

Looking Ahead: October Term 2012

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Last fall, many pundits predicted that the 2011 Supreme Court term would be the term of the century. In all likelihood, however, that term will primarily be remembered for one decision—the decision in the health care cases, *NFIB v. Sebelius*, which received more attention than any other single decision going back to *Bush v. Gore* (if not beyond).

If the health care cases taught us one thing, it is that making predictions about the Supreme Court is an exceedingly perilous enterprise. But the way things are shaping up, the 2012 term looks like it could be even more significant than 2011. At the time of this writing, the Court already has no shortage of high-profile cases, involving subjects such as affirmative action, property rights, foreign affairs, and the war on terror. And there are numerous other high-profile cases in the pipeline, involving issues such as same-sex marriage and the constitutionality of the Voting Rights Act.

In this article, we offer a few preliminary thoughts on some of the more important cases that the Court has already agreed to hear in the fall, along with a selection of cases that may land on the Court's docket later in the term. Regardless of precisely which cases the Court ends up hearing and deciding, one thing already seems

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clear: in October Term 2012, the Court will be jumping from the frying pan into the fire.

Individual Rights

Affirmative Action

In *Fisher v. University of Texas at Austin*, perhaps the highest-profile case currently on the docket, the Court will return to the politically and legally contentious issue of affirmative action. The case, to be argued in October, involves equal protection claims raised by Abigail Fisher, a white student from Sugar Land, Texas, who contends she was denied admission to the University of Texas at Austin because of her race.

UT, as it's known to those who love it, has a long and somewhat complicated relationship with affirmative action. In 1996, the U.S. Court of Appeals for the Fifth Circuit struck down UT's then-existing affirmative-action policy, which authorized the explicit use of race in admissions decisions.¹ After the policy was invalidated, minority enrollment began to drop. In response, the Texas legislature enacted the "Top 10% Law," which required UT to admit any Texas student who graduated in the top 10 percent of his high school class. The Top 10% Law is still in effect today and accounts for the majority of undergraduate admissions each year.

Just hours after the Supreme Court's decision in *Grutter v. Bollinger*,² which upheld the University of Michigan Law School's use of race as a "plus" factor in admissions decisions, UT announced that it would modify its admissions plan to reintroduce race as a consideration, operating alongside the preexisting Top 10% Law. Under the new plan, UT seeks to achieve racial diversity not only across the entering class (as the policy at issue in *Grutter* had), but also across fields of study—and even at the classroom level.

In the decision under review, the Fifth Circuit rejected Fisher's challenge and upheld the new plan.³ By a 9–7 vote, the court subsequently denied Fisher's request for *en banc* review, over a vigorous dissent from Chief Judge Edith Jones.⁴ Now UT must defend its plan against Fisher's challenge in the Supreme Court.

¹ Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

² 539 U.S. 306 (2003).

³ Fisher v. University of Texas at Austin, 631 F.3d 213 (5th Cir. 2011).

⁴ Fisher v. University of Texas at Austin, 644 F.3d 301 (5th Cir. 2011).

On the merits, Fisher contends that UT's plan goes further than the plan the Court sanctioned in *Grutter*. Fisher also contends that, if the Court disagrees, it should simply overrule *Grutter* altogether. For its part, UT not only joins issue on the merits, but suggests that Fisher did not properly preserve her argument that *Grutter* should be overruled—pointing out that Fisher's own petition framed the question as whether UT's plan passed muster under *existing* precedent, including *Grutter*. And the United States, as expected, has entered the fray, filing an *amicus curiae* brief in support of UT.

Grutter, of course, was a 5–4 decision handed down in 2003. Since then, there have been four changes in the Court's membership—perhaps most notably, the replacement of Justice Sandra Day O'Connor, the author of the majority opinion in *Grutter*, with Justice Samuel Alito. In addition, Justice Elena Kagan is recused from the case, presumably because, as solicitor general, she authorized the federal government to file an *amicus curiae* brief supporting UT in the Fifth Circuit.

In her opinion for the Court in *Grutter*, Justice O'Connor famously expressed the expectation that, in 25 years, affirmative action programs would no longer be necessary.⁵ In *Fisher*, the Court may well moot that expectation by holding, some 10 years after *Grutter*, that affirmative action programs such as UT's are no longer constitutional.

Takings

Next term presents the Court with one of its most interesting Takings Clause cases since its controversial decision several years ago in *Kelo v. City of New London*.⁶ *Arkansas Game & Fish Commission v. United States*, to be argued in October, presents the somewhat metaphysical question of what constitutes a "taking" for purposes of the Takings Clause. The Arkansas Game and Fish Commission owns 23,000 acres of land on which it operates a wildlife refuge and recreational preserve. Clearwater Dam is a federal flood-control project that lies about 115 miles upstream. From 1993 to 2000, the federal government released more water from the dam than had been approved under a preexisting management plan. The excess water flooded the land and damaged its tree population. In 2001,

⁵ *Grutter*, 539 U.S. at 343.

⁶ 545 U.S. 469 (2005).

the federal government acknowledged the harm caused by the flooding and returned to releasing water in accordance with the plan. Based on that damage, however, the commission sued the government for violating the Takings Clause.

The U.S. Court of Federal Claims agreed with the commission and awarded \$5.8 million in damages.⁷ But the U.S. Court of Appeals for the Federal Circuit reversed. It held that temporary flooding cannot constitute a taking, even if it extends for years.⁸ Instead, the Federal Circuit explained, in determining whether the government's flooding of the land was "permanent," courts must focus on the policy behind the flooding, not the effects. Because each deviation from the plan was temporary, the court reasoned that the flooding was not permanent, and the commission had failed to establish that a taking had occurred.

