U.S. Supreme Court October 2011 Term Cases Affecting State Government

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*Cases where the SLLC filed an *amicus* brief

National Federation of Independent Business v. Sebelius

The Court held 5-4 the Patient Protection and Affordable Care Act's (ACA) individual mandate is within Congress's constitutional power to tax. While seven Justices concluded the Medicaid expansion is coercive, five Justices agreed that the remedy is to bar the federal government from forcing states to participate in it or lose all Medicaid funding. And the Court held 5-4 that the Anti-Injunction Act doesn't bar this case.

The ACA "aims to increase the number of Americans covered by health insurance and decrease the cost of health care." The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage by 2014 or make a "shared responsibility payment" to the federal government. The ACA also expands the scope of the Medicaid program and increases the number of individuals states must cover. A state that doesn't agree to the Medicaid expansion may lose all its federal Medicaid funds. A number of states challenged the individual mandate as exceeding Congress's Commerce Clause authority and the Medicaid expansion as exceeding Congress's Spending Clause authority.

Per the Anti-Injunction Act, taxes ordinarily can be challenged only after they are paid. Five Justices concluded the shared responsibility payment, which no one will pay until 2014, is a penalty and not a tax for Anti-Injunction Act purposes, meaning this lawsuit could proceed. Chief Justice Roberts, writing for the majority, reasoned that Congress chose to describe the shared responsibility payment not as a "tax," but as a "penalty." Five Justices also concluded that, for constitutional purposes, the

individual mandate's requirement to pay a penalty for not obtaining health insurance "may reasonably be characterized as a tax" and is within Congress's constitutional taxing power. The shared responsibility payment is a tax rather than a penalty because it is far less than the cost of insurance, it is assessed not just for "knowing" violations, and it is collected by the Internal Revenue Services. Seven Justices (Roberts, Breyer, Kagan, Scalia, Kennedy, Thomas, and Alito) concluded the Medicaid expansion exceeds Congress's Spending Clause authority and is coercive. Five Justices (Roberts, Ginsburg, Breyer, Sotomayor, and Kagan) agreed that the remedy should be that Congress may not penalize states that choose not to participate in the Medicaid expansion by taking away their existing Medicaid funding.

State governments may consider the individual mandate ruling a victory for federalism because a majority of the Court did not conclude that the individual mandate was constitutional under the Commerce Clause. In this case, for the first time ever, the Court concluded a federal law is coercive. As a result, states get to choose whether to participate in the Medicaid expansion, and there is no penalty for declining to participate.

Arizona v. United States

The Court held 8-0 that Arizona's immigration law requiring police to attempt to determine a person's immigration status if he or she is stopped for a legitimate reason and there is reasonable suspicion he or she is in the United States unlawfully isn't clearly preempted before the law has gone into effect. A divided Court held that three other provisions of Arizona's immigration statute are preempted.

Four provisions of Arizona's immigration law, S.B. 1070, were challenged as being preempted by federal law. Section 2(B) requires that officers who conduct a stop, detention, or arrest must in some circumstances try to verify the person's immigration status. Section 3 makes failure to comply with federal alien registration requirements a misdemeanor. Section 5 makes it a misdemeanor for an unauthorized alien to work in Arizona. Section 6 allows officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States." The Ninth Circuit affirmed the district court's preliminary injunction preventing these four provisions from going into effect on grounds of likely preemption.

The Court held 8-0 that before Section 2(B) (verifying immigration status) goes into effect "it would be inappropriate to assume [it] will be construed in a way that creates conflict with federal law." Justice Kennedy, writing for the majority, rejected concern regarding the mandatory nature of the immigration status check noting that "Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status." Regarding concern about possible prolonged detention to determine immigration status, Justice Kennedy wrote "§2 could be read to avoid these concerns."

The Court held 6-3 that Section 3 (state crime to not carry alien registration document) is preempted. According to the Court, federal law requires aliens to carry proof of registration so Congress has occupied the entire field making even complementary state regulation impermissible. The Court

held 5-3 that Section 5 (state crime for unauthorized alien to work) is preempted because Congress has regulated the "employment of illegal aliens" and "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." The Court held 5-3 that Section 6 (warrantless arrests for removable offenses) is preempted. According to the Court, "Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers."

To the extent state governments prefer that state statutes, in general, not be preempted this case is (mostly) a disappointment. On the other hand, not all states want the responsibility of immigration enforcement.

Perry v. Perez

In a *per curiam* opinion the Court remanded this case to the Texas district court to "follow[] the appropriate standards in drawing interim [redistricting] maps for the 2012 Texas elections."

The Texas legislature had to redraw a variety of electoral districts due to an "enormous increase" in Texas' population. As Texas is a "covered jurisdiction" under Section 5 of the Voting Rights Act a court must preclear its changes to make sure they don't have the purpose or effect of denying or abridging the right to vote on the basis of race or color. While preclearance was ongoing various plaintiffs sued Texas claiming the electoral plan violated Section 2 of the Voting Rights Act, which prohibits states from adopting electoral practices that result in the denial or abridgement of the right to vote on the basis of race or color, because it dilutes the voting strength of Latinos and African-American voters. Before pre-clearance or the Section 2 lawsuit was decided a Texas federal district court was tasked with devising an interim election plan because Texas' 2012 primaries were approaching. Texas challenged the district court's interim plans arguing that they were "unnecessarily inconsistent with the State's enacted plans."

