

ACLU SUMMARY  
of the  
2015 SUPREME COURT TERM

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**Major Civil Liberties Decisions**

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## FREE SPEECH

In *Friedrichs v. California Teachers Assoc.*, 136 S.Ct. 1083 (Mar. 29, 2016)(4-4), an equally divided Court affirmed without opinion the judgment below, which had relied on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to uphold so-called agency fees paid by non-union members to support the cost of negotiating and implementing the collective bargaining agreement. It had been widely anticipated that *Abood* might be overruled when certiorari was initially granted.

In *Heffernan v. City of Paterson*, 136 S.Ct. 1412 (April 26, 2013)(6-2), the Court reinstated the First Amendment complaint of a New Jersey police officer who alleged that he had been demoted by superiors who believed he was supporting the mayor's political opponent in an upcoming election when, in fact, he was merely collecting a yard sign for his mother. Writing for the majority, Justice Breyer concluded that "the government's reasoning for demoting [the employee] is what counts . . . even if, as here, the employer makes a factual mistake about the employee's behavior." *Id.* at 1418.

## SECOND AMENDMENT

In *Caetano v. Massachusetts*, 136 S.Ct. 1027 (Mar. 21, 2016)(9-0), the Court summarily ruled that the Second Amendment prohibits a state from categorically banning stun guns. The Massachusetts Supreme Judicial Court had held that the Second Amendment did not cover stun guns because they were not in use when the Second Amendment was adopted. That view was quickly rejected by the Court as inconsistent with *Heller* in a brief *per curiam* opinion. Justice Thomas, joined by Justice Alito, wrote a longer concurring opinion emphasizing that the stun gun in this case had been used by the defendant to defend herself against an abusive ex-boyfriend and was thus preferable to the use of a handgun, which would have been permitted under state law.

## FOURTH AMENDMENT

In *Utah v. Strieff*, 136 S.Ct. 2056 (June 20, 2016)(5-3), the Court held that the exclusionary rule did not bar the use of evidence discovered when the defendant was searched incident to an arrest based on an outstanding warrant, even though the initial stop that led to the warrant check was conceded to be unconstitutional. Writing for the majority, Justice Thomas explained this conclusion by characterizing the initial stop as the product of good faith mistakes by the police officer that were not flagrant enough to justify the social cost of applying the exclusionary rule. In a portion of her dissent that was not joined by the other two dissenters, Justice Sotomayor emphasized the indignity of being stopped by the police, the consequences that followed, and the fact "that people of color are disproportionate victims of this type of scrutiny." *Id.* at \_\_\_\_\_. The ACLU submitted an amicus brief arguing that the exclusionary rule should apply under these circumstances.

In *Birchfield v. North Dakota*, 136 S.Ct. 2160 (June 23, 2016), the Court ruled that a state may criminally penalize the refusal to submit to a breathalyzer test but not the refusal to submit to a blood draw following a drunk driving arrest. Writing for a 6-2 majority, Justice Alito concluded that a warrantless breathalyzer test is categorically justified as a search incident to an arrest because it is minimally intrusive. However, a 7-1 majority held that blood draws are significantly more intrusive and thus do not fall within a categorical exception to the Fourth Amendment, citing *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). The ACLU submitted an

amicus brief arguing that the state could not constitutionally criminalize the refusal to submit to either a blood draw or a breathalyzer test.

## **FIFTH AMENDMENT**

### **A. Double Jeopardy**

In *Commonwealth of Puerto Rico v. Sanchez-Valle*, 136 S.Ct. 1863 (June 9, 2016) (6-2), the Court ruled that the Double Jeopardy Clause bars the federal government and Puerto Rico from bringing separate prosecutions arising out of the same facts. Writing for the majority, Justice Kagan first explained that the Double Jeopardy Clause does not apply to prosecutions brought by separate sovereigns under longstanding law. She then held, however, that the dual sovereignty inquiry under the Double Jeopardy Clause is a narrow one than turns on the original source of authority to prosecute crime rather than sovereignty as it is more commonly understood in most contexts. Applying that rule here, she concluded that the authority Puerto Rico now has to enact criminal law and prosecute its violation originally came from Congress – in contrast to the states and Indian tribes – and thus the Double Jeopardy Clause does not allow both Puerto Rico and the federal government to prosecute the defendants for the same illegal gun sale.

