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Supreme Court Report 2006-2007: Closing of The Courthouse Doors?

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I. Introduction

THE EXPECTATION THAT THE COURT WOULD SHIFT to the right came to fruition in the 2006–07 term if not by its decisions on the merits, by the sheer lack of clear decisions on the merits. Time and again, the Court decided cases on the standing issue, never reaching the merits and frustrating litigants and citizens attempts to define their rights. Yale law professor Judith Resnick went so far as to call this term "the year they closed the courts."[1] Many of the cases that were decided were sharply divided resulting in numerous 5–4 splits, and even 4–4 decisions in eagerly anticipated cases. It was a "series of very vigily divided five to four decisions" that seemed to be the principal cases of the term.[2] Chief Justice Roberts arguably failed to bring about the "harmony and unanimity" he was aiming for when he testified before the Senate Judiciary Committee stating that he "would be working more and more toward . . . consensus" this term, "getting away from these 5–4 decisions."[3] The Court issued only sixty-eight signed opinions this term, the fewest total number of cases the Court has decided since 1953, with 24 of the 68 being decided by a 5–4 margin.[4] Even the conservatives were split among themselves on occasion.[5]

Bush appointees Chief Justice John G. Roberts and Justice Samuel A. Alito, Jr., who joined the Court last term, replacing Chief Justice William Rehnquist and Justice Sandra Day O'Connor, greatly influenced this right wing swing.[6] It was Chief Justice Kennedy, however, who again "defined this term."[7] Formerly a "swing voter,"[8] "[r]emarkably, he was in the conservative majority in all twenty-four of the 5-to-4 cases."[9] Kennedy even greatly influenced the term by not deciding a

1. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right,* N.Y. TIMES, July 1, 2007, at A1 (quoting Professor Judith Resnik).
2. Neal Conan, *Supreme Court Rules on Race in the Classroom,* NPR: TALK OF THE NATION, KCUR 89.3, June 28, 2007, *available at* http://www.npr.org/templates/rundowns/rundown.php?prgId=5&prgDate=28-Jun-07 (audio portion) (quoting David Savage, Supreme Court Correspondent for the *L.A. Times*).
3. *Id.*
4. Greenhouse, *supra* note 1.
5. Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash,* N.Y. TIMES, June 28, 2007, at A1.
6. Greenhouse, *supra* note 1.
7. Dahlia Lithwick, *Supreme Court Term Defined by Close Splits,* NPR: DAY TO DAY, June 28, 2007, *available at* http://www.npr.org/templates/story/story.php?storyId=11507810.
8. *Id.*
9. Greenhouse, *supra* note 1.

case, recusing himself and leaving the Court 4–4 on the issue of whether students must first try the public schools placement before claiming it is inadequate.[10] It is now thought that Justice Alito will cast the deciding vote in the future.[11] Alito, more conservative than O'Connor, "created a five member majority" in several big cases[12] including the partial birth abortion ban case.[13] Many wonder whether this session simply "dismantle[ed] . . . the work of prior years," especially in the areas of campaign finance, abortion, and affirmative action.[14] Decisions previously rendered with the force of Justice O'Connor behind them seem to have been retracted this term.[15] A group that had opposed the nominations of both Chief Justice Roberts and Justice Alito[16] analogized the Court's "respect for precedent" to a "wrecking ball," explicitly overturning three precedents and indirectly overruling several others "providing a roadmap for future challenges."[17]

II. Abortion

As predicted, the retirement of Justice Sandra Day O'Connor and President George W. Bush's appointments of Chief Justice Roberts and Justice Alito impacted the Supreme Court's abortion jurisprudence.[18] In *Gonzales v. Carhart*,[19] a narrow 5–4 majority[20] held that the federal Partial Birth Abortion Ban Act of 2003 (Act),[21] which bans two specific

10. Bd. of Educ. v. Tom F. *ex rel.* Gilbert F., 2007 U.S. LEXIS 11481 (U.S. 2007).

11. Lithwick, *supra* note 7.

12. Neal Conan, *Supreme Court Rules on Race in the Classroom*, NPR: TALK OF THE NATION, KCUR 89.3, June 28, 2007, *available at* http://www.npr.org/templates/ rundowns/rundown.php?prgId=5&prgDate=28-Jun-07.

13. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

14. Lithwick, *supra* note 7.

15. *Id.*

16. People for the American Way, led by president Ralph G. Neas.

17. Greenhouse, *supra* note 1.

18. *See* Peter Sachs, Gonzales, Alberto (Atty Gen) v. Carhart, Leroy, et al., MEDILL—ON THE DOCKET, February 21, 2006, *available at* http://docket.medill.northwestern.edu/archives/003376.php. *See also* Tom Curry, *Roberts, Alito Help Define New Supreme Court*, MSNBC, June 18, 2007, *available at* http://www.msnbc.msn.com/id/19244921/ ("Roberts and Alito have 'bolstered the conservative wing' and "we have clearly seen a shift to the right, in areas from criminal law to privacy rights for women.") (quoting Marcia Greenberger, the co-president of the National Women's Law Center, which opposed the Alito and Roberts nominations).

19. 127 S. Ct. 1610 (2007).

20. Justice Kennedy wrote the majority opinion, joined by Justices Roberts, Alito, Thomas, and Scalia.

21. *See* 18 U.S.C.A. § 1531 (2003). The Act bans intact dilation and extraction (IDX and intrauterine cranial decompression) and dilation and evacuation (D&E), both performed usually after the twentieth week of pregnancy.

late-term abortion procedures, is constitutional. The Court ruled that the Act is not too vague or broad, nor does it create an "undue burden" on a woman.[22] Furthermore, the "lack of a health [of the mother] exception" does not render it unconstitutional.[23] The lone female Justice remaining on the Court, Justice Ruth Bader Ginsburg, read the dissent aloud.[24] Stanford law professor Pamela S. Karlan interpreted Justice Ginsberg's oral dissent as saying "this is not law," and "accusing the other side of making political claims, not legal claims."[25]

The Attorney General for the United States sought certiorari from the Court following rulings in the Eighth and Ninth Circuits enjoining the Attorney General from enforcing the Act.[26] The District Court for the District of Nebraska had ruled in favor of doctors in Nebraska who perform second-trimester abortions. The district court based its decision on the Court's 2000 ruling in *Stenberg v. Carhart*,[27] which held that Nebraska's partial birth abortion statute[28] violated the Constitution because it failed to include an exception for allowing the procedure when necessary for the health of the mother.[29] The Eighth Circuit affirmed the district court's ruling, finding the Act unconstitutional for failing to include a "health of the mother" exception.[30]

The Ninth Circuit affirmed the district court's injunction in favor of two Planned Parenthood organizations as well as the city and county of San Francisco.[31] Because of the lack of a mother's health exception,

22. *Gonzales*, 127 S. Ct. at 1615. The landmark case of *Planned Parenthood v. Casey* established that an "undue burden" on the woman exists if a regulation's "purpose or effect is to place a substantial obstacle in the [woman's] path"; however, regulations merely "creat[ing] a structural mechanism by which the State . . . may express profound respect for the life of the unborn[,] are permitted." 505 U.S. 833, 846 (1992).

23. *Id.*

24. Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, at A1. ("To read a dissent aloud is an act of theater that justices use to convey their view that the majority is not only mistaken, but profoundly wrong. It happens just a handful of times a year.").

25. *Id.*

26. *Gonzales*, 127 S. Ct. at 1619.

27. 530 U.S. 914 (2000).

28. *See* NEB. REV. STAT. §§ 28–326(9), 28–328(1).

29. *Stenberg*, 530 U.S. at 938 ("[W]here substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" (citing Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992))).

30. *See* Carhart v. Gonzales, 413 F.3d 791, 803 (8th Cir. 2005) ("Because the Act does not contain a health exception exception [sic], it is unconstitutional.").

31. Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

vagueness surrounding what exactly is prohibited, and the undue burden placed on the woman in obtaining pre-viability abortions, the Ninth Circuit Court found the Act unconstitutional.[32]

The Court challenged the grounds on which the federal appellate courts had found the Act unconstitutional. After a discussion of various methods of abortion, the Court turned to the procedure the Act aimed to prohibit—the "intact D&E."[33] First, with respect to the vagueness of the Act, the Court determined that the Act "sets forth 'relatively clear guidelines as to prohibited conduct' and provides 'objective criteria' to evaluate whether a doctor has performed a prohibited procedure."[34] Thus, since "the Act requires the doctor deliberately [with intent] to have delivered the fetus to an anatomical landmark"[35] to face criminal liability, the Court held that "the Act is not vague."[36]

The Court then addressed whether the Act is overbroad, creating an undue burden and rendering the Act facially invalid. The Court reiterated its finding that the Act specifically "prohibits intact D&E; and . . . it does not prohibit the D&E procedure in which the fetus is removed in parts"[37] and the Act's intent requirement "limit[s] its reach to those physicians who carry out the intact D&E after intending to undertake [the overt acts of partial delivery past the statutory anatomical landmarks and the piercing or crushing of the skull] at the outset" of the procedure.[38] Furthermore, "requiring doctors to intend dismemberment before delivery to an anatomical landmark will [not] prohibit the vast majority of D&E abortions. The Act, then, cannot be held invalid on its face on these grounds."[39]

32. *Id.* at 1191 ("The Act lacks the health exception required of all abortion regulations in the absence of a medical consensus that the prohibited procedure is never necessary to preserve women's health, imposes an undue burden on a woman's right to choose a previability abortion, and is impermissibly vague.").

33. *See Gonzales,* 127 S. Ct. at 1620–1623 (Describing in detail the methods of abortion, primarily those utilized for terminating pregnancies in the second trimester. The traditional non-intact "D&E" procedure involves dilating the cervix and removing the fetus through dismemberment, bringing each piece through the birth canal, requiring multiple intrusions into the uterus by surgical instruments. The "intact D&E" procedure requires a more significant dilation of the cervix so that most of the body of the fetus can be brought out of the body, allowing the physician access to the skull to "evacuate the skull contents" thus allowing the entire body to be extracted in one attempt.).

34. *Id.* at 1628 (internal citations omitted); *see also* 18 U.S.C.A. § 1531(b)(1) (2003).

35. *Id.*

36. *Id.* at 1629.

37. *Gonzales,* 127 S. Ct. at 1629.

38. *Id.*

39. *Id.* at 1632.

The biggest hurdle for the Court was that the Act does not provide a "health of the mother" exception; one of the reasons the Court found the Nebraska statute unconstitutional.[40] After recognizing that there is a disagreement among doctors as to whether an intact D&E would ever be medically necessary to ensure the health of the mother, or more significantly that the Act's prohibition on intact D&E would "ever impose significant health risks on women,"[41] the Court held "[t]he Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives."[42]

The Court concluded that "[t]he considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance."[43] A broad, facial challenge placed the burden of proof on the parties filing the suit and in this case, the "[r]espondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception."[44] The appropriate method for challenging this Act is on a case-by-case basis: "[I]n an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."[45]

The dissent would have found the Act unconstitutional affirming the decisions of the federal circuit courts.[46] Emphasizing the importance of the "health of the woman" discussed at length in *Casey* and *Sternberg*, the dissent calls the majority's "[r]etreat[] from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health" and refusal to take *stare decisis* "seriously" is "appalling."[47] The dissent pointed out that "the Court [majority] upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices."[48]

40. *See id.* at 1635 ("The Act's furtherance of legitimate government interests bears upon . . . whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where 'necessary, in appropriate medical judgment, for [the] preservation of the . . . health of the mother.'" (internal citations omitted)).
41. *Id.* at 1636.
42. *Gonzales,* 127 S. Ct. at 1638.
43. *Id.*
44. *Id.*
45. *Id.* at 1638–39.
46. *Gonzales,* 127 S. Ct. at 1653 (Ginsberg, J., dissenting).
47. *Id.* at 1641.
48. *Id.*

The dissent pointed out evidence from the record that there were many instances in which intact D&E could be found to be the safest form of abortion, if the physician was allowed to consider this procedure in the interest of the health of the woman.[49] The majority "upholds a law that, while doing nothing to 'preserve . . . fetal life,' . . . bars a woman from choosing intact D&E although her doctor 'reasonably believes [that procedure] will best protect [her].'"[50]

The dissent also disagreed that the Act should not be subject to a facial challenge. The majority's holding that facial challenges are not "permissible . . . where medical uncertainty exists . . . is perplexing given that, in materially identical circumstances [the Court previously] held that a statute lacking a health exception was unconstitutional on its face."[51] The dissent recognized that the majority left open as-applied challenges, "[b]ut the Court offers no clue on what a 'proper' lawsuit might look like."[52] The dissent argues that "allowance only of an 'as-applied challenge in a discrete case,' . . . jeopardizes women's health and places doctors in an untenable position" as "physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment [to use] the safest [but prohibited] medical procedure for their patients."[53]

Perhaps unwittingly agreeing with Professor Karlen that the decision was largely a political one as opposed to one based on precedent, President Bush contended that the decision is indicative of the positive steps the nation has made in the last six years "in protecting human dignity and upholding the sanctity of life."[54] The outcome in this case determined another case, *NAF v. Gonzales*, which was pending in the Second Circuit after it also declared the ban unconstitutional on January 31, 2006.[55] There is no doubt that this issue will continue to be a "hot-button" in the upcoming terms.[56]

III. First Amendment

The six First Amendment cases decided this term (including two school speech cases) evidenced the Court's swing to the right. Perhaps most

49. *See id.* at 1644–45.
50. *Id.* at 1647 (internal citations omitted).
51. *Gonzales*, 127 S. Ct. at 1650 (citing Stenberg v. Carhart, 530 U.S. 914, 930 (2000)).
52. *Id.* at 1651.
53. *Id.* at 1652.
54. Sachs, *supra* note 18.
55. Federal Abortion Ban Trials, *available at* http://federalabortionban.org/legislative_history.asp.
56. Sachs, *supra* note 18 (quoting Supreme Court blogger, Lyle Denniston).

notable about the term was the Court's repeated limitations on standing to even get into the federal courts. Taxpayer standing was limited in *Hein v. Freedom from Religion Foundation*,[57] preventing taxpayers from challenging expenditures on religious programs that were not expressly authorized by Congress, but were undertaken by the executive branch. In *Federal Election Commission v. Wisconsin Right to Life*,[58] the Court upheld the limitation on campaign advertisements by corporations and unions in time periods preceding federal elections, but held that ads which did not advocate for or against the re-election of a candidate could not be restricted. *Lance v. Coffman*[59] limited citizens' ability to bring claims under the Elections Clause by requiring the citizens to suffer a particularized injury by a governmental action.

Adhering to this conservative trend, the speech cases also limited speech. *Davenport v. Washington Education Ass'n*[60] restricted the ability of unions to spend money for political purposes, while *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*[61] upheld restrictions on coaches' ability to recruit. Most notable was the Court's upholding the suppression of student speech, albeit off campus, in the "BONG HiTS 4 JESUS" case also known as *Morse v. Frederick*.[62] Four of the six First Amendment cases were decided in the last week of the term, with Justices Souter, Stevens, Ginsburg, and Breyer comprising the liberal block of dissenters in the three narrowly decided cases of *Federal Election Commission*, *Hein*, and *Morse*, all decided on June 25, 2007.

A. *Religion*

In a case that is representive of the term, and the lone religion case this term, the Court ruled 5–4 in *Hein v. Freedom from Religion Foundation*[63] that taxpayers do not have standing to bring a lawsuit challenging government expenditures supporting its Office of Faith-Based and Community Initiatives. Although the precedent *Flast v. Cohen* had long ago carved out an exception allowing taxpayers to argue against spending on religious programs they claimed violated the First Amendment's

57. 127 S. Ct. 2553 (2007).
58. 127 S. Ct. 2652 (2007).
59. 127 S. Ct. 1194 (2007).
60. 127 S. Ct. 2372 (2007).
61. 127 S. Ct. 2489 (2007).
62. 127 S. Ct. 2618 (2007).
63. 127 S. Ct. 2553 (2007).

Establishment Clause, the Court said the exception did not apply here because the spending was not "specifically financed by Congress."[64]

A secular advocacy group, Freedom from Religion Foundation ("Foundation"), brought suit to dispute conferences that the Bush Administration held to advise religious groups on "how to apply for federal grants."[65] The Foundation claimed this entangled religion with government since "the conferences were designed to promote, and had the effect of promoting, religious community groups over secular ones."[66] The Foundation asserted their standing as taxpayers who are "opposed to the use of Congressional taxpayer appropriations to advance and promote religion."[67]

To have standing to sue in federal court, one must "claim a concrete injury" from the government policy that is contested.[68] The Court's ruling in *Flast v. Cohen*[69] had created an exception to the general rule that "taxpayers do not have standing to sue to stop government expenditures with which they disagree."[70] Justices Alito, Roberts, and Kennedy of the majority interpreted *Flast* narrowly, saying it only allowed challenges to religious programs set up and supported by the legislative branch itself.[71] Since the Office of Faith-Based and Community Initiatives is funded through the executive branch, the Court held that taxpayers lack standing to sue for indirect congressional acts supporting religion because it falls outside the scope of the *Flast* exception.[72] The Court decided to "leave Flast as [they] found it"[73] in answering the "jurisdictional question . . . on the law of taxpayer standing."[74]

64. Linda Greenhouse, *Justices Reject Suit on Federal Money for Faith-Based Office,* N.Y. TIMES, June 26, 2007, at A18.

65. *Id.*

66. *Hein,* 127 S. Ct. at 2561.

67. *Id.*

68. Linda Greenhouse, *Court Hears Arguments Linking Right to Sue and Spending on Religion,* N.Y. TIMES, March 1, 2007, at A14. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

69. 392 U.S. 83 (1968).

70. Greenhouse, *supra* note 64. *See* U.S. CONST. art. III (limiting federal jurisdiction to "Cases" and "Controversies").

71. Greenhouse, *supra* note 68 (*Flast* held that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.").

72. *Hein,* 127 S. Ct. at 2568 (Holding that the "lawsuit is not directed at an exercise of congressional power, . . . and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'" (citing *Flast,* 392 U.S. at 102)).

73. *Id.* at 2572.

74. Greenhouse, *supra* note 68.

Justices Scalia and Thomas, despite concurring with the judgment, filed a separate opinion referring to the Court's unanimous decision this term, *Lance v. Coffman*,[75] consistently holding that "a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."[76] Justices Scalia and Thomas expressed the irrationality of limiting *Flast* to only direct congressional expenditures since the plurality "offers no intellectual justification" for this limitation.[77] Furthermore, they argued the plurality had provided no factual explanation to differentiate this case from *Flast*, which the dissent capitalized on, calling the two cases "indistinguishable."[78] Justice Souter, speaking for the dissent, would have determined that the taxpayers "alleged the type of injury . . . sufficient for standing."[79]

The decision in *Hein* will not apply to challenges in state court against state programs, or to challenges in federal court against federal programs established by Congress.[80] *Flast* still stands to provide taxpayers recourse for direct congressional spending on programs that promote religion.[81]

B. *Voting/Elections*

In *Lance v. Coffman*,[82] a standing case the *Hein* dissenters and concurring Justices found irreconcilable with the *Hein* majority opinion, the Court reiterated in a per curiam decision its mantra requiring taxpayers to have a particularized injury in order to bring a suit alleging that a government action violated the taxpayers' rights.[83]

A Colorado district court had redrawn congressional districts in 2000 when Colorado legislators were unable to agree on a plan to present to the governor.[84] The Colorado legislature subsequently passed a redistricting plan, which was signed into law in 2003, but in *Salazar v. Davidson*,[85] the Colorado Supreme Court held the new plan by the legislature violated article V, section 44 of the Colorado Constitution.[86] The

75. 127 S. Ct. at 1194 (2007).
76. *Hein*, 127 S. Ct. at 2564 (quoting *Lance*, 127 S. Ct. at 1196).
77. *Id.* at 2579.
78. *Id.* at 2579–80.
79. *Id.* at 2588 (joined by Justices Stevens, Ginsburg, and Breyer).
80. *See* Greenhouse, *supra* note 64.
81. *Id.*
82. 127 S. Ct. 1194 (2007).
83. *Id.* at 1198.
84. *See* Beauprez v. Avalos, 42 P.3d 642, 653 (Colo. 2002).
85. 79 P.3d 1221 (Colo. 2003).
86. *See Salazar*, 79 P.3d at 1231; *see also* COLO. CONST. art. V, § 44.

Colorado court held that congressional districts created by the judiciary are "just as binding and permanent as districts created by the General Assembly," and therefore, must remain in effect for the entire census.[87]

Four Colorado taxpayers filed suit, claiming they were injured by the Colorado Supreme Court's *Salazar* decision, which violated the Elections Clause "by depriving the state legislature of its responsibility to draw congressional districts."[88] According to the *Lance* Court, this was the just the "kind of undifferentiated, generalized grievance about the conduct of government" that the Court has refused to recognize as an injury in fact.[89] Because the Colorado voters had no "particularized stake in the [2003] litigation," the Supreme Court held "they lack[ed] standing to bring their Elections Clause claim."[90]

In a second elections and voting case, this one involving the Bipartisan Campaign Reform Act of 2002 (BCRA),[91] the Court upheld the limitation on campaign advertisements by corporations and unions in time periods preceding federal elections, but held that ads that did not advocate for or against the re-election of a candidate could not be restricted, potentially creating a "significant loophole in the measure."[92] In *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc.*,[93] the Court decided the BCRA was unconstitutional as applied, but not on its face with respect to an advertising campaign by Wisconsin Right to Life (WRTL).[94] Because the ads in this case "qualified for an exception . . . so [c]ould many or most others, leaving the statute 'wide open.'"[95]

Section 203 of the BCRA makes illegal "any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within thirty days of a federal primary election or sixty days of a federal general election in the jurisdiction in which that candidate is running for office."[96] This is known as "electioneering communications."[97]

87. *Id.* at 1231.
88. *Lance,* 127 S. Ct. at 1198. None of the taxpayer plaintiffs had participated in the *Salazar* decision.
89. *Id.* at 1198.
90. *Id.*
91. 2 U.S.C. § 441b(b)(2) (2000 ed., Supp. IV).
92. Linda Greenhouse, *Justices Raise Doubts on Campaign Finance Law,* N.Y. TIMES, April 26, 2007, at A1.
93. 127 S. Ct. 2652 (2007).
94. *Id.* at 2673.
95. Greenhouse, *supra* note 92 (quoting Solicitor General Paul D. Clement, arguing on behalf of the Federal Election Commission).
96. *FEC,* 127 S. Ct. at 2660 (citing 2 U.S.C.A. § 434(f)(3)(A) (2000 ed., Supp. IV)).
97. 2 U.S.C.A. § 434(f)(3)(A) (2000 ed., Supp. IV)).