The Court offered three standards to the Texas district court when remanding this case to it to reconsider how it drew Texas' interim maps. First, the Court advised the district court to "take guidance from the State's recently enacted plan in drafting an interim plan. That plan reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." Second, where a plan is being challenged under Section 2 of the Voter Rights Act, "a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." Third, to avoid "prejudging the merits of preclearance" the district court should "tak[e] guidance from a State's policy judgments unless they reflect aspects of the state plan that stand a reasonable probability of failing to gain §5 preclearance." The Court criticized a variety of aspects of the district court's interim plan for not paying adequate attention to Texas' electoral plan or for not clearly explaining why the district court deviated from Texas' plan.

This case is favorable to states as the Court requires district courts that have to draw interim electoral maps to defer to the maps drawn by the state legislature even if the plans are not precleared and have been challenged for violating Section 2 of the Voter Rights Act.

Douglas v. Independent Living Center of Southern California*

In a 5-4 decision, the Court left it to the Ninth Circuit to decide whether once the Centers for Medicare and Medicaid (CMS) approved state statutes reducing state Medicaid payments, Medicaid providers and beneficiaries may still maintain a Supremacy Clause action asserting that Medicaid preempts the state statutes.

The California Legislature passed three statutes reducing state Medicaid payments to various providers and placing a limit on state contributions for certain services. Medicaid providers and beneficiaries sued California arguing that the rate reductions were preempted by § (30)(A) of the federal Medicaid statute that addresses state payments. The Ninth Circuit held that the plaintiffs could sue California under the Supremacy Clause and that § (30)(A) of Medicaid preempted the state laws. The Supreme Court agreed to decide whether a Supremacy Clause case could be brought to enforce Medicaid. After the Supreme Court heard oral argument in this case, CMS approved several of California's statutory amendments to its Medicaid plan, indicating that it did not believe Medicaid preempted California's statutes.

The Court remanded these cases to the Ninth Circuit to determine whether a Supremacy Clause claim may proceed in light of CMS's action. The majority of the Court seemed skeptical that the Supremacy Clause provides a cause of action in this case noting that the plaintiffs now may be required to seek review of CMS's decision under the Administrative Procedure Act instead of against California under the Supremacy Clause. The dissent concluded that the Supremacy Clause provides no private right of action to enforce § (30)(A) of the Medicaid statute as the Supremacy Clause is "not a source of any federal rights."

A better outcome in this case for state governments would have been the majority of the Court adopting the position of the dissent, as the SLLC argued in its *amicus* brief. The Court's opinion leaves open the possibility Supremacy Clause causes of action can be read into Medicaid and other federal Spending Clause statutes that lack a private right of action.

Filarsky v. Delia*

The Court held unanimously that an individual temporarily hired by the government to do its work is eligible for qualified immunity.

Firefighter Nicholas Delia missed three weeks of work, per doctor's orders, after becoming ill while responding to a toxic spill. Private investigators hired by the City of Rialto observed Delia buying insulation, and the City surmised Delia was missing work to do construction at home. The City then hired outside attorney Steve Filarsky to interview Delia. After Delia refused to agree to produce the

insulation, Filarsky ordered Delia to do so, which Delia did. Delia then sued Filarsky and three fire chiefs claiming that being ordered to produce the insulation violated his Fourth Amendment rights. The Ninth Circuit granted qualified immunity to the fire chiefs concluding that while the order violated the Fourth Amendment, Delia's Fourth Amendment rights weren't clearly established. But the Ninth Circuit denied qualified immunity to Filarsky because he wasn't a City employee.

The Court held that not only full-time or permanent government employees are eligible for qualified immunity. Chief Justice Roberts, writing for the Court, reasoned that under common law, part-time public servants were common and they received qualified immunity. And, according to the Court, the policy reasons for recognizing qualified immunity support applying it to private individuals who perform occasional services for the government. Some of these reasons include avoiding "unwarranted timidity" by those serving the government even in a part-time capacity, the fact that the "most talented candidates" may decline part-time public assignments if they are ineligible for qualified immunity, the "distractions that accompany even routine lawsuits," and the difficulty of determining whom is working for the government full-time and permanently.

This case is a big win for state governments as outside attorneys and other government contractors now may receive qualified immunity just like their full-time employee counterparts. As the SLLC wrote in its *amicus* brief in this case, governments frequently hire outside counsel. Outside attorneys likely would have raised their rates or even refused to represent government altogether had the Court held outside attorneys could be sued for the legal advice they give to government clients on unclear constitutional or federal statutory issues.

Armour v. Indianapolis*

The Court held 6-3 that the City of Indianapolis didn't violate the Equal Protection Clause when it forgave the assessments of lot owners who paid for sewer improvements in multi-year installments but didn't issue refunds to lot owners who paid for the same improvements in a lump sum.

For several decades, Indianapolis funded sewer projects using the Barrett Law, which allowed it to apportion a project's cost equally among affected lots. Lot owners could pay for the improvements in a single lump sum or in installments over 10, 20, or 30 years. The entire assessment for the Brisbane/Manning sewer project was about $9,000. A year later, Indianapolis began charging connected lot owners $2,500 and paid for the rest by bonds all city lot owners would pay back. Indianapolis forgave the debt of all Barrett Law installment payers but refused to issue refunds to lump sum payers. Brisbane/Manning lump sum payers sued Indianapolis claiming the City's refusal to provide them a refund violated the Equal Protection Clause of the U.S. Constitution. The Indianapolis Supreme Court disagreed finding Indianapolis had a number of rational reasons for distinguishing between those who paid their assessments in full and those who did not.

