ACLU SUMMARY

of the

2013 SUPREME COURT TERM

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Major Civil Liberties Decisions

Steven R. Shapiro
National Legal Director
ACLU

Dated: June 30, 2014

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FIRST AMENDMENT

A. Freedom of Speech

In *United States v. Apel*, 134 S.Ct. 1144 (Feb. 26, 2014)(9-0), the Court unanimously held that the language of 18 U.S.C. § 1382, which makes it a crime for anyone who has been barred from a military base to reenter the base, was sufficient to uphold the defendant's conviction for demonstrating on a public easement located within the boundaries but outside the front gate of Vandenburg Air Force Base in California. Writing for the Court, Chief Justice Roberts rejected the contention that § 1382 only applies to property that is under the military's exclusive possession and control. However, he remanded the question of whether Apel's conviction was consistent with the First Amendment to the Ninth Circuit, which had not addressed it on the original appeal. In a separate concurrence, Justice Ginsburg (joined by Justice Sotomayor) noted that since the military had shown no "special interest" in who used the public easement, "it is questionable whether Apel's ouster from the protest area can withstand constitutional scrutiny." The ACLU was co-counsel for Apel.

In *McCutcheon v. FEC*, 134 S.Ct. 1434 (April 2, 2014)(5-4), the Court struck down aggregate limits on campaign contributions to federal candidates and political committees. For example, under current law, an individual can contribute up to $5,200 to a particular candidate ($2,600 for the primary and $2,600 for the general election), but no more than $48,600 to all federal candidates. In other words, an individual who contributes the maximum to 9 candidates is effectively barred from contributing to any other candidates. Writing for a four-person plurality, Chief Justice Roberts ruled that these aggregate limits are unconstitutional. His opinion begins by noting that several parties had asked the Court to strike down all contribution limits but that there was no need to do so in this case. He then held that the only state interest that the Court has recognized as legitimate in this context is curbing corruption or the appearance of corruption. After narrowly defining corruption to mean only *quid-pro-quo* corruption (as opposed to influence or access), he rejected the government's argument that aggregate limits are necessary to prevent circumvention of individual limits by describing the government's concerns as speculative and/or implausible, and by citing existing anti-circumvention restrictions. Finally, he noted that those restrictions could be further tightened by targeted regulations that do not sweep as broadly as the current aggregate limits. Responding to the dissent's contention that the aggregate limits promote a collective interest in democratic self-governance, the Chief Justice wrote: "[T]he degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process." *Id.* at 1438. Justice Thomas provided the fifth vote for the majority in a concurring opinion arguing that all contribution limits should be struck down, and that the part of *Buckley* distinguishing between expenditure limits and contribution limits should be reversed. The dissent, written by Justice Breyer, criticizes the plurality for its narrow definition of corruption, argues that avoiding corruption in the political process is not simply a competing state interest but an independent First Amendment value, and asserts that the risk of circumvention is greater, and the adequacy of alternative solutions less effective, than the plurality proposes. Summarizing his disagreement with the plurality, Justice Breyer offered the following assessment of the Court's decision. "Taken together with *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010), today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."

In *Wood v. Moss*, 134 S.Ct. 2056 (May 27, 2014)(9-0), a unanimous Court ruled that two Secret Service agents were entitled to qualified immunity in a lawsuit alleging that they had engaged in viewpoint discrimination by moving protestors two blocks away from where President Bush was dining during a campaign visit to Oregon in 2004. Writing for the Court, Justice Ginsburg described it as "uncontested and uncontestable" that the government may not discriminate against peaceful expressive activity in a public forum because the government "fears, dislikes, or disagrees with the views" expressed. *Id*. at 2066. But, she held, a reasonable officer could have believed under the facts that the protesters needed to be moved from their original location because of valid security concerns. And, once the decision to move the protestors had been made, no prior Court decision required that protesters and supporters be kept a comparable distance from the President. While dismissing the complaint on qualified immunity grounds, the Court again assumed that federal officers can be sued under *Bivens* for violating the First Amendment. The ACLU represented the protesters in this case.