In the WRTL ads, Wisconsin television "[v]iewers were urged to contact" their two state senators, Russell D. Feingold and Herb Kohl, both Democrats, to oppose a "Democratic-led filibuster of some of President Bush's judicial nominees."[98] No contact information was provided in the WRTL ads except for a web site address that led viewers to content criticizing Sen. Feingold.[99] WRTL recognized that these ads would be in violation of the BCRA if they aired "within 30 days of a federal primary election" because the ads named Senator Feingold.[100] WRTL filed suit, claiming that the BCRA, as applied to the specific advertising campaign, and possible future campaigns of a similar nature, violated the First Amendment.[101]

In *McConnell v. Federal Election Commission*,[102] the Court had held that section 203 of the BCRA was constitutional on its face but subsequently concluded that "in upholding section 203 against a facial challenge, we did not purport to resolve future as-applied challenges."[103] The Court determined that the WRTL case before it was an example of such an "as-applied" case.[104] Thus, the issue before the Court was "whether it [was] consistent with the First Amendment for BCRA § 203 to prohibit WRTL from running these . . . ads."[105]

Under *McConnell*, section 203 can constitutionally prohibit ads in the defined timeframes prior to federal elections, which "expressly advocate the election or defeat of a candidate for federal office—[or] the 'functional equivalent' of such advocacy."[106] To be the "functional equivalent" of express advocacy, the ad must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[107] If the ad does not tell viewers to vote or not vote for a certain candidate, then "it passes the test and must be permitted even if the message, seen in a broader context, is perfectly clear."[108] The Court followed the district court's "four-corners" approach which

98. Greenhouse, *supra* note 92.
99. *Id.*
100. *FEC*, 127 S. Ct. at 2661.
101. *Id.*
102. 540 U.S. 93 (2003).
103. *FEC*, 127 S. Ct. at 2659 (quoting Wis. Right to Life, Inc. v. Fed'l Election Comm'n, 546 U.S. 410, 411–412 (2006)).
104. *Id.*
105. *Id.* at 2663.
106. *Id.* at 2661–62 (citing Wis. Right to Life v. Fed. Election Comm'n, 466 F. Supp. 2d 195, 204 (D.D.C. 2006)).
107. *FEC*, 127 S. Ct. at 2667.
108. Greenhouse, *supra* note 92.

looked only at the language of the ad itself.[109] The Court found the ads were "genuine issue" ads which did not "express advocacy or its functional equivalent" regarding the upcoming federal election, so banning them was a violation of the First Amendment.[110]

Despite calling the test "impermissibly vague and thus ineffective" to address First Amendment issues, Justice Scalia voted with the conservative majority.[111] In another concurring opinion, Justice Alito stated the Court must "give the benefit of the doubt to speech, not censorship" reverting to "[t]he First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech.'"[112] He also suspected that the Supreme Court "will presumably be asked in a future case to reconsider" precedent, which holds section 203 facially constitutional, although it was unnecessary at this point.[113]

The four dissenters argued that "context" is crucial to determine the meaning of the words.[114] The dissent further criticized the Court's holding as "reinsta[ting] the 'magic words' criterion" of expressly advocating candidates in order to hold a statute unconstitutional.[115]

C. *Speech*

In *Davenport v. Washington Education Ass'n*,[116] a unanimous Court held for the first time that public-sector labor unions must obtain affirmative consent prior to spending nonmembers' agency-shop fees for election-related expenses if the state so requires.[117]

A state has the authority to regulate labor relationships with its public employees, including levying fees on employees who are not members of the union, under the National Labor Relations Act.[118] This practice is known as an "agency-shop agreement" and is arranged to "prevent nonmembers from free-riding on the union's efforts," essentially benefiting from its collective bargaining without contributing.[119] The State of Washington authorizes unions to negotiate such agency-shop agreements with public-sector employees, but includes a statutory restriction on the use of

109. *Id.*
110. *FEC*, 127 S. Ct. at 2673.
111. *Id.* at 2680 (Scalia, J., concurring).
112. *Id.* at 2674 (Alito, J., concurring) (quoting U.S. CONST. amend. I).
113. *Id.* (referring to McConnell).
114. *Id.* at 2701–02 (Souter, J., dissenting) (joined by Justices Stevens, Ginsburg, and Breyer).
115. *Id.; see also*, McConnell, 540 U.S. at 192–93.
116. 127 S. Ct. 2372 (2007).
117. *Id.* at 2383.
118. *See* 29 U.S.C.A. § 152(2).
119. *Davenport*, 127 S. Ct. at 2377.

funds collected from nonmembers: the union may not spend nonmember funds "to influence an election or to operate a political committee, unless affirmatively authorized by the individual."[120]

The Washington Education Association ("Union") was sued in two separate suits for violating section 706 of the Washington code for its expenditures of nonmember fees for election-related purposes.[121] The Union claimed that the nonmembers had the right to object to the expenditures and that failure to object was considered authorization for the expenditures.[122] The Union argued that the burden was on the nonmember to object to the expenditure rather than on the Union to obtain affirmative authorization.[123] Additionally, the Union claimed that statutorily limiting the Union's activities in the political arena is unconstitutional, as it creates a "content-based discrimination" of the Union's First Amendment rights.[124]

The Court focused on whether the Washington statute's limitation on the expenditure of fees collected from nonmember, public-sector employees violated the First Amendment through content-based discrimination. The Court ruled that there is "no suppression of ideas . . . since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission."[125] Therefore, the Court held that the "content-based nature of § 760 does not violate the First Amendment."[126]

IV. Fourth Amendment

A. *Termination of High-Speed Chases/ Video Evidence*

In *Scott v. Harris*,[127] the Court had the opportunity to determine whether the Fourth Amendment rights of a fleeing motorist are violated when

120. *Id.* at 2377 (quoting Wash. Rev. Code § 42.17.760 (2006) ("Section 760")).
121. *Id.* at 2378.
122. *Id.* The Union distributed a "Hudson packet" twice annually to nonmembers (in light of the Court's ruling in *Teachers v. Hudson*, 475 U.S. 292 (1986)), which gave nonmembers multiple options for "objecting" to union expenditures, but did not expressly provide a means for affirmative authorization of election-related expenditures as required by the Washington statute.
123. *Id.* at 2379 (wherein the Union relied on Court's agency-fee cases of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 (1977), and *Hudson*, 475 U.S. at 306, to support the argument that any dissent must be made apparent by the employee).
124. *Id.* at 2380.
125. *Id.* at 2382.
126. *Id.*
127. 127 S. Ct. 1769 (2007) (8–1 decision).

the police severely injure the motorist during the termination of a high-speed chase. The case was remarkable in that, rather than viewing the facts as articulated in the written record in the light most favorable to the nonmoving party, the Court instead reviewed videotaped evidence obtained from cameras mounted in two police cars involved in the chase to determine the facts.[128]

The Court granted certiorari to address two issues: whether the police officer's actions violated the driver's Fourth Amendment rights and whether the officer's actions were reasonable, thus immunizing him from liability.[129] In a qualified immunity case, the Court typically views the evidence most favorable to the nonmoving party—the driver in this case.[130] However, in *Scott*, the police officer's version, which was supported by video taken by in-car dash cameras from the police cars, directly contradicted the driver's rendition of the chase as documented by the Eleventh Circuit.[131] The Court viewed the videotaped evidence and determined that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[132] In light of the facts depicted in the video, the Court found that the police officer "did not violate the Fourth Amendment" rights of the driver.[133]

The Court then turned its attention to whether the officer's actions were "objectively reasonable."[134] This is ascertained by balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[135] In *Scott*, the Court weighed how the

128. *Id.* at 1775. In a ground-breaking move, the Supreme Court has posted the video on its website at http://www.supremecourtus.gov/opinions/video/scott_v_ harris. rmvb.

129. Scott, the police officer, filed a motion for summary judgment based on qualified immunity, which the district court denied. The appellate court affirmed the lower court's ruling, determining that a jury could find that Scott's actions violated the driver's constitutional rights. When summary judgment is denied for qualified immunity, a two-pronged test applies. *Scott*, 127 S. Ct. at 1774 (citing the test for qualified immunity from *Saucier v. Katz*, 533 U.S. 194 (2001)).

130. *Scott*, 127 S. Ct. at 1774.

131. *Id.* at 1775.

132. *Id.* at 1776.

133. *Id.*

134. *Id.*

135. *Scott*, 127 S. Ct. at 1778.

officer's actions, which put the driver at risk, against the threat to the public caused by the driver's "reckless, high-speed flight."[136] Without a way to "quantify the risks on either side," the Court felt it should "take into account not only the number of lives at risk, but also their relative culpability."[137] The driver failed to stop, despite the flashing lights and sirens and thus "intentionally placed himself and the public in danger" while the officer's actions prevented potential harm to innocent drivers and pedestrians.[138]

The driver argued that neither he nor the innocent public would have been in danger had the police officers ceased the pursuit.[139] The Court disagreed with this argument for two reasons: first, the officer's actions to remove the driver from the road "was certain to eliminate the risk"[140] whereas the driver may have continued to drive recklessly even if the officers stopped chasing him; and second, the Court did not want to set a precedent that would require "the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger."[141] The Court ruled that the officer's actions were objectively reasonable in order to stop a driver who was intentionally endangering the public and the officers involved in the pursuit.[142]

The concurring opinions of Justice Ginsburg and Justice Breyer agree with the Court's majority ruling that the officer did not violate the Fourth Amendment rights of the driver, but would not render a *per se* rule that an officer can place a fleeing driver at risk so as to terminate a high-risk, high-speed chase, and can do so without violating the rights of the driver.[143] Both would have held that the reasonableness of an officer's actions must still be reviewed in light of the particular circumstances.[144]

136. *Id.* The chase lasted nearly 10 minutes, primarily on two-lane roads, roads with a center turn lane that the driver used to pass traffic, and crossing at least two intersections against the lights. Speeds exceeded 85 m.p.h. at times, with the chase ending when the officer used the bumper of his car to push the driver's car off the road. The driver's car left the road, went down an embankment, and overturned. *Id.* at 1772–73.
137. *Id.*
138. *Id.*
139. *Scott*, 127 S. Ct. at 1778.
140. *Id.* at 1778–79 (emphasis in original).
141. *Id.* at 1779 (emphasis in original).
142. *Id.* at 1776.
143. *Id.* at 1779–80.
144. *Scott*, 127 S. Ct. at 1780–81.

In his dissent, Justice Stevens had a different interpretation of the high-speed chase as it played out in the video evidence.[145] According to Justice Stevens, the officer's actions could be interpreted as violating the driver's Fourth Amendment rights, which is a fact-finding determination that should be left to a jury rather than decided by the Court.[146] Likewise, Justice Stevens disagreed with the majority's assumption that lives would have continued to be at risk had the police ended the chase.[147] He agreed that the driver's "refusal to stop and subsequent flight was a serious offense that merited severe punishment. It was not, however, . . . an offense that justified the use of deadly force rather than an abandonment of the chase."[148] The dissent strongly opposed the *per se* ruling of the majority and repeatedly emphasized that the circumstances in this case warranted an evaluation of the facts by a jury.[149]

With the advent of in-dash video cameras, the Court has established that videotaped evidence is an integral part of the record and courts will compare this evidence to the statements presented by the parties in a multitude of Fourth Amendment cases. Furthermore, the *Scott* case will continue to provide guidance to the courts in evaluating whether the

145. *Id.* at 1782–84 (Stevens, J., dissenting) (Justice Stevens noted that the driver, although driving at high speeds, avoided oncoming traffic, and used his signal to indicate his intent to pass slow traffic. The driver did lead police through a shopping center parking lot, but since it was late at night, the lot was deserted and at no time, in the lot or on the roads, were any pedestrians visible. Justice Stevens also noted that the danger may not have been as imminent as the majority presented since cars that had pulled over or were driving on the shoulder were doing so out of respect for the flashing lights and sirens and not forced to evade the driver's actions.).

146. *Id.* at 1781 ("[T]he question of the reasonableness of the officer's actions should be decided by a jury, after a review of the degree of danger and the alternatives available to the officer."). *See also id.* at 1784 ("Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury.").

147. *Id.* at 1783.

148. *Id.*

149. Since the case was handed down on April 30, 2007, several district courts have applied the Court's holding with respect to qualified immunity and the need to analyze whether an officer's actions have violated any constitutional rights. *See, e.g.*, Mahan v. Sundmacher, 2007 U.S. Dist. LEXIS 34279 (W.D. Mich. 2007) (actions taken by officers to handcuff and detain individual were reasonable); Sutton v. Duguid, 2007 U.S. Dist. LEXIS 35853 (E.D.N.Y 2007) (same); Willis v. Oakes, 2007 U.S. Dist. LEXIS 44137 (D. Va. 2007)(when a passenger in car was struck by officer's bullet, officer was granted qualified immunity based on driver's threatening acts). Other district courts have utilized videotaped evidence to assess the liability of police officers, including a case where the videotaped evidence disputes the plaintiff's versions of the facts. *See, e.g.*, Martinez v. City of Auburn, 2007 U.S. Dist. LEXIS 49236 (D. Wash. 2007)(court used videotape evidence to determine officer's actions were reasonable given the circumstances after passenger shot after driver's attempt to flee a traffic stop); Miller v. Jensen, 2007 U.S. Dist. LEXIS 39252 (D. Okla. 2007)(court relied on uncontroverted videotape at the summary judgment stage to determine officer's actions reasonable).

conduct of a police officer violated a constitutional right, whether that right was clearly established at the time of the violation, and whether the actions of the officer were objectively reasonable, thereby immunizing the officer from liability.

B. *Traffic Stops: Passengers Are Seized*

For over twenty-five years, the Court has held that a traffic stop constitutes a seizure of the driver under the Fourth Amendment.[150] Several cases during that timeframe implicitly included the occupants and passengers of the car as being seized as well, but it was not until this term in *Brendlin v. California*[151] that the Court explicitly extended Fourth Amendment rights to the passengers of a car that is pulled over by the police.[152] A unanimous Court overturned the California Supreme Court's

Although the plaintiff in *Scott* was rendered a quadriplegic and not killed, two other cases have come before the federal courts where the termination of the high-speed chase resulted in the death of the fleeing motorist. In May 2007, the District Court for the District of Nevada (Ninth Circuit) applied the Court's analysis in *Scott* to determine that the actions of the police were reasonable in terminating a high-speed chase, even without warning the driver of the pending police action. *See* Galipo v. City of Las Vegas, 2007 U.S. Dist. LEXIS 34540, *15 (D. Nev. 2007) ("[T]he *Scott* Court did not require the officer to give the suspect an opportunity to appreciate the force about to be used against him and to respond before the officer bumped his car. . . . The officers' attempt to stop Galipo's reckless, high-speed flight that threatened the lives of innocent members of the public does not violate the Fourth Amendment, even though they risked using deadly force against Galipo."). Likewise, in July 2007, the Fourth Circuit ruled that an officer's actions were reasonable even though a high-speed chase was terminated when the motorcycle and the police vehicle collided and the motorist was killed. *See* Abney v. Coe, 2007 U.S. Dist. LEXIS 15841,1–2 (4th Cir. 2007) Neither of these cases had the benefit of videotaped evidence for the court's review.

150. *See* Delaware v. Prouse, 440 U.S. 648, 653 (1979) (holding that a traffic stop constitutes a seizure of the driver "even though the purpose of the stop is limited and the resulting detention quite brief"); *see also* Whren v. United States, 517 U.S. 806, 809–10 (1996).

151. 127 S. Ct. 2400 (2007).

152. *Id.* at 2406 ("[A]lthough we have not, until today, squarely answered the question whether a passenger is also seized, we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver.") The Court goes on to cite several cases:

> *See, e.g., Prouse,* 440 U.S. at 653 . . . ("[S]topping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments"); Colorado v. Bannister, 449 U.S. 1, 4, n.3 . . . (1980) (per curiam) ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment"); Berkemer v. McCarty, 468 U.S. 420 . . .(1984) ("[W]e have long acknowledged that stopping an automobile and detaining its occupants constitutes a seizure" (internal quotation marks omitted)); United States v. Hensley, 469 U.S. 221, 226 . . . (1985) ("[S]topping a car and detaining its occupants constitutes a seizure"); Whren v. United States, 517 U.S. 806, 809–810, . . .(1996)) ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]").

ruling that the defendant, a passenger in a car, "was not seized when [the driver] submitted to the deputy's show of authority and brought the vehicle to a stop."[153]

Bruce Brendlin was a passenger in a car that was pulled over, even though the "[s]tate concedes that the police had no adequate justification to pull the car over."[154] Upon approaching the vehicle, one of the officers recognized Brendlin and sought verification from dispatch that Brendlin had an outstanding warrant for a parole violation. It was then that the officer approached the passenger's side of the car and, at gunpoint, asked Brendlin to step out of the car and placed him under arrest.[155] The officer then searched Brendlin and the driver, finding drug paraphernalia, and Brendlin was charged with "possession and manufacture of methamphetamine."[156] Brendlin challenged the constitutionality of the traffic stop in order to suppress the evidence of the drugs.[157] The California Supreme Court held that "Brendlin was not seized by the traffic stop because [the driver] was [the stop's] exclusive target"[158] and since Brendlin was not seized until his formal arrest, he did not have grounds to challenge the constitutionality of the traffic stop.[159]

The Supreme Court has defined a person as seized and "entitled to challenge the government's action under the Fourth Amendment when [a police] officer, by means of physical force or show of authority, terminates or restrains his freedom of movement."[160] Determining if the passengers of a car stopped by the police have been seized depends on whether their freedom of movement was terminated or restrained under a show of authority. The Court recognized that a traffic stop "necessarily curtails the travel a passenger has chosen just as much as it halts the driver."[161] Furthermore, using the reasonable person standard, a seizure occurs if a reasonable person would "believe[] that he [is] not free to leave"[162] or does not "feel free to decline the officers' requests or otherwise terminate the encounter."[163] The Court held that a passenger in a car stopped by the police would understand "the police officers to be

153. People v. Brendlin, 136 P.3d 845, 855 (Cal. 2006).
154. *Brendlin*, 127 S. Ct. at 2406.
155. *Id.* at 2404.
156. *Id.*
157. *Id.*
158. *Id.* at 2405.
159. *Brendlin*, 127 S. Ct. at 2404.
160. *Id.* at 2405 (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991)).
161. *Id.* at 2407.
162. *Id.* at 2405 (quoting Unites States v. Mendenhall, 446 U.S. 544, 554 (1980)).
163. *Id.* at 2405–06 (quoting *Bostick*, 501 U.S. at 435–36)).

exercising control to the point that no one in the car [is] free to depart without police permission."[164] Thus, "a passenger is seized as well [as the driver] and so may challenge the constitutionality of the stop."[165]

C. *Execution of Warrants*

According to the Supreme Court's holding in *Los Angeles County v. Rettele*,[166] when officers search a house during the execution of a properly obtained search warrant, they may take reasonable steps "to protect themselves from harm" without violating the Fourth Amendment rights of the residents, even when it becomes obvious the residents are notably a different race than the suspects being sought, arguably casting doubt on the warrant. In this case, the suspects were described as "African-American" in the search warrant but the current residents of the home were Caucasian. The residents were rousted from their bed by the police and made to stand still, unclothed, for two or three minutes until the officers could secure the room.[167]

The question before the Court was whether the police violated the Fourth Amendment rights of the residents by requiring them to remain undressed for the time that it took to search the room for other people or weapons. The Court ruled that "[t]he orders by the police to the occupants, in the context of [the] lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies."[168] The Court maintained that there is less risk of harm to the police and the occupants of the home when "officers routinely exercise unquestioned command of the situation."[169] But the Court also recognized that a search may be unreasonable and unconstitutional under "special circumstances, or possibly a prolonged detention."[170] The Court's holding in *Rettele* clearly gives the police the right to detain innocent individuals for a few minutes (less than five in this case) even if this results in the individuals

164. *Brendlin*, 127 S. Ct. at 2407.
165. *Id.* at 2403.
166. 127 S. Ct. 1989 (2007) (per curiam).
167. *Id.* at 1991.
168. *Id.* at 1993 (The Court cited several cases in which weapons were found hidden in the bedding or under pillows, hence the necessity in this case for the officers to prevent the occupants from remaining in the bed or using the bedding to cover themselves.).
169. *Id.* at 1993 (citing Michigan v. Summers, 452 U.S. 692, 702–03 (1981)).
170. *Id.* (citing *Summers*, 452 U.S. at 705, n.21); *see also* Muehler v. Mena, 544 U.S. 93 (2005) (two to three hour detention in handcuffs was reasonable and did not violate Mena's Fourth Amendment rights when the police were searching a house for dangerous weapons).

being frustrated, embarrassed, and humiliated,[171] as long as the police are acting in "a reasonable manner to protect themselves from harm."[172]

D. *False Imprisonment Claims/§ 1983*

Although *Wallace v. Kato*[173] is related to defendant's Fourth Amendment rights, the issue was whether Wallace had filed a suit under 42 U.S.C. § 1983 seeking "damages arising from . . . his unlawful arrest" in a timely manner.[174] The Court held that when the claimed false arrest is "followed by criminal proceedings," the statute of limitations "begins to run at the time the claimant becomes detained pursuant to legal process" and not when the charges were ultimately dropped.[175]

In 1994, Wallace was taken to a Chicago police station as part of an investigation of a homicide. After extensive interrogation throughout the night, Wallace "agreed to confess" to the murder.[176] Although Wallace tried to suppress his statements at trial, he was convicted of the murder.[177] In 1998, the Illinois Appellate Court ruled that the police had violated Wallace's Fourth Amendment rights by arresting him without probable cause and, in a subsequent appeal, the court further held that Wallace's statements were inadmissible and remanded for a new trial.[178] Since the confession was the extent of the evidence that had convicted Wallace, prosecutors ultimately dropped the charges in 2002, eight years after he was taken into custody.[179]

After the charges were dropped, Wallace brought a § 1983 suit for damages, claiming that his "false imprisonment ended upon his release from custody" in 2002.[180] Wallace argued that the Court's ruling in *Heck v. Humphrey*[181] should prevail, tolling the statute of limitations until the state dropped its charges, which set aside his conviction. The Court rejected Wallace's interpretation of the law because, in a case

171. *Rettele*, 127 S. Ct. at 1993. ("Valid warrants will issue to search the innocent, and the resulting frustration, embarrassment, and humiliation may be real, as was true here." But "the Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty.").

172. *Id.* at 1993–94.

173. 127 S. Ct. 1091 (2007).

174. *Id.* at 1100.

175. *Id.* at 1094.

176. *Id.*

177. *Id.*

178. *Wallace*, 127 S. Ct. at 1094.

179. Jason Horn & Brittany Agro, *Wallace, Andre v. Kato, Kristen & Roy, Eugene*, MEDILL—ON THE DOCKET, http://docket.medill.northwestern.edu/archives/003730.php (last visited June 5, 2007).

180. *Wallace*, 127 S. Ct. at 1096.

181. *Id.* at 1096 (citing 512 U.S. 477 (1994)).

where charges are subsequently dropped and there is no conviction, Wallace's interpretation would require tolling until some future anticipated conviction occurs and is then set aside, finally triggering the statute of limitations to begin again.[182] Consequently, the Court determined that the period of the false imprisonment for Wallace was from his arrest without a warrant in January 1994 until a few days later when "he appeared before the examining magistrate and was bound over for trial."[183] The Court held that Wallace should have filed his § 1983 suit within two years of being bound over for trial, or upon his majority three years later, either timeframe of which expired prior to the charges being dropped in 2002.[184] The Court leaves it up to the district court to stay a claim of false arrest "until the criminal case or the likelihood of a criminal case is ended."[185]

The dissent would have applied "equitable tolling"[186] arguing that "the limitations period does not run against a falsely arrested person until his false imprisonment ends."[187] The dissent maintains it would be better to permit the equitable tolling of a § 1983 claim rather than have every criminal defendant filing a § 1983 claim early in the process so as not to be time-barred.[188] The majority decision will increase the number of cases that will have to be stayed or dismissed, which would require the courts to consider the merits of a case that was still being litigated.[189]

182. *Id.* at 1098 ("What petitioner seeks . . . is the adoption of a principle that . . . an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside.") (emphasis in original).

183. *Id.* at 1096–97 ("false imprisonment ends once the victim becomes held pursuant to such process—when, for example, he is bound over by a magistrate or arraigned on charges."); *see also* Horn & Argo, *supra* note 179 (quoting the counsel for the City of Chicago who stated that "[i]f Wallace wins, he can probably only recover for two days.").

184. *Id.* at 1096–97; *see also id.* at 1095 (The Court used the statute of limitations as determined under Illinois tort law for false imprisonment. The court determined that the accrual date under § 1983 is governed by "federal rules conforming . . . to [State] common-law tort principles.").

185. *Wallace*, 127 S. Ct. at 1098 ("If a plaintiff files a false arrest claim before he has been convicted . . . it is within the power of the district court . . . to stay the civil action until the criminal case or the likelihood of a criminal case is ended.").

186. *Id.* at 1102 (Breyer, J., dissenting) ("Where a 'plaintiff because of disability, irremediable lack of information, or other circumstances beyond his control just cannot reasonably be expected to sue in time,' courts have applied a doctrine of 'equitable tolling.'") (quoting Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996)).

187. *Id.* (Breyer, J., dissenting).

188. *Id.* at 1103 (Breyer, J., dissenting) ("[The Court's] approach would force all potential criminal defendants to file all potential § 1983 actions soon lest they lose those claims due to protracted criminal proceedings.").

189. *Id.* (Breyer, J., dissenting) ("[A] claim . . . might linger on a federal docket because the federal court . . . wishes to avoid interfering with any state proceedings and therefore must postpone reaching, not only the merits of the § 1983 claim, but the threshold *Heck* inquiry as well.").

V. Fifth Amendment

In the Court's only Fifth Amendment case this term, *Wilkie v. Robbins*,[190] the Court limited property owners' "remedies for violations of their constitutional rights by federal government officials."[191] In *Wilkie*, the Court decided 7–2 that a landowner does not have a private right of action against officials of the Bureau of Land Management (BLM) for alleged "harassment and intimidation" in "extracting an easement" across the landowner's property. Neither a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO),[192] nor a *Bivens* action,[193] is permissible in an action for damages in such a case.[194]

Conflict between the BLM and the landowner, Robbins, began in 1994 when a BLM employee and his supervisor, Charles Wilkie, "demanded an easement" to replace the one received from the previous owner.[195] The previous property owner, in order to obtain a passageway "across federal land to otherwise isolated parts of the ranch," had "granted the United States an easement to use and maintain a road running through the ranch to federal land."[196] The BLM did not record the easement and the new landowner, therefore, took the land "free of the easement," allowing him to "run cattle drives" and let his "cattle graze" on the land with a Special Recreation Use Permit (SRUP) issued by the BLM.[197] Robbins' plea for relief from a suit involving trespass and a voided settlement agreement brought by the BLM in 2004 was denied by both the district court and the Tenth Circuit.[198]

Robbins alleged the government "carried on a campaign of harassment and intimidation" in "forcing him to regrant [it a] lost easement," constituting blackmail.[199] He sued the officials in their "individual

190. 127 S. Ct. 2588 (2007).

191. Ilya Somin, *My Legal Times Article on* Wilkie v. Robbins, THE VOLOKH CONSPIRACY, Aug. 1, 2007, *available at* http://www.volokh.com/posts/1186005176.shtml.

192. 18 U.S.C. § 1961 *et seq.* (2006).

193. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (holding that a "complaint alleging that agents of Federal Bureau of Narcotics, acting under color of federal authority, made warrantless entry of petitioner's apartment, searched the apartment and arrested him on narcotics charges, all without probable cause, stated federal cause of action under the Fourth Amendment for damages recoverable upon proof of injuries resulting from agents' violation of that Amendment").

194. *Wilkie*, 127 S. Ct. at 2593, 2597.

195. *Id.* at 2593–94.

196. Ross Runkel, *United State Supreme Court Case: Wilkie v. Robbins*, LAWMEMO, *available at* http://www.lawmemo.com/sct/06/Robbins/.

197. *Wilkie*, 127 S. Ct. 2593; *see* WYO. STAT. ANN. § 34-1-120 (2005).

198. *Id.* at 2596; *see* Robbins v. Bureau of Land Management, 438 F.3d 1074 (10th Cir. 2006).

