

Looking Ahead: October Term 2014

Miguel A. Estrada and Ashley S. Boizelle***

The Supreme Court's October 2014 term will follow a term marked by both unanimity and a spate of 5-4 decisions spanning topics that include the limits of executive power in making recess appointments, cell phone searches and the Fourth Amendment, the First Amendment rights of abortion protestors and home health care providers, and the religious rights of closely held corporations. Although pundits and the public are still digesting the implications of the Court's decisions, the polarizing nature of much of the Court's jurisprudence shows no sign of abating. Indeed, only a few weeks after the Court's 5-4 decision striking down the government's contraceptive mandate for closely held corporations that object on religious grounds, congressional Democrats introduced legislation to override it.¹

As the dust from the previous term settles and new battles begin, the Court's new docket is taking shape and promises to feature its fair share of high-profile cases. As of this writing, the Court has granted review in 39 cases and asked for the view of the solicitor general in 10 others. The 2014 caseload includes important questions such

* Partner in the Washington, D.C. office of Gibson, Dunn & Crutcher and has argued 22 cases before the Supreme Court. Prior to entering private practice, Mr. Estrada served as Assistant to the Solicitor General of the United States and as an Assistant U.S. Attorney and Deputy Chief of the Appellate Section, U.S. Attorney's Office, Southern District of New York. He also served as a law clerk to the Honorable Anthony M. Kennedy in the U.S. Supreme Court in 1988-1989 and to the Honorable Amalya L. Kearse in the U.S. Court of Appeals for the Second Circuit in 1986-1987.

** Associate in the Washington, D.C. office of Gibson, Dunn & Crutcher, where she specializes in appellate and constitutional litigation. Prior to joining Gibson Dunn, she clerked for the Honorable Sandra S. Ikuta in the U.S. Court of Appeals for the Ninth Circuit.

¹ See, e.g., Kristina Peterson, Senate Bill to Nullify Hobby Lobby Decision Fails, Wall St. J., July 16, 2014, available at <http://online.wsj.com/articles/senate-bill-against-hobby-lobby-decision-fails-1405537082>.

as whether a prison can prohibit a Muslim inmate from growing a beard that he claims is required by his religion, whether Congress can direct the State Department to recognize Jerusalem as part of Israel on the passports of Jerusalem-born U.S. citizens, and whether a person can be prosecuted under the anti-shredding provision of Sarbanes-Oxley for destroying undersized fish. In this article, we discuss these and other significant cases from the upcoming term and offer a few predictions about additional cases that may end up on the Court's calendar come October.

I. Fourth Amendment

After winning widespread acclaim for unanimously bringing the Fourth Amendment into the 21st century in *Riley v. California*,² the Court will open the 2014 term with oral argument in *Heien v. North Carolina*, which presents the question whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.³

In 2009, Nicholas Heien and a friend were driving through North Carolina and were pulled over by a police officer for a nonfunctioning brake light. The officer performed the traffic stop on the mistaken belief that North Carolina law requires that a vehicle have *two* functioning brake lights, rather than merely "*a* stop lamp," as the relevant statute provides.⁴ During the stop, the officer asked for and received permission to search the vehicle, and discovered a plastic bag containing cocaine. Based on that evidence, the state charged Heien with trafficking in cocaine. At trial, Heien moved to suppress it on the ground that the stop was an illegal seizure under the Fourth Amendment. The trial court denied the motion, and Heien was sentenced to two consecutive prison terms of 10 to 12 months. The appeals court unanimously reversed, but the North Carolina Supreme Court agreed with the trial court, holding that "so long as an officer's mistake is reasonable, it may give rise to reasonable suspicion."⁵ Relying in part on the Supreme Court's decision in

² 134 S.Ct. 2473 (2014).

³ No. 13-604 (OT 2014).

⁴ N.C.G.S. § 20-129(g) (2013) (emphasis added).

⁵ *State of North Carolina v. Heien*, 737 S.E.2d 351, 358 (N.C. 2012).

Michigan v. DeFillippo,⁶ the North Carolina Supreme Court reasoned that “requiring an officer to be more than reasonable, mandating that he be perfect, would impose a greater burden than that required under the Fourth Amendment.”⁷

DeFillippo is part of a mosaic of decisions in which the Court has strained to protect the truth-finding function of trials from overly technical applications of the exclusionary rule. In that case, the Court recoiled from requiring police officers to second-guess the constitutionality of the laws they are required to enforce, holding that evidence obtained during an arrest under an ordinance that was later declared unconstitutional need not be suppressed under a good-faith exception to the exclusionary rule.⁸ The Court has applied the same exception when evidence is obtained in “objectively reasonable reliance” on the basis of binding, but later abrogated, circuit precedent.⁹ The Court has not, however, extended this exception to mistakes of *existing* law, nor has it suggested that the good-faith exception goes to the question whether the Fourth Amendment was violated in the first instance, rather than simply to the remedy for a violation.

Nevertheless, the Court has occasionally noted that the text of the Fourth Amendment reflects some tolerance for certain kinds of errors by law enforcement, a question that comes before and stands quite apart from whether the exclusionary rule applies. Indeed, in *Illinois v. Rodriguez*, the Court made clear that “in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”¹⁰

⁶ 443 U.S. 31 (1979); see also *Illinois v. Krull*, 480 U.S. 340, 342, 349–50 (1987) (recognizing exception to exclusionary rule when officers act in objectively reasonable reliance on a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment).

⁷ Heien, 737 S.E.2d at 356.

⁸ *DeFillippo*, 134 S. Ct. 2473.

⁹ *Davis v. United States*, 131 S. Ct. 2419 (2011); see also *United States v. Leon*, 468 U.S. 897 (1984) (permitting admission of evidence obtained on the basis of a facially valid search warrant that is not actually supported by probable cause under a good faith exception to the exclusionary rule).

¹⁰ 497 U.S. 177, 185–86 (1990).

State and federal courts are divided on the question whether a mistake of law, as opposed to fact, violates the Fourth Amendment. The U.S. Court of Appeals for the Eighth Circuit, for example, has held in a case similar to *Heien* that the relevant question is “whether an objectively reasonable police officer could have formed a reasonable suspicion that [the defendant] was committing a code violation.”¹¹ Because the language of the applicable statute was “counterintuitive and confusing,” the court determined that the officer had an objectively reasonable basis to believe that he had witnessed a traffic violation and that the stop was permitted under the Fourth Amendment.¹² The Eleventh Circuit, however, has held that “a mistake of law, no matter how reasonable or understandable, . . . cannot provide reasonable suspicion . . . to justify a traffic stop” and has stressed “the fundamental unfairness of holding citizens to ‘the traditional rule that ignorance of the law is no excuse,’ while allowing those ‘entrusted to enforce’ the law to be ignorant of it.”¹³

Ultimately, *Heien* poses the question whether those charged with enforcing the law should be permitted (if not, encouraged) to acquire a lackadaisical understanding of the law relevant to the execution of their duties. The Court must decide this question in the context of a long-standing rule for criminal defendants that “ignorance of the law is no excuse.”¹⁴ The Court appears to have three possible paths. It could hold that mistakes of law (1) do not violate the Fourth Amendment, (2) violate the Fourth Amendment but are not subject to suppression when they are objectively reasonable, or (3) violate the Fourth Amendment and are subject to the exclusionary rule. To be sure, the third option is likely to have a significant deterrent effect, while options 1 and 2 may have the undesirable effect of encouraging willful ignorance of the law by the very people charged with enforcing it. In any event, it would seem an odd bargain indeed for laypersons to be charged with knowledge of criminal law and denied any defense on the basis of mistakes of law—absent certain statutory exceptions—while law enforcement is incentivized to

¹¹ *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005).