The issues presented by this case fall at an intersection in the Supreme Court's takings jurisprudence. On one hand, the Court has explained that "[t]emporary takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."⁹ On the other hand, the Court has stated that "[n]ot every physical *invasion* is a taking"; instead, as "the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking."¹⁰ In *Arkansas Game & Fish Commission*, the Court will have the opportunity to provide badly needed clarification of the law governing temporary takings. It remains to be seen whether the Court will take a more protective view of property rights than it did in *Kelo*.

Foreign Affairs

The Alien Tort Statute

The Supreme Court likes to issue all of its decisions before it breaks for its summer vacation. But in an exception that proves the

⁷ *Arkansas Game & Fish Comm'n v. United States*, 87 Fed. Cl. 594 (2009).

⁸ *Arkansas Game & Fish Comm'n v. United States*, 637 F.3d 1366, 1378–79 (Fed. Cir. 2011).

⁹ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

¹⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) (emphasis in original).

rule, the Court will have some unfinished business when it returns in the fall. The Court will open the term with re-argument in *Kiobel v. Royal Dutch Petroleum*, in which the Court will resolve at least one open question concerning the scope of the Alien Tort Statute. Enacted as part of the Judiciary Act of 1789, the statute provides in full: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹¹ In *Sosa v. Alvarez Machain*, the Court held that the ATS permits foreigners to bring suit in American courts for at least some violations of international human-rights norms.¹² But the Court left open a host of questions, including what sorts of violations count; who may be sued for those violations; and where those violations must have occurred in order to be actionable.

As it initially came before the Court, *Kiobel* presented the question of who may be sued: specifically, whether corporations can be sued for a “violation of the law of nations” under the ATS. In *Kiobel*, the relevant claims had been brought by a group of Nigerian plaintiffs against three oil companies; the claims sought to hold the oil companies liable for alleged human-rights abuses committed on the companies’ behalf by Nigerian soldiers. The U.S. Court of Appeals for the Second Circuit held that corporations could not be liable under the ATS and ordered dismissal of the claims on that basis.¹³

At oral argument last term, however, a number of justices appeared to be interested in another question: whether the ATS permits courts to recognize *any* claims—against corporations *or* individuals—based on violations that occurred in another country. After plaintiffs’ counsel noted at oral argument that the question had not been briefed by the parties, the Court took the point and issued an order a few days later, setting the case for supplemental briefing and re-argument.

It seems likely that the Court will now decide the case on the additional question presented. Curiously, although the federal government had initially taken the position that corporations could be held liable under the ATS, and that the Court should therefore rule

¹¹ 28 U.S.C. § 1350.

¹² 542 U.S. 692 (2004).

¹³ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

in favor of the plaintiffs, it has since filed a supplemental brief taking the position that, while lawsuits based on conduct occurring in foreign countries should be allowed to proceed in appropriate circumstances, this one should not—and that the Court should therefore rule in favor of the defendants, but only if it reaches the extraterritoriality issue. (Got all of that?) And in a tidbit of the type on which Supreme Court aficionados greedily feed, the State Department's top lawyer appeared on the government's first brief, but—whether by accident or by design—did not appear on the second.

Whatever the backstory to the government's position, there is a good chance that the Court's decision in *Kiobel* will impose substantial limits on the ability to pursue human-rights claims under the ATS against American companies for conduct that took place abroad—a type of litigation that has become commonplace in recent years. For one side, at least, the Court's decision in *Kiobel* will be worth the wait.

Standing and Surveillance

The Supreme Court will take a small step back into the legal battle surrounding the war on terror next term when it considers *Clapper v. Amnesty International*, to be argued in late October. The case arises out of Congress's recent amendments to the Foreign Intelligence Surveillance Act.¹⁴

In a nutshell, FISA establishes the procedures under which federal officials may conduct electronic surveillance for foreign intelligence purposes. The FISA Amendments Act of 2008 significantly expanded the federal government's authority to engage in covert electronic surveillance of foreign nationals located outside the United States. Under those amendments, the federal government need not identify the particular target or facility it intends to monitor. Instead, it need only submit an affidavit attesting that a significant purpose of its intended surveillance is to obtain foreign intelligence information.¹⁵ In addition, the amendments shift oversight responsibility from the Foreign Intelligence Surveillance Court to the executive branch, which is required only to submit regular reports to the FISC.

In *Clapper*, the plaintiffs—a group of attorneys, journalists, and organizations—allege that the new FISA procedures violate the First

¹⁴ See 50 U.S.C. ch. 36 et seq.

¹⁵ See 50 U.S.C. § 1804.

and Fourth Amendments and the constitutional separation of powers. The Court, however, will not address the merits of those claims, but instead will decide only whether the plaintiffs have standing under Article III of the Constitution to pursue their constitutional challenges. In order to establish standing, the plaintiffs must show actual, imminent harm that is likely to be redressed by a favorable decision.¹⁶ The district court ruled that the plaintiffs lacked standing,¹⁷ but the Second Circuit reversed.¹⁸

The plaintiffs press two arguments in support of their right to sue: first, that they have standing because of their fear that the government will intercept their communications; and second, that they have standing because of the costly steps they took to protect the confidentiality of their communications. In response, the government contends that the first argument is precluded by *Laird v. Tatum*,¹⁹ which held that the “chilling” effect of a surveillance program does not confer standing. As for the second argument, the government contends that the asserted harms are self-inflicted ones that the plaintiffs could easily have avoided without a lawsuit.

If the Court accepts the government’s arguments, it will likely foreclose any future challenge to the FISA amendments; injured individuals will rarely be able to prove that the government actually intercepted their communications because the government’s surveillance program is secret. By contrast, if the Court permits the plaintiffs’ suit to go forward, it may well have the opportunity to consider the merits of the plaintiffs’ underlying constitutional claims in a future term.

Criminal Law

The Fourth Amendment

A term rarely passes without an interesting Fourth Amendment case or two on the Court’s docket; next term already has three.