In *Lane v. Franks*, 2014 WL 2765285 (June 19, 2014)(9-0), the Court unanimously held that the First Amendment protects a public employee against retaliation for providing truthful sworn testimony outside the course of his ordinary job responsibilities. Eight years ago, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court had drawn a distinction between public employees who speak in their capacity as citizens, and public employees who speak as part of their official duties. *Garcetti* holds that the First Amendment applies in the former instance but not in the latter. Writing for the Court in this case, Justice Sotomayor clarified that public employees do not lose their First Amendment right to speak about matters of public concern merely because their speech involves information or insights they learned on their job. To the contrary, she explained, such speech is often particularly valuable to public understanding of government affairs. Furthermore, she wrote, providing truthful testimony in a judicial proceeding is a duty shared by all citizens. She specifically reserved the question of whether and how the First Amendment applies to public employees, like police officers, whose job responsibilities require them to testify in court. Finally, she ruled that the defendant in this case was entitled to qualified immunity because the First Amendment rules had not been clearly established at the time of the events that gave rise to this lawsuit. The ACLU submitted an *amicus* brief supporting the employee's First Amendment claim.

In *McCullen v. Coakley*, 2014 WL 2882079 (June 26, 2014)(9-0), the Court struck down a Massachusetts statute creating a 35-foot buffer zone outside abortion clinics as a violation of the First Amendment. Writing for a five-person majority, Chief Justice Roberts first held that the buffer zone law was content-neutral. Applying intermediate scrutiny, he then ruled that Massachusetts had failed to demonstrate that less restrictive alternatives, including the enforcement of existing criminal laws or injunctions targeted against specific lawbreakers, were inadequate to address the state's legitimate concerns about patient safety and obstruction of the sidewalks. The ACLU submitted an *amicus* brief in support of neither party, arguing that the buffer zone was constitutional on its face, but urging a remand because the lower courts had not adequately considered its impact on the right to engage in face-to-face communication on the public streets.

In *Harris v. Quinn*, 2014 WL 2921708 (June 30, 2014)(5-4), the Court was asked to overrule its decision in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), holding that public employees can be required to pay an agency fee to the union that represents them, even if they have chosen not to join the union, because they receive the benefits of the collective bargaining

agreement. Although Justice Alito's majority opinion sharply criticized the reasoning of *Abood*, it stopped short of overruling it. Instead, it held that the personal assistants who brought this challenge, and who function like home health care aids whose salaries are paid by the state under the Medicaid program, are at best quasi-public employees who are directly hired and supervised by the patients they serve. Under these circumstances, Justice Alito concluded, the First Amendment prohibits a compulsory agency fee. He therefore declined to "extend" *Abood*, as he put it.

B. The Establishment Clause

In *Town of Greece v. Galloway*, 134 S.Ct. 1811 (May 5, 2014)(5-4), the Court ruled that the Establishment Clause is not violated by sectarian prayer before monthly town hall meetings. Relying heavily on the Court's decision three decades ago in *Marsh v. Chambers*, 463 U.S. 783 (1983), Justice Kennedy's majority opinion found no reason to distinguish between the town hall meetings at issue here and the state legislative sessions at issue in *Marsh*. Likewise, he rejected any meaningful distinction between non-sectarian prayers and sectarian ones. And, he dismissed any worry that worry that members of minority faiths might feel coerced to pray or be marginalized as outsiders in their own community by saying that "mature adults" can "presumably" resist such peer pressure. *Id.* at 1827. The majority did, however, caution that legislative prayer could not be used, over time, either to proselytize or to belittle other religions. The principal dissent, written by Justice Kagan, accepted the validity of *Marsh* but argued that it did not extend to town hall meetings or sectarian prayers. "When citizens of this country approach their government," she wrote, "they do so only as Americans, not as members of one faith or another." *Id.* at 1854. The ACLU submitted an *amicus* brief arguing that *Marsh* was wrongly decided, that it should at the very least be limited to non-sectarian prayers, and that it is feasible to develop a set of guidelines (as Congress has done) for clergy delivering legislative prayers.