¹² *Id.* at 1001–02.

¹³ *United States v. Chanthasouvat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (quoting *Bryan v. United States*, 524 U.S. 184, 196 (1998)).

¹⁴ *Bryan*, 524 U.S. at 196.

embrace ignorance of the law, even as it purports to enforce those laws on the public's behalf.

II. Criminal Law and Statutory Interpretation

In addition to the Fourth Amendment, the Court's 2014 term will feature several criminal appeals that involve important questions of statutory interpretation.

A. *Go Fish*

Of the Court's current crop of criminal cases, *Yates v. United States* features the most bizarre fact pattern and the most aggressive application of a federal statute by federal prosecutors.¹⁵ Specifically, the case poses the question whether a commercial fisherman can be convicted under the anti-shredding provision of the Sarbanes-Oxley Act for destroying fish—yes, fish—following receipt of a civil fishing citation from the Florida Fish & Wildlife Commission for harvesting undersized red grouper in the Gulf of Mexico.

To be sure, Sarbanes-Oxley has never been applied in this manner. The statute, which was enacted in 2002 in response to Enron Corporation's systematic destruction of documents and financial records during a federal investigation into the circumstances of its collapse, provides:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation of proper administration of any matter within the jurisdiction of any department or agency of the United States . . . shall be fined under this title, imprisoned not more than 20 years, or both.¹⁶

Based on this provision, federal prosecutors charged Yates with illegally destroying evidence that demonstrated that he had illegally harvested red grouper that were smaller than the minimum 20 inches required under applicable regulations. He was convicted, and the U.S. Court of Appeals for the Eleventh Circuit affirmed.¹⁷

¹⁵ No. 13-7541 (OT 2014).

¹⁶ 18 U.S.C. § 1519 (2014); see also *Arthur Andersen v. United States*, 544 U.S. 696 (2005).

¹⁷ *United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013).

The solicitor general submitted a waiver of the United States' right to respond 10 days after the petition for certiorari was filed. Such a waiver is scarcely unusual—the government declines to respond to the vast majority of cert petitions, a practice that can be justified by the plain fact that most petitions require only cursory examination to conclude that the case does not merit further review—but the practice can be troubling when, as in *Yates*, it is apparently used in an attempt to “bury” a petition so that questionable prosecutorial decisions will escape notice. The solicitor general's special standing with the Court, which has earned the office the label “the 10th justice,” is not easily compatible with behavior that smacks of abusing procedural rules for narrow tactical advantage. It surely ought to embarrass the solicitor general when his waiver is rejected and certiorari is granted, especially if the judgment is then reversed. His original waiver, after all, implicitly represented to the Court that the issues presented by the petition were not even worth discussing.

That may well be the path that lies ahead for *Yates*. After the Court rejected the solicitor general's waiver and called for a government response, he filed a brief defending the judgment below on the ground that a fish is a “tangible object,” and that *Yates* acted with “obstructive intent.”¹⁸ That may be true as far as it goes, but it seems a bit strained in the context of a statute that contemplates that “false entries” might be made on such “tangible object[s]” or that such objects might be “falsified.” Sadly, the silly literalism of federal prosecutors in *Yates*, and the solicitor general's willingness to defend the nearly indefensible, appear to be part of a broader pattern of criminal-justice abuse unchecked by any meaningful adult supervision.

Indeed, *Yates* is a fitting sequel to last term's example of the same syndrome, *Bond v. United States*.¹⁹ That case featured a plot straight out of a soap opera—a scorned wife who used chemical irritants on the doorknob, mailbox, and car door handle of her husband's mistress, ultimately causing a minor thumb burn that was easily treated with water. Evidently, federal prosecutors could think of nothing better to do with their time than to prosecute the wronged woman under the Chemical Weapons Convention Implementation Act of 1998, a federal law regulating chemical warfare. The solicitor

¹⁸ Brief for the United States in Opposition at 9–10, *Yates* (No. 13-7451).

¹⁹ 134 S. Ct. 2077 (2014).

general defended that prosecutorial judgment not once, but *twice*, losing *unanimously* each time.²⁰ To the surprise of no one outside the Department of Justice, the Supreme Court was unwilling to “transform a statute passed to implement the international Convention on Chemical Weapons into one that makes it a federal offense to poison goldfish” or to embrace a reading of the act “that would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room.”²¹

Despite the Court’s obvious antipathy toward the government’s creative and capacious interpretation of a federal criminal statute, it appears that federal prosecutors have not been chastened by the experience of *Bond*. Instead, they continue to use their discretion to press the outer bounds of criminal statutes, irrespective of legislative intent and the availability or adequacy of state criminal penalties. And, as in *Bond*, their work is being abetted by the Office of the Solicitor General. This dynamic is understandably disconcerting to criminal defense attorneys and those generally concerned with federal overreach. In *Bond*, the Court responded to this dynamic with a decisive 18 adverse votes. Time will tell whether *Yates* is destined for a similar fate.

B. *Aggravated Robbery*

Whitfield v. United States is another case in which the Court will determine whether prosecutors and courts have reasonably interpreted and applied a criminal statute.²² Specifically, 18 U.S.C. § 2113(e) provides a sentence of 10 years to life in prison for anyone who, in the commission of a bank robbery, forces another person “to accompany him without the consent of such person” during the robbery or while in flight.²³

Larry Whitfield and an accomplice, armed with a handgun and an assault rifle, entered a credit union in North Carolina but were foiled when a metal detector triggered an automatic locking system. They fled the scene by car and were pursued by police, but became stuck on a highway median. After abandoning their vehicle,

²⁰ *Id.*; see also *Bond v. United States*, 131 S. Ct. 2355 (2011).

²¹ *Bond*, 134 S. Ct. at 2091.

²² No. 13-9026 (OT 2014).

²³ 18 U.S.C. § 2113(e) (2014).

they discarded their weapons and separated. Whitfield ended up in the home of Herman and Mary Parnell, where he encountered the 79-year-old Mrs. Parnell and ordered her to accompany him to an interior computer room to avoid detection by police. Whitfield eventually fled the Parnell residence and was apprehended. When Mr. Parnell returned home, he found his wife in the computer room, dead from a heart attack.

