

ACLU SUMMARY
of the
2010 SUPREME COURT TERM

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Major Civil Liberties Decisions

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FIRST AMENDMENT

A. Freedom of Speech

In *Snyder v. Phelps*, 131 S.Ct. 1207 (Mar. 2, 2011)(8-1), the Court held that a funeral protest by members of the Westboro Baptist Church was protected by the First Amendment, and that a jury verdict in favor of the Snyder family (whose son had died on active duty in Iraq) could not stand. Writing for the majority, Chief Justice Roberts broadly upheld the right of protestors to express their views on matters of public concern in a public forum, no matter how offensive those views may be. At the same time, he stressed that the Court's decision was "narrow" because it was based on the facts in this particular record. In addition, the Court declined to address the question of whether a subsequent Internet posting by the protestors was also constitutionally protected, noting that it had not been properly preserved, and that "an Internet posting may raise distinct issues in this context." *Id.* at 1214, n.1. Justice Alito filed a lone dissent, stating: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case." *Id.* at 1222. The ACLU submitted an amicus brief arguing that the jury verdict should be overturned.

In *Nevada Commission on Ethics v. Carrigan*, 2011 WL 2297793 (June 13, 2011)(9-0), the Court was unanimous in rejecting an overbreadth challenge to a Nevada recusal statute that bars a legislator from voting on or advocating for any matter on which his impartial judgment might reasonably be questioned because of his "commitment in a private capacity to the interests of others." Writing for eight members of the Court, Justice Scalia held that the act of legislative voting is not protected by the First Amendment because a legislator casting a vote is acting on behalf of his constituents and not exercising a personal right. Justice Scalia also traced the long history of recusal provisions as evidence of their presumed constitutionality. Justice Alito agreed that Nevada's law was constitutional but disagreed that it was beyond First Amendment scrutiny. The Court declined to reach two other arguments raised in opposition to the statute – that it abridged freedom of association and that it was unconstitutionally vague – on the theory that the former was not raised in timely fashion and the latter was not reached by the court below.

In *Sorrell v. IMS Health Inc.*, 2011 WL 2472796 (June 23, 2011)(6-3), the Court struck down a Vermont law that prohibited the sale or use of prescriber-identifying information for marketing purposes. Writing for the majority, Justice Kennedy noted that the express purpose and clear effect of the law was to restrict the ability of drug manufacturers to market brand name drugs by targeting doctors based on their past prescription history. The state justified this restriction by arguing that it had a substantial interest in containing health care costs by promoting the use of generic drugs, which otherwise had difficulty competing with the marketing tactics of brand name drug manufacturers. The state also defended the statute as a way of protecting medical privacy, although the case did not involve any patient-identifiable information. The majority concluded, however, that the law had less to do with protecting medical privacy than with discouraging a message that the state disfavored. Characterizing this interest as both content-based and speaker-based, Justice Kennedy held that heightened scrutiny applied, even in a commercial speech context, and that the statute violated the First Amendment. Justice Breyer dissented, joined by Justices Ginsburg and Kagan. He described Vermont's law as a permissible form of economic regulation that should only be subject to rational basis review.

In *Brown v. Entertainment Merchants Ass'n*, 2011 WL 2518809 (June 27, 2011)(7-2), the Court ruled that a California law prohibiting the sale of "violent video games" to minors violated

the First Amendment. Writing for the majority, Justice Scalia stressed that video games are a form of expression protected by the First Amendment, and that minors have their own First Amendment rights as well as adults. Applying strict scrutiny to what he described as a content-based regulation of speech, Justice Scalia then concluded that the state had failed to demonstrate a causal relationship between violent video games and violent behavior by children. He also noted that the industry had adopted its own voluntary rating system to assist parents. Justice Alito, joined by Chief Justice Roberts, concurred in the judgment on the ground that the law was unconstitutionally vague. But, unlike the majority, the concurrence strongly suggested (by describing a series of violent video games in gory detail) that a more carefully crafted statute might survive constitutional scrutiny. Justice Thomas and Justice Breyer wrote separate dissents. The ACLU submitted an *amicus* brief urging the Court to strike down the law.

In *Arizona Free Enterprise v. Bennett*, 2011 WL 2518813 (June 27, 2011)(5-4), the Court struck down a provision of Arizona's campaign finance law that provides publicly financed candidates with matching funds once a privately financed opponent (and any independent expenditures in support of that privately financed candidate) exceed the initial public grant. Heavily relying on the Court's ruling in *Davis v. FEC*, 554 U.S. 724 (2008), the majority held in an opinion by Chief Justice Roberts that matching funds substantially burden the free speech rights of the non-participating candidate, as well as outside groups making independent expenditures. He then ruled that the statute could not be justified by either an asserted interest in leveling the playing field, which the Court has rejected as constitutionally impermissible in prior cases, or as an anti-corruption measure, because it burdened speech that the Court has found non-corrupting (namely, independent expenditures and a candidate's personally funded speech). Justice Kagan wrote a strongly worded dissent, arguing that "the law struck down today . . . fostered both the vigorous competition of ideas and its ultimate object – a government responsive to the will of the people." *Id.* at ____.

B. Establishment Clause

In *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436 (Apr. 4, 2011)(5-4), the Court held that plaintiffs lacked standing as taxpayers to challenge an Arizona law that provides tax credits for contributions to "school tuition organizations" that can and do use the funds to subsidize religious education and, according to the complaint, discriminate on the basis of religion. Writing for the majority, Justice Kennedy characterized *Flast v. Cohen*, 392 U.S. 83 (1968), as a narrow exception to the general rule against taxpayer standing, which only applies if the plaintiff-taxpayers can show that their own tax dollars have been "extracted" to support religion. He then concluded that plaintiffs could not make that showing in this case. In a lengthy and vigorous dissent, Justice Kagan accused the Court of ignoring 40 years of precedent allowing taxpayer suits to challenge "tax expenditures" in the form of tax deductions and tax credits. She also challenged the factual distinction drawn by the majority, noting that "[c]ash grants and targeted tax breaks are means of accomplishing the same government objective – to provide financial support to select individuals or organizations." *Id.* at 1450. Finally, she predicted that the Court's decision would "devastate[] taxpayer standing in Establishment Clause cases." *Id.* at 1462. The ACLU represented plaintiffs in their Establishment Clause challenge.