RELIGIOUS FREEDOM RESTORATION ACT

In *Burwell v. Hobby Lobby Stores, Inc.*, 2014 WL 2921709 (June 30, 2014)(5-4), the Court interpreted the Religious Freedom Restoration Act (RFRA) to mean that closely held corporations cannot be compelled to provide their employees with insurance coverage for contraception, as otherwise required by the Affordable Care Act, if they object on religious grounds. Writing for the majority, Justice Alito first concluded that closely held corporations are "persons" within the meaning of RFRA. The question of whether publicly held corporations are similarly protected by RFRA was left unresolved, although Justice Alito assumed that publicly held corporations would rarely assert religious claims because of conflicting shareholder interests. He next held that the requirement to include contraceptive coverage as part of a statutorily-mandated employee health care plan imposes a substantial burden on those closely held corporations that assert a religious objection, without explaining why it imposes a greater burden than payment of an employee's wages that can be used to buy contraceptives. Applying the strict scrutiny that RFRA then mandates, Justice Alito assumed that the contraceptive care mandate furthered a compelling government interest in promoting women's health but held that there were other, more narrowly tailored alternatives that the government could have pursued to advance its interests. Specifically, he suggested that the government could pay for the contraceptive coverage itself, or grant closely held corporations the same accommodation that it

has already granted to religious non-profits (namely, having the insurance company pay without any employer subsidy). The majority opinion nonetheless contains a series of caveats, beginning with the observation that the Court's decision "is concerned solely with the contraceptive mandate," *id.* at ___. Justice Alito then goes on to say that the decision should not be read to imply that closely held corporations can refuse insurance coverage for blood transfusions or immunizations on religious grounds (for reasons that are not entirely clear). And, he asserts, the Court's decision does not provide "a shield" for religiously-based claims of race discrimination. The precise meaning of those reservations will have to be worked out in future cases. *Id.* Justice Ginsburg, who wrote the principal dissent, took a less benign view of the majority's ruling, calling it "a decision of startling breadth." *Id*. at ___. The ACLU submitted an *amicus* brief urging the Court to reject this RFRA challenge to the contraceptive care mandate.

FOURTH AMENDMENT

In *Fernandez v. California*, 134 S.Ct. 1126 (Feb. 25, 2014)(6-3), the Court ruled that its earlier holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), which prohibits the police from entering a home without a warrant based on the consent of one occupant when another occupant is present and objects, does not apply "where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared." *Id*. at 1130. In this case, the defendant was present when the police arrived and objected to their entry into the apartment. He was then arrested. One hour later, the police returned to the apartment and obtained consent to enter from his roommate. Writing for the majority, Justice Alito held that the consent search was constitutional under the circumstances because the decision to remove Fernandez from the premises was objectively reasonable.

In *Navarette v. California*, 134 S.Ct. 1683 (Apr. 22, 2014)(5-4), the Court held that the police had reasonable suspicion to stop a truck on suspicion of drunk driving – which led to the seizure of 30 pounds of marijuana – based on an anonymous and uncorroborated phone call to 911 from another motorist who claimed that he had been recently run off the road by a vehicle that he identified by model and license plate number. Writing for the majority (which included Justice Breyer), Justice Thomas concluded that the 911 call had sufficient indicia of reliability to support reasonable suspicion and that it was not necessary for the police to follow the identified vehicle to corroborate (or not) the report of erratic driving. In fact, the police did follow the defendant's car for five minutes and observed no evidence of drunkenness or other traffic infractions. Justice Scalia's dissent accused the majority of "serv[ing] up a freedom-destroying cocktail . . . ." *Id*. at 1697.

In *Plumhoff v. Rickard*, 134 S.Ct. 2012 (May 27, 2014), the Court ruled by an 8-1 vote that police officers did not act unreasonably, and thus did not violate the Fourth Amendment, by firing 15 shots at a driver following a high-speed, high-risk car chase that led to the death of the driver and a passenger in the car. Writing for the majority, Justice Alito held that the use of lethal force was appropriate under the circumstances and that, once lethal force is justified, officers are instructed to keep shooting until the threat is over. (Justice Ginsburg did not join this part of the opinion but also did not dissent.) Alternatively, the Court unanimously held that the defendant officers were entitled to qualified immunity.