The Court held that Indianapolis did not violate equal protection because it had a rational basis—administrative considerations—for distinguishing between lot owners who already paid for their

share of the sewer improvements and those who had not. Justice Breyer, writing for the majority, applied rational basis review because this case involved a tax classification. According to the Court, "[o]rdinarily, administrative considerations can justify a tax-related distinction." In this case, administrative considerations—in maintaining an administrative system that would collect debt for up to 30 years, for 20-plus construction projects, with monthly payments as low as $25 per month—provided a rational basis for the City not continuing to collect unpaid debt. And adding refunds to forgiveness would only mean further administrative costs—namely processing refunds.

Justice Breyer rejected the argument that this case was like *Allegheny Pittsburg Coal Co. v. Commission of Webster County*, 488 U.S. 336 (1989), where the Court struck down a tax assessor's practice of determining property values as of the time of a property's last sale where the state constitution required equal valuation of property. According to Justice Breyer, here, the City followed state law by apportioning the cost of Barrett Law projects equally. But state law said nothing about how to design a debt forgiveness program.

This case is a big win for state governments allowing them to tax imperfectly because of administrative reasons without violating the U.S. Constitution. The Court cited the SLLC's brief, which argued administrative considerations should pass rational basis, for the point that if the City failed to forgive installment payers' debt it would have to "keep files on old, small, installment-plan debts, and (a City official says) possibly spend hundreds of thousands of dollars keeping computerized debt-tracking systems current."

Reichle v. Howards*

In a unanimous decision the Court granted qualified immunity to two Secret Service agents, who allegedly arrested a suspect for his political speech, but had probable cause to arrest him for committing a federal crime.

Vice President Richard Cheney was visiting a shopping mall in Colorado. Secret Service agent Doyle overheard Steven Howards say on his cell phone that he was going to ask the Vice President how many kids he has killed today. Then Howards, in the presence of several Secret Service agents, approached the Vice President and said that his "policies in Iraq are disgusting" and touched him. Agent Reichle questioned Howards who denied assaulting or touching the Vice President. Howards was arrested and charged with harassment under state law but was never prosecuted.

Howards sued agents Doyle and Reichle claiming he was arrested in retaliation for criticizing the Vice President in violation of the First Amendment. The Tenth Circuit concluded the agents had probable cause to arrest Howards for making a materially false statement to a federal official in violation of a federal statute. The Tenth Circuit denied the agents qualified immunity concluding that *Hartman v. Moore*, 547 U.S. 250 (2006), which held that probable cause bars retaliatory *prosecution* claims, did not upset prior Tenth Circuit precedent holding that a retaliatory *arrest* violates the First Amendment even if supported by probable cause.

The Court granted the agents qualified immunity concluding it wasn't "clearly established" at the time of the arrest that an arrest supported by probable cause could violate the First Amendment. Justice Thomas, writing for the Court, began his analysis by noting that the Supreme Court has never held that a person has a First Amendment right to be free from a retaliatory arrest supported by probable cause. Next, according to the Court, assuming Tenth Circuit precedent could be a "dispositive source of clearly established law in the circumstances of this case," Tenth Circuit precedent wasn't clearly established. While in a pre-*Hartman* case the Tenth Circuit held probable cause doesn't bar retaliatory arrest claims, "[a] reasonable official could have interpreted *Hartman*'s rationale to apply to retaliatory arrests." In both retaliatory arrests and prosecutions, evidence of the presence or absence of probable cause, which will undermine or support the retaliation claim, virtually always will be available. Finally, Justice Thomas pointed out that before and after Howards' arrest a number of Courts of Appeals concluded that *Hartman*'s no-probable-cause requirement extends to retaliatory arrests.

The Court's qualified immunity ruling may be favorable to state and local police officers, who case law indicates, have been the victim of First Amendment retaliatory arrest claims far more often than Secret Service agents. However, the Court also granted *certiorari* on the question of whether probable cause bars First Amendment retaliatory arrest claims. While the SLLC urged the Court to hold that probable cause is a bar, the Court only resolved the qualified immunity question.

United State v. Jones

The Court unanimously held that attaching a Global-Positioning-System (GPS) tracking device to a vehicle and then using the device to monitor the vehicle's movements constitutes a search under the Fourth Amendment.

Following an investigation for narcotics trafficking, the government applied for a warrant to install a GPS tracking devise on the Jeep Antoine Jones drove. The warrant was executed a day late in a different state. The government tracked the vehicle's movement for 28 days and collected over 2,000 pages of data. Jones was charged with a variety of drug-related offenses and sought to suppress evidence obtained through the GPS. The District of Columbia Court of Appeals reversed Jones' conviction and held that the warrantless use of a GPS device violates the Fourth Amendment.

The Court held that attaching a GPS device to a vehicle and using it to monitor the vehicle's movements constitutes a search under the Fourth Amendment. Justice Scalia, writing for the majority, reasoned that "physically occup[ying] private property for the purpose of obtaining information" would have been a search "within the meaning of the Fourth Amendment when it was adopted." Justice Sotomayor wrote separately but joined the majority opinion. She agreed with Justice Scalia that "[w]hen the government physically invades personal property to gather information a search occurs." But she criticized Justice Scalia's trespass test as providing "little guidance" where surveillance occurs without a physical intrusion. Justice Alito, writing for three other Justices, rejected the trespass test and opined that "long term GPS monitoring in investigations of most offenses impinges on expectations of privacy" and is therefore a search. Justice Sotomayor agreed with Justice Alito's holding too.