FOURTH AMENDMENT

In *Kentucky v. King*, 131 S.Ct. 1849 (May 16, 2011)(8-1), the Court held that the police did not violate the Fourth Amendment by entering an apartment without a warrant when they first smelled marijuana and then, after knocking and announcing their presence, heard sounds inside the apartment that led them to believe that the residents might be destroying evidence. Justice Alito concluded for the majority that “the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment,” *id.* at 1862, rejecting various alternative tests that the lower courts have developed to determine when the police themselves have created the exigency. Justice Ginsburg was the sole dissenter. She focused less on whether the police had created the exigency than on whether there was time to obtain a warrant. Because she believed there was in this case – the police could have sought a warrant after smelling marijuana while stationing an officer outside the door – she criticized the majority for “arm[ing] the police with a way routinely to dishonor the Fourth Amendment’s warrant requirement in drug cases.” *Id.* at 1864.

In *al-Kidd v. Ashcroft*, 131 S.Ct. 2074 (May 31, 2011)(8-0), the Court unanimously held that former Attorney General John Ashcroft was protected by qualified immunity in a suit alleging that he instituted a policy, post-9/11, authorizing use of the material witness statute as a form of preventive detention to hold terrorism suspects in the absence of probable cause to believe that they had committed a crime. Writing for a five-person majority, Justice Scalia also held that the subjective intent of government officials utilizing the material witness statute is irrelevant under the Fourth Amendment because such arrests are based on individualized suspicion and approved by a magistrate. Thus, he ruled, al-Kidd’s assertion that the material witness statute was used as a pretext in his case did not state a Fourth Amendment claim. Justice Kennedy provided the fifth vote for that majority opinion. But, he also authored a concurrence for four of the eight participating Justices raising serious questions about whether the material witness statute was lawfully applied in al-Kidd’s case for reasons other than pretext – namely, whether al-Kidd actually presented a flight risk. That issue remains to be decided in further litigation against other defendants. In another concurrence, Justice Ginsburg highlighted the need for judges to closely scrutinize applications for material witness warrants in order to prevent abuse. Al-Kidd was represented by the ACLU.

In *Davis v. United States*, 2011 WL 2369583 (June 16, 2011)(7-2), the Court held that the exclusionary rule does not apply when police officers engage in a search that is constitutionally permissible under binding judicial precedent even if that precedent is later overruled - making the search retroactively unlawful - while the case is still on direct review. Writing for the majority, Justice Alito explained that the exclusionary rule is justified by its deterrent effect, and that there is no deterrent value to be served when the police are obeying the law as it exists at the time of the search. Justice Alito described this situation as no different than past decisions holding that the exclusionary rule does not apply when police officers act on the basis of a warrant later deemed invalid, or on the basis of a statute later declared unconstitutional. Justices Breyer and Ginsburg dissented.

FIFTH AMENDMENT

A. *Miranda*

In *J.D.B. v. North Carolina*, 2011 WL 2369508 (June 16, 2011)(5-4), the Court held that the age of a child subjected to police questioning is relevant to determining whether the child is “in custody” and must therefore receive *Miranda* warnings. Writing for the majority, Justice

Sotomayor noted that the Court had often acknowledged in other settings that children as a class were more subject to influence and pressure than adults and, thus, “children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” *Id.* at _____. Accordingly, she concluded, the police must consider a child’s age in deciding whether to administer *Miranda* warnings when the child’s age is either known to the police or objectively apparent. Justice Alito dissented. The ACLU submitted an *amicus* brief arguing that a child’s age should be considered for *Miranda* purposes.

B. Substantive Due Process

In *NASA v. Nelson*, 131 S.Ct. 746 (Jan. 19, 2011)(8-0), the Court unanimously ruled that NASA did not violate the constitutional rights of contract employees at the Jet Propulsion Laboratory by conducting background checks that included questions about past drug use, and any drug treatment or counseling. Citing *Whalen v. Roe*, 429 U.S. 589 (1977), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), Justice Alito’s opinion for the Court began by “assuming” that the Constitution protects a right to informational privacy. He then went on to hold, however, that the right was not violated in this case because the challenged questions were reasonable in light of the state’s interests as an employer, and because the Privacy Act adequately protects the employee’s information against unwarranted disclosure. Justices Scalia and Thomas wrote separate concurring opinions arguing that there is no constitutional right to informational privacy. The ACLU submitted an *amicus* brief urging the Court to recognize a right to informational privacy and to hold that the inquiry into drug treatment and counseling was both intrusive and inadequately justified on this record.

SIXTH AMENDMENT

A. Ineffective Assistance of Counsel

Harrington v. Richter, 131 S.Ct. 770 (Jan. 19, 2011)(8-0) – see full summary on p. 13.

Premo v. Moore, 131 S.Ct. 733 (Jan. 19, 2011)(8-0) – see full summary on p. 13.

B. Confrontation Clause

In *Michigan v. Bryant*, 131 S.Ct. 1143 (Feb. 28, 2011)(6-2), the Court ruled that statements by a shooting victim to the police identifying the defendant shortly before the victim died were “non-testimonial” and thus could be admitted at trial without violating the Confrontation Clause. Writing for the majority, Justice Sotomayor focused on whether the “primary purpose” of the interrogation was to obtain evidence for trial or to respond to an ongoing emergency. On these facts, she concluded that the police were responding to an ongoing emergency, stressing that the “primary purpose” test is an objective one and that the facts should be examined from the perspective of both the police and the witness. Justice Scalia wrote a strongly worded dissent, disagreeing on both the law and the facts, and accusing the majority of once again blurring the distinction between the Confrontation Clause and hearsay rules. Justice Ginsburg also dissented in a separate opinion.