## **SIXTH AMENDMENT**

### **A. Right to Counsel**

In *Luis v. United States*, 136 S.Ct. 1083 (Mar. 30, 2016)(5-3), the Court held that the Sixth Amendment does not allow the government to seize the untainted assets of a criminal defendant prior to trial if those assets are needed by the defendant to hire a lawyer. Writing for a four-person plurality, Justice Breyer balanced the government’s interest in preserving the assets for possible restitution after a conviction and the defendant’s fundamental right to counsel of choice. Justice Thomas, who provided the crucial fifth vote, rejected the plurality’s balancing approach and relied instead on his original understanding of the Sixth Amendment. Justice Kennedy, joined by Justice Alito, dissented on the merits. Justice Kagan also dissented based on existing precedent but made clear that she might be prepared to reconsider that precedent in another case.

In *United States v. Bryant*, 136 S.Ct. 1954 (June 13, 2016)(8-0), a unanimous Court ruled that an uncounseled tribal court conviction for domestic abuse that resulted in a prison sentence – and thus would have violated the Sixth Amendment in state or federal court – could nonetheless be used as a predicate in a subsequent federal prosecution for domestic abuse as a repeat offender. Writing for the majority, Justice Ginsburg began by recounting “the high incidence of domestic violence against Native American women,” *id.* at \_\_\_\_\_. She then noted that the Sixth Amendment does not apply in tribal courts and the underlying conviction was therefore valid. Absent any other reason to question the reliability of the tribal court proceedings, she wrote, there is no impediment to using the tribal court conviction as a trigger for a repeat offender prosecution in federal court where the defendant was represented by appointed counsel as required by the Sixth Amendment.

### **B. Ineffective Assistance of Counsel**

In *Maryland v. Kulbicki*, 136 S.Ct. 2 (Oct. 5, 2015)(9-0), the Court summarily reversed a state post-conviction ruling in the defendant’s favor, holding that defense counsel’s failure at trial to seriously probe a method of forensic analysis that was widely accepted at the time,

although later discredited, did not amount to ineffective assistance of counsel. Quoting *Strickland*, the Court held that “the reasonableness of counsel’s challenged conduct . . . [must] be viewed as of the time of counsel’s conduct.” *Id.* at 4.

### **C. Speedy Trial**

In *Betterman v. Montana*, 136 S.Ct. 1609 (May 19, 2016)(8-0), the Court unanimously held that the Speedy Trial Clause does not apply to sentencing proceedings. However, Justice Ginsburg’s opinion for the Court contained two important caveats. First, it reserved opinion on whether the Speedy Trial Clause might apply to the sentencing phase of a capital trial where the jury is engaged in a fact-finding process. Similarly, it reserved opinion on whether undue delays in sentencing might be subject to challenge under the Due Process Clause, a claim that the defendant did not make in this case.

## **EIGHTH AMENDMENT**

In *Montgomery v. Louisiana*, 136 S.Ct. 718 (Jan. 25, 2016)(6-3), the Court gave retroactive effect to its decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), prohibiting mandatory sentences of life without parole for juvenile offenders convicted of homicide. Writing for the majority, Justice Kennedy first held that new substantive rules apply retroactively to all cases, whether they are on direct appeal, in state post-conviction proceedings, or in federal habeas. “There is no grandfather clause that permits States to enforce punishments that the Constitution forbids.” *Id.* at 731. The Court then held that *Miller* had announced a new substantive rule by making clear that mandatory sentences of life without parole for juveniles do not serve any of the traditional goals of punishment and are therefore constitutionally disproportionate in all but the rarest of cases. From that premise, the majority reasoned that *Miller* effectively barred a category of punishment for a class of defendants, which is one of the definitions of a substantive rule. Finally, Justice Kennedy wrote that states need not resentence every affected defendant to comply with the ruling. They can, instead, simply make the possibility of parole available to every defendant who received an unconstitutional sentence of mandatory life without parole. The ACLU submitted an amicus brief urging the Court to apply *Miller* retroactively.

## **DEATH PENALTY**

In *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016)(8-1), the Court struck down Florida’s capital sentencing scheme as a violation of the Sixth Amendment right to a jury trial. Reiterating its holding in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court ruled that only the jury can find the existence of aggravating factors that qualify a defendant for the death penalty. Florida assigned that responsibility to the judge. Writing for the majority, Justice Sotomayor expressly overruled two prior decisions that had upheld Florida’s capital sentencing scheme prior to *Ring*. The ACLU submitted an amicus brief in support of the defendant.