The Court will return to the issue of when a “dog sniff” constitutes a search for Fourth Amendment purposes in two cases, *Florida v. Jardines* and *Florida v. Harris*, which will be argued on the same

¹⁶ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁷ *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

¹⁸ *Amnesty Int’l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

¹⁹ 408 U.S. 1 (1972).

day in late October. The Court last addressed the constitutional significance of dog sniffs in *Illinois v. Caballes*.²⁰ There, the defendant argued that the police officers' use of a drug-detection dog during a routine traffic stop transformed the stop into a drug investigation requiring probable cause. The Court rejected the defendant's argument, explaining that the use of a drug-detection dog during a routine traffic stop—one that does not otherwise expose items that are hidden from public view—does not constitute a Fourth Amendment search. In reaching that conclusion, the Court distinguished *Kyllo v. United States*, a case classifying the thermal imaging of a home as a search, by explaining that thermal imaging collected information not just about unlawful activity, but also about lawful activity such as "at what hour each night the lady of the house takes her daily sauna and bath."²¹

Jardines and *Harris* raise separate issues not specifically addressed in *Caballes*. *Jardines* presents the question of whether a dog sniff by a drug-detection dog at the door of a suspected drug house constitutes a Fourth Amendment search. In concluding that it does, the Florida Supreme Court relied on *Kyllo*, not *Caballes*, and the "special status accorded a citizen's home in Anglo-American jurisprudence."²² *Jardines* will thus present the question whether the additional privacy interests that an individual maintains in his home are sufficient to alter the Fourth Amendment analysis.

Harris presents the related question of how well-trained a drug-detection dog must be before the dog's "alert" is sufficient to establish probable cause to search a vehicle. The Florida Supreme Court held that the alert was insufficient to establish probable cause, on the ground that simply showing that the dog had been "trained" and "certified" to detect narcotics was insufficient to render the dog "well-trained" for purposes of the holding of *Caballes*.²³ Like *Jardines*, therefore, *Harris* will require the Court to consider the potential outer bounds of *Caballes*—a decision that, on its face, appears to put the use of drug-detection dogs beyond Fourth Amendment scrutiny.

²⁰ 543 U.S. 405 (2005).

²¹ *Id.* at 409–10 (quoting *Kyllo v. United States*, 533 U.S. 27, 38 (2001)).

²² *Jardines v. State*, 73 So. 3d 34, 55 (Fla. 2011).

²³ *Harris v. State*, 71 So. 3d 756, 766 (Fla. 2011).

The Court will be asked to consider the bounds of another of its Fourth Amendment precedents in *Bailey v. United States*, to be argued in late October. *Bailey*—in which our firm represents the petitioner—presents the question whether, under *Michigan v. Summers*,²⁴ police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed. In *Summers*, the Court held that, as a categorical matter, officers executing a search warrant for contraband may detain the occupants of the premises while the search is conducted.²⁵ In this case, officers followed Chunon Bailey from the apartment to be searched and detained him approximately one mile away. The detention itself produced evidence linking Bailey to the apartment, and the search of the apartment turned up guns and drugs. Bailey moved to suppress this evidence, arguing that his detention could not be justified under *Summers* as one incident to the execution of a search warrant because it occurred away from the scene. The district court denied Bailey's motion, and Bailey was subsequently convicted of various federal offenses.²⁶ The Second Circuit affirmed, although it recognized a split among the federal courts of appeals on the issue.²⁷

The issue in *Bailey* is whether the safety- and efficacy-based justifications for the *Summers* rule apply with equal force to a detention that occurs away from the immediate vicinity of the premises to be searched. (In our biased view, the answer is clear: They do not.) We will learn the answer later this term.

Right to Competence and Habeas Corpus

In two cases to be argued back-to-back in October, the Court will confront the question of whether capital prisoners have a right to be competent during federal habeas corpus proceedings. In *Ryan v. Gonzales*, the Court will consider the validity of a U.S. Court of Appeals for the Ninth Circuit decision recognizing such a right. The Ninth Circuit rooted its decision in a federal statute that provides a right to an attorney for a state death-row inmate who cannot

²⁴ 452 U.S. 692 (1981).

²⁵ *Id.* at 705.

²⁶ *United States v. Bailey*, 468 F. Supp. 2d 373 (E.D.N.Y. 2006).

²⁷ *United States v. Bailey*, 652 F.3d 197 (2d Cir. 2011).

afford one in federal habeas proceedings.²⁸ Under the Ninth Circuit's reasoning, the statutory right to an attorney encompasses the right to be competent to assist the attorney in a habeas proceeding.

In *Tibbals v. Carter*, the Court will review a Sixth Circuit decision that likewise recognized a right to be competent during federal habeas proceedings, but based its reasoning on different grounds.²⁹ The Sixth Circuit relied on the Court's holding in *Rees v. Peyton* that a capital defendant must be afforded a competency hearing before the defendant can withdraw his petition for certiorari,³⁰ together with a federal statute that allows courts to order competency hearings for criminal defendants before trial.³¹ In *Ryan* and *Tibbals*, the Court will have to decide whether either (or both) of the sources of law identified by the lower courts is sufficient to support recognition of the claimed right to competence—a right that would effectively extend the preexisting constitutional right to be competent at the point of execution.³²

Class Actions

After a hiatus last term, the Supreme Court will once again tackle questions of enormous practical significance concerning the ability of plaintiffs to pursue class actions. To begin with, when federal courts decide whether to certify a class action, may they “peek” at the merits of the plaintiffs' claims? After all, class actions are expensive and certification imposes enormous costs on defendants and creates enormous pressures to settle. In recent years, including two terms ago in *Wal-Mart v. Dukes*,³³ the Court has stressed that a federal court must engage in rigorous analysis before certifying a class. The Court has also recognized that this analysis necessarily entails some consideration of the merits of the plaintiffs' claims insofar as they are overlapping. In two cases to be argued the same day in November, the Court will consider just how much consideration of the

²⁸ *Gonzales v. United States Dist. Court for Dist. of Arizona*, 623 F.3d 1242 (9th Cir. 2010) (interpreting 18 U.S.C. § 3599(a)(2)).

