ACLU SUMMARY

of the

2008 SUPREME COURT TERM

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Major Civil Liberties Decisions

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FIRST AMENDMENT

A. Freedom of Speech

In *FCC v. Fox Television Studios*, 129 S.Ct. 1800 (April 28, 2009) (5-4), the Court held that the FCC did not act arbitrarily when it changed its rule to ban even "fleeting expletives" from the airwaves but it reserved decision on whether the new rule is constitutional, instead sending the case back to the court of appeals for an initial constitutional review. Writing for the majority, Justice Scalia repeated the notion that an administrative agency carries a greater burden of justification when it reverses a long-held position. In a separate concurrence, Justice Thomas expressed a "willingness to reconsider the entire rationale for FCC regulation of the airwaves, not simply limited to "fleeting expletives." The ACLU filed an amicus brief saying that the FCC's effort to regulate "indecent" speech, including "fleeting expletives," is unconstitutional – an issue that will now be litigated in the lower courts.

In *Ysursa v. Pocatello Educ. Ass'n*, 129 S.Ct. 1093 (Feb. 24, 2009)(6-3), the Court held that an Idaho law prohibiting public employers from authorizing payroll deductions for union political action committees did not violate the First Amendment. Writing for the Court, Chief Justice Roberts concluded that the law did not abridge speech because it did not prevent unions from forming political action committees or expressing their political views. He then held that the First Amendment does not require the government "to assist others in funding the expression of particular ideas, including political ones." *Id.* at 1098. Justices Stevens, Souter, and Breyer each filed separate dissents based at least, in part, on the suspicion that the challenged state law was designed to discriminate against the political speech of unions.

In *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125 (Feb.25, 2009)(9-0), the Court ruled unanimously that a city's decision to place a donated Ten Commandments monument in its public park did not require it to accept the donated monument of another religion and place it in the public park as well. Writing for the Court, Justice Alito acknowledged that public parks represent traditional public forums for many First Amendment purposes. But, he held, "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." *Id.* at 1129. While agreeing with that theory on these facts, Justices Stevens, Souter, Ginsburg and Breyer all wrote or joined in concurring opinions expressing some reservations about too broadly expanding the government speech doctrine. In their separate opinion, Justices Scalia and Thomas expressed the view that the Ten Commandments monument did not violate the Establishment Clause, even though that issue had not been raised in the case.

B. Freedom of Association

In *Locke v. Karass*, 129 S.Ct. 798 (Jan. 21, 2009)(9-0), the Court unanimously held that government employees who were not union members but were required by state law to pay a "service fee" to the local union representing them were not entitled under the First Amendment to a rebate for the portion of their fee that funded litigation by the national parent union if two conditions were met: the national litigation was related to collective bargaining and benefited workers represented by the local union. The Court's opinion was written by Justice Breyer.

C. Establishment Clause

Pleasant Grove City, Utah v. Summum, 129 S.Ct. 1125 (Feb.25, 2009)(9-0) – *see* full summary on p.4, *supra*.

FOURTH AMENDMENT

In *Herring v. United States*, 129 S.Ct. 695 (Jan. 14, 2009)(5-4), the Court held that the exclusionary rule did not require the suppression of evidence seized following an arrest that lacked probable cause because the arresting officer was mistakenly informed, based on a negligent bookkeeping error by a police employee in a neighboring county, that the defendant was subject to an outstanding arrest warrant. The majority decision, written by Chief Justice Roberts, is yet another indication of the Court's increasingly skeptical view of the exclusionary rule. Under the Chief Justice's balancing test, the exclusionary rule should apply only if the police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 702. He then ruled that this first criterion is satisfied only if the police conduct is deliberate, reckless, or grossly negligent. Conversely, mere negligence by an individual officer does not justify imposition of the exclusionary rule although, "in some circumstances, recurring or systematic negligence" might be sufficient. *Id.* Finally, he concluded that these facts did not warrant the exclusionary rule because they involved only the negligence of an individual officer. Justice Ginsburg dissented. First, she advocated in favor of a "more majestic conception" of the Fourth Amendment. *Id.* at 707. Second, she pointed out that tort law rests on the notion that even individual negligence can be deterred by a judicial remedy. Third, she noted both the proliferation of criminal justice databases and their well-documented inaccuracies. The ACLU submitted an *amicus* brief urging application of the exclusionary rule and explaining the lack of available civil remedies to redress the Fourth Amendment violation that occurred in this case.

In *Arizona v. Johnson*, 129 S.Ct. 781(Jan. 26, 2009)(9-0), the Court unanimously held that the police may "frisk" a passenger in a car that has been lawfully stopped for a traffic violation if there is reason to believe the passenger may be armed, and the fact that the police have begun to question the passenger about matters unrelated to the traffic stop does not change the analysis "so long as those inquiries do not measurably extend the duration of the stop." *Id.* at 788. Writing for the Court, Justice Ginsburg stressed that traffic stops were often "fraught with danger." *Id.* at 786 (citations omitted).