Following a jury trial, Whitfield was convicted of attempted bank robbery (Count 1), conspiring to carry a firearm during an attempted bank robbery (Count 2), carrying a firearm during an attempted bank robbery (Count 3), and forcing Mrs. Parnell to accompany him while attempting to avoid apprehension for an attempted bank robbery that resulted in death (Count 4). In accordance with 18 U.S.C. § 2113(e), the district court sentenced Whitfield to life imprisonment on Count 4, although the U.S. Court of Appeals for the Fourth Circuit reversed this portion of the judgment, holding that the indictment alleged only a killing offense and a forced accompaniment offense, rather than a “forced accompaniment resulting in death” offense.²⁴ The court therefore remanded for resentencing.²⁵ On remand, the district court sentenced Whitfield to 264 months of imprisonment to be followed by five years of supervised release. The Fourth Circuit affirmed.²⁶

Whitfield has challenged his conviction on the ground that compelling Mrs. Parnell to accompany him to an interior room in her home did not constitute “forced accompaniment” within the meaning of Section 2113(e). In granting review, the Supreme Court has agreed to decide whether a conviction under 18 U.S.C. § 2113(e) requires proof of more than *de minimis* movement of the victim.²⁷ While most courts to consider this issue have held that the amount of movement at issue in this case is sufficient to satisfy the statute,²⁸ the U.S. Court of Appeals for the Tenth Circuit has held that “more

²⁴ United States v. Whitfield, 695 F.3d 288 (4th Cir. 2012).

²⁵ *Id.* at 311.

²⁶ United States v. Whitfield, 548 F. App'x 70 (4th Cir. 2013).

²⁷ 134 S. Ct. 2840 (2014).

²⁸ See, e.g., United States v. Strobehn, 421 F.3d 1017, 1018–20 (9th Cir. 2005); United States v. Turner, 389 F.3d 111, 114, 119–20 (4th Cir. 2004); United States v. Davis, 48 F.3d 277, 278–79 (7th Cir. 1995); United States v. Reed, 26 F.3d 523, 525, 526–28 (5th Cir. 1994); United States v. Bauer, 956 F.2d 239, 241–42 (11th Cir. 1992).

is required than forcing [a bank president] to enter his own house or forcing the [bank president's] family to move from the den to a bedroom."²⁹

To be sure, Whitfield is not remotely a sympathetic defendant. And yet, his case presents important questions about statutory structure, fair notice, and lenity. Section 2113(e) defines an *aggravated* form of the bank robbery offense. But relatively minor movements are so commonplace in the context of bank robberies that, under a broad reading of "accompaniment," *every* bank robbery could be charged as an aggravated crime, essentially nullifying the congressional design.³⁰ On the other hand, the Tenth Circuit's remedy may be worse than the disease, because a *de minimis* exception to this criminal statute would not easily satisfy criminal-law standards of definiteness. It will be interesting to see how the Court ultimately resolves that tension.

C. First Amendment

Unlike most recent high-profile First Amendment cases, in *Elonis v. United States*, the Court will address constitutional speech protections in the context of a criminal prosecution.³¹ Specifically, 18 U.S.C. § 875(c) makes it a federal crime to "transmit[] in interstate or foreign commerce any communication containing . . . any threat to injure the person of another."³² Anthony Elonis was indicted for five violations of Section 875(c) after publishing posts on his public Facebook page—frequently in the form of violent rap lyrics—threatening physical harm to various targets, including former coworkers and patrons of an amusement park where he worked, his ex-wife, police officers, a kindergarten class, and an FBI agent. At trial, he insisted that the posts were amateur musical or poetic expressions and requested that the jury be instructed that the government must establish that he possessed a subjective intent to threaten in order to convict him under Section 875(c). The court denied his request, and Elonis was convicted on four of five counts with a sentence of 44 months of imprisonment to be followed by three years of supervised

²⁹ *United States v. Marx*, 485 F.2d 1179, 1186 (10th Cir. 1973).

³⁰ See, e.g., *United States v. Reed*, 26 F.3d 523, 528 (5th Cir. 1994).

³¹ No. 13-983 (OT 2014).

³² 18 U.S.C. § 875(c) (2014).

release. The U.S. Court of Appeals for the Third Circuit affirmed, holding that the district court correctly instructed the jury to apply an objective reasonable-person standard because the First Amendment permits criminal punishment for communications that qualify as “true threat[s].”³³

In granting *Elonis*’s petition for certiorari, the Supreme Court has agreed to decide (1) whether the First Amendment and *Virginia v. Black*³⁴ require that a conviction under Section 875(c) be predicated on proof of the defendant’s subjective intent to threaten rather than proof that a “reasonable person” would regard the statement as threatening, and (2) whether, as a matter of statutory interpretation, conviction of threatening a person under Section 875(c) requires proof of the defendant’s subjective intent to threaten.

As to the first question, *Virginia v. Black* held that a state may ban cross burning carried out with an intent to intimidate, but that a Virginia statute that treated *any* cross burning as prima facie evidence of an intent to intimidate violated the First Amendment.³⁵ The plurality opinion, authored by Justice Sandra Day O’Connor, concluded that the prima facie evidence provision was facially unconstitutional because it “permit[ted] the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself,” when “a burning cross is not always intended to intimidate.”³⁶ Because cross burning could be used to different effects, a statute that criminalized the activity could not ignore “all the contextual factors that are necessary to decide whether a particular cross burning was intended to intimidate.”³⁷

Although *Black* reflects the Court’s concerns about the contours of criminal-threat statutes—with an emphasis on the failure to account for the context in which speech is communicated—the statute at issue expressly incorporated an intent-to-intimidate requirement, and thus the Court was not forced to decide the precise question of whether the First Amendment requires that convictions under such

³³ *Elonis v. United States*, 730 F.3d 321 (3d Cir. 2013); see also *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

³⁴ 538 U.S. 343 (2003).

³⁵ *Id.* at 365.

³⁶ *Id.*

³⁷ *Id.* at 367.

statutes be based on the speaker's subjective intent to threaten the recipient of the speech. Absent clear authority, the majority of federal appellate courts to consider this question have adopted an objective standard, reasoning that the prohibition on true threats "protect[s] individuals from the fear of violence," "from the disruption that fear engenders," and "from the possibility that the threatened violence will occur," rather than simply from the ultimate threatened harm.³⁸

The U.S. Court of Appeals for the Ninth Circuit and several state supreme courts have applied a different rule, construing *Black* to require that the subjective test be read into all threat statutes that criminalize pure speech.³⁹ The Ninth Circuit has reasoned, in part, that the prima facie evidence provision in *Black* could not have offended the First Amendment if intent to intimidate were constitutionally irrelevant.⁴⁰

The Supreme Court must now decide which test is compelled by the First Amendment and whether Section 875(c) itself incorporates an intent-to-threaten element. The Court posed the second question without the parties' request, suggesting that it may believe that there is a basis to link *Elonis* to *Black* after all. Although the relevant provision does not expressly incorporate an intent element, Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit has previously observed that Section 875(c) could be construed to require proof of intent because "[e]very relevant definition of the noun 'threat' or the verb 'threaten,' whether in existence when Congress passed the law (1932) or today, includes an intent component."⁴¹

Whether the Supreme Court extends the logic of *Black*, adopts Judge Sutton's construction of Section 875(c), or holds that an objective test is permissible, the questions presented in *Elonis* will

³⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); see also, e.g., *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013), petition for cert. filed, (Feb. 21, 2014) No. 13-8837; *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), cert. denied, 124 S. Ct. 59 (U.S. Oct. 7, 2013)(No. 12-1185); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012); *United States v. Mabie*, 663 F.3d 322, 330-32 (8th Cir. 2011), cert. denied, 133 S. Ct. 107 (U.S. Oct. 1, 2012)(No. 11-9770); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997).