In *Riley v. California*, 2014 WL 2864483 (June 25, 2014)(9-0), the Court unanimously held that the police must obtain a warrant before searching a cell phone seized incident to arrest

absent exigent circumstances. Writing for the Court, Chief Justice Roberts explained that cell phones pose little threat to officer safety but typically contain extensive and intimate information about people's lives. Failing to recognize that cell phones raise fundamentally different privacy concerns than other items that may be searched without a warrant incident to arrest, he said, is "like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Id*. at ___. The ACLU submitted an *amicus* brief urging the Court to rule that a warrant is required before a cell phone can be searched.

FIFTH AMENDMENT

A. Self-Incrimination

In *Kansas v. Cheever*, 134 S.Ct. 596 (Dec. 11, 2013)(9-0), the Court unanimously held that "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal." *Id*. at 597. In an opinion written by Justice Sotomayor, the Court then remanded the case for a determination of whether the prosecution's use of psychiatric evidence exceed the proper scope of rebuttal, either under the Fifth Amendment or state evidentiary rules. By writing a narrow opinion, the Court left open the question of whether and to what extent the state can introduce psychiatric evidence during the sentencing stage of a capital trial when the defendant has introduced psychiatric testimony to support a mitigation claim. The ACLU submitted an *amicus* brief focusing on this latter question.

B. Double Jeopardy

In *Martinez v. Illinois*, 134 S.Ct. 2070 (May 27, 2014)(9-0), the Court's *per curiam* decision reiterated the long-standing rule that jeopardy attaches when a jury is empaneled and sworn. It also held that the trial court's directed verdict for the defendant after the prosecution refused to participate in the case because its principal witnesses had not appeared constituted an acquittal for double jeopardy purposes that barred retrial.

SIXTH AMENDMENT

A. Ineffective Assistance of Counsel

In *Hinton v. Alabama*, 134 S.Ct. 1081 (Feb. 24, 2014)(9-0), the Court summarily reversed, in a *per curiam* opinion, a ruling by the Alabama state courts rejecting the defendant's post-conviction claim of ineffective assistance of counsel in this capital case. Applying the *Strickland* standard, the Court first held that the decision by trial counsel to use a forensics expert that he regarded as inadequate rather than seeking additional expert funding that state law allowed and the trial judge had invited was objectively unreasonable. The Court then remanded for a further inquiry into prejudice, noting that the critical question was whether a more credible expert for the defense might have altered the outcome of the trial.

EIGHTH AMENDMENT

In *Hall v. Florida*, 134 S.Ct. 1986 (May 27, 2014)(5-4), the Court struck down a Florida rule that prohibited capital defendants with an IQ over 70 from even attempting to show that their intellectual disability barred the state from executing them under *Atkins v. Virginia*, 536

U.S. 304, 321 (2002). According to Florida, the capital defendant in this case had an IQ score of 71, and was therefore eligible for the death penalty. Writing for the majority, Justice Kennedy observed that "[i]ntellectual disability is a condition, not a number." *Id.* at 2001. More specifically, he held that treating a IQ of 70 as dispositive ignored the margin of error that applies to IQ exams, was inconsistent with the way that mental health professionals evaluated intellectual disability, and was contrary to the rule in a large (and growing) majority of the states. He concluded his opinion by stating: "The States are laboratories for experimentation, but those experiments may not deny the basic dignity of the Constitution."

DUE PROCESS

In *Kaley v. United States*, 134 S.Ct. 1090 (Feb. 25, 2014)(6-3), the Court held that someone who has been indicted cannot contest the grand jury's probable cause determination when the government moves to restrain the disposition of assets allegedly related to the crime for possible forfeiture if the defendant is ultimately convicted. The majority opinion was written by Justice Kagan.