State police officers want to use GPS to track a variety of people because it is cheap, easy to use, and provides a wealth of detailed information about someone's whereabouts. Had the Court held the use of GPS isn't a search police could use GPS routinely without a warrant, probable cause, or reasonable suspicion. While the Court held that installing and using GPS is a search, it did not decide whether a warrant is required.

Florence v. Board of Chosen Freeholders of the County of Burlington

The Court held 5-4 that jail detainees "who will be admitted to the general population may be required to undergo a close visual inspection while undressed."

In 1998, Albert Florence was arrested for fleeing the police, charged with a variety of crimes, and sentenced to pay a fine in monthly installments. In 2003, he fell behind on his payments and a bench warrant was issued for his arrest. He paid the outstanding balance in less than a week but "for some unexplained reason" his warrant remained in a statewide computer database. Two years later Florence was stopped while driving. The state trooper arrested him based on the outstanding warrant. He spent about a week in two county jails where he was strip searched before being admitted to the general jail population. Florence sued the jail claiming that it is a violation of the Fourth and Fourteenth Amendments for persons arrested for minor offenses to be strip searched as a routine part of the intake process. The Third Circuit disagreed holding that the search procedures "struck a reasonable balance between inmate privacy and the security needs of the two jails."

The Court, in an opinion written by Justice Kennedy, agreed with the Third Circuit that strip searching detainees before they enter the general jail population does not violate the Fourth and Fourteenth Amendments. The Court rejected as "unworkable" Florence's argument that detainees not arrested for serious crimes or weapons or drug offenses should be exempt from strip searches unless officers have a particular reason to suspect they are hiding contraband. First, according to the Court, people detained for minor offenses may be the most "devious and dangerous criminals," may have the same incentives as more serious criminals to sneak in contraband, and may be coerced to sneak in contraband. Second, it may be difficult before the intake search to classify inmates based on current and prior offense because of incomplete or inaccurate records. Even if records were complete, officers would have difficulty quickly determining whether any underlying offenses were serious enough to authorize a strip search.

The Court allowed the strip search in this case where Florence was entering the general jail population, recognizing "the difficulties of operating a detention center." In concurring opinions, Justices Roberts and Alito suggest routinely admitting minor offenders to the general jail population to be strip searched could violate the constitution. Justice Roberts noted that Florence was being detained pursuant to a warrant, not for a minor traffic offense, and there was apparently no other place to detain him but the general jail population. Justice Alito opined that for most persons committing minor offenses "admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible."

Miller v. Alabama

The Court held 5-4 that mandatory life in prison without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishment."

Kuntrell Jackson, 14 years old at the time, waited outside while two boys, one who Jackson knew had a gun, robbed a video store. After Jackson went into the store, one of the boys shot and killed the clerk. Evan Miller was 14 years old when he beat his neighbor with a baseball bat after the neighbor grabbed Miller by the throat after the neighbor caught Miller robbing him. The neighbor died from his injuries and smoke inhalation after Miller and a friend tried to cover up the crime by lighting fires. Both Jackson and Miller where charged as adults. State law in Arkansas and Alabama, where each crime was committed respectively, required that, at a minimum, murder be punished by life in prison without the possibility of parole. The Arkansas Supreme Court affirmed dismissal of Jackson's habeas corpus petition, and the Alabama Supreme Court denied review of Miller's conviction.

A majority of the Court concluded that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. In reaching this conclusion Justice Kagan looked at "two strands of precedent reflecting our concern with proportionate punishment." First, sentences cannot mismatch the culpability of a class of offenders and the severity of a penalty. For example, *Roper* bars capital punishment for children, and *Graham* prohibits life without parole for children who have committed nonhomicide offenses. Second, mandatory imposition of the death penalty is prohibited; sentencing authorities must consider characteristics of the defendant and details on his or her offense. Regarding the first line of cases, according to the Court, *Roper* and *Graham* indicate that "[b]ecause juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.'" However, "the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations." Regarding the second line of cases, *Graham* likened life-without-parole for juveniles to the death penalty, which required individualized sentencing, disallowed by the sentencing schemes in these cases.

To the extent the Supreme Court rejected two state criminal sentencing schemes these cases diminish state sentencing authority. The Court did not consider whether the Eighth Amendment requires a categorical bar on life without parole for juveniles. However, Justice Kagan did state that "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon."

Coleman v. Maryland Court of Appeals

The Court held 5-4 that sovereign immunity bars lawsuits against states for violations of the Family Medical Leave Act's (FMLA) self-care provision.

When Daniel Coleman requested sick leave from his employer, the Maryland Court of Appeals, he was informed he would be terminated if he didn't resign. Coleman sued claiming the Maryland Court of Appeals violated the FMLA by refusing to provide him with self-care leave. The Fourth Circuit concluded the FMLA's self-care provision did not validly abrogate the states' immunity from suit because it "was not directed at an identified pattern of gender-based discrimination and was not congruent and proportional to any pattern of sex-based discrimination" by states.