In *Kansas v. Carr*, 136 S.Ct. 633 (Jan. 20, 2016)(8-1), the Court rejected the claim that the Constitution requires an instruction to the jury during the sentencing phase of a capital case making clear that the defendant is not required to prove the existence of any mitigating factors beyond a reasonable doubt. Writing for the majority, Justice Scalia distinguished mitigating factors from aggravating factors (which must be proven beyond a reasonable doubt) by questioning whether it is even possible to apply a standard of proof to the mitigation inquiry. “Whether mitigation exists,” he wrote, “is largely a judgment call . . . .” *Id.* at 642. The Court



also held that the decision to hold a single sentencing hearing for the two defendants in this case did not raise any Eighth Amendment issues and did not violate fundamental fairness given the evidence against them and “the almost inconceivable cruelty and depravity of the crime.” *Id.* at 646.

In *Wearry v. Cain*, 136 S.Ct. 1002 (Mar. 7, 2016)(6-2), the Court ruled that the defendant in this capital case was entitled to state post-conviction relief based on the prosecution’s failure to disclose exculpatory evidence. In a *per curiam* opinion, the Court concluded that the withheld evidence, judged cumulatively rather than piecemeal, was sufficient to “undermine confidence” in the verdict. The dissent, written by Justice Alito and joined by Justice Thomas, faulted the majority for overstating the significance of the withheld evidence. It also criticized the majority for deciding a fact-bound question summarily without full briefing or argument.

In *Lynch v. Arizona*, 136 S.Ct. 1818 (May 31, 2016)(6-2), the Court summarily rejected two reasons offered by the Arizona Supreme Court for not following the rule announced in *Simmons v. South Carolina*, 512 U.S. 154 (1994), which requires that the jury be informed if the defendant is ineligible for parole in any capital case where the defendant’s future dangerousness has been put in issue during the sentencing phase. Citing *Simmons*, the Court’s *per curiam* opinion held that neither the possibility of executive clemency nor a future legislative change to the parole system justifies a failure to provide the mandated instruction. Justices Thomas and Alito dissented.

In *Tucker v. Louisiana*, 136 S.Ct. 1801 (May 31, 2016), Justice Breyer (joined by Justice Ginsburg) dissented from the denial of certiorari with a brief written opinion that renewed his call for the Court to consider the constitutionality of the death penalty. In this case, a Louisiana death row inmate noted that a single Louisiana parish accounted for 50% of all death penalty sentences in the state, even though it was the site of only 5% of the homicides. “Given these facts,” Justice Breyer wrote, “Tucker may well have received the death penalty not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography.” *Id.* at 1801-2.

## **REPRODUCTIVE RIGHTS**

In *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292 (June 26, 2016)(5-3), the Court struck down two Texas abortion restrictions. The first required all doctors performing abortions to have admitting privileges within 30 miles of the abortion clinic. The second required all abortion clinics to meet the standards of an ambulatory surgical care center. Writing for a majority that included Justice Kennedy, Justice Breyer began by holding that the plaintiffs’ claims were not barred by res judicata even though an initial pre-enforcement challenge to the restrictions had been unsuccessful. On the merits, he then concluded that both restrictions placed an undue burden on the right to obtain an abortion because both imposed substantial obstacles on the abortion right without any countervailing medical benefit. In conducting this balancing, Justice Breyer emphasized that courts should not blindly defer to legislative judgments in this area, and that more stringent judicial review is appropriate than when reviewing economic regulation because of “the constitutionally protected personal liberty interest” at stake. The ACLU submitted an amicus brief urging the Court to strike down the challenged restrictions.

## DUE PROCESS

In *Williams v. Pennsylvania*, 136 S.Ct. 1899 (June 9, 2016)(5-3), the Court held that the Due Process Clause requires a judge to recuse himself whenever “the likelihood of bias on the part of the judge is too high to be constitutionally tolerable,” citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009), and that threshold is crossed “whenever a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” *Id.* at \_\_\_\_\_. Here, Justice Kennedy wrote for the majority, those due process principles were violated when the Chief Justice of the Pennsylvania Supreme Court refused to recuse himself from a habeas appeal brought by a death row prisoner despite the fact that the Chief Justice had personally approved the decision to seek the death penalty in his former role as the District Attorney of Philadelphia. Justice Kennedy also concluded that the risk of bias under these circumstances is a structural error that cannot be deemed harmless even though the decision of the Pennsylvania Supreme Court was unanimous. The case was therefore remanded to the Pennsylvania Supreme Court for reconsideration without the participation of the former Chief Justice, who has since retired in any event. The ACLU submitted an amicus brief urging the Court to find a due process violation and stressing the heightened need for reliable judicial decision-making in capital cases.

