' initial notice of rescission was ineffective because they had not filed their lawsuit seeking rescission within three years of the transaction at issue.[85]

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Justice Scalia, in a two-page opinion for a unanimous Court, reversed the lower courts' holding.[86] The Court described the statutory rescission process as "unequivocal" in that the statute provides that a borrower "'shall have the right to rescind ... by notifying the creditor ... of his intention to do so'" and that "'the right of rescission shall expire three years after the date of consummation of the transaction.'"[87] The Court rejected the lender's contention that a different process should be triggered if the lender disputes the allegations in the rescission notice: "Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter."[88]

The Court's unanimity in *Jesinoski* devolved into a more familiar 5-to-4 division over whether two different statutory timelines governing the Federal Tort Claims Act are subject to equitable tolling. In one of two cases reviewed together, the respondent had timely submitted her underlying administrative claim, but, due to delays in the processing of her claim by the federal district court, her federal suit was filed several weeks after the six-month Federal Tort Claims Act deadline.[89] In the other case, which involved the alleged fault of the Federal Highway Administration in constructing a median barrier that contributed to a fatal car accident, the untimely submission was the administrative claim, with the late filing attributed to the government's failure to disclose certain information about the barrier.[90] In both cases the Ninth Circuit held that the deadlines at issue were not jurisdictional and therefore were subject to equitable tolling.[91]

The statutory language governing both Federal Tort Claims Act timelines is set forth in one provision, which says that a tort claim against the United States "shall be forever barred" unless it is first presented to the "appropriate Federal agency within two years after such claim accrues" and then

78 *Oneok Incorporated v. Learjet Incorporated*, 135 S. Ct. 1591 (2015).

79 *Id.* at 1595.

80 *Id.* (citation and internal quotation marks omitted).

81 *Id.*

82 *Id.* For the record, the Court held, after a lengthy discussion of the history of the natural-gas industry, that Congress had not preempted the field of state antitrust law in the natural-gas context: "[T]he Natural Gas Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way" (*id.* at 1599 (citation and internal quotation marks omitted)). Justice Scalia, writing for himself and the Chief Justice in dissent, was dismissive of the majority's "make-it-up-as-you-go-along approach to preemption" (*id.* at 1603 (Scalia, J., dissenting)).

83 *Jesinoski v. Countrywide Home Loans Incorporated*, 135 S. Ct. 790 (2015). See 15 U.S.C. § 1635(a) (2014).

84 *Jesinoski*, at 791.

85 *Id.*

86 *Id.* at 792–93.

87 *Id.* at 792 (quoting 15 U.S.C. §§ 1635(a), (f)) (emphasis added by Court omitted)).

88 *Id.*

89 *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630 (2015). The Supreme Court addressed the cases together "because everyone agrees that the core arguments for and against equitable tolling apply equally to both of [the Federal Tort Claims Act's] deadlines" (*id.* at 1630 n.1).

90 *Id.*

91 *Id.*

filed in federal court "within six months" after the agency's denial of the claim.[92] The issue presented was whether, as the government contended, these timelines cannot be equitably tolled because they are "jurisdictional restrictions."[93] Justice Kagan, writing on behalf of her usual three colleagues and Justice Kennedy, disagreed with the government and decided that those timelines could be equitably tolled because they are not jurisdictional restrictions.[94]

The majority began (and ended) its analysis with *Irwin v. Department of Veterans Affairs*, which "sets out the framework for deciding 'the applicability of equitable tolling in suits brought against the Government.'"[95] In *Irwin* the Court decided that "'the same rebuttable presumption of equitable tolling' [applicable to statutes of limitations in private litigation] should also apply to suits against the United States under a statute waiving sovereign immunity."[96] To overcome the presumption, the government must show that, in enacting a limitations period for suits against the United States, Congress intended to create a jurisdictional bar which, if not met, "deprives a court of all authority to hear a case … even if equitable considerations would support extending the prescribed time period."[97]