In *Bullcoming v. New Mexico*, 2011 WL 2472799 (June 23, 2011)(5-4), the Court held that the defendant in a DWI prosecution is entitled under the Confrontation Clause to cross-examine the lab technician who performed the blood alcohol test. Rejecting the state’s argument that the Confrontation Clause is satisfied so long as a lab technician is available to testify at trial, even if it is not the lab technician who performed the test at issue and certified its results, the Court said that “surrogate testimony of that sort does not meet the constitutional requirement.”

Id. at ___. Writing for the majority, Justice Ginsburg relied heavily on the Court's prior *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), which held that a lab test to determine the presence of cocaine was "testimonial" for purposes of the Confrontation Clause. Justice Sotomayor, who provided the critical fifth vote, wrote a concurring opinion suggesting that, while she agreed with the outcome in this case, she may take a narrower view of what constitutes testimonial evidence in some other cases. The Court's views on the Confrontation Clause do not follow its normal ideological lines. Justices Scalia and Thomas joined Justice Ginsburg's majority opinion. Justice Kennedy's dissenting opinion was joined by Justice Breyer, along with Chief Justice Roberts and Justice Alito.

EIGHTH AMENDMENT

In *Brown v. Plata*, 131 S.Ct. 1910 (May 23, 2011)(5-4), the Court upheld a three-judge court order, made pursuant to the Prison Litigation Reform Act (PLRA), which requires California to reduce its prison population from 200% of capacity to 137.5% of capacity within two years, or by approximately 46,000 inmates. Under the PLRA, a prisoner release order can only be issued by a three-judge court upon a showing that (a) there is a continuing constitutional violation, (b) overcrowding is the primary cause, (c) other remedies have proved ineffective, and d) the release order is narrowly tailored to remedy the identified violation. Writing for the majority in two consolidated cases – one challenging medical care and the other challenging mental health care -- Justice Kennedy concluded that each of these findings was amply supported by the extensive record. He also noted that prison officials were given discretion to determine how best to reduce the size of the prison population under the release order, and that the terms of the release order are always subject to modification under traditional equity principles. The ACLU submitted an *amicus* brief supporting the three-judge court order in this case.

DEATH PENALTY

In *Bobby v. Mitts*, 131 S.Ct. 1762 (May 2, 2011)(9-0), the Court summarily reversed the Sixth Circuit's grant of habeas corpus in this capital case, holding that the jury instructions at the penalty phase did not unfairly bias the jury in favor of conviction under *Beck v. Alabama*, 447 U.S. 635 (1980)(requiring that a capital jury be advised of its authority to convict on a lesser-included offense) because the jury had already rendered a guilty verdict. Moreover, the Court noted, the jury's guilty verdict in this case included conviction for attempted murder, so the jury could not possibly have thought that the defendant would go free unless the death sentence was imposed.

ELEVENTH AMENDMENT

In *Virginia Office for Protection and Advocacy v. Stewart*, 131 S.Ct. 1632 (April 19, 2011)(7-2), the Court held that the Eleventh Amendment does not bar a suit against the state by a P&A seeking to enforce its federal right to mental health records. Writing for the majority, Justice Scalia ruled that such suits are permissible under *Ex parte Young* regardless of whether the P&A is a private organization or a state agency, as in Virginia. While acknowledging that *Ex parte Young* had never been applied to a suit by one state agency against another, Justice Scalia concluded that the critical issue under *Ex parte Young* is whether the plaintiff is seeking prospective relief based on a violation of federal law, and not whether the plaintiff is public or private. At the same time, he cabined the reach of the Court's decision by noting that federal law rarely grants one state agency federally enforceable rights against another state agency. Chief Justice Roberts dissented, claiming that a suit by one state agency against another state agency based on federal law was more than novel; in his view, it significantly intruded on state

sovereign interests and thus could not be justified without extending *Ex parte Young*, which he was unwilling to do. However, even the dissent was careful to note that “[n]o one questions the continued vitality or importance of the doctrine announced in *Ex parte Young*. *Id.* at 1650.

In *Sossamon v. Texas*, 131 S.Ct. 1651 (April 20, 2011)(6-2), the Court ruled that the Religious Land Use and Institutionalized Persons Act (RLUIPA) does not authorize damage actions against the state for violations of religious freedom. Writing for the majority, Justice Thomas held that the statutory provision authorizing suits against the state for “appropriate relief” is too ambiguous to satisfy the clear statement rule necessary to infer a waiver of the state’s Eleventh Amendment immunity as a condition of federal funding. In dissent, Justice Sotomayor noted that the inability to sue for damages will leave many prisoners without any meaningful remedy given the ease with which prison officials can moot claims for injunctive relief by transferring the prisoner to another facility. The ACLU submitted an *amicus* brief supporting the prisoner’s right to sue for damages in this case.

EQUAL PROTECTION

In *Flores-Villar v. United States*, 2011 WL 2297764 (June 13, 2011)(4-4), the Court affirmed, by an equally divided vote, a federal law that makes it easier for unmarried U.S. mothers to pass on U.S. citizenship to their children than unmarried U.S. fathers. The law had been challenged on sex discrimination laws. The Court’s one-sentence order leaves the law in place for the moment, but does so without resolving the appropriate level of constitutional scrutiny under these circumstances.

SECTION 1983

In *Los Angeles County v. Humphries*, 131 S.Ct. 447 (Nov. 30, 2010)(8-0) the Court unanimously held that prospective relief under § 1983 requires proof that the municipality has engaged in an unconstitutional policy or custom, just as it does for damages. At the same time, Justice Breyer acknowledged that the Court’s ruling may have “limited practical significance, *id.* at 453, since the question of remedy necessarily follows the question of liability, which has always depended on a finding that the municipality has engaged in a policy or custom.