## EQUAL PROTECTION

In *Foster v. Chatman*, 136 S.Ct. 1737 (May 23, 2016)(7-1), the Court held that prosecutors in this capital case had violated the anti-discrimination principle of *Batson v. Kentucky*, 476 U.S. 79 (1986), by using at least two peremptory challenges to disqualify prospective Black jurors on the basis of race, and that the state court ruling to the contrary was clearly erroneous. Writing for the majority, Chief Justice Roberts said: “Two peremptory strikes on the basis of race are two more than the Constitution allows.” *Id.* at 1755.

In *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (June 23, 2016)(5-3), the Court rejected an equal protection challenge to the admissions plan at the University of Texas (UT) in this long-running battle over affirmative action. Writing for the majority, Justice Kennedy first held that universities have a compelling educational interest in a diverse student body and that their conception of diversity is entitled to deference, reaffirming the ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003). He then held that UT’s use of race as “a factor of a factor of a factor” in a holistic review used to admit 25% of the incoming class (the other 75% is reserved under Texas law for the top 10% of each high school graduating class) satisfies strict scrutiny. In a cautionary note, however, Justice Kennedy ended his opinion by noting UT’s “ongoing obligation to engage in constant deliberation and continued reflection regarding its admission policies.” *Id.* at \_\_\_\_\_. The ACLU submitted an amicus brief supporting UT’s admission’s plan.

## FULL FAITH AND CREDIT

In *V.L v. E.L.*, 136 S.Ct. 1017 (Mar. 7, 2016)(8-0), the Court unanimously ruled that the Alabama courts violated the Full Faith and Credit Clause by refusing to recognize a second-parent adoption decree entered in Georgia. The case involves a lesbian couple that subsequently separated and became embroiled in a battle over visitation. The Alabama courts justified their refusal to respect the Georgia decree by concluding that it violated Georgia law. As the Court noted in its *per curiam* opinion, however, the only question under the Full Faith and Credit

Clause is whether the Georgia court had jurisdiction over the matter, not whether its decision was or was not correct.

### **SEPARATION OF POWERS**

In *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (April 20, 2016)(6-2), the Court held that Congress did not invade the proper role of the judiciary, and thus violate separation of powers, when it enacted a statute directing that certain assets in the U.S. were available to execute judgments against Iran for state-sponsored terrorism. The principal dispute between Justice Ginsburg, who wrote the majority opinion, and Chief Justice Roberts, who dissented (joined by Justice Sotomayor), was whether the challenged statute adopted a new substantive rule or, instead, dictated the result in a particular case.

### **STANDING**

In *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (May 16, 2016)(6-2), the Court remanded this case to the Ninth Circuit to determine whether plaintiff's complaint that he had been subject to a false credit report in violation of the False Credit Reporting Act was concrete enough, as well as particularized enough, to satisfy the requirements of Article III standing. More important than the remand, however, was the majority's acknowledgement, in an opinion by Justice Alito, that an intangible injury can be deemed concrete for Article III purposes, and that the creation by Congress of a statutory claim to relief based on intangible injury is entitled to weight in the Article III analysis. Although Justices Ginsburg and Sotomayor agreed with this critical legal point (making it unanimous), they dissented on the ground that plaintiff's concrete harm was evident and thus a remand was unnecessary.

In *Wittman v. Personhuballah*, 136 S.Ct. 1732 (May 23, 2016)(8-0), a unanimous Court ruled that three incumbent congressman who intervened in this action to defend the legality of a single congressional district that had been struck down as a racial gerrymander lacked standing because none were seeking to run in the invalidated district and none introduced any evidence that his own district would be affected by the decision below.