EQUAL PROTECTION

In *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (Apr. 22, 2014)(6-2), the Court upheld an amendment to Michigan's Constitution that bars affirmative action at state universities. The amendment was adopted in response to the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which ruled that Michigan had a compelling interest in a racially diverse student body that could be pursued through a properly constructed affirmative action plan. The controlling opinion in *Schuette* was written by Justice Kennedy and joined by Chief Justice Roberts and Justice Alito. It begins by emphasizing that the Court is not addressing the constitutionality of affirmative action but, rather, the question of who gets to decide whether the state should engage in affirmative action at its state universities. In concluding that nothing in the federal constitution prohibited Michigan from leaving that decision to the voters, he rejected the political restructuring argument that had prevailed in the court of appeals. More specifically, he held that the court of appeals had erred in striking down so-called Proposal 2 on the theory that it made it more difficult to advocate in favor of affirmative action than to advocate in favor of other admissions policies that could still be decided by the University regents. The political restructuring doctrine, he concluded, only applies when the normal political processes are changed in a way that makes it more difficult for to remedy past discriminatory action (thus effectively and intentionally perpetuating that discrimination), a description that in the plurality's view does not apply to affirmative action. Justices Scalia and Thomas wrote a separate concurrence in which they argued that the political restructuring doctrine should be overruled in its entirety. Justice Breyer also wrote a separate concurrence emphasizing that the political restructuring in this case had transferred decision-making authority from the administrative process to the democratic process, which he viewed as a constitutionally permissible change. Justice Sotomayor wrote an impassioned dissent that began with the observation that "to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process." *Id.* at 1651. The ACLU represented the plaintiffs in one of the two consolidated cases challenging Proposal 2.

QUALIFIED IMMUNITY

In *Stanton v. Sims*, 134 S.Ct. 3 (Nov. 4, 2013)(9-0), the Court summarily reversed a Ninth Circuit ruling denying qualified immunity to police officers who had entered a private yard without a warrant but in hot pursuit of a fleeing misdemeanant. The Ninth Circuit had concluded that the hot pursuit doctrine permitted a warrantless entry only when chasing a fleeing felon. Without reaching the ultimate constitutional question, the Court's *per curiam* decision described existing law as far more unsettled. It accordingly held that the police officers in this case had not been "plainly incompetent" in acting as they did and thus were entitled to qualified immunity.

In *Tolan v. Cotton*, 134 S.Ct. 1861 (May 5, 2014)(9-0), the Court summarily reversed the Fifth Circuit's grant of summary judgment in favor of the defendant police officer on qualified immunity grounds in this § 1983 action alleging excessive force. The Court's *per curiam* opinion stressed that the court of appeals had misapplied the summary judgment standard by failing to acknowledge that the plaintiff's version of events raised genuine issues of material fact. The decision is noteworthy on two grounds. First, it is rare for the Court to grant review solely to correct an error below. Second, it is an equally rare victory for the plaintiff in a qualified immunity case.

RECESS APPOINTMENTS

In *National Labor Relations Board v. Noel Canning*, 2014 WL 2882090 (June 26, 2014) (9-0), the Court unanimously struck down three recess appointments to the NLRB by President Obama, although the Court divided on the rationale. Writing for a five-person majority, Justice Breyer ruled that the power to make recess appointments applies during intra-session recesses as well as inter-session recesses, and that it extends to any positions that are vacant during the recess regardless of when the vacancy arose. However, he also held that the recess appointment power is not triggered until the Senate has been in recess for ten days, and that the Senate is presumptively in session whenever it says it is. More specifically, he held on the facts of this case that the *pro forma* sessions held by the Senate every Tuesday and Friday during the critical period meant that the Senate was never in recess for more than three days. Hence, he concluded, the challenged recess appointments during this period exceeded the president's power. Justice Scalia agreed that the NLRB appointments were invalid but, in his view, the recess appointment power is limited to vacancies that occur during inter-session recesses. His opinion concurring in the judgment was joined by Chief Justice Roberts, and Justices Thomas and Alito.

TREATIES

In *Bond v. United States*, 134 S.Ct. 2077 (June 2, 2014)(9-0), the Court unanimously held that the federal government exceeded its power in using a federal law enacted to implement an international convention banning chemical weapons to prosecute a Pennsylvania woman who had used toxic chemicals in an act of revenge against her husband's lover, causing a minor burn. Although all nine members of the Court agreed that the conviction should be reversed, they offered different rationales for doing so. Writing for a six-person majority, Chief Justice Roberts concluded that the language of the federal statute did not reach the purely local conduct at issue in what he twice called this "unusual" case. He supported that conclusion by relying on the presumption that Congress does not intend to supplant the power of the states to regulate purely local crime absent a clear statement to that effect, which he found lacking in this law.