²⁹ *Carter v. Bradshaw*, 644 F.3d 329 (6th Cir. 2011).

³⁰ 384 U.S. 312 (1966).

³¹ 18 U.S.C. § 4241.

³² *Ford v. Wainwright*, 477 U.S. 399 (1986).

³³ 131 S. Ct. 2541 (2011).

merits is appropriate—and how courts should go about engaging in that consideration.

In *Comcast v. Behrend*, the U.S. Court of Appeals for the Third Circuit affirmed the certification of a class estimated to include more than two million current and former cable subscribers in the Philadelphia area³⁴—a class larger than even the class invalidated in *Wal-Mart*, which the Supreme Court described as “one of the most expansive” in history.³⁵ Comcast had argued that certification was improper on the ground that individual issues of the class members predominated over any common issues. But the Third Circuit rejected that argument, concluding that it was impermissible at the certification stage to consider any arguments that could be characterized as addressing the merits of the plaintiffs’ claims.³⁶

Comcast then sought review from the Supreme Court on the question “whether a district court may certify a class action without resolving ‘merits arguments’ that bear on Rule 23’s prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).”³⁷ While the Court granted review, it exercised its prerogative to reword the question presented, as follows: “Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.”³⁸

The Court’s rewording of the question presented is significant. The plaintiffs in *Comcast* relied on expert testimony to prove that damages could be awarded on a class-wide basis, and the courts below agreed that any definitive evaluation of the reliability of that testimony under *Daubert v. Merrell Dow*³⁹ would have to wait until the merits stage of the litigation—that is, after the certification inquiry.⁴⁰ In *Wal-Mart*, however, the Supreme Court had expressed its “doubt”

³⁴ 655 F.3d 182 (3rd Cir. 2011).

³⁵ *Wal-Mart*, 131 S. Ct. at 2547.

³⁶ *Comcast*, 655 F.3d at 190.

³⁷ Petition for Writ of Certiorari, *Comcast Corp. v. Behrend*, No. 11-864, 2012 WL 105558 (U.S. Jan. 1, 2012).

³⁸ *Comcast Corp. v. Behrend*, No. 11-864, 2012 WL 113090 (U.S. June 25, 2012).

³⁹ 509 U.S. 579 (1993).

⁴⁰ *Behrend v. Comcast Corp.*, 655 F.3d 182 (3rd Cir. 2011).

about that proposition.⁴¹ Assuming that the Court meant what it suggested in *Wal-Mart*, the smart money is on reversal—although, given the amount at stake here, the smarter money might be on settlement.

One other case currently on the Court's docket presents a notable question concerning class actions—this time, in the specific context of securities litigation. In *Amgen v. Connecticut Retirement Plans and Trust Funds*, the plaintiffs allege that Amgen, a medical therapeutics company, made misrepresentations regarding the safety of two of its products used to treat anemia—misrepresentations that, they say, artificially inflated Amgen's stock price.⁴² To prevail in an individual securities-fraud action, a plaintiff must prove that he relied on the alleged misrepresentation.⁴³ In a class action, however, proving that each member of a class relied on the misrepresentation would be particularly difficult, if not impossible. Accordingly, in *Basic v. Levinson*, the Court adopted the "fraud-on-the-market" theory, under which a plaintiff can invoke a rebuttable presumption of reliance if the plaintiff proves that the market for the security is efficient, the alleged misrepresentation was public, and the misrepresentation was material.⁴⁴ *Amgen* raises two questions related to the fraud-on-the-market theory: first, whether a plaintiff must establish materiality at the class-certification stage; and second, if the plaintiff need not do so, whether a defendant may present evidence at that stage to rebut the presumption of reliance.

Put simply, the law in this area is a bit of a mess. Some courts of appeals require proof of materiality and allow defendants to rebut the presumption of reliance.⁴⁵ Others treat materiality as a merits issue not properly addressed at the certification stage, but still allow defendants to rebut the presumption of reliance.⁴⁶ And still others, like the Ninth Circuit in the decision under review, treat materiality as a merits issue and do not allow defendants to rebut the presumption of reliance.

⁴¹ 131 S. Ct. at 2554.

⁴² 600 F.3d 1170, 1172 (9th Cir. 2011).

⁴³ *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 159 (2008).

⁴⁴ 485 U.S. 224 (1988).

⁴⁵ See, e.g., *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2nd Cir. 2008).

⁴⁶ See, e.g., *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623 (3rd Cir. 2011).

The Supreme Court's recent cases also point in conflicting directions. In *Erica P. John Fund v. Halliburton*,⁴⁷ the Court unanimously held that plaintiffs need not prove loss causation at the class certification stage. But that holding may not carry much weight here; the Court reasoned that loss causation need not be proven because it does not affect an investor's reliance. By contrast, the relationship between materiality and reliance is much closer. And even though materiality is an element of the cause of action, *Wal-Mart* explicitly contemplates some consideration of the merits at the certification stage.⁴⁸

Throughout its petition for certiorari, Amgen stressed the high stakes of the case.⁴⁹ And rightly so: Materiality is often the biggest roadblock to class certification for a securities-fraud claim. If the Court affirms the Ninth Circuit, it may lead to an explosion of class actions in those jurisdictions in which materiality currently serves as a bar. And the stakes in *Amgen* may be even higher than they seem at first glance. In its opening brief, Amgen cited several studies suggesting that the hypothesis that markets operate efficiently is flawed and that the criteria considered in determining the applicability of the fraud-on-the-market theory do not accurately predict whether material information will affect a stock's price.⁵⁰ This raises the possibility that the Court could reconsider (or at least refine) the fraud-on-the-market theory. Were the Court to pursue such a path, *Amgen* would be the sleeper decision of the 2012 term.

