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802 Business Cases in the Roberts Court

Adam Charnes
Partner
Kilpatrick Stockton LLP

Virginia Hoptman
Partner
Womble Carlyle Sandridge & Rice

Teresa Roseborough
Chief Counsel – Litigation
MetLife

Amar Sarwal
General Litigation Counsel
United States Chamber of Commerce

Faculty Biographies

Adam Charnes

Adam H. Charnes is a partner in the Winston-Salem, NC, office of Kilpatrick Stockton LLP, where he practices appellate, constitutional, and complex business litigation. Mr. Charnes has litigated appeals in state and federal appellate courts across the nation. In addition to his practice, Mr. Charnes has spoken and written widely about a number of legal subjects, including the Supreme Court, appellate litigation, and legal issues related to the war on terrorism.

Previously, Mr. Charnes served as the principal deputy assistant attorney general for the Office of Legal Policy at the United States Department of Justice. At the Office of Legal Policy, he was responsible for various legal policy matters—including counter-terrorism policy and civil justice reform—and for assisting with the selection and confirmation of federal judges. Following law school, Mr. Charnes served as a law clerk to Supreme Court Justice Anthony M. Kennedy and to Judge J. Harvie Wilkinson III of the US Court of Appeals for the Fourth Circuit.

Mr. Charnes is a member of the Appellate Rules Committee of the North Carolina Bar Association, the Chief Justice Joseph Branch American Inn of Court, and the organizational committee of the Middle District of North Carolina chapter of the Federal Bar Association.

Mr. Charnes graduated summa cum laude from Princeton University and received his JD, magna cum laude, from Harvard Law School, where he was executive editor of the Harvard Law Review.

Virginia Hoptman

Virginia Whitner Hoptman is a member of Womble Carlyle's appellate and business litigation practice groups. Her practice focuses on complex business cases in federal and state courts, including trade-secret misappropriation, patent infringement, and commercial and regulatory disputes. She represents clients in a variety of industries, including software technology, telecommunications, pharmaceuticals, banking, and higher education.

Ms. Hoptman brings to her practice substantial expertise on issues of federal preemption, constitutional law, and appellate and US Supreme Court practice. In addition to practicing in these areas, she has both taught in these fields at George Washington University Law School and served as law clerk to Justice Thurgood Marshall of the US Supreme Court and Chief Judge Collins J. Seitz of the US Court of Appeals for the Third Circuit.

She is currently vice-chair of Womble Carlyle's Diversity Committee, and recently was program chair for the 2008 Just the Beginning Foundation Conference, an organization founded by federal judges to develop and nurture interest in the law, and advancement to the bench and bar, by persons from diverse and traditionally underrepresented groups. She is also a member of the Constitutional and Administrative Law Advisory Committee of the US Chamber Litigation Center, providing support to companies in landmark cases in the US Supreme Court and federal and state courts nationwide.

Ms. Hoptman received a BS from the University of North Carolina and graduated from the University of Virginia School of Law.

Teresa Roseborough
Chief Counsel – Litigation
MetLife

Amar Sarwal
General Litigation Counsel
United States Chamber of Commerce

SYLLABI OF BUSINESS-RELATED DECISIONS

ARGUED DURING SUPREME COURT'S OCTOBER TERM 2008

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SUPREME COURT OF THE UNITED STATES

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ALTRIA GROUP, INC., ET AL. *v*. GOOD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 07–562. Argued October 6, 2008—Decided December 15, 2008

Respondents, smokers of petitioners' "light" cigarettes, filed suit, alleging that petitioners violated the Maine Unfair Trade Practices Act (MUTPA) by fraudulently advertising that their "light" cigarettes delivered less tar and nicotine than regular brands. The District Court granted summary judgment for petitioners, finding the state-law claim pre-empted by the Federal Cigarette Labeling and Advertising Act (Labeling Act). The First Circuit reversed, holding that the Labeling Act neither expressly nor impliedly pre-empts respondents' fraud claim.

Held: Neither the Labeling Act's pre-emption provision nor the Federal Trade Commission's actions in this field pre-empt respondents' state-law fraud claim. Pp. 5–20.

(a) Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. See *Jones* v. *Rath Packing Co.,* 430 U. S. 519, 525. When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption." *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 449. The Labeling Act's stated purposes are to inform the public of the health risks of smoking while protecting commerce and the economy from the ill effects of nonuniform requirements to the extent consistent with the first goal. Although fidelity to these purposes does not demand the pre-emption of state fraud rules, the principal question here is whether that result is nevertheless required by 15 U. S. C. §1334(b), which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." Pp. 5–9.