### **RELIGIOUS FREEDOM RESTORATION ACT**

In *Zubik v. Burwell*, 136 S.Ct. 1557 (May 16, 2016)(8-0), the Court decided not to decide a challenge brought by religious nonprofits arguing that an opt-out procedure designed to accommodate their religious rights nonetheless violated the Religious Freedom Restoration Act (RFRA). Under the Affordable Care Act, employers must generally provide their employees with health insurance that includes contraceptive care coverage. The accommodation, cited with approval by the Court only two years ago in *Hobby Lobby*, permits religious nonprofits who object to contraceptive care coverage to shift that obligation to their insurer by submitting a simple, one-page form. Petitioners claimed that even this accommodation violates RFRA because it puts them in the position of facilitating contraceptive coverage that is inconsistent with their religious beliefs. Rather than address that question, the Court sent the case back to the lower courts to further consider a compromise that the Court first proposed in a post-argument order: "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners." *Id.* at 1559-60. "We anticipate," the Court said its *per curiam* opinion, "that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them." *Id.* at 1560. At the same

time, the Court stressed that it was expressing no views on the merits of petitioners' RFRA claim. The ACLU submitted an amicus brief supporting the government's view that the challenged accommodation did not violate RFRA.

### **VOTING RIGHTS**

In *Shapiro v. McManus*, 136 S.Ct. 450 (Dec. 8, 2015)(9-0), the Court unanimously ruled, in an opinion by Justice Scalia, that 28 U.S.C. § 2284(a) requires a district judge to convene a three-judge court whenever a case challenges the apportionment of congressional districts or a state legislative body. The only exception is if the complaint is so insubstantial that it does not provide a basis for federal jurisdiction.

### **REDISTRICTING**

In *Evenwel v. Abbott*, 136 S.Ct. 1120 (Apr. 4, 2106)(8-0), the Court rejected an equal protection challenge to the decision by Texas (and all other states) to apportion state legislative districts on the basis of total population rather than voter-eligible population. Relying on constitutional history, the Court's precedents, and longstanding practice, Justice Ginsburg held that apportionment on the basis of total population is constitutionally permissible. The Court expressly declined to decide whether apportionment on the basis of voter-eligible population is also constitutionally permissible since that question was not presented by this case. The ACLU submitted an amicus brief supporting apportionment based on total population as most consistent with the idea of representative democracy.

In *Harris v. Arizona Independent Redistricting Comm'n*, 136 S.Ct. 1301 (April 20, 2016) (8-0), the Court unanimously upheld a state legislative redistricting plan that was adopted prior to *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), where the deviation between districts was less than 10% and plaintiffs failed to prove that redistricting plan was predominantly motivated by partisan considerations rather than compliance with the then-applicable preclearance rules under Section 5 of the Voting Rights Act. The opinion was written by Justice Breyer.

### **EMPLOYMENT DISCRIMINATION**

In *Green v. Brennan*, 136 S.Ct. 1769 (May 23, 2016)(7-1), the Court held that the 45 day period for filing a discrimination claim with the EEOC based on an allegation of constructive discharge begins when the employee gives notice of her intent to resign and not when the acts that led to the resignation occurred. Writing for the Court, Justice Sotomayor then remanded to determine when notice was actually given on this record.

### **FAIR LABOR STANDARDS ACT**

In *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117 (June 20, 2016)(6-2), the Court held that Department of Labor had failed to provide a reasoned explanation for reversing its longstanding position that service advisors employed by automobile dealerships are exempt from the overtime provisions of the FLSA, and therefore remanded to the court of appeals to decide on its own whether the new administrative interpretation was consistent with the statute without *Chevron* deference to the agency's view.

## **INDIAN RIGHTS**

In *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (June 23, 2016)(4-4), an equally divided Court upheld the lower court judgment recognizing tribal court jurisdiction over a non-tribal corporation sued for a tort committed on tribal land. The ACLU submitted an amicus brief supporting tribal jurisdiction.

## **PRISONER RIGHTS**

In *Bruce v. Samuels*, 136 S.Ct. 627 (Jan. 12, 2016)(9-0), the Court construed a provision of the Prison Litigation Reform Act that requires prisoners who file federal lawsuits to pay the filing fee in monthly installments that does not exceed 20% of the prisoner's account, 28 U.S.C. § 1915(b)(1). Writing for a unanimous Court, Justice Ginsburg held that the 20% cap applies to each new case filed by the prisoner and is not, as the prisoner had argued, a total cap on the fee that can be charged regardless of the number of cases filed.

In *Ross v. Blake*, 136 S.Ct. 1850 (June 6, 2016)(8-0), the Court held that the PLRA's mandatory exhaustion requirement could not be excused based on judicially-created "special circumstances," but that the PLRA only requires exhaustion of "available" remedies. Writing for a unanimous Court, Justice Kagan then ruled that a remand was appropriate to determine whether the pendency of an internal investigation into the use of excessive force in this case superseded the normal administrative appeal procedure under Maryland practice, leaving the prisoner with no available remedy to exhaust for PLRA purposes.