Accordingly, and significantly, the majority found it unnecessary to reach the scope of the federal government's power to implement treaties or the Court's seminal decision in *Missouri v. Holland*, 252 U.S. 416 (1920), broadly interpreting that power. Justices Scalia, Thomas, and Alito all thought it necessary to reach the constitutional question because, in their view, the language of the statute clearly applied to this case. Justices Scalia and Thomas would have struck down the statute on the theory that the treaty power embraces the right to ratify treaties but not to implement them, and that the power of implementation is therefore subject to the traditional limits on federal power, including the Tenth Amendment. They also argued that the treaty power applies only to conduct among nations and that purely domestic conduct cannot be subject to the treaty process. Justice Alito concurred only in the latter proposition.

IMMIGRATION

In *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191 (June 9, 2014)(5-4), the Court considered a complex set of interrelated provisions in the Immigration and Nationality Act that determine when someone who applies for an immigrant visa as a child but then turns 21 before the application is adjudicated has "aged out" of relief. Deferring to the Board of Immigration Appeals, the Court accepted the agency's interpretation that a statute designed to protect child applicants from "aging out" only applies to child applicants who have a qualifying relationship with the US sponsor – *i.e.*, one that is not entirely derivative of someone else's application (usually a parent). As Justice Kagan observed at the end of her plurality opinion, "[t]his is the kind of case *Chevron* [deference] was built for," *id.* at 2213.

WHISTLEBLOWING

In *Lawson v. FMR LLC*, 134 S.Ct. 1158 (Mar. 4, 2014)(6-3), the Court held that the whistleblower protections of the Sarbanes-Oxley Act apply not only to the employees of public companies but to the employees of contractors who work for public companies. Writing for the majority, Justice Ginsburg pointed out that a contrary interpretation of the statutory language would have essentially insulated the mutual fund industry involved in this case from the Act's whistleblower provisions because of its heavy reliance on outside advisors. Justice Sotomayor's dissent was joined by Justices Kennedy and Alito.

PATENTS AND COPYRIGHT

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962 (May 19, 2014)(5-4), the Court held that the doctrine of laches cannot be used to bar a damages claim based on copyright infringement that is brought within the congressionally prescribed statute of limitations (three years), but the plaintiff's delay in bringing suit can be considered in weighing equitable relief, including the disgorgement of profits. Justice Ginsburg wrote the majority opinion.

In *Alice Corporation Pty. Ltd. v. CLS Bank International*, 2014 WL 2765283 (June 19, 2014)(9-0), a unanimous Court invalidated a series of patents describing the use of a third-party institution to settle financial accounts with the aid of a computer. Characterizing the concept of "intermediated settlement" as an abstract idea, Justice Thomas ruled it patent-ineligible for that reason under the Patent Act. The ACLU submitted an *amicus* brief arguing that the prohibition against patenting abstract ideas also reflects important First Amendment values.

In *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2014 WL 2864485 (June 25, 2014)(6-3), the Court considered whether the Copyright Act prohibits a company from selling its subscribers the ability to digitally stream network TV shows that are simultaneously broadcast on air. Writing for the Court, Justice Breyer concluded that the Act did prohibit contemporaneous live streaming, largely on the basis that this new service is sufficiently analogous to cable to apply the same copyright rules to both. And, since cable systems cannot show network programming without a license, an Internet streaming service should not be allowed to either.

HABEAS CORPUS

In *Burt v. Titlow*, 134 S.Ct. 10 (Nov. 5, 2013)(9-0), the Court unanimously reversed the Sixth Circuit for ignoring the "doubly deferential" standard of review that applies when a federal habeas court is reviewing a claim of ineffective assistance of counsel in state court proceedings. As explained by Justice Alito in his opinion for the Court, that standard requires deference to the state court's factual determination of why the trial lawyer did what he did unless those findings are clearly unreasonable. It also requires deference to counsel's strategic choices absent evidence in the record clearly establishing that counsel failed to exercise reasonable professional judgment.

In *White v. Woodall*, 134 S.Ct. 1697 (Apr. 23, 2014)(6-3), the Court held that Sixth Circuit erred in granting a writ of habeas corpus in this capital case because the question of whether the jury must be charged that no adverse inference can be drawn from the defendant's failure to testify during the penalty phase of a capital trial had not been definitively resolved by the Court's prior opinions and was therefore open to fair-minded disagreement. Writing for the majority, Justice Scalia declined to resolve that ultimate question in this case either.