³⁹ See, e.g., *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); accord *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011); *State v. Grayhurst*, 852 A.2d 491, 515 (R.I. 2004).

⁴⁰ *United States v. Cassel*, 408 F.3d 622, 633 n.10 (9th Cir. 2005).

⁴¹ *Jeffries*, 692 F.3d at 483-84 (Sutton, J., concurring).

only become more pressing in the social media age. According to *Elonis's* petition for certiorari, the Justice Department has brought hundreds of Section 875(c) prosecutions since *Black* was decided,⁴² which should come as no surprise given the explosion in available social media outlets and the attendant ease with which individuals across the United States “transmit” messages in “interstate or foreign commerce” that would no doubt qualify as threats of physical harm under an objective standard. Although attempting to predict the outcome in Supreme Court cases is always perilous, the Court’s recent First Amendment jurisprudence reflects a robust commitment to free-speech rights and suggests that some portion of the Court is likely to be gravely concerned about any standard that criminalizes amateur rap lyrics, no matter how repugnant, posted to an individual’s Facebook page.

III. Freedom of Religion

In addition to its criminal cases, and on the heels of the controversial *Hobby Lobby* ruling, the Supreme Court has agreed to hear another case that addresses the contours of religious freedom, albeit in a prison in lieu of a craft store. Whereas *Hobby Lobby* dealt with the religious views of closely held corporations under the Religious Freedom Restoration Act of 1993 (RFRA), *Holt v. Hobbs* addresses the religious freedom of prisoners under the Religious Land Use and Institutionalized Persons Act (RLUIPA)—a statute enacted to extend to prisoners the same religious protections offered to unincarcerated individuals (and corporations and other legal persons) under RFRA.⁴³ Whereas *Hobby Lobby* addressed a federal requirement that compelled a corporation to act in a manner inconsistent with its religious practices, *Holt* addresses a prohibition on certain acts that are purportedly required by a prisoner’s religious commitments.

Specifically, *Holt* involves the question whether the Arkansas Department of Corrections’ no-beard-growing policy violates RLUIPA or the First Amendment, and whether a half-inch beard would satisfy the security goals sought by the policy. The challenge was brought

⁴² *Elonis*, 730 F.3d 321 Petition for Certiorari at 33, 134 S.Ct. 2819 (U.S. Feb. 14, 2014) (No. 13-983)(citing U.S. Dep’t of Justice, Bureau of Justice Statistics: Federal Criminal Case Processing Statistics, <http://www.bjs.gov/fjsrc/tsec.cfm>).

⁴³ No. 13-6827 (OT 2014).

by Gregory H. Holt, who is serving a life sentence for burglary and domestic battery—evidently involving an attempt to slash his girlfriend's throat—and who claims that his Muslim faith requires that he don at least a half-inch beard.

Under RLUIPA, prison officials must demonstrate that policies that burden religious practices serve a compelling penological interest through the least restrictive means. The policy that Holt challenges permits mustaches and quarter-inch beards for those with diagnosed dermatologic problems but prohibits all other facial hair on the ground that a ban is needed to promote “health and hygiene,” minimize “opportunities for disguise,” promote uniformity in inmate appearance, and help prevent concealment of contraband in inmates’ hair and cheeks. In their defense of the Arkansas policy, prison officials insist that “homemade darts and other weapons” and “cellphone SIM cards” can be concealed in half-inch beards and that there are serious practical difficulties in monitoring the lengths of inmates’ beards to ensure that they are in compliance with Holt’s proposed half-inch limit. The Eighth Circuit held that the justifications offered by the prison officials satisfied the RLUIPA standard, despite evidence that prisons in 41 state corrections systems and the federal system allow prisoners to grow beards for religious reasons.

Solicitor General Donald Verrilli filed an amicus brief in support of Holt’s challenge, calling the no-beard policy “religious discrimination” and “a substantial burden on religious exercise.”⁴⁴ Interestingly, this brief was filed only a few months after the government’s reply brief in *Hobby Lobby*, which insisted that the requirement that employers provide their employees with no-cost contraceptives did not constitute a substantial burden on the religious beliefs of those employers.⁴⁵ In the government’s view, prisons can advance their legitimate safety objectives in some other way that is more respectful of the inmate’s religious beliefs; the federal government, on the other hand, need not be troubled to accommodate the sincere religious beliefs of business owners.

The federal government’s differential treatment of these two cases is odd because RLUIPA was intended to make available to prisoners

⁴⁴ Brief for the United States as Amicus Curiae Supporting Petitioner, *Holt v. Hobbs*, No. 13-6827 (OT 2014).

⁴⁵ Reply Brief for Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

protections that replicate those available to the general citizenry under RFRA. Whatever the relationship between the two statutes, it would be bizarre if those whose liberty is restricted on account of proven antisocial behavior were better protected from the government's incursions on their religion than members of the law-abiding public. Be that as it may, given the Supreme Court's disposition in *Hobby Lobby*, we should not be surprised to see a ruling invalidating the no-beard policy as an unjustified burden on Holt's religion.

IV. Executive Power

As a general rule, no Supreme Court term is complete without a healthy dose of separation-of-powers cases, and the 2014–2015 term has its fair share of them.

A. *The Recognition Power*

In *Zivotofsky v. Kerry*, for example, the Court will decide whether the Foreign Relations Authorization Act (FRAA)—which directs the secretary of state, on request, to record the birth country of an American citizen born in Jerusalem as “Israel” on a Consular Report of Birth Abroad (CRBA) and on a U.S. passport—“impermissibly infringes on the President’s exercise of the recognition power reposing exclusively in him.”⁴⁶ The case arises out of a dispute over the passport and CRBA of Menachem Zivotofsky, who was born to American parents living in Jerusalem in 2002. Zivotofsky’s parents filed a request in accordance with the FRAA but were denied.

The FRAA has been controversial from its inception. Indeed, when President George W. Bush signed it, he issued a statement disclaiming the above statutory requirement as an impermissible interference “with the president’s constitutional authority to conduct the nation’s foreign affairs.”⁴⁷ Consistent with this position, the State Department refuses to enforce the law on the ground that it is inconsistent with the government’s long-standing neutrality on the status of Jerusalem as part of neither Israel nor Palestine. State

⁴⁶ No. 13-628 (OT 2014).