## **QUALIFIED IMMUNITY**

In *Mullenix v. Luna*, 136 S.Ct. 305 (Nov. 9, 2015)(8-1), the Court summarily reversed the Fifth Circuit and granted qualified immunity to a police officer who fatally shot an intoxicated driver who had engaged the police in a high speed chase, announced that he was armed, and threatened to kill any police officers who tried to stop him. The principal dispute between the majority and Justice Sotomayor, who dissented, was whether it was objectively reasonable to shoot at the car rather than waiting to see whether the car could be stopped by spikes that the police had already placed on the road. Following a recent trend, the *per curiam* opinion again stressed that qualified immunity requires a fact-specific inquiry and should be denied only if the officer was plainly incompetent or knowingly violated the law.

## **FEDERAL TORT CLAIMS ACT**

In *Simmons v. Himmelreich*, 136 S.Ct. 1843 (June 6, 2016)(8-0), the Court held that the "judgment bar" rule – which provides that a judgment in a FTCA case against the United States bars a subsequent suit against a federal employee arising out of the same facts – does not apply when the original FTCA case was dismissed because it fell within one of the exceptions to the FTCA, thus depriving the federal court of jurisdiction to hear the case at all. Justice Sotomayor wrote the Court's unanimous opinion. The ACLU joined with Public Citizen in an amicus brief urging the result adopted by the Court

## **IMMIGRATION**

In *Torres v. Lynch*, 136 S.Ct. 1619 (May 19, 2106)(5-3), the Court considered a provision of the Immigration and Nationality Act that bars aliens convicted of certain "aggravated

felonies” from obtaining various forms of discretionary relief, including cancellation of removal. Writing for the majority, Justice Kagan held that a state court conviction that shares all the elements of a federal crime that Congress has specifically designated as an “aggravated felony” except the requirement that it involve interstate commerce, also qualifies as an “aggravated felony” under the INA.

In *United States v. Texas*, 136 S.Ct. 2271 (June 23, 2016)(4-4), an equally divided Court upheld a lower court judgment enjoining the Obama administration from exercising its prosecutorial discretion to defer deportation and grant work authorization to as many as 5 million undocumented immigrants who meet certain eligibility requirements, including having children who are U.S. citizens or permanent residents. The ACLU submitted an amicus brief supporting the administration’s deferred action plan.

### **HABEAS CORPUS**

In *White v. Wheeler*, 136 S.Ct. 456 (Dec. 14, 2015)(9-0), the Court summarily reversed, in a *per curiam* opinion, the Sixth Circuit’s grant of habeas corpus in this capital case. The specific issue was whether the state trial judge had acted “unreasonably” under AEDPA in excusing for cause a juror who stated that he was “not absolutely certain whether [he] could realistically consider” the death penalty. More broadly, the Court reiterated that the critical question under AEDPA is whether the state court decision subject to federal habeas review was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 460 (citations omitted). The Court also stressed that the provisions of AEDPA “apply with full force” in death penalty cases. *Id.* at 462.

In *Woods v. Etherton*, 136 S.Ct. 1149 (Apr. 4, 2016)(8-0), the Court summarily reversed a habeas corpus decision by the Sixth Circuit upholding defendant’s claim of ineffective assistance of counsel. The closing paragraph of the Court’s *per curiam* opinion summarizes its reasoning: “Given AEDPA, both Etherton’s appellate counsel and the state habeas court [which had rejected the claim of ineffective assistance] were to be afforded the benefit of the doubt.” *Id.* at 1151.

### **FEDERAL CRIMINAL LAW**

In *Musacchio v. United States*, 136 S.Ct. 709 (Jan. 25, 2016)(9-0), a unanimous Court ruled that the sufficiency of the evidence must be judged against the charged crime and not an erroneous jury instruction. The Court further held that the defendant had waived his statute of limitations defense by not raising it at trial. Writing for the Court, Justice Thomas noted that statutes of limitations (and other filing deadlines) are generally not jurisdictional unless Congress has clearly stated otherwise, and Congress had not done so in this case.

In *Lockhart v. United States*, 136 S.Ct. 958 (Mar. 1, 2016)(6-2), the Court construed the language of 18 U.S.C. § 2252(a)(4), which provides that a defendant convicted of possessing child pornography is subject to a mandatory minimum sentence of 10 years in prison if he has previously been convicted in state court of one of three designated sex offenses. The list of predicate state offenses in the statute ends with the phrase, “involving a minor or ward,” and the question presented was whether all three of the state court predicates must involve a minor or only the last in the list. Writing for the majority, Justice Sotomayor held that the limiting phrase

applied only to the last listed offense, and thus the defendant was properly subject to a 10-year mandatory minimum even though his prior conviction for sexual abuse involved an adult.