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(b) Respondents' claim is not expressly pre-empted by §1334(b). As determined in *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, and *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, the phrase "based on smoking and health" modifies the state-law rule at issue rather than a particular application of that rule. The *Cipollone* plurality concluded that "the phrase 'based on smoking and health' fairly but narrowly construed" did not pre-empt the *Cipollone* plaintiff's common-law claim that cigarette manufacturers had fraudulently misrepresented and concealed a material fact, because the claim alleged a violation of a duty not to deceive—a duty that is not "based on" smoking and health. 505 U. S., at 528–529. Respondents here also allege a violation of the duty not to deceive as codified in the MUTPA, which, like the common-law duty in *Cipollone*, has nothing to do with smoking and health. Respondents' claim is not analogous to the "warning neutralization" claim found to be pre-empted in *Cipollone*. *Reilly* is consistent with *Cipollone*'s analysis. This Court disagrees with petitioners' alternative argument that the express pre-emption framework of *Cipollone* and *Reilly* should be rejected. *American Airlines, Inc.* v. *Wolens*, 513 U. S. 219, and *Riegel* v. *Medtronic, Inc.*, 552 U. S. ___, are distinguished. Pp. 9–16.

(c) Various Federal Trade Commission decisions with respect to statements of tar and nicotine content do not impliedly pre-empt state deceptive practices rules like the MUTPA. Pp. 17–20.

501 F. 3d 29, affirmed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

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VADEN *v.* DISCOVER BANK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 07–773. Argued October 6, 2008—Decided March 9, 2009

Section 4 of the Federal Arbitration Act (FAA or Act), 9 U. S. C. §4, authorizes a United States district court to entertain a petition to compel arbitration if the court would have jurisdiction, "save for [the arbitration] agreement," over "a suit arising out of the controversy between the parties."

Discover Bank's servicing affiliate filed a complaint in Maryland state court to recover past-due charges from one of its credit cardholders, petitioner Vaden. Discover's pleading presented a claim arising solely under state law. Vaden answered and counterclaimed, alleging that Discover's finance charges, interest, and late fees violated state law. Invoking an arbitration clause in its cardholder agreement with Vaden, Discover then filed a §4 petition in Federal District Court to compel arbitration of Vaden's counterclaims. The District Court ordered arbitration.

On Vaden's initial appeal, the Fourth Circuit remanded the case for the District Court to determine whether it had subject-matter jurisdiction over Discover's §4 petition pursuant to 28 U. S. C. §1331, which gives federal courts jurisdiction over cases "arising under" federal law. The Fourth Circuit instructed the District Court to conduct this inquiry by "looking through" the §4 petition to the substantive controversy between the parties. With Vaden conceding that her state-law counterclaims were completely preempted by §27 of the Federal Deposit Insurance Act (FDIA), the District Court expressly held that it had federal-question jurisdiction and again ordered arbitration. The Fourth Circuit then affirmed. The Court of Appeals recognized that, in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826, this Court held that federal-question jurisdiction depends on the contents of a well-pleaded complaint, and

may not be predicated on counterclaims. It concluded, however, that the complete preemption doctrine is paramount and thus overrides the well-pleaded complaint rule.

Held: A federal court may "look through" a §4 petition to determine whether it is predicated on a controversy that "arises under" federal law; in keeping with the well-pleaded complaint rule as amplified in *Holmes Group*, however, a federal court may not entertain a §4 petition based on the contents of a counterclaim when the whole controversy between the parties does not qualify for federal-court adjudication. Pp. 6–21.

(a) Congress enacted the FAA "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443, and to declare " 'a national policy favoring arbitration' of claims that parties contract to settle in that manner," *Preston* v. *Ferrer*, 552 U. S. ___, ___. To that end, §2 makes arbitration agreements in contracts "involving commerce" "valid, irrevocable, and enforceable," while §4 provides for federal district court enforcement of those agreements. The "body of federal substantive law" generated by elaboration of §2 is equally binding on state and federal courts. *Southland Corp.* v. *Keating*, 465 U. S. 1, 12. However, the FAA "requir[es] [for access to a federal forum] an independent jurisdictional basis" over the parties' dispute. *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. ___, ___. Under the well-pleaded complaint rule, a suit "arises under" federal law for 28 U. S. C. §1331 purposes "only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law]." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152. Federal jurisdiction cannot be predicated on an actual or anticipated defense, *ibid.,* or rest upon an actual or anticipated counterclaim, *Holmes Group*, 535 U. S. 826. A *complaint* purporting to rest on state law can be recharacterized as one "arising under" federal law if the law governing the complaint is exclusively federal, see *Beneficial Nat. Bank* v. *Anderson*, 539 U. S. 1, 8, but a state-law-based *counterclaim*, even if similarly susceptible to recharacterization, remains nonremovable. Pp. 6–11.