199. *Id.* at 2594, 2608.

capacities" claiming violations of his Fourth and Fifth Amendment rights.[200] Affirming the District of Wyoming's denial of the officials' motion for summary judgment, the Tenth Circuit held that the property owner had "a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power."[201] The Tenth Circuit also stated that the officials were "not entitled to qualified immunity," because government employees' "retaliation for the exercise of a [clearly established] constitutionally protected right" is "beyond the scope" of protection.[202]

The Supreme Court reversed, holding that relief under *Bivens* would have required the Court "to devise a new *Bivens* damages action for retaliating against the exercise of ownership rights."[203] The Court determined that "Robbins ha[d] an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." As for the behavior of the government employees, the Court found that although "the [g]overnment was not offering to buy the easement, . . . it did have valuable things to offer in exchange, like continued permission for Robbins to use [g]overnment land on favorable terms (at least to the degree that the terms of a permit were subject to discretion)."[204] Thus, the government's attempts "to induce someone to grant an easement for public use is a perfectly legitimate purpose: as a landowner, the [g]overnment may have, and in this instance does have, a valid interest in getting access to neighboring lands."[205] Therefore, the Court refused to allow a *Bivens* action "to redress retaliation against those who resist [g]overnment impositions on their property rights."[206]

Likewise, the Court dismissed the landowner's claims that the actions of the government employees arose to the level of racketeering defined by the Hobbs Act, or as acts or threats of extortion required for a RICO claim. The Court opined that it "is not reasonable to assume that the Hobbs Act (let alone RICO) was intended to expose all federal employees . . . to extortion charges whenever they stretch in trying to enforce

200. *Id.* at 2593. The Fourth Amendment guarantees "people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," while the Fifth Amendment guarantees people shall not "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amends. IV, V.

201. Robbins v. Wilkie, 433 F.3d 755, 765–66 (10th Cir. 2006).

202. *Id.* at 767 (quoting DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990)) (internal quotations omitted).

203. *Wilkie*, 127 S. Ct. at 2597.

204. *Id.* at 2602.

205. *Id.* at 2601.

206. *Id.* at 2604.

[g]overnment property claims."[207] The Court determined that "the crime of extortion [is] focused on the harm of public corruption, by the sale of public favors for private gain, not on the harm caused by overzealous efforts to obtain property on behalf of the [g]overnment."[208] In sum, the Court found that "neither *Bivens* nor RICO gives Robbins a cause of action."[209]

VI. Sixth and Fourteenth Amendments

Of the six Sixth and Fourteenth Amendment cases to come before the Court this term, only *Cunningham v. California*, which held that California's sentencing guidelines were unconstitutional,[210] was decided against the government. In the remaining cases, ranging from the dismissal of a juror and the behavior of trial spectators, to sentencing challenges, the Court either did not find violations of the Sixth or Fourteenth Amendments or determined that the Court lacked jurisdiction to review the decision of the lower court.

A. *Prejudicial Impact of Spectators*

In *Carey v. Musladin*,[211] the most publicized of the Sixth Amendment cases this term, the Court unanimously held that since there was no precedent regarding the prejudicial impact of the behavior of spectators on a defendant's right to a fair trial, the ruling by the State of California was not contrary to "clearly established federal law."[212] In *Carey v. Musladin*, the inmate filed for a writ of habeas corpus in the United States District Court for the Northern District of California, arguing that spectators' conduct of wearing buttons displaying the victim's picture at his state murder trial was inherently prejudicial and a denial of his right to a fair trial under the Sixth and Fourteenth Amendments.[213] The federal district court denied the writ of habeas corpus but the Ninth Circuit reversed on the ground that the California court's decision was "contrary to clearly established federal law and constituted an unreasonable application of that law."[214]

The question then before the Supreme Court was whether the California state court failed to follow "clearly established federal law"

207. *Id.* at 2607.
208. *Wilkie*, 127 S. Ct. at 2606.
209. *Id.* at 2608.
210. 127 S. Ct. 856 (2007) (6–3 decision).
211. 127 S. Ct. 649 (2006).
212. *Id.* at 651.
213. *Id.* at 652.
214. *Id.* (citing Musladin v. Lamarque, 427 F.3d 653, 662 (9th Cir. 2005)).

in holding that the buttons worn by the spectators did not create unfair prejudice.[215] To address this question, the Court had to determine whether federal law was clearly established regarding the prejudicial impact of spectator clothing or behavior, and whether the California state court ruling was contrary to, or an unreasonable application of, that law under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[216]

A law is "clearly established" only as defined by "the holdings . . . of [the Supreme] Court's decisions as of the time of the relevant state-court decision."[217] When the California court decided his case, there were two prevailing Supreme Court rulings related to the clothing worn by individuals in the courtroom, but neither expressly addressed the present situation.[218] Therefore, the California courts were not required to apply those holdings and thus the state's decision "was not contrary to, or an unreasonable application of clearly established federal law."[219]

This leaves unanswered at the Supreme Court level whether spectators wearing buttons or other articles of clothing portraying messages relevant to the case may be inherently prejudicial and deny a defendant his right to a fair trial. The Court recognizes that there is much divergence among the lower state and federal courts as to whether spectator behavior or appearance can create such a prejudice,[220] and "the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in [the Court's] jurisprudence."[221]

In his concurrence, Justice Kennedy reflected that perhaps there is a need for a new rule related to this issue and "[t]hat rule should be explored in the court system, and then established in this Court [so that] it can be grounds for relief in the procedural posture of this case."[222]

215. *Id.*

216. *Carey*, 127 S. Ct. at 653 (noting that AEDPA allows a federal court to grant a writ of habeas corpus only when a state court's decision "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." (110 Stat. § 1219(d)(1))).

217. *Id.* (citing Williams v. Taylor, 529 U.S. 362, 412 (2000)).

218. *See id.* at 512 (In *Estelle v. Williams*, 452 U.S. 501 (1976), the prosecution's insistence that a defendant wear prison clothing violated the Fourteenth Amendment and interfered with the accused's rights to a fair trial.); *see also id.* at 571 (In *Holbrook v. Flynn*, 475 U.S. 560 (1986), the Supreme Court had held that the presence of uniformed police officers sitting in the spectator's row behind the defendant "was not so inherently prejudicial that it denied the defendant a fair trial.").

219. *Id.* at 654.

220. *See Carey*, 127 S. Ct. at 654, for a summary of holdings from various state and federal courts.

221. *Id.* at 653.

222. *Id.* at 657 (Kennedy, J., concurring in the judgment).

B. *Jury Selection*

In *Uttecht v. Brown*,[223] the Court held that a trial judge should be given deference in dismissing a juror for cause.[224] In this case, the state trial court dismissed a juror for cause, finding the juror's ability to impose the death penalty would be substantially impaired by his confusion about the sentencing requirements for a murder with aggravating circumstances.[225] On appeal, the Ninth Circuit held the dismissal of the juror to be reversible error in that the juror's *voir dire* did not indicate substantial impairment and thus the trial court violated the defendant's Sixth and Fourteenth Amendment rights to a fair trial and due process.[226]

In evaluating whether the dismissal of a juror violates the constitutional rights of the defendant, the Court relied on precedent established primarily by two cases, which the Court collectively referred to as the *Witherspoon-Witt* rule.[227] From these cases, and other cases based on their logic, the Court identified four principles: First, the jury must be impartial and not weighted in favor of capital punishment. Second, the jurors must be able to "apply capital punishment within the framework state law prescribes." Third, if a juror is "substantially impaired in his or her ability to impose the death penalty under the state-law framework" then he or she "can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." Fourth, "in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts."[228] Upon reviewing the *voir dire* transcript and the published opinions of the Washington state

223. 127 S. Ct. 2218 (2007) (5–4 decision).

224. *Id.* at 2231 (Courts reviewing the exclusion of a juror for cause "owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror. The [Ninth Circuit] Court of Appeals neglected to accord this deference. And on this record it was error to find that Juror Z was not substantially impaired.").

225. *Id.* at 2227.

226. *See* Brown v. Lambert, 451 F.3d 946, 951, 953 (9th Cir. 2006) ("The reasons that the court [gave] for upholding Z's exclusion are misplaced and insufficient," and "excusing [J]uror Z for cause was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal.").

227. *See generally* Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. 412 (1985).

228. *See Uttecht*, 127 S. Ct. at 2224 (internal citations omitted).

courts, the Court majority agreed with the state courts' decisions to uphold the dismissal of the juror for cause.[229]

The dissent reviewed the same transcript and published state opinions and came to the opposite conclusion, finding that, although the juror expressed a misunderstanding of the law or the circumstances under which the death penalty may be imposed, "by the end of the *voir dire* questioning, [the juror's] confusion on [the relevant law] had abated and he had made clear that even if the defendant were never to be released, he could still consider the death penalty."[230] Furthermore, the dissent noted that "[w]hile such testimony might justify a prosecutor's peremptory challenge, until today not one of the many cases decided in the wake of *Witherspoon* . . . has suggested that such a view would support a challenge for cause." While the dissent disagreed with the majority's assessment of this particular juror, the dissent reiterated a main premise of the majority by emphasizing that "[e]ven a juror who is generally opposed to the death penalty cannot permissibly be excused for cause so long as he can still follow the law as properly instructed."[231]

C. *Witness Testimony*

In *Whorton v. Bockting*,[232] the Court addressed whether a ruling in 2004 regarding hearsay testimony was retroactive to a conviction finalized in 1993. A unanimous Court held that it was not. In 1980, the Court held that out-of-court statements could be admitted as evidence at trial if the witness was unavailable to testify and the judge determined that there was a sufficient "indicia of reliability" to allow the hearsay statements to be admitted.[233] But in the 2004 case of *Crawford v. Washington*,[234] the Court reconsidered its position on hearsay statements and ruled that the "Confrontation Clause" in the Sixth Amendment gives the accused the constitutional right to confront and cross-examine witnesses testifying against him.[235] This overturned the earlier holding and prevents the

229. *Id.* at 2228, 2230 ("From our own review of the state trial court's ruling, we conclude the trial court acted well within its discretion in granting the State's motion to excuse [the juror]. . . . The record does not show the trial court exceeded [its] discretion in excusing Juror Z; indeed the transcript shows considerable confusion on the part of the juror, amounting to substantial impairment.").

230. *Id.* at 2241 n.4 (Stevens, J., dissenting).

231. *Id.* at 2243 (Stevens, J., dissenting).

232. 127 S. Ct. 1173 (2007).

233. *See id.* at 1178 (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

234. *See id.* at 1179 (citing 541 U.S. 36 (2004)).

235. *Crawford*, 541 U.S. at 54 ("[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.").

use of hearsay testimony if the defendant has not had the chance to cross-examine the accuser.

Whorton came before the Court after the Ninth Circuit retroactively applied the new standard for hearsay testimony, overturning Bockting's conviction.[236] The Court, however, clarified that the ruling in *Crawford* was never intended to be applied "retroactively to cases already final on direct review."[237] The Court determined that by overturning the old standard for hearsay testimony, the holding in *Crawford* was a new rule[238] and "a new rule is generally applicable only to cases that are still on direct review."[239]

Exceptions to this arise only when a new rule is (1) substantive or (2) identifiable as a "watershed rule."[240] The Court held that requiring the opportunity for cross-examination was procedural rather than substantive and, in disagreement with the Ninth Circuit ruling, the Court held that the *Crawford* rule was not profound enough to be a watershed rule.[241] Thus, since Bockting's conviction was final on direct appeal more than a decade before the *Crawford* opinion, the new rule in *Crawford* did not apply and the Court unanimously reversed and remanded the case.[242]

The ruling in *Whorton* has subsequently been used by several courts to thwart attempts by defendants to apply *Crawford* retroactively in cases where a final order has been entered.[243] Furthermore, the number of cases attempting to apply the *Crawford* rule retroactively will diminish in light of this term's definitive ruling in *Whorton*.

In *Fry v. Pliler*,[244] the Court issued a unanimous decision that in habeas corpus proceedings, constitutional error in a state-court trial

236. *Whorton*, 127 S. Ct. at 1180 (overturning the final decision rendered by the Nevada Supreme Court in 1993).

237. *Id.*

238. *Id.* (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990) ("The explicit overruling of an earlier holding no doubt creates a new rule.")).

239. *Id.*

240. *Id.*

241. *Id.* at 1182 (A watershed rule must prevent "an impermissibly large risk of an inaccurate conviction . . . [and it] must alter [the Court's] understanding of the bedrock procedural elements essential to the fairness of a proceeding.") (internal quotes and citations omitted).

242. *Whorton*, 127 S. Ct. at 1184.

243. *See, e.g.*, Corey v. United States, 2007 U.S. App. LEXIS 7039 (1st Cir. 2007); United States v. Coleman, 2007 U.S. App. LEXIS 5534 (3d Cir. 2007); Little v. Runnels, 2007 U.S. App. LEXIS 11450 (9th Cir. 2007); Phillips v. Kenan, 2007 U.S. App. LEXIS 11458 (9th Cir. 2007); Mingo v. Artuz, 2007 U.S. Dist. LEXIS 28992 (D.N.Y. 2007);

244. 127 S. Ct. 2321 (2007) (Unanimous opinion, with partial dissenting opinions).

must be evaluated by the federal courts under a "substantial and injurious effect" standard, regardless of whether the state appellate court applied the "harmless beyond a reasonable doubt" standard.[245] The "harmless beyond a reasonable doubt" standard is utilized by state appellate courts to assess a trial-court error as harmless or not, under the Court's ruling in *Chapman v. California*.[246] Likewise, the Court would apply the same standard on direct review of a state-rendered decision.[247] When a case comes before a federal court on collateral review, however, the reviewing court applies the standard expressed in *Brecht v. Abrahamson*,[248] which requires the error to have a "substantial and injurious effect or influence in determining the jury's verdict."[249]

John Fry requested habeas relief from the federal courts after the state courts denied his claims that the omission of a defense witness violated his constitutional right to due process.[250] A magistrate in the U.S. District Court for the Eastern District of California determined that although the state appellate court failed to find reversible error with the exclusion of the witness, the court did not indicate what standard it had applied in reaching this decision.[251] The magistrate found the lack of definitive standards in the California court ruling as contradictory to "clearly established law as set forth by the Supreme Court" in the *Chapman* case.[252] However, the magistrate determined that a federal court's review must fall under the purview of *Brecht* and held that the exclusion of the witness did not create a "substantial and injurious effect" on the outcome of the jury verdict and thus denied habeas relief to the petitioner.[253] The Ninth Circuit affirmed the magistrate's ruling.[254]

The Court granted certiorari to determine whether the federal courts were required to abide by the "harmless" standard of review set forth in *Chapman* or by the "substantial and injurious effect" standard set forth

245. *See id.* at 2328.
246. *Id.* at 2325 (citing 386 U.S. 18 (1967)).
247. *See id.* ("In *Chapman*, . . . a case that reached this Court *on direct review* of a state-court criminal judgment, we held that a federal constitutional error can be considered harmless only if a court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'") (emphasis in original) (quoting *Chapman*, 386 U.S. at 24).
248. *Id.* (citing 507 U.S. 619 (1993)).
249. *Fry*, 127 S. Ct. at 2325 (citing *Brecht*, 507 U.S. at 637 (quoting Court's opinion in Kotteakos v. United States, 328 U.S. 750, 776 (1946))).
250. *Id.* at 2324.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Fry*, 127 S. Ct. at 2324.

in *Brecht*.[255] The Court held that on collateral review of a federal decision, the *Brecht* standard must prevail and that an error must be held harmless unless it has a "substantial and injurious" effect.[256] The Court remained silent on the factual issue as to whether the omission of the witness testimony in *Fry* was harmless error or not, and the dissenting opinions felt lower-court rulings should be reversed or remanded in order to address this issue.[257]

D. *Sentencing*

In *Cunningham v. California*,[258] the Court reiterated its holdings that the discretion a trial judge has in maximizing a sentence is limited by the facts established beyond a reasonable doubt by a jury. The question as to whether a judge can use facts outside of the purview of the jury to support his or her discretionary power during sentencing has recently been addressed multiple times by the United States Supreme Court and the answer has repeatedly been that the judge may not do so.[259]

A California trial judge sentenced John Cunningham after a jury had found Cunningham guilty of sexually abusing his 10-year old son.[260] Under California's determinate sentencing law (DSL), the judge had three options available: a 6-year sentence, a 12-year sentence, or a 16-year sentence.[261] In a sentencing hearing subsequent to the jury trial, the judge found six additional facts supported "by a preponderance of the

255. *Id.* at 2325.

256. *Id.* at 2328.

257. *See id.* at 2328 (Stevens, J., dissenting in part) ("[G]iven the nature of the error, I cannot agree with the Ninth Circuit's conclusion that the erroneous exclusion of [the witness's] testimony was harmless under [the *Kotteakos/Brecht* standard] . . . and would reverse the judgment."); *see also id.* at 2330 (Breyer, J., dissenting in part) ("[W]e should consider the application of the [*Brecht*] standard, that the error was not harmless, and . . . remand this case.").

258. 127 S. Ct. 856 (2007) (6–3 decision).

259. *See generally* United States v. Booker, 543 U.S. 220, 244 (2005) (The Court addressed the federal sentencing guidelines and reiterated earlier rulings that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (The Court held that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."); Apprendi v. New Jersey, 530 U.S. 466, 491 (2000) (The Court held that a defendant's Sixth Amendment right to trial by jury was violated when the additional facts were found by a "preponderance of the evidence" by a judge rather than "beyond a reasonable doubt" by a jury).

260. *Cunningham*, 127 S. Ct. at 860.

261. *Id.*

evidence" to justify the maximum sentence of 16 years.[262] Cunningham appealed on the basis that, by relying on facts not found by a jury, the judge violated Cunningham's Sixth and Fourteenth Amendment rights to a trial by jury and due process.[263] The California Court of Appeal upheld Cunningham's sentence and the California Supreme Court denied the petition for review since it had recently held the DSL did not violate the Sixth Amendment.[264]

When the California courts evaluated the DSL's judiciary discretion against the Court's holdings in *Apprendi*, *Blakely*, and *Booker*, the California courts held that no constitutional rights were violated when a judge found aggravating factors sufficient to apply the maximum sentence.[265] The Court's 6–3 majority ruling in *Cunningham* reversed the California courts by re-evaluating the DSL with respect to the aforementioned cases. The Court held that "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent."[266]

In two dissenting opinions, Justices Kennedy[267] and Alito[268] expressed their discontent with the road being paved by the rulings since *Apprendi*. Kennedy believed that the jury should be responsible for finding facts related to the offense committed, while leaving judicial discretion intact with respect to facts related to the offender.[269] The majority countered this dissent by pointing out that the rule in *Apprendi* did not allow for a distinction between types of facts, but applied to "[a]ny fact that increases the penalty for a crime."[270]

262. *Id.*

263. Blathnaid Healy, *Cunningham, John v. California*, MEDILL—ON THE DOCKET, http://docket.medill.northwestern.edu/archives/003379.php.

264. *See Cunningham*, 127 S. Ct. at 861 (citing People v. Black, 113 P.3d 534, 545 (Cal. 2005) (wherein the court held that the "jury's verdict of guilty . . . authorizes the judge to sentence a defendant to any of the three terms specified by statute . . . as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules." In addition, "the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis.")), *vacated by* 127 S. Ct. 1210 (2007) (vacated by the Court's holding in *Cunningham*).

265. *Id.*

266. *Id.* at 871.

267. Joined by Justice Breyer.

268. Joined by Justice Kennedy and Justice Breyer.

269. *Cunningham*, 127 S. Ct. at 872 (Kennedy, J., dissenting) ("The Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not.").

270. *Id.* at 869 n.14 (citing *Apprendi*, 530 U.S. at 490) (emphasis omitted).

In *Rita v. United States*[271] the Court held that federal appellate courts may "presume that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence."[272] The Court reasoned that if a federal district court applies a sentence that coincides with a sentence recommended by the Sentencing Commission for the particular crime and circumstances, then the appellate court can presume that the sentence is a reasonable one.[273] Furthermore, "the presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task."[274]

The inmate in *Rita* argued that the sentence imposed by the judge for the Western District of North Carolina was longer than necessary and unreasonable since it failed to take into consideration his "special circumstances: health, fear of retaliation in prison, and military record."[275] However, the Court found that the sentencing judge did take these circumstances into consideration, yet determined that "these circumstances [were] insufficient to warrant a sentence lower than the Guidelines range of 33 to 45 months."[276] The Court noted that the sentencing judge must provide sufficient cause for imposing the stated sentence, indicating the reasonableness of his decision-making and that he considered all of the factors presented by the parties.[277] The *Rita* Court determined that the sentencing judge had indeed met this requirement since, although his opinion was brief, the record substantiated the judge's awareness and understanding of the factors presented by the defense.[278]

271. 127 S. Ct. 2456 (2007) (8–1 decision) (Note that although the opinion is a majority opinion, Justices Scalia and Thomas joined only as to Part III. Justice Scalia wrote an opinion concurring in part and concurring in judgment, in which Justice Thomas joined. Another concurring opinion was written by Justice Stevens in which Justice Ginsberg joined as to all but Part II. A dissenting opinion was written by Justice Souter.).

272. *Id.* at 2459.

273. *Id.* at 2463 ("[T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.").

274. *Id.*

275. *Id.* at 2469.

276. *Rita*, 127 S. Ct. at 2469.

277. *Id.* at 2456 ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.").

278. *Id.* ("[T]he sentencing judge's statement of reasons was brief but legally sufficient. . . .The record makes clear that the sentencing judge listened to each argument.

When the Fourth Circuit applied a presumption of reasonableness to the imposed sentence, which fell within, albeit at the minimum of, the Sentencing Guidelines, the Fourth Circuit was "legally correct in holding that Rita's sentence . . . was not 'unreasonable' . . . [and] the Court of Appeals' conclusion was lawful."[279]

VII. Civil Rights

A. *Education*

The cases decided this term on education issues were representative of the term in both its shift right and the closely divided nature of the Court's decision-making. Four of the five cases were decided by narrow 5–4 splits including *Morse v. Frederick*,[280] the combined cases of *Parents Involved in Community Schools v. Seattle School District No. 1*[281] and *Meredith v. Jefferson County Board of Education*, forbidding school districts from using race to maintain integration; and *Zuni Public School District No. 89 v. Department of Education*,[282] allowing consideration of school district populations in determining expenditures. The fifth case, a 7–2 decision in *Winkelman v. Parma City School District*,[283] granted the parents of disabled children the right to bring suit under the Individuals with Disabilities Education Act.

1. STUDENT SPEECH

In *Morse v. Frederick*,[284] the "BONG HiTS 4 JESUS case," the Court held 5–4 that the First Amendment rights of students are not violated when school officials restrict speech at a public place during a public event that was held during normal school hours, when the speech arguably encourages illegal drug use.[285] Because of the "special characteristics of the school environment"[286] and the school's "compelling interest"

The judge considered the supporting evidence."); *see also id.* ("Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively.").

279. *Id.* at 2470.

280. 127 S. Ct. 2618 (2007).

281. 127 S. Ct. 2738 (2007) (heard together with Meredith v. Jefferson County Bd. of Educ.).

282. 127 S. Ct. 1534 (2007).

283. 127 S. Ct. 1994 (2007).

284. 127 S. Ct. 2618 (2007).

285. *Id.* at 2625.

286. *Id.* (citing Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that a policy prohibiting high school students from wearing antiwar armbands violated the First Amendment)).

in "deterring drug use by schoolchildren,"[287] a principal may prevent students from expressing views that could be reasonably interpreted as promoting "smok[ing] marijuana" or "celebrating illegal drug use"[288] even when the speech occurs off-school grounds.

Juneau-Douglass High School (JDHS) students were allowed to gather off campus (on a public street across from the school) during normal school hours to watch the Olympic Torch Relay pass through Juneau, Alaska, on January 24, 2002, headed for the site of the games in Salt Lake City, Utah.[289] Senior Joseph Frederick and his friends displayed a 14-foot banner containing the message "BONG HiTS 4 JESUS" as a "meaningless" ploy, according to Frederick, to attract television cameras.[290] Principal Morse, upon seeing the banner, demanded the students take it down and, when Frederick refused, confiscated the banner. Frederick was suspended for eight days after the superintendent upheld, but reduced, a ten-day suspension.[291]

Frederick sued in the United States District Court for the District of Alaska claiming that the school had violated his First Amendment rights. The trial court granted summary judgment for the school board finding it "entitled to qualified immunity."[292] The principal, the trial court held, had "reasonably interpreted the banner as promoting illegal drug use . . . [which] directly contravened the Board's policies."[293] Reversing, the United States Court of Appeals for the Ninth Circuit stated the banner "expressed a positive sentiment about marijuana use" but held the student's rights had been violated because, focusing on the *Tinker* language, the school did not demonstrate that his speech created a "risk of substantial disruption."[294] The Supreme Court reversed the Ninth Circuit in an opinion that focused on the content of the message—the encouragement of drug use in contravention of school policies and the fact that the speech took place at an event that was school-sanctioned.[295]

287. *Id.* at 2628 (citing Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995) (holding that the Student Athlete Drug Policy, which authorizes random urinalysis drug testing of students who participate in its athletics programs, does not violate the Fourth and Fourteenth Amendments)).

288. *Morse*, 127 S. Ct. at 2625.

289. *Id.* at 2622.

290. *Id.* at 2622, 2624.

291. *Id.* at 2623.

292. *Morse*, 127 S. Ct. at 2623.

293. *Id.* (internal quotations omitted).