In *Arizona v. Gant*, 129 S.Ct. 1710 (April 21, 2009)(5-4), the Court held that police officers can search a car incident to arrest only if the car is still within reach of the person arrested, who is therefore capable of seizing a weapon or destroying evidence, or if there is reason to believe that the car contains evidence of the crime for which the person was arrested. A majority of the Court then concluded that neither condition was met on these facts. Gant was arrested for driving with a suspended license, and he was handcuffed in the backseat of a police car by the time his car was searched. Justice Stevens described the Court's holding as a clarification of the rule announced in *New York v. Belton,* 453 U.S. 454 (1981), even though *Belton* had been widely interpreted by the lower courts to permit the police to search a car whenever they arrested its recent occupant. Justice Alito, author of the principal dissent, perhaps more accurately described the majority opinion as effectively overruling *Belton.* The ACLU submitted an *amicus* brief arguing that the *Belton* rule was inconsistent with core Fourth Amendment principles restricting the government's authority to engage in warrantless searches.

In *Safford Unified School District v. Redding,* 129 S.Ct. 2633 (June 25, 2009)(8-1), the Court ruled that the strip search of a 13-year-old student violated the Fourth Amendment because school officials had no reason to believe that she was hiding dangerous contraband in her underwear. The school officials who conducted the search were looking for prescription strength ibuprofen based on the uncorroborated tip of another student who was already in trouble for violating school rules. Writing for the Court, Justice Souter explained that the intrusiveness of a strip search requires more justification than the search of a student's backpack or outer clothing. By a 7-2 vote, the Court nevertheless held that the school officials in this case were entitled to qualified immunity on the theory that the Court had not been sufficiently clear in the past in defining the constitutional rules governing strip searches in school. Justices Stevens and Ginsburg dissented on the immunity question. As Justice Stevens wrote: "I have long believed that 'it does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude." *Id.* at 1 (concurring in part and dissenting in part) (internal quotes and citation omitted). The ACLU represented Savana Redding, the student who was strip-searched.

SIXTH AMENDMENT

A. Ineffective Assistance of Counsel

In *Knowles v. Mirzayance,* 129 S.Ct. 1411 (Mar. 24, 2009)(9-0), the Court unanimously ruled in this habeas proceeding that the defendant had not received ineffective assistance of counsel when his trial lawyer successfully urged him to withdraw his plea of not guilty by reason of insanity (an issue on which the defendant would have borne the burden of proof) after the jury had already convicted him of premeditated first degree murder in a bifurcated trial (where the state bore the burden of proof). Writing for the Court, Justice Thomas explained that the *Strickland* standard for measuring ineffective assistance of counsel "does not require counsel to raise every available nonfrivolous defense." *Id.* at 1422. In a section of the opinion joined by a six-person majority, Justice Thomas also wrote that the California courts had not violated clearly established law when they concluded that the Sixth Amendment did not require defense counsel to raise any claim where there was "nothing to lose."

B. Right to Counsel

In *Kansas v. Ventris*, 129 S.Ct. 1841 (April 29, 2009)(7-2). The Court ruled that evidence elicited from a defendant by a jailhouse informant in the absence of counsel is a violation of the Sixth Amendment and therefore cannot be used by the prosecution during its case-in-chief, but it is admissible as impeachment evidence if the defendant testifies at trial. Writing for the majority, Justice Scalia applied a balancing test and concluded that "[o]ur precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle." *Id.* at 1846.

In *Montejo v. Louisiana*, 129 S.Ct. 2079 (May 26, 2009)(5-4), the Court overruled its decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), and held that the Sixth Amendment does not bar the police from questioning a represented defendant without his lawyer present so long as the defendant does not affirmatively request the presence of counsel during the interrogation. Writing for the majority, Justice Scalia treated the Fifth and Sixth Amendment interests involved during custodial interrogation as essentially the same. Thus, he ruled, the Sixth Amendment right to counsel during interrogation can be waived just as *Miranda* rights can be waived under the Fifth Amendment. Conversely, he ruled, both rights are adequately protected so long as the police are required to halt the interrogation once the defendant/suspect requests a lawyer. In

reaching the conclusion, Justice Scalia held that *Jackson* did not properly weigh the costs and benefits of the exclusionary rule it imposed. The ACLU submitted an *amicus* brief urging the Court to reaffirm *Jackson* and stressing the importance of counsel for indigent defendants and juveniles, as well as those who are mentally and developmentally disabled.

C. Right to Jury Trial

In *Oregon v. Ice*, 129 S.Ct. 711 (Jan. 14, 2009)(5-4), the Court held that consecutive sentences can be imposed based on judicial findings of fact that are not submitted to the jury under Oregon law. Writing for the majority, Justice Ginsburg declined to extend the *Apprendi* line of cases to the determination of whether to impose consecutive or concurrent sentences, which she said had historically been left to the judge without any involvement by the jury. Dissenting, Justice Scalia accused the majority of adopting a formalistic distinction that undermines the jury's role as the constitutionally-entrusted factfinder in criminal cases. The issue continues to divide the Court along unusual lines. Justice Scalia's dissent was joined by Chief Justice Roberts, Justice Souter, and Justice Thomas.

D. Speedy Trial

In *Vermont v. Brillon*, 129 S.Ct. 1283 (Mar. 9, 2009)(7-2), the Court held that delays caused by appointed counsel are not "ordinarily" attributable to the State for speedy trial purposes but that "the State may bear responsibility if there is a breakdown in the public defender system." *Id.* at 1292 Focusing on these particular facts, the Court concluded that the most significant delays were caused either by the defendant himself or by his succession of appointed counsel and, therefore, there was no Sixth Amendment violation. The Court did not express any view on what evidence might be necessary to establish a systemic breakdown because there was no such claim in this case. The ACLU submitted an amicus brief arguing that the delays in this case were not solely attributable to defense counsel. For similar reasons, Justices Breyer and Stevens dissented on the grounds that certiorari should have been dismissed as improvidently granted.

