

# Looking Ahead: October Term 2015

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If the Supreme Court watchers you know have been looking exhausted recently, there's a reason for that: It's only 2015, and we're already on about our *third* "Term of the Century."<sup>1</sup> The recently completed term has a better claim to that title than most. It not only had more than its share of blockbuster cases that would make any term memorable—same-sex marriage;<sup>2</sup> Obamacare II, Electric Boogaloo;<sup>3</sup>

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<sup>1</sup> The nominees (from the past decade) are: (1) October Term 2011, see, e.g., Adam Liptak, A Significant Term, With Bigger Cases Ahead, *N.Y. Times* (June 28, 2011) ("Next term [October Term 2011] is going to be the term of the century," said Thomas C. Goldstein, a leading Supreme Court advocate and the publisher of *Scotusblog*."), available at <http://goo.gl/tbEjMJ>; Bill Mears, Justice Ginsburg Suggests 'Sharp Disagreement' over Hot-Button Cases, *CNN* (June 16, 2012) (Justice Ginsburg, speaking shortly before Obamacare individual mandate was upheld as a tax, stated that "The term has been more than usually taxing, some have called it the term of the century."), <http://goo.gl/y2Avqr>; (2) October Term 2012, cf. Kannon K. Shanmugam & James M. McDonald, Looking Ahead: October Term 2012, 2011–2012 *Cato Sup. Ct. Rev.* 393, 393 (2012) (noting that "many pundits predicted that the 2011 Supreme Court term would be the term of the century" but "the 2012 term looks like it could be even more significant than 2011"; "in October Term 2012, the Court will be jumping from the frying pan into the fire"); and (3) October Term 2014, see Adam Liptak, Supreme Court's Robust New Session Could Define Legacy of Chief Justice, *N.Y. Times* (Oct. 4, 2014) ("I'm more excited about the next 12 months at the Supreme Court than about any Supreme Court term in its modern history," said Thomas C. Goldstein.); "This term [October Term 2014] could become the "déjà vu all over again" term of the century," said Pratik A. Shah, a Supreme Court specialist."), available at <http://goo.gl/ICKWcX>.

<sup>2</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>3</sup> *King v. Burwell*, 135 S. Ct. 2480 (2015).

the constitutionality of independent redistricting;<sup>4</sup> disparate impact under the Federal Housing Act;<sup>5</sup> specialty license plates as government speech;<sup>6</sup> the constitutionality of lethal injection;<sup>7</sup> a campaign-finance law the Roberts Court actually likes;<sup>8</sup> and the first decision ever to “accept[] a President’s direct defiance of an Act of Congress in the field of foreign affairs.”<sup>9</sup> October Term (OT2014) also marked the best term for liberals since the Warren Court.<sup>10</sup> As a result, the Supreme Court’s approval ratings among Republicans hit record lows usually seen only for ISIS, or even teachers’ unions, while with Democrats, the Court polled nearly as well as subsidized housing for transgendered baby seals.<sup>11</sup> Some on the left looked past the unusually high percentage of 5–4 decisions this term (26 percent versus just 14 percent for OT2013<sup>12</sup>), and made appreciative comments about how John Roberts really was calling balls and strikes after all.<sup>13</sup>

The coming term has a lot to live up to, and so far, relatively few cases to do it with: just 35 granted as of this writing, versus 39 as OT2014 began and 47 at this point the term before that. But the new term already has more than its share of high-profile cases, and those granted already have observers speculating that it may reverse the leftward drift of the Roberts Court. In the memorable-if-nerdy phrase of one academic commentator, if last term was *Return of the*

<sup>4</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015).

<sup>5</sup> *Texas Dep’t. of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

<sup>6</sup> *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

<sup>7</sup> *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

<sup>8</sup> *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

<sup>9</sup> *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2113 (2015) (Roberts, C.J., dissenting).

<sup>10</sup> Alicia Parlapiano, Adam Liptak, & Jeremy Bowers, *The Roberts Court’s Surprising Move Leftward*, N.Y. Times (June 29, 2015), available at <http://goo.gl/hLPxqU>; see also Adam Liptak, *Right Divided, a Disciplined Left Steered the Supreme Court*, N.Y. Times (June 30, 2015), available at <http://goo.gl/H4lxN8>.

<sup>11</sup> Pew Research Center, *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction* (July 29, 2015), <http://goo.gl/TRqDN9>.

<sup>12</sup> See Stat Pack, *October Term 2014*, SCOTUSblog (July 30, 2015), <http://goo.gl/gBdExP>.

<sup>13</sup> Jeffrey Rosen, *John Roberts, the Umpire in Chief*, N.Y. Times (June 27, 2015), available at <http://goo.gl/jxX9Qg>.

*Jedi*, next term may be *The Empire Strikes Back*.<sup>14</sup> The implications are obvious—and grave. First: October Term 2015 is a term of sequels. Second: If present trends continue, it is only a matter of time before an activist and antidemocratic judiciary inflicts a jurisprudential Jar Jar Binks on the nation.

So what—besides the prospect of a bumbling Gungan buzzkill with an inexplicable Jamaican accent—is causing all the fuss? In the next few pages we aim to tell you a bit about the Court’s “coming attractions.”

### I. First Amendment

Readers familiar with past Terms of the Century may recall OT2011’s *Knox v. Service Employees International Union, Local 1000*.<sup>15</sup> That case concerned a fairly narrow question of how to implement *Abood v. Detroit Board of Education*, which held that public-sector unions can bill nonmembers for expenses related to collective bargaining to keep nonmembers from free-riding on the union’s efforts on behalf of workers, but unions may not require nonmembers to fund political or ideological efforts.<sup>16</sup> *Knox* involved a public-sector union that imposed a temporary dues increase to fund the union’s political operations for an upcoming special election. In an opinion by Justice Samuel Alito, joined by the Court’s four other conservatives, the Court held that where a union imposes a special assessment or dues increase levied to meet expenses that were not disclosed when its regular assessment was set, it has to provide a new notice and may not exact additional funds from nonmembers without their affirmative consent. But that was not the half of it. As one pair of halfwits put it:

Even more significantly, the opinion went on to express skepticism of using compelled assessments even to *finance collective bargaining*. The majority said that compulsory fees for collective bargaining “constitute a form of compelled speech and association that imposes a ‘significant impingement on First Amendment rights,’” and the Court’s past “tolera[nce]”

<sup>14</sup> Kimberly Robinson, Twitter (July 13, 2015), <https://goo.gl/itBnzD> (quoting Dean Erwin Chemerinsky of the University of California Irvine School of Law). Yes, we realize that reverses the order of the films, but details should never stand in the way of a good metaphor.

<sup>15</sup> 132 S. Ct. 2277 (2012).

<sup>16</sup> 431 U.S. 209 (1977).

of the practice was an “anomaly.” The majority all but invited requests to revisit that line of cases, which could set the stage for a *Citizens United*-style reconsideration in the area of union dues.<sup>17</sup>

Two terms later, the Court in *Harris v. Quinn* (in another opinion authored by Justice Alito) refused to extend *Abood* to personal rehabilitation assistants, and in the process threw enough cold water on *Abood* to fill Lake Erie.<sup>18</sup>

Then, in the waning days of OT2014, the Court granted review in a case, *Friedrichs v. California Teachers Association*, which involves a challenge to California’s “agency shop” law. That law requires public-school teachers either to be union members (and thus pay dues) or contribute an equivalent fee to the teachers’ union. *Friedrichs* presents the question whether *Abood* should be overruled and public-sector “agency shop” arrangements invalidated under the First Amendment, and whether it violates the First Amendment to require public employees each year to affirmatively *object* to funding the union’s political speech rather than requiring employees’ affirmative *consent* before such funds can be collected. For the real nerderati, *Friedrichs* also sets something of a record for pre-grant pleadings, with *nine* amicus briefs, *three* briefs in opposition, and *two* reply briefs.

Because a majority of the Court has twice previously expressed skepticism of the continuing validity of *Abood*, the Court seems poised to overrule the case. This Court has a very broad view of free speech, and this is a subject about which the remaining swing justice doesn’t, well, swing much. Because the case was decided on motions for judgment on the pleadings, respondents argue the record is inadequate and that arguments against opt-out are premised on facts and issues not presented on this record. It remains to be seen whether those arguments gain traction. If the Court invalidates *Abood*, it could have enormous implications for “[p]ublic sector

<sup>17</sup> John Elwood & Eric White, What Were They Thinking: The Supreme Court in Review, October Term 2011, 15 Green Bag 2d 405, 417 (2012), available at <http://goo.gl/fDvxDQ>; see also Adam Liptak, With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear, N.Y. Times (July 6, 2015), available at <http://goo.gl/jRiyKm>.

<sup>18</sup> 134 S. Ct. 2618 (2014).

unions, which represent one of the last bastions of strong unionism in the U.S.”<sup>19</sup> Because nonmembers would no longer have to contribute to the union, and the practical difference between (required) union dues and (opt-in) nonmember fees would be so great, it could prompt “thousands of members” to leave unions, and cost unions “millions of dollars” in dues and fees,<sup>20</sup> causing public-sector unions to “potentially wither into insignificance.”<sup>21</sup> The case thus has the potential to be a watershed in labor law.

Check for union seals printed on the covers of amicus briefs. It’s likely to be a record number for the 21st century.

## II. Equal Protection

There is so much going on in OT2015 that the Equal Protection Clause comes *second*.