294. Frederick v. Morse, 439 F.3d 1114, 1121 (2006); *see* Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 513 (1969) (stating that school officials cannot suppress student expression unless they reasonably conclude it will "materially and substantially disrupt the work and discipline of the school").

295. *Morse*, 127 S. Ct. at 2622.

Because the event occurred "during normal school hours" and "[t]eachers and administrators . . . were charged with supervising" students, the Court held the banner was considered "school speech."[296] Furthermore, the Court found the banner was directed "toward the school, making it plainly visible to most students," and the principal's "pro-drug interpretation" was plausible.[297]

Although the Court has held that children do not "shed their constitutional rights . . . at the schoolhouse gate,"[298] the Court has also recognized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[299] Justice Kennedy joined Justice Alito's concurring opinion emphasizing "the narrowness of the court's holding," limiting only "speech advocating drug use," not any "speech that interfered with a school's 'educational mission.'"[300]

The dissenting block of four Justices said the majority opinion "distorted the First Amendment . . . permitting the censorship of any student speech that mentions drugs."[301] Punishing students for "flying a 'Wine Sips 4 Jesus' banner," as Justice Stevens pondered, is a possibility in the future with this outcome.[302]

2. THE USE OF RACE IN ASSIGNING STUDENTS TO SCHOOLS

In another 5–4 decision, this one involving two cases combined for decision, the Court held that race cannot be used as a factor in student assignment to a particular school even if the goal is to achieve integration in public schools. *Parents Involved in Community Schools v. Seattle School District No. 1*[303] and *Meredith v. Jefferson County Board of Education*[304] involved attempts by two school districts to achieve racial balance in their schools. The student assignment plans were tied to the proportional, geographical distribution of "white/nonwhite" students in Seattle and "black/other" students in Louisville.[305]

296. *Id.* at 2624.
297. *Id.* at 2624–26.
298. *Id.* at 2622 (quoting *Tinker*, 393 U.S. at 506).
299. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).
300. Linda Greenhouse, *Vote Against Banner Shows Divide on Speech in Schools*, N.Y. TIMES, June 26, 2007, at A18.
301. Linda Greenhouse, *Court Hears Whether a Drug Statement Is Protected Free Speech for Students*, N.Y. TIMES, March 20, 2007, at A16.
302. *Id.*
303. 127 S. Ct. 2738 (2007) (heard together with Meredith v. Jefferson County Bd. of Educ.).
304. *Id.*
305. *Id.* at 2755.

In Seattle, race was used as a "tiebreaker" in resolving a case in which high school a student could enroll if the school district was "integration positive," meaning too many white or nonwhite students listed the school as their first choice which would have otherwise resulted in the district's overall white/non-white ratio not being "within ten percentage points" of the prescribed 41/59 ratio.[306] Five schools in Seattle were "oversubscribed" with "eighty-two percent of incoming ninth graders rank[ing] one of these schools as their first choice."[307] Three of the schools had enrollments exceeding fifty-one percent white students, making them "integration positive."[308] A student's race was considered after considering where students' siblings were enrolled, but before "geographical proximity" to the school was taken into account.[309]

Louisville had a similar student assignment plan called a "managed choice" plan in which race was sometimes considered as a factor in order to maintain black student enrollment between fifteen and fifty percent at each district school.[310] Parents could list a first and second choice of school in their geographic "cluster," and students were assigned following the "racial guidelines."[311] Parents could also apply for a transfer, but that could be denied based on the racial guidelines as well.[312] In *Meredith*, a white elementary student sued after being denied transfer to his chosen kindergarten class because his current class "needed to keep its white students to stay within the program's racial guidelines."[313]

Both federal courts of appeals upheld the student assignment plans finding that allocating children to different public schools on the basis of race did not violate the Fourteenth Amendment guarantee of equal protection because the states had a compelling interest in achieving racial diversity, and the plans were narrowly tailored to achieve this goal.[314]

306. *Id.* at 2747.
307. *Id.*
308. *Parents Involved*, 127 S. Ct. at 2747–48.
309. *Id.* at 2747.
310. McFarland v. Jefferson County Public Schs., 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004); *see also* Neal Conan, *Supreme Court Rules on Race in the Classroom*, NPR: TALK OF THE NATION, KCUR 89.3, June 28, 2007, *available at* http://www.npr.org/templates/story/story.php?storyId=11515776.
311. *Parents Involved*, 127 S. Ct. at 2749–50.
312. *Id.*
313. Linda Greenhouse, *Justices, Voting 5–4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 29, 2007, at A1.
314. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005); *see also* McFarland *ex rel.* McFarland, 416 F.3d 513 (6th Cir. 2005) (per curiam).

The Supreme Court reversed both the Ninth and the Sixth Circuits holding that race may not be decisive to school assignment as it was in these two school districts. Where "race is not considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints,' [but rather] . . . when race comes into play [for assignment to a school], it is decisive by itself . . . not simply one factor weighed with others in reaching a decision."[315] The Court found there was "no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts."[316] Thus, the Court held that "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[317]

Both the majority and the dissent relied on *Brown v. Board of Education*[318] to support their opinions. Chief Justice Roberts, writing for the five member majority, used the "color-blind" reading of *Brown* to conclude that race should never be determinative of where children go to school.[319] Objecting to the majority's opinion as "rewrite[ing] the history" of *Brown*, the dissent opined that "*Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality" is undermined by this decision.[320] The dissent predicted the majority decision "would strip local communities of the tools they need . . . to prevent resegregation of their public schools."[321]

Filing a separate opinion was Justice Kennedy, who concurred in the judgment, but believed race may be used as a factor in limited circumstances to achieve diversity.[322] He focused on the "compelling interest" of the state and proposed a test to determine whether a program was

315. *Parents Involved*, 127 S. Ct. at 2753 (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).

316. *Id.*

317. *Id.* at 2758.

318. 347 U.S. 483 (1954) (holding that "segregation of children in public schools solely on the basis of race . . . deprives the children of the minority group of equal educational opportunities," in violation of the Equal Protection Clause of the Fourteenth Amendment).

319. *Parents Involved*, 127 S. Ct. at 2787, 2833; *see* Plessy v. Ferguson, 163 U.S. 537, 539 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

320. *Parents Involved*, 127 S. Ct. at 2800 (Breyer, J., dissenting).

321. Greenhouse, *supra* note 313.

322. *See Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in judgment).

unconstitutional.[323] If the measure was "facially race neutral," though "race conscious," it would be allowed.[324] If it was an overtly racial measure, it would be prohibited, because a "crude system of individual racial classifications is quite a different matter."[325]

3. SCHOOL FUNDING

In *Zuni Public School District No. 89 v. Department of Education*,[326] the Court evaluated the calculation method used by a state to determine whether the state's school funding program "equalize[d] expenditures" when allocating state funds in relation to federal funds to the local school districts.[327] In a 5–4 decision, the Court held that the Secretary of the Department of Education (DOE) may calculate district spending using the *number of pupils* in a district, not just the number of districts and their expenditures per pupil.[328]

Under the Federal Impact Aid Act,[329] a state program is considered one that "equalizes expenditures" if the highest amount of money spent in any district does not exceed the lowest amount spent in any other district by twenty-five percent or more.[330] The Department of Education determined that the New Mexico program qualified as an "equalizer" using a ranking of districts based on "per-pupil expenditures" which was then weighted by number of pupils in each district.[331] The Zuni school district challenged that determination arguing that the Act requires that the percentiles must be arrived at by "the number of school districts" alone, "without any consideration of the number of pupils in those districts."[332]

Using the Federal Impact Aid Act's statutory history and purpose, the Court determined that the Secretary's formula was reasonable and

323. *Id.* at 2789, 2792.
324. *Id.* at 2792 (internal citations omitted).
325. *Id.*
326. 127 S. Ct. 1534 (2007).
327. *See id.* at 1538 (quoting Federal Impact Aid Act, 20 U.S.C. § 7709(b)(1) (2000), which allows state programs to subtract federal monies received if the program qualifies as one that "equalizes expenditures").
328. *Id.*
329. 20 U.S.C. § 7709(b) (2000).
330. *Zuni Public Sch. Dist.*, 127 S. Ct. at 1538; *see also* Federal Impact Aid Act, 20 U.S.C. § 7709(b)(2)(A). A highly technical formula is used by the Secretary to figure the disparity in spending among local school districts to determine if the program is one that "equalizes expenditures." Essentially, the top five percent of districts in terms of spending are thrown out, as well as the bottom five percent, to eliminate "outliers." The remaining ninety percent are then ranked and compared.
331. *Id.* at 1540.
332. *Id.*

carried out the intent of Congress.[333] DOE regulations set forth the method of calculation in 1976 and "no [m]ember of Congress has ever criticized the method."[334] Justices Kennedy and Alito in the majority stressed the importance of adherence to "an administrative agency's interpretation of a statute" when a statute is ambiguous.[335] Statutory language and context further substantiated the Court's opinion declaring the method reasonable because it is evident its purpose is to exclude statistical outliers.[336] In considering the language of the statute, the Court found that "the instruction to identify school districts with 'per-pupil expenditures' above the 95th percentile [and below the 5th percentile] 'of such expenditures' is . . . ambiguous, because both students and school districts are of concern to the statute."[337] Thus, the Court determined that the "instruction can include within its scope the distribution of a ranked population that consists of pupils (or of school districts weighted by pupils) and not just a ranked distribution of unweighted school districts alone.[338] Furthermore, in consulting *Black's Law Dictionary*, the majority explained "per" means "[f]or each" or "for every," so the Secretary may look at "*each* individual pupil" when analyzing total district expenditures.[339]

The dissent argued "per" "connotes . . . a single average figure assigned to a unit . . ." and therefore, only the amount for each district may be analyzed.[340] Had the Secretary done so, New Mexico's program would not have been equalized because only 10 districts would have been eliminated, representing 1.8 percent of the students, and the formula would have resulted in a non-equalized distribution of funds.[341] The dissenters[342] would have held that the Secretary did not use the formula properly because "per-pupil expenditure or revenue is an average number" already based on a total number of students in a district.[343]

333. *Id.* at 1541, 1543.
334. *Zuni Public Sch. Dist.*, 127 S. Ct. at 1541. The method is set forth in Methods of Calculations for Treatment of Impact Aid Payments Under State Equilization Programs, 34 C.F.R. pt. 222, subpt. K, app. 1 (2006), listed in the Appendixes to the Opinion of the Court; and described in Part I-B in the Opinion.
335. *Id.* at 1550–51 (Kennedy, J., concurring) (citing Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984)).
336. *Id.*
337. *Id.* at 1546.
338. *Id.*
339. *Id.* at 1545.
340. *Id.* at 1554 (Scalia, J., dissenting).
341. *Zuni Public Sch. Dist.*, 127 S. Ct. at 1540.
342. Justices Scalia, Roberts, Thomas, and Souter.
343. *Zuni Public Sch. Dist.*, 127 S. Ct. at 1555.

4. STUDENTS WITH DISABILITIES

In a 7–2 decision, the Court held in *Winkelman v. Parma City School District*[344] that parents of children with disabilities can go to court without a lawyer to enforce their parental rights to ensure their child has access to a "free and appropriate public education."[345] The Court held that the Individuals with Disabilities Education Act (IDEA) "grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child."[346]

The parents of a nine-year-old boy with autism, Jacob Winkelman, were dissatisfied with their son's individualized educational program (IEP) in the Parma City School District.[347] The parents claimed placing their son at the public elementary school was inadequate and did not provide him with a "free appropriate public education."[348] IDEA defines "free appropriate public education" (FAPE) as requiring the placement of a student under "educational instruction 'specially designed . . . to meet the unique needs of a child with a disability,' . . . coupled with any additional 'related services' that are 'required to assist a child with a disability to benefit from [that instruction].'"[349] When the parents were unable to reach an agreement with the school district on a suitable IEP, they placed their son in a private school and, under the provisions of IDEA, sought reimbursement for the expenses of this private education.[350]

When the administrative proceedings failed to satisfy the parents, the parents filed suit in federal district court.[351] After the district court ruled in favor of the school district, the parents appealed to the Sixth Circuit, but the appellate court dismissed the case, finding the parents did not have the legal right to bring a suit pro se on behalf of their son.[352]

The Court determined that IDEA "guarantees rights not only to children, but also to their parents . . . [and the parents] are representing their own interests, as everyone is entitled to do in any federal court case, and are not acting as the unauthorized lawyers for someone else."[353] The

344. 127 S. Ct. 1994 (2007).
345. *Id.* at 1998 (citing Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A)).
346. *Id.* at 2005.
347. *Id.* at 1998.
348. *Id.*
349. *Winkelman*, 127 S. Ct. at 2005 (citing IDEA §§ 1401(29), 1401(26)(A)).
350. *Id.* at 1998.
351. *Id.* at 1999.
352. *Id.*
353. Linda Greenhouse, *Legal Victory for Families of Disabled Students*, N.Y. TIMES, May 22, 2007, at A14.

Court declared that parents have an interest in the "substantive adequacy" of the child's education affording them this right as a "real party in interest."[354] Parents are aggrieved parties with respect to their child's IEP "not simply . . . representatives of their children."[355] Recognizing that IDEA clearly contains provisions granting parental rights to bring *procedural* and reimbursement-related actions under the statute, such as for private school expenses or attorney's fees,[356] parents now also have a right to bring *substantive* actions.[357]

Concurring in the judgment, Justices Scalia and Thomas agreed that parents can proceed *pro se* when they seek reimbursement for private school expenses, but filed a dissenting opinion concluding that IDEA did not provide parents rights to seek substantive determination of their child's FAPE.[358] The dissent would have found that the "substantive right . . . belongs not to the parent but to the child," making a distinction between a statutory "right" to a proper education and an "interest" in the child's education.[359]

B. *Employment*

If the Supreme Court's theme this term was the closing of the courthouse door,[360] this theme was especially pronounced in the area of employment law. Three of the five cases decided this term limited employee access to the courts. In *Long Island Care at Home, Ltd. v. Coke*,[361] the Court restricted domestic employees' ability to sue for minimum and overtime wages. The employee, furthermore, has a limited amount of time to bring a discrimination claim, the Court held in *Ledbetter v. Goodyear Tire & Rubber Corp.*[362] In *Rockwell International Corp. v. United States*,[363] the Court declared an employee must be an

354. *Winkelman*, 127 S. Ct. at 2004, 1999.

355. Linda Greenhouse, *Justices Hear Arguments on Autism-Case Dispute*, N.Y. TIMES, February 28, 2007, at A12.

356. *Winkelman*, 127 S. Ct. at 2005, 2001 (emphasis added); *see, e.g.*, IDEA § 1412(a)(10)(C)(ii).

357. *Id.* at 2004 (emphasis added).

358. *Id.* at 2007 (Scalia, J., concurring in judgment, dissenting in part).

359. Greenhouse, *supra* note 353.

360. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

361. 127 S. Ct. 2339 (2007).

362. 127 S. Ct. 2162 (2007).

363. 127 S. Ct. 1397 (2007) (In a 6–2 decision, the Court held that a party must disclose "direct and independent knowledge of the information on which the allegations are based" in order to be an "original-source" with standing to sue under the False Claims Act (FCA). The Court declared that the district court lacked jurisdiction to enter judgment because the former Rockwell engineer party claiming a violation of the statute was not an "original source.").

"original source" to bring a lawsuit under the False Claims Act against his employer.[364] Relying on the interpretation of congressional intent in *Osborn v. Haley*,[365] the Court held that when a federal employee is sued for tortious conduct, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act) mandates federal jurisdiction over the case when the Attorney General certifies that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose."[366]

The Justices stated that employers and employees are subject to the same negligence causation standard in *Norfolk Southern Railway Co. v. Sorrell*,[367] while in *Beck v. PACE International Union*,[368] the Court ruled that employers are not required to consider a merger in pension plan termination. All in all, employers were certainly favored this year.

1. FAIR LABOR STANDARDS ACT (FLSA)

In a unanimous decision, the Court held in *Long Island Care at Home v. Coke*[369] that the Department of Labor (DOL) correctly interpreted the Fair Labor Standards Act (FLSA) exemption as applying to individuals who perform "domestic services," including "companionship services," even when they are employed by a party other than the individual for whom they provide the services. The FLSA exempts individuals hired to perform "domestic services" from the otherwise required "minimum wage" and "maximum hours" rules defined in the statute.[370] The DOL

364. *Id.*

365. 127 S. Ct. 881 (2007). In this case, Osborn sued Haley claiming Haley tortiously interfered with Osborn's employment. Osborn alleged that Haley communicated with Osborn's manager in such a way as to encourage the manager to terminate Osborn's employment. Haley denied having any such conversation and the manager corroborated Haley's statement.

366. *Id.* at 887–88 (quoting the Westfall Act, 28 U.S.C. § 2679(d)(1), (2)). The Court stated:

> The Westfall Act grants a federal employee suit immunity, we reiterate, when "acting within the scope of his office or employment at the time of the incident out of which the claim arose." . . . That formulation, we are persuaded, encompasses an employee on duty at the time and place of an "incident" alleged in a complaint who denies that the incident occurred. . . . Were it otherwise, a federal employee would be stripped of suit immunity not by what the court finds, but by what the complaint alleges.

Id. at 897–98 (internal citations omitted).

367. 127 S. Ct. 799 (2007).

368. 127 S. Ct. 2310 (2007).

369. 127 S. Ct. 2339 (2007).

370. *Id.* at 2344; *see also* Fair Labor Standards Act of 1938, 29 U.S.C.S. § 213(a)(15) (stating that section 206 minimum wage and section 207 maximum hours provisions shall not apply to "any employee employed on a casual basis in domestic service employment . . . to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor])").

issued regulations interpreting this provision as applicable to employees hired directly to care for an individual, as well as "'companionship' workers who 'are employed by an employer or agency other than the family or household using their services.'"[371] All nine Justices agreed that the Department of Labor's (DOL) regulation interpreting the statute as such is binding[372] and that "courts should defer to the Department's rule."[373]

Evelyn Coke provided in-home "companionship services" to the elderly and infirm as an employee of Long Island Care at Home, Ltd.[374] Since Coke was hired by the Long Island Care agency, rather than the individuals themselves, she argued that the FLSA entitled her to collect minimum wages and overtime wages from her employer.[375] The issue before the Court was whether "the statutory exemption for 'companionship services' [applies] to companionship workers paid by third-party agencies such as Long Island Care."[376]

The Court granted *Chevron* deference to the DOL because administrative agencies like the DOL have the power to "fill any gap[s]" in policy left by Congress with its own regulations.[377] The Department did just that when ambiguity existed regarding the FLSA's meaning of "domestic service employment" and "companionship services."[378] It said the former includes those who work in the "private home of the person by whom he or she is employed."[379] The latter are those who are "employed by an employer or agency other than the family or household using their services."[380] The Court concluded that the DOL's "interpretation of the two regulations falls well within the principle that an agency's interpretation of its own regulations is 'controlling' unless 'plainly erroneous or inconsistent with' the regulations being interpreted."[381]

2. TITLE VII

The Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.* limited employees' ability to sue for "discrimination in pay."[382] The Court held

371. *Id.* (quoting 29 C.F.R. § 552.109(a) (2006)).
372. *Id.* at 2344.
373. *Id.* at 2351.
374. *Long Island Care*, 127 S. Ct. at 2345.
375. *Id.*
376. *Id.*
377. *Id.* at 2345–46. *See also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
378. *Id.* at 2346 (quoting 29 U.S.C.S. § 213(a)(15)).
379. *Long Island Care*, 127 S. Ct. at 2347 (citing 29 C.F.R. § 552.3).
380. *Id.* at 2348 (citing 29 C.F.R. § 552.109(a)).
381. *Id.* at 2349 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).
382. 127 S. Ct. 2162 (2007); *see also* Linda Greenhouse, *Justices' Ruling Limits Lawsuits on Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1.

5–4 that employees must bring their complaint within 180 days of the alleged discriminatory employment decision, not within receipt of the pay.[383] The Court determined that a "pay-setting decision is a 'discrete act'" initiating the time period, and each paycheck issued does not restart the period.[384]

Lilly Ledbetter was employed by Goodyear Tire and Rubber Company (Goodyear) from 1979 until 1998, during which time salaried employees were evaluated by their supervisors who determined whether a raise in salary was granted or denied.[385] Ledbetter alleged, under a Title VII claim of sex discrimination in an Equal Employment Opportunity Commission (EEOC) questionnaire, that "several supervisors had given her poor evaluations because of her sex," and "that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly."[386] In fact, "[t]oward the end of her time with Goodyear, [Ledbetter] was being paid significantly less than any of her male colleagues."[387] A jury was convinced that discrimination had occurred and awarded Ledbetter backpay and damages.[388]

Goodyear challenged the verdict, claiming Ledbetter's suit "was time barred with respect to all pay decisions made prior to September 26, 1997—that is, 180 days before the filing of her EEOC questionnaire," which would preclude all discriminatory acts occurring before that date, and Goodyear maintained that no discriminatory acts occurred after that date.[389] The Court looked to Title VII of the Civil Rights Act of 1964, which states that the 180-day time frame to file a complaint with the EEOC begins when "the alleged unlawful employment practice occurred."[390] The Court did not consider paychecks received after the 180-day charging period started to be discriminatory acts, but rather the decisions impacting the amount paid, even if these were discriminatory, occurred prior to the charging period. The Court also dismissed Ledbetter's claim that "the 1998 decision denying her a raise . . . was 'unlawful because it carried forward intentionally discriminatory disparities from prior years.'"[391] The Court concluded that the "EEOC

383. *Id.* at 2165–66.
384. *Id.* at 2165 (citing National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).
385. *Id.* at 2165.
386. *Id.* at 2166.
387. *Id.*
388. *Ledbetter,* 127 S. Ct. at 2166.
389. *Id.*
390. *Id.* (quoting Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1)).
391. *Id.* at 2167 (quoting Reply Brief for Petitioner 20).

charging period is triggered when a discrete unlawful practice takes place" and that "a new charging period does not commence upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[392] Thus, the Court held "that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the [180-day] period prescribed by statute."[393]

Justice Ginsburg read her vigorous dissent from the bench arguing that the majority overlooked the basic nature of pay discrimination.[394] Pay discrimination, she stated, is like a claim for hostile work environment because it evolves from "the cumulative effect of individual acts," not a single specific act such as refusal to hire or denial of a desired transfer.[395] It is uncommon for an employee to know if he or she "had received a lower raise than others," and even if the employee did, he or she probably would "avoid 'making waves'" over the disparity initially.[396] Citing precedent, Ginsburg contended that "[p]aychecks perpetuating past discrimination ... are actionable ... because they discriminate anew each time they issue."[397]

3. FEDERAL EMPLOYER'S LIABILITY ACT (FELA)

In a unanimous opinion in *Norfolk Southern Railway Co. v. Sorrell*,[398] the Court held that the standard of causation under the Federal Employers' Liability Act (FELA) is the same for employer negligence and employee contributory negligence, leaving for another day the question of exactly what that standard is.[399]

Norfolk Southern Railway Company employee Timothy Sorrell suffered neck and back injuries while working as a trackman when his truck veered off the road and into a ditch, reportedly to avoid another oncoming truck, also driven by a Norfolk employee.[400] Sorrell alleged

392. *Id.* at 2169.
393. *Ledbetter*, 127 S. Ct. at 2177.
394. Greenhouse, *supra* note 382.
395. *Ledbetter*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting).
396. *Id.* at 2179 (Ginsburg, J., dissenting).
397. *Ledbetter*, 127 S. Ct. at 2180 (Ginsburg, J, dissenting) (citing Bazemore v. Friday, 478 U.S. 385, 395–96 (1986) (holding that an employer committed an unlawful employment practice each time it paid black employees less than similarly situated white employees)).
398. 127 S. Ct. 799 (2007).
399. *Id.* at 809. The railroad tried to "smuggle" this additional question into the case on appeal, but the Court noted its reluctance to allow parties to do so after certiorari has been granted.
400. *Id.* at 802.

in Missouri state court that the railroad was negligent under FELA for failing to provide safe working conditions.[401] Despite the railroad's contention that Sorrell's own negligence caused the accident, the jury awarded Sorrell $1.5 million in damages.[402] In its reasoning, the Court explained that it makes more sense to interpret the language as requiring equal standards for two reasons. One is that for a comparative fault system for negligence to work, one must compare "apples to apples."[403] Second, there would be no recovery at all if the employee's negligence contributed "in whole" to his injury.[404]

Justices Souter and Ginsburg wrote concurring opinions commenting on what the standard actually is by revisiting *Rogers v. Missouri Pacific Railroad Co.*,[405] which purportedly eliminated the common law proximate causation requirement in FELA actions.[406] Justice Souter explained that proximate cause is still the proper standard, but with the comparative negligence approach replacing the all-or-nothing contributory negligence rule that barred plaintiff recovery, the defendant's action does not have to be the "sole" proximate cause of the injury, but can be a "partial cause" of the injury.[407]

Justice Ginsburg agreed that "slightest" in *Rogers* sounds less exacting than "proximate," and suggested replacing the language with "legal cause" to eliminate confusion in jury instructions.[408] Even if the instructions in *Norfolk* had been as such, Justice Ginsburg said a jury would unlikely find the railroad's negligence caused Sorrell's injury, and only indirectly, if at all.[409] By using a single causation standard jurors should now have less misunderstanding when determining liability for negligence, and therefore, will be able to better decide cases based on their merits.[410]

401. *Id.*
402. *Id.*
403. *Norfolk S. Ry.*, 127 S. Ct. at 807–08. *See also* Page v. St. Louis Southwest Ry. Co., 349 F.2d 820, 823–24 (Tex. App. 1965) (explaining the use of the same causation standard for practical reasons).
404. *Id.* at 808.
405. 352 U.S. 500 (1957).
406. *Id.* at 506 (holding that proof of negligence under FELA is met if "employer negligence played any part, even the slightest," in causing the injury).
407. *Norfolk S. Ry.*, 127 S. Ct. at 810–11 (Souter, J., concurring).
408. *Id.* at 813–14 (Ginsburg, J., concurring) (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS § 42, 273 (5th ed. 1984)).
409. *Id.* at 815.
410. *Id.* at 814.

4. EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

In *Beck v. Pace International Union*,[411] the Court unanimously held that an employer who sponsors and administers a single-employer defined-benefit pension plan does not have a fiduciary duty to consider merger as a method of terminating the plan.[412] In so holding, the Court relied on a Pension Benefit Guaranty Corporation's (PBGC)[413] interpretation of section 1341(b)(3)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) to the effect that the statute only allows for the purchase of annuities or lump-sum distributions to terminate the plans.[414] Merger is merely an alternative to plan termination.[415]

PACE International Union represented Crown Paper employees, and when the employees' pension plans were subject to termination due to Crown's filing for bankruptcy, PACE proposed the idea of a merger of plans[416] rather than converting the pension plans into annuities. Although Crown "took PACE's merger offer under advisement," Crown proceeded with the conversion to an annuity in order to reap $5 million that it had overfunded the pension plans.[417] PACE alleged that Crown had not properly considered the PACE proposal and thus breached its fiduciary obligations under ERISA.[418]

The Court deferred to the "PBGC's regulations [which] impose in substance the same requirements as [ERISA]."[419] The Court gave three reasons for following PBGC's views regarding merger. First, by purchasing annuities, plan assets and employer obligations are severed from ERISA's provisions; whereas merger keeps the assets within ERISA where they can be used to satisfy the benefit liabilities of other

411. 127 S. Ct. 2310 (2007).

412. *Id.* at 2320 (quoting Comm'r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 154 (1993) ("A 'defined-benefit pension plan'. . . is one where the employee, upon retirement, is entitled to a fixed periodic payment.")).

413. The PBGC administers an insurance program to protect plan benefits. The Court has traditionally deferred to the PBGC when interpreting ERISA because it is the agency responsible for enforcing the Act. *Beck*, 127 S. Ct. at 2315, 2317. *See*, e.g., Mead Corp. v. Tilley, 490 U.S. 714, 722, 725–26 (1989).

414. *See* 29 U.S.C. § 1341(b)(3)(A) (stating "In . . . any final distribution of assets pursuant to . . . standard termination . . . , the plan administrator shall . . . (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or . . . (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan.").

415. *Beck*, 127 S. Ct. at 2317.

416. *Id.* at 2312.

417. *Id.* at 2314–15.

418. *Id.* at 2315.

419. *Id.* at 2317 (referring to 29 C.F.R. § 4041.28(c)(1)).

participants.[420] Second, ERISA authorizes employers to recoup surplus funds after termination.[421] Merger, on the other hand, would preclude employers receiving these funds because they would be transferred to the plan with which the funds would merge.[422] Last, the Court explained that merger is not mentioned anywhere in section 1341 of the Act, but rather it is dealt with in a completely different set of sections.[423]

Since merger would have "detrimental consequences for plan beneficiaries and plan sponsors alike," the Court concluded that it was reasonable for PBGC's statutory interpretation "to determine both that merger is not like the purchase of annuities in its ability to 'fully provide all benefit liabilities under the plan,' and that the statute's distinct treatment of merger and termination provides clear evidence that one is not an example of the other."[424] Therefore, the Court held that "merger is not a permissible method of terminating a single-employer defined-benefit pension plan."[425]

C. *Prisoner's Rights*

1. PRISON LITIGATION REFORM ACT

In *Jones v. Bock*,[426] which combined the cases of three inmates in Michigan prisons, a unanimous Court clarified the procedures that inmates must follow to exhaust their claims in a correctional system under the Prison Litigation Reform Act of 1995 (PLRA). The Court found that the Michigan Department of Corrections had not properly applied the PLRA in its evaluation of the inmates' complaints.

The Court provided three guidelines for jurisdictions in the procedural enforcement of the Prison Litigation Reform Act of 1995 (PLRA). The PLRA requires prisoners to exhaust all avenues for relief within the prison system prior to filing a suit.[427] The first ruling by the Court is that the failure to fulfill this requirement must be set forth as an affirmative defense by the defendants rather than demonstrated by the prisoner in his or her pleading.[428] Second, the defendants named in an inmate's suit must not be restricted to only those individuals identified by the inmate

420. *Beck*, 127 S. Ct. at 2318.
421. *Id.* at 2319.
422. *Id.*
423. *Id.; see* 29 U.S.C. §§ 1058, 1411, 1412.
424. *Beck*, 127 S. Ct. at 2318.
425. *Id.*
426. 127 S. Ct. 910 (2007) (unanimous decision).
427. *See id.* at 914 (citing 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(a)).
428. *Id.* at 921 ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.").

during the grievance process within the correctional system in order to meet the exhaustion requirement.[429] And third, if it appears that the inmate has failed to exhaust some of his claims, then a court must allow the petitioner to proceed with the exhausted claims rather than dismissing all claims.[430]

2. ARMED CAREER CRIMINAL ACT

In a 5–4 decision in *James v. United States*,[431] the Court held that Florida's attempted burglary law met the definition of a violent felony under the Armed Career Criminal Act (ACCA). Defendant James had argued that "attempted burglary" could not be considered a violent felony under the ACCA, but the Court's ruling meant that James, who already had two prior violent felony convictions, would be sentenced under the "three strikes" provision of the ACCA.

The ACCA includes a "three strikes" rule wherein a defendant charged with firearm possession faces a mandatory minimum of fifteen years in prison if the defendant has three prior convictions for violent felonies.[432] James had three prior convictions, one of which was attempted burglary and would qualify him for the fifteen year minimum sentence if "attempted burglary" were defined as a "violent felony."[433] Under this statute a crime qualifies as a "violent felony" if it is punishable for more than one year and "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[434] Thus, the issue before the Court was whether attempted burglary, as defined by Florida law, met the ACCA definition of a violent felony.[435]

Since the crime was an "attempted" crime, it did not meet the enumerated crimes in section 924(e)(2)(B)(ii) of burglary, extortion, arson, or a crime involving explosives. So the Court assessed whether the attempted burglary was includable in the residual provision of "otherwise presents a serious potential risk of physical injury to another." The

429. *Id.* at 923 ("[E]xhaustion is not per se inadequate simply because an individual later sued was not named in the grievances.").

430. *Jones*, 127 S. Ct. at 924 ("As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad."); *see also id.* ("A typical PLRA suit with multiple claims . . . may combine a wide variety of discrete complaints . . . seeking different relief on each claim. There is no reason failure to exhaust on one necessarily affects any other.").

431. 127 S. Ct. 1586 (2007) (5–4 decision).

432. *Id.* at 1590 (citing 18 U.S.C.A. § 924(e)).

433. *Id.*

434. *Id.* at 1591 (citing 18 U.S.C. § 924(e)(2)(B)(ii)).

435. *Id.* at 1590. ("The question before us is whether attempted burglary, as defined by Florida law, is a 'violent felony' under ACCA.").

Court majority based its logic on the premise that if an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of the residual provision of section 924(e)(2)(B)(ii).[436]

The Court analyzed the Florida law for its applicability to the residual provision by (1) looking to the wording of the Florida statutes; (2) considering how the statute has been interpreted in Florida courts; and (3) determining whether the elements of the crime rise to the level of a "violent felony" as defined by the ACCA. This categorical approach allowed the Court to establish a process by which the elements of the crime should be assessed rather than focusing on the specific facts of a particular criminal act.[437]

The Court noted that Florida's attempt statute was fairly broad, requiring "only that a defendant take 'any act toward the commission' of burglary."[438] However, the judicial interpretation by Florida's courts narrowed the definition of attempted burglary to require "an 'overt act directed toward entering or remaining in a structure or conveyance.'"[439] Having looked at the language of the statute and the judicial interpretation of the statute, the Court then evaluated whether the elements of an attempted burglary could rise to the level of a violent felony under the ACCA. The Court concluded that attempted burglary indeed rises to the level of a violent crime not simply from overtly attempting to enter the premises, "but [also] from the possibility that an innocent person might appear while the crime is in progress." This possibility "creates a risk [for the victim] of violent confrontation comparable to that posed by finding [the burglar] inside the structure itself" and this possibility creates the requisite risk required by the ACCA.[440] Thus, the Court held that attempted burglary, as defined by Florida law, met the ACCA definition of a violent felony and upheld the mandatory minimum ACCA sentence for James.

As the dissent points out, the Court majority's analysis and holding may only provide guidance for lower courts if the crime being assessed is an attempted crime, and if the state in which the crime is committed

436. *See James*, 127 S. Ct. at 1597.

437. *Id.* at 1594 ("[W]e consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.") (emphasis in original).

438. *Id.*

439. *Id.* at 1594 (citing Jones v. State, 608 So. 2d 797, 799 (Fla. 1992)).

440. *Id.* at 1594–95. The Court also observed that in jurisdictions with a statutory definition of attempted burglary similar to Florida's, the appellate courts have "held that [attempted burglary] qualifies as a 'violent felony' under [the] residual provision" of § 924(e)(2)(B)(ii). *Id.*

statutorily defines an "attempt" as one which "presents a serious potential risk of injury to another," and if the crime requires a sentence of more than one year.[441] The majority recognizes the dissent's attempt to provide a more in-depth assessment of the level of risk that must be present to meet the ACCA definition, but the Court reiterates that the issue at hand in the *James* case was "the comparative risks presented by burglary and attempted burglary."[442] The Court concluded that "[t]he risk of physical injury in both cases occurs when there is a confrontation between the criminal and another person."[443] Thus, the Florida law for attempted burglary qualifies as a "violent felony" under the ACCA residual clause.[444]

VIII. Death Penalty

In the death penalty cases decided by the Court this term, the votes of eight of the nine justices were evenly divided and consistent: Chief Justice Roberts, Justices Alito, Scalia, and Thomas all voted in favor of upholding or reinstating the death penalty,[445] while Justices Breyer, Ginsberg, Souter, and Stevens all voted to reverse and/or remand the death sentences.[446] All of the death penalty cases were decided by a 5–4 vote, with the deciding vote in each case cast by Justice Kennedy. One case related solely to procedure was decided per curiam.[447]

The Court considered most of these cases under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[448] Part of this statute identifies the conditions that must be met for a state prisoner to seek habeas relief in the federal courts, including a one-year statute of limitations for seeking relief from a state action.[449] Furthermore, if the

441. *James*, 127 S. Ct. at 1601 (Scalia, J., dissenting) (stating that the majority opinion "fails to . . . provide guidance concrete enough to ensure that the ACCA residual provision will be applied with an acceptable degree of consistency by the hundreds of district judges that impose sentences every day.").

442. *Id.* at 1599.

443. *Id.*

444. *Id.*

445. These four Justices were in the majority in *Ayers v. Belmontes*, 127 S. Ct. 469 (2006), *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007), and *Lawrence v. Florida*, 127 S. Ct. 1079 (2007).

446. These four Justices were in the majority in *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (combined opinion with Brewer v. Quarterman, 127 S. Ct. 1706 (2007)), *Smith v. Texas*, 127 S. Ct. 1686 (2007), and *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

447. *See* Burton v. Stewart, 127 S. Ct. 793 (2007) (per curiam).

448. 110 Stat. 1214 (1996). AEDPA did not apply in *Smith* as the Court was ruling on a case that had been previously remanded and was back in front of the Court, and AEDPA did not apply in *Ayers* because the petition for habeas corpus was filed prior to the enactment of AEDPA.

449. 110 Stat. 1214, 1217; *see also* 28 U.S.C. § 2244(d)(1).

petitioner has already filed one motion for habeas relief, he cannot then file a "second or successive" petition without first getting a court order from the federal appellate court granting the district court jurisdiction to hear the "second or successive" claim.[450]

The Court evaluated whether these procedural requirements were met in three cases before it this term. In *Panetti v. Quarterman*,[451] the Court held that Panetti's second petition for habeas relief did not qualify as a "second or successive" petition under AEDPA,[452] allowing the Court to rule on the merits of the case regarding mental competence. In *Burton v. Stewart*,[453] the Court further delineated the circumstances under which a state prisoner must file for a "second or successive" petition for habeas relief in the federal courts, and in *Lawrence v. Florida*,[454] the Court ruled that the statute of limitations had expired under AEDPA.

If a petitioner's application is found by the Court to meet the procedural requirements of AEDPA, then the Court must determine if the state's ruling "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States."[455] In the combined opinion in *Abdul-Kabir v. Quarterman*[456] and *Brewer v. Quarterman*[457] the Court found the then-applicable "special issues" instructions given by Texas trial courts to juries in capital cases were "contrary to" the "clearly established" precedent and thus, unconstitutional. The Court also found these Texas jury instructions to be unconstitutional in *Smith v. Texas*[458] even when the judge gave an additional "nullification" instruction intended to address the Court's concern. The Texas courts were under fire again in *Panetti* because the courts failed to follow the procedures set forth in prior Court rulings for properly addressing a mental incompetency claim that would bar execution. All of these Texas death-penalty cases were reversed or remanded, thereby barring execution.[459]

450. 110 Stat. 1214, 1220; *see also* 28 U.S.C. § 2244(b)(3)(A).
451. 127 S. Ct. 2842 (2007).
452. *See generally id.* (wherein the Court held Panetti's claim of mental incompetence which would forego execution was filed when the claim was first ripe). *But see* Burton v. Stewart, 127 S. Ct. 793 (2007) (per curiam) (wherein the Court held the second petition to be a "second or successive" filing under AEDPA when the second petition was for claims that were unexhausted under his first filing).
453. 127 S. Ct. 793 (2007) (per curiam).
454. 127 S. Ct. 1079 (2007).
455. 110 Stat. 1214, 1219(d)(1); *see also* 28 U.S.C. § 2254(d)(1).
456. 127 S. Ct. 1654 (2007).
457. 127 S. Ct. 1706 (2007).
458. 127 S. Ct. 1686 (2007).
459. The *Brewer* case was reversed, but *Abdul-Kabir*, *Smith*, and *Panetti* were remanded for further adjudication in light of the Court's ruling. None of these cases had subsequent appellate history as of August 11, 2007.

Jury instructions in a California case were also evaluated by the Court in *Ayers v. Belmontes*.[460] The Court found these instructions were not unconstitutional and reinstated the death sentence. Also with respect to sentencing, in *Schriro v. Landrigan*,[461] the Court found the State of Arizona had not made an unreasonable application of federal law when it refused to grant an evidentiary hearing and reinstated that death sentence as well. As mentioned above, the Court found in *Lawrence* that the statute of limitations had expired under AEDPA, thus upholding the death sentence in the Florida case.

A. *Mental Incompetence*

In *Panetti v. Quarterman*,[462] the Court set out to determine if Scott Louis Panetti was mentally competent to be executed. Panetti, representing himself, "tried to issue subpoenas to Jesus, the pope and John F. Kennedy"[463] during his trial for murdering his father- and mother-in-law and thought his pending "execution was part of a conspiracy by which the state was trying to prevent him from preaching the Gospel"[464] The Fifth Circuit found Panetti competent to face execution because he was "aware that he committed the murders; . . . aware that he will be executed; and, . . . aware that the reason the State has given for the execution is his commission of the crimes in question."[465] But in a 5–4 decision, the Court majority ruled that an individual must not only be "aware" of the pending execution, but must also have a "rational understanding" of why he or she is to be executed.[466] The Court ruled that the Fifth Circuit's interpretation of the law was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment."[467]

B. *AEDPA—Procedural Requirements*

1. AEDPA—SECOND OR SUCCESSIVE FILING

In *Burton v. Stewart*,[468] the Court further delineated the circumstances under which a state prisoner must file for a "second or successive" petition for habeas relief in the federal courts. The Court held that when

460. 127 S. Ct. 469 (2006).
461. 127 S. Ct. 1933 (2007).
462. 127 S. Ct. 2842 (2007).
463. Linda Greenhouse, *Justices to Consider Impact of Mental Illness on Death Penalty*, N.Y. TIMES, Jan. 6, 2007, at A1.
464. *Id.*
465. *Panetti*, 127 S. Ct. at 2860.
466. *Id.* at 2862 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it.").
467. *Id.*
468. 127 S. Ct. 793 (2007) (per curiam).

a state prisoner seeks habeas relief in the federal courts in a "mixed petition," with both exhausted and un-exhausted claims, and seeks adjudication on only the exhausted claims, any subsequent petition for the un-exhausted claims would be a "second or successive" petition requiring authorization by the appellate court.[469]

Lonnie Lee Burton filed a petition in December 1998 for federal habeas relief related to the constitutionality of his conviction for rape, robbery, and burglary.[470] At that time, an appeal was pending in the state courts not related to his conviction, but rather to the constitutionality of his sentence.[471] In 2002, after the state courts denied him relief, Burton then filed another petition for federal habeas relief, this time for the sentence imposed, but without first getting approval from the appellate court for filing the subsequent petition.[472] The Court determined that "Burton twice brought claims contesting the same custody imposed by the same judgment of a state court" and since he did not seek the approval required under AEDPA for the second petition, the district court was "without jurisdiction to entertain" the second claim.[473]

2. AEDPA—STATUTE OF LIMITATIONS

With a 5–4 split decision in the case of *Lawrence v. Florida*,[474] the Court upheld Lawrence's death sentence when it declared that the one-year statute of limitations for filing for federal habeas corpus relief was tolled only until a final decision was rendered by a state court, and tolling does not continue while a petition for certiorari for post-conviction relief is pending before the Supreme Court.[475] Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the statute of limitations for seeking habeas corpus relief from a state action in the federal court system is one year.[476] However, the statute of limitations is tolled while "a properly filed application for State post-conviction or other

469. *See id.* at 797 (citing Rose v. Lundy, 455 U.S. 509, 520–22 (1982)).
470. *Id.* at 794–95.
471. *See id.* (Washington trial court sentenced Burton to 562 months based on running consecutive sentences for the three crimes for which Burton was convicted. Burton claimed this sentence was unconstitutional per the Court's ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), wherein the Court held that a Washington trial judge had exceeded his judicial authority in imposing a sentence greater than the statutorily defined maximum.).
472. *Id.* at 796.
473. 127 S. Ct. at 796.
474. 127 S. Ct. 1079 (2007).
475. *Id.* at 1083.
476. *Id.* at 1081 (citing 28 U.S.C.S. § 2244(d)(1)).

collateral review with respect to the pertinent judgment or claim is pending."[477]

In *Lawrence*, the petitioner filed for post-conviction relief from the state courts 364 days after his conviction was final.[478] His application for relief was denied by the trial court and the denial was affirmed by the Florida Supreme Court and Lawrence then petitioned the United States Supreme Court for a writ of certiorari.[479] While the petition for certiorari was pending, Lawrence filed a claim for habeas relief in the federal district court.[480] The question before the Court was whether the statute of limitations for filing for federal relief expired one day after the Florida Supreme Court issued its final decision, or if the period of limitations continued to toll pending the United States Supreme Court's action on the petition for certiorari for review of the state's denial.

The Court majority felt that an application for post-conviction relief was "pending" only while the petitioner awaited a final decision from the highest state court.[481] The majority determined that a petition for certiorari is a petition to a federal court and, therefore, "[t]he application for state postconviction review is . . . not 'pending' after the state court's postconviction review is complete, and § 2244(d)(2) does not toll the one-year limitations period during the pendency of a petition for certiorari."[482] Thus, Lawrence only had one day after the Florida Supreme Court issued its final decision and, since the application for federal habeas relief was not filed for 113 days after the Florida Supreme Court's decision, the statute of limitations under AEDPA had expired.[483]

The Court was split on whether the period of limitations tolled until the "conclusion of direct review" which the petitioner argued included the petition for certiorari by the United States Supreme Court for review of the state's decision.[484] The majority determined that the language in

477. *Id.* (citing 28 U.S.C. § 2244(d)(2)).

478. *Id.* at 1082 (A Florida trial court sentenced Lawrence to death for first-degree murder and other related charges.).

479. *Lawrence*, 127 S. Ct. at 1082.

480. *Id.*

481. *See id.* at 1083 ("After the [s]tate's highest court has issued its mandate or denied review, . . . an application for state postconviction review no longer exists.").

482. *Id.*

483. *Id.* at 1082.

484. *Lawrence*, 127 S. Ct. at 1083 ("Lawrence argues that § 2244(d)(2) should be construed to have the same meaning as § 2244(d)(1)(A), the trigger provision that determines [the] AEDPA's statute of limitations begins to run. . . . on 'the date on which the judgment became final by *the conclusion of direct review*.'" (emphasis in original.)).

§ 2244(d)(2) overrode this definition by specifically limiting the period to the state's actions.[485] The dissent disagreed with the majority's determination that an application for post-conviction relief is no longer pending after the state court issues its final decision. The dissent noted that when the Court is "asked to review a state court's denial of habeas relief, [the Court] consider[s] an application for that relief—not an application for federal habeas relief. Until [the Court has] disposed of the petition for certiorari, the application remains live as one for state postconviction relief."[486]

An additional issue dividing the Court was the procedural effect of extending the tolling time to include the petition for certiorari. The majority believed that "allowing the statute of limitations to be tolled by certiorari petitions would provide incentives for state prisoners to . . . file certiorari petitions—regardless of the merit of the claims asserted—so that they receive additional time to file their habeas applications."[487] But the dissent did not foresee an abuse of the federal system by petitioners for post-conviction relief simply to toll the statute of limitations. The dissent believed the ability to toll exists to "protect[] a litigant's ability to pursue his or her federal claims in a federal forum and avoids simultaneous litigation in more than one court—objectives undercut by [the majority's] decision."[488]

C. *Jury Instructions in Capital Cases*

This term, in *Smith v. Texas*[489] (*Smith II*), the Court reiterated its holding in the 2004 *Smith v. Texas*[490] (*Smith I*) case that "Texas special issues [instructions] were insufficient to allow proper consideration [by the jury] of some forms of mitigating evidence,"[491] and the nullification instruction given by the judge in *Smith I*, which was intended to allow the jury to take into consideration mitigating factors, was insufficient to

485. *Id.* ("[section] 2244(d)(2) refers exclusively to '*[s]tate* post-conviction or other collateral review,' language not easily interpreted to include participation by a federal court." (emphasis in original)).

486. *Id.* at 1086 (Ginsburg, J., dissenting).

487. *Id.* at 1085; *see also id.* (wherein the Court recognizes that there may be situations that give the court leeway to apply equitable tolling, but that the circumstances of the case and the hypothetical possibilities presented by the petitioner were so remote as to not require a broader definition of the statute).

488. *Id.* at 1088 (Ginsberg, J., dissenting).

489. 127 S. Ct. 1686 (2007) (5–4 decision).

490. Smith v. Texas, 543 U.S. 37 (2004).

491. *Smith II*, 127 S. Ct. at 1689. This error in the Texas law was originally recognized by the Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), and referred to as the "*Penry* error" by the Court.

correct the underlying error inherent in the special-issues instructions.[492] Smith's death sentence was reversed in a 5–4 split decision in *Smith II* when the Court majority held that on remand the Texas Court of Criminal Appeals (TCCA) had misinterpreted the Court's holding in *Smith I* and erred in denying Smith relief by applying a heightened standard of review.[493]

To be granted relief under Texas law, if a party preserves a jury instruction for review by objecting to it at trial, then it only need to "establish some 'actual'. . . harm resulting from the error"; but if the party fails to preserve the instruction for review, the party must "establish not merely some harm but also that the harm was egregious."[494] On remand after *Smith I*, the TCCA found that Smith's claim that the "nullification charge" was unconstitutional had not been preserved for review due to his failure to object to the trial judge's pre-trial wording of the instruction; thus Smith would need to show "egregious" harm in order to be granted relief.[495] However, the Court majority determined the TCCA's finding that Smith's claim had not been preserved was a misinterpretation of the Court's holding in *Smith I*.[496] The majority maintained that Smith's claims on remand flowed from his ongoing objections to the constitutionality of the special-issues instructions and the fact that the nullification charge did not cure this defect.[497] Thus, "[t]he state court's error of federal law cannot be the predicate for requiring Smith to show egregious harm."[498] Since Smith then was only

492. *Id.* at 1691 ("When this Court reversed the Court of Criminal Appeals in *Smith I*, it did so because the nullification charge had not cured the underlying *Penry* error." This was based on the Court's holding in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*)("Penry II held a . . . nullification charge [similar to that in *Smith I* as] insufficient to cure the flawed special issues.").

493. *Id.* at 1690 ("The requirement that Smith show [the heightened standard of] egregious harm was predicated, we hold, on a misunderstanding of the federal right Smith asserts; and we therefore reverse.").

494. *See id.* at 1696 (citing *Ex parte* Smith, 185 S.W.3d 455, 467 (Tex. Crim. App. 2006) (applying the rule established by the TCCA in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984) (en banc))).

495. *Id.* ("The court found Smith had not preserved his claim of instructional error. Smith's only objection at trial, reasoned the state court, was that the statute authorizing the special issues was unconstitutional in light of *Penry I*. This objection did not preserve a challenge to the nullification charge based on *Penry II*, so *Smith* was required to show egregious harm.") (internal citations omitted).