⁴⁷ George W. Bush, Statement on Signing the Foreign Relations Authorization Act (Sept. 12, 2002), 38 Weekly Comp. Pres. Doc. 40 at 1660 (Oct. 7, 2002), available at <http://www.gpo.gov/fdsys/pkg/WCPD-2002-10-07/html/WCPD-2002-10-07-Pg1658-2.htm>.

Department policy concerning the birthplace of U.S. citizens born in Jerusalem instead directs that the birthplace on official documents be recorded as “Jerusalem,” without any mention of a country.

The case has been before the Court once before, when it reversed the U.S. Court of Appeals for the D.C. Circuit’s determination that the case posed a political question that the judiciary should not resolve.⁴⁸ Forced to decide the case on the merits, the D.C. Circuit held that the FRAA is unconstitutional because it violates the president’s exclusive power to recognize foreign nations. The court explained that while the question of passport authority is not itself in the Constitution, the president’s “recognition power” is derived from his or her authority to receive ambassadors and enables the president to speak as the sole representative of the United States in matters of international diplomacy.

Unsurprisingly, members of Congress are displeased with that ruling and have objected, in particular, to the D.C. Circuit’s suggestion that the president’s recognition power is plenary and exclusive. In an amicus brief in support of certiorari, they argued that the upshot of the court’s determination is that “the Executive is given carte blanche to treat as unconstitutional—and to refuse to comply with—any Act of Congress that it determines touches on recognition policy,”⁴⁹ thereby interfering with the necessary exercise of Congress’s powers, including naturalization and immigration.⁵⁰

Ultimately, the case presents a politically and legally contentious question—one made even more controversial by the intensification of hostilities between Israel and Hamas in Gaza and the existing partisan rancor between President Obama and Congress. Whether one believes that Jerusalem is part of Israel, Palestine, or some split authority, it would appear that the president has the constitutional authority to determine when and how to recognize it. The questions the Court must answer are whether that power is exclusive to the executive branch and whether the FRAA unconstitutionally interferes with it.

⁴⁸ *M.B.Z. v. Clinton*, 132 S. Ct. 1421 (2012).

⁴⁹ Brief for Members of Congress as Amici Curiae in Support of Petitioner at 4, Zivotovsky, No. 13-628 (OT 2014).

⁵⁰ *Id.* at 15.

B. The Nondelegation Doctrine

In addition to addressing the scope of the executive's recognition power, the 2014 term will feature the Court's first case in more than 70 years that features the nondelegation doctrine—the idea that one branch of government cannot authorize another entity to exercise its constitutionally authorized powers. Indeed, the Court has not invalidated a federal statute on nondelegation grounds since 1936.⁵¹ In *Department of Transportation v. Association of American Railroads*, the Court will review a decision of the D.C. Circuit holding that Congress violated the nondelegation doctrine when it empowered Amtrak and the Federal Railroad Administration (FRA) to collaborate to develop performance measures to improve enforcement of the statutory priority Amtrak's passenger rail service has over other trains.⁵²

As the parties' briefing explains, Congress created Amtrak—an entity with both public and private dimensions—in 1970 to provide intercity passenger rail service and replace railroads that were angling to abandon passenger-rail service.⁵³ In an attempt to improve Amtrak's profitability and as a condition of releasing railroads from their passenger-service obligations, Congress directed railroads to allow Amtrak to use their tracks and facilities, at rates either agreed to by Amtrak and the host railroads or prescribed by the Surface Transportation Board (STB).⁵⁴ To further improve passenger-rail service, Congress also granted Amtrak a general priority over freight transportation in using rail facilities. Most recently, in 2008, Congress passed the Passenger Rail Investment and Improvement Act of 2008 (PRIIA),⁵⁵ which provides that the Federal Railroad Administration and Amtrak

shall jointly, in consultation with the Surface Transportation Board [and others] . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance

⁵¹ *Carter v. Carter Coal*, 298 U.S. 238, 283–84, 310–12 (1936).

⁵² No. 13-1080 (OT 2014).

⁵³ See *Dep't of Transp. v. Ass'n of Am. R.R.'s*, 721 F.3d 666 (D.C. Cir. 2013), petition for cert. filed, No. 13-1080 (U.S. Mar. 10, 2014; see also Brief in Opposition, No. 13-1080 (OT 2014)).

⁵⁴ 49 U.S.C. § 24308(a)(2014).

⁵⁵ Pub. L. No. 110-432, Division B, 122 Stat. 4848, 4907 (codified generally in Title 49).

and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.⁵⁶

The statute further provides that any deadlock between Amtrak and the FRA must be resolved via binding arbitration, with an arbitrator appointed by the STB.⁵⁷ Amtrak and the FRA published proposed “metrics and standards” in March 2009 and jointly issued their final rule on May 6, 2010.

Shortly thereafter, the Association of American Railroads (AAR) challenged Section 207 of the PRIIA as an unconstitutional delegation of authority to a private actor and a violation of the Due Process Clause. AAR argued that the statute delegated to Amtrak the authority to promulgate the metrics and standards by which its performance, and the performance of other railroads, would be evaluated, and that, in the event of a disagreement between Amtrak and the FRA, the latter would be precluded from implementing its desired standards. The D.C. Circuit agreed.⁵⁸

Although the Supreme Court rarely applies the nondelegation doctrine, it has repeatedly recognized that a statutory scheme may give private entities a rulemaking role provided that they “function subordinately” to the government.⁵⁹ Here, it does not appear that Amtrak operates subordinately to the FRA, although whether Section 207 of the PRIIA is an unconstitutional delegation of authority will also turn on whether the Court finds that Amtrak is a private or public entity. The Court has previously held, in *Lebron v. National Railroad Passenger Corp.*, that Amtrak “is part of the Government for purposes of the First Amendment.”⁶⁰ It has not, however, held that Amtrak should be deemed a governmental entity for all purposes.

Ultimately, the case involves a sui generis delegation of authority that is specific to Amtrak and does not appear elsewhere in federal law. The Court’s decision to review it and revisit what many consider a dormant doctrine suggests that it may well take issue with the D.C. Circuit’s analysis.

⁵⁶ 49 U.S.C. § 24101 note (2014).

⁵⁷ *Id.*

⁵⁸ *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666 (D.C. Cir. 2013).

⁵⁹ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

⁶⁰ 513 U.S. 374, 400 (1995).