Readers familiar with past Terms of the Century may recall OT2012’s *Fisher v. University of Texas at Austin*. The case involves equal protection claims raised by Abigail Fisher, a white (now former) student from Sugar Land, Texas, who argues that in 2008, she was denied admission to the University of Texas at Austin (“UT”) because of her race.

After the U.S. Court of Appeals for the Fifth Circuit invalidated an earlier UT affirmative-action policy in 1996,<sup>22</sup> the Texas legislature enacted the “Top 10% Law,” which required the university to admit any Texas student who graduated in the top 10 percent of his or her high school class. The Top 10% Law still accounts for the vast majority of undergraduate admissions each year (around 80 percent), but after the Supreme Court in *Grutter v. Bollinger* upheld the University of Michigan Law School’s use of race as a “plus” factor in admission decisions,<sup>23</sup> UT modified its admissions plan to reintroduce race as a consideration for admitting the portion of the class not filled based

<sup>19</sup> Moshe Z. Marvit, *The Supreme Court Case That Could Decimate American Public Sector Unionism*, In *These Times* (Feb. 3, 2015), available at <http://goo.gl/xSTRvp>.

<sup>20</sup> *Id.*

<sup>21</sup> Laura Moser, *Why an Upcoming Supreme Court Case Has Teachers’ Unions Feeling Very, Very Nervous*, *Slate* (July 8, 2015), <http://goo.gl/hRDmkn>.

<sup>22</sup> *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

<sup>23</sup> 539 U.S. 306 (2003).

on class rank. This was the basic admissions scheme in place at the time UT denied Fisher's application, and it remains in place today.

During the case's *first* trip through the court system, a Fifth Circuit panel (with Judge Emilio Garza writing separately to note his doubts about the correctness of *Grutter*) upheld UT's admissions system. With Justice Elena Kagan recused (because, as solicitor general, she had approved the Justice Department's decision to support UT as amicus in the lower courts), the Supreme Court granted review. Some 257 days after argument (making it the longest-pending decision of the term by a 47-day margin<sup>24</sup>), the Court issued a 13-page, 7–1 opinion that essentially restated existing law. The opinion stated that the Fifth Circuit had been too deferential to UT and that strict scrutiny requires a showing that the reviewing court must "be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."<sup>25</sup> Because it does not take the better part of a year to prepare such a short, straightforward, and largely unanimous opinion, the clear implication—borne out by interviews with the justices—was that earlier iterations of the opinion had gone further, and had done so by a more closely divided (or splintered) vote.<sup>26</sup>

The case returned to the Fifth Circuit, which, by a divided vote, again upheld UT's admissions policy. The majority stated that while Fisher (who in 2012 graduated from Louisiana State University) likely lacked standing because her test scores were low enough that she would not have been admitted even if her race were a plus factor, it was constrained to resolve the case on the merits because the Supreme Court did not "address the issue of standing, although it was squarely presented to it."<sup>27</sup> The majority called UT's program "nearly indistinguishable from the . . . program [upheld] in *Grutter*," and agreed with UT's conclusion that the Top 10% Plan did not produce "sufficient

<sup>24</sup> Stat Pack, October Term 2012, Time Between Oral Argument and Opinion, SCOTUSblog (June 27, 2013), <http://goo.gl/9QEgJC>.

<sup>25</sup> 133 S. Ct. 2411, 2420 (2013).

<sup>26</sup> See Joan Biskupic, Breaking In: The Rise of Sonia Sotomayor and the Politics of Justice 201–210 (2014) ("[C]onversations with a majority of justices" indicated that Justice Sonia Sotomayor initially wrote a dissent comparable to the "attention-getting fiery statements that were the trademark of Justice Scalia," but Sotomayor "dropped her dissenting statement" after Kennedy narrowed his majority opinion to "le[ave] intact the central holding of *Grutter*.").

<sup>27</sup> *Fisher v. University of Texas at Austin*, 758 F.3d 633, 640 (5th Cir. 2014).

numbers of minorities for critical mass” the university said it needed to obtain the benefits of diversity. In other words, the court held that the university “has demonstrated that race-conscious holistic review is necessary to . . . patch[] the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission.”<sup>28</sup> In dissent, Judge Garza wrote that UT had “failed to define th[e] term [‘critical mass’] in any objective manner,” so it was “impossible to determine whether the University’s use of racial classifications in its admissions process is narrowly tailored.”<sup>29</sup>

When Fisher again sought cert., the Court relisted the case a whopping *five times*, suggesting that the justices might be attempting a summary disposition of the case or maybe someone was dissenting from denial of review—or perhaps they simply weren’t sure they were ready to revisit such a divisive subject. Finally, the Court granted review with the penultimate group of grants before heading out for the summer recess.

Fisher does not seek to revisit *Grutter*, but argues that the Fifth Circuit again failed to apply traditional strict scrutiny and that the record contains no evidence or analysis of students demonstrating that those admitted under the Top 10% Law lack the “unique talents or higher test scores” required to enrich the diversity of the student body such that consideration of race is necessary. Fisher also argues that UT impermissibly adopted a new rationale to defend its program while on remand and that the university should be held to the original rationale it asserted at the time of its adoption. She argues that UT presented no evidence to substantiate an unmet need for “qualitative” diversity, and that such a rationale could not survive strict scrutiny.

Since the Court has gone to the trouble of granting cert. a second time, it seems unlikely that the decision in *Fisher II* will be the nothingburger that the Court’s earlier opinion was. It also seems unlikely that the Court will overrule *Grutter*, which would go beyond what Fisher’s lawyers have sought in *this* case—although they are separately challenging *Grutter* in actions against Harvard University and the University of North Carolina at Chapel Hill. Instead, the Court likely will provide further guidance (we almost said “clarification”)

<sup>28</sup> *Id.* at 653, 657, 659.

<sup>29</sup> *Id.* at 661–62 (Garza, J., dissenting).

on the application of strict scrutiny in education. Picking up on one of Judge Garza's key complaints in dissent, the Court may provide additional guidance on the meaning of "critical mass"—that is, the point at which a college admissions plan produces enough minority students to achieve the academic goal of diversity. Lastly, it is worth noting that Justice Kennedy dissented in *Grutter*, so any further gloss on that decision that has his endorsement may have the effect of making strict scrutiny more exacting.

### III. Election Law

The new term is shaping up to be an especially important one in the field of election law.

#### A. *One-Person, One-Vote*

In 1964's landmark decision *Reynolds v. Sims*, the Supreme Court held that states must make election districts "as nearly of equal population as is practicable" to ensure equal voting rights under the Fourteenth Amendment.<sup>30</sup> This "one-person, one-vote" principle prevents states from apportioning voting districts along county (or other geographic) lines, heedless of population. Next term's *Evenwel v. Abbott* will resolve a question that seems long overdue, a half-century later: What's a person?

*Sims* did not specify what the Court meant by "population"—the total population, the population of registered voters, or something else entirely. Two years later, the Court held in *Burns v. Richardson* that Hawaii could use either *total* population or *voting* population in drawing district lines, writing, "The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."<sup>31</sup> There, the Court upheld a plan that drew district lines based on registered voters, but took pains to state that, "We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere."<sup>32</sup> Since then, some thought "[i]t ha[d] been settled . . . that states have discretion" whether to use total

<sup>30</sup> 377 U.S. 533, 577 (1964).

<sup>31</sup> *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

<sup>32</sup> *Id.* at 96.



population or registered voters in “put[ting] the one-person, one-vote principal into effect.”<sup>33</sup> Federal appeals courts have uniformly held that it is *permissible* to use total population. Judge Alex Kozinski wrote in a 1990 partial dissent that whether one-person, one-vote entailed “representational equality” (equal total populations) or “electoral equality” (equal voting populations) “deserves a more careful examination.”<sup>34</sup> In 2001, Justice Clarence Thomas dissented from the Court’s denial of cert. to review the redistricting plan in *Chen v. Houston*, writing that the Court “ha[d] an obligation to explain to States and localities what [population] actually means.”<sup>35</sup> Saying he had not prejudged the question of which population governed, Justice Thomas noted that districts in *Chen* having a total population variance of less than 10 percent (which is presumptively constitutional under current doctrine) could have a much higher variance among the citizens-of-voting-age population—there, on the order of 20–30 percent.<sup>36</sup>

Petitioners in *Evenwel* say the variance at issue there is more on the order of 30–55 percent. Sue Evenwel and Edward Pfenninger live in rural Texas. They say that rural Texas state senate districts are heavy with registered voters, while more urban districts have fewer, so rural votes are diluted and urban voters have undue sway. While the challengers do not appear to be saying that legislatures should be forever forbidden from using total population as a districting measure, they argue that Texas’s current districting “distributes voters or potential voters in a grossly uneven way,” denying them equal protection. The case is very significant, particularly in “border states, like California, Texas, Arizona and Nevada, that have the largest proportions of noncitizens.”<sup>37</sup> Election law expert Professor Richard Hasen explains, “Urban areas are much more likely to be filled with people who cannot vote: noncitizens (especially Latinos), released

<sup>33</sup> Tierney Sneed, 5 Points on How ‘One Person, One Vote’ Is Suddenly in Jeopardy, Talking Points Memo (May 27, 2015), <http://goo.gl/b9X6Wb> (quoting election-law expert Richard L. Hasen).

<sup>34</sup> *Garza v. County of Los Angeles*, 918 F.2d 763, 784 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).