In *Skinner v. Switzer*, 131 S.Ct. 1289 (Mar. 7, 2011)(6-3), the Court held that a convicted state prisoner may bring a claim under § 1983 seeking access to crime-scene evidence for DNA testing. Writing for the majority, Justice Ginsburg rejected the argument that such claims should be raised in habeas proceedings under *Heck v. Humprhey*, 512 U.S. 477 (1994), noting that mere access to DNA evidence does not undermine the validity of the conviction because the test results may be inculpatory, exculpatory, or inconclusive. She further held that such claims do not amount to appeals from an adverse state court judgment and thus are not barred by the *Rooker/Feldman* doctrine. But, she emphasized, the Court’s ruling addressed only jurisdiction and not the merits of plaintiff’s claim. Under *District Attorney’s Office v. Osborne*, 129 S.Ct. 2308 (2009), substantive due process claims are foreclosed. Accordingly, on remand, the issue in this case is limited to whether the state’s procedures for addressing DNA claims, like Switzer’s, satisfy procedural due process.

In *Connick v. Thompson*, 131 S.Ct. 1350 (Mar. 29, 2011)(5-4), the Court ruled that the Orleans Parish District Attorney’s Office was not liable for an alleged failure to train its prosecutors on their *Brady* obligations in a suit brought by a former inmate who spent 18 years in prison – 14 on death row – for two convictions that were later reversed based on the prosecution’s failure to turn over potentially exculpatory blood evidence. Writing for the

majority, Justice Thomas first noted that the Court has narrowly confined the failure-to-train theory in order to preserve the more general principle that liability under § 1983 cannot be based on respondeat superior. Thus, he explained, the plaintiff's burden in a failure-to-train case is to show that the municipality has been deliberately indifferent. Typically, he said, that requires a showing that the municipality was aware of similar violations in the past and chose to ignore them. On rare occasions, a failure-to-train claim can be based on a single incident in circumstances where constitutional violations are highly predictable in the absence of training. In this case, he concluded, there was no pattern of similar violations. The four other *Brady* violations that plaintiff identified did not involve the suppression of blood evidence or lab reports. Likewise, he held, the need to train prosecutors on their *Brady* obligations was not nearly as obvious as the need to train police about lethal force because lawyers are trained in the law and are presumed to know, or know how to find out, what the law requires. Justice Ginsburg wrote a lengthy dissent, arguing that *Brady* training is obviously necessary and thus there was no need to establish a pattern of similar violations. Moreover, she wrote, “the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements was pervasive in Orleans Parish, [and] that evidence . . . established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983.” *Id.* at 170. The ACLU submitted an *amicus* brief supporting Thompson's § 1983 claim.

QUALIFIED IMMUNITY

Camreta v. Greene, 131 S.Ct. 2020 (May 26, 2011)(7-2) – see summary on p.18.

al-Kidd v. Ashcroft, 131 S.Ct. 2074 (May 31, 2011)(8-0) – see summary on p.6, *supra*.

STATUTORY CIVIL RIGHTS CLAIMS

In *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (Mar. 1, 2011)(8-0), the Court ruled that an employer can be held liable for discrimination if a supervisor's discriminatory animus was a proximate cause of the adverse employment action, even if the ultimate decisionmaker was not motivated by discrimination. Writing for six members of the Court, Justice Scalia's focus on proximate cause led him to reject a bright line rule proposed in a separate concurrence by Justices Alito and Thomas; if adopted, that rule would have absolved the employer whenever the final decisionmaker conducted an independent investigation rather than merely relying on the discriminatory recommendation of the employee's supervisors. Although this case arose under the Uniformed Services Employment and Reemployment Rights Act, and involved discrimination against a military reservist because of his service, Justice Scalia noted that “[t]he statute is very similar to Title VII.” *Id.* at 1191.

A. Title VII

In *Thompson v. North American Stainless, LP*, 131 S.Ct. 863 (Jan. 24, 2011)(8-0), the Court unanimously ruled that an employer may not retaliate against an employee who has filed a discrimination claim under Title VII by firing the employee's fiancée. Writing for the Court, Justice Scalia noted that the anti-retaliation provision of Title VII should be “broadly construed.” While “declin[ing] to identify a fixed class of relationships for which third-party reprisals are unlawful,” *id.* at 868, he had little difficulty concluding that the relationship in this case was statutorily protected. Justice Scalia also held that the fired fiancée had standing to sue as an “aggrieved” party, although he rejected dicta in some earlier cases suggesting that standing under Title VII was co-extensive with constitutional standing under Article III. For example, he wrote, a shareholder who claimed that the value of his stock was diminished because of a

discriminatory dismissal would not have standing to sue under Title VII even though he may have suffered an injury-in-fact for Article III purposes. Rather, he said, the relevant question was whether the party bringing suit fit within the zone of interests Congress intended to protect under the statute. He then concluded that these facts easily met that standard.

Wal-Mart v. Dukes, 2011 WL 2437013 (June 20, 2011)(5-4) – see summary on p.17.

B. Fair Labor Standards Act

In *Kasten v. Saint-Gobain Performance Plastics Group*, 131 S.Ct. 1325 (Mar. 22, 2011)(6-2), the Court held that anti-retaliation provision of the Fair Labor Standards, which prohibits retaliation against an employee who “has filed any complaint” under the Act, extends to oral complaints as well as written complaint when the language of the statute is read “in conjunction with [its] purpose and context.” *Id.* at 1331. The majority opinion was written by Justice Breyer.

C. Religious Land Use and Institutionalized Persons Act

Sossamon v. Texas, 131 S.Ct. 1651 (April 20, 2011)(6-2) – see summary on p.9, *supra*.

FREEDOM OF INFORMATION ACT

In *FCC v. AT&T*, 131 S.Ct. 1177 (Mar. 1, 2011)(8-0), a unanimous Court held that a provision of FOIA exempting law enforcement records from disclosure if the disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” Exemption 7(C), was not intended to protect the privacy rights of corporations. Writing for the Court, Chief Justice Roberts acknowledged that corporations are defined as “persons” under FOIA, but he noted that adjectives, such as “personal,” often have different meanings than their root nouns. Moreover, he explained “[p]ersonal’ in the phrase ‘personal privacy’ conveys more than just ‘of a person.’ It suggests the type of privacy evocative of human concerns – not the sort usually associated with an entity like, say, AT&T.” *Id.* at 1183. The ACLU submitted an *amicus* brief arguing in favor of the statutory interpretation ultimately adopted by the Court.