C. Government Whistleblowers and National Security

Another case that addresses the relationship between Congress and the executive branch is *Department of Homeland Security v. MacLean*, in which the Court will determine whether certain statutory protections in 5 U.S.C. § 2302(b)(8)(A) of the Whistleblower Act of 1989, which are inapplicable when a federal employee makes a disclosure “specifically prohibited by law,” can bar a federal agency from taking an enforcement action against an employee who intentionally discloses sensitive security information (“SSI”) in violation of an agency regulation.⁶¹

SSI is defined as sensitive but unclassified information. Disclosure of such information is prohibited by federal regulations.⁶² Robert MacLean was employed as an air marshal for the Transportation Security Administration (TSA) but was fired after disclosing to a cable news reporter that the TSA was reducing the number of air marshals that had been put on flights out of Las Vegas after September 11, 2001. MacLean’s leak, which was aired anonymously, prompted fierce opposition from Congress, prompting the TSA to abandon the plan. Once the TSA determined that MacLean was the reporter’s source, however, he was terminated for violating a TSA regulation barring public disclosure of details concerning how the agency deploys its security staff.

MacLean challenged his termination, arguing that the Whistleblower Act precluded the government from disciplining any federal employee for exposing information that the employee believed would be a “specific danger to public health and safety.”⁶³ Although the statutory protection does not insulate individuals who have disclosed information in violation of federal law, MacLean argued that he had not violated any law because the information he released was covered only by a TSA regulation rather than by a federal statute. The U.S. Court of Appeals for the Federal Circuit unanimously agreed, and the government seeks review of that decision on the ground that the Federal Circuit’s decision “effectively permits individual federal

⁶¹ No. 13-894 (OT 2014).

⁶² 49 C.F.R. § 1520 (2014).

⁶³ 5 U.S.C. § 2302(b)(8)(A) (2014).

employees to override the TSA's judgments about the dangers of public disclosure."⁶⁴

For those familiar with canons of construction, it is perhaps perplexing that the word "law" is being construed to exclude federal regulations. MacLean insists that the structure and history of the Whistleblower Act make clear that "law" does not include regulations and that it should not be so construed in light of the act's purpose to protect whistleblowers against the agencies that would retaliate against them. Indeed, the conference report accompanying the provision's enactment states that it "does not refer to agency rules and regulations" but instead "to statutory law and counter interpretations of those statutes."⁶⁵ The government contends, however, that "agency rules and regulations" cannot be construed to encompass congressionally mandated regulations like those at issue in this case.⁶⁶

In deciding this dispute, the Court is likely to consider the potentially broad implications for the rights of government employee whistleblowers and the need to balance national security interests associated with secrecy and disclosure. Here, MacLean's disclosure was widely lauded by those outside of the executive branch, but one can easily imagine others (such as Edward Snowden imitators) whose disclosures would provoke less sympathy.

D. Agencies and the Administrative Procedure Act

In *Perez v. Mortgage Bankers Association* and *Nickols v. Mortgage Bankers Association*, the Court will again address the limits of executive power in deciding whether a federal agency must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act (APA) before it can significantly alter an interpretive rule that sets forth a particular interpretation of an agency regulation.⁶⁷

In these consolidated cases, the plaintiffs challenged a change in the Labor Department's interpretation of the Fair Labor Standards Act (FLSA) to require overtime for mortgage loan officers. The department's 2010 Wage and Hour Division administrative interpretation,

⁶⁴ Dep't of Homeland Sec. v. MacLean, 714 F.3d 1301 (Fed. Cir. 2013), petition for cert. filed at 11, No. 13-894 (U.S. Jan. 27, 2014).

⁶⁵ H.R. Conf. Rep. No. 1717, 95th Cong., 2d. Sess. 130 (1978).

⁶⁶ DHS v. MacLean, cert. petition, *supra* n.64, at 15.

⁶⁷ Nos. 13-1041, 13-1052 (OT 2014).

which was issued without public comment, reversed an earlier 2006 Bush era administrative opinion letter that concluded that mortgage loan officers were exempt from the FLSA's overtime requirements.

The APA generally requires that agencies promulgating new regulations provide interested parties an opportunity to submit written comments on the proposed regulations.⁶⁸ The APA also provides that its notice-and-comment requirement does not apply to interpretative rules unless notice is otherwise required by statute.⁶⁹ Under D.C. Circuit case law, however, when an agency has announced a specific and definitive interpretation of a regulation, and then substantially revises that interpretation, the agency has effectively amended its rule, which may not be accomplished without notice-and-comment under the APA.⁷⁰ Accordingly, the court ruled that because the department's 2010 administrative interpretation was a "definitive" regulatory interpretation that substantially revised (indeed, reversed) the department's earlier position in its 2006 Opinion Letter, notice-and-comment rulemaking was required under the APA.⁷¹ The D.C. Circuit's interpretation has been adopted by the Fifth Circuit, but the First and Ninth Circuits have held that the APA allows agencies to amend interpretive rules without notice-and-comment.⁷²

Although the ultimate question of whether mortgage loan officers are entitled to overtime is not likely to capture the public's imagination, these cases will have important consequences for all federal agencies subject to the APA. Under the existing framework, entities subject to federal regulations have to vigilantly monitor agencies' prevailing interpretive guidance to keep abreast of changes and are often subject to dramatic shifts in regulatory policies under different administrations with different political agendas. A rule affirming the D.C. Circuit would make it more difficult for agencies to change their interpretations without engaging in notice-and-comment,

⁶⁸ 5 U.S.C. § 553 (2014).

⁶⁹ *Id.* at § 553(b).

⁷⁰ See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997); see also *Alaska Prof. Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999).

⁷¹ See *Mort. Bankers Ass'n v. Harris*, 720 F.3d 966, 968 (D.C. Cir. 2013).

⁷² See *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629–30 (5th Cir. 2001); see also *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008); *Warder v. Shalala*, 149 F.3d 73, 75–79 (1st Cir. 1998).

which generally takes more time and exposes the agency to legal challenge on procedural and substantive grounds under the APA.

V. Anti-Discrimination Laws

The new term will also feature cases involving discrimination claims by a pregnant UPS employee and Democrats and minority voters in Alabama.

A. *Pregnancy Discrimination*

Accusations of pregnancy discrimination are becoming a pervasive workplace phenomenon, as evidenced by the upsurge in the number of claims filed with the Equal Employment Opportunity Commission (EEOC) annually. In *Young v. United Parcel Service, Inc.*, the Court will wade into that thicket to decide whether an employer can deny pregnant employees accommodations such as light duty that are offered to other workers who are allegedly “similar in their ability or inability to work” under the Pregnancy Discrimination Act (PDA).⁷³

The PDA amended Title VII of the Civil Rights Act of 1964. It provides that the prohibition on discrimination “because of sex” or “on the basis of sex” includes but is not limited to discrimination “on the basis of pregnancy, childbirth or related medical conditions,” and that “women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”⁷⁴

Peggy Young was a driver for UPS when she became pregnant and was directed by her doctor to refrain from lifting heavy objects. She requested a temporary light-duty assignment, but UPS denied her request, contending that light-duty assignments were available only to employees with job-related injuries, those considered permanently disabled under the Americans with Disabilities Act, and injured employees ineligible for their federal driver’s certification under the terms of UPS’s collective-bargaining agreement. Instead, Young was directed to take unpaid leave.