(b) FAA §4's text drives the conclusion that a federal court should determine its jurisdiction by "looking through" a §4 petition to the parties' underlying substantive controversy. The phrase "save for [the arbitration] agreement" indicates that the district court should assume the absence of the agreement and determine whether it "would have jurisdiction under title 28" over "the controversy between the parties," which is most straightforwardly read to mean the "underlying dispute" between the parties. See *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 25, n. 32. Vaden's argument that the relevant "controversy" is simply and only the par-

ties' discrete dispute over the arbitrability of their claims is difficult to square with §4's language. If courts are to determine whether they would have jurisdiction "save for [the arbitration] agreement," how can a dispute over an arbitration agreement's existence or applicability be the controversy that counts? The Court is unpersuaded that the "save for" clause means only that the "antiquated and arcane" ouster notion no longer holds sway. To the extent that the ancient "ouster" doctrine continued to impede specific enforcement of arbitration agreements, FAA §2, the Act's "centerpiece provision," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 625, directly attended to the problem by commanding that an arbitration agreement is enforceable just as any other contract. Vaden's approach also has curious practical consequences. It would permit a federal court to entertain a §4 petition only when a federal-question suit is already before the court, when the parties satisfy the requirements for diversity-of-citizenship jurisdiction, or when the dispute over arbitrability involves a maritime contract, yet would not accommodate a §4 petitioner who *could* file a federal-question suit in, or remove such a suit to, federal court, but has not done so. In contrast, the "look through" approach permits a §4 petitioner to ask a federal court to compel arbitration without first taking the formal step of initiating or removing a federal-question suit. Pp. 11–15.

(c) Having determined that a district court should look through a §4 petition, this Court considers whether the court "would have [federal-question] jurisdiction" over "a suit arising out of the controversy" between Discover and Vaden. Because §4 does not enlarge federal-court jurisdiction, a party seeking to compel arbitration may gain such a court's assistance only if, "save for" the agreement, the entire, actual "controversy between the parties," as they have framed it, could be litigated in federal court. Here, the actual controversy is not amenable to federal-court adjudication. The "controversy between the parties" arose from Vaden's "alleged debt," a claim that plainly did not "arise under" federal law; nor did it qualify under any other head of federal-court jurisdiction. The Fourth Circuit misapprehended *Holmes Group* when it concluded that jurisdiction was proper because Vaden's state-law counterclaims were completely preempted. Under the well-pleaded complaint rule, a completely preempted counterclaim remains a counterclaim, and thus does not provide a key capable of opening a federal court's door. Vaden's responsive counterclaims challenging the legality of Discover's charges are merely an aspect of the whole controversy Discover and Vaden brought to state court. Whether one might hypothesize a federal-question suit involving that subsidiary disagreement is beside the point. The relevant question is whether the whole controversy is one over which the fed-

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eral courts would have jurisdiction. Section 4 does not give parties license to recharacterize an existing controversy, or manufacture a new controversy, in order to obtain a federal court's aid in compelling arbitration. It is hardly fortuitous that the controversy in this case took the shape it did. Seeking to collect a debt, Discover filed an entirely state-law-grounded complaint in state court, and Vaden chose to file responsive counterclaims. Section 4 does not invite federal courts to dream up counterfactuals when actual litigation has defined the parties' controversy. Allowing parties to commandeer a federal court to slice off responsive pleadings for discrete arbitration while leaving the remainder of the parties' controversy pending in state court makes scant sense. Furthermore, the presence of a threshold question whether a counterclaim alleged to be based on state law is totally preempted by federal law may complicate the §4 inquiry. Although FAA §4 does not empower a federal court to order arbitration here, Discover is not left without recourse. Because the FAA obliges both state and federal courts to honor and enforce arbitration agreements, Discover may petition Maryland's courts for appropriate aid in enforcing the arbitration clause of its contracts with Maryland credit cardholders. Pp. 15–20.