The majority emphasized that "the Government must clear a high bar to establish that a statute of limitations is jurisdictional" and must "plainly show that Congress imbued a procedural bar with jurisdictional consequences."[98] Ordinary statutory filing deadlines and limitations periods, regardless of how "important," "mandatory," or "emphatically expressed," do not qualify as jurisdictional: "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it."[99] After reviewing the language and long legislative history of the Federal Tort Claims Act, the Court concluded that Congress consistently "failed to provide anything like the clear statement this Court has demanded before deeming a statute of limitations to curtail a court's power."[100]

To the dissent's contention that the words "shall be forever barred" in the statute should qualify as a "special" procedural bar sufficient to merit jurisdictional status, Justice Kagan responded that the formulation was "an utterly unremarkable phrase."[101] That language was "commonplace in federal limitations statutes for many decades," and, as such, the Court has never "accorded those words talismanic power to render time bars jurisdictional."[102]

Stare Decisis

In *Kimble v. Marvel Entertainment Limited Liability Company* Kimble sought to continue receiving royalty payments for which there was no termination date, on an expired patent that Marvel Entertainment's predecessor had purchased from Kimble to settle a patent infringement case.[103] Asserting the precedent established in *Brulotte v. Thys Company* that a patent holder cannot continue to receive sales royalties for an expired patent, Marvel sought relief from paying the royalties.[104] Kimble urged the Court to reject the 50-year-old precedent and to review his right to continued royalties based on a multifactor, "flexible, case-by-case analysis" under the "rule of reason" used in antitrust law.[105] The Court said "no," 6-to-3.

Justice Kagan explained that *stare decisis* is "'not an inexorable command'" but is the "'preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"[106] Further, she explained, "belief 'that the precedent was wrongly decided'" is not enough in itself to overcome *stare decisis*.[107]

Guided by these precepts, the majority determined that it should not abandon *stare decisis* because doing so would upset the "web of precedents" undergirding *Brulotte*.[108] Further, the Court found "nothing about *Brulotte* has proved unworkable"; its bright-line rule fostered consistency and predictability, compared to the standard advocated by Kimble.[109] The Court also listed other factors that supported maintaining the *Brulotte* rule, factors including that precedents that interpreted statutes and cases implicating property or contract rights had extra *stare decisis* weight and that Congress had had multiple opportunities to reverse *Brulotte* but had not done so.[110]

Applying the same *stare decisis* principles, however, the Court overruled precedent in *Johnson v. United States*.[111] There the Court analyzed the "residual clause" part of the definition of "violent felony" under

92 28 U.S.C. § 2401(b) (2013).

93 *Kwai Fun Wong*, 135 S. Ct. at 1629.

94 *Id.*

95 *Id.* at 1630 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

96 *Id.* at 1631 (quoting *Irwin*, 498 U.S. at 95–96).

97 *Id.*

98 *Id.* at 1632.

99 *Id.*

100 *Id.* at 1633.

101 *Id.* at 1634.

102 *Id.*

103 *Kimble v. Marvel Entertainment Limited Liability Company*, 135 S. Ct. 2401 (2015).

104 *Id.* at 2406 (citing *Brulotte v. Thys Company*, 379 U.S. 29, 32 (1964)).

105 *Id.* at 2408 (internal quotation marks omitted).

106 *Id.* at 2409 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

107 *Id.* (quoting *Halliburton Company v. Erica P. John Fund Incorporated*, 134 S. Ct. 2398, 2407 (2014)).

108 *Id.* at 2411.

109 *Id.*

110 *Id.* at 2409–10.

111 *Johnson v. United States*, 135 S. Ct. 2551 (2015).

the Armed Career Criminal Act; if found to apply, the residual clause required courts to impose enhanced sentences for illegal firearms possession.[112] Ultimately at issue was whether the residual clause was too vague to pass constitutional muster.[113]

The Court held 8-to-1 that "[i]ncreasing a defendant's sentence under the [residual] clause denies due process of law."[114] To reach this holding, the Court had to overrule two of its earlier decisions in which the respective majorities rejected strong dissents by Justice Scalia, among others, asserting that the residual clause was unconstitutionally vague.[115] Justice Scalia finally won the day in *Johnson*, for which he wrote the majority opinion.