<sup>35</sup> 532 U.S. 1046, 1046 (2001) (Thomas, J., dissenting from denial of cert.).

<sup>36</sup> *Id.*

<sup>37</sup> Adam Liptak, Supreme Court Agrees to Settle Meaning of ‘One Person One Vote,’ N.Y. Times (May 26, 2015), available at <http://goo.gl/NVHtUk>.

felons whose voting rights have not been restored, and children.”<sup>38</sup> He forecasts that a ruling for petitioners would favor Republicans. Others argue that just as it “was intolerable for a rural district with 500 voters to have the same representation in a state legislature as an urban district with 5000 voters, it’s now constitutionally suspect to have that disparity between a heavily (non-citizen) foreign-born district and one with mostly native-born citizens. In each case, the Supreme Court must intervene to maintain voter equality.”<sup>39</sup> Some are skeptical that the Court will hold that basing districts on registered voters will be deemed mandatory: they note many states used total population both at the time of the Founding and at the time the Fourteenth Amendment was ratified, and the census no longer collects citizenship information, which would make it difficult to obtain adequate information for redistricting.<sup>40</sup> The case was brought by the Project on Fair Representation,<sup>41</sup> the group behind both *Fisher v. University of Texas* and *Shelby County v. Holder*, which successfully challenged the constitutionality of the Voting Rights Act provision establishing which areas of the country were subject to preclearance before new voting rules could take effect.<sup>42</sup>

Although *Evenwel* involves the districting for state legislatures, which is governed by the Equal Protection Clause of the Fourteenth Amendment, it seems likely that if the challengers are successful, others will argue it should also be applied to drawing congressional districts (not to be confused with apportioning House seats among the states).

### *B. Redistricting and Preclearance*

Readers familiar with past Terms of the Century may recall OT2014’s *Arizona State Legislature v. Arizona Independent Redistricting*

<sup>38</sup> Richard L. Hasen, Only Voters Count? Conservatives Ask the Supreme Court to Restrict States’ Rights and Overturn Precedent, *Slate* (May 26, 2015), <http://goo.gl/CJODGE>.

<sup>39</sup> Ilya Shapiro, Symposium: Taking Voter Equality Seriously, *SCOTUSblog* (July 29, 2015), <http://goo.gl/WrVyBT>.

<sup>40</sup> See Richard Pildes, Symposium: Misguided Hysteria over *Evenwel v. Abbott*, *SCOTUSblog* (July 30, 2015), <http://goo.gl/ZPNsqV>.

<sup>41</sup> See Project on Fair Representation, Our Cases, <https://goo.gl/YZoGtJ> (last visited Aug. 17, 2015).

<sup>42</sup> 133 S. Ct. 2612 (2013).

*Commission*, in which the Court, by a 5–4 vote, held that Arizona voters’ decision to amend their state constitution by referendum to entrust redistricting to an independent districting commission, instead of the legislature itself, was constitutional.<sup>43</sup> Just one day later, the Court noted probable jurisdiction in *Harris v. Arizona Independent Redistricting Commission*, an appeal that alleges that the commission wrongly used race and partisanship in drawing Arizona’s state legislative district boundaries in the wake of the 2010 Census.

A group of 11 Republican Arizona voters brought suit, arguing, in relevant part, that the commission’s maps, which were used in 2012 state elections, violated the “one person, one vote” requirement by packing Republican voters into districts to enhance minority voter strength in other, relatively underpopulated districts. The challengers emphasized that all but one Republican-leaning district has *more* voters than the ideal district size (thus diluting each voter’s power), while all but two Democratic-leaning districts have *fewer* voters than ideal (thus enhancing each voter’s power).

A divided three-judge district court rejected the challenge. The courts’ two appellate judges (Richard Clifton, a George W. Bush appointee, largely joined by Roslyn O. Silver, a Clinton appointee) held that the redistricting was constitutional, concluding that “the population deviations were primarily a result of good-faith efforts” “to obtain preclearance [of the redistricting scheme] from the Department of Justice” before its plan could be used for the then-upcoming elections, consistent with the requirement of Section 5 of the Voting Rights Act for covered jurisdictions (those with a history of voting discrimination).<sup>44</sup> The majority noted that “[m]ost of the underpopulated districts have significant minority populations,” and to obtain preclearance, “the Commission had to show that any proposed changes” would not violate the Voting Rights Act’s “anti-retrogression” principle—that is, they would not “diminish the ability of minority groups to elect the candidates of their choice.”<sup>45</sup> The commission believed that the Justice Department was under the impression that under the previous district scheme, there were 10 districts where

<sup>43</sup> 135 S. Ct. 2652 (2015).

<sup>44</sup> *Harris v. Ariz. Indep. Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1046–47 (D. Ariz. 2014).

<sup>45</sup> *Id.* at 1047.

minorities were able to elect the candidate of their choice, and so to obtain preclearance, it would be advisable to create a 10th such district in their plan.<sup>46</sup> To do so, the commission increased overpopulation in two districts. To further increase the chances of preclearance, the commission then underpopulated some districts and overpopulated others to make an 11th district closer to a minority ability-to-elect district. While the majority concluded that “[p]artisanship may have played some role” in district lines (mainly, the majority concluded, because one Democratic commissioner sought to make one district more politically competitive), “the primary motivation was [a] legitimate” desire to obtain preclearance so the district lines could be used in upcoming elections.<sup>47</sup> The majority acknowledged that the Supreme Court’s 2013 decision in *Shelby County v. Holder* had invalidated the coverage formulas governing Section 5 preclearance, so Arizona voting plans were no longer subject to preclearance, but concluded that obtaining preclearance was still a legitimate objective at the time the maps were drawn.

Judge Silver concurred in part, dissented in part, and concurred in the judgment, to emphasize that the challengers had failed to prove partisanship motivated changes, and also noted that after the redistricting, Republicans were overrepresented in the legislature in proportion to party registration.

The Court’s decision to grant review has to have been driven in substantial part by the powerful opinion of District Judge Neil V. Wake (a George W. Bush appointee) concurring in part, dissenting in part, and dissenting from the judgment. He emphasized that “[o]f 30 legislative districts, the 18 with population deviation greater than  $\pm 2\%$  from ideal population correlate perfectly with Democratic Party advantage,” and that “the statistics of their plan are conclusive.”<sup>48</sup> He argued that seeking Voting Rights Act preclearance “is insufficient as a matter of law” to justify population deviations in districting, saying that “[p]ending civil cases must be decided in accordance with current law,” under which Arizona is no longer subject

<sup>46</sup> *Id.* at 1056–57.

<sup>47</sup> *Id.* at 1060–61.

<sup>48</sup> *Id.* at 1092 (Wake, J., concurring in part, dissenting in part, and dissenting from the judgment).

to Section 5 preclearance.<sup>49</sup> In a passage that seems likely to resonate with the four justices who subscribed to Chief Justice Roberts' statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"<sup>50</sup> Judge Wake argued that it was categorically illegitimate to deviate from population equality in an effort to obtain preclearance, saying, "there is no basis in statutory text, administrative interpretation, or precedent . . . to systematically dilute people's equal voting rights for any reason, least of all as a protection of equal voting rights."<sup>51</sup> He accused the commission of "coin-clipping the currency of our democracy—everyone's equal vote—and giving all the shavings to one party, for no valid reason."<sup>52</sup>

The Court has agreed to review (1) whether the constitution permits intentionally overpopulating legislative districts to gain partisan advantage and (2) whether the desire to obtain preclearance justifies deviating from the one-person, one-vote principle. Two days after noting probable jurisdiction in the case, the Court amended its order to state that it would not review the third question the challengers had presented, which asked whether it was constitutional to overpopulate Republican districts to create districts in which Hispanics would have greater electoral influence. While both (1) and (2) may be the subject of questioning at argument, it seems likely that if the case goes against Arizona, the opinion will center on preclearance. Seeking partisan advantage is a much more complex question—with, one imagines, a fairly substantial historical pedigree. Meanwhile, preclearance is already wounded after *Shelby County*.

#### IV. Federal Jurisdiction

The law of Article III standing is like *Star Trek*: Those who care about it care *a lot*—and everyone else thinks those people are dorks.

<sup>49</sup> *Id.* at 1100.

<sup>50</sup> *Parents Involved in Cmty. Schools v. Seattle Schl. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2006) (plurality opinion).

<sup>51</sup> *Harris*, 993 F. Supp. 2d at 1102 (Wake, J., concurring in part, dissenting in part, and dissenting from the judgment).

<sup>52</sup> *Id.* at 1092.

### A. Injury

Like *Star Trek, Spokeo, Inc. v. Robins*, is one installment in a series. *Spokeo* is “The Wrath of Khan”<sup>53</sup> to *First American Financial Corp v. Edwards*’s<sup>54</sup> “The Motion Picture.”<sup>55</sup> Readers familiar with past Terms of the Century may recall that OT2011’s *First American* presented the question whether a technical violation of a federal statute satisfies the injury-in-fact requirement for Article III standing—or, to put it differently, whether Congress can by legislation confer Article III standing upon a plaintiff who suffers no concrete harm by authorizing a private right of action based on a bare violation of a federal statute. *First American* asked whether Congress could create a cause of action under the Real Estate Settlement Procedures Act of 1974 (“RESPA,” which gave us the HUD-1 Form every homeowner pretends to read at closing) for buyers of real-estate settlement services for statutory violations that do not affect the price, quality, or other characteristics of the transaction. *First American* was argued in November 2011 and the majority opinion was apparently assigned to Justice Thomas (the only justice with no majority opinion from that sitting); but on the last day of the term (213 days later—the term’s longest-pending case by an 18-day margin<sup>56</sup>), the Court dismissed the case as improvidently granted in a one-sentence order.