FEDERAL CRIMINAL LAW

In *Burrage v. United States*, 134 S.Ct. 881 (Jan. 27, 2014)(9-0), the Court unanimously held that the defendant, a heroin dealer, was not subject to a penalty enhancement under the Controlled Substances Act when someone who purchased heroin from him later died during a "drug binge." Under the statute, a penalty enhancement is appropriate if the victim's death "results from" the defendant's unlawful conduct. The government argued that this statutory standard is met whenever the defendant's conduct contributes to the victim's death. Writing for the Court, Justice Scalia rejected that interpretation, ruling instead that the government must prove instead that the victim would not have died "but for" the defendant's unlawful conduct. He also ruled that question of causation is one for the jury to decide.

In *Rosemond v. United States*, 134 S.Ct. 1240 (Mar. 5, 2014)(7-2), the Court considered the elements of proof required to sustain a conviction for aiding and abetting a violation of 18 U.S.C. § 924(c), which penalizes the act of using or carrying a firearm during a violent crime or drug trafficking offense. Writing for the majority, Justice Kagan held that the government must show that the defendant both knowingly participated in the underlying crime *and* knew in advance that "a confederate would use or carry a gun during the crime's commission." *Id.* at 1243. Because the trial judge mischarged the jury on the second element, the conviction in this case was reversed.

In *United States v. Castleman*, 134 S.Ct. 1405 (Mar. 26, 2014)(9-0), the Court interpreted the language of 18 USC § 922(g)(9), which makes it a federal crime for anyone previously convicted of a misdemeanor crime of domestic violence to possess a firearm, to embrace the defendant's prior misdemeanor conviction for intentionally causing bodily injury to the mother of his child. Writing for a unanimous Court, Justice Sotomayor explained that the reference to a crime of domestic violence in the federal statute should be read in light of the common law definition of force. She then concluded that the common law's expansive definition of force was satisfied in this case after reviewing the language of the defendant's state law indictment.

In *Paroline v. United States*, 134 S.Ct. 1710 (Apr. 24, 2014)(5-4), the Court reviewed a provision of federal law stating that defendants convicted of violating the child pornography laws shall be required to pay restitution. The question in this case was, how much? Writing for the majority, Justice Kennedy held that it would be unfair to require the defendant, who possessed two of the defendant's images, to pay all of the victim's documented damages when it was clear that many others possessed the same or similar images. Instead, he directed the district court to determine an appropriate sum based on multiple considerations identified in Justice Kennedy's opinion. Chief Justice Roberts (joined by Justices Scalia and Thomas) "regretfully" dissented after concluding that any allocation of damages was inevitably arbitrary. Justice Sotomayor also dissented, but she would have required the defendant to pay the victim's full damages.

In *Abramski v. United States*, 134 S.Ct. 2259 (June 16, 2014)(9-0), the Court held that a "straw purchaser" who fails to disclose that he is buying a gun for somebody else has made a material false statement that is subject to prosecution under the federal gun laws, even if the true purchaser of the gun was qualified to own one. The majority opinion was written by Justice Kagan.

FEDERAL CIVIL PROCEDURE

In *United States v. Clarke*, 2014 WL 2765284 (June 19, 2014)(9-0), the Court ruled that a taxpayer wishing to examine an IRS agent about his reasons for issuing a subpoena in a proceeding to enforce that subpoena must do more than merely allege an improper motive. Instead, Justice Kagan held for a unanimous Court, the taxpayer must "point to specific facts or circumstances plausibly raising an inference of bad faith." *Id*. at __.

JURISDICTION

In *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584 (Dec. 10, 2013)(9-0), a unanimous Court ruled that *Younger* abstention did not bar a federal court proceeding between two telecom companies even though a parallel proceeding between the same parties was underway in state court. Writing for the Court, Justice Ginsburg stressed that the *Younger* doctrine represents a narrow exception to the general rule that federal courts should adjudicate cases that are properly before them. Specifically, Justice Ginsburg wrote, *Younger* applies only in three narrow circumstances – where there is a pending state criminal prosecution, a civil enforcement proceeding akin to a criminal prosecution, or a proceeding to enforce prior orders in furtherance of the state court's judicial function (such as a contempt order). Justice Ginsburg then held that none of those exceptions applied to the facts of this case.