496. *Smith II*, 127 S. Ct. at 1698 ("The Court of Criminal Appeals on remand misunderstood the interplay of *Penry I* and *Penry II*, and it mistook which of Smith's claims furnished the basis for this Court's opinion in *Smith I*.")

497. *Id.* ("[E]rrors of federal law led the state court to conclude Smith had not preserved at trial the claim this Court vindicated in *Smith I*.").

498. *Id.*

required by Texas law to show "some harm," the Court found that "Smith ha[d] shown there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence. [Therefore, he was] entitled to relief under the state harmless-error framework."[499]

The dissent agreed with the majority's ruling that the Texas special-issues instructions were unconstitutional under the *Penry* rule and that the nullification charge given by the judge failed to address this error, per the ruling in *Smith I*.[500]

The Court combined and reversed two death-penalty cases that came before the Court this term. In both *Abdul-Kabir v. Quarterman*[501] and *Brewer v. Quarterman*,[502] the narrow majority of the Court admonished the courts of the Fifth Circuit for "ignoring the fundamental principles established by our most relevant precedents," resulting in decisions that were "contrary to . . . and involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States."[503] The Court provided in both cases a summary of the "clearly established [f]ederal law" regarding the unconstitutionality of the jury instructions provided by Texas courts in capital cases during the years Abdul-Kabir (then known as Ted Cole) and Brewer were tried.

At the time of these trials, the Texas courts gave instructions to capital case juries that required them to answer either in the affirmative or the negative two "special issues" questions and the jury had "a duty to answer the special issues based on the facts, and the extent to which such facts objectively supported findings of deliberateness and future dangerousness, rather than their views about what might be an appropriate punishment for [the] particular defendant."[504]

The case providing the foundation for the Court's attack on the Texas jury instructions was *Penry v. Lynaugh*[505] (*Penry I*). In *Penry I* the Court established that, as given by the court, these instructions were unconstitutional because "neither the 'deliberateness' nor the 'future dangerousness' special issue provided the jury with a meaningful opportunity to

499. *Id.* at 1698–99.

500. *Id.* at 1699 (Alito, J., dissenting) ("[T]he instructions did not give the jury an adequate opportunity to take some of petitioner's mitigating evidence into account.") (citing *Smith I*, 543 U.S. 37).

501. 127 S. Ct. 1654 (2007) (5–4 decision).

502. 127 S. Ct. 1706 (2007) (5–4 decision).

503. *Abdul-Kabir*, 127 S. Ct. at 1671 (quoting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)) (internal quotations omitted).

504. *Id.* at 1661.

505. 492 U.S. 302 (1989).

give effect to [the defendant's] mitigating evidence."[506] The court opined that evidence presented regarding the defendant's character and background could be construed as a "double-edged sword" as both mitigating the deliberateness of the crime but potentially increasing the likelihood that the defendant would continue to be dangerous.[507] Under these circumstances, the jury needs special instructions to know how to weigh this evidence when considering whether or not to impose the death penalty.[508]

The Court emphasized that *Penry I* was itself founded on a line of cases that required juries to be instructed in such a way that they could "give meaningful consideration and effect to all mitigating evidence" that would influence the jury's verdict for a life or death sentence.[509] Furthermore, the Court pointed to subsequent decisions that specifically related to the admissibility of the defendant's character and background as potentially mitigating factors.[510] The Court considered these precedential cases as "firmly establish[ing]" that the instructions provided to sentencing juries must allow the jury "to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future."[511]

In the case of Ted Cole (a.k.a. Jalil Abdul-Kabir), the trial judge instructed the jury with the special issues and made no mention of mitigating factors.[512] Then the prosecutor all but admonished the jury not to consider mitigating factors for "they had 'promised the State that, if

506. *Abdul-Kabir*, 127 S. Ct. at 1669.

507. *See id.* (The mitigating evidence for Penry "functioned as a 'two-edged sword,' because it 'may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.'") (internal citation omitted).

508. *Id.* ("When the evidence proffered is double edged, or is as likely to be viewed as aggravating as it is as mitigating, the [special issues] statute most obviously fails to provide for adequate consideration of such evidence.").

509. *Abdul-Kabir*, 127 S. Ct. at 1664 (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (wherein the Court held unconstitutional a statute mandating the death penalty for all first-degree murder convictions)); *see also id.* (citing Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976) (in joint opinions in *Proffitt* and *Jurek* the court held instruction statutes constitutional as long as they included the provision for "unrestricted admissibility of mitigating evidence")).

510. *See generally id.* at 1665–66 (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978) (wherein the Court held that a sentencer should be allowed to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.")); *see also id.* (citing Hitchcock v. Dugger, 481 U.S. 393 (1987) (confirming the *Lockett* rule by holding Florida courts were unconstitutionally construing the instructions statute as precluding the jury from considering factors not specifically identified in the statute)).

511. *Abdul-Kabir*, 127 S. Ct. at 1664.

512. *Id.* at 1660.

it met its burden of proof,' they would answer 'yes' to both special issues."[513] The Court found that the trial judge did not rely on *Penry I* or the relevant precedents when it held that the nature of the mitigating evidence and the testimonial support in the record for the evidence would dictate whether the mitigating evidence was sufficient for consideration.[514] The Court ruled that "the judge ignored our entire line of cases establishing the importance of allowing juries to give meaningful effect to any mitigating evidence providing a basis for a sentence of life rather than death."[515] Thus, the Court held that the Texas court's ruling was an unreasonable application of federal law and reversed the death sentence.[516]

In the case of Brent Brewer, the Texas court refused to give special instructions related to the mitigating factors presented by Brewer, giving the jury only the "special issues" to answer in the affirmative or the negative, and again the prosecutor de-emphasized the mitigating factors, stressing that the jury was to consider only the evidence in light of the special issues and that the jury members did not "have the power to say whether [Brewer] lives or dies."[517] In reviewing the logic employed by the lower courts, the Court reiterated that "[n]owhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability." The Court held that the Texas Court of Criminal Appeals:

> [Failed] to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death.[518]

513. *Id.* (internal citation omitted).

514. *Id.* at 1671 ("[W]hether the mitigating evidence can be sufficiently considered . . . depend[s] on the nature of the mitigating evidence offered and whether there exists other testimony in the record that would allow consideration to be given.") (internal quotations and citation omitted).

515. *Id.* at 1672.

516. *Abdul-Kabir*, 127 S. Ct. at 1674–75 ("Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense . . . and [f]or that reason, . . . the judgment of the Court of Appeals in this case must be reversed.").

517. *See generally Brewer*, 127 S. Ct. at 1710–11.

518. *Id.* at 1714.

Therefore, the Court reversed Brewer's death sentence. A joint dissent was written for both cases by Chief Justice Roberts and signed by Justices Scalia, Thomas, and Alito.[519]

In *Ayers v. Belmontes*[520] the Court had the occasion to evaluate the constitutionality of California's sentencing instructions for juries in a death penalty case. The Court majority, in a 5–4 decision, held that the challenged jury instruction was "consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings."[521] The Court had previously evaluated Cal. Penal Code Ann. § 190.3 (k) (West 1988), also known as the "factor (k)" instruction, in *Boyde v. California*[522] and *Brown v. Payton*.[523] The Court reviewed the standard set forth in these cases for evaluating the constitutionality of "factor (k)" and, as in those cases, found the issue in *Ayers* to be "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[524] The Court majority concluded that the jury heard mitigating evidence and would consider it in its deliberations. The Court held that factor (k) did not violate any constitutional rights when accompanied by mitigating evidence in a capital case.[525]

D. *Evidentiary Hearing*

With a slim 5–4 majority, the Court reinstated a death sentence in *Schriro v. Landrigan*[526] when it reversed the Ninth Circuit by holding that the District Court of Arizona properly refused to grant the inmate an evidentiary hearing on the grounds that the inmate "could not demonstrate that he was prejudiced by any error his counsel may have made."[527] The Court concluded that even under the heightened standards for granting

519. *See Abdul-Kabir*, 127 S. Ct. at 1675 (Roberts, C.J., dissenting; Scalia, J., dissenting), and *Brewer*, 127 S. Ct. at 1714 (Roberts, C.J., dissenting; Scalia, J., dissenting).

520. 127 S. Ct. 469 (2006).

521. *Id.* at 480.

522. 494 U.S. 370 (1990) (holding that factor (k) did not "preclude[] consideration of mitigating evidence unrelated to the crime, such as evidence of the defendant's background and character." *Id.* at 377–78, 386).

523. 544 U.S. 133 (2005) (holding that the California court did not unreasonably apply *Boyde* under the Antiterrorism and Effective Death Penalty Act (AEDPA)). Even though AEDPA does not apply to the *Ayers* case, which was filed prior to AEDPA, the Court reiterated the logic in *Payton*, finding "there was no reasonable likelihood that the jury understood the instruction to preclude consideration of the postcrime mitigation evidence it had heard." *Ayers*, 127 S. Ct. at 474 (citing *Payton*, 544 U.S. at 147).

524. *Ayers*, 127 S. Ct. at 474 (quoting *Boyde*, 494 U.S. at 380) (internal quotations removed).

525. *Id.* at 480

526. 127 S. Ct. 1933 (2007) (5–4 decision).

527. *Id.* at 1938.

federal habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), "the decision to grant an evidentiary hearing [is] left to the sound discretion of district courts."[528] Thus, the Court ruled that a district court is not required to hold an evidentiary hearing when the state court record refutes, or otherwise fails to support, the evidence presented in the petition for federal habeas relief.[529]

In analyzing *Landrigan*, the Court refuted three findings of the Ninth Circuit. The Court ruled that (1) the Arizona state courts had not made an unreasonable determination of the facts under AEDPA; (2) the Arizona state courts had not made an unreasonable application of Supreme Court precedent under AEDPA; and (3) the district court had not abused its discretion in finding that, even with the additional evidence presented by Landrigan, the sentence imposed would not have changed.

IX. Immigration Issues

In a term when the Court seemed divided on many subjects, immigration appeared to be one subject on which the Justices could mostly agree. Under the Immigration and Nationality Act (INA) definition of theft, an accomplice is as culpable as the principal, thus a state conviction of an alien in "aiding and abetting" the theft of a vehicle qualifies as an aggravated felony for deportation purposes.[530] Conversely, a drug trafficking crime is defined under the INA as "any felony punishable under the Controlled Substances Act" (CSA) and thus only those crimes that are considered a felony under the CSA can be considered an aggravated felony for deportation. Therefore, even if an alien is convicted of a felony under state law, if the same infraction is only a misdemeanor under the CSA, the crime is not considered an aggravated felony under the INA.[531]

Typically, when filing an indictment, the indictment should contain the elements of the charged offense to enable the defendant to sufficiently defend against the charged offense. When the indictment is for the "attempted" re-entry into the United States by an illegal alien, the Court held that the elements of "attempt" do not need to be specified, for the word "attempt," in conjunction with the time and place of the attempt, are sufficient to meet the constitutional requirements for an indictment.[532]

528. *Id.* at 1939 ("Prior to [AEDPA] . . . the decision to grant an evidentiary hearing was generally left to the sound discretion of district courts. . . . That basic rule has not changed.") (internal citations omitted).

529. *Id.* at 1940 ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

530. *See* Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (2007) (9–0 decision).

531. *See* Lopez v. Gonzales, 127 S. Ct. 625 (2006) (8–1 decision).

532. *See* United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007) (8–1 decision).

A. *Aggravated Felonies*

The Court considered two different cases involving the "aggravated felony" definition of the Immigration and Nationality Act (INA). In *Gonzales v. Duenas-Alvarez,*[533] the Court held that aiding and abetting a theft qualified as a "theft offense" under the Immigration and Nationality Act (INA). Under the INA, a "theft offense" is an "aggravated felony" mandating deportation.[534]

Luis Duenas-Alvarez was convicted of violating a California statute criminalizing the driving or taking of a vehicle "without the consent of the owner thereof, . . . or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing."[535] The federal government began deportation proceedings, determining that this offense qualified as a "theft offense" under the INA.[536] The only chance Duenas-Alvarez had to stop the deportation process was to show that California's theft statute "reaches beyond generic theft to cover certain nongeneric crimes."[537] If Duenas-Alvarez could show that in applying the statute California "criminalizes conduct that most other States would not consider 'theft,'" then his conviction would not fall under the generic "theft offense" as defined by the INA.[538] The Ninth Circuit agreed with Duenas-Alvarez following their ruling in the *Penuliar* case wherein the Ninth Circuit held that "[b]ecause the statute criminalizes [aiding and abetting] activity that is neither 'a taking of property or an exercise of control over property,' we conclude that a conviction under California Vehicle Code [section] 10851(a) does not categorically qualify as a 'theft offense' within the meaning of [the INA]."[539]

Duenas-Alvarez argued that because the California statute had been applied in cases wherein the "aiding and abetting" of a crime could hold the accomplice liable for crimes that were "natural and probable" consequences, the California statute exceeded the boundaries of the generic

533. 127 S. Ct. 815, 818 (2007) ("The question here is whether the term 'theft offense' in [the INA] federal statute includes the crime of 'aiding and abetting' a theft offense. We hold that it does.") (emphasis omitted); *see also* the Immigration and Nationality Act, 8 U.S.C. § 1101.

534. *See id.* at 819 (citing Penuliar v. Ashcroft, 395 F.3d 1037, 1044 (9th Cir. 2005) (Under 8 U.S.C. § 1101(a)(43)(G), the term 'aggravated felony' means 'a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year.'") (modification in original)).

535. *Duenas-Alvarez*, 127 S. Ct. at 819 (quoting CAL. VEH. CODE § 10851(a) (West 2000)) (emphasis omitted).

536. *Id.*

537. *Id.* at 920.

538. *See id.* at 820.

539. *Penuliar*, 395 F.3d at 1044–1045.

"theft offense" definition of the INA.[540] Furthermore, Duenas-Alvarez contended that "California's doctrine, unlike that of most other States, makes a defendant criminally liable for conduct that the defendant did not intend, not even as a known or almost certain byproduct of the defendant's intentional acts."[541]

The Court rejected these arguments, finding that most jurisdictions allow for some version of "natural and probable" consequences to be considered and that doctrine alone "does not show that the statute covers a nongeneric theft crime."[542] Likewise, the Court insisted that "Duenas-Alvarez must show something *special* about California's version of the doctrine"[543] and that upon reviewing the cases presented by Duenas-Alvarez, the Court "cannot agree that [the cases] show that California's law is somehow special."[544] The Court continued by noting that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute . . . requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime."[545]

Because the act of "aiding and abetting" a theft does not exceed the generic "theft offense" of the INA, the Court vacated the Ninth Circuit's holding in *Penuliar*[546] and because Duenas-Alvarez could not make a showing that the California statute exceeded the generic definition, the Court reversed the Ninth Circuit and remanded for further proceedings.[547]

In *Lopez v. Gonzales*,[548] the Court held that a crime that is considered a felony under state law, but a misdemeanor under the Controlled

540. *See id.* at 820–21 ("Duenas-Alvarez points out that California defines 'aiding and abetting' such that an aider and abettor is criminally responsible not only for the crime he intends, but also for any crime that 'naturally and probably' results from his intended crime.") (citing People v. Durham, 449 P.2d 198, 204 (1969)).

541. *Id.* at 821.

542. *Id.*

543. *Id.* (emphasis in original).

544. *Duenas-Alvarez*, 127 S. Ct. at 821 (In analyzing each of three cases presented by Duenas-Alvarez, the Court found that the "concepts as used in any of these cases [do not] extend significantly beyond the concept[s] as set forth in the cases of other States." The Court provides a substantial listing of cases to support this finding in Appendix C of the *Duenas-Alvarez* case.).

545. *Id.* at 822.

546. *See* Gonzales v. Penuliar, 127 S. Ct. 1146 (2007) (vacated and remanded in light of Gonzales v. Duenas-Alvarez).

547. *Duenas-Alvarez*, 127 S. Ct. at 822 ("Because Duenas-Alvarez makes no . . . showing here [that the State would apply its statute to conduct that falls outside the generic definition of a crime], we cannot find that California's statute, through the California courts' application of a 'natural and probable consequences' doctrine, creates a subspecies of the Vehicle Code section crime that falls outside the generic definition of 'theft.'").

548. 127 S. Ct. 625 (2006).

Substances Act (CSA) cannot be considered an "aggravated felony" under the INA. Under the INA, aggravated felonies include drug trafficking crimes, which are defined as "any felony punishable under the Controlled Substances Act."[549] Both federal and state offenses can be considered aggravated felonies.[550]

Antonio Lopez was convicted in South Dakota state court of aiding and abetting another's possession of cocaine.[551] This crime is a misdemeanor under the CSA, but a felony under South Dakota law, and Lopez was sentenced to five years.[552] Although he was released for good behavior after fifteen months, the Immigration and Nationalization Service (INS) started deportation proceedings since "illicit trafficking" in drugs qualified as an aggravated felony, mandating deportation.[553] This interpretation of the statute was upheld by the Eighth Circuit.[554]

The government argued that the phrase "any felony punishable under the [CSA]" meant that "any felony," whether convicted as such under federal or state law, which was also punishable in any way under the CSA, would suffice as an aggravated felony for deportation purposes.[555] The Court disagreed, stating that this interpretation of the phrase is contrary to the English language.[556] The Court pointed out that there is no break "between the noun 'felony' and the contiguous modifier 'punishable under the [CSA].'"[557] Therefore, the phrase

549. *See id.* at 627–28 ("[The INA] defines the term 'aggravated felony' by a list that mentions 'illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18).' . . . The general phrase 'illicit trafficking' is left undefined, but [section] 924(c)(2) of Title 18 identifies the subcategory by defining 'drug trafficking crime' as 'any felony punishable under the Controlled Substances Act' or under either of two other federal statutes having no bearing on this case.") (internal citations omitted).

550. *See id.* ("[T]he term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law.") (modification in original) (quoting 8 U.S.C. § 1101(a)(43)).

551. *Id.* at 628.

552. *Id.*

553. *See Lopez,* 127 S. Ct. at 628 ("[The] judge ruled that Lopez's drug crime was an aggravated felony . . . owing to its being a felony under state law. . . . That left Lopez ineligible for cancellation of removal, and the judge ordered him removed.") (internal citations omitted).

554. *Id.* at 628. ("The [Board of Immigration Appeals] affirmed, and the Court of Appeals affirmed the BIA") (citing 417 F.3d 934 (8th Cir. 2005)).

555. *See id.* at 631 ("The Government stresses that the text does not read 'punishable as a felony,' and that by saying simply 'punishable' Congress left the door open to counting state felonies, so long as they would be punishable at all under the CSA.").

556. *Id.* at 631. But Justice Thomas, as the sole dissent, agrees with the government's interpretation of the phrase stating that "[a] plain reading of this definition identifies two elements: First, the offense must be a felony; second, the offense must be capable of punishment under the [CSA]." *Id.* at 634.

557. *Lopez,* 127 S. Ct. at 631.

must be read as to include only crimes considered to be felonies under the CSA.[558]

Thus, in order for Lopez's state felony conviction to qualify as an "aggravated felony" under the INA statutes, his crime would have to constitute a felony under the CSA as well. The Court considered whether aiding and abetting another's possession of cocaine constituted "illicit trafficking in a controlled substance" per the INA statute.[559] South Dakota state law considered aiding and abetting the possession of a controlled substance to be the same as possession, hence constituting a felony under state law.[560] However, under the CSA, mere possession of a drug is a misdemeanor unless the possessor has more than enough drugs for his or her own consumption.[561] The Court held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law"[562] and Lopez's crime was only a misdemeanor under the CSA.[563]

B. *Indictments for "Attempt"*

An indictment against an alien for an attempt to re-enter the United States is constitutionally sufficient when it states the time and place of the attempted entry and need not identify any specific overt acts according to the holding in *United States v. Resendiz-Ponce*.[564] Juan Resendiz-Ponce's indictment alleged that "[o]n or about June 1, 2003, Juan Resendiz-Ponce, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona" after previously being deported and without obtaining permission for re-entry.[565] Resendiz-Ponce argued that the indictment against

558. *See id.* ("[W]hen we read 'felony punishable under the . . . Act,' we instinctively understand 'felony punishable as such under the Act' or 'felony as defined by the Act.'").

559. *See id.* at 629 ("The INA makes Lopez guilty of an aggravated felony if he has been convicted of 'illicit trafficking in a controlled substance . . . including,' but not limited to, 'a drug trafficking crime (as defined in section 924(c) of title 18).'") (emphasis in original) (quoting 8 U.S.C. § 1101(a)(43)(B)).

560. *Lopez*, 127 S. Ct. at 629.

561. *Id.* (citing 21 U.S.C. § 841, 844(a) (2000 ed. and Supp. III); United States v. Kates, 174 F.3d 580, 582 (5th Cir. 1999) (per curiam)).

562. *Id.* at 633.

563. Although Lopez had already been deported, the Court felt that "Lopez [could] benefit from relief in this Court by pursuing his application for cancellation of removal." *Id.* at 629 n.2.

564. 127 S. Ct. 782 (2007).

565. *Id.* at 786.

him "failed to allege an essential element, an overt act, or to state the essential facts of such overt act" because it failed to specifically identify how he "attempted" re-entry.[566] Resendiz-Ponce's argument was based on the Court's holding in *Hamling v. United States*[567] wherein the Court identified two constitutional requirements for an indictment: "first, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."[568]

The Court reasoned that the word "attempt" implicitly includes both overt acts and intent, and has been recognized under common law as sufficiently encompassing these elements without further specificity as to the underlying acts and intentions.[569] The Court determined that "the use of the word 'attempt,' coupled with the specification of the time and place of respondent's attempted illegal [re-entry], satisfied both" of the *Hamling* requirements.[570] Furthermore, the Court looked to the Federal Rules of Criminal Procedure and noted that an indictment "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged."[571] The Court concluded that "respondent's indictment fully complied with [Federal Rule of Criminal Procedure 7(c)(1)] and did not deprive him of any significant protection that the constitutional guarantee of a grand jury was intended to confer."[572]

X. Environment

The five environmental cases before the Court this term included the regulation of greenhouse gas emissions from motorized vehicles, the regulation of air pollutant emissions from energy facilities, the protection of endangered species, hazardous waste clean-up costs, and municipal ordinances controlling the disposal of trash.

566. *Id.*
567. *Id.* at 788 (quoting Hamling v. United States, 418 U.S. 87 (1974)).
568. *Id.* (quoting *Hamling*, 418 U.S. at 117).
569. *Resendiz-Ponce*, 127 S. Ct. at 787 ("Not only does the word 'attempt' as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements.").
570. *Id.* at 788 ("[T]he time-and-place information provided respondent with more adequate notice than would an indictment describing particular overt acts. After all, a given defendant may have approached the border or lied to a border-patrol agent in the course of countless attempts on innumerable occasions. For the same reason, the time-and-date specification in respondent's indictment provided ample protection against the risk of multiple prosecutions for the same crime.").
571. *Id.* at 789 (quoting FED. R. CRIM. P. 7(c)(1)).
572. *Id.* at 789–90.

A. *Greenhouse Gases*

The environmental law case receiving the most mainstream media attention involved the Court's 5–4 ruling that, contrary to the EPA's interpretation of the Clean Air Act, the EPA is *not only authorized* to regulate the emissions of greenhouse gases by motorized vehicles, but the EPA must provide a reason within the confines of the Clean Air Act that would *justify not regulating* such pollutants at this time.[573] In *Massachusetts v. Environmental Protection Agency*,[574] the Court held that the Environmental Protection Agency (EPA) has authority under the Clean Air Act to regulate the emissions of greenhouse gases from "new motor vehicles."[575] The Court majority based its reasoning on the construction of the statute which authorizes the EPA to generate standards for regulating the emissions of "any air pollutant" which, in the "judgment" of the EPA Administrator, causes or contributes to air pollution and puts the public health or welfare at risk.[576] Furthermore, the Court interpreted the Act to include carbon dioxide and other chemicals found in automobile emissions under the definition of "air pollutants."[577] The Court opined that the "statute is unambiguous" and that "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' [the Court held] that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."[578]

The case arose after nineteen private organizations had petitioned the EPA to regulate emissions of greenhouse gases under the Clean

573. *See, e.g.*, Robert Barnes & Juliet Eilperin, *High Court Faults EPA Inaction on Emissions*, WASH. POST, Apr. 3, 2007 at A01; SPLIT SUPREME COURT ORDERS EPA TO ACT ON GREENHOUSE GASES (Apr. 4, 2007), http://www.foxnews.com/story/0,2933,263641,00.html; Martin LaMonica, *Supreme Court Rules EPA Can Regulate Greenhouse Gases*, CNET NEWS.COM, Apr. 2, 2007, http://news.com.com/2100-11746_3-6172658.html; *see also* Mass. v. Envtl. Prot. Agency, 127 S. Ct. 1438 (2007) (5–4 decision).

574. 127 S. Ct. 1438 (2007).

575. *Id.* at 1462 (citing 42 U.S.C. § 7521(a)(1)).

576. *Id.* at 1453 ("The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court."); *see also Mass.*, 127 S. Ct. at 1459 ("the first question is whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change.").

577. *Id.* at 1460 ("The Clean Air Act's sweeping definition of 'air pollutant' includes 'any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . . .'") (quoting 42 U.S.C. § 7602(g)) (emphasis omitted). *But see id.* at 1460 ("Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an 'air pollutant' within the meaning of the provision.").

578. *Id.* at 1460.