489 F. 3d 594, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which STEVENS, BREYER, and ALITO, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

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KENNEDY, EXECUTRIX OF THE ESTATE OF KENNEDY, DECEASED *v.* PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07–636. Argued October 7, 2008—Decided January 26, 2009

The Employee Retirement Income Security Act of 1974 (ERISA), as relevant here, obligates administrators to manage ERISA plans "in accordance with the documents and instruments governing" them, 29 U. S. C. §1104(a)(1)(D); requires covered pension benefit plans to "provide that benefits . . . may not be assigned or alienated," §1056(d)(1); and exempts from this bar qualified domestic relations orders (QDROs), §1056(d)(3). The decedent, William Kennedy, participated in his employer's savings and investment plan (SIP), with power both to designate a beneficiary to receive the funds upon his death and to replace or revoke that designation as prescribed by the plan administrator. Under the terms of the plan, if there is no surviving spouse or designated beneficiary at the time of death, distribution is made as directed by the estate's executor or administrator. Upon their marriage, William designated Liv Kennedy his SIP beneficiary and named no contingent beneficiary. Their subsequent divorce decree divested Liv of her interest in the SIP benefits, but William did not execute a document removing Liv as the SIP beneficiary. On William's death, petitioner Kari Kennedy, his daughter and the executrix of his Estate, asked for the SIP funds to be distributed to the Estate, but the plan administrator relied on William's designation form and paid them to Liv. The Estate filed suit, alleging that Liv had waived her SIP benefits in the divorce and thus respondents, the employer and the SIP plan administrator (together, DuPont), had violated ERISA by paying her. As relevant here, the District Court entered summary judgment for the Estate, ordering DuPont to pay the benefits to the Estate. The Fifth Circuit reversed, holding that

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Liv's waiver was an assignment or alienation of her interest to the Estate barred by §1056(d)(1).

Held:

1. Because Liv did not attempt to direct her interest in the SIP benefits to the Estate or any other potential beneficiary, her waiver did not constitute an assignment or alienation rendered void under §1056(d)(1). Pp. 5–13.

(a) Given the legal meaning of "assigned" and "alienated," it is fair to say that Liv did not assign or alienate anything to William or to the Estate. The Fifth Circuit's broad reading—that Liv's waiver indirectly transferred her interest to the next possible beneficiary, here the Estate—is questionable. It would be odd to speak of an estate as the transferee of its own decedent's property or of the decedent in his lifetime as his own transferee. It would also be strange under the Treasury Regulation that defines "assignment" and "alienation." Moreover, it is difficult to see how certain waivers not barred by the antialienation provision *e.g.,* a surviving spouse's ability to waive a survivor's annuity or lump-sum payment, see *Boggs* v. *Boggs,* 520 U. S. 833, 843; 29 U. S. C. §§1055(a), (b)(1)(C), (c)(2), would be permissible under the Fifth Circuit's reading. These doubts, and exceptions calling the Fifth Circuit's reading into question, point the Court toward the law of trusts that "serves as ERISA's backdrop." *Beck* v. *PACE Int'l Union*, 551 U. S. 96, 101. Section 1056(d)(1) is much like a spendthrift trust provision barring assignment or alienation of a benefit, see *Boggs, supra,* at 852, and the cognate trust law is highly suggestive here. The general principle that a designated spendthrift beneficiary can disclaim his trust interest magnifies the improbability that a statute written with an eye on the old law would effectively force a beneficiary to take an interest willy-nilly. The Treasury reads its own regulation to mean that the antialienation provision is not violated by a beneficiary's waiver "where the beneficiary does not attempt to direct her interest in pension benefits to another person." Brief for United States as *Amicus Curiae* 18. Being neither "plainly erroneous [n]or inconsistent with the regulation," the Treasury Department's interpretation is controlling. *Auer* v. *Robbins*, 519 U. S. 452, 461. ERISA's QDRO provisions shed no light on the validity of a waiver by a non-QDRO. Pp. 5–11.

(b) DuPont's additional reasons for saying that ERISA barred Liv's waiver are unavailing. Pp. 11–13.