In *Nichols v. United States*, 136 S.Ct. 1113 (Apr. 4, 2016)(8-0), the Court held that the federal Sex Offender Registration and Notification Act (SORNA), which generally requires registered sex offenders to notify “involved” jurisdictions” of any change of address, does not apply to a registered sex offender who leaves the country, as the defendant did in this case. Writing for the Court, however, Justice Alito emphasized that its interpretation of SORNA did not relieve the defendant of his obligation to notify designated authorities of his new location under state law and a subsequently-enacted federal law.

In *Welch v. United States*, 136 S.Ct. 1257 (April 18, 2016)(7-1), the Court held that last term’s decision striking down the so-called “residual clause” of the Armed Career Criminal Act on vagueness grounds, *see Johnson v. United States*, 135 S.Ct. 2551 (2015), applies retroactively because it announced a new substantive rule. The residual clause had imposed an increased minimum sentence on certain former felons convicted of firearm possession. By declaring the residual clause unconstitutional, Justice Kennedy concluded for the majority, the decision in *Johnson* had altered “the range of conduct or the class of persons that the law punishes.” *Welch*, 136 S.Ct. at 1265 (citation omitted).

In *Molina-Martinez v. United States*, 136 S.Ct. 1338 (April 20, 2016)(8-0), the Court unanimously concluded, in an opinion by Justice Kennedy, that a district court’s reliance on the wrong sentencing range under the Sentencing Guidelines is plain error that can be raised for the first time on appeal even if the imposed sentence also falls within the proper sentencing range.

In *Ocasio v. United States*, 136 S.Ct. 1423 (May 2, 2016)(5-3), the Court upheld a police officer’s conviction for conspiracy to commit extortion in violation of the Hobbs Act, ruling that it was unnecessary to show that every member of the conspiracy was capable of satisfying every element of the underlying crime. Justice Alito wrote for a four-person plurality. Justice Breyer provided the crucial fifth vote, agreeing with Justice Alito on the scope of conspiracy law but expressing reservations about the Court’s prior interpretations (unquestioned in this case) on the scope of extortion law.

In *Taylor v. United States*, 136 S.Ct. 2074 (June 20, 2016)(7-1), the Court ruled that the provisions of the Hobbs Act, which make it a federal crime to engage in a robbery (or attempt a robbery) that affects interstate commerce allow federal prosecution for the robbery (or attempted robbery) of a drug dealer. Writing for the majority, Justice Alito relied on the Court’s earlier holding in *Gonzales v. Raich*, 545 U.S. 1 (2005), that the federal government may prohibit even intrastate activities involving marijuana because of their impact on the national market. By the same reasoning, he concluded, someone who “target[s] a drug dealer” for robbery “necessarily affects or attempts to affect commerce over which the United States has jurisdiction.” *Id.* at \_\_\_\_\_.

In *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090 (June 20, 2016)(4-3), the Court held that the substantive provisions of RICO apply to racketeering activity that occurs outside the United States provided that the each of the required predicate activities violates a statute that applies extraterritorially. However, Justice Alito’s majority opinion also concluded that the private cause of action created by RICO does not apply extraterritorially. Thus, a private plaintiff seeking relief under RICO must prove the existence of a domestic injury.

In *Mathis v. United States*, 136 S.Ct. 2243 (June 23, 2016)(5-3), the Court reaffirmed that the determination of whether a state conviction triggers a sentencing enhancement under the Armed Career Criminal Act (ACCA) turns on whether the elements of the state crime are broader than the generic definition of the comparable offense listed in ACCA. Applying that test here, Justice Kagan’s majority opinion held that petitioner’s state conviction for burglary did not qualify as a predicate offense under ACCA because Iowa defines burglary more broadly than it is customarily defined.

In *Voisine v. United States*, 136 S.Ct. 2272 (June 26, 2016)(6-2), the Court held that a federal law prohibiting anyone convicted of a misdemeanor crime of domestic violence involving the use of force from possessing firearms, 18 U.S.C. § 922(g)(9), applies to those convictions based on the reckless use of force as well as the intentional use of force. Justice Kagan wrote the majority opinion.