A plurality of the Court agreed with the Fourth Circuit that the self-care provision isn't a valid abrogation of states' immunity from lawsuits under Section 5 of the Fourteenth Amendment because in enacting the self-care provision Congress failed to identify "evidence of a pattern of state [sex-based] constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations." Justice Kennedy, writing for the plurality, first rejected the argument that the self-care provision standing alone validly abrogates states' immunity because the evidence Congress relied on did not suggest states had facially discriminatory self-care leave policies or administered them discriminatorily. The plurality then rejected the argument that the self-care provision is necessary to adjunct the family-care provision noting "[t]he 'few fleeting references' to how self-care leave is inseparable from family-care leave fall short of what is required" to validly abrogate states' immunity. Finally, while the plurality agreed that the self-care provision may help single parents, who are mostly women, retain their jobs, evidence of disparate impact does not prove a constitutional violation. Justice Scalia concurred in judgment writing that he would limit Congress's Section 5 power to regulate conduct that itself violates the Fourteenth Amendment; failing to grant state employees' self-care leave "does not come close."

While this case is clearly a victory for states, dissenting Justice Ginsburg pointed out that states cannot just ignore the FMLA's self-care provision because state employees cannot sue them for money damages. Justice Ginsburg noted that the self-care provision remains valid Commerce Clause legislation; state employees may still seek injunctive relief and the Department of Labor may still sue states for violating the self-care provision and recover monetary damages on an employee's behalf. And Justice Kennedy pointed out states can waive their sovereign immunity under the self-care provision or create a parallel state law cause of action.

National Meat Association v. Harris

The Court held unanimously that the Federal Meat Inspection Act (FMIA), which regulates slaughterhouses' handling and treatment of nonambulatory pigs from delivery until the end of meat production, preempts a California law that "endeavors to regulate the same thing."

The FMIA regulates a broad range of slaughterhouses activities "to ensure both the safety of meat and the humane handling of animals." Per FMIA regulations if a slaughterhouse inspector determines an animal is nonambulatory the animal is set apart from the other animals. Following slaughter, the inspector decides at a post-mortem examination which parts, if any, may be processed for

human consumption. The FMIA contains an express preemption clause that prohibits state laws "in addition to, or different than" the FMIA.

In 2008 the Humane Society released an undercover video showing slaughterhouse workers in California dragging, kicking, and elctroshocking sick and disabled cows. This video resulted in the largest beef recall in U.S. history. California passed §599f disallowing slaughterhouses from buying, selling, or receiving nonambulatory animals; processing, buthering, or selling meat of nonambulatory animals for human consumption; and not immediately euthanizing nonambulatory animals. The National Meat Association sued to enjoin enforcement of §599f against swine slaughterhouses arguing that the FMIA preempts §599f. The Ninth Circuit disagreed concluding that §599f only regulates "the kind of animal being slaughtered," (ambulatory only) and not the inspection or slaughtering process itself.

The Supreme Court held that the FMIA preempts §599f. According to Justice Kagan, writing for the Court, "at every turn §599f imposes additional or different requirements on swine slaughterhouses," contrary to the FMIA's widely sweeping preemption clause. Specifically, §599f requires a slaughterhouse to immediately euthanize a nonambulatory pig and not use any part of the animal to make food. But the FMIA allows a slaughterhouse to hold (without euthanizing) a nonambulatory pig and use the animal's meat for human consumption subject to an inspector's approval at a post-mortem inspection. And while §599f disallows slaughterhouses from accepting nonambulatory pigs, FMIA regulations "specifically authorizes" slaughterhouses to buy them. Justice Kagan also rejected the argument the Ninth Circuit accepted that §599f avoids the scope of the FMIA by removing nonambulatory pigs for the slaughtering process. She pointed out that under the FMIA nonambulatory pigs, unlike other sick animals including nonambulatory cattle, aren't excluded from the slaughtering process.

Particularly after the Human Society's video and the resulting recall, states may have good reason to prefer imposing stricter regulations on the slaughtering of nonambulatory animals. However, the Court's decision in this case indicates the FMIA will likely preempt attempts similar to California's.

Astrue v. Capato

The Court unanimously held that children conceived after their parent's death may only receive Social Security survivor benefits if they qualify to inherit from their deceased parent under state intestacy law.

Karen Capato gave birth to twins 18 months after her husband died of cancer with the help of in vitro fertilization using her husband's frozen sperm. Her application for Social Security survivor benefits for the twins was denied. Capato sued arguing that the Social Security Act's initial definition of "child," "child of an [insured] individual," applies to her children. She claimed that a later section of the Social Security Act entitled "determination of family status," which allows biological children to receive benefits only if they qualify for inheritance from their deceased parent under state law, does not apply

to "the biological child of a married couple" because such a child's family status does not need to be determined. The Third Circuit agreed.

Justice Ginsburg, writing for the Court, accepted Social Security Administration's interpretation of the Social Security Act that biological children may only receive Social Security survivor benefits if they may inherit from their deceased parent under state intestacy law. First, the Court rejected the argument that a "child" is a "biological child of married parents" noting that Capato's children might not meet this definition as in Florida a marriage ends with the death of a spouse. Second, the Court noted that referring to state law to determine if an applicant is a "child" is "anything but anomalous" because the Social Security Act commonly refers to state law to determine if an applicant is a wife, widow, husband, widower, or parent. Next, according to the Court, the "core purpose" of the Social Security Act is to provide benefits to those dependent on a wage earners support; if a child is eligible to inherit from a parent per state intestacy law he or she is likely dependent on that parent. Finally, the Court stated that the Social Security Administration's interpretation of this statute, which has been "adhered to without deviation for many decades," is at least reasonable and therefore entitled to *Chevron* deference.