In *Daimler AG v. Bauman*, 134 S.Ct. 746 (Jan. 14, 2014)(9-0), the Court held that California courts could not constitutionally exercise personal jurisdiction over a German multinational corporation based on the fact that its US subsidiary did business in California when the actions giving rise to the suit – alleged human rights violations – occurred in Argentina and involved a separate Argentinian subsidiary. After disposing of the jurisdictional issue, Justice Ginsburg's majority opinion noted the "transnational context" of the dispute and observed that "[r]ecent decisions of this Court . . . have rendered plaintiffs' Alien Torts Statute and Torture Victims Protection Act claims infirm," *id*. at 762-63 (citing *Kiobel v. Royal Dutch Petroleum Authority*, 133 S.Ct. 1659 (2013), and *Mohamad v. Palestinian Authority*, 132 S.Ct. 1702 (2012)). Justice Sotomayor concurred in the judgment based on the "unique circumstances of this case" but otherwise disagreed with the Court's reasoning. Among other things, she wrote that the majority decision leads to the incongruous result that individual defendants are more amenable to personal jurisdiction than multinational corporations.

In *Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S.Ct. 773 (Jan. 15, 2014)(9-0), the Court unanimously ruled that the 30 days to file a notice of appeal generally runs from the final decision on the merits and not from a subsequent decision addressing attorney's fees. Justice Kennedy wrote the Court's opinion.

In *Walden v. Fiore*, 134 S.Ct. 1115 (Feb. 25, 2014)(9-0), a unanimous Court dismissed this *Bivens* action on the theory that the Nevada courts lacked personal jurisdiction over the defendant, who lived in Georgia and whose allegedly unconstitutional conduct also occurred in Georgia. Although the plaintiff resided in Nevada, Justice Thomas concluded that the defendant lacked the minimum contacts with Nevada necessary to support jurisdiction under the Due Process Clause.

In *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (Mar. 25, 2014)(9-0), the Court clarified that whether or not a plaintiff's claim falls within the zone of interests protected by a statute is a question of statutory construction rather than prudential standing. Writing for a unanimous Court, Justice Scalia then held that plaintiff's claim of reputational injury in this case fell comfortably within the interests protected by the Lanham Act, and that plaintiff had also adequately alleged that its injury was proximately caused by the defendant's conduct.

In *Susan B. Anthony List v. Driehaus*, 2014 WL 2675871 (June 16, 2014)(9-0), the Court unanimously ruled than an anti-abortion advocacy group had standing to challenge an Ohio law criminalizing false statements during a political campaign when the state agency responsible for enforcing the law had found probable cause to believe that the statute was violated by a statement accusing a congressional candidate of supporting taxpayer-funded abortion because he voted for the Affordable Care Act. Writing for the Court, Justice Thomas stressed that the plaintiffs had a credible fear of prosecution based on their intent to repeat similar statements in future elections and that, along with the probable cause finding, was sufficient to confer standing. The ACLU filed an *amicus* brief agreeing with the conclusion that the Court ultimately reached.

STARE DECISIS

In *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (May 27, 2014)(5-4), Justice Kagan's majority opinion relied heavily on *stare decisis* in holding that this dispute over gaming

authority was barred by the tribe's sovereign immunity, and that the federal law cited by Michigan had not abrogated that immunity under the circumstances of this case.

In *Halliburton Co. v. Erica B. John Fund, Inc.*, 2014 WL 2807181 (June 23, 2014)(6-3), the Court reaffirmed the so-called *Basic* presumption for proving shareholder reliance in a securities fraud case in an opinion written by Chief Justice Roberts noting that "[t]he principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what we have done." *Id*. at __ (internal quotes and citations omitted). Justices Thomas, joined by Justices Scalia and Alito, would have overruled the *Basic* presumption. All nine justices agreed, however, that defendants can introduce evidence rebutting the presumption of reliance at the class certification stage as well as at the merits stage.