E. Confrontation Clause

In *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (June 25, 2009)(5-4), the Court ruled that forensic reports produced in anticipation of criminal prosecution constitute testimonial evidence and are therefore subject to the Confrontation Clause. In this case, the defendant was charged with cocaine distribution and the prosecution relied in part on forensic reports concluding that the material seized from the defendant was, in fact, cocaine. Writing for the majority, Justice Scalia held that "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that the petitioner had a prior opportunity to cross-examine them, [the defendant] was entitled to 'be confronted with' the analysts at trial. *Id.* at 5. In a lengthy dissent, Justice Kennedy accused the majority of "disregard[ing] a century of jurisprudence." *Id.* at 1.

DOUBLE JEOPARDY

In *Yeager v. United States*, 129 S.Ct. 2360 (June 18, 2009)(6-3), the Court ruled that a former Enron executive who had been acquitted on fraud charges by the jury could not be retried for insider trading and money laundering, even though the jury had hung on those counts. Writing for the majority, Justice Stevens explained that since the accusation of fraud presumed insider knowledge, the jury's decision that Yeager was not guilty of fraud precluded the government from pursuing other charges that were likewise based on alleged insider knowledge.

According to Justice Stevens, the jury's inability to reach a verdict on insider trading during the first trial was a "non-event" for double jeopardy purposes.

DEATH PENALTY

In *Bobby v. Bies*, 129 S.Ct. 2145 (June 1, 2009)(9-0), the Court unanimously held that that a reference to the defendant's mental retardation in a 1996 decision by the Ohio Supreme Court upholding his death sentence did not bar the prosecution from relitigating the question in habeas proceedings following *Atkins v. Virginia*, 536 U.S. 604 (2002), which barred the execution of the mentally retarded. Writing for the Court, Justice Ginsburg explained that "the change in the law substantially altered the State's incentive to contest Bies' mental capacity," and that "applying preclusion would not advance the equitable administration of the law." *Id.* at 3.

DUE PROCESS

In *Rivera v. Illinois*, 129 S.Ct. 1446 (Mar. 31, 2009)(9-0), the Court unanimously held that the erroneous denial of a peremptory challenge in state court does not violate the federal Constitution so long as the seated juror is in fact fair and impartial. Absent actual bias, Justice Ginsburg wrote, "[j]ust as state law controls the existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge." *Id.* at 1450.

In *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (June 8, 2009)(5-4), the Court ruled that, as a matter of due process, a state supreme court justice in West Virginia should have recused himself rather than participate in an appeal reversing a $50 million award against a coal company whose chief executive had contributed $3 million to support the judge's election a short time earlier. Writing for the majority, Justice Kennedy described the facts of the case as "exceptional." Stressing the need for what he described as an "objective" standard, Justice Kennedy concluded "that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 14. In his dissent, Chief Justice Roberts accused the majority of inviting a broad new category of constitutional recusal motions that, he declared, will undermine public confidence in the judiciary rather than promote it. He also identified forty questions that he said were raised but unanswered by the limiting principle that the majority announced.

In *District Attorney's Office v. Osborne*, 129 S.Ct. 2308 (June 18, 2009)(5-4), the Court rejected a convicted inmate's claim that he had a due process right to access DNA evidence in the prosecution's possession that could establish the inmate's actual innocence. Writing for the majority, Chief Justice Roberts agreed that someone convicted of a crime that he did not commit had a protected liberty interest under Alaska law. But, he held, the procedures available to pursue a claim of actual innocence under Alaska law were sufficient on their face to satisfy federal due process concerns. He then held that there is no substantive due process right under the federal constitution to DNA evidence because it is not a right that has been traditionally recognized and because elected officials at the state and federal level are actively addressing the issue through legislation. "To suddenly constitutionalize this area," he noted, would short-circuit what looks to be a prompt and considered legislative response." *Id.* at 3. Justice Stevens wrote the principal dissent and disagreed on both counts. First, he disputed whether Alaska's existing procedures were adequate to assure Osborne's access to the DNA evidence he sought in this case. Second, he concluded that the state's unexplained refusal to provide Osborne access to

evidence that could establish his actual innocence was so patently arbitrary that it violated substantive due process. In a separate dissent, Justice Souter concluded that it was unnecessary to reach the substantive due process claim. He nonetheless added: "I certainly agree with the Court that the beginning of wisdom is to go slow." *Id.* at 2. The ACLU submitted an *amicus* brief supporting Osborne and asking the Court to expressly hold what it has so far only assumed (including in this case) – that the continued imprisonment of someone who is actually innocent is unconstitutional.

SECTION 1983

In *Haywood v. Drown*, 129 S.Ct. 2108 (May 26, 2009)(5-4), the Court ruled that a New York State law requiring that all damage claims against correction officers be filed in the state court of claims rather than in the state court of general jurisdiction -- the former has stricter procedural rules and more limited remedies than the latter -- violates the Supremacy Clause as applied to claims brought under 42 U.S.C. § 1983. Writing for the majority, Justice Stevens acknowledged that the Court had previously held that a state could decline to exercise jurisdiction over § 1983 claims based on a "neutral rule" of judicial administration, and that the New York rule at issue was neutral in the sense that it applied to state tort claims as well as § 1983 claims. Nevertheless, he held, New York's rule rested on a view that prisoner lawsuits are largely frivolous that is inconsistent with the operating premise of § 1983, and that the Supremacy Clause prohibits states from enacting even neutral rules of procedure that are based on a policy disagreement with federal law.