Antitrust

The Supreme Court will hear its first case in more than 20 years on the doctrine of state-action antitrust immunity. Relying on principles of federalism, the Court has interpreted the Sherman Act not to apply to the anticompetitive conduct of a state acting through its legislature.⁵¹ Political subdivisions can also receive immunity if they can show they were acting pursuant to a "clearly articulated and

⁴⁷ 131 S. Ct. 2179 (2011).

⁴⁸ 131 S. Ct. at 2551.

⁴⁹ See Petition for Writ of Certiorari, *Amgen v. Connecticut Retirement Plans and Trust Funds*, No. 11-1085, 2012 WL 707042 (U.S. Mar. 1, 2012).

⁵⁰ See *id.*

⁵¹ *Parker v. Brown*, 317 U.S. 341, 352 (1943).

affirmatively expressed” state policy to displace competition.⁵² The “clear articulation” requirement does not require explicit permission; it is enough if the suppression of competition is the “foreseeable result” of what the state statute authorizes.⁵³ The upcoming case, *FTC v. Phoebe Putney Health System*, presents two questions concerning the scope of the state-action doctrine as it applies to political subdivisions: first, whether the Georgia legislature clearly articulated a policy authorizing anticompetitive conduct; and second, whether the state-action doctrine still applies when the local government entity acts through a private actor.

Phoebe Putney involves a Georgia statute that permits municipalities to form hospital authorities—local-government entities granted general corporate powers and charged with meeting the public-health needs of their communities. In 1941, the City of Albany and Dougherty County created such an authority, the Hospital Authority of Albany-Dougherty County, which in turn acquired Phoebe Putney Memorial Hospital. The hospital authority operated Memorial Hospital until 1990, when it formed two private corporations—Phoebe Putney Health System, Inc., and a PPHS subsidiary, Phoebe Putney Memorial Hospital, Inc.—and leased Memorial Hospital to PPMH. In 2011, with the approval of the hospital authority, PPHS reached a deal to buy Memorial Hospital’s only real competitor, Palmyra Medical Center.

At that point, the Federal Trade Commission filed suit to enjoin PPHS’s purchase of Palmyra on the ground that it would give PPHS a monopoly. Rather than contesting the FTC’s substantive allegations, the hospital authority and PPHS asserted that the state-action antitrust immunity doctrine protected them from antitrust liability. The district court and the U.S. Court of Appeals for the Eleventh Circuit agreed, dismissing the case.⁵⁴

On the first question presented—the “clear articulation” question—the parties cannot even agree on what the Eleventh Circuit held. According to the FTC, the Eleventh Circuit held that a state’s

⁵² *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 429 U.S. 96, 109 (1978)).

⁵³ *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991) (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41 (1985)).

⁵⁴ *FTC v. Phoebe Putney Health System*, 663 F.3d 1369, 1377-78 (11th Cir. 2011).

grant of general corporate powers to a municipal authority could qualify as a “clear articulation” of a state policy that would suspend federal antitrust laws. The hospital authority concedes that such a holding would have been erroneous, but maintains that the Eleventh Circuit held only that market concentration was the “foreseeable result” of the Georgia statute, because that law explicitly grants hospital authorities the power to acquire existing facilities operating within a narrow service area. The Eleventh Circuit’s decision, in the hospital authority’s view, is simply a straightforward application of settled law.

On the second question presented—the “private actor” question—the parties’ disagreement in large part centers on the extent to which the Court may look behind the actions of state entities to determine whether they are, for all relevant purposes, the actions of private parties. The FTC asserts that the hospital authority exists essentially to rubber-stamp the actions of private actors. The hospital authority, the FTC points out, has no budget, no staff, and no employees. In the decision under review, the court of appeals rejected the FTC’s argument, reasoning that it was not permitted to look behind the hospital authority’s decisions to determine the extent to which it was controlled by private actors.⁵⁵

The Court’s opinion could have far-reaching effects on ongoing consolidation in the hospital industry nationwide, because most states have statutes similar to Georgia’s. And the standards the Court adopts for state action will potentially apply to thousands of municipally established entities that provide power, water, electricity, and other services to the public.

Environmental Law

The Clean Water Act

Every once in a while, it actually rains in Los Angeles. When it does, the Los Angeles County Flood Control District collects and channels the stormwater into four rivers, which then drain into the Pacific Ocean. The district operates its storm sewer system pursuant to the Clean Water Act, which, among other things, prohibits the

⁵⁵ Phoebe Putney Health System, 663 F.3d at 1376 n.12.

“discharge of any pollutant” into navigable waters.⁵⁶ The question in *Los Angeles County Flood Control District v. National Resource Defense Council* is whether there is a “discharge” for purposes of the Clean Water Act when water flows from one portion of a river, through a concrete channel constructed for flood and stormwater control, and back into a downstream portion of the same river.

The district does not contest that water passing through its storm sewer system did not meet the Act’s quality standards; instead, the district maintains that the water was already polluted when it entered the district’s storm sewer system. All that the district did, then, was to channel the polluted water from one part of a river to another. The district primarily relies on *South Florida Water Management District v. Miccosukee Tribe of Indians*, in which the Supreme Court held that pumping water from a canal into a wetland cannot constitute a “discharge” for purposes of the Clean Water Act because the two bodies of water were hydrologically indistinct.⁵⁷ But the Ninth Circuit rejected that argument, determining that the district’s storm sewer system was distinct from the river from which the sewer system channeled water, even though it simply channeled the water back into the same river.⁵⁸

The Court’s decision in this case will have obvious implications for any entity charged with flood or stormwater control, as affirmance would impose a duty on those entities to clean up any pollution in water flowing into a drainage system before discharging the water. It will come as no surprise that flood and stormwater management agencies from across the country filed briefs supporting certiorari. Now those same agencies will do all they can to convince the Court to reverse.