Four terms later, the Court apparently has recovered from whatever unpleasantness transpired and is ready to face the issue once again. *Spokeo* involves whether a bare violation of the Fair Credit Reporting Act is enough to establish Article III standing. Respondent Thomas Robins instituted a putative class action against Spokeo, operator of a “people search engine” that aggregates publicly available information, saying that Spokeo search results associated with his name falsely indicated that he has more education and professional experience than he actually has, that he is married, and that he is wealthier than he is. Robins claims that this misinformation—which in the pre-digital age was the *sole purpose* of class reunions—harmed his employment prospects and caused him anxiety and stress.

<sup>53</sup> See *Star Trek II: The Wrath of Khan* (1982); see also *id.* (“Khaaaaaan!!”).

<sup>54</sup> No. 10-708, October Term 2011.

<sup>55</sup> *Star Trek: The Motion Picture* (1979).

<sup>56</sup> Stat Pack, October Term 2011, Days Between Oral Argument and Opinion, SCOTUSblog (June 30, 2013), <http://goo.gl/lvoOIK>.

Spokeo countered that he had not suffered any actual concrete harm, just speculative anxiety and concern about what might happen. The district court dismissed his claims on the grounds that he had not alleged any actual or imminent harm, but the U.S. Court of Appeals for the Ninth Circuit reversed. After Spokeo petitioned for certiorari, the Court sought the views of the solicitor general, who recommended that the Court deny cert. In part of what at least *feels* like a trend, the Court departed from its usual practice of following the SG's denial recommendation and granted review.<sup>57</sup>

The issue may sound like the classic dispute about whether Kirk or Picard is better. But the case has tremendous practical importance—as demonstrated by the remarkable 10 amicus briefs supporting Spokeo filed at the cert stage, and 17 at the merits stage—because it is poised to determine the extent to which Congress can give people who have not suffered a traditional “injury” a right to sue. Just don't try explaining to a layperson why the case is important; it's like bragging that you speak Klingon.

### B. Mootness

*Campbell-Ewald Company v. Gomez* involves a lingering question of the federal courts' jurisdiction: whether a defendant's offer to settle a lawsuit for everything the named plaintiff is seeking renders a case moot. If there is only one party suing to advance a claim, some federal courts have ruled that if there is an offer to give the plaintiff everything he or she is seeking, that ends the case, whether the party accepts the offer or not—the theory is that the plaintiff has won and has no cognizable legal interest in pursuing the case, even if she won't take “yes” for an answer. Cutting the other way (in federal court at least) is Federal Rule of Civil Procedure 68, which provides that “[a]n unaccepted [settlement] offer is considered withdrawn.” And some courts have held that when the lawsuit is brought on behalf of a putative class as well as the named plaintiff, the case remains live despite the settlement offer because the absent class plaintiffs have live

<sup>57</sup> David C. Thompson & Melanie F. Wachtell, An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General, 16 *Geo. Mason L. Rev.* 237, 276 (2009) (noting Court historically denied cert. in 75 percent of cases in which the solicitor general recommended denial during 1998–2000 and 83 percent during 2001–2004).

concerns.<sup>58</sup> The question is of obvious interest both to corporations (which have a strong interest in having suits dismissed, especially class actions) and the people who sue them (who have a strong interest in maximizing recovery and, not incidentally, their fees).

Enter Campbell-Ewald Company, an advertising agency that conducts recruiting campaigns for the U.S. Navy. The agency developed a recruiting text message and sent it to 150,000 cell phones, and surpassed all expectations by yielding five recruits, seven online stalkers, 15 marriage proposals, and 149,973 lawsuits. Respondent Jose Gomez received the Navy's call to service and was so moved that he immediately enlisted . . . the assistance of counsel to commence a class-action lawsuit under the Telephone Consumer Protection Act. Campbell-Ewald offered Gomez \$1503 per text message he received and stipulated to an injunction prohibiting it from sending more such messages—more than matching the statutory \$500 per violation (with trebling) and injunctive relief Gomez could obtain if he prevailed in the litigation. Nevertheless, this was an offer Gomez could (and did) refuse. The district court held that the offer had not mooted Gomez's claims, but granted Campbell-Ewald summary judgment, concluding that because it was acting as a Navy contractor, it was entitled to derivative sovereign immunity. On appeal, the Ninth Circuit agreed that the claim was not moot, but reversed the sovereign immunity ruling, holding that derivative sovereign immunity applied only in the context of property damage resulting from public works projects.

*Campbell-Ewald* asks (1) whether a case becomes moot when the plaintiff receives an offer of complete relief on his claim; (2) whether a case becomes moot when the plaintiff has asserted a class claim but receives an offer of complete relief before any class is certified; and (3) whether the doctrine of sovereign immunity recognized for government contractors in *Yearsley v. W.A. Ross Construction Co.*<sup>59</sup> is restricted to claims arising out of property damage caused by public works projects. If the first two questions sound familiar, it's either an obscure neurological condition affecting the brain's FedJur cortex, or you're a reader familiar with past Terms of the Century

<sup>58</sup> See, e.g., *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 704–09 (11th Cir. 2014); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1247–50 (10th Cir. 2011).

<sup>59</sup> 309 U.S. 18 (1940).



who recalls OT2012's *Genesis Healthcare Corp. v. Symczyk*.<sup>60</sup> *Genesis* sought to resolve those questions, but the Court could not reach the question because Symczyk (coincidentally, Polish for “my typewriter’s jammed!”) had conceded before the court of appeals that an unaccepted-but-fully-satisfactory Rule 68 offer renders a claim moot.<sup>61</sup> *Genesis* went off on a 5–4 vote split along ideological lines, with Justice Kagan writing a clever if vituperative dissent that forcefully argued that an unaccepted settlement offer can never moot a case (and inviting the reader to “relegate the majority’s decision to the furthest reaches of your mind”<sup>62</sup>). The Court’s four liberals have solidly staked out their position; the question remains whether this famously disciplined group<sup>63</sup> can peel off the one conservative vote it will take to make a majority.

## V. Class Actions

Although the Court has in recent terms taken an active interest in delineating limits to class actions under Federal Rule of Civil Procedure 23, the area remains “a messy corner of the law,”<sup>64</sup> where “the Supreme Court and the lower courts appear out of step.”<sup>65</sup> In *Tyson Foods, Inc. v. Bouaphakeo*, the Court aims to clear up two recurring issues: (1) whether damages for class members can be determined using statistical sampling techniques, and (2) whether a class may be certified that contains members who were not injured.

Plaintiffs are current and former employees at Tyson’s Storm Lake, Iowa, pork-processing plant, who work in occupations whose names are not likely to make you crave a ham sandwich: “Slaughter” and “Fabrication.” (Fabrication?) Such employees must wear (or wield) various professional accouterments—hard hats, hair nets, smocks, mesh sleeves, knives, scabbards, and, ominously, “belly guards,”

<sup>60</sup> 133 S. Ct. 1523 (2013).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1533 (Kagan, J., dissenting).

<sup>63</sup> Adam Liptak, Right Divided, a Disciplined Left Steered the Supreme Court, N.Y. Times (June 30, 2015), available at <http://goo.gl/IdseLi>.

<sup>64</sup> Editorial, Class Action Spring Cleaning, Wall. St. J. (June 12, 2015), available at <http://goo.gl/WqbhyY>.

<sup>65</sup> Tim Bishop, Archis A. Parasharami, & Chad Clamage, Supreme Court to Revisit Class-Certification Standards in *Tyson Foods, Inc. v. Bouaphakeo*, Class Defense Blog (June 8, 2015), <https://goo.gl/NPAVK6>.

raising the fundamental question whether the guard protects the belly in question or those within its gravitational field. Tyson paid its employees for a fixed amount of extra time each day (around four to eight minutes) to compensate workers for “donning” and “doffing” their occupational garb. In 2007, plaintiffs filed a class action claiming that Tyson failed to adequately compensate them for overtime work spent donning and doffing, in violation of both the Fair Labor Standards Act (“FLSA”) and a related Iowa statute. Plaintiffs successfully moved for class certification under Federal Rule 23(b)(3) (and for a collective action under the FLSA). After the Court issued its landmark decision in *Wal-Mart Stores, Inc. v. Dukes*, which reemphasized that class actions could be certified only when “questions of law or fact common to the class” “predominate over any questions affecting only individual members”<sup>66</sup> (and disapproving of “trial by formula,” determining liability for a “sample set” of class members and then “appl[ying it] to the entire remaining class”<sup>67</sup>), the plaintiffs successfully opposed decertification.

Invoking *Wal-Mart*, Tyson took aim at two experts used to prove and measure plaintiffs’ alleged damages: the first measured how much time a sample of employees took for donning/doffing-related activities, and used those figures to arrive at averages for both Fabrication and Slaughter employees (18 and 21 minutes, respectively); the second, assuming that all class members spent this average amount of time donning/doffing their equipment (the 18 and 21 minutes), used a computer program to determine how much overtime compensation would be due to an employee if he or she was credited for the average donning/doffing time each workday. Tyson protested that this was precisely the type of “trial by formula” that *Wal-Mart* prohibited and vitiated Tyson’s right to demonstrate that *individual* members were not entitled to overtime pay. Subsequent trial testimony showed that (1) Tyson employees wore different equipment, depending on their job; (2) Tyson employees donned and doffed this equipment in different order, and in different places; and (3) over 200 employees appeared to suffer no injury at all because even adding up the average donning/doffing time did not result in these employees working uncompensated “overtime” (that is, over 40 hours in a

<sup>66</sup> Fed. R. Civ. P. 23(a), (b)(3).