Air Act.[579] The EPA followed standard protocol of seeking public comment and, specifically, seeking technical and scientific input related to the petition.[580] After receiving over 50,000 comments, the agency "entered an order denying the rulemaking petition."[581] The EPA had determined that the Clean Air Act did not authorize the agency to regulate greenhouse gases as these were part of a larger, global climate issue and even if the EPA did have this authority, it would be "unwise" for the agency to establish such regulations.[582]

The EPA reasoned that Congress had taken other measures to address the global warming issue by regulating pollutants that impact the ozone layer (through 42 U.S.C. §§ 7671–7671q) and by authorizing the Department of Transportation to issue fuel-economy standards.[583] The EPA concluded that "climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it."[584] Conversely, even if the EPA was to consider regulating greenhouse emissions, the EPA justified its lack of doing so by pointing to several political and legislative initiatives which already address climate changes or which may even be hampered by the EPA's issuance of emission standards for greenhouse gases.[585]

The petitioners, joined by the State of Massachusetts and other interveners, sought judicial review of the EPA's denial of the petition.[586] After the lower court ruled in favor of the EPA, the Court granted

579. 127 S. Ct. at 1449.

580. *Id.* ("EPA requested public comment on 'all the issues raised in [the] petition,' adding a 'particular' request for comments on 'any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA's consideration of this petition.'").

581. *Id.* at 1450.

582. *Id.* (The two reasons given by the EPA were (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change, and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.) (internal citations omitted).

583. *See generally id.* at 1450–51.

584. 127 S. Ct. at 1450.

585. *See id.* at 1463 (The Court summarized the EPA's legislative and political reasons:

> EPA said that a number of voluntary executive branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions, and that curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue.") (internal citations omitted.)

586. *Id.* at 1451 ("Petitioners . . . sought review of [the] EPA's order in the United States Court of Appeals for the District of Columbia Circuit.").

certiorari.[587] First, the Court determined that petitioners had standing to bring a cause of action against the EPA.[588] The Court recognized that since "[o]nly one of the petitioners needs to have standing to permit [the Court] to consider the petition for review,"[589] the Court could focus on the State of Massachusetts.[590] As a sovereign state owning a significant amount of shoreline that is being adversely affected by climate changes and rising sea levels, Massachusetts had satisfied the most demanding standards of the adversarial process.[591]

Recognizing that administrative agencies are typically granted much deference for internal decisions and responsibilities and that the CAA afforded the EPA Administrator the right to exercise judgment in determining whether a particular emission will endanger society, the Court cautioned that the Administrator's discretionary judgment was limited by the statute and that the "EPA can avoid taking . . . action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."[592]

The Court majority found the EPA's political and legislative reasons for denying the petition to be "divorced from the statutory text" and that the "statutory question is whether sufficient information exists to make an endangerment finding."[593] The Court majority held that the EPA's failure to provide a reasoned explanation for denying the petition was arbitrary and capricious.[594] The case was remanded with the Court allowing the EPA to act on the petition or deny it again, but either way the "EPA must ground its reasons for action or inaction in the statute."[595]

587. *See id.* (The Court of Appeals for the District of Columbia Circuit had ruled 2–1 in favor of the EPA, finding that the EPA Administrator had the discretion, under the Clean Water Act, to deny a rulemaking petition based on not only statutory merits but also on the policy matters put forth by the EPA.).

588. *Id.* at 1446 ("[The Court] may not address [the] two questions [raised in this case] unless at least one petitioner has standing to invoke our jurisdiction under Article III of the Constitution.").

589. 127 S. Ct. at 1453.

590. *Id.* at 1454.

591. *Id.* at 1455.

592. *Id.* at 1462.

593. *Id.* at 1462, 1463.

594. 127 S. Ct. at 1463 ("EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious, . . . or otherwise not in accordance with law.'").

595. *Id.* (The Court "do[es] not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. [The Court] holds only that EPA must ground its reasons for action or inaction in the statute.") (internal citation omitted).

Four Justices joined collectively in two different dissenting opinions.[596] The first dissent would have held that petitioners did not have standing in that they failed to show an injury that was "traceable" to the EPA's decision not to regulate emissions and by failing to show that the injury would be remedied by the EPA's issuance of emission standards.[597] The second dissent would affirm the EPA's denial of the petition on the ground that the EPA Administrator's decision was not arbitrary or capricious, but rather within the scope of the judgment afforded the Administrator in the CAA.[598]

B. *Constitutionality of Municipal "Flow Control" Ordinances*

In a decision that distinguishes between public and private waste management facilities, in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*,[599] the Court held that municipal "flow control" ordinances requiring all waste to be deposited at a public facility do not discriminate against interstate commerce.[600] The Court had previously struck down a flow control ordinance that required trash haulers to deliver all municipality waste to a private processing facility.[601] The Court's reasoning in that case was that the ordinance "discriminated against interstate commerce by 'hoarding solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.'"[602]

In *United Haulers*, the New York counties of Oneida and Herkimer (Counties) faced an escalating waste management problem until they joined forces and established the Oneida-Herkimer Solid Waste

596. *See id.* (Roberts, C.J., dissenting); *see also id.* at 1471 (Scalia, J., dissenting).

597. *Id.* at 1464 (Roberts, C.J., dissenting) ("[P]etitioners bear the burden of alleging an injury that is fairly traceable to the Environmental Protection Agency's failure to promulgate new motor vehicle greenhouse gas emission standards, and that [the injury] is likely to be redressed by the prospective issuance of such standards.").

598. *Id.* at 1473 (Scalia, J., dissenting) ("EPA's interpretation of the discretion conferred by the statutory reference to 'its judgment' is not only reasonable, it is the most natural reading of the text.").

599. 127 S. Ct. 1786 (2007).

600. *Id.* at 1795 ("[F]low control ordinances [which benefit a clearly public facility, while treating all private companies exactly the same] do not discriminate against interstate commerce for purposes of the dormant Commerce Clause."). The Commerce Clause grants Congress the constitutional authority to control the flow of commerce among the states and, although it does not specifically limit the states' power to regulate commerce, the Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *Id.* at 1792.

601. *See* C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994).

602. *United Haulers*, 127 S. Ct. at 1793 (quoting *Carbone*, 511 U.S. at 392).

Management Authority (Authority) to own and operate public facilities that would not only process solid waste, but would also provide recycling and household hazardous waste disposal services to the public.[603] The Counties entered an agreement with the Authority that would guarantee a minimum revenue stream through "tipping fees" and should the minimum not be met by the fees, the Counties would make up the difference.[604] So as to maximize the revenue stream through tipping fees, the Counties implemented municipal "flow control" ordinances that required private haulers to obtain a permit from the Authority to collect and haul waste, which must then be taken to an Authority facility.[605] The United Haulers and individual collectors filed suit, claiming the flow control ordinances "violate[d] the Commerce Clause by discriminating against interstate commerce" in that the ordinances increased their costs in that it was less expensive to haul the waste out-of-state.[606]

The question before the Court was whether the Court's ruling in *Carbone* rendered all flow control ordinances regulating the collection and hauling of waste unconstitutional, regardless of whether the processing facility was a public or privately held facility.[607] The Court determined that "*Carbone* cannot be regarded as having decided the public-private question."[608] In reviewing *Carbone*, the Court reiterated that the holding

603. *See generally id.* at 1790–91 (The Court describes the history of private waste management in the counties as being riddled with problems including violations of state regulations, "price fixing, pervasive overcharging, and the influence of organized crime." To address these problems, the newly created Authority and the Counties entered into a Solid Waste Management Agreement which would allow the authority to provide waste and recycling services to the public.)

604. *Id.* at 1791 ("If the Authority's operating costs and debt service were not recouped through tipping fees and other charges, the agreement provided that the Counties would make up the difference.").

605. *Id.* at 1791–92 ("[T]he Counties enacted 'flow control' ordinances requiring that all solid waste generated within the Counties be delivered to the Authority's processing sites. Private haulers must obtain a permit from the Authority to collect waste in the Counties.").

606. *Id.* at 1792 (Petitioners "submitted evidence that without the flow control laws and the associated $86-per-ton tipping fees, they could dispose of solid waste at out-of-state facilities for between $37 and $55 per ton, including transportation.").

607. *United Haulers*, 127 S. Ct. at 1793 (The Court reviewed *Carbone*:

> The majority did not comment [in *Carbone*] on the dissent's public-private distinction. The parties in this case draw opposite inferences from the majority's silence. The haulers say it proves that the majority . . . thought there was no difference under the dormant Commerce Clause between laws favoring private entities and those favoring public ones. The Counties disagree, arguing that the majority studiously avoided the issue because the facility in *Carbone* was private, and therefore the question whether public facilities may be favored was not properly before the Court. (emphasis omitted.)

608. *Id.* at 1795.

there centered on the fact that the "ordinance favored a single local [privately held] business."[609] In *United Haulers*, the Court recognized that the ordinances "benefit a clearly public facility, while treating all private companies exactly the same."[610] The Court reasoned that the Counties had implemented the Authority as part of the government's responsibility to look after the welfare of its public and the public, in voting to establish the Authority, chose to have the government regulate the collection and processing of waste in the municipality.[611] The Counties then, were simply putting into place measures that would facilitate maximizing the use of the municipal facilities "while allocating the costs . . . [to] citizens and businesses according to the volume of waste they generate."[612] Thus, the Court held that flow control ordinances "which treat in-state private business interests exactly the same as out-of-state ones, do not 'discriminate against interstate commerce' for purposes of the dormant Commerce Clause."[613]

C. *The Clean Air Act*

In *Environmental Defense v. Duke Energy Corp.*[614] a unanimous Court clarified what constitutes a "modification" of a pollution-emitting facility.[615] In essence, the Court approved the EPA's regulations for the enforcement of the Clean Air Act Amendments of 1977, which require a pollution-emitting facility to obtain a Prevention of Significant Deterioration (PSD) permit for new construction or modifications. The crux of the case was the definition of "modification" and how the EPA attempted to regulate activities that qualified as "modifications" to a facility.

Under the New Source Performance Standards (NSPS) of the Clean Air Amendments of 1970, the EPA was authorized to regulate the new

609. *Id.* at 1794.
610. *Id.* at 1795.
611. *Id.* ("[G]overnment is vested with the responsibility of protecting the health, safety, and welfare of its citizens."); *see also id.* at 1796 ("[T]he citizens of Oneida and Herkimer Counties have chosen the government to provide waste management services, with a limited role for the private sector in arranging for transport of waste from the curb to the public facilities.").
612. *United Haulers*, 127 S. Ct. at 1796.
613. *Id.* at 1797.
614. 127 S. Ct. 1423 (2007) (9–0 decision).
615. *See id.* at 1428 ("The Court of Appeals concluded that the [Clean Air Act] requires the Environmental Protection Agency (EPA) to conform its [Prevention of Significant Deterioration] regulations on 'modification' to their [New Source Performance Standards] counterparts, and that EPA's 1980 PSD regulations can be given this conforming construction."); *see also id.* (wherein the Court held "that the Court of Appeals's [sic] reading of the 1980 PSD regulations, intended to align them with NSPS, was inconsistent with their terms and effectively invalidated them.").

construction of, or modifications to, facilities that are "stationary sources of air pollutants."[616] The NSPS amendment defined "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."[617] The regulations implemented by the EPA in 1975 dictated that a "modification" was any activity which increased the emissions of any regulated air pollutant, as measured in "kg/hr of any pollutant discharged into the atmosphere."[618]

Congress enhanced the Clean Air Act again with the Clean Air Amendments of 1977, this time implementing the PSD provisions, including the requirement of "a PSD permit before a 'major emitting facility' could be 'constructed'... [wherein] [t]he term 'construction' ... includes the modification (as defined in Section 111(a)) of any source or facility.'"[619] To regulate the administration of the PSD permits, the EPA invoked the 1980 PSD regulations, in which "modifications" would include any major change that increased the actual emission of pollutants to an annual level exceeding the average of the previous two years.[620]

In 2000, the United States filed a claim against Duke Energy Corporation for violating the Clean Air Act by failing to obtain PSD permits for the modifications made to the tube assemblies in several of its facilities with the end result being an increase in the number of operating hours and thus increasing the annual emission of pollutants.[621] Duke Energy contested the claim in the United States District Court of the Middle District of North Carolina by arguing that the changes made to its facilities did not create an increase in the hourly rate of emissions, as required for the EPA's regulation of modifications under the NSPS, and thus did not require a permit under the PSD since the PSD incorporated

616. *Id.* ("The [Clean Air] Amendments dealing with NSPS authorized EPA to require operators of stationary sources of air pollutants to use the best technology for limiting pollution, ... both in newly constructed sources and those undergoing 'modification[.]').

617. *Id.* (quoting 42 U.S.C. § 7411(a)(4)).

618. *Envtl. Def.*, 127 S. Ct. at 1428 (quoting 40 C.F.R. § 60.14).

619. *Id.* at 1429 (quoting 42 U.S.C. § 7479(2)(C)); note that "Section 111(a)" refers to the NSPS definition of "modification" in the Clean Air Act Amendments of 1970 (§ 7411(a)(4)).

620. *See id.* at 1430 (The Court encapsulated this by stating that the "EPA's 1980 PSD regulations require a permit for a modification ... only when it is a major one and only when it would increase the actual annual emission of a pollutant above the actual average for the two prior years.").

621. *Id.; see also id.* ("Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund intervened as plaintiffs and filed a complaint charging similar violations.").

the NSPS definition of "modification" by reference.[622] The Fourth Circuit affirmed.[623]

The district court and the Fourth Circuit both determined that since the PSD amendment assumed the same definition for "modification" as the NSPS that the EPA must regulate the PSD in accordance with its regulations of the NSPS.[624] The Court found that although the PSD references the NSPS for its definition of "modification," there is no requirement on the part of the EPA to regulate the different statutes in the same manner.[625] The Court noted that "[n]othing in the text or the legislative history of the technical amendments that added the cross-reference to NSPS suggests that Congress had details of regulatory implementation in mind when it imposed PSD requirements on modified sources."[626] The Court concluded that "[a]bsent any iron rule to ignore the reasons for regulating PSD and NSPS 'modifications' differently, EPA's construction need do no more than fall within the limits of what is reasonable, as set by the [Clean Air] Act's common definition."[627]

D. *The Clean Water Act*

The Court faced two seemingly conflicting federal statutes in *National Ass'n of Home Builders v. Defenders of Wildlife*.[628] First, section 402(b) of the Clean Water Act of 1972 (CWA) mandates that EPA "shall approve each submitted program" to transfer authority to individual states for issuing permits under the National Pollution Discharge Elimination System (NPDES), if the state requesting authority meets nine criteria specified by the CWA.[629] The Endangered Species Act of 1973

622. *Id.* at 1431 ("[Duke argued that] none of the projects was a 'major modification' requiring a PSD permit because none increased hourly rates of emissions."); *see also id.* ("[T]he District Court [held that] a PSD 'major modification' can occur 'only if the project increases the hourly rate of emissions.'").

623. *Envtl. Def.*, 127 S. Ct. at 1431.

624. *Id.* at 1429 (citing 42 U.S.C. § 7479(2)(C), which states that PSD permits are required for "modification[s] (as defined in Section 111(a)) of any source or facility.").

625. *See id.* at 1433 ("There is . . . no . . . presumption that the same defined term in different provisions of the same statute must 'be interpreted identically.' Context counts.") (internal citations omitted).

626. *Id.*

627. *Id.* at 1434.

628. 127 S. Ct. 2518 (2007) (5–4 decision) (combined with *Envtl. Prot. Agency v. Defenders of Wildlife*, also on writ of certiorari before the Court this term).

629. *Id.* at 2525 (The Court summarized: "Under § 402(b) of the CWA, 'the Governor of each State desiring to administer its own permit program for discharges into navigable waters . . . may submit to [the EPA] a full and complete description of the program it proposes to establish and administer under State law' [and]. . . the EPA 'shall approve each submitted program' for transfer of permitting authority to a State 'unless [it] determines that adequate authority does not exist' to ensure that nine specified criteria are satisfied.") (quoting 33 U.S.C. § 1342(b)).

(ESA), section 7(a)(2), on the other hand, requires each federal agency, including the EPA, to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species."[630] The question before the Court was whether the EPA properly transferred permitting authority to the state of Arizona under section 401(b) of the CWA or if the EPA was also required to consider the "no-jeopardy" requirement of the ESA. In a 5–4 decision, the Court held that the transfer was proper.[631]

The Court majority determined that by requiring the EPA to meet section 7(a)(2) of the ESA, in addition to finding the state met the nine criteria set forth in section 402(b), then the ESA would, in effect, "repeal the mandatory and exclusive list of criteria set forth in [section] 402(b), and replace it with a new, expanded list that includes [section] 7(a)(2)'s no-jeopardy requirement."[632] But the Court "will not infer a statutory repeal unless the later statute 'expressly contradict[s] the original act' or unless such a construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'"[633]

The Court then looked to how the administrative agencies themselves handle this apparent conflict. The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) administer the ESA under the Secretary of the Interior and the Secretary of Commerce, respectively.[634] These agencies jointly published a regulation stating that "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."[635] The key word focused on by the Court majority was "discretionary" and the Court concluded that the FWS and NMFS would expect the EPA to meet the section 7(a)(2) no-jeopardy requirement only if the EPA was undertaking a discretionary action.[636]

630. *Id.* at 2526 (quoting 16 U.S.C. § 1536(a)(2)).

631. *Id.* ("The transfer of permitting authority to state authorities—who will exercise that authority under continuing federal oversight to ensure compliance with relevant mandates of the Endangered Species Act and other federal environmental protection statutes—was proper.")

632. *Id.* at 2532.

633. *Home Builders*, 127 S. Ct. at 2532. (internal citations omitted); *See also id.* at 2533 ("While the language of § 7(a)(2) does not explicitly repeal any provision of the CWA (or any other statute), reading it for all that it might be worth runs foursquare into our presumption against implied repeals.").

634. *Id.* at 2526.

635. *Id.* (quoting 50 C.F.R. § 402.03).

636. *See id.* at 2533 ("[T]he ESA's requirements would come into play only when an action results from the exercise of agency discretion."); *see also id.* at 2538 ("Applying [Chevron deference], we defer to the agency's reasonable interpretation of ESA § 7(a)(2) as applying only to 'actions in which there is discretionary Federal involvement or control.'").

The question then becomes whether the EPA's authority was discretionary under section 402(b) if a state met all nine of the statutory criteria in applying for the authority to issue permits under the NPDES. The Court majority concluded that since the language of section 402(b) mandated the transfer of authority when all nine criteria are met, the EPA's decision is not discretionary.[637] Furthermore, the transfer of authority to a state is not absolute; the state's administration of permits under NPDES is still subject to the oversight of the EPA.[638] Thus, the Court majority concluded that "[s]ince the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria set forth in section 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger [section] 7(a)(2)'s consultation and no-jeopardy requirements."[639]

The dissent took issue with the majority allowing section 402(b) of the CWA to take precedence over section 7(a)(2) of the ESA by the majority's finding that the EPA lacks discretionary decision-making under section 402(b).[640] The dissent states that limiting section 7(a)(2) to discretionary actions undermines the congressional intent to make the protection of endangered species the highest priority.[641] The dissent would have resolved the seemingly contradictory statutes by giving priority to the ESA—the EPA would be required to comply first with the consultation requirements of section 7(a)(2) to determine whether the transfer of authority to a state to administer permits under the NPDES would "jeopardize the continued existence of endangered species."[642] By following the mandates of the ESA, the EPA could obtain the appropriate releases from the FWS and NMFS via consultation or a biological

637. *See id.* at 2531 ("By its terms, the statutory language [of § 402(b)] is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application.").

638. *See Home Builders,* 127 S. Ct. at 2525 ("If authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight.")

639. *Id.* at 2538.

640. *See id.* (Stevens, J., dissenting) ("[The majority] opinion unsuccessfully tries to reconcile the CWA and ESA by relying on a federal regulation, . . . which it reads as limiting the reach of § 7(a)(2) to *only* discretionary federal actions.") (emphasis in original); *see also id.* at 2552 (Breyer, J., dissenting) ("[T]he majority cannot possibly be correct in concluding that the structure of § 402(b) precludes application of § 7(a)(2) to the EPA's discretionary action . . . because grants of discretionary authority always come with *some* implicit limits attached.") (emphasis in original.).

641. *See id.* at 2539 ("[T]he Court whittles away at Congress' comprehensive effort to protect endangered species from the risk of extinction and fails to give the [Endangered Species] Act its intended effect.").

642. *Id.* (quoting TVA v. Hill, 437 U.S. 153, 173 (1978)).

opinion indicating that the transfer of authority would not jeopardize any species.[643] If the biological opinion indicated that one or more species would be in danger, the EPA could work with the state and the administrative agencies to determine what steps would need to be taken to still allow the transfer of authority to take place under section 402(b).[644] Thus, the dissent concluded that "the consultation process would generate an alternative course of action whereby the transfer could still take place-as required by [section] 402(b) of the CWA—but in such a way that would honor the mandatory requirements of [section] 7(a)(2) of the ESA."[645]

E. *Recovery of Clean-up Costs Under CERCLA*

In *United States v. Atlantic Research Corp.*,[646] a unanimous Court confirmed that a private party can sue under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for the recovery of costs incurred cleaning up a contaminated site, even if that private party qualifies as a potentially responsible party (PRP).[647] An individual or organization may be considered a PRP if it meets one of the definitions set forth in CERCLA section 107(a), which identifies those who transport, dispose of, treat, or otherwise handle hazardous materials.[648]

Atlantic Research Corp. was a contractor for the United States and, in performing its duties of retrofitting rocket motors, contaminated the groundwater and soil at the site.[649] After incurring the costs to clean the site, Atlantic Research sued the United States under CERCLA section 107(a) to recover some of its costs.[650] The United States argued that Atlantic Research could be considered a PRP and section 107(a) did not allow one PRP to sue another PRP.[651]

643. *See generally Home Builders*, 127 S. Ct. at 2545.

644. *See id.* at 2545–46 ("[I]n the face of any conflict between the ESA and another federal statute, the ESA and its implementing regulations encourage federal agencies to work out a reasonable alternative that would let the proposed action move forward 'consistent with [its] intended purpose' and the agency's 'legal authority,' while also avoiding any violation of § 7(a)(2).").

645. *Id.* at 2546.

646. 127 S. Ct. 2331 (2007).

647. *Id.* at 2333 ("Two provisions of . . . [CERCLA]—§§ 107(a) and 113(f)—allow private parties to recover expenses associated with cleaning up contaminated sites."); *see also id.* at 2336 ("the plain language of [CERCLA § 107(a)(4)(B)] authorizes cost-recovery actions by any private party, including PRPs.").

648. *See id.* at 2335 n.2 (quoting 42 U.S.C. §§ 9607(a)(1)-(4)).

649. *Id.* at 2335.

650. *Id.*

651. *Atl. Research*, 127 S. Ct. at 2335 ("The United States moved to dismiss, arguing that § 107(a) does not allow PRPs (such as Atlantic Research) to recover costs.").

In a previous case, the Court had held that under CERCLA section 113(f), a PRP who was sued under section 106 or section 107 could then bring a suit for contribution against other liable PRPs, but the Court remained silent as to whether a PRP could sue another PRP under section 107(a).[652] To answer this question, the Court looked at the language of section 107(a)(4)(A) and section 107(a)(4)(B), which define the liability of PRPs. Subparagraph (A) makes PRPs liable for the recovery or remediation costs "incurred by the United States Government or a State or an Indian tribe" while subparagraph (B) makes PRPs liable for "any other necessary costs of response incurred by any other person."[653] The government argued that "other person" in subparagraph (B) must refer to parties not defined as PRPs in section 107(a)(1)-(4), thus eliminating the possibility for a PRP to sue another PRP under section 107(a).[654] The Court disagreed, stating that "[s]tatutes must 'be read as a whole.'"[655] In comparing the similar structures of subparagraphs (A) and (B), the Court concluded that "the language of subparagraph (B) can be understood only with reference to subparagraph (A)."[656] Thus, when subparagraph (A) categorically lists the "United States Government or a State or an Indian tribe" as being able to recover costs, then subparagraph (B)'s reference to "any other person" means precisely that—any person other than the three entities named in subparagraph (A).[657] The Court concluded that this meant a PRP could bring a cause of action against another PRP under section 107(a) for the recovery of clean-up costs.[658]

The Court harmonized this case with *Cooper Industries* by reiterating that under the holding in *Cooper Industries*, section 113(f) "explicitly

652. *See generally* Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004); *see also Atl. Research*, 127 S. Ct. at 2334 ("In *Cooper Industries*, we held that a private party could seek contribution from other liable parties only after having been sued under § 106 or § 107(a).") (citing *Cooper Industries*, 543 U.S. at 161); *see also id.* at 2333 ("In this case, we must decide a question left open in *Cooper Industries* . . . : whether § 107(a) provides so-called potentially responsible parties (PRPs) . . . with a cause of action to recover costs from other PRPs.").

653. *Atl. Research*, 127 S. Ct. at 2334 (quoting 42 U.S.C. §§ 9607(a)(4)(A)-(B)).

654. *Id.* at 2335 ("The Government argues that 'any other person' refers to any person not identified as a PRP in §§ 107(a)(1)-(4). In other words, subparagraph (B) permits suit only by non-PRPs and thus bars Atlantic Research's claim.").

655. *Id.* at 2336 (quoting King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991)).

656. *Id.*

657. *Id.* ("In light of the relationship between the subparagraph[s], it is natural to read the phrase 'any other person' by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe. The phrase 'any other person' therefore means any person other than those three.").