The Court has already granted review in two other Clean Water Act cases, which have been consolidated for oral argument: *Decker v. Northwest Environmental Defense Center* and *Georgia-Pacific West v. Northwest Environmental Defense Center*. Several Oregon timber companies gain access to logging sites from two roads in the Tillamook State Forest. Under their contracts with the state, the compa-

⁵⁶ See 33 U.S.C. § 1252 et seq.

⁵⁷ 541 U.S. 95 (2004).

⁵⁸ *Natural Resource Defense Council, Inc. v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011).

nies constructed a system of ditches, culverts, and channels that collect stormwater runoff from the roads and convey it into nearby rivers and streams. The plaintiffs allege, however, that the stormwater runoff deposits sediment, adversely affecting the state's fish population.

Under the Clean Water Act, an entity discharging a pollutant from a point source must secure a federal permit.⁵⁹ "Point source" is defined as including "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."⁶⁰ The Northwest Environmental Defense Center brought a citizen suit against the timber companies and the Oregon Board of Forestry, alleging that the Clean Water Act requires the companies to obtain a permit for the stormwater runoff. The timber companies and Board of Forestry contend that the channeled stormwater runoff from the logging roads does not fit under the Clean Water Act's definition of "point source," and thus that no permit was required. The Ninth Circuit rejected that argument and held—contrary to the Environmental Protection Agency's position—that the Clean Water Act did require them to secure a permit.⁶¹

Before it gets to the merits of the cases, the Court will have to address a jurisdictional issue. The relevant provision of the Clean Water Act provides that, when a citizen seeks to challenge the validity of an EPA rule, he must do so in a review proceeding in the court of appeals, rather than in a citizen suit.⁶² The Ninth Circuit held that this provision is not implicated because the plaintiffs do not challenge the validity of the EPA rule, but instead challenge only the EPA's application of what they concede to be a valid rule.

As to the merits, the Ninth Circuit declined to defer to the EPA's interpretation of two provisions of the Clean Water Act. First, the court held that stormwater runoff from logging roads are "point source" discharges within the meaning of the Act, despite an existing EPA rule—the Silviculture Rule⁶³—which the EPA interprets to

⁵⁹ 33 U.S.C. §§ 1311(a), 1362(12).

⁶⁰ 33 U.S.C. § 1362(14).

⁶¹ *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011).

⁶² See 33 U.S.C. § 1369(b)(2).

⁶³ 7 C.F.R. § 122.27. In case you (like us) were wondering, "silviculture" is the art of managing the development and care of forest trees.

exempt stormwater runoff from logging roads. Second, the Ninth Circuit held that stormwater from logging roads is “industrial stormwater,” again despite a contrary EPA interpretation.⁶⁴ Naturally, the federal government argues that the Ninth Circuit erred by failing to defer to the EPA’s interpretations.

The Court’s decision in these cases may well have implications beyond the Clean Water Act, as the cases provide the Court with another opportunity to clarify the proper degree of deference that courts should afford agency interpretations of their own regulations—an issue that some members of the Court have recently indicated an interest in revisiting.

Copyright Law

In *Kirtsaeng v. John Wiley & Sons*, slated for argument in late October, the Court will confront a lingering question in copyright law: whether the first-sale doctrine applies to a copy that was made and legally acquired abroad, then imported into the United States without the copyright owner’s permission. The first-sale doctrine allows the owner of a lawfully purchased copy of a copyrighted work to resell the copy without the copyright owner’s permission.⁶⁵ But copyright law separately prohibits importing a copyrighted work without the authority of the owner of the copyright.⁶⁶ With respect to copies of copyrighted works made and purchased abroad, the question presented is a simple one: Which of those two principles controls?

The particular case before the Court arises from a scheme devised by Supap Kirtsaeng, a native of Thailand who moved to the United States in 1997 to pursue his college degree. In order to fund his education, Kirtsaeng had family members in Thailand send him copies of foreign-edition textbooks—which are typically cheaper than the corresponding American editions—and then sold them to students in the United States. John Wiley & Sons, whose Asian subsidiary printed some of the books Kirtsaeng sold, sued Kirtsaeng for copyright infringement. After the district court rejected

⁶⁴ Nw. Envtl. Def. Ctr., 640 F.3d at 1085.

⁶⁵ 17 U.S.C. § 109(a).

⁶⁶ 17 U.S.C. § 602(a)(1).

Kirtsaeng's invocation of the first-sale doctrine, a jury found Kirtsaeng liable for infringement and ordered him to pay \$600,000 in statutory damages.⁶⁷

The Second Circuit agreed with the district court that the first-sale doctrine does not apply to copies manufactured outside the United States, and affirmed the judgment in Wiley's favor.⁶⁸ In so doing, it relied on section 109(a) of the Copyright Act, which limits the applicability of the first-sale doctrine to copies "lawfully made under this Title."⁶⁹ The Second Circuit reasoned that this language limits the first-sale doctrine to copies that are made in territories in which the Copyright Act is law.

Petitioner Kirtsaeng warns that the Second Circuit's interpretation would obliterate the first-sale doctrine and encourage manufacturers to move overseas, where they could enjoy perpetual downstream control over their manufactured works. To avoid that result, Kirtsaeng urges the Court to interpret "lawfully made under this Title" to extend the first-sale doctrine to any copy made in compliance with the legal principles articulated in the Copyright Act, regardless of where the copy was made.