In *McDonnell v. United States*, 136 S.Ct. 2355 (June 26, 2016)(8-0), a unanimous Court reversed the Hobbs Act conviction of the former governor of Virginia. The Hobbs Act prohibits the exchange of an official act or decision for a loan or gift. Writing for the majority, Chief Justice Roberts held that more is required to violate the Hobbs Act than setting up a meeting, talking to other officials, or organizing an event. McDonnell’s conviction was reversed because the jury instructions did not include these necessary limitations.

## **FEDERAL CIVIL PROCEDURE**

In *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (Jan. 20, 2016)(6-3), the Court held that a defendant’s unaccepted offer to satisfy the named plaintiff’s individual claim – in this case, a claim brought under the Telephone Consumer Protection Act – does not moot the case or prevent class certification. As Justice Ginsburg explained for the majority, an unaccepted settlement offer is a legal nullity. The Court further held that a defendant who is acting on behalf of the federal government but nonetheless violates the government’s instructions cannot claim the benefit of the government’s sovereign immunity.

In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (Mar. 22, 2016)(6-2), the Court upheld class certification in this FLSA case. The parties agreed that the time employees spent donning and doffing their protective gear was compensable under the FLSA; the dispute was whether the employees could prove how much time each spent on donning and doffing their protective gear could rely on a representative average calculated by an expert based on sample videotapes when the employer had failed to keep individual time records as required by the FLSA. Writing for the Court, Justice Kennedy upheld the use of representative evidence in this case but declined to pronounce a broad rule on when representative evidence is appropriate. Instead, he wrote, “[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action.” *Id.* at 1049. Because representative evidence could have been used by an individual plaintiff on these facts, it can be used in a class action. The case was then remanded to the district court to determine whether the jury award could be allocated, as required, only to employees who worked more than 40 hours per week (including the average time for donning and doffing).

In *Dietz v. Bouldin*, 136 S.Ct. 1885 (June 9, 2016)(6-2), the Court held that district court judges have inherent authority to recall a discharged jury for further deliberation after an error in



the verdict. But, Justice Sotomayor's cautioned in her majority opinion, the authority should be carefully exercised to ensure that the jury has not been tainted in any way after its discharge. Beyond direct evidence of taint, she said, district judges should consider, among other things, how much time has passed since the discharge and how much exposure the jurors have had to others outside the jury. Justice Thomas' dissent, joined by Justice Breyer, advocated for what he described as the common law rule that a jury discharge order is irrevocable, principally on the ground that it is easy to administer.

### **ATTORNEY'S FEES**

In *James v. Boise*, 136 S.Ct. 685 (Jan. 25, 2016)(9-0), the Court held, in a short *per curiam* opinion, that both state and federal courts are bound by its prior ruling that a defendant can recover attorney's fees in a § 1983 action only if the "plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 686 (citations omitted).

In *CRST Van Expedited, Inc. v. EEOC*, 136 S.Ct. 1642 (May 19, 2016)(8-0), the Court held that a defendant may recover attorney's fees under Title VII as a prevailing party whenever a complaint is dismissed as frivolous, regardless of whether or not that dismissal is on the merits. In this case, the EEOC's complaint was dismissed for failure to conduct adequate pre-filing investigation and conciliation, as required by Title VII. Justice Kennedy wrote the Court's unanimous opinion.

In *Kirtsaeng v. Wiley & Sons, Inc.*, 136 S.Ct. 1979 (June 16, 2016)(8-0), the Court addressed the standard for awarding attorney's fees to a prevailing party under the Copyright Act. In an unanimous opinion written by Justice Kagan, the Court ruled that the reasonableness of the losing party's position should be a substantial factor but it is not dispositive, by itself, and the district court may consider other factors in the exercise of its discretion.

### **ARBITRATION**

In *DirectTV, Inc. v. Imburgia*, 136 S.Ct. 463 (Dec. 14, 2015)(6-3), the Court considered whether a consumer contract provision barring class arbitration unless such waivers are "unenforceable" in the consumer's home state allowed such provisions to be enforced in California. At the time the contract was signed, California law prohibited class arbitration waivers, but that state law rule was subsequently struck down in *AT&T Mobility Ltd. v. Concepcion*, 563 U.S. 333 (2011). Writing for the majority, Justice Breyer concluded that the reference to "unenforceable" waivers in the contract presumed a valid state prohibition, which no longer existed in California. Thus, he held, the ban on class arbitration could be enforced.