The Court pointed out that some states (California, Colorado, Iowa, Louisiana, and North Dakota) grant inheritance rights to children conceived posthumously while a number of states (New York, Georgia, Idaho, Minnesota, South Carolina, and South Dakota) including Florida do not. State legislation may be proposed in states across the country granting or denying inheritance rights to children conceived posthumously depending on whether the legislation's supporters want to grant or deny Social Security survivor benefits to such children.

Knox v. Service Employees International Union, Local 1000

The Court held 7-2 that when a public-sector union imposes a special assessment or dues increase it must provide a new *Hudson* notice and may not collect any funds from nonmembers unless they opt in.

In June 2005, Service Employees International Union, Local 1000 (SEIU) sent out its regular *Hudson* notice informing employees what the agency fee would be for the next year. Shortly after the 30-day period where nonmembers could opt out of the non-chargeable portion of the fee, SEIU sent a letter announcing a temporary 25% increase in employee fees to raise money to fight two ballot measures unfavorable to unions. When a nonunion employee complained he was told that if he had objected to the June *Hudson* notice he would only have to pay the percent of the increase equal to chargeable activities estimated for the coming year. Nonunion employees sued claiming they should have received a second *Hudson* notice for the special assessment and should have been allowed to opt out of the assessment altogether as it was entirely for political expenditures. The Ninth Circuit disagreed concluding that the procedure SEIU used reasonably accommodated the interests of the union, the employer, and nonmember employees.

In an opinion written by Justice Alito, five Justices agreed that the First Amendment required SEIU to send out a new *Hudson* notice allowing nonmembers to *opt in* to the special fee rather than *opt out*. According to the Court, forcing nonunion members to pay even chargeable expenses (covering collective bargaining) is a "significant impingement on First Amendment rights" that is allowed to avoid free-riders in the interest of "labor peace." Allowing an opt-out rather than an opt-in system for the nonchargeable portion of annual union dues came from an "offhand remark" in dicta. According to the Court, "[e]ven if this burden [of opting out] can be justified during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires." The Court also held a fresh *Hudson* notice was required in this case because a nonmember couldn't make an informed choice about the special assessment that was unknown when the annual notice was sent. Finally, the Court concluded nonmembers who opted out of the initial *Hudson* notice should not have been required to pay any of the special assessment because "virtually all of the money was slated for nonchargeable uses."

To the extent public employee unions are engaging in political activity contrary to the interest of state governments this case is favorable to state governments as it will make it more difficult for unions to collect money from nonmembers for special assessments for political activity. Justice Sotomayor, in a concurring opinion joined by Justice Ginsburg, notes the novelty of this decision: "The majority thus decides, for the very first time, that the First Amendment does require an opt-in system in some circumstances: the levying of a special assessment or dues increase" and notes the Court "strongly hints" it may go further in the future.

PPL Montana v. Montana

The Court held unanimously that the Montana Supreme Court's ruling that Montana owns riverbeds underlying segments of three rivers was based on an "infirm legal understanding" of the U.S. Supreme Court's rules of navigability for title under the equal footing doctrine.

PPL Montana owns and operates 10 hydroelectric facilities built on three Montana riverbeds. Montana sought a declaration that under the equal-footing doctrine it owns the riverbeds PPL Montana was using and could charge rent. The Montana Supreme Court ruled in favor of Montana dismissing the Supreme Court's approach of assessing the navigability of the disputed segment of the river rather than the river as a whole. The Montana court accepted that certain relevant stretches of the rivers weren't navigable but declared them "merely short interruptions" that could be portaged. The Montana court also relied extensively on present-day use of one of the rivers when concluding it was navigable at the time of statehood.

The Court focused on following flaws when reversing the Montana Supreme Court's judgment: "its treatment of the question of river segments and overland portage" and "its reliance upon evidence of present-day, primarily recreational use of the Madison River." Justice Kennedy, writing for the majority, began his analysis by explaining that under the equal-footing doctrine, states have title to

riverbeds of navigable waters and that navigability is determined at the time of statehood by assessing the riverbed on a segment-by-segment basis.

Justice Kennedy declared the Montana Supreme Court should not have disregarded the Court's segment-by-segment approach to navigability because "[a] key justification for sovereign ownership of navigable riverbeds is that a contrary rule would allow private riverbed owners to erect improvements on the riverbeds that could interfere with the public's right to use the waters as a highway for commerce." Next, Justice Kennedy opined that, contrary to the Montana Supreme Court's conclusion, in most cases portages are sufficient to defeat a finding of navigability because they require transportation over land rather than over water. Finally, the Court concluded the Montana Supreme Court erred by not confining its reliance on present-day recreational use of the Madison River to show "the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood."

The question in this case is narrow but should not be overlooked for at least two reasons. First, the Court's decision could affect other states' ownership of riverbeds. Second, a lot of money is at stake in this case. In fact, the Montana Supreme Court ordered PPL Montana to pay over $40 million in rent between 2000-2007.

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak

The Court held 8-1 that the United States doesn't have sovereign immunity from a lawsuit challenging the acquisition of land for Indians and that a person living near the acquired land alleging economic, environmental, and aesthetic harm has prudential standing to challenge the acquisition.