In *Milner v. Dep’t of Navy*, 131 S.Ct. 1259 (Mar. 7, 2011)(8-1), the Court ruled that FOIA Exemption 2, which covers material “related solely to the internal personnel rules and practices of an agency,” applies to personnel files and the like. Because of this limited reach, Justice Kagan wrote for the majority, Exemption 2 was improperly used in this case to withhold data and maps prepared by the Navy to assess the impact of an explosion at munitions storage facilities in Puget Sound, Washington. Specifically, the Court rejected the so-called High 2 exemption developed by the D.C. Circuit, which allowed the government to withhold material that could lead to the circumvention of law. At the same time, Justice Kagan acknowledged that the material at issue could potentially be withheld under other exemptions, including Exemption 1, which applies to classified material. In a lone dissent, Justice Breyer contended that the majority opinion created an incentive to overclassification, and that overclassification was a greater impediment to government transparency than Exemption 2. The ACLU submitted an *amicus* brief urging the Court to reject the government’s broad reading of Exemption 2.

STATE SECRETS

In *General Dynamics Corp. v. United States*, 131 S.Ct. 1900 (May 23, 2011)(8-0), the Court unanimously ruled that the parties to a government defense contract should be restored to their pre-litigation position when the merits of their contract dispute could not be resolved because of the state secrets privilege. As a result, the contractors did not receive the damages

they were seeking and the government did not receive the reimbursement it was demanding. Writing for the Court, Justice Scalia relied on what he described as “our common-law authority to fashion contractual remedies in Government-contracting disputes.” *Id.* at 1906. Because of that focus, the decision sheds little light on the government’s contentious use of the state secrets doctrine in recent torture and rendition cases.

FALSE CLAIMS ACT

In *Schindler Elevator Corp. v. United States*, 131 S.Ct. 1885 (May 16, 2011)(5-3), the Court held a provision of the False Claims Act, which bars *qui tam* lawsuits “based upon the public disclosure of allegations or transactions” in an administrative report or other enumerated sources, applies to information obtained in the government’s response to a FOIA request. The majority opinion was written by Justice Thomas.

PREEMPTION

In *Bruesewitz v. Wyeth*, 131 S.Ct. 1068 (Feb. 22, 2011)(6-2), the Court ruled that state tort law actions against vaccine manufacturers for defective design are expressly preempted by the National Childhood Vaccine Injury Act of 1986. Justice Scalia’s majority opinion primarily relied on a close analysis of the statutory text. Justice Sotomayor and Ginsburg dissented.

In *Williamson v. Mazda*, 131 S.Ct. 1131 (Feb. 23, 2011)(8-0), the Court held that federal regulation permitting auto manufacturers to install either lap belts or lap-and-shoulder belts on inner, rear seats did not preempt a state tort suit on behalf of a passenger who died in a minivan equipped only with lap belts. Justice Breyer wrote the opinion for the Court. A decade ago, Justice Breyer had also written the Court’s opinion in *Geier v. American Honda Mfg. Co.*, 529 U.S. 861 (2000), which held that similar federal regulations did preempt a state tort suit based on the manufacturers failure to install airbags. Justice Breyer distinguished the two cases by noting that *Geier* involved a significant federal regulatory objective triggering conflict preemption, while this case did not.

In *AT&T v. Concepcion*, 131 S.Ct. 1740 (April 27, 2011)(5-4), the Court reversed a Ninth Circuit holding that an arbitration agreement between AT&T and its consumers that prohibited class-wide arbitration was unconscionable under California law and therefore unenforceable under the Federal Arbitration Act. Writing for the majority, Justice Scalia concluded that the California rule relied on by the Ninth Circuit was pre-empted by the FAA because it conflicted with the congressional goal of encouraging the speedy and efficient resolution of disputes through arbitration. Justice Thomas, who rejects implied preemption, concurred in the judgment because he construed the language of the FAA to expressly preempt the application of California’s unconscionability rule in this context. The dissent, written by Justice Breyer, accused the majority of ignoring the plain language of the FAA, which recognizes that arbitration agreements can be ruled unenforceable on “such grounds as exist at law or in equity for the revocation of any contract.” He also characterized the majority’s ruling as an affront to state’s rights, noting that “federalism is as much of question of deeds as words.”

In *Pliva v. Mensing*, 2011 WL 2472790 (June 23, 2011)(5-4), the Court held that federal law preempted a state tort lawsuit against a generic drug manufacturer for failure to provide adequate warning of potentially serious side effects. Writing for the majority, Justice Thomas concluded that it was impossible for the generic drug manufacturer to comply with state tort law, which requires adequate warnings, and federal law, which requires that the generic drugs have the same label as the comparable brand name drugs. Justice Thomas acknowledged that federal

law allows generic drug manufacturers to seek permission from the FDA to change their label, but ruled that possibility was irrelevant for preemption purposes. By contrast, he noted, manufacturers of brand name drugs can change their warning labels unilaterally under federal law. Thus, the consequence of the majority's ruling is that state tort claims against generic drug manufacturers based on a failure to warn are preempted by federal law, but state tort claims against brand name manufacturers based on precisely the same theory are not. As the dissent notes, generic drugs account for about 75% of all prescription drugs dispensed in the country today.

Chamber of Commerce v. Whiting, 131 S.Ct. 1968 (May 26, 2011)(5-3) – see summary on p.17.

FEDERALISM

In *Bond v. United States*, 2011 WL 2369334 (June 16, 2011)(9-0), the Court unanimously held that a criminal defendant had standing to raise a Tenth Amendment challenge to the federal law she was convicted of violating. Writing for the Court, Justice Kennedy rejected the argument that the Tenth Amendment protects only state's rights, and thus only the states can raise a Tenth Amendment claim. To the contrary, he explained: "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." *Id.* at _____. Proceeding from that premise, the Court ruled that "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id.* at _____. Justice Kennedy's opinion makes clear that the same rule also applies to separation-of-power claims.