⁷³ No. 13-1226 (OT 2014); see also 42 U.S.C. § 2000e(k) (2014).

⁷⁴ 42 U.S.C. § 2000e(k) (2014).

Young took this leave but filed a challenge to UPS's policy on the ground that the PDA requires employers to provide accommodations for pregnant employees that are comparable to those received by others with similar "ability or inability to work," regardless of how the person became disabled. Both the district court in Maryland and the U.S. Court of Appeals for the Fourth Circuit ruled against Young, however, holding that UPS's policy was consistent with the PDA because there was no evidence of discriminatory intent, the policy did not exclude only pregnancy, and "where a policy treats pregnant workers and nonpregnant workers alike, the employer has complied with the PDA."⁷⁵ The Fourth Circuit's ruling, however, conflicts with a 1996 Sixth Circuit decision that allowed a similar PDA claim to move forward.⁷⁶

Although the solicitor general contended that the Fourth Circuit erred, he recommended that the Court deny the petition for review because of 2008 amendments to the Americans with Disabilities Act that might "lead courts to reconsider their approach to evaluating a pregnant employee's claim that other employees with similar limitations on their ability to work were treated more favorably," and because the EEOC was poised to issue guidance clarifying its interpretation of the PDA.⁷⁷ Indeed, the EEOC went on to release that guidance on July 14, 2014.⁷⁸ Nevertheless, the Court took the case.

While the EEOC's guidance lacks the force and effect of an act of Congress or a Supreme Court ruling, it reflects the agency's—and presumably the Obama administration's—prevailing interpretation of the PDA. Whether the Court will adopt this interpretation is a separate question altogether. Given the Court's decision to hear *Young* over the solicitor general's opposition, it does not appear to believe

⁷⁵ *Young v. UPS, Inc.*, 707 F.3d 437, 449 (4th Cir. 2013).

⁷⁶ See *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996).

⁷⁷ Brief for the United States as Amicus Curiae at 8, *Young v. UPS, Inc.*, No. 12-1226 (2014).

⁷⁸ See EEOC, Enforcement Guidance on Pregnancy Discrimination and Other Issues (July 14, 2014), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm. The EEOC's guidance expressly states that a pregnant worker may "establish a violation of the PDA by showing that she was denied light duty or other accommodations that were granted to other employees who are similar in their ability or inability to work." *Id.* at Example 9(b).

that its ultimate interpretation of the PDA requires input from or deference to the EEOC.

B. Voting Rights Act

In a bout of “*déjà vu* all over again,” Alabama is back before the Supreme Court in another Voting Rights Act case. In *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama*, the Court will review challenges by Democratic legislators who claim that the Republican-majority Alabama legislature intentionally diluted the voting power of minority voters in violation of Section 2 of the Voting Rights Act and the Fourteenth Amendment by intentionally packing them into a few supermajority districts during recent redistricting undertaken in response to the 2010 census.⁷⁹ Separate challenges to that ruling have been filed by the Alabama Democratic Conference and the Alabama Legislative Black Caucus, with both groups seeking a reversal by the Court in time for the general election on November 3, 2014.

The case comes a year after *Shelby County v. Holder*, which also involved the state of Alabama and which struck down Section 4(b) of the Voting Rights Act, thus effectively gutting Section 5, which had required jurisdictions with a history of discrimination to seek permission from federal authorities before changing their voting procedures. Although Alabama is no longer required to obtain pre-clearance from the Department of Justice, the Voting Rights Act continues to prohibit changes that interfere with voting rights or dilute the electoral power of racial minorities.

Black lawmakers argue that the packing of majority-black districts necessarily increases the political segregation of African Americans and diminishes their ability to influence the outcome of elections throughout Alabama. The state’s government contends that it was complying with Section 5 of the Voting Rights Act—which was still valid during the last round of redistricting—by ensuring that the new map did not decrease the number of majority-black districts. Under the Republican plan, 28 of 105 House districts and 8 of 35 Senate districts have a black majority.

A three-judge district court held, by a vote of 2–1, that the district lines approved by the Republican-controlled legislature in 2012 are

⁷⁹ Nos. 13-895, 13-1138 (OT 2014).

constitutional.⁸⁰ In what Judge Myron H. Thompson, the dissenting judge on the three-judge panel, called a “cruel irony,” however, the provision that Alabama had successfully invalidated in *Shelby County* is the very provision that it claims justified the legislative maps.

The ultimate question is whether the redistricting was undertaken to increase Republicans’ partisan or racial advantage. Alabama contends that it preserved the number of majority-black districts, which is true. In fact, the number of majority-black districts in the state house increased by one. Nonetheless, Alabama is prohibited from making election changes with the purpose or effect of interfering with minority voting rights. The Court’s holding may very well be limited to this question.

VI. Securities Litigation

The Court’s 2014 term will also feature at least two securities cases of great importance to the plaintiffs’ bar and public companies alike. First, in another case reminiscent of the “subjective intent/objective standard” dichotomy in *Elonis*, the Court has agreed to address a circuit split concerning the scope of liability for so-called “false opinions” under Section 11 of the Securities Act of 1933, in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*.⁸¹

Section 11 provides a private remedy for a purchaser of securities issued under a registration statement filed with the Securities and Exchange Commission if the registration statement “contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading.”⁸² The question presented is whether a plaintiff can state a Section 11 claim by pleading that a statement of opinion was “untrue” on the ground that it was objectively wrong, as the Sixth Circuit has held, or whether the plaintiff must also allege that the statement was subjectively false, requiring allegations that the speaker’s actual opinion was different from the one expressed, as the Second, Third, and Ninth Circuits have held.

⁸⁰ Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227 (M.D. Ala. 2013).

⁸¹ No. 13-435 (OT 2014).

⁸² 15 U.S.C. § 77k (2014).

Much of the disagreement between the courts of appeals stems from their interpretations of the Supreme Court's decision in *Virginia Bankshares v. Sandberg*, Justice David Souter's first opinion for the Court and a typically impenetrable example of his handiwork.⁸³ *Virginia Bankshares* held that a claim under Section 14(a) of the Securities Exchange Act, which regulates the solicitation of shareholder votes in proxy statements, must allege that a statement of opinion is both objectively and subjectively false (that it is wrong *and* that the speaker did not actually believe it to be true). The circuit courts that have extended this requirement to Section 11 claims have done so on the theory that a statement of opinion cannot be "false" unless the speaker actually believes that it is untrue.⁸⁴

The Sixth Circuit's test, on the other hand, amounts to a strict liability standard for false opinions.⁸⁵ An affirmance by the Supreme Court would effectively relax the pleading standards required of Section 11 plaintiffs and likely would lead to a flurry of Section 11 filings.