The Court deemed the residual clause "unworkable" and therefore unconstitutionally vague because the clause required courts to apply unclear standards and to hypothesize rather than to consider "real-world facts or statutory elements" to determine whether a particular crime was a violent felony.[116] Further, the majority reasoned, the Court had failed to fashion a "principled and objective standard" in its four previous decisions on the residual clause.[117] This failure, along with the many splits on interpretation of the residual clause among the lower courts, made consistent application of the residual clause "nearly impossible" and therefore justified overruling the Court's prior decisions, the majority concluded.[118]

112 *Id*. at 2555–56 (citing 18 U.S.C. § 924(e)(2)(B)).

113 *Id*. at 2556.

114 *Id*. at 2557.

115 Id. at 2557–63 (referencing *Sykes v. United States*, 131 S. Ct. 2267 (2011), and *James v. United States*, 550 U.S. 192 (2007)).

116 *Id*. at 2557–58, 2562.

117 *Id*. at 2558.

118 *Id*. at 2560 (citation and internal quotation marks omitted).

The Court this Term largely ignored one of its favorite topics, but in one case it did issue a standing ruling that could benefit future plaintiffs.

Standing

The Court this Term largely ignored one of its favorite topics, but in one case it did issue a standing ruling that could benefit future plaintiffs. The case at issue involved challenges to Alabama's redistricting of its state legislative bodies.[119] Although the analysis was in the context of voting rights, the standing discussion should apply beyond that realm.

On direct appeal, the Supreme Court considered a three-judge district court's holding that the Alabama Democratic Conference lacked standing to challenge alleged racial gerrymandering.[120] The lower court, acting *sua sponte*, had reached that conclusion on the ground that the record did not identify in which legislative districts the conference's individual members lived.[121] The five-Justice majority, however, in an opinion by Justice Breyer, inferred from the record that the conference was "highly likely" to have members in the affected districts.[122]

Perhaps more important, in the alternative the Court stated that the conference's failure to offer further information was excusable because it had been lulled into believing that no more was needed: "At the very least, the common sense inference is strong enough to lead the Conference reasonably to believe that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list."[123] Justice Breyer trotted out that old mainstay *Warth v. Seldin* to support this position: "[I]n these circumstances, elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence."[124] The majority relied on its belief that the conference would have been able to produce a membership list in the district court because it filed such a list with the Supreme Court.[125] On remand, the Court directed the district court to reconsider its position on standing after allowing the conference to submit its membership list.[126]

Needless to say, Justice Scalia, authoring the main dissent for the usual foursome, was not pleased: "The Court provides no support for this theory of jurisdiction by illogical inference, perhaps because this Court has rejected other attempts to peddle more-likely-than-not standing."[127] With respect to the majority's suggestion that "elementary principles of procedural fairness" bestowed a second chance on the conference, the dissent emphasized that standing principles placed the burden on plaintiffs: "[I]t was the Conference's responsibility, as the party invoking federal jurisdiction, to establish standing.

119 *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

120 *Id*. at 1268–70.

121 *Id*. at 1268–69.

122 *Id*. at 1269.

123 *Id*.

124 *Id*. (citing *Warth v. Seldin*, 422 U.S. 409, 501–2 (1975), for proposition that plaintiff must have "opportunity" to supplement record on standing).

125 *Id*. at 1269–70.

126 *Id*. at 1270.

127 *Id*. at 1276 (Scalia, J., dissenting).

The decision should protect organizational plaintiffs from dismissal of their claims without having an opportunity to supplement the record and thus demonstrate that they satisfy the requirements of standing.