2. Although Liv's waiver was not nullified by §1056's express terms, the plan administrator did its ERISA duty by paying the SIP benefits to Liv in conformity with the plan documents. ERISA provides no exception to the plan administrator's duty to act in accordance with plan documents. Thus, the Estate's claim stands or falls

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by "the terms of the plan," 29 U. S. C. §1132(a)(1)(B), a straightforward rule that lets employers "'establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits,'" *Egelhoff* v. *Egelhoff*, 532 U. S. 141, 148. By giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into expressions of intent, in favor of the virtues of adhering to an uncomplicated rule. Less certain rules could force plan administrators to examine numerous external documents purporting to be waivers and draw them into litigation like this over those waivers' meaning and enforceability. The guarantee of simplicity is not absolute, since a QDRO's enforceability may require an administrator to look for beneficiaries outside plan documents notwithstanding §1104(a)(1)(D). But an administrator enforcing a QDRO must be said to enforce plan documents, not ignore them, and a QDRO enquiry is relatively discrete, given its specific and objective criteria. These are good and sufficient reasons for holding the line, just as the Court did in holding that ERISA preempted state laws that could blur the bright-line requirement to follow plan documents in distributing benefits. See *Boggs, supra,* at 850, and *Egelhoff, supra,* at 143. What goes for inconsistent state law goes for a federal common law of waiver that might obscure a plan administrator's duty to act "in accordance with the documents and instruments." See *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 259. This case points out the wisdom of protecting the plan documents rule. Under the SIP, Liv was William's designated beneficiary. The plan provided a way to disclaim an interest in the SIP account, which Liv did not purport to follow. The plan administrator therefore did exactly what §1104(a)(1)(D) required and paid Liv the benefits. Pp. 13–18.

497 F. 3d 426, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

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SUPREME COURT OF THE UNITED STATES

Syllabus

WINTER, SECRETARY OF THE NAVY, ET AL. *v* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–1239. Argued October 8, 2008—Decided November 12, 2008

Antisubmarine warfare is one of the Navy's highest priorities. The Navy's fleet faces a significant threat from modern diesel-electric submarines, which are extremely difficult to detect and track because they can operate almost silently. The most effective tool for identifying submerged diesel-electric submarines is active sonar, which emits pulses of sound underwater and then receives the acoustic waves that echo off the target. Active sonar is a complex technology, and sonar operators must undergo extensive training to become proficient in its use.

This case concerns the Navy's use of "mid-frequency active" (MFA) sonar during integrated training exercises in the waters off southern California (SOCAL). In these exercises, ships, submarines, and aircraft train together as members of a "strike group." Due to the importance of antisubmarine warfare, a strike group may not be certified for deployment until it demonstrates proficiency in the use of active sonar to detect, track, and neutralize enemy submarines.

The SOCAL waters contain at least 37 species of marine mammals. The plaintiffs—groups and individuals devoted to the protection of marine mammals and ocean habitats—assert that MFA sonar causes serious injuries to these animals. The Navy disputes that claim, noting that MFA sonar training in SOCAL waters has been conducted for 40 years without a single documented sonar-related injury to any marine mammal. Plaintiffs sued the Navy, seeking declaratory and injunctive relief on the grounds that the training exercises violated the National Environmental Policy Act of 1969 (NEPA) and other federal laws; in particular, plaintiffs contend that the Navy should have prepared an environmental impact statement (EIS) before con-

ducting the latest round of SOCAL exercises.

The District Court entered a preliminary injunction prohibiting the Navy from using MFA sonar during its training exercises. The Court of Appeals held that this injunction was overbroad and remanded to the District Court for a narrower remedy. The District Court then entered another preliminary injunction, imposing six restrictions on the Navy's use of sonar during its SOCAL training exercises. As relevant to this case, the injunction required the Navy to shut down MFA sonar when a marine mammal was spotted within 2,200 yards of a vessel, and to power down sonar by 6 decibels during conditions known as "surface ducting."

The Navy then sought relief from the Executive Branch. The Council on Environmental Quality (CEQ) authorized the Navy to implement "alternative arrangements" to NEPA compliance in light of "emergency circumstances." The CEQ allowed the Navy to continue its training exercises under voluntary mitigation procedures that the Navy had previously adopted.