Fitzgerald v. Barnstable School Committee, 129 S.Ct. 788 (Jan. 21, 2009)(9-0) – *see* full summary on p.8, *supra*.

STATUTORY CIVIL RIGHTS CLAIMS

A. Title VII

In *Crawford v. Nashville*, 129 S.Ct. 846 (Jan. 26, 2009)(9-0), a unanimous Court held that the anti-retaliation provision of Title VII protects an employee who speaks out about discrimination in response to an employer's internal investigation. Writing for the Court, Justice Souter emphasized that a contrary result would impede internal investigations, which the Court's prior decisions interpreting Title VII were designed to encourage. Justice Alito wrote a concurring opinion to emphasize his understanding that the Court's holding did not necessarily extend to employees who suffered adverse job consequences after expressing their opposition to discriminatory behavior in a less formal setting than an employer's internal investigation – e.g., at the water cooler. The ACLU submitted an *amicus* brief supporting the plaintiff's retaliation claim.

In *Ricci v. DeStefano*, 129 S.Ct. 2658 (June 29, 2009)(5-4), the Court ruled that the City of New Haven violated Title VII when it refused to certify the results of a promotional exam for firefighters based on the racially disparate impact of those results. Writing for the majority, Justice Kennedy defined the Court's task as reconciling Title VII's twin bans on discriminatory impact and discriminatory treatment. In this case, firefighters who passed the test claimed that the City's refusal to certify the results amounted to discriminatory treatment on the basis of race, and the City defended its actions by arguing that certifying the results would have exposed the City to a lawsuit by minority firefighters alleging that the test had a prohibited discriminatory impact under Title VII. Justice Kennedy's solution to that "tension" was to hold, first, that the City's refusal to certify the results was on the basis of race, and second, that this disparate

treatment violated Title VII unless the City could show that it had a "strong basis in evidence" to believe that the test was either not job-related or that that the City could have identified qualified candidates for promotion though alternative procedures that would have had a less discriminatory impact on minorities. He then reviewed the record and concluded that the City had not carried that burden. Justice Ginsburg's dissent disagreed with the majority's conclusion that the City's actions were race-based. In her view, an employer's desire to utilize a fair and non-discriminatory test is racially neutral. She also disagreed with the majority's standard, arguing that the City should prevail if it could show that it had "good cause" to believe that certifying the test results with a racially disparate impact would violate Title VII. Finally, unlike the majority, she contended that the City had met its burden in this case. The ACLU submitted an *amicus* brief supporting the City's position that it had not violated Title VII.

B. Pregnancy Discrimination Act

In *AT&T Corp. v. Hulteen*, 129 S.Ct. 1962 (May 18, 2009)(7-2), the Court ruled that employers who provided less retirement credit for pregnancy leave than for other medical leave when such disparate treatment was legal were not required to adjust their pension plans retroactively when Congress declared that discrimination illegal by enacting the Pregnancy Discrimination Act in 1978.

C. Title IX

In *Fitzgerald v. Barnstable School Committee*, 129 S.Ct. 788 (Jan. 21, 2009)(9-0), the Court unanimously held that the existence of an implied right of action for sexual harassment under Title IX does not preclude a claim against public school officials under 42 U.S.C. § 1983 for intentional sex discrimination. Writing for the Court, Justice Alito explained that the question of whether a statutory remedy precludes a constitutional claim under § 1983 is one of congressional intent, and that the Court had never found such preclusion based on an implied (rather than express) right of action. He also noted significant differences in the scope and coverage of Title IX and the Equal Protection Clause. For example, Title IX applies to all federal grantees while the Equal Protection Clause applies only to state actors. A suit under Title IX must be brought against the school district receiving federal funds while § 1983 reaches individual defendants. And, Title IX contains statutory exemptions – it does not, for instance, apply to the admissions decisions of elementary and secondary schools – that are irrelevant under § 1983 and the Equal Protection Clause. The ACLU submitted an *amicus* brief supporting the plaintiff's right to pursue her equal protection claim under § 1983.

D. Voting Rights Act

In *Bartlett v. Strickland*, 129 S.Ct. 1231 (Mar. 9, 2009)(5-4), the Court held that § 2 of the Voting Rights Act, which guarantees minorities voters an equal opportunity to elect a candidate of their choice and therefore prohibits vote dilution, does not require the State to create a district in which minority voters represent less than 50% of the voting age population, even if the minority population in such a district could elect candidates of their choice by forming coalitions with white crossover voters. In a plurality opinion, Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, stressed that the 50% threshold provided a judicially manageable standard that protected minorities without requiring courts to weigh the interaction of race and politics in each challenged district. Having concluded that crossover districts were not required by § 2, however, he also noted that state legislatures could create crossover districts if they chose to do so. Justices Thomas and Scalia joined in a concurring opinion repeating their

view that § 2 does not authorize a vote dilution claim under any circumstances. Justice Souter, writing the principal dissent, accused the plurality of fundamentally misunderstanding the meaning and purpose of the Voting Rights Act. The ACLU submitted an amicus brief arguing that the State in this case had reasonably concluded that the crossover district it created was required by § 2.