That responsibility was enforceable, challenge or no, by the court."[128]

Although this kind of situation may not arise frequently, the decision should protect organizational plaintiffs from dismissal of their claims without having an opportunity to supplement the record and thus demonstrate that they satisfy the requirements of standing.[129]

Administrative Law

The Court issued four decisions discussing various issues of administrative law and adjudication. In *T-Mobile South Limited Liability Company v. City of Roswell, Georgia*, the Court had to piece together the process by which a telecommunications provider can obtain judicial review of a denial by a local government of an application to construct a cell phone tower.[130] The city had issued a brief written denial of the provider's application, but it was unaccompanied by an explanation.[131] Twenty-six days later (and only four days before expiration of the period for seeking judicial review of the denial), the city supplied its basis for the denial, in the form of the published minutes of the city council hearing where the decision was made.[132]

Justice Sotomayor, writing for a 6-to-3 majority, reversed the appellate court's approval of this process. After a review of several disconnected provisions of the Telecommunications Act of 1996, the Court held that a municipal locality must give reasons, in writing, for denying cell phone siting applications.[133] The locality need not state those reasons in the denial notice itself, but if it does not do so, it must state its reasons "with sufficient clarity in some other written record issued essentially contemporaneously with the denial."[134] Thus, although the *form* of the city's explanation for the denial (the transcribed minutes of the city council hearing) did meet the majority's test, its *timing* (nearly a month after the denial letter) did not.[135]

In a second case, the Court considered the propriety and scope of judicial review of the statutory obligation of the Equal Employment Opportunity Commission (EEOC) to try to remedy alleged unlawful workplace practices "through informal methods of conciliation" before filing a lawsuit.[136] The defendant mining company had sought to dismiss a suit in which the EEOC alleged sex discrimination in hiring because, although in its prelitigation investigation the EEOC invited the company to participate in an informal "conciliation process," allegedly the EEOC failed to "conciliat[e] in good faith."[137]

Justice Kagan's opinion for a unanimous Court observed that, since "Congress rarely intend[ed] to prevent courts from enforcing its directives to federal agencies," the Court applied a "strong presumption favoring judicial review of administrative action."[138] The decision concluded that the EEOC failed to meet its "heavy burden" to show that Congress intended to "prohibit all judicial review" of its "legislative mandate" to attempt conciliation efforts.[139]

Turning to the appropriate scope of review, the Court limited its analysis to deciding whether the EEOC "afford[ed] the employer a chance to discuss and rectify a specified discriminatory practice."[140] Where, as here, that question is disputed, a "sworn affidavit" from the agency stating that it had tried and failed at informal resolution "will usually suffice" to establish compliance with the conciliation requirement.[141] If the employer offers "credible evidence" to the contrary, however, "a court must conduct the factfinding necessary to decide that limited dispute."[142]

The Court revisited a topic left unaddressed for a number of years: the extent to which the findings of an administrative agency will preclude relitigation of those issues between the parties before another agency or a court. The case to consider this issue arose in the context of a decades-long war between two companies over their use of similar trademarks, with skirmishes held before two federal agencies and the federal courts.[143] The Eighth Circuit had held that issue preclusion analysis was not applicable to one of the agencies'

128 *Id.* (citation and internal quotation marks omitted).

129 See, e.g., *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1042 (9th Cir. 2015).

130 *T-Mobile South Limited Liability Company v. City of Roswell, Georgia*, 135 S. Ct. 808, 811–12 (2015).

131 *Id.* at 813.

132 *Id.*

133 *Id.* at 818.

134 *Id.*

135 *Id.*

136 *Mach Mining Limited Liability Company v. Equal Employment Opportunity Commission*, 135 S. Ct. 1645, 1649 (2015).

137 *Id.* at 1650 (citation and internal quotation marks omitted).

138 *Id.* at 1651 (citation and internal quotation marks omitted).

139 *Id.* (citation and internal quotation marks omitted).

140 *Id.* at 1653.

141 *Id.* at 1656.

142 *Id.*

143 *B&B Hardware Incorporated v. Hargis Industries Incorporated*, 135 S. Ct. 1293 (2015).