658. *Atl. Research*, 127 S. Ct. at 2339 ("Because the plain terms of § 107(a)(4)(B) allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action.").

grants PRPs a right to contribution" and this right "is contingent upon an inequitable distribution of common liability among liable parties."[659] But under the holding in *Atl. Research*, section 107(a) "permits recovery of cleanup costs but does not create a right to contribution. A private party may recover under [section] 107(a) without any establishment of liability to a third party."[660]

XI. Telecommunications

The Court decided two telecommunications cases this term, both 7–2 decisions interpreting provisions of the Telecommunications Act of 1996. *Bell Atlantic Corp. v. Twombly*[661] made it more difficult for consumers to state a claim of antitrust conspiracy, while *Global Crossing Telecommunications v. Metrophones Telecommunications*[662] allowed pay phone service providers to bring federal claims for compensatory damages against long-distance carriers.

A. *Antitrust Claim Under the Sherman Act*

Bell Atlantic Corp. v. Twombly[663] established that, to have a claim of antitrust conspiracy under the Sherman Act, consumers in a class action suit must allege more than "parallel business conduct and a bare assertion of conspiracy."[664] A violation of the Act's restraint of trade provision requires proof of facts that an agreement existed between companies.[665] This is because the Sherman Act does not prohibit restraints on trade stemming from "independent actions,"[666] "but only restraints effected by a contract, combination, or conspiracy."[667]

The Telecommunications Act of 1996 restructured local telephone markets "to facilitate market entry" of incumbent local exchange carriers (ILECs) into the long-distance market through set conditions.[668] The purpose was to obligate each ILEC "to share its network with competitors,"

659. *Id.* at 2337–38.
660. *Id.* at 2338.
661. 127 S. Ct. 1955 (2007).
662. 127 S. Ct. 1513 (2007).
663. 127 S. Ct. 1955 (2007).
664. *Id.* at 1963–70 (delivered by Justice Souter).
665. *See* Sherman Act, 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").
666. *Id.*
667. *Bell Atlantic*, 127 S. Ct. at 1964 (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984)).
668. *Id.* at 1961 (quoting AT&T v. Iowa Util. Bd., 525 U.S. 366 (1999); *see* 47 U.S.C. § 271.

which were also known as CLECs.[669] In *Bell Atlantic*, consumers of local telephone and/or high-speed Internet services complained that ILECs were preventing competition in the local telephone and internet service markets in violation of the Sherman Act.[670] First, they engaged in "parallel business conduct" by "inflating charges" to prevent new CLECs from entering the market.[671] They allegedly made unfair agreements with the CLECs giving inferior access to networks, overcharging, and billing wrongfully to "sabotage" the carriers' customer relations.[672] Second, they implicitly agreed not to pursue business opportunities in the other ILEC's territory, thereby "allocate[ing] customers and markets to one another."[673]

Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," the Court held that a claim alleging a violation of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[674] The Court requires that when "allegations of parallel conduct are set out in order to make a [section] 1 claim, . . . [these allegations] must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[675]

Thus, the Court found "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."[676] The Court held that "nothing in the complaint intimates that the [ILECs'] resistance to the [CLEC] upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance."[677]

B. *Standing*

In a 7–2 opinion, the Court held in *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*[678] that payphone service providers (PSPs) are allowed to bring suit in federal court against long-distance carriers who fail to pay compensation for payphone calls.

669. *Id.* (quoting Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402 (2004)).
670. *Id.* at 1961.
671. *Id.* at 1962–63.
672. *Id.*
673. *Id.*
674. *Id.* at 1964–65.
675. *Id.* at 1965.
676. *Id.* at 1971.
677. *Id.*
678. 127 S. Ct. 1513 (2007).

Failure to pay is an "unjust and unreasonable" practice under section 201(b) of the Communications Act of 1934, and section 207 provides recourse for the PSP for damages.[679]

Congress wanted to ensure that consumers could use the long-distance provider of their choice from any payphone without depositing coins, typically accomplished by utilizing a 1–800 number for the long-distance provider.[680] Congress specifically tasked the Federal Communications Commission (FCC) to create a regulation which would "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call."[681] The FCC regulation required the long-distance provider to pay the PSP $0.24 per call, with the option to pass this cost on to the consumer.[682] The FCC determined that, under the Communications Act,[683] failure on the part of the long-distance provider to pay this reimbursement to the PSP constituted "an 'unreasonable practice' within the terms of [section] 201(b)" and a PSP would be able to "bring a federal-court lawsuit under [section] 207, to collect the compensation owed."[684] Metrophones Telecommunications, Inc., a PSP, sued the long-distance carrier Global Crossing Telecommunications, Inc. in federal court for failing to compensate Metrophones as required by the FCC's regulations.[685]

The Court first considered whether a claim for a violation of section 201(b) can be brought in federal court under section 207. The Court determined that "to violate a regulation that lawfully implements section 201(b)'s requirements is to violate the [Communications Act]."[686] Therefore, a federal "lawsuit is proper *if* the FCC could properly hold that a carrier's failure to pay compensation is an 'unreasonable practice' deemed 'unlawful' under § 201(b)."[687]

679. *Id.* at 1516.

680. *Id.* at 1518 (The Telephone Operator Consumer Services Improvement Act of 1990 was special legislation enacted by Congress to keep PSPs from imposing the long-distance provider of its choice onto the consumer.); *see* 47 U.S.C.S. § 226 (LexisNexis 2007).

681. *Id.* (quoting the Telecommunications Act of 1996, 47 U.S.C.S. § 276(b)(1)(A) (LexisNexis 2007)).

682. *Global Crossing*, 127 S. Ct. at 1518; *see also* 47 C.F.R. § 64.1300(d) (2005).

683. § 276(b)(1)(A) of the Communications Act of 1934 (as added by § 151 of the Telecommunications Act of 1996, 110 Stat. 106, codified at 47 U.S.C. § 276(b)(1)(A)).

684. *Global Crossing*, 127 S. Ct. at 1518; *see also* 2003 Payphone Order, 18 FCC Rcd. 19975, 19990, P32.

685. *Id.* at 1518–19.

686. *Id.* at 1519 (emphasis in original).

687. *Id.* (emphasis in original).

The Court then considered whether the FCC could reasonably interpret the Communications Act statute as holding a long-distance carrier liable for "unreasonable practice" if it failed to comply with the FCC regulation. Giving *Chevron* deference to the FCC, the Court determined that a "carrier's refusal to divide the revenues it receives from the caller with its collaborator, the payphone operator, despite the FCC's regulation requiring it to do so, can reasonably be called a 'practice' 'in connection with' the provision of that service that is 'unreasonable.'"[688] Thus, "the FCC's finding that the failure to follow the order is an unreasonable practice is well within its authority."[689] The Court concluded that "the FCC's application of [section] 201(b) to the carrier's refusal to pay compensation is a reasonable interpretation of the statute; hence it is lawful.

XII. Tobacco

The Court decided two tobacco-related cases this term, both involving Philip Morris, which prevailed in a unique punitive damages-as-takings case that was the closest the Court got this term to deciding a takings case. In the other case, *Watson v. Philip Morris*,[690] the outcome proved less favorable for the tobacco manufacturer who was not allowed to remove an action for false and deceptive advertising to federal court.

In *Philip Morris USA v. Williams*,[691] the Supreme Court held 5–4 that awarding punitive damages on account of a corporation's acts affecting "strangers to the litigation" amounts to a "taking of property . . . without due process," because the defendant is unable to defend itself against the nonparties.[692] Although juries may still look at harm done to others when determining reprehensibility,[693] damages awarded to punish defendants may not be based on harm done to nonparties to the suit, but only to those who are parties to the action.[694]

In *Philip Morris v. Williams*, the widow of a cigarette smoker brought a lawsuit for "negligence and deceit" against Philip Morris, the manufacturer of Marlboro cigarettes.[695] The trial jury found that Mr. Williams, whose cigarette of choice was Marlboro, died from smoking.[696] The jury

688. *Id.* at 1520.
689. *Global Crossing*, 127 S. Ct. at 1521.
690. 127 S. Ct. 2301 (2007).
691. 127 S. Ct. 1057 (2007).
692. *Id.* at 1058, 1063.
693. *Id.* at 1065.
694. *Id.* at 1058.
695. *Id.* at 1060.
696. *Philip Morris*, 127 S. Ct. at 1060–61.

also found that Philip Morris had engaged in deceitful behaviors, which "knowingly and falsely led [Mr. Williams] to believe" that smoking was safe.[697] Because of the deceit, the jury awarded significant compensatory damages and $79.5 million in punitive damages.[698] Philip Morris argued that the trial court should have limited the scope of the punitive damages by using a jury instruction "that specified the jury could not seek to punish [the defendant] for injury to other persons not before the court."[699] Instead, the trial court judge instructed the jury that "punitive damages are awarded against a defendant to punish misconduct and to deter misconduct, and are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct."[700] Philip Morris claimed these instructions allowed the jury to award the $79.5 million punitive damages as punishment for the harm that Philip Morris may have caused to others, which constitutes a violation of due process.[701]

The Court agreed with Philip Morris that, when awarding punitive damages, the procedures followed are limited by the Due Process Clause of the Constitution.[702] Due process requires that a defendant to a suit be allowed "an opportunity to present every available defense."[703] Without being able to build a defense against nonparties to the suit, Philip Morris was deprived of the ability to defend against other smokers, including those who might have different beliefs about smoking, knew the dangers of smoking but chose to smoke anyway, or who may not have relied on any action or behavior on the part of Philip Morris.[704] Likewise, juries would be "left to speculate" about damage awards without any clear standards to determine them.[705] Thus, the Court determined that the "Due Process Clause forbids a [s]tate to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . who are, essentially, strangers to the litigation."[706]

697. *Id.*
698. *Id.* (The compensatory damages were about $821,000; $21,000 of which was noneconomic, the remaining $800,000 for economic damages).
699. *Id.* at 1061.
700. *Id.* (internal quotations omitted).
701. *Id.*
702. *Philip Morris*, 127 S. Ct. at 1062–63.
703. *Id.* at 1063 (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).
704. *Id.*
705. *Id.* (The Court pointed to the unknowns that would be inherent in allowing juries to punish a defendant for harm to nonparties: how many other victims are to be considered; how serious were their injuries; what were the circumstances surrounding their injuries; etc.).
706. *Id.* at 1063.

There were multiple dissenting opinions, with the main themes revolving around the nature of punitive damages and, more specific to this case, the lack of procedural error that would support a reversal of the state's supreme court verdict upholding the punitive damages award. Furthermore, the dissent found it difficult to distinguish between punitive damages to punish the "reprehensible behavior" of the defendant and damages that punish the defendant for "harm to others."[707]

In *Watson v. Philip Morris,*[708] the Court unanimously held that the mere facts that a federal agency "directs, supervises, and monitors" a company's activities does not bring that company within the scope of "'acting under' an 'officer' of the United States" to enable removal of a state-court action to federal court.

Consumers brought a class action in the United States District Court for the Eastern District of Arkansas, arguing that Philip Morris "manipulated the design" of their cigarettes for the purposes of industry testing to measure tar and nicotine levels in cigarettes. The techniques employed by Philip Morris showed lower amounts in the testing than the cigarettes shipped to consumers actually contained.[709] The plaintiffs further alleged that the company's "advertisements and packaging" indicating the cigarettes were "light" constituted "unfair and deceptive business practices" in violation of Arkansas law.[710]

"Any person acting under" an "officer . . . of the United States or of any agency thereof" may remove a case to federal court when that person is "sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress."[711] Philip Morris claimed that, like contractors hired by the government, they qualify under the statute allowing removal because they are subjected to intense regulation, monitoring or supervision by a federal agency.[712]

The Court rejected the company's claim relying on "precedent and statutory purpose [which] make clear that the private person's 'acting

707. *See id.* at 1067 (Stevens, J., dissenting) ("When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm.").

708. 127 S. Ct. at 2301 (2007).

709. *Id.* at 2304.

710. *Id.* (referencing Arkansas Deceptive Trade Practices Act, ARK. CODE ANN. § 4–88–107 (West 2007)).

711. *See* 28 U.S.C.S. § 1442(a)(1) (1996).

712. *Watson,* 127 S. Ct. at 2303.

under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior.[713] Although the tobacco industry is closely regulated with particularity, the company is not like a government contractor who "helps officers fulfill other basic governmental tasks."[714]

Philip Morris also contended that the FTC delegated the testing of the cigarettes to the tobacco industry, yet the FTC "'extensively . . . supervised' and 'closely monitored' the manner in which the laboratory tests cigarettes."[715] Due to this delegation, Philip Morris argued it was "'acting under' officers of the FTC when it conducts cigarette testing."[716] The Court found there was "no evidence of any delegation of legal authority" to the industry from the FTC to test cigarettes on the agency's behalf, pointing out a "fatal flaw . . . of omission" in the company's argument.[717] Because the regulatory relationship was not "distinct from the usual regulator/regulated relationship," the company is not brought within the scope of "acting under" an "officer" of the United States.[718]

XIII. Preemption/Jurisdiction

Two cases decided this term will be of particular interest to followers of the law affecting state and local government. In the first case, *Watters v. Wachovia Bank*,[719] the Court decided that federal law preempts state laws regulating subsidiaries of national banks. With respect to jurisdiction, the Court's decision in *Permanent Mission of India to the United Nations v. New York City*[720] recognized the rights of state governments to collect property taxes from foreign governments. In *Bowles v. Russell*,[721] the Court ruled in a 5–4 decision that petitioners are responsible for meeting statutorily defined filing deadlines, regardless of the date calculated by the district judge. Failure to meet the deadline deprived the appellate court of jurisdiction.

713. *Id.* at 2307 (emphasis in original).
714. *Id.* at 2308 (distinguishing Winters v. Diamond Shamrock Chemical Co., 149 F.3d 387 (5th Cir. 1998) (authorizing removal of a tort suit against private defense contractors that manufactured Agent Orange)).
715. *Id.* at 2308.
716. *Id.* at 2309.
717. *Watson*, 127 S. Ct. at 2309–10.
718. *Id.* at 2310 (citing 28 U.S.C.S. § 1442(a)(1)).
719. 127 S. Ct. 1559 (2007).
720. 127 S. Ct. 2352 (2007). *See* Linda Greenhouse, *U.S. Supreme Court Supports New York City's Effort to Collect Taxes on Some U.N. Missions*, N.Y. TIMES, June 15, 2007, at B5.
721. 127 S. Ct. 2360 (2007) (5–4 decision).

A. *Federal Law Preemption*

In *Watters v. Wachovia Bank,*[722] the Court ruled 5–3 that state regulators cannot control state subsidiaries of national banks.[723] Rather, the state mortgage business of a national bank is subject to federal supervision by the Office of the Controller of the Currency (OCC).[724] The Court also clarified that the OCC regulation stating that state laws apply "to the same extent" to subsidiaries of national banks as they do to the parent national bank itself does not violate the Tenth Amendment.[725]

The federal chartered bank, Wachovia, brought suit when the Michigan Office of Insurance and Finance Services tried to regulate its subsidiary state mortgage company's lending practices.[726] It argued that federal regulations take precedence over state laws requiring subsidiaries, but not national banks, "to register and pay fees to the [s]tate."[727] The Commissioner of the Michigan Office of Insurance and Finance Services argued that the OCC regulation incorrectly expanded the definition of "national bank" to include subsidiaries.[728]

The Court deferred to the OCC's interpretation of the National Bank Act (NBA), which prohibits the use of any "visitorial powers" consisting of regulating and examining the activities of national banks except by Congress.[729] Michigan law, however, requires subsidiary banks to register with the state and allows the state to investigate consumer complaints.[730]

722. 127 S. Ct. 1559 (2007). Justice Thomas did not participate in the 5–3 decision for Wachovia Bank.

723. *See id.* at 1564–65.

724. *Id; see also* Comptroller of the Currency Administration of National Banks, U.S. DEP'T OF THE TREASURY, July 20, 2007, *available at* http://www.occ.treas.gov/customer.htm. ("The OCC charters, regulates, and supervises over 1,750 (as of Sept. 30, 2006) national banks and their operating subsidiaries to ensure a safe, sound and competitive national banking system that supports the citizens, communities and economy of the United States.").

725. 12 C.F.R. § 7.4006; *see* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

726. *Watters,* 127 S. Ct. at 1565–66.

727. *Id; see also* Hilary Oswald, *Watters, Linda v. Wachovia Bank,* MEDILL—ON THE DOCKET, June 19, 2006, *available at* http://docket.medill.northwestern.edu/archives/003731.php. (The nation has a "dual banking system" whereby banks are under the direction of either state or federal government.).

728. *Watters,* 127 S. Ct. at 1565–66.

729. National Bank Act, 12 U.S.C. § 484. The practice of giving deference to a regulatory agency's interpretation of a statute if it is unclear or silent on an issue is called "*Chevron* Deference." *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

730. *See* Mortgage Brokers, Lenders, and Services Licensing Act, MICH. COMP. LAWS ANN. § 445. 1651 *et seq.* (West 2002 & Supp. 2006); Secondary Mortgage Loan Act, *id.* § 493.51 *et seq.* (West 2005).

Hence, the question was what role the OCC plays in resolving tension between federal and state regulations.[731] Because the law was issued by an agency, not by Congress, it spurred debate over the "degree of deference" given and whether it should equal that given to federal agencies.[732]

The Court determined that the OCC Comptroller's interpretation of 12 C.F.R. section 7.4006 equating "state-chartered operating subsidiary" with "national bank" was reasonable, because national banks have "incidental powers" giving them the authority to operate a subsidiary.[733] Furthermore, the Court opined that Congress has the authority to regulate national banks from the Commerce Clause, which gives Congress the power to enact laws that are "necessary and proper" for executing its power.[734] Therefore, the OCC provision stating that states can only regulate operating subsidiaries in as much as it is allowed to regulate national banks is not unconstitutional.[735]

B. *Collection of Foreign Property Taxes*

The Court ruled in *Permanent Mission of India v. City of New York*[736] that local governments may collect unpaid property taxes from foreign countries that use the property for housing its missions. The 7–2 majority reverted to basic principles of property law to support its decision that "a lien implicates 'rights in immovable property'" invoking the exception to the federal law that foreign governments are immune from certain suits.[737] Missions are, therefore, not immune from paying city property taxes under The Foreign Sovereign Immunities Act of 1976 (FSIA).[738]

India and Mongolia claimed sovereign immunity under the FSIA from suits brought against them for not paying their New York City property tax bills on buildings they used for housing lower-ranking employees.[739] The city argued that the buildings were "immovable

731. Oswald, *supra* note 727.

732. Linda Greenhouse, *Supreme Court Ruling Limits State Control of Big Banks*, N.Y. TIMES, April 18, 2007, at C2.

733. Wachovia Bank v. Watters, 334 F. Supp. 2d 957, 966 (W.D. Mich. 2004).

734. *Watters*, 127 S. Ct. at 1573. *See also* U.S. CONST. art. I, § 8, cl. 3, 18.

735. *Id.* (The provision does not take away any unenumerated powers reserved to the states by the Tenth Amendment).

736. 127 S. Ct. 2352 (2007).

737. *Id.* at 2356. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter).

738. *See id.*

739. Linda Greenhouse, *U.S. Supreme Court Supports New York City's Effort to Collect Property Taxes on Some U.N. Missions*, N.Y. TIMES, June 15, 2007, at B5.

property," not subject to the state law providing that "property owned by a foreign government is exempt from taxation" if used for "diplomatic offices" or "housing for an ambassador or a senior minister."[740] New York placed a tax lien on the buildings when the countries failed to pay.[741]

The Court explained that "[p]roperty ownership is not an inherently sovereign function" and "acquiring property in a foreign country may . . . subject[] that property to the territorial jurisdiction."[742] The Court recognized that New York state law exempted only the portion of foreign-owned property that was used exclusively for "diplomatic offices or for the quarters of a diplomat 'with the rank of ambassador or minister plenipotentiary' to the United Nations."[743] Since portions of the buildings owned by India and Mognolia were used to house "lower level employees" of the Permanent Mission of India to the United Nations and the Ministry for Foreign Affairs of the People's Republic of Mongolia, these portions of the buildings were taxable under New York law.[744]

The FSIA's provision also bolsters the argument against immunity because it states that the law does not extend to "an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction."[745] Therefore, the Court held that "[u]nder the language of the FSIA's exception for immovable property, petitioners are not immune from the [c]ity's suits."[746]

The dissent's interpretation of FSIA differed from the majority's in that none of the exceptions granted under FSIA make "any reference to actions brought to establish a foreign sovereign's tax liabilities."[747] The dissent expressed concern that permitting a "tax lien to invoke the property exception . . . opened the door too widely."[748] Other negative reactions came from the Bush Administration, which cautioned that

740. *Id. See* N.Y. REAL PROP. TAX LAW ANN. § 418 (West 2000).
741. *Id.*
742. *Id.* at 2357 (citing Schooner Exchange v. McFaddon, 7 Cranch 116, 145 (1812)) (internal quotations omitted).
743. *Permanent Mission,* 127 S. Ct. at 2354–55 (quoting N. Y. REAL PROP. TAX LAW ANN. § 418 (West 2000)).
744. *Id.* at 2354.
745. *Id.* at 2357 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 68(b) (1965)).
746. *Id.* at 2358.
747. *Id.* at 2358–59 (Stevens, J., dissenting).
748. Greenhouse, *supra* note 739.

"allowing suits against foreign countries for unpaid property taxes would 'adversely affect the nation's foreign relations.'"[749] Regardless, this outcome "will remind the 190 other foreign missions in the city of their obligations" to pay local taxes and will benefit New York City.[750]

C. *Statutory Filing Deadlines*

In the case that perhaps best represents the closing of the (appellate) courthouse door, in *Bowles v. Russell*,[751] the Court held 5–4 that a petitioner is responsible for meeting statutory deadlines for filing a notice of appeal under 28 U.S.C.S. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6) even when the district court's order mistakenly allows more time. Failure to do so results in dismissal for want of jurisdiction. In light of this reasoning, the Court overruled two long-standing cases "to the extent they purport to authorize an exception to a jurisdictional rule."[752]

In *Bowles*, the petitioner had requested a fourteen-day extension for filing an appeal under Rule 4(a)(6)[753] and the District Court of the Northern District of Ohio erroneously granted Bowles seventeen days instead.[754] Bowles filed his appeal prior to the date identified by the district court, but after the statutorily defined fourteen days.[755] The Sixth Circuit ruled that it lacked jurisdiction to hear the case since Bowles had not filed within the timeframe dictated by the statute.[756] The Court agreed, holding that the "petitioner's untimely notice—even though filed in reliance upon a district court's order—deprived the Court of Appeals of jurisdiction."

The dissent argued that "[t]he stakes are high in treating time limits as jurisdictional."[757] Time limits that are mandatory, rather than jurisdictional, allow for waiving or mitigating factors through "reasonable equitable discretion."[758] The dissent maintains that the Court has "the

749. *Id.*
750. *Id.*
751. 127 S. Ct. 2360, 2371 (2007).
752. *Id.* (overruling Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) (per curiam), and Thompson v. INS, 375 U.S. 384 (1964) (per curiam)).
753. "The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered." FED. R. APP. P. 4(a)(6).
754. *Bowles*, 127 S. Ct. at 2362 ("On February 10, 2004, the District Court granted Bowles' motion. But . . . the District Court inexplicably gave Bowles 17 days—until February 27—to file his notice of appeal.").
755. *Id.* ("Bowles filed his notice on February 26—within the 17 days allowed by the District Court's order, but after the 14-day period allowed by [statute].").
756. *Id.*
757. *Id.* at 2368.
758. *Bowles*, 127 S. Ct. at 2368.

authority to recognize an equitable exception to the 14-day limit, and [the Court] should do that [for Bowles], as it certainly seems reasonable to rely on an order from a federal judge."[759]

XIV. Conclusion

This term can be characterized as "the conservative victory at the court," even though it was only a narrow margin of victory,[760] despite the court's unanimity last term and early unanimity this term with eight out of eighteen cases decided 9–0 at midterm in March. When the Justices returned from a four-week recess, they issued two 5–4 decisions setting the tone for the rest of the term.[761] The Court accepted twenty cases in January after taking only two in November and eight in December.[762] In the latter months of the term Justice Roberts' goal for the Court of "speak[ing] with one voice" was lost.[763]

The recent history of split decisions and lack of consensus has led many to abandon "[t]he notion that profound social change can be accomplished through judicial action."[764] Cass R. Sunstein of the University of Chicago Law School worries that the current bench is without "a voice . . . for significant social reform."[765] With the four "liberal" justices being significantly older than the five "conservative" justices,[766] it may be a long time before the Court shifts to the left.

759. *Id.* at 2370.

760. Linda Greenhouse, *On the Wrong Side of 5 to 4, Liberals Talk Tactics,* N.Y. TIMES, July 8, 2007, at 3.

761. Linda Greenhouse, *As to the Direction of the Roberts Court: The Jury is Still Out,* N.Y. TIMES, March 7, 2007, at A15. About half the decisions were unanimous in the 2005–06 term (forty-nine percent or fifty-three percent, depending on if you include opinions where justices disagreed on the reasoning behind a 9–0 decision). *Id.*

762. *Id.*

763. *Id.*

764. Greenhouse, *supra* note 761.

765. *Id.*

766. *Id.* The average age of Justices Souter, Ginsburg, Stevens, and Breyer is seventy-four, while Justices Kennedy, Scalia, Roberts, Alito, and Thomas is sixty-one, with Roberts being merely fifty-two (young for a federal judge).