In *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S.Ct. 2504 (June 22, 2009)(8-1), the Court declined to rule on the constitutionality of § 5 of the Voting Rights Act, which requires jurisdictions with a history of voting discrimination to submit any proposed changes in their voting practices or procedures to either the Department of Justice or a federal district court for pre-clearance. Instead, in an opinion by Chief Justice Roberts, the Court ruled that the utility district qualified as a "political subdivision" entitled to seek a bail-out from the preclearance requirements of § 5, contrary to the ruling below. Invoking the doctrine of constitutional avoidance, the Court then held that it was unnecessary to reach the constitutionality of § 5 because the utility district would no longer be subject to § 5 it was successful in its bail-out application. The Court also declined to resolve whether the constitutionality of § 5 should ultimately be judged on whether it rationally advances the goals of the Fifteenth Amendment or whether it is congruent and proportional to documented violations of the Fifteenth Amendment. In a cautionary note, however, the majority opinion did observe in dicta that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test," *id.* at 9, and that "the Act imposes current burdens and must be justified by current needs." *Id.* at 2. The ACLU represented an African-American voter who resides in the district and who intervened in the action to defend the constitutionality of § 5.

E. Age Discrimination in Employment Act

In *Gross v. FBL Financial Services, Inc.* 129 S.Ct. 2343 (June 18, 2009)(5-4), the Court ruled that the plaintiff in an ADEA case involving mixed motive has the burden of proving that age was the "but-for" cause of the challenged employment decision. Under Title VII, once an employee proves that improper considerations were a motivating factor for the employer, the burden shifts to the employer to prove that it would have taken the same action without taking the impermissible factor into account. Writing for the majority, Justice Thomas held that Title VII's evidentiary rule does not apply to the ADEA, even though the relevant statutory language in both statutes is identical. In addition, he added, "it is far from clear that the Court would have the same approach [to Title VII] were it to consider the question today in the first instance." *Id.* at 10.

14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (April 1, 2009)(5-4) – *see* full summary on p.15.

F. Individuals with Disabilities Education Act

In *Forest Grove School District v. T.A.*, 129 S.Ct. 2484 (June 22, 2009)(6-3), the Court held that parents may seek reimbursement for tuition expenses if they place their child in a private school after their public school district improperly concludes that the child is not entitled to special education and thus fails to provide the "free appropriate public education" required by the IDEA. Writing for the majority, Justice Stevens concluded that Congress could not have intended for parents either to accept an inadequate public education or forfeit any possibility of reimbursement if they place their child in an appropriate private school pending final adjudication of their IDEA claim.

F. Equal Educational Opportunities Act

In *Horne v. Flores*, 129 S.Ct. 2579 (June 25, 2009)(5-4), the Court remanded this case for reconsideration of the state's motion under Rule 60(b)(5) for relief from a longstanding injunction requiring the state to provide increased funding for English Language Learners based on an initial finding that the state had failed to take "appropriate action" to overcome language barriers faced by its students as required by the Equal Educational Opportunities Act (EEOA). Writing for the majority, Justice Alito concluded that the lower courts had erred in focusing on whether the state had complied with the earlier funding orders rather than asking whether the state had met its obligation under the EEOA through other means. If so, Justice Alito reasoned in an opinion that was openly skeptical of what he described as "institutional reform litigation," the state was no longer in violation of federal law and continuation of the injunction would no longer be equitable in the terms of Rule 60(b)(5). Justice Breyer's dissent criticized the majority for misstating the law and misstating the facts.

IMMUNITY

In *Pearson v. Callahan*, 129 S.Ct. 808 (Jan. 21, 2009)(9-0), the Court unanimously rejected the two-step process for resolving qualified immunity claims that it had previously embraced in *Saucier v. Katz*, 533 U.S. 194 (2001). In *Saucier,* the Court ruled that district courts should address qualified immunity claims by first deciding whether plaintiff's constitutional rights were violated by the defendant's actions and, if so, then deciding whether those rights were clearly established when the defendant acted. Writing for the Court in *Pearson*, Justice Alito noted that *Saucier*'s "rigid order of battle" had been subject to widespread criticism by lower court judges and Members of the Court. His opinion recited the most familiar of those criticisms, including the assertion that *Saucier* promoted unnecessary constitutional adjudication on records that were often incomplete and led to decisions that were often shielded from review if the defendant prevailed on the second prong of the qualified immunity test. At the same time, he stressed that the Court's decision still left judges with discretion to first resolve the underlying constitutional issue when ruling on qualified immunity claims; it simply no longer mandated that they do so. Finally, applying that new flexibility in this case, Justice Alito held that the defendant police officers were entitled to qualified immunity after they entered a suspect's home based on the consent given to an undercover agent – so called "consent once removed" – because the Fourth Amendment rules governing that situation were not clearly established at the time of the entry. The ACLU submitted an *amicus* brief urging the Court to adhere to the *Saucier* rule in order to prevent what in fact happened here – the perpetuation of constitutional ambiguity that undermines the ability to recover damages in future cases arising from similar facts.