<sup>67</sup> 131 S. Ct. 2541, 2561 (2011).

single week). Nevertheless, the trial court denied Tyson's motions for decertification and entered a nearly \$6 million judgment for the plaintiffs.

The U.S. Court of Appeals for the Eighth Circuit affirmed, over the dissent of Judge C. Arlen Beam. Though the appellate court acknowledged that plaintiffs "rel[ie]d on inference from average donning [and] doffing" times, it reasoned that, because Tyson had a "specific company policy" that applied to all class members, and the class members worked at the same plant, "this inference was allowable under [the Supreme Court's decision in] *Anderson v. Mt. Clemens Pottery Co.*"<sup>68</sup> The court likewise rejected Tyson's argument that decertification was necessary because evidence showed that some class members suffered no harm.

Before the Supreme Court, Tyson points to "undisputed evidence" showing substantial variance in the time employees spent in donning/doffing-related activities, and contends that plaintiffs cannot "prove" liability and damages using statistical evidence that presumes that all class members are identical to the average observed in a sample. Regarding the question of uninjured plaintiffs, Tyson draws on the holding of *Lujan v. Defenders of Wildlife*<sup>69</sup> to argue that Rule 23 must be interpreted consistently with the basic Article III requirement that plaintiffs who invoke federal courts' jurisdiction must establish that they have standing to sue under the "case or controversy" requirement. Rule 23, Tyson says, is a limited procedural device for aggregating liability and damages claims; it should not be used to expand federal court jurisdiction and compensate individuals who have suffered no injury, lack Article III standing, and are entitled to no damages.

The case is still being briefed, but plaintiffs' best argument so far may be the Court's nearly 70-year-old *Mt. Clemens* FLSA decision that the Eighth Circuit invoked to uphold class certification. There, the Court held that where an employer has failed to keep records of time worked, "an employee has carried out his burden [in seeking overtime] if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient

<sup>68</sup> *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797 (8th Cir. 2014) (citing 328 U.S. 680 (1946)).

<sup>69</sup> 504 U.S. 555 (1992).

evidence to show the amount and extent of that work *as a matter of just and reasonable inference.*<sup>70</sup> Plaintiffs contend that *Mt. Clemens* used the “just and reasonable inference” principle to allow 300 employees in a FLSA collective action to make out a claim based on the representative testimony of eight employees whose estimates of uncompensated time spent walking to work stations ranged from 30 seconds to 8 minutes, and where walking distances varied from 130 feet to 890 feet. A similar result should follow here because Tyson failed to keep the requisite records. For its part, Tyson italicizes a different portion of this *Mt. Clemens* quote to suggest individualized proof is required: “*he . . . performed work for which he was improperly compensated.*”<sup>71</sup>

This is a question that arises constantly. *Tyson* was just one of at least three cases raising similar issues about resort to statistics and allegedly unharmed class members vying for a spot on OT2015’s docket; that means that even if *this* case is resolved based on the peculiarities of FLSA collective actions, there are other cases behind it in line to serve as vehicles to address any distinct Rule 23 question.<sup>72</sup> All eyes will be on the justices during argument—and not just to watch them try to pronounce the lead plaintiff’s name (which, if you’re buying vowels, is a much more expensive proposition than “Symczyk”). But on that score, it can’t hold a candle to the league-leader from a prior Term of the Century, OT2011’s epic *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, which the chief justice may have rehearsed more than the oath of office.<sup>73</sup>

<sup>70</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

<sup>71</sup> Cert. Pet. at 19, *Tyson Foods, Inc. v. Bouaphakeo* (No. 14-1146).

<sup>72</sup> Among the other cases were: *Wal-Mart Stores v. Braun*, involving a \$187 million judgment entered on behalf of a certified class of 187,000 Wal-Mart employees who claimed that they had not been paid for rest breaks and off-the-clock work; *Dow Chemical v. Industrial Polymers*, arising from a \$1.1 billion judgment in an antitrust class action alleging coordinated price announcements; and *Allstate Insurance Co. v. Jimenez*, also involving unpaid overtime. See John Elwood, *Relist Watch*, SCOTUSblog (May 29, 2015), <http://goo.gl/9wI0t4>. With the exception of *Allstate* (in which the Court denied cert. in June), the other cases appear to remain on hold until a decision is rendered in *Tyson*.

<sup>73</sup> Barack Obama Oath of Office, YouTube, Jan. 20, 2009, <https://goo.gl/iq3CUg>.

## VI. Criminal Law

### A. Right to Counsel

Our next case involves a subject close to every attorney's heart: making sure the lawyer gets paid. The Court touched on this issue in OT2013's *Kaley v. United States*, but the seminal cases were decided 25 years ago on the same day: *United States v. Monsanto* and *Caplin & Drysdale, Chartered v. United States*.

All three cases involved 21 U.S.C. § 853, a federal forfeiture statute authorizing a court to freeze a convicted or indicted defendant's assets under certain circumstances. In *Caplin & Drysdale*, the Court rejected arguments that, under the Sixth Amendment or the Fifth Amendment's Due Process Clause, money a convicted defendant has agreed to pay his attorney *from tainted assets* is exempt from forfeiture: "A defendant has no [constitutional] right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice."<sup>74</sup> *Monsanto*, in turn, held that, *even before* trial, when the presumption of innocence still applies, the government may constitutionally use Section 853 to freeze assets of an indicted defendant "based on a finding of probable cause to believe that the property will ultimately be proved forfeitable."<sup>75</sup> As a practical matter, that determination requires a two-part inquiry: first, whether there is probable cause to think a defendant has committed an offense permitting forfeiture; and second, whether there is probable cause that the property has the requisite criminal connection. "[I]f the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order, barring a defendant from frustrating that end by dissipating his assets prior to trial."<sup>76</sup>

Neither *Monsanto* nor *Caplin & Drysdale* considered whether the Due Process Clause requires a hearing to establish probable cause—though, in the wake of those decisions, most courts did. (Section 853 itself is silent on the matter.) Lower courts split on whether, at

<sup>74</sup> 491 U.S. 617, 626 (1989).

<sup>75</sup> 491 U.S. 600, 615 (1989).

<sup>76</sup> *Id.* at 616.

such a hearing, criminal defendants are constitutionally entitled to contest the first prong of the *Monsanto* inquiry—a grand jury’s prior determination of probable cause to believe the defendant committed the crimes charged. In *Kaley*, the Court held by a 6–3 vote that indicted defendants “cannot challenge the grand jury’s conclusion that probable cause supports the charges against them.”<sup>77</sup> Justice Kagan’s majority decision drew a dissent from Chief Justice Roberts, who (joined by Justices Stephen Breyer and Sonia Sotomayor) faulted the majority for failing to explain “why the District Court may reconsider the grand jury’s probable cause finding as to traceability [of the asset to a crime] . . . but may not do so as to the underlying charged offense.”<sup>78</sup> The chief justice argued that the “Court’s opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and governing.”<sup>79</sup>

Fast forward to OT2015. The same attorney who argued *Kaley* is back with *Luis v. United States*, this time to determine whether it matters that the assets to be used for paying the lawyer are “untainted”—that is, not connected to the commission of a crime.<sup>80</sup> The case implicates a different (if similar) statute. Like Section 853, 18 U.S.C. § 1345 authorizes the government to initiate a civil action in order to “preserve the defendant’s assets until a judgment requiring restitution or forfeiture can be obtained.”<sup>81</sup> But unlike Section 853, Section 1345 authorizes the court to enter an order restraining “property, obtained as a result of a banking law violation . . . or property

<sup>77</sup> 134 S. Ct. 1090, 1105.

<sup>78</sup> *Id.* at 1108 (Roberts, C.J., dissenting).

<sup>79</sup> *Id.* at 1107, 1114 (quoting *United States v. Gonzales-Lopez*, 548 U.S. 140, 147–48 (2006)).

<sup>80</sup> Fear not: He has other clients who are permitted to pay him. The same attorney has succeeded (so far at least) in preventing the public release of photos of Justin Bieber “relieving” himself by the roadside after his DUI arrest. Although, however much an attorney is paid for such a representation, it remains in some deeper sense work done *pro bono publico*. See David Ovalle, Justin Bieber’s Privates Will Remain Private for Now as Miami-Dade Judge Weighs Public Urination Footage, *Miami Herald* (Feb. 19, 2014), available at <http://goo.gl/JrUano> (noting that “footage” of incident will remain sealed while the judge reviews the videos in chambers; in unrelated news, judicial internship applications from Miami middle school students have soared); see also <https://goo.gl/6KffC8> (videotape of hearing).