If you're feeling a sense of déjà vu, that's because the Court attempted to resolve the same issue two terms ago in *Costco Wholesale Corporation v. Omega*, but ended up splitting 4–4, with Justice Kagan recused.⁷⁰ The Supreme Court addressed a similar question in *Quality King Distributors Inc. v. L'anza Research International Inc.*, in which it unanimously held that the first-sale doctrine applies to "round-trip" works—those manufactured in the United States, taken abroad, then re-imported.⁷¹ Justice Ruth Bader Ginsburg wrote a concurring opinion strongly implying that she did not believe the first-sale doctrine applied to products manufactured abroad,⁷² and three justices apparently agreed with her in *Costco*. There have been no changes in the

⁶⁷ *John Wiley & Sons, Inc. v. Kirtsaeng*, No. 08 Civ. 7834 (DCP), 2009 WL 3364037 (S.D.N.Y. Oct. 19, 2009).

⁶⁸ *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210 (2d Cir. 2011).

⁶⁹ *Id.* at 222.

⁷⁰ 131 S. Ct. 565 (2010).

⁷¹ 523 U.S. 135 (1998).

⁷² *Id.* at 154.

Court's membership since *Costco*, so all eyes will be on Justice Kagan, who has not yet taken part in a copyright case. One potentially ominous sign for petitioner Kirtsaeng is that Justice Kagan has disagreed with Justice Ginsburg in only one of 27 5–4 decisions during her first two years on the Court.

Employment Discrimination

The Supreme Court has interpreted Title VII of the Civil Rights Act of 1964,⁷³ which prohibits employment discrimination on the basis of race or sex, to impose a two-track system of employer liability for workplace harassment: Employers are strictly liable for harassment committed by a victim's "supervisor," but liable only upon a showing of negligence for harassment committed by a victim's "co-employee."⁷⁴ In *Vance v. Ball State University*, the Court will resolve a circuit split on how to draw the line between a supervisor and a co-employee.

Maetta Vance was the only African American working in the catering department of Ball State University when she allegedly suffered race-based harassment. One alleged harasser was Sandra Davis, whom Vance considered to be her supervisor. According to the complaint, Davis physically assaulted, threatened, and verbally abused Vance. The university investigated Vance's complaints and subsequently disciplined Davis. Vance then brought a hostile work environment claim against the university, claiming that it was vicariously liable for Davis's actions. The district court disagreed, dismissing Vance's suit.⁷⁵ The Seventh Circuit affirmed, holding that Davis was not Vance's supervisor for purposes of Title VII.⁷⁶

The Seventh Circuit acknowledged the longstanding circuit conflict on how to determine whether a harasser is a supervisor or co-employee under Title VII. The First, Seventh, and Eighth Circuits take the position that a harasser is a supervisor only if he has the power to "hire, fire, demote, promote, transfer, or discipline" the

⁷³ 42 U.S.C. § 2000e *et seq.*

⁷⁴ See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁷⁵ *Vance v. Ball State Univ.*, No. 1:06-cv-1452-SEB-JMS, 2008 WL 4247836 (S.D. Ind. Sept. 10, 2008).

⁷⁶ *Vance v. Ball State Univ.*, 646 F.3d 461 (7th Cir. 2011).

victim.⁷⁷ The Second, Fourth, and Ninth Circuits—along with the Equal Employment Opportunity Commission⁷⁸—take a more expansive view, classifying anyone who has authority to direct an employee’s daily work activities as a supervisor, regardless of whether he also has the power to fire that employee.⁷⁹

One interesting wrinkle is that the federal government, despite agreeing with Vance that the Seventh Circuit applied the wrong legal standard, still recommended denial of certiorari. In the government’s opinion, Davis would not be Vance’s supervisor even under a more expansive standard, making the case an unsuitable vehicle for review. The Court nonetheless took the case, signaling its desire finally to resolve the circuit conflict on the issue. Because of the depth of that conflict, the Court’s decision—regardless of the outcome—will effect a change in employment law for about half the country.

ERISA

The Supreme Court seems immoderately fond of cases involving the Employee Retirement Income Security Act of 1974.⁸⁰ The statute governs a variety of different types of employee-benefit plans and presents an assortment of interesting questions of statutory interpretation. The ERISA case before the Court next term involves the operation of a provision, contained in many employer-provided medical-benefit plans, that requires participants to reimburse the plan for any payments made on their behalf if they end up recovering from third parties.

In *Sereboff v. Mid Atlantic Medical Services*,⁸¹ the Court held that ERISA plan administrators can enforce these reimbursement provisions under section 502(a)(3) of ERISA, which authorizes plan participants, beneficiaries, or fiduciaries to obtain “appropriate equitable relief.”⁸² But the Court expressly reserved the question of whether

⁷⁷ See, e.g., *Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005) (quoting *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998)).

⁷⁸ EEOC, Enforcement Guidance No. 915.002, *Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999).

⁷⁹ See, e.g., *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003).

⁸⁰ 29 U.S.C. § 1002 et seq.

⁸¹ 547 U.S. 356 (2006).

⁸² 29 U.S.C. § 1132(a)(3).

courts can use equitable principles—like unjust enrichment—to override a plan’s plain terms and refuse to require reimbursement. In *US Airways v. McCutchen*, the Court will confront that question.

After James McCutchen was injured in an automobile accident, a plan administered by US Airways paid \$66,866 for his medical expenses. McCutchen then hired counsel, who helped him recover \$10,000 from the driver who caused the accident and another \$100,000 in underinsured motorist coverage. After paying his counsel a 40 percent contingency fee, McCutchen retained just under \$66,000. US Airways then invoked the terms of the ERISA plan to demand full reimbursement of the money it had paid, without allowing for McCutchen’s legal costs. McCutchen refused to pay, and US Airways sued.