Section 465 of the Indian Reorganization Act (IRA) allows the Secretary of the Interior to acquire property "for the purpose of providing lands for Indians." The Secretary acquired land in trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians so they could open a casino. David Patchak lives near that land and sued the Secretary under the Administrative Procedure Act (APA) claiming the Secretary lacked authority to take title to the land because Band wasn't a federally recognized tribe in 1934 when the IRA was enacted and alleging economic, environmental, and aesthetic harm from the casino. The D.C. Circuit rejected the district court's determination that Patchak lacked prudential standing because his interests fell outside §465 "zone of interests" and its determination that per the Quiet Title Act the United States was immune from suit.

The Court affirmed both of the D.C. Circuit's holdings. Regarding sovereign immunity, the APA waives the federal government's immunity for non-monetary claims for official acts of federal officers unless another statute forbids the relief a plaintiff seeks. The United States and Band claimed the Quiet Title Act, which allows for suits by a plaintiff asserting a "right, title, or interest" in federally claimed land *except* trust or restricted Indian lands, forbids Patchak's suit. However, Justice Kagan, writing for the majority, concluded "Patchak's suit is not a quiet title action, because although it contests the Secretary's title, it does not claim any competing title [to the property in trust]."

To have prudential standing, the interests asserted by a person suing must be "arguably within the zone of interests to be protected or regulated by the statute" allegedly violated. The Court rejected the argument that because §465 focuses on land *acquisition* and Patchak's economic, environmental, and aesthetic interests focus on land *use* that his interests are insufficient. According to the Court, Patchak satisfies the prudential standing standard because §465 "has far more to do with land use than the Government and Band acknowledge." Specifically, the Secretary of the Interior takes title to property keeping in mind how the tribe will use the land to support economic development.

Depending on the situation, state governments may or may not benefit from the rulings in this case. First, regarding sovereign immunity, in two of the three cases the Court cited as creating a circuit split, state and/or local governments brought the §465 claim. So to the extent *state governments* want to bring actions under §465 this case is a win. However, to the extent the lack of sovereign immunity allows *private citizens* to bring §465 claims and state governments don't like the position a private citizen is taking in a case, this case is a loss. Second, regarding standing, the D.C. Circuit indicated that the authority of *state and local governments* to bring §465 claims is clear. To the extent *private citizens* may now have standing to bring §465 claims this may be to the advantage or disadvantage of state governments depending on whether the state governments agree or disagree with the private citizen's position.

Sackett v. Environmental Protection Agency

The Court held unanimously that a lawsuit may be brought to challenge a compliance order issued under the Clean Water Act's provision prohibiting polluting navigable waters without a permit.

The Sacketts own a lot north of a lake separated from the lake by several lots containing permanent structures. After they filled in part of their lot with dirt and rock they received a compliance order from the Environmental Protection Agency (EPA) claiming that their property contains wetland and they had discharged pollutants into navigable waters in violation of the Clean Water Act by adding the fill. The Sacketts sued the EPA under the Administrative Procedures Act (APA) claiming their property is not subject to the Clean Water Act. The Ninth Circuit held the Sacketts could not sue the EPA because the APA "preclude[s] pre-enforcement judicial review of compliance orders."

The Court held that a court may review the EPA's compliance order and determine whether the EPA has regulatory authority over the Sackett's property under the Clean Water Act. Justice Scalia, writing for the Court, concluded judicial review under the APA is permissible because the compliance order was "final agency action" and nothing in the Clean Water Act precludes judicial review. According to the Court, the compliance order was final because the Sacketts have a legal obligation to follow it, no further agency review is available, and the Sacketts can only otherwise seek judicial review if the EPA sues them (for $75,000 a day per violation). Justice Scalia rejected all of the EPA's arguments that the Clean Water Act precludes judicial review including the fact that EPA warned the Court it will be less likely to use compliance orders if a court could review them. To this Justice Scalia responded:

"Compliance orders will remain an effective means of securing voluntary compliance in those many cases where there is no substantial basis to question their validity."

State governments, like private individuals and corporations, may be subject to Clean Water Act compliance orders. So this case is a big win for state governments as they now may challenge whether the EPA has the authority to issue a compliance order against them. Concurring Justice Ginsburg points out that the opinion in this case is narrow; the Court does not hold that the terms and conditions of a compliance order can be challenged at the pre-enforcement stage. Concurring Justice Alito describes the decision in this case as "better than nothing." And he urges "Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act," because "the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune."

Rehberg v. Paulk

The Court unanimously held that a witness in a grand jury proceeding is entitled to the same absolute immunity from a lawsuit as a witness who testifies at trial.

James Paulk, chief investigator in the Albany, Georgia, district attorney's office, investigated faxes Charles Rehberg sent anonymously to several recipients, including management of a hospital, criticizing the hospital. Paulk provided testimony to a grand jury, and Rehberg was indicted three times for assaulting a doctor and making harassing phone calls. All indictments against Rehberg ultimately were dismissed. Rehberg sued Paulk for conspiring to present and presenting false testimony to a grand jury. The Eleventh Circuit granted Paulk absolute immunity for his grand jury testimony.

In an opinion written by Justice Alito, the Court agreed with the Eleventh Circuit that a grand jury witness is entitled to the same absolute immunity as a trial witness. And, the Court held, this rule may not be circumvented by a claim that a grand jury witness conspired to present false testimony. The Court concluded that the reasons it extended absolute immunity to any claim based on a trial witness' testimony in *Briscoe v. LaHue*, 460 U.S. 325 (1983) apply with "equal force" to grand jury witnesses. In both contexts, without absolute immunity, a witness may not speak freely for fear of retaliatory litigation. In neither context is potential civil liability needed to prevent perjury because perjury is a serious criminal offense. As in *Briscoe,* the Court chose not to distinguish between lay witnesses and law enforcement witnesses when granting absolute immunity because police officers testify frequently and "a police officer witness' potential liability, if conditioned on the exoneration of the accused, could influence decisions on appeal and collateral relief." Finally, the Court rejected the argument that grand jury witnesses are "complaining witnesses" who are not shielded by absolute immunity. According to the Court, "complaining witnesses" procure an arrest and initiate a prosecution, not necessarily testify at trial. But if they do, they too cannot be held liable for perjurious trial testimony.