<sup>81</sup> *United States v. DBB, Inc.*, 180 F.3d 1277, 1284 (11th Cir. 1999).

which is traceable to such violation . . . or property of equivalent value.”<sup>82</sup> The *Luis* trial court held that the “equivalent value” language meant “that when some of the assets that were obtained as a result of fraud cannot be located, a person’s substitute, *untainted* assets may be restrained instead.”<sup>83</sup> The U.S. Court of Appeals for the Eleventh Circuit affirmed, in tension with a Fourth Circuit holding that under Section 853, a defendant “still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice.”<sup>84</sup>

In support of her argument that the Fifth and Sixth Amendments prohibit pretrial restraint of a criminal defendant’s untainted assets needed to retain counsel of choice, the petitioner notes that, in all of the Court’s cases addressing the constitutionality of restraining and forfeiting funds earmarked for attorneys’ fees, those assets have been tainted; and indeed, *Kaley* emphasized that fact.<sup>85</sup> Cases involving untainted assets thus do not implicate the oft-repeated maxim that a defendant “has no Sixth Amendment right to spend another person’s money’ for legal fees.”<sup>86</sup> *Luis* concedes that, under the “relation-back” doctrine, the government has a vested interest in property tainted by virtue of being traceable to, or instrumentalities of, a crime. But no aspect of the Court’s prior holdings, *Luis* contends, suggests that pretrial restraint of *untainted* assets would meet a similar fate. *Luis*’s petition is seasoned with appeals to both English common law and the Framers’ intent—catnip for the originalists, part-time originalists, and even “faint hearted” originalists on the Court.<sup>87</sup> Frequently referenced in the argument is the hypothetical bank robber who uses his ill-gotten proceeds to cover legal costs,

<sup>82</sup> 18 U.S.C. § 1345(a)(2)(B)(i) (emphasis added).

<sup>83</sup> *United States v. Luis*, 966 F. Supp. 2d 1321, 1325 (S.D. Fla. June 21, 2013) (emphasis added).

<sup>84</sup> *United States v. Farmer*, 274 F.3d 800, 804 (4th Cir. 2001).

<sup>85</sup> See *Kaley*, 134 S. Ct. at 1097 (“[N]o one contests that the assets in question derive from, or were used in committing, the offenses.”).

<sup>86</sup> *Id.* at 1029 (quoting *Caplin & Drysdale*, 491 U.S. at 626).

<sup>87</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989) (“It is, I think, the fact that most originalists are faint-hearted.”). But see Jenifer Senior, *In Conversation: Antonin Scalia*, *New York Magazine* (Oct. 6, 2013), available at <http://nymag.com/news/features/antonin-scalia-2013-10/#> (Senior: “You’ve described yourself as a fainthearted originalist. But really, how fainthearted?” Scalia: “I described myself as that a long time ago. I repudiate that.”).

who made his first appearance in *Caplin & Drysdale*, and was later revived by Justice Kagan in her majority opinion in *Kaley*. Something tells me we haven't heard the last of this guy.

If the government is able to restrain untainted assets needed to pay counsel, it could have a far more sweeping effect on defendants than *Monsanto* and *Caplin & Drysdale*, because it could deprive them of all assets to retain a lawyer.

### B. Capital Punishment

Cases involving the death penalty will be especially closely watched in October Term 2015, in the wake of last term's contentious lethal-injection case *Glossip v. Gross*, which saw two more members of the Court express the view that the death penalty is likely categorically unconstitutional.<sup>88</sup> But the new term finds the Court continuing to "tinker with the machinery of death."<sup>89</sup>

In OT2001's *Ring v. Arizona*,<sup>90</sup> the Court held that the Sixth Amendment jury trial guarantee, as construed by *Apprendi v. New Jersey*,<sup>91</sup> requires jurors and not judges to find aggravating circumstances that justify imposing the death penalty. Ever since, Florida's capital sentencing scheme has seemed, like Florida itself,<sup>92</sup> precariously positioned. Nevertheless, the scheme has fended off

<sup>88</sup> See *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting) ("[T]he death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment[.]'"); accord *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) ("[T]he imposition of the death penalty represents the pointless and needless extinction of life . . . . A penalty with such negligible returns to the state [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." (internal quotations omitted)); *Callins v. Collins*, 510 U.S. 1141, 1145–46 (1994) (Blackmun, J., dissenting) ("[T]he inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.").

<sup>89</sup> *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting).

<sup>90</sup> 536 U.S. 584 (2002).

<sup>91</sup> 530 U.S. 466 (2000).

<sup>92</sup> See Michael Kuhne, Will This Season Bring an End to Florida's Decade-Long Hurricane Drought?, AccuWeather.com (June 3, 2015), <http://www.accuweather.com/en/weather-news/florida-decade-hurricane-drought-atlantic-2015/47137699> (noting that Florida "has been hit by seven of the [ten] most costly and damaging hurricanes in U.S. history").



13 years of Sixth Amendment attacks post-*Ring*.<sup>93</sup> That streak may be coming to an end.

The Court granted cert. in *Ring* to “allay uncertainty in the lower courts caused by the manifest tension between *Walton v. Arizona* and the reasoning of *Apprendi*.”<sup>94</sup> In *Walton*, rendered in 1990, the Court held that it was permissible under the Sixth Amendment to allow a trial judge, sitting alone, to determine the presence or absence of aggravating factors supporting imposition of the death penalty.<sup>95</sup> *Walton* drew support from *Hildwin v. Florida*, which had, by summary affirmance, upheld that state’s sentencing scheme, under which the jury enters an advisory sentence the judge is free to override, “without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment.”<sup>96</sup> But a decade after *Walton*, the Court declared in *Apprendi* that the Sixth Amendment does not allow a defendant to be “expose[d] to . . . a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”<sup>97</sup> While *Apprendi* papered over the tension with *Walton*, two terms later, the Court explicitly held in *Ring* that “the Sixth Amendment’s jury trial guarantee . . . requires that the aggravating factor determination be entrusted to the jury,” and “overrule[d] *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.”<sup>98</sup>

That brings us to next term’s *Hurst v. Florida*, which asks “[w]hether Florida’s death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of . . . *Ring*.”<sup>99</sup> *Hurst*, who was convicted of murdering a co-worker at Popeye’s Fried Chicken, notes that in addition to providing the jury only an advisory role in sentencing, Florida law requires only a majority vote

<sup>93</sup> See, e.g., *Peterson v. State*, 94 So. 3d 514, 538 (Fla. 2012) (“We have consistently rejected claims that Florida’s death penalty statute is unconstitutional” under *Ring*.).

<sup>94</sup> *Ring*, 536 U.S. at 596.

<sup>95</sup> 497 U.S. 639, 649 (1990).

<sup>96</sup> 490 U.S. 638, 640–41 (1989) (per curiam).

<sup>97</sup> 530 U.S. 466, 483 (2000).

<sup>98</sup> 536 U.S. 584, 597, 609 (2002).

<sup>99</sup> *Hurst v. Florida*, 147 So.3d 435 (Fla. 2014), cert. granted, 135 S. Ct. 1531 (U.S. March 9, 2015) (No. 14-7505).

is necessary for a jury's recommendation of death—and even then, the jurors need not agree on *which* aggravators are present, nor do they make express findings on aggravating circumstances. The trial judge typically conducts a separate hearing in which he may consider evidence, arguments, and aggravators that were not presented to the jury. If a court imposes the death sentence, it renders its findings in writing; and these findings, rather than the jury's verdict, furnish the basis of the Florida Supreme Court's review.<sup>100</sup> Hurst argues that by assigning the fact-finding responsibilities to a court, rather than to a jury, Florida's capital-sentencing scheme contravenes *Ring*. Hurst also claims the Eighth Amendment requires the death penalty to be imposed by a jury, which embodies "the community's moral sensibility." Finally, Hurst claims that even if Florida's scheme does satisfy *Ring*, his death sentence violates the Sixth and Eighth Amendments for other reasons, including: the misleading minimization of the jury's sense of responsibility for determining the appropriateness of death; Florida's simple majority vote on the death penalty offends the Constitution; and the aggregate effects of the scheme's subversion of the jury's deliberative function. There are very few cases in which judicial fact-finding related to sentencing has survived *Apprendi* challenges. Florida has its work cut out for it.

### C. *Hobbs Act*

The Hobbs Act, the Court observed a few years ago in *Sekhar v. United States*, punishes "one of the oldest crimes in our legal tradition": extortion.<sup>101</sup> Under the act, extortion is defined to include "the obtaining of property from another, with his consent, . . . under the color of official right."<sup>102</sup> At issue in *Ocasio v. United States* is whether a conspiracy to commit extortion requires that the co-conspirators agree to obtain property from someone *outside* the conspiracy.

*Ocasio* arises from misconduct by members of the Baltimore Police Department—albeit a fairly mild form of misconduct by BPD

<sup>100</sup> *Grossman v. State*, 525 So.2d 833, 839 (Fla. 1988).

<sup>101</sup> *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013).

<sup>102</sup> 18 U.S.C. § 1951(b)(2).

standards, if news accounts are to be believed.<sup>103</sup> After an extensive FBI investigation, 17 Baltimore police officers were arrested and indicted for participating in a kickback scheme with brothers Hernan Alexis Moreno Mejia (“Moreno”) and Edwin Javier Mejia (“Mejia”), the owners of the Majestic Auto Repair Shop ‘n’ Graft Emporium.<sup>104</sup> Over the course of several years, the brothers paid BPD cops, as the first responders to car accidents, to refer accident victims to Majestic for repairs. Though Moreno, Mejia, and most of the officers pleaded guilty to the crimes, Ocasio and another officer contested the charges. By a superseding indictment, the two were charged with three counts of substantive extortion under the Hobbs Act and one count of conspiracy to commit extortion. The conspiracy charge forms the basis of Ocasio’s petition.