In *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (Jan. 26, 2009)(9-0), the Court unanimously ruled that someone who had been wrongfully convicted for murder and imprisoned for 24 years based on the perjured testimony of a police informant could not recover damages against senior officials in the Los Angeles County District Attorney's Office based on their failure to maintain an office database containing potential impeachment information about informants, and their failure to adequately train and supervise the line prosecutors who worked for them. Justice Breyer's opinion acknowledged that the Court's prior decisions on prosecutorial immunity had drawn a distinction between prosecutorial acts, which are entitled to absolute immunity, and administrative acts, which are entitled only to qualified immunity. He also recognized that the allegations in this case involved managerial duties that could properly be characterized as administrative. He nonetheless concluded that the defendants were entitled to absolute immunity because "[t]he management tasks at issue, insofar as they are relevant, concern how and when to

make impeachment information available at a trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties." *Id.* at 863. The ACLU submitted an *amicus* brief supporting plaintiff's claim for damages and highlighting the systemic problems associated with the use of informants.

MILITARY JUSTICE

In *United States v. Denedo*, 129 S.Ct. 2213 (June 8, 2009)(5-4), the Court ruled that appellate courts in the military justice system have jurisdiction to issue writs of *coram nobis* if necessary to correct fundamental errors of fact or law in their prior judgments.

STANDING

In *Summers v. Earth Island Institute*, 129 S.Ct. 1142 (Mar. 3, 2009)(5-4), the Court held that the Sierra Club lacked standing to challenge U.S. Forest Service regulations about when the proposed sale of government land must be subject to notice and comment after the parties' dispute over the proposed sale of a particular piece of land was settled. The Sierra Club claimed its members were still injured by the challenged regulation despite the settlement because other parcels of land visited by Sierra Club members might be sold without notice and comment while the regulations remained in effect. Writing for the majority, Justice Scalia held that plaintiffs had not demonstrated that specific land that specific Sierra Club members visited would be sold and then added that constitutional standing under Article III requires proof of actual injury and not a mere "statistical probability."

PRE-EMPTION

In *Altria Group, Inc. v. Good*, 129 S.Ct. 538 (Dec. 15, 2008)(5-4), the Court held that the Federal Cigarette Labeling and Advertising Act did not pre-empt a state law claim against Philip Morris under the Maine Unfair Trade Practices Act for fraudulent advertising about the tar and nicotine content of its "light" cigarettes. Writing for the majority, Justice Stevens explained that federal law bars any claim that the federally-mandated cigarette warnings are inadequate to advise consumers about the health risks of smoking but federal law does not bar state law claims based on the theory that cigarette manufacturers have engaged in false or deceptive advertising about their products. More broadly, he wrote that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts 'ordinarily accept the reading that disfavors pre-emption.'" *Id.* at 543 (citation omitted). That is especially true, he added, in areas that have traditionally been subject to state regulation, such as false advertising.

In *Wyeth v. Levine,* 129 S.Ct. 1187 (Mar. 4, 2009)(6-3), the Court ruled that the FDA's approval of a drug warning label does not pre-empt a state tort suit for failure to warn. In this case, a Vermont jury concluded that the label on Phenergen, an anti-nausea drug, did not adequately warn of the risks associated with administering the drug directly into a patient's vein. The patient ultimately developed gangrene and lost her arm. Writing for the majority, Justice Stevens began by noting that the relevant federal statute does not contain an express pre-emption law. He then held that the issue of implied pre-emption is a question of congressional intent and that the best indicia of congressional intent – specifically, the statutory language, history, and context – all indicate that Congress did not intend to pre-empt state tort suits. Finally, he held that the FDA's support for pre-emption in the preamble to a recent regulation was not entitled to *Chevron* deference because (a) the preamble to a regulation does not have the force of law, (b) the language of the preamble was never subject to notice and comment review, and (c) the

agency offered no reasoned explanation for the shift in its historic position. In a separate concurrence, Justice Thomas expressed doubt about the entire notion of implied pre-emption.

HABEAS CORPUS

In *Hedgpeth v. Pulido*, 129 S.Ct. 530 (Dec. 2, 2009)(6-3), all nine Justices agreed that a state court conviction resting on jury instruction that provide the jury with alternative theories of guilt, one of which is wrong, is not subject to *per se* reversal on federal habeas corpus as a structural error but instead requires an inquiry into whether the error had a "substantial and injurious effect." In a *per curiam* opinion, the Court reversed the Ninth Circuit for engaging in the wrong analysis; three members of the Court dissented on the ground that the appeals court had effectively made a finding of "substantial and injurious effect" under a different nomenclature.

In *Jimenez v. Quarterman*, 129 S.Ct. 681 (Jan. 13, 2009)(9-0), the Court held that the one-year statute of limitations for filing a federal habeas petition from a state conviction does not begin to run until the conclusion of direct review, including any time the state courts grant to file an otherwise out-of-time state court appeal.

In *Waddington v. Sarausad*, 129 S.Ct. 823 (Jan. 21, 2009)(6-3), the Court held, in an opinion by Justice Thomas, that the Washington state courts did not unreasonably apply federal law in rejecting a claim that the jury instruction on accomplice liability in this murder case was so confusing that it relieved the prosecution of proving every element of the crime beyond a reasonable doubt, and the Ninth Circuit therefore erred in granting habeas corpus.