The Court revisited a topic left unaddressed for a number of years: the extent to which the findings of an administrative agency will preclude relitigation of those issues between the parties before another agency or a court.

decisions on the trademark dispute, but, in an opinion by Justice Alito for the seven-member majority, the Supreme Court, reversing the Eighth Circuit, held that "[s]o long as the other ordinary elements of issue preclusion are met, when the [issues] adjudicated by the [agency] are materially the same as those before the district court, issue preclusion should apply."[144]

The Court also addressed the application of the Administrative Procedure Act's notice-and-comment requirements to so-called interpretive rules.[145] Although the Act generally does not require federal agencies to subject rules interpreting agency regulations to the notice-and-comment process, the District of Columbia Circuit held in 1997 that an agency must comply with that process "when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted."[146]

In an opinion by Justice Sotomayor for herself and six other Justices, the Supreme Court reversed the D.C. Circuit's recent enforcement of that requirement. Under the "straightforward" language of the Administrative Procedure Act, declared the Court, "legislative" rules are subject to the notice-and-comment process, but "interpretive" rules, such as the one in *Mortgage Bankers*, are not.[147] The Act simply permits no exceptions such as the one created by the court of appeals.[148]

Justices Scalia and Thomas concurred in the judgment and issued separate concurring opinions reflecting their significant concerns about the deference accorded to agencies' interpretations of their own regulations.[149]

Skidmore Deference

Young v. United Parcel Service Incorporated rejected United Parcel Service's argument that it did not need to accommodate a pregnant woman's restricted lifting ability under the Pregnancy Discrimination Act.[150] While the opinion is most notable for establishing standards for proving discrimination under the Act, it also includes a brief discussion about the degree of deference accorded to an administrative agency when *Chevron* deference is not applicable.

The majority opinion by Justice Breyer on behalf of himself and four colleagues refused to give an EEOC guideline controlling weight.[151] The Court noted that, under *Skidmore*, the weight given to an agency judgment "'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.'"[152] While acknowledging that the EEOC had no lack of experience and informed judgment, the Court found that the EEOC guideline lacked the "timing, consistency, and thoroughness of consideration" necessary to give it power to persuade.[153] The basis for the guideline was not explained, and the position taken in it was not consistent with past government advocacy.[154] The *Young* majority's application of *Skidmore* deference is somewhat notable because some justices had questioned its continued relevance.[155]

Civil Rights Pleading Requirement

Occasionally the Court reaches out to swat down a circuit court that has "gone rogue" on a particular issue. Such was the case in *Johnson v. City of Shelby, Mississippi*, where a group of former police officers alleged that they were fired by the city in violation of their due process rights.[156] The Fifth Circuit affirmed the district court's dismissal of the complaint for the plaintiffs' failure to invoke 42 U.S.C. § 1983 expressly in support of their claims.[157] In a two-page *per curiam* opinion, however, the Supreme Court "summarily" reversed the dismissal and cited decades-old precedent for the proposition that "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim."[158] The Court added that its two relatively recent decisions discussing the adequacy of various pleading requirements "are not in [sic] point, for they concern

144 *Id*. at 1310.

145 *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015).

146 *Id*. at 1203 (citing *Paralyzed Veterans of America v. D.C. Arena Limited Partnership*, 117 F.3d 579 (D.C. Cir. 1997)).

147 *Id*. at 1207.

148 *Id*.

149 *Id*. at 1211 (Scalia, J., concurring in the judgment), 1213 (Thomas, J., concurring in the judgment).

150 *Young v. United Parcel Service Incorporated*, 135 S. Ct. 1338 (2015).

151 *Id*. at 1351–52 (citing *Skidmore v. Swift & Company*, 323 U.S. 134 (1944)).

152 *Id*. at 1352 (quoting *Skidmore*, 323 U.S. at 140).

153 *Id*. (internal quotation marks omitted).

154 *Id*.

155 See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment) (arguing *Skidmore* deference is "anachronism, dating from an era ... [t]hat ... came to an end" with *Chevron*).

156 *Johnson v. City of Shelby, Mississippi*, 135 S. Ct. 346 (2014).

157 *Id*.

158 *Id*. at 346–47.