The Navy moved to vacate the District Court's preliminary injunction in light of the CEQ's actions. The District Court refused to do so, and the Court of Appeals affirmed. The Court of Appeals held that there was a serious question whether the CEQ's interpretation of the "emergency circumstances" regulation was lawful, that plaintiffs had carried their burden of establishing a "possibility" of irreparable injury, and that the preliminary injunction was appropriate because the balance of hardships and consideration of the public interest favored the plaintiffs. The Court of Appeals emphasized that any negative impact of the injunction on the Navy's training exercises was "speculative," and determined that (1) the 2,200-yard shutdown zone was unlikely to affect naval operations, because MFA sonar systems are often shut down during training exercises; and (2) the power-down requirement during surface ducting conditions was not unreasonable, because such conditions are rare and the Navy has previously certified strike groups not trained under these conditions.

Held: The preliminary injunction is vacated to the extent challenged by the Navy. The balance of equities and the public interest—which were barely addressed by the District Court—tip strongly in favor of the Navy. The Navy's need to conduct realistic training with active sonar to respond to the threat posed by enemy submarines plainly outweighs the interests advanced by the plaintiffs. Pp. 10–24.

(a) The lower courts held that when a plaintiff demonstrates a strong likelihood of success on the merits, a preliminary injunction may be entered based only on a "possibility" of irreparable harm. The "possibility" standard is too lenient. This Court's frequently reiterated standard requires plaintiffs seeking preliminary relief to dem-

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onstrate that irreparable injury is *likely* in the absence of an injunction.

Even if plaintiffs have demonstrated a likelihood of irreparable injury, such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. For the same reason, it is unnecessary to address the lower courts' holding that plaintiffs have established a likelihood of success on the merits. Pp. 10–14.

(b) A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences. *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 312. Military interests do not always trump other considerations, and the Court has not held that they do, but courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. *Goldman* v. *Weinberger*, 475 U. S. 503, 507.

Here, the record contains declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat. Those officers emphasized that realistic training cannot be accomplished under the two challenged restrictions imposed by the District Court—the 2,200-yard shutdown zone and the power-down requirement during surface ducting conditions. The use of MFA sonar under realistic conditions during training exercises is clearly of the utmost importance to the Navy and the Nation. The Court does not question the importance of plaintiffs' ecological, scientific, and recreational interests, but it concludes that the balance of equities and consideration of the overall public interest tip strongly in favor of the Navy. The determination of where the public interest lies in this case does not strike the Court as a close question. Pp. 14–16.

(c) The lower courts' justifications for entering the preliminary injunction are not persuasive. Pp. 16–21.

(1) The District Court did not give serious consideration to the balance of equities and the public interest. The Court of Appeals did consider these factors and conclude that the Navy's concerns about the preliminary injunction were "speculative." But that is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct. The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises. Pp. 16–17.

(2) The District Court abused its discretion by requiring the Navy to shut down MFA sonar when a marine mammal is spotted within 2,200 yards of a sonar-emitting vessel. The Court of Appeals concluded that the zone would not be overly burdensome because marine mammal sightings during training exercises are relatively rare. But regardless of the frequency of such sightings, the injunction will increase the radius of the shutdown zone from 200 to 2,200 yards, which expands its surface area by a factor of over 100. Moreover, because training scenarios can take several days to develop, each additional shutdown can result in the loss of several days' worth of training. The Court of Appeals also concluded that the shutdown zone would not be overly burdensome because the Navy had shut down MFA sonar several times during prior exercises when marine mammals were spotted well beyond the Navy's self-imposed 200-yard zone. But the court ignored undisputed evidence that these voluntary shutdowns only occurred during tactically insignificant times. Pp. 18–20.

(3) The District Court also abused its discretion by requiring the Navy to power down MFA sonar by 6 decibels during significant surface ducting conditions. When surface ducting occurs, active sonar becomes more useful near the surface, but less effective at greater depths. Diesel-electric submariners are trained to take advantage of these distortions to avoid being detected by sonar. The Court of Appeals concluded that the power-down requirement was reasonable because surface ducting occurs relatively rarely, and the Navy has previously certified strike groups that did not train under such conditions. This reasoning is backwards. Given that surface ducting is both rare and unpredictable, it is especially important for the Navy to be able to train under these conditions when they occur. Pp. 20–21.

(4) The Navy has previously taken voluntary measures to address concerns about marine mammals, and has chosen not to challenge four other restrictions imposed by the District Court in this case. But that hardly means that other, more intrusive restrictions pose no threat to preparedness for war. The Court of Appeals noted that the Navy could return to the District Court to seek modification of the preliminary injunction if it actually resulted in an inability to train. The Navy is not required to wait until it is unable to train sufficient forces for national defense before seeking dissolution of the preliminary injunction. By then it may be too late. P. 21.