Knowles v. Mirzayance, 129 S.Ct. 1411 (Mar. 24, 2009)(9-0) – *see* full summary on p.4, *supra.*

In *Cone v. Bell*, 129 S.Ct. 1769 (April 28, 2009)(7-2), the court held, in a fact-specific decision written by Justice Stevens, that the habeas petition in this capital case was improperly decided based on the mistaken assumption that it was procedurally barred by adequate and independent state law rules, and without fully considering whether the exculpatory evidence withheld by the prosecution in violation of *Brady* was relevant to petitioner's mitigation defense during the sentencing practice of his capital trial.

FEDERAL CRIMINAL LAW

In *United States v. Hayes*, 129 S.Ct. 1079 (Feb. 24, 2009)(7-2), the Court held, in an opinion by Justice Ginsburg, that 18 U.S.C. § 921, which makes it a felony under federal law for someone who has been convicted of a misdemeanor crime of domestic violence to possess a gun, does not require proof that the predicate crime (in this case a West Virginia state court conviction) made the relationship between the defendant and victim an element of the crime. Rather, Justice Ginsburg wrote, it is sufficient for the federal government to prove in the § 921 prosecution that the victim in the earlier case was in fact a spouse even if the defendant was prosecuted, as here, under a general battery statute.

In *Dean v. United States*, 129 S.Ct. 1849 (April 29, 2009)(7-2), the Court ruled that the three year sentencing enhancement that applies if a gun "is discharged" during a violent crime was properly applied to the defendant, who accidentally fired his gun during a bungled bank robbery. Writing for the majority, Chief Justice Roberts concluded that Congress did not impose a separate mens rea requirement for the sentencing enhancement and the rule of lenity does not compel one.

In *Flores-Figueroa v. United States*, 129 S.Ct. 1886 (May 4, 2009)(9-0), the Court unanimously ruled that the federal law penalizing aggravated identity theft, 18 U.S.C. § 1028A(a)(1), requires the government to prove both that the defendant knowingly used false identification and that the defendant knew the false identification belonged to another person (as opposed, for example, to a social security number that the defendant believes was simply fabricated). In recent years, the government has been using the statute aggressively in the immigration context, as this case illustrates. The Court's opinion was written by Justice Breyer.

In *Boyle v. United States*, 129 S.Ct. 2237 (June 8, 2009)(7-2), the Court held that a RICO "enterprise" need not have a structure separate and apart from the pattern of racketeering activity in which it engages. Rather, Justice Alito wrote for the majority, it is sufficient for the government to prove that a group of persons associated together for a common purpose – namely, the commission of crime – and remained together long enough to pursue that purpose.

FEDERAL SENTENCING

In *Chambers v. United States,* 129 S.Ct. 687 (Jan. 13, 2009)(9-0), the Court that the crime of "failure to report" to a penal institution under Illinois law does not qualify as a prior "violent felony" for purposes of sentencing under the federal Armed Career Criminal Act. Justice Breyer wrote the Court's opinion.

In *Spears v. United States*, 129 S.Ct. 840 (Jan. 21, 2009)(6-3), the Court "clarif[ied]" last Term's decision in *Kimbrough v. United States*, 128 S.Ct. 558 (2007), by holding, in a summary reversal of the Eighth Circuit, "that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines." *Id.* at 843.-44

In *Nelson v. United States*, 129 S.Ct. 890 (Jan. 26, 2009)(9-0), the Court made clear, in a summary reversal of the Fourth Circuit, that the rule of reasonableness announced in *Rita v. United States,* 551 U.S. 338 (2007), applies only to appellate review of district court sentences within the Guideline range. It does not apply to the initial sentencing decision. As the Court explained in a *per curiam* opinion, "[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Id.* at 892 (emphasis in original).

FEDERAL CRIMINAL PROCEDURE

In *Puckett v. United States*, 129 S.Ct. 1423 (Mar. 25, 2009)(7-2), the Court held that the government's failure to fulfill the terms of a plea bargain by not making the sentencing recommendation it had promised is not a "structural error" and thus, if not raised by the defendant at sentencing, can be reversed on appeal only if it meets the "plain error" requirement of Rule 52(b), Fed.R.Crim.P. In this case, Justice Scalia wrote, the failure to recommend a reduced sentence, as promised, did not affect substantial rights of the defendant because the district judge's comments at sentencing made clear that he would have rejected the recommendation in any event.

In *Corley v. United States,* 129 S.Ct. 1558 (April 6, 2009)(5-4), the Court held that 18 U.S.C. § 3501, passed by Congress in 1968, limited the *McNabb/Mallory* rule but did not abrogate it, so that any confession obtained more than six hours after a suspect is arrested and before he is presented to a magistrate remains inadmissible regardless of whether or not the confession is otherwise voluntary. As Justice Souter pointed out for the majority, without this

remedy there would be no way to enforce the presentment requirement, which has its roots in the common law, was designed to prevent secret interrogations, and is now codified in Rule 5(a) of the Federal Rules of Criminal Procedure.