Under the indictment, Ocasio allegedly conspired “with Moreno and Mejia to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from Moreno, Mejia, and [the Majestic Auto Repair Shop], with their consent . . . in violation of [the Hobbs Act].”<sup>105</sup> “In other words,” Ocasio says, the indictment “accused the defendant[] of conspiring *with [his] bribers* to obtain property *from the bribers themselves*”<sup>106</sup>—an offense he argues the Hobbs Act does not recognize. Relying on *United States v. Brock*, an opinion by Sixth Circuit Judge Jeffrey Sutton (whose opinion in *United States v. Jeffries* was influential in another statutory construction case in the most recent Term of the Century, *Elonis v. United States*<sup>107</sup>), Ocasio argued that, to conspire to obtain property “from another” under the act, conspirators must have agreed to obtain property from someone *outside the*

<sup>103</sup> See Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, *The Atlantic* (April 22, 2015), available at <http://goo.gl/OSGJmb>; Meredith Cohn, *Two More Men Allege ‘Rough Rides’ in Baltimore Police Van*, *Baltimore Sun* (May 1, 2015), available at <http://goo.gl/WvxR2O>. See generally *The Wire*, “Port in a Storm,” Season 2, Episode 12 (originally aired August 24, 2003) (Major Valchek: “F\*\*k you. This is the Baltimore Police Department, not the Roland Park Ladies Tea.”).

<sup>104</sup> Name partially made up. See *Majestic Auto Repair Shop*, *Baltimore Sun*, <http://goo.gl/wnY16v>.

<sup>105</sup> Cert. Pet. at 5, *Ocasio v. United States*, (No. 14-361) (quoting indictment).

<sup>106</sup> *Id.*

<sup>107</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2008, 2011 (2015) (citing *United States v. Jeffries*, 692 F.3d 473, 483–84 (6th Cir. 2012) (Sutton, J., concurring *dubitante*)).

*conspiracy*, not from a person participating *in* the conspiracy. But the trial court concluded that the argument was foreclosed by Fourth Circuit law. Because of the inclusion of the conspiracy charge, Ocasio says that the trial judge admitted “a great deal of evidence (offered to prove the conspiracy) that otherwise would not have been admitted.”<sup>108</sup> After his co-defendant pleaded guilty on the last day of trial, Ocasio was found guilty on all counts and sentenced to serve 18 months in prison.

The U.S. Court of Appeals for the Fourth Circuit affirmed. While appearing to acknowledge (like the Sixth Circuit) that the Hobbs Act clause requiring conspirators to obtain “property from another” and do so “with his consent” does not “appl[y] naturally to the conspirators’ own property or to their own consent,”<sup>109</sup> the panel nevertheless held that the “from another” provision simply “refers to a person or entity other than the public official.”<sup>110</sup> Which is to say, the requirement “provides only that a public official cannot extort himself.”<sup>111</sup> Thus, nothing in the Hobbs Act forecloses the possibility that the “another” can also be a coconspirator of the public official.

Before the Court, Ocasio contends, not without force, that the text of the Hobbs Act requires that a conspiracy involve an agreement to obtain *someone else’s* property. “If two people agree that one will pay the other a bribe,” Ocasio argues, “no speaker of English would say they have agreed to ‘obtain property from another, with his consent.’”<sup>112</sup> There is the further question (noted by Judge Sutton) of “How do (or why would) people conspire to obtain their own consent?”<sup>113</sup> The Fourth Circuit’s reading would transform every bribe into a criminal conspiracy, effectively transforming the Hobbs Act into an anti-bribery statute. In response, the government observes that the Hobbs Act “does not state that the defendant must agree to obtain property from someone outside of the conspiracy,”

<sup>108</sup> Cert. Pet. at 6, *supra* note 105.

<sup>109</sup> *United States v. Ocasio*, 750 F.3d 399, 410 (4th Cir. 2014) (quoting *United States v. Brock*, 501 F.3d 762, 768 (6th Cir. 2007)).

<sup>110</sup> 750 F.3d at 411.

<sup>111</sup> *Id.*

<sup>112</sup> Pet. Br. at 23, *Ocasio v. United States*, No 14-361 (U.S. June 1, 2015).

<sup>113</sup> *Id.* at 24 (quoting *Brock*, 501 F.3d at 767).

“[n]or do its terms imply such a limitation.”<sup>114</sup> “Whoever” refers to the defendant official; and property from “another” refers to property not belonging to that official. Ocasio’s reading, the government argues, would produce anomalous results. “Petitioner does not contest in this Court that he committed substantive Hobbs Act violations by accepting payments from Moreno. But if a bribe-payer such as Moreno can be ‘another’ under [§] 1951(b)(2) for purposes of a substantive Hobbs Act violation, it is difficult to see how that same person can lose his status as ‘another’ solely by virtue of a conspiracy charge.”<sup>115</sup> Assisted by an amicus brief filed by numerous prominent former U.S. Attorneys, Ocasio seeks to harness the sentiment that the case reflects prosecutorial overreaching, à la OT2014’s pun-fest *Yates v. United States*<sup>116</sup> (*wearily*: yes, the fish case). Oral argument will help reveal which OT2014 criminal case *Ocasio* most closely resembles: *Henderson v. United States* (a “controlled implosion” of the government’s position<sup>117</sup>), *Yates* (a disturbing prosecution, but legally a close question), or *Whitfield v. United States* (a prosecution that seemed outrageous at the time of the grant, but turned out quite reasonable once the Court took a careful look).<sup>118</sup>

## VII. Cases in the Pipeline

In case the last 28 pages of rampant speculation about the cases the Court will be hearing next term is not enough for you, we thought we’d end this essay by engaging in some truly wild guesses about cases that the Court hasn’t even decided to review yet.

### A. Environmental Law

*Kent Recycling Services, LLC v. U.S. Army Corps of Engineers*, 14-493. Mention your rehearing petition around the Supreme Court *cognoscenti*, and you will get a look like you just said you’ve received an email from a deposed prince promising to pay you handsomely to

<sup>114</sup> Govt. Brief in Opposition at 7, *Ocasio v. United States*, No. 14-361 (U.S. Dec. 29, 2014).

<sup>115</sup> *Id.* at 8.

<sup>116</sup> 135 S. Ct. 1074, 1100–01 (Kagan, J., dissenting).

<sup>117</sup> See Richard M. Re, *Argument Analysis: A Controlled Implosion*, SCOTUSblog (Feb. 25, 2015), <http://goo.gl/Q7zCnU>.

<sup>118</sup> 135 S. Ct. 785 (2015).

move his assets through your bank account. That is because both situations have approximately the same odds of a happy ending.<sup>119</sup> They *never* work—except when they do. The Court grants rehearing once in a blue moon, just to ensure people keep legal printers fully employed preparing rehearing petitions in hopeless cases.<sup>120</sup> The most recent example of the Court granting cert. on rehearing is *Boumediene v. Bush*, 553 U.S. 723 (2008).

So back to *Kent Recycling*. The petition principally presented the question whether a “jurisdictional determination” by the Army Corps of Engineers that a property contains “waters of the United States” subjecting it to costly regulation under the Clean Water Act (“CWA”) is final agency action subject to immediate review under the Administrative Procedure Act, even if the agency has not ordered the property owner to do (or refrain from doing) something to comply with the CWA. Readers familiar with past Terms of the Century may recall Justice Alito’s concurrence in OT2011’s *Sackett v. EPA*, suggesting that a jurisdictional determination alone might be reviewable.<sup>121</sup> Soon after the Court denied Kent Recycling’s petition as splitless in March 2015, the Eighth Circuit held that a jurisdictional determination itself *is* reviewable, and Kent Recycling filed a petition for rehearing. The Court took the unusual step of ordering the government to file a response. The government acknowledged the circuit split but told the Court to deny cert. because it was filing a rehearing petition to give the Eighth Circuit the opportunity to bring its law into line. But in July, the Eighth Circuit denied rehearing, cementing the split. As this goes to press, the rehearing petition remains pending. The Court’s conservatives like EPA’s regula-

<sup>119</sup> That is true even when the rehearing petition is meritorious. Just take our word for it that the Court should have at least granted the petition, vacated the judgment below, and remanded (“GVR’d”) in light of the rehearing petition in *British American Tobacco (Investments) Ltd. v. United States*, after *Morrison v. National Australia Bank*, 561 U.S. 247 (2010). Both involved the correct test for the extraterritorial application of U.S. law. It didn’t work out. See *British American Tobacco (Investments) Ltd. v. United States*, 131 S. Ct. 57 (2010). The Court is generally a bit more indulgent in granting rehearing to GVR. See, e.g., *Liberty University v. Geithner*, 133 S. Ct. 679 (2012); *Melson v. Allen*, 561 U.S. 1001 (2010). Hat tip to Sean Marotta and Bryan Gividen. See <https://goo.gl/SCaZWl>.

<sup>120</sup> It’s possible that that may not be their actual motivation.

<sup>121</sup> 132 S. Ct. 1367, 1375 (Alito, J., concurring) (“property owners like petitioners will have the right to challenge the EPA’s jurisdictional determination under the [APA]”).

tion of “waters of the United States” (redefined in a recent rule<sup>122</sup>) about as much as they like the Armed Career Criminal Act’s residual clause.<sup>123</sup>

*B. Abortion*

Recent years have seen a variety of new restrictions placed on the provision of abortion, including requirements that providers comply with certain health and safety regulations or have admitting privileges at local hospitals, requirements that the mother be shown an ultrasound, and measures prohibiting abortion outright past a certain number of weeks of gestation.