Occasionally the Court reaches out to swat down a circuit court that has "gone rogue" on a particular issue.

the *factual* allegations a complaint must contain to survive a motion to dismiss."[159]

Appeals

Petitioner Jennings, who had been sentenced to death, sought federal habeas corpus relief on three theories of ineffective assistance of counsel.[160] He prevailed on two theories but was denied relief on his third.[161] When Texas appealed, Jennings defended on all three theories.[162] The Fifth Circuit treated Jennings's third theory as an untimely and improper cross-appeal over which it had no jurisdiction because Jennings had not filed a notice of appeal or obtained a certificate of appealability.[163]

On a 6-to-3 vote the Supreme Court held that Jennings was not required to take a cross-appeal or obtain a certificate of appealability to assert his third theory. The majority opinion by Justice Scalia applied the long-standing rule that, in seeking affirmance, an appellee may attack the reasoning of the lower court but may neither enlarge his own rights nor lessen those of his adversary without taking a cross-appeal.[164] The majority found that Jennings had not violated this rule because what he received from the trial court—"release, resentencing, or commutation within a fixed time, at the State's option"—was the best that he could have accomplished under his third theory, and the state would be no worse off than it was under the trial court judgment if Jennings had prevailed on his third theory.[165]

In a second case involving appeals, the Court clarified the effect of a dismissal when an appeal has been taken.[166] At issue was the provision barring a prisoner from proceeding *in forma pauperis* if he had filed in federal court three lawsuits dismissed as frivolous, malicious, or for failure to state a claim.[167] Petitioner Coleman argued that he should be allowed to proceed *in forma pauperis* in a fourth lawsuit since his appeal of the dismissal of his third lawsuit was still pending.

Unanimously disagreeing with Coleman (and a majority of the circuit courts), the Court cited the rule that "[u]nless a court issues a stay, a trial court's judgment … normally takes effect despite a pending appeal."[168] Further, the Court explained that "a judgment's preclusive effect is generally immediate, notwithstanding any appeal."[169] These maxims of civil procedure, the Court reasoned, bolstered its literal interpretation of the *in forma pauperis* statute that went against Coleman.[170]

Removal and Remand of Class Actions

In a 5-to-4 decision with a decidedly atypical lineup, the majority and dissent primarily sparred over whether the case was properly before the Court. Concluding that it was, the majority made short work of the issue presented: whether a defendant seeking to remove a putative class action from state to federal court must include in its notice of removal more than a mere allegation that the jurisdictional threshold is satisfied.[171]

A district court granted the plaintiff's motion to remand a class action to state court on the ground that the defendant had offered no evidence in its notice of removal that the amount in controversy necessary for federal jurisdiction had been met. Since "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand," the defendant sought review of the remand order.[172] The Tenth Circuit, however, declined to accept the appeal and stated only that, "[u]pon careful consideration of the parties' submissions, as well as the applicable law, the Petition is denied."[173] The Supreme Court granted the defendant's petition for certiorari solely to consider the required content of the notice of removal.[174] Neither party questioned the propriety of the Supreme Court's reviewing the appellate court's discretionary decision to decline the appeal.[175]

Justice Ginsburg's brief analysis for the majority, who included the Chief Justice and Justices Breyer, Alito, and Sotomayor, focused on the statutory requirement that the notice contain only "'a short and plain statement of the grounds for removal,'" intended to simplify the requirements for removal.[176] Justice Ginsburg observed that,

159 *Id.* at 347 (referring to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007)).

160 *Jennings v. Stephens*, 135 S. Ct. 793, 796 (2015).

161 *Id.*

162 *Id.*

163 *Id.* at 798.

164 *Id.* (citing *United States v. American Railway Express Company*, 265 U.S. 425, 435 (1924)).

165 *Id.* at 798–99.

166 *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015).

167 *Id.* at 1761. See 28 U.S.C. § 1915(g) ("three strikes" provision).

168 *Coleman*, 135 S. Ct. at 1764 (referencing Fed. R. App. P. 8(a) and Fed. R. Civ. P. 62).

169 *Id.* at 1764.

170 *Id.* at 1762–64.

171 *Dart Cherokee Basin Operating Company v. Owens*, 135 S. Ct. 547, 551 (2014).

172 28 U.S.C. § 1453(c)(1).

173 *Dart Cherokee Basin Operating Company v. Owens*, No. 13-603, 2013 WL 8609250 (10th Cir. June 20, 2013).

174 *Dart Cherokee Basin Operating Company*, 135 S. Ct. at 552–53.