HABEAS CORPUS

In *Wilson v. Corcoran*, 131 S.Ct. 13 (Nov. 8, 2010)(9-0), the Court summarily reversed a Seventh Circuit decision granting habeas corpus to a death row inmate on the ground that the sentencing judge violated Indiana law by improperly considering non-statutory aggravating factors. As the Court explained, however, "[f]ederal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law." *Id.* at 13.

In *Harrington v. Richter*, 131 S.Ct. 770 (Jan. 19, 2011)(8-0), the Court unanimously reversed the Ninth Circuit's grant of habeas corpus based on a claim of ineffective assistance of counsel. Writing for the Court, Justice Kennedy first held that the standard of deference required under AEDPA for state court decisions applies even when, as in this case, the state court offers no reasons for its decision. "Where a state court's decision is unaccompanied by an explanation," he wrote, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* at 778. He then held that the Ninth Circuit erred in asking whether the representation was adequate rather than whether "a fair-minded jurist" could have reached the opposite conclusion. Finally, Justice Kennedy concluded that reasonable minds could disagree on this record about whether the defendant had received inadequate representation and, if so, whether there was a "reasonable probability" that the inadequate representation affected the outcome of the trial. Hence, he concluded, the Ninth Circuit should not have issued a writ of habeas corpus overruling the decision of the California state courts.

In *Premo v. Moore*, 131 S.Ct. 733 (Jan. 19, 2011)(8-0), the Court again unanimously reversed the Ninth Circuit in a habeas case, holding that the state courts had not unreasonably

applied established law in rejecting a claim that the defendant had received ineffective assistance of counsel when his lawyer negotiated a plea bargain before moving to suppress the defendant's confession. If anything, Justice Kennedy wrote, courts should be even more hesitant to review counsel's strategic choices with hindsight when those choices occurred during plea bargaining. "The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance." *Id.* at 745.

In *Swarthout v. Cate*, 131 S.Ct. 859 (Jan. 24, 2011)(9-0), the Court summarily reversed the Ninth Circuit's grant of habeas corpus. In a *per curiam* opinion, the Court ruled that the question of whether the state's decision to deny parole was supported by "some evidence," as California law requires, was not subject to review in a federal habeas proceeding. First, the Court noted, errors of state law are not subject to habeas review. Second, the Court held, failure to comply with the "some evidence" rule did not rise to the level of a federal due process violation because due process in this context only requires an opportunity to be heard and a statement of reasons, both of which the prisoner received. "It is no federal concern," the Court wrote, "whether California's 'some evidence' rule of judicial review (a procedure beyond what the Constitution demands) was correctly applied." *Id.* at 863.

In *Walker v. Martin*, 131 S.Ct. 1120 (Feb. 23, 2011)(9-0), the Court unanimously held that enforcement of a California rule barring state habeas petitions that are not filed "as promptly as the circumstances allow" is an "independent and adequate" state ground that forecloses federal habeas relief. In reaching this conclusion, Justice Ginsburg noted that California's rule was well-established and there was no evidence that it had been applied inconsistently or in a manner that discriminated against federal claims. The mere fact that it is discretionary does not render it inadequate, she said, even though most states impose a definite time limit for filing habeas petitions.

In *Wall v. Kholi*, 131 S.Ct. 1278 (Mar. 7, 2011)(9-0), a unanimous Court held that a post-conviction motion to reduce sentence is not part of the direct review process under Rhode Island law. Accordingly, Justice Alito wrote, it qualifies as a collateral state court proceeding under AEDPA that tolls the one-year statute of limitations for filing habeas claims, even though a motion to reduce sentence is not an attack on the lawfulness of the underlying judgment.

In *Felkner v. Jackson*, 131 S.Ct. 1305 (Mar. 21, 2011)(9-0), the Court unanimously ruled, in a *per curiam* opinion, that the Ninth Circuit failed to show the deference required by AEDPA to the state court finding that the prosecution had offered a valid, non-racial explanation for its use of peremptory challenges in response to the defendant's *Batson* motion. Accordingly, the Court summarily reversed the grant of habeas corpus.

In *Cullen v. Pinholster*, 131 S.Ct. 1388 (Apr. 4, 2011), the Court held that AEDPA requires a federal habeas court to determine whether the state court adjudication on the merits is reasonable based on the evidence available to the state court at the time of its decision. Writing for a seven-person majority, Justice Thomas ruled that a federal habeas court can hold a separate evidentiary hearing only on claims that the state court did not adjudicate. (Justices Sotomayor and Alito would have applied a due diligence standard instead). On the merits, Justice Thomas ruled for a five-person majority that *Pinholster* had not received ineffective assistance of counsel at trial and, moreover, that the state court decision rejecting that claim was not unreasonable under AEDPA. The ACLU submitted an *amicus* brief arguing that federal factfinding is appropriate under AEDPA if the legal claims were presented in state court and the factual claims have not been waived.

FEDERAL CRIMINAL LAW

In *Abbott v. United States*, 131 S.Ct. 18 (Nov. 15, 2010)(9-0), the Court unanimously ruled that the five-year mandatory minimum imposed by Congress as a consecutive sentence for carrying or using a firearm during a crime of violence or drug trafficking crime, 18 U.S.C. § 924(c)(1), applies unless there is a higher mandatory minimum applicable for the gun offense and is not overridden, as defendants urged, if there is a higher mandatory minimum for the predicate crime.

In *Pepper v. United States*, 131 S.Ct. 1229 (Mar. 2, 2011)(7-1), the Court ruled that “when a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant’s postsentencing rehabilitation, and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines range.” *Id.* at 1236. Writing for the majority, Justice Sotomayor stressed what she described as the traditional principle that punishment should fit the offender as well as the crime.