(d) This Court does not address the underlying merits of plaintiffs' claims, but the foregoing analysis makes clear that it would also be an abuse of discretion to enter a permanent injunction along the same lines as the preliminary injunction. Plaintiffs' ultimate legal claim is that the Navy must prepare an EIS, not that it must cease

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sonar training. There is accordingly no basis for enjoining such training pending preparation of an EIS—if one is determined to be required—when doing so is credibly alleged to pose a serious threat to national security. There are many other remedial tools available, including declaratory relief or an injunction specifically tailored to preparation of an EIS, that do not carry such dire consequences. Pp. 21–23.

518 F. 3d 658, reversed; preliminary injunction vacated in part.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined as to Part I. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined.

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SUPREME COURT OF THE UNITED STATES

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CRAWFORD *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06–1595. Argued October 8, 2008—Decided January 26, 2009

In response to questions from an official of respondent local government (Metro) during an internal investigation into rumors of sexual harassment by the Metro School District employee relations director (Hughes), petitioner Crawford, a 30-year employee, reported that Hughes had sexually harassed her. Metro took no action against Hughes, but soon fired Crawford, alleging embezzlement. She filed suit under Title VII of the Civil Rights Act of 1964, claiming that Metro was retaliating for her report of Hughes's behavior, in violation of 42 U. S. C. §2000e–3(a), which makes it unlawful "for an employer to discriminate against any . . . employe[e]" who (1) "has opposed any practice made an unlawful employment practice by this subchapter" (opposition clause), or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (participation clause). The court granted Metro summary judgment, and the Sixth Circuit affirmed, holding that the opposition clause demanded "active, consistent" opposing activities, whereas Crawford had not initiated any complaint prior to the investigation, and finding that the participation clause did not cover Metro's internal investigation because it was not conducted pursuant to a Title VII charge pending with the Equal Employment Opportunity Commission.

Held: The antiretaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. Because "oppose" is undefined by statute, it carries its ordinary dictionary meaning of resisting or contending against. Crawford's statement is thus covered by the opposition clause, as an ostensibly

disapproving account of Hughes's sexually obnoxious behavior toward her. "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. Thus, a person can "oppose" by responding to someone else's questions just as surely as by provoking the discussion. Nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when asked a question. Metro unconvincingly argues for the Sixth Circuit's active, consistent opposition rule, claiming that employers will be less likely to raise questions about possible discrimination if a retaliation charge is easy to raise when things go badly for an employee who responded to enquiries. Employers, however, have a strong inducement to ferret out and put a stop to discriminatory activity in their operations because *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 765, and *Faragher* v. *Boca Raton*, 524 U. S. 775, 807, hold "[a]n employer . . . subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee." The Circuit's rule could undermine the *Ellerth-Faragher* scheme, along with the statute's " 'primary objective' " of "avoid[ing] harm" to employees, *Faragher*, *supra,* at 806, for if an employee reporting discrimination in answer to an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses. Because Crawford's conduct is covered by the opposition clause, this Court does not reach her argument that the Sixth Circuit also misread the participation clause. Metro's other defenses to the retaliation claim were never reached by the District Court, and thus remain open on remand. Pp. 3–8.

211 Fed. Appx. 373, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

SUMMERS ET AL. *v.* EARTH ISLAND INSTITUTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–463. Argued October 8, 2008—Decided March 3, 2009

After the U. S. Forest Service approved the Burnt Ridge Project, a salvage sale of timber on 238 acres of fire-damaged federal land, respondent environmentalist organizations filed suit to enjoin the Service from applying its regulations exempting such small sales from the notice, comment, and appeal process it uses for more significant land management decisions, and to challenge other regulations that did not apply to Burnt Ridge. The District Court granted a preliminary injunction against the sale, and the parties then settled their dispute as to Burnt Ridge. Although concluding that the sale was no longer at issue, and despite the Government's argument that respondents therefore lacked standing to challenge the regulations, the court nevertheless proceeded to adjudicate the merits of their challenges, invalidating several regulations, including the notice and comment and the appeal provisions. Among its rulings, the Ninth Circuit affirmed the determination that the latter regulations, which were applicable to Burnt Ridge, were contrary to law, but held that challenges to other regulations not at issue in that project were not ripe for adjudication.

Held: Respondents lack standing to challenge the regulations still at issue absent a live dispute over a concrete application of those regulations. Pp. 4–12.