FEDERAL CIVIL PROCEDURE

In *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365 (Nov. 12, 2009)(5-4), the Court reversed a preliminary injunction barring the Navy from using certain sonar frequencies during anti-submarine training exercises in Southern California pending an environmental impact statement because of the alleged impact of that sonar on marine mammals. Writing for the majority, Chief Justice Roberts held that a party seeking a preliminary injunction must establish a likelihood of success on the merits and a likelihood, not just a possibility, of irreparable harm. Even when that threshold showing is made, moreover, a court must balance the equities and should not issue a preliminary injunction if the harm to the public interest outweighs the harm to the plaintiff. In this case, he ruled, the lower courts gave insufficient deference to the military's assessment of how the proposed injunction would reduce the effectiveness of their training exercises. He also noted that it would be an abuse of discretion to issue a permanent injunction as broad as the preliminary injunction even if plaintiffs ultimately prevailed on the merits. "An injunction is a matter of equitable discretion," he wrote, "it does not follow from success on the merits as a matter of course." *Id.* at 381.

In *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (May 18, 2009)(5-4), the Court applied the plausibility standard first announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to a *Bivens* claim filed by a Pakistani Muslim who alleged that his arrest, detention, and abuse post-9/11 were the result of racial and religious profiling either authorized or tolerated by the then-Attorney General and FBI Director. Writing for the majority, Justice Kennedy first held that conclusory allegations that merely recite the elements of a cause of action are insufficient to survive a motion to dismiss. He then held that even more detailed factual allegations are insufficient to survive a motion to dismiss unless they are "plausible." While noting, as in *Twombly,* that the plausibility standard is not a probability requirement, Justice Kennedy nonetheless held that allegations that Ashcroft and Mueller had engaged in intentional racial and religious discrimination were implausible because a legitimate and non-discriminatory explanation was "more likely" in the majority's view. Finally, the majority ruled that supervisors are not liable under *Bivens* (or Section 1983) for the discriminatory conduct of their subordinates simply because the supervisors had actual knowledge of the discrimination and failed to correct it. "[P]urpose, rather than knowledge," Justice Kennedy wrote, "is required to impose *Bivens* liability on . . . an official charged with violations arising from his or her superintendent responsibilities." *Id.* at 1949.

In *United States ex rel. Irwin Eisenstein v. City of New York*, 129 S.Ct. 2230 (June 8, 2009)(9-0), the Court unanimously ruled, in an opinion by Justice Thomas, that a private party has 30 days to appeal from an adverse judgment in a *qui tam* lawsuit when the United States declines to intervene, rather than the 60 day time limit that would apply if the United States became a formal party.

Horne v. Flores, 129 S.Ct. 2579 (June 25, 2009)(5-4) – *see* full summary on p.15.

IMMIGRATION

In *Negusie v. Holder*, 129 S.Ct. 1159 (Mar. 3, 2009)(8-1), the Court held that a BIA decision holding that aliens who assisted in persecution are ineligible for asylum, whether or not they acted under coercion or duress, was not entitled to *Chevron* deference because it rested on a misinterpretation of *Fedorenko v. United States*, 449 U.S. 490 (1981), which involved a similar question but a different statutory scheme. The majority opinion, written by Justice Kennedy, therefore remanded the question of statutory construction to the BIA for its independent consideration free from its earlier misunderstanding about the binding effect of *Fedorenko*. Justice Stevens and Breyer agreed that the BIA's initial decision was flawed because of its reliance on *Fedorenko* but, rather than remand, they construed the statutory language themselves and concluded that it does not reach acts of persecution committed under coercion or duress.

In *Nken v. Holder*, 129 S.Ct. 1749 (April 22, 2009)(7-2), the Court held, in an opinion by Chief Justice Roberts, that a stay of removal in immigration proceedings is governed by the traditional standards for granting a stay rather than the more stringent test that Congress imposed for enjoining deportations. The ACLU filed an *amicus* brief urging the position that the Court adopted.

In *Nijhawan v. Holder*, 129 S.Ct. 2294 (June 15, 2009)(9-0), the Court unanimously held that in deciding whether an alien has been found guilty of an aggravated felony, which includes an offense involving fraud and deceit "in which the loss to the victim or victims exceeds $10,000, an immigration court can look to the underlying facts supporting the criminal conviction and is not limited to reviewing the elements of the crime or the actual factual findings of the judge or jury in the criminal proceeding. Justice Breyer wrote the opinion for the Court. The ACLU filed an *amicus* brief supporting the alien and arguing against mini-trials in immigration court that relitigate the facts of a criminal conviction without the evidentiary or procedural protections of a criminal proceeding.

Flores-Figueroa v. United States, 129 S.Ct. 1886 (May 4, 2009)(9-0) – *see* full summary on p.12.

ARBITRATION

In *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (April 1, 2009)(5-4), the Court ruled that a provision in a collective bargaining agreement requiring arbitration of statutory discrimination claims is enforceable. In this case the statutory discrimination claim arose under the ADEA but the same rule would presumably apply to Title VII claims, for example. The majority opinion was written by Justice Thomas; the principal dissent was written by Justice Souter. The disagreement between them centered on the scope of the Court's holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The dissent read *Gardner-Denver* as barring a union from waiving a judicial forum for statutory discrimination claims (as opposed to contract claims). Justice Thomas, however, read *Gardner-Denver* as limited to situations where the waiver of a judicial forum for statutory discrimination claims is not explicitly set forth in the collective bargaining agreement. Here, it was clear that the collective bargaining agreement required the arbitration of age discrimination claims. For Justice Thomas, therefore, the only remaining question was whether the ADEA itself prohibited the union from agreeing to arbitrate age discrimination claims in a collective bargaining agreement. He concluded that the statute said nothing about the issue, and thus the arbitration provision was valid and enforceable.