In *Fowler v. United States*, 131 S.Ct. 2045 (May 26, 2011)(7-2), the Court considered a section of the federal witness tampering statute, 18 U.S.C. § 1512(a)(1)(C), that makes it a crime to kill another person with the intent to prevent that person from communicating with a federal officer about a federal crime. Writing for the majority, Justice Breyer construed this language to mean that the government must prove a “reasonable likelihood” that the victim would have communicated with a federal officer about a federal crime. To satisfy this standard, Justice Breyer explained, the government need not show that the communication was more likely than not to occur; the government must, however, show that the communication was “more than [a] remote, outlandish, or simply hypothetical” possibility. *Id.* at 2052. The case was then remanded to the lower courts to determine whether the reasonable likelihood standard had been met on these facts.

In *United States v. Tinklenberg*, 131 S.Ct. 2007 (May 26, 2011)(8-0), the Court ruled that the Speedy Trial Act, which normally requires trial to begin no more than 70 days after arraignment, is tolled by the filing of pretrial motions regardless of whether the motions actually cause the trial to be delayed. Justice Breyer wrote the principal opinion.

In *McNeill v. United States*, 2011 WL 2175212 (June 6, 2011)(9-0), the Court unanimously held, in an opinion by Justice Thomas, that the determination whether a prior state conviction qualifies as a serious drug offense for purposes of the federal Armed Career Criminal Act, and thus is sufficient to trigger a federal mandatory minimum, turns on whether the maximum term of imprisonment for the state offense was 10 years or more when the defendant was convicted, even if the maximum term was subsequently reduced by later changes in the law.

In *DePierre v. United States*, 2011 WL 2224426 (June 9, 2011)(9-0), the Court unanimously held that the mandatory minimum sentences imposed by federal law for crimes involving “cocaine base,” which are significantly longer than the sentences imposed for similar amounts of powder cocaine, apply to any form of “chemically base” cocaine and are not limited to one particular form, namely crack cocaine. The Court’s opinion, written by Justice Sotomayor, relied heavily on the plain language of the statute.

In *Sykes v. United States*, 2011 WL 2224437 (June 9, 2011)(6-3), the Court ruled that the crime of vehicular flight under Indiana law qualifies as a violent felony under federal law, thereby increasing the maximum sentence under the Armed Career Criminal Act (ACCA), because it “presents a serious potential risk of physical injury to another,” 18 U.S.C. §

924(e)(2)(B)(ii). Justice Kennedy wrote the majority decision. Justice Kagan dissented, joined by Justice Ginsburg, on the ground that the majority had misconstrued the relevant Indiana law. Justice Scalia dissented separately on the ground that the relevant provision of ACCA is unconstitutionally vague. More generally, he accused Congress of routinely “failing to grapple with the nitty-gritty,” adding that [i]n the field of criminal law, at least, its time to call a halt.” *Id.* at ____.

In *Tapia v. United States*, 2011 WL 2369395 (June 16, 2011)(9-0), the Court ruled unanimously that a federal district judge may not lengthen a defendant’s sentence in order to provide a better opportunity for rehabilitation in prison. The Court’s decision was written by Justice Kagan.

In *Freeman v. United States*, 2011 WL 2472797 (June 23, 2011)(5-4), the Court held that the defendant in this case was eligible for a sentence reduction based on a retroactive amendment to the Sentencing Guidelines. Writing for a four-person plurality, Justice Breyer concluded that eligibility for a sentence reduction under these circumstances does not depend on whether the defendant was sentenced after trial or pursuant to a plea agreement. Justice Sotomayor’s concurring and dispositive opinion took a different approach. In her view, a defendant who pleads is normally bound by the terms of his agreement unless, as here, the sentencing agreement expressly refers to the Sentencing Guidelines.

FEDERAL CIVIL PROCEDURE

In *Ortiz v. Jordan*, 131 S.Ct. 884 (Jan. 24, 2011)(9-0), the Court unanimously held that the denial of a motion for summary judgment cannot be appealed after trial. “Once the case proceeds to trial,” Justice Ginsburg wrote, “the full record developed in court supersedes the record existing at the time of the summary judgment motion,” *id.* at 889. That rule applies even in the context of qualified immunity. Thus, a defendant who wishes to challenge the denial of qualified immunity after trial must move for judgment as a matter of law under Rule 50(a) or Rule 50(b). Absent a motion under Rule 50, the sufficiency of the evidence is not reviewable on appeal.

In *Henderson v. Shinseki*, 131 S.Ct. 1197 (Mar. 1, 2011)(8-0), a unanimous Court ruled that the 120-day period for appealing an adverse decision from the Board of Veterans’ Appeals (an administrative agency) to the United States Court of Appeals for Veterans’ Claims (an Article I court) is a claim-processing rule subject to equitable tolling rather than a jurisdictional rule. Writing for the Court, Justice Alito focused on the language used by Congress in adopting the 120-day rule, and distinguished it from the time periods that apply to appeals within the Article III system – from a district court to a circuit court to the Supreme Court – which have been deemed jurisdictional.

In *Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309 (Mar. 22, 2011)(9-0), the Court unanimously held that plaintiffs had stated a claim for securities fraud under § 10(b) of the Securities Exchange Act. In reaching this conclusion, Justice Sotomayor found the allegations of the complaint “plausible” under both *Twombly* and *Iqbal*. Specifically, she found that plaintiffs’ “allegations suffice to ‘raise a reasonable expectation that discovery will reveal evidence’ satisfying the materiality requirement [citing *Twombly*], and to ‘allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged [citing *Iqbal*]’.” *Id.* at 1323.

In *Smith v. Bayer Corp.*, 2011 WL 2369357 (June 16, 2011)(9-0), a unanimous Court ruled that a federal district court that denied class certification in a products liability case

exceeded its authority by enjoining a state court from considering class certification in a parallel litigation brought by a different plaintiff. Writing for the Court, Justice Kagan concluded that the “relitigation exception” to the Anti-Injunction Act, 28 U.S.C. § 2283, did not apply for two reasons. First, the state courts in West Virginia have interpreted their class certification rules differently than federal class certification rules (although the language is identical), and thus the issues before the state and federal courts in this case were not precisely the same. Second, the plaintiff in the state court action was not a party to the federal court action nor subject to nonparty preclusion simply by being included as a putative member of non-certified federal class.