Citing the plain language of the plan, the district court granted US Airways summary judgment and ordered McCutchen to provide full reimbursement.⁸³ The Third Circuit reversed, holding that US Airways would be unjustly enriched if it were able to retain the benefits of McCutchen’s litigation without also sharing in the costs.⁸⁴ The court altered the terms of the plan based on its interpretation of the word “appropriate” in section 502(a)(3), which it found to require the application of traditional equitable principles when determining what relief is permissible. In so ruling, the Third Circuit created a circuit conflict, as several other circuits had previously held that reimbursement provisions should be enforced as written, regardless of any equitable defenses.⁸⁵

Resolution of the circuit split will be particularly important here. With over 100 million employees nationwide covered by similar plans, the Court’s ruling on providers’ ability to recover medical expenses from injury victims will have far-reaching effects.

Certiorari Pipeline

The Court entered its summer recess with only 30 cases on the docket for the 2012 term—the smallest number by that point of the year since 2007. (At the beginning of the summer last year, the Court

⁸³ *US Airways, Inc. v. McCutchen*, No. 2:08cv1593, 2010 WL 3420951 (W.D. Pa. Aug. 30, 2010).

⁸⁴ *US Airways, Inc. v. McCutchen*, 663 F.3d 671 (3d Cir. 2011).

⁸⁵ See, e.g., *Zurich Am. Ins. Co. v. O’Hara*, 604 F.3d 1232 (11th Cir. 2010).

had already granted review in 43 cases.) Despite the relatively small docket at the time of this writing, however, there are a number of important cases on the way that have the potential to transform the 2012 term from a fairly interesting one into a blockbuster.

Same-Sex Marriage

The most closely watched cases in the pipeline involve challenges to laws concerning same-sex marriage. The first challenge involves section 3 of the Defense of Marriage Act, the provision that defines marriage as a legal union between a man and a woman for purposes of providing federal marriage-based benefits.⁸⁶ The U.S. Court of Appeals for the First Circuit⁸⁷ and the U.S. District Court for the Northern District of California⁸⁸ recently invalidated that provision. The Obama administration has effectively declined to defend its constitutionality, leading to the intervention of the Republican leadership in the House of Representatives in these and other lawsuits. The Republican leadership has now sought review of the First Circuit's decision. The Obama administration has supported the request for Supreme Court review, citing the need for definitive resolution of this highly contentious issue.

The second challenge involves California's Proposition 8, which amended the state's constitution to prohibit same-sex marriage, and which the Ninth Circuit struck down on equal protection grounds.⁸⁹ The Proposition 8 proponents have asked the Supreme Court to review that decision, which means that it too will be teed up this term.

Although these two challenges present the same general question regarding same-sex marriage, it is conceivable that the Court could decide one of the cases in a way that leads to a different result in the other. It seems inevitable that the Court will grant review in at least one of the challenges, if not both, and the interplay between them will be interesting to watch.

Voting Rights

The Voting Rights Act,⁹⁰ last before the Court in *Northwest Austin Municipal Utility District v. Holder*,⁹¹ will surely return to the Court

⁸⁶ 1 U.S.C. § 7.

⁸⁷ *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

⁸⁸ *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012).

⁸⁹ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

⁹⁰ 42 U.S.C. §§ 1973–1973aa-6.

⁹¹ 557 U.S. 193 (2009).

this term, most likely in *Shelby County v. Holder*.⁹² That case involves a facial challenge to the VRA's Section 5, which requires federal pre-clearance of changes to voting practices in jurisdictions with a history of racial discrimination.⁹³ Although Shelby County concedes that Congress properly acted under its power to enforce the Fifteenth Amendment when it initially enacted the Voting Rights Act in 1965, it argues that Congress lacked sufficient evidence of contemporary discrimination to invoke that same power when it reauthorized the legislation with the same coverage formula in 2006. Shelby County has filed its petition for certiorari, and the Court will likely act on it in the fall.

Affirmative Action

As if one affirmative action case were not enough, the Court may yet have the opportunity to add another. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, currently pending before the *en banc* Sixth Circuit, presents the question whether a state may amend its own constitution to *ban* affirmative action.⁹⁴ After *Grutter v. Bollinger*,⁹⁵ Michigan voters passed Proposal 2, a state constitutional amendment forbidding race-based preferences in public education, employment, and contracting. Last year, a panel of the Sixth Circuit invalidated Proposal 2, concluding that it impermissibly burdens the ability of minority groups to achieve beneficial legislation.⁹⁶ The Sixth Circuit granted rehearing *en banc* and heard oral argument in March. The case remains pending. Meanwhile, the Ninth Circuit in April upheld a nearly identical California state constitutional amendment.⁹⁷ In the wake of the Ninth Circuit's decision, a contrary outcome in the *en banc* Sixth Circuit may well attract the Supreme Court's attention.

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⁹² 679 F.3d 848 (D.C. Cir. 2012).

⁹³ See 42 U.S.C. § 1973c.

⁹⁴ 652 F.3d 607 (6th Cir. 2011), vacated and reh'g granted *en banc*, No. 08-1387 (Sept. 9, 2011).

⁹⁵ 539 U.S. 306 (2003).

⁹⁶ *Coal. to Defend Affirmative Action*, 652 F.3d at 630–31.

⁹⁷ *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012).

Various other cases could still reach the Court in the next year, including challenges to nonconsensual blood testing,⁹⁸ the EPA's greenhouse gas regulations,⁹⁹ military commissions,¹⁰⁰ and Washington State's "top-two" primary system.¹⁰¹ Even without those cases, however, October Term 2012 promises to be a fascinating term—one that will provide substantial insights into the direction of the Roberts Court.

⁹⁸ *State v. McNeely*, 358 S.W.3d 65 (Mo. 2012) (en banc).

⁹⁹ *Coal. for Responsible Regulation v. EPA*, No. 09-1322, 2012 WL 2381955 (D.C. Cir. June 26, 2012).

¹⁰⁰ *Hamdan v. United States*, No. 11-1257 (D.C. Cir. 2011).

¹⁰¹ *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784 (9th Cir. 2012).