175 *Id.* at 553–54.

176 *Id.* at 553 (quoting 28 U.S.C. § 1446(a)).

just as a plaintiff's amount-in-controversy allegations in a complaint should be accepted if made in good faith, so, too, should a defendant's allegation in the notice of removal.[177] If there is a dispute about the alleged amount in controversy, the parties may submit evidence for resolution by the court.[178] Accordingly "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold."[179]

Attorney Fees

The Court decided that a fee-shifting provision in the bankruptcy code does not permit compensation for time incurred "defending" a fee application.[180] A corporation, ASARCO, obtained the bankruptcy court's permission to hire two law firms during the bankruptcy.[181] After ASARCO's successful emergence from bankruptcy with over $1.4 billion in cash, the firms sought compensation for their services under 11 U.S.C. § 330(a)(1) (2014), which states that the bankruptcy court "may award … reasonable compensation for actual, necessary services rendered by" any professionals hired pursuant to 11 U.S.C. § 327(a).[182]

Although the bankruptcy and district courts awarded the firms over $5 million for time incurred litigating the fee issues, the Fifth Circuit reversed the lower courts; the statute permits compensation only for time incurred for services directly related to issues arising in the bankruptcy and thus not for time spent defending the fee claim itself, the Fifth Circuit held.[183] In an opinion by Justice Thomas, the Supreme Court affirmed that decision on a 6-to-3 vote.[184] Distinguishing the specific limitations of the bankruptcy code's provision from the more general provisions in the Equal Access to Justice Act, the Court held that time incurred "defending" the fee application was not compensable.[185] Because the bankruptcy code specifically authorizes fees for time spent preparing the fee application, the Court allowed fees for the application but not for the subsequent defense of the fee claim.[186]

In the 2015 Term the Court has already agreed to hear several cases that could have an impact on plaintiffs' ability to pursue their claims. One involves the question of the degree to which Congress can effectively manufacture standing through a statutorily created right.[187] Another may have implications for class actions.[188] And a third raises questions about mootness when a settlement offer is turned down.[189] Undoubtedly many others are lurking on the docket. We, the members of the self-styled Federal Court Access Group, will continue to search for these nuggets and report on them in the fall of 2016.

177 *Id*.

178 *Id*. at 553–54 (citing 28 U.S.C. § 1446(c)(2)(B)).

179 *Id*. at 554. The majority and dissent devoted far more attention to the contention of an amicus that the Supreme Court lacked authority to reach the merits of the dispute below because the Tenth Circuit had merely exercised its discretion not to review the district court's decision (*id*. at 554–58). Interpreting the "many signals" embedded in the appellate panel's one-line order, Justice Ginsburg opined that "whether the Tenth Circuit abused its discretion in denying review, and whether the District Court's remand order was erroneous … do not pose genuinely discrete questions" (*id*. at 555, 558). In dissent, Justice Scalia suggested that, once the Court had recognized that the real question presented was whether the Tenth Circuit had abused its discretion in denying permission to appeal, "the responsible course would have been to confess error and to dismiss the case as improvidently granted" (*id*. at 558–59 (Scalia, J., dissenting)).

180 *Baker Botts Limited Liability Partnership v. ASARCO Limited Liability Company*, 135 S. Ct. 2158 (2015).

181 *Id*. at 2163.

182 *Id*. at 2162.

183 *Id*. (citing *In Re ASARCO Limited Liability Company*, 751 F.3d. 291, 301 (5th Cir. 2014)).

184 *Id*. at 2162–63.

185 *Id*. at 2162 (citing 11 U.S.C. § 330(a)(1) (2014)).

186 *Id*. at 2167–68.

187 See *Spokeo Incorporated v. Robins*, 135 S. Ct. 1892 (2015).

188 See *Tyson Foods Incorporated v. Bouaphakeo*, 135 S. Ct. 2806 (2015).

189 See *Campbell-Ewald Company v. Gomez*, 135 S. Ct. 2311 (2015).

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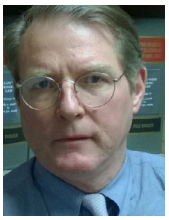

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