In *Wal-Mart v. Dukes*, 2011 WL 2437013 (June 20, 2011)(5-4), the Court ruled that the lower courts had erroneously certified a class of 1.5 million female employees in this sex discrimination lawsuit against Wal-Mart. In support of their class certification motion, plaintiffs established that Wal-Mart managers are given broad discretion to make hiring and promotion decisions as a matter of company policy. They also established that this discretion has led to statistically significant disparities in the treatment of men and women at Wal-Mart. Justice Scalia nevertheless concluded for the majority that the existence of a pattern and practice is insufficient in this case to establish common questions of fact or law, as required by Rule 23, because it does not establish that individual managers exercised their discretion in a discriminatory fashion. Justice Ginsburg (joined by Justices Breyer, Sotomayor and Kagan) dissented from that portion of the Court’s holding noting, among other things, that it is inconsistent with the approach taken in prior Court decisions. All nine Justices agreed, however, that the claim for backpay, as opposed to injunctive and declaratory relief, should have been certified, if at all, under Rule 23(b)(3) rather than Rule 23(b)(2). The ACLU submitted an *amicus* brief urging the Court to uphold the class certification.

IMMIGRATION

In *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (May 26, 2011)(5-3), the Court upheld Arizona’s employer sanction law, which had been challenged on preemption grounds by immigrants’ rights groups, civil rights groups, business groups, and the Obama administration. Under Arizona law, a company that knowingly hires undocumented workers can lose its license to do business in the state. Under federal law, an employer who knowingly hires undocumented workers is subject to a series of escalating fines that are designed to deter immigration violations without encouraging employment discrimination. Federal law also expressly preempts any state or local law “imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.” Writing for the majority, Chief Justice Roberts concluded that the Arizona statute qualified as a licensing law and thus was not expressly preempted, even though its penalties were far more severe than those allowed under federal law. He also ruled that Arizona could require its employers to participate in the federal government’s E-verify program, even though the federal government was barred from requiring mandatory participation by the express terms of the statute. Finally, he held that neither challenged provision of the Arizona law was impliedly preempted because neither undermined the purposes of the federal law. Justice Breyer summarized his dissent by asking: “Why would Congress, after deliberately limiting ordinary penalties to the range of a few thousand dollars per illegal worker, want to permit far more drastic state penalties that would directly and mandatorily destroy entire businesses?” *Id.* at 1992. The ACLU represented a group of plaintiffs in one of the consolidated challenges to the Arizona law.

Flores-Villar v. United States, 2011 WL 2297764 (June 13, 2011)(4-4) – see summary on p.9.

JURISDICTION

In *Camreta v. Greene*, 131 S.Ct. 2020 (May 26, 2011)(7-2), the Court held that it has jurisdiction under 28 U.S.C. § 1254(1) to rule on a petition for certiorari filed by government officials who prevailed below on qualified immunity but nonetheless object to the lower court's finding that the plaintiff's constitutional rights were violated. Writing for Court, Justice Kagan also held that Article III is not an impediment to recognizing jurisdiction in these circumstances as long as both parties continue to have a stake in the outcome. Here, she concluded, the government social worker who filed the petition had a continuing stake in overturning the Ninth Circuit's decision that social workers must obtain a search warrant before interviewing children in school as part of a child abuse investigation because he remained employed as a social worker by the County. On the other hand, she wrote, the plaintiff no longer has a continuing interest in the dispute because she did not seek review of the qualified immunity ruling and has since moved to North Carolina so she is no longer be affected by the Ninth Circuit's ruling. Declaring the case moot, the Court then vacated that part of the Ninth Circuit decision that addressed the Fourth Amendment question. Justice Kennedy dissented, joined by Justice Thomas. He argued that the Court's qualified immunity law had led it to distort its jurisdictional rules, and strongly suggested that lower courts should be barred from addressing the constitutional question when qualified immunity attaches unless the plaintiff satisfies the standing requirements for declaratory or injunctive relief. Justice Scalia joined the majority opinion based on existing precedent but noted that he would be willing to consider Justice Kennedy's concerns in an appropriate case.

In *J.McIntyre Machinery, Ltd. V. Nicastro*, 2011 WL 2518811 (June 27, 2011)(6-3), a majority of the Court held that due process barred New Jersey from exercising personal jurisdiction over a British manufacturer in a tort action based on the theory that the defendant's products had entered the "stream of commerce" and it was therefore foreseeable that one or more might wind up in New Jersey, where plaintiff was injured. Writing for a four-person plurality, Justice Kennedy rejected the "stream of commerce" theory and held that personal jurisdiction was improper absent some evidence that the defendant had purposefully sought to do business in the forum state. The controlling concurrence, written by Justice Breyer and joined by Justice Alito, agreed that personal jurisdiction had not been established on these facts but did not endorse the plurality's proposed test based on its concern about unintended consequences. In Justice Breyer's words, "what do [the plurality's rules] mean when a company targets the world by selling products from its Web site?" *Id.* at ____.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 2011 WL 2518815 (June 27, 2011)(9-0), the Court unanimously held that the "stream of commerce" theory was not enough to give North Carolina courts general personal jurisdiction over foreign subsidiaries of a U.S. corporation sued for an accident that occurred abroad. The opinion was written by Justice Ginsburg.

ATTORNEY'S FEES

In *Fox v. Vice*, 2011 WL 2175211 (June 6, 2011)(9-0), the Court unanimously held that a defendant in a § 1983 action can recover reasonable attorney's fees for the time expended on frivolous claims "but only for costs that the defendant would not have incurred but for the frivolous claims." *Id.* at _____. Generally, this allocation can be made simply by determining

whether defense counsel would have performed the same task in defending against any non-frivolous claims, but not only. For example, as Justice Kagan pointed out in her opinion for the Court, a defendant might hire a more expensive lawyer to defend against a frivolous claim involving a specialized area of the law, which would then drive up the costs of the entire defense. Justice Kagan also stressed that the “essential goal in shifting fees (to either party) is to do rough justice . . . [s]o trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney’s time.” *Id.* at _____. The ACLU submitted an *amicus* brief advocating the standard that the Court ultimately adopted.