Government officials, particularly police officers, may regularly testify at grand jury proceedings. It is advantageous for them to be granted absolute immunity in any context because then they cannot be sued for money damages. The Court's ruling protects the secrecy of the grand jury process, which

also encourages full and frank testimony. As the Court pointed out, not granting absolute immunity could lead to discovery of grand jury proceedings—which "would compromise this vital secrecy."

Messerschmidt v. Millender

A majority of the Court held that a warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member who shot at his ex-girlfriend after she called the police on him wasn't so obviously lacking in probable cause that the officers seeking it should be denied qualified immunity.

Shelly Kelly broke up with Jerry Ray Bowen, who had previously assaulted her and had been convicted of multiple violent felonies, and asked the Los Angeles County Sheriff's Department to accompany her as she moved out of her apartment. Before the move was complete deputies were called away to respond to an emergency. As soon as the officers left Bowen yelled, "I told you never to call the cops on me bitch" and ultimately shot at Kelly five times with a black pistol-grip sawed-off shotgun. Kelly escaped and reported to the police what happened including that Bowen was a gang member. Officer Messerschmidt sought and received a warrant to search Bowen's foster mother's home for firearms, firearm-related materials, and gang-related items. Bowen's foster mother sued Messerschmidt and others claiming the warrant violated the Fourth Amendment because it was overbroad. The en banc Ninth Circuit agreed and denied Messerschmidt qualified immunity.

According to Chief Justice Roberts, writing for the majority, police officers receive qualified immunity when neutral magistrates authorize unconstitutional warrants unless "it is obvious that no reasonably competent officer would have concluded a warrant should be issued." Seven Justices agreed that Messerschmidt should receive qualified immunity for seeking a warrant to search for all firearms and firearm-related items, not just the specific firearm used to shoot at Kelly. Chief Justice Roberts opined that "[e]vidence of one crime is not always evidence of several, but given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned." Regarding the warrant's authorization to search for evidence of gang membership, five Justices agreed that a reasonable officer could have concluded that Bowen's attack on Kelly was not motivated by her ending their relationship but instead by a desire to prevent her from disclosing details of his gang activities to the police. And, the fact that Messerschmidt sought and obtained approval for the warrant from a superior and a deputy district attorney before submitting it to the magistrate "provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause."

Thousands of warrants are issued every day to state officers, and some are likely better than others. While the qualified immunity determination in this case is pretty fact specific, police will benefit from the Court concluding in this case that even if the warrant was invalid, "it was not so obviously lacking in probable cause that the officers can be considered 'plainly incompetent' for concluding otherwise."

Howes v. Fields

The Court held 6-3 that just because a person is imprisoned, questioned in private, and questioned about events in the outside world he or she is not necessarily in custody for *Miranda* purposes.

While serving a prison sentence, two sheriffs' deputies questioned Randall Fields about engaging in sexual contact with a 12-year-old boy before he went to prison. Fields was questioned in a conference room, at night, for between five and seven hours. While he was not read his *Miranda* rights, he was told at the beginning of the interview that he was free to leave and return to his cell. He wasn't restrained or handcuffed, and sometimes the conference room door was open. While Fields stated several times that he no longer wanted to talk to the deputies, he did not ask to go back to his cell. Fields eventually confessed and was convicted in state court of two counts of third-degree criminal sexual contact. Fields sought review of his conviction in federal court claiming that the Michigan Court of Appeals decision that he wasn't in custody for *Miranda* purposes violated clearly established federal law. The Sixth Circuit agreed with Fields that it was clearly established that he was in *Miranda* custody.

The Court unanimously agreed that its prior decisions do not clearly hold that a prisoner isolated from the general prison population and questioned about conduct outside prison is always in *Miranda* custody. Six Justices concluded that just because a person is imprisoned and questioned in private about events in the outside world he or she is not necessarily in *Miranda* custody. According to Justice Alito, writing for the majority, being imprisoned alone isn't enough to create a custodial situation. Someone already imprisoned and then questioned isn't in "shock" like someone just arrested and questioned, those imprisoned aren't going to be "lured into speaking by a longing for prompt release," and prisoners know that the officers questioning them probably lack the authority to affect the duration of their sentence. Regarding being questioned in private, Justice Alito stated that inmates, unlike those not in prison, generally are not being removed from a supportive environment where they are more likely to be able to resist speaking. Finally, the Court failed to see any difference between being questioned about what happened inside or outside prison because "[i]n both instances there is the potential for additional criminal liability and punishment." The majority of the Court concluded that Fields wasn't in *Miranda* custody because he was told he could leave, wasn't physically restrained or threatened, was in a comfortable room with the door sometimes open, and was given food and water.

This case gives state police officers the authority to not always read *Miranda* rights to inmates questioned in prison. As dissenting Justice Ginsburg laments, "[t]oday for people already in prison, the Court finds it adequate for the police to say: 'You are free to terminate this interrogation and return to your cell.'"