*Currier v. Jackson Women’s Health Organization* seeks review of the Fifth Circuit’s decision to invalidate a Mississippi law requiring abortion clinics (er, *clinic*—there is only one statewide) to comply with health and safety regulations applicable to other outpatient facilities and have admitting privileges. The Fifth Circuit held—over the dissent of, you guessed it, Judge Garza—that it was an undue restriction on the constitutionally recognized right to an abortion to “effectively clos[e] the one abortion clinic in the state.”<sup>124</sup> The Court has already relisted *Currier* six times, making clear that the justices were giving the case close consideration. A second panel of the Fifth Circuit *upheld* a Texas measure that required those who perform abortions to have admitting privileges at local hospitals and have facilities equal to those available at a surgical center.<sup>125</sup> Near the end of the term, the Court, by a 5–4 vote, stayed the Fifth Circuit’s judgment in that case and thus temporarily blocked Texas from enforcing its abortion law,<sup>126</sup> reflecting that a majority concluded that there is “a reasonable probability that th[e] Court will grant certiorari, [and] a fair prospect

<sup>122</sup> Environmental Protection Agency, Clean Water Rule: Definition of ‘Waters of the United States, 80 Fed. Reg. 37054 (2015), available at <http://goo.gl/ULCQR6>.

<sup>123</sup> See *Johnson v. United States*, No. 13-7120 (U.S. June 26, 2015) (finally putting the clause out of its constitutional misery after several fruitless attempts to give lower courts guidance regarding its meaning).

<sup>124</sup> *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014).

<sup>125</sup> *Whole Woman’s Health v. Cole*, 790 F.3d 563, as modified by 790 F.3d 598 (5th Cir. 2015). The Court did, however, enjoin its application to one isolated facility along the Mexican border.

<sup>126</sup> *Whole Woman’s Health v. Cole*, 135 S. Ct. 2923 (2015).

that the Court will then reverse the decision below.”<sup>127</sup> Separately, the Eighth Circuit, in the course of invalidating North Dakota’s law prohibiting abortion after a fetus has a detectable heartbeat, urged the Supreme Court that “good reasons exist for the Court to reevaluate its jurisprudence” because the Court’s “viability standard . . . gives too little consideration to the substantial state interest in potential life.”<sup>128</sup> It seems inevitable that the Court will have at least *one* high-profile abortion case on its docket next term.

### C. Fourth Amendment

It’s great how your cellphone can give turn-by-turn directions from your precise location. It’s less great when prosecutors use the same “cell site location information” (“CSLI”) to tie you to a string of armed robberies that results in a 162-year prison sentence. That is the situation that Quartavious Davis finds himself in, and he is not alone: CSLI has become an everyday tool in criminal prosecutions.

The Fifth Circuit has held that no warrant is required before the government obtains CSLI records, reasoning that because cellphone users permit service providers to access that information, people lack an expectation of privacy in it.<sup>129</sup> This is known as the “third party doctrine,” best associated with *Smith v. Maryland*.<sup>130</sup> The Third Circuit, by contrast, has concluded that “[a] cell phone customer has not ‘voluntarily’ shared his location information with a cellular provider in any meaningful way,” and suggested that a warrant might be required where disclosure of information “would implicate the Fourth Amendment, as it could if it would disclose location information about the interior of a home.”<sup>131</sup>

When Davis appealed his conviction, a panel of the Eleventh Circuit, in an opinion written by visiting D.C. Circuit Judge David Sentelle, held that a warrant was required. But on rehearing *en banc*, the

<sup>127</sup> *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in Chambers) (internal quotation marks omitted).

<sup>128</sup> *MKB Mgmt. Corp. v. Stenehjem*, No. 14-2128, 2015 WL 4460405, at \*4 (8th Cir. July 22, 2015).

<sup>129</sup> *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013).

<sup>130</sup> 442 U.S. 735 (1979).

<sup>131</sup> *In re Application of U.S. for an Order Directing a Provider of Elec. Comm’n Serv. to Disclose Records to Gov’t*, 620 F.3d 304, 317–18 (3d Cir. 2010).



full court joined the Fifth Circuit in applying the third-party doctrine.<sup>132</sup> While Davis's petition for certiorari was pending (indeed, between the due date for this article and the date it was actually delivered), a divided panel of the Fourth Circuit in *United States v. Graham* explicitly disagreed with the Fifth and Eleventh Circuits and held that users have an expectation of privacy because "a cell phone user does not 'convey' CSLI to her service provider at all—voluntarily or otherwise—and therefore does not assume any risk of disclosure to law enforcement."<sup>133</sup> The Fourth Circuit *also* adopted the so-called "mosaic" theory associated with the D.C. Circuit opinion in *United States v. Maynard* (and some of the concurring opinions when the case later reached the Supreme Court as *United States v. Jones*) that long-term monitoring infringes privacy interests because of its ability to reveal "an intimate picture" of a person's life.<sup>134</sup>

There is now a clear split. But both *Davis* and *Graham* seem like longshots—regardless of whether the government seeks rehearing in *Graham*. In both cases, the courts held that the CSLI evidence was admissible under the good-faith exception to the exclusionary rule, and in both cases *that* issue appears to implicate no circuit split and is not obviously certworthy.<sup>135</sup> Thus, it seems unlikely that the Court would grant review since a ruling in Davis's or Graham's favor would not affect the outcome. It seems inevitable, however, that the Court *will* pass on the question whether (and under what circumstances) individuals have an expectation of privacy in CSLI. Such cases arise quite frequently, so there is a real prospect that the Court will have the opportunity to address this issue in OT2015. The Court seems increasingly interested in privacy and electronic surveillance, as exemplified by recent decisions in OT2013's *Riley v. California* (requiring a warrant for a cellphone search)<sup>136</sup> and OT2011's *United States v. Jones* (requiring a warrant for GPS monitoring).<sup>137</sup> And since Justice

<sup>132</sup> *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (en banc).

<sup>133</sup> *United States v. Graham*, No. 12-4659, slip op. at 43 (4th Cir. Aug. 5, 2015), available at <http://goo.gl/ydxlYn>.

<sup>134</sup> *United States v. Maynard*, 615 F.3d 544, 561-64 (D.C. Cir. 2010), *aff'd* sub nom. *United States v. Jones*, 132 S. Ct. 945 (2012).

<sup>135</sup> Cert. Pet. at 36–39, *Davis v. United States*, (No. 15-146); *Graham*, *supra* note 133, slip op. at 60–65.

<sup>136</sup> 134 S. Ct. 2473 (2014).

<sup>137</sup> 132 S. Ct. 945 (2012).

Sotomayor's *Jones* concurrence questioned whether the third-party doctrine remain appropriate in the digital age,<sup>138</sup> and "*Riley* can be viewed as a signal . . . that old Fourth Amendment precedents may be narrowed in light of new digital technologies,"<sup>139</sup> there is every reason to believe that a major reconsideration may be in the offing.

\* \* \*

That is just the beginning. The Court will be granting cases to be argued during OT2015 for several more months, which may result in many more grants to talk about on Twitter with your law-nerd friends, perhaps involving the required mental state (and benefit a participant must receive) to be convicted of insider trading,<sup>140</sup> the standard for obtaining a religious accommodation under the Affordable Care Act's contraceptive mandate,<sup>141</sup> the lawfulness of Texas's voter-ID law,<sup>142</sup> the use of military commissions,<sup>143</sup> and the National Security Agency's collection of telephone metadata.<sup>144</sup> And perhaps, if we are really lucky, we'll get a truly hot-button issue that is sure to galvanize public attention and inspire protests from both Left and Right: whether ERISA permits a court to retroactively reassign retirement benefits after the plan participant's death.<sup>145</sup>

OT2015 might fairly be called a "term of sequels," as numerous questions three previous Terms of the Century failed to resolve will be returning. With several other important issues, the coming term is shaping up to be interesting indeed. While we would hesitate to

<sup>138</sup> *Jones*, 132 S. Ct. at 957; see also Elwood & White, 15 Green Bag 2d at 410 (noting that Sotomayor's opinion "may loom large in future Fourth Amendment cases.").

<sup>139</sup> Richard M. Re, *Narrowing the Third-Party Doctrine from Below*, PrawfsBlawg (Aug. 6, 2015 8:11AM), <http://goo.gl/itz3XO>.

<sup>140</sup> *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), cert. pet. filed, No. 15-137 (July 30, 2015).

<sup>141</sup> *Little Sisters of the Poor Home for the Aged v. Burwell*, No. 13-1540, 2015 WL 423206 (10th Cir. July 14, 2015), cert. pet. filed, No. 15-105 (July 23, 2015).

<sup>142</sup> *Veasey v. Abbott*, No. 14-41127 (5th Cir. Aug. 5, 2015), available at <http://goo.gl/iINmkf>.

<sup>143</sup> *Al Bahlul v. United States*, No. 11-1324, 2105 WL 3687457 (D.C. Cir. June 12, 2015).

<sup>144</sup> *American Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015).

<sup>145</sup> *Cowser-Griffin v. Griffin*, 753 S.E.2d 574 (Va. 2015), cert. pet. filed, No. 14-1531 (June 26, 2015). One of the authors is sorta counsel for petitioner in that case.

say that this is another candidate to be the Term of the Century, we can all agree that OT2015 is a strong contender to be the outstanding term of the third fifth of the 20-teens.