Second, the Court has agreed to hear *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, in which it will decide whether the filing of a class action tolls the statute of repose under the Securities Act, via operation of *American Pipe* tolling—which the Court first articulated in *American Pipe & Construction Co. v. Utah*—or whether the statute of repose functions as an absolute bar that cannot be tolled.⁸⁶

The statute of limitations for claims under the Securities Act provides that all claims must be brought within one year of the discovery of the violation or within three years from the time the security involved was first offered to the public. Under *American Pipe*, the filing of a securities class action tolls the running of the one-year

⁸³ 501 U.S. 1083 (1991). The first paragraph of Justice Antonin Scalia's concurring opinion attempted to provide a decoder-ring translation—in the spirit of "if the Court is saying that X gives rise to liability but Y does not, I agree." *Id.* at 1108–09 (Scalia, J., concurring).

⁸⁴ See *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011); *Rubke v. Capital Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368–69 (3d Cir. 1993).

⁸⁵ *Ind. Dist. Council of Laborers v. Omnicare, Inc.*, 719 F.3d 498 (6th Cir. 2013).

⁸⁶ No. 13-640 (OT 2014); see also *Am. Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

statute of limitations. The question in this case is whether *American Pipe* applies to the three-year statute of repose.

The case is likely to have important implications regardless of how the Court rules. One major consequence of the Court's decision will be its effect on class-action opt-outs and the rigor with which institutional investors must monitor—and potentially intervene in—securities cases to preserve their rights. The Court's ruling will also dictate whether putative securities class members can wait to decide whether to opt out of a class action or must act earlier in order to avoid the running of the statute of repose. Moreover, because the case also implicates the broader question of the difference between statutes of limitation and statutes of repose, it could have effects far beyond the context of securities class actions.

VII. Certiorari Pipeline

As of this writing, the Supreme Court has agreed to hear oral argument in 39 cases, many of which pose important questions with broad implications. In addition to the collection of cases already on the Court's calendar, there are several high-profile cases in the pipeline that could potentially make their way to One First Street when the Court reconvenes after its summer recess. A few of these cases are described below.

1. The Court's decisions in *Hollingsworth v. Perry*⁸⁷ and *United States v. Windsor*⁸⁸ spawned a litany of state and federal court decisions holding that state same-sex marriage bans—or bans on the recognition of out-of-state same-sex marriages—violate the rights of gays and lesbians who wish to marry. The first post-*Windsor* circuit court to rule that same-sex marriage bans violate the Fourteenth Amendment was the Tenth Circuit, which issued its decision one day before the first anniversary of the *Windsor* ruling.⁸⁹ In striking down Utah's same-sex marriage ban, the Tenth Circuit held that marriage is a fundamental right, same-sex marriage bans must be subject to strict scrutiny, and none of the state's arguments, including purported interests in the procreative capacity of opposite-sex couples, satisfied

⁸⁷ 133 S. Ct. 2652 (2013).

⁸⁸ 570 U.S. 12 (2013).

⁸⁹ *Kitchen v. Herbert*, No. 13-4178, 2011 WL 2868044 (10th Cir. June 25, 2014).

that standard.⁹⁰ Utah officials have filed a cert petition, and their calls for Supreme Court review have recently been joined by parties in the Fourth Circuit.⁹¹ Although there is no circuit split at this time, and the Court may wish to avoid deciding these issues, the case presents a question of substantial importance to same-sex couples across the United States. While the Court's last foray into this arena is hardly a model of clarity concerning the appropriate standard of review for these prohibitions, Justice Anthony Kennedy's opinion in *Windsor* suggests that he is sympathetic to the view that same-sex marriage bans violate either a substantive federal right or the equal protection of the laws (or both), which could lead to another divisive 5-4 decision.

2. The Patient Protection and Affordable Care Act (ACA) makes tax credits available to individuals who purchase health insurance through "exchanges" that are "established by the State under section 1311" of the ACA,⁹² but the Internal Revenue Service has interpreted that provision to authorize the tax credit also for insurance purchased on a federal exchange.⁹³ On July 22, 2014, the D.C. Circuit and the Fourth Circuit issued contradictory rulings concerning the government's ability to provide subsidies in the form of tax credits to encourage individuals to purchase health insurance on federally run exchanges.⁹⁴

In a 2-1 vote, the D.C. Circuit ruled that the ACA expressly provides that subsidies are available only for individuals who purchase insurance on exchanges established and run by one of the 50 states or the District of Columbia.⁹⁵ The Fourth Circuit, however, unanimously held that the ACA's reference to exchanges "established by the State" was ambiguous and thus that the court should defer to the government's interpretation that subsidies were permitted for its

⁹⁰ *Id.*

⁹¹ *Bostic v. Schaefer*, 2014 WL 3702493 (4th Cir. July 28, 2014).

⁹² 26 U.S.C. § 36B(c)(2)(A)(i) (2014).

⁹³ 26 C.F.R. § 1.36B-2(a)(1) (2014).

⁹⁴ *Halbig v. Burwell*, 2014 WL 3579745 (D.C. Cir. July 22, 2014); *King v. Burwell*, 2014 WL 3582800 (4th Cir. July 22, 2014).

⁹⁵ *Halbig*, 2014 WL 3579745, at *7.

own federal exchanges.⁹⁶ The Fourth Circuit plaintiffs have already filed a petition for certiorari, while the government has asked the D.C. Circuit for en banc review. The D.C. Circuit is likely to decide whether to rehear the case before the Supreme Court can act on the cert petition, so if the Court wants to avoid wading into health care again so soon after *NFIB v. Sebelius*, it will probably have that ongoing proceeding (as well as two other cases in Oklahoma and Indiana) as an excuse. It is certainly possible that this issue will miss the Court this term only to resurface in October Term 2015.

3. The Court will almost certainly see a second round in the contraceptive-mandate imbroglio, this time as it pertains to nonprofits with religious objections. The Affordable Care Act's requirement that businesses provide contraceptives to female employees at no cost to the patient is subject to an exception for nonprofit religious institutions, including churches and private universities, which permits them to submit a two-page form to insurance companies stating their religious opposition. Upon receipt of the form, the insurance company must bill the federal government instead of the objecting institution for the cost of providing contraceptives.

In a lawsuit against the Department of Health and Human Services, the University of Notre Dame has argued that even that alternative procedure is unduly burdensome because it forces the university to "trigger" the process of providing contraceptives and to associate with a third party willing to provide the services that Notre Dame finds objectionable—again in violation of RFRA and the First Amendment. The district court and the U.S. Court of Appeals for the Seventh Circuit denied Notre Dame's request for a preliminary injunction, and Notre Dame intends to appeal to the Court. Given the outcry that followed *Hobby Lobby*, any challenge to the ACA brought by churches or private universities is likely to garner considerable attention.

* * *

The Supreme Court's 2014 term includes an assortment of important and interesting cases that span a broad swath of topics, many of

⁹⁶ King, 2014 WL 3582800, at *6.

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which are described above. Like recent terms, the Court will have an opportunity to address issues under the Fourth Amendment, the First Amendment, criminal law, separation of powers, and securities laws, among others. To be sure, after a 2013 term that featured several controversial decisions and kept commentators on their toes, all eyes will be on the Court again in October.