(a) In limiting the judicial power to "Cases" and "Controversies," Article III restricts it to redressing or preventing actual or imminently threatened injury to persons caused by violation of law. See, *e.g., Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–560. The standing doctrine reflects this fundamental limitation, requiring that "the plaintiff . . . 'alleg[e] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdic-

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tion," *Warth* v. *Seldin*, 422 U. S. 490, 498–499. Here, respondents can demonstrate standing only if application of the regulations will affect *them* in such a manner. Pp. 4–5.

(b) As organizations, respondents can assert their members' standing. Harm to their members' recreational, or even their mere esthetic, interests in the National Forests will suffice to establish the requisite concrete and particularized injury, see *Sierra Club* v. *Morton*, 405 U. S. 727, 734–736, but generalized harm to the forest or the environment will not alone suffice. Respondents have identified no application of the invalidated regulations that threatens imminent and concrete harm to their members' interests. Respondents' argument that they have standing based on Burnt Ridge fails because, after voluntarily settling the portion of their lawsuit relevant to Burnt Ridge, respondents and their members are no longer under threat of injury from that project. The remaining affidavit submitted in support of standing fails to establish that any member has concrete plans to visit a site where the challenged regulations are being applied in a manner that will harm that member's concrete interests. Additional affidavits purporting to establish standing were submitted after judgment had already been entered and notice of appeal filed, and are thus untimely. Pp. 5–8.

(c) Respondents' argument that they have standing because they have suffered procedural injury—*i.e.,* they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied—fails because such a deprivation without some concrete interest affected thereby is insufficient to create Article III standing. See, *e.g., Defenders of Wildlife, supra*, at 572, n. 7. Pp. 8–9.

(d) The dissent's objections are addressed and rejected. Pp. 9–12.

490 F. 3d 687, reversed in part and affirmed in part.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

WYETH *v.* LEVINE

CERTIORARI TO THE SUPREME COURT OF VERMONT

No. 06–1249. Argued November 3, 2008—Decided March 4, 2009

Petitioner Wyeth manufactures the antinausea drug Phenergan. After a clinician injected respondent Levine with Phenergan by the "IV-push" method, whereby a drug is injected directly into a patient's vein, the drug entered Levine's artery, she developed gangrene, and doctors amputated her forearm. Levine brought a state-law damages action, alleging, *inter alia,* that Wyeth had failed to provide an adequate warning about the significant risks of administering Phenergan by the IV-push method. The Vermont jury determined that Levine's injury would not have occurred if Phenergan's label included an adequate warning, and it awarded damages for her pain and suffering, substantial medical expenses, and loss of her livelihood as a professional musician. Declining to overturn the verdict, the trial court rejected Wyeth's argument that Levine's failure-to-warn claims were pre-empted by federal law because Phenergan's labeling had been approved by the federal Food and Drug Administration (FDA). The Vermont Supreme Court affirmed.

Held: Federal law does not pre-empt Levine's claim that Phenergan's label did not contain an adequate warning about the IV-push method of administration. Pp. 6–25.

(a) The argument that Levine's state-law claims are pre-empted because it is impossible for Wyeth to comply with both the state-law duties underlying those claims and its federal labeling duties is rejected. Although a manufacturer generally may change a drug label only after the FDA approves a supplemental application, the agency's "changes being effected" (CBE) regulation permits certain preapproval labeling changes that add or strengthen a warning to improve drug safety. Pursuant to the CBE regulation, Wyeth could have unilaterally added a stronger warning about IV-push administration, and there is no evidence that the FDA would ultimately have rejected

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such a labeling change. Wyeth's cramped reading of the CBE regulation and its broad assertion that unilaterally changing the Phenergan label would have violated federal law governing unauthorized distribution and misbranding of drugs are based on the fundamental misunderstanding that the FDA, rather than the manufacturer, bears primary responsibility for drug labeling. It is a central premise of the Food, Drug, and Cosmetic Act (FDCA) and the FDA's regulations that the manufacturer bears responsibility for the content of its label at all times. Pp. 11–16.

(b) Wyeth's argument that requiring it to comply with a state-law duty to provide a stronger warning would interfere with Congress' purpose of entrusting an expert agency with drug labeling decisions is meritless because it relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law. The history of the FDCA shows that Congress did not intend to pre-empt state-law failure-to-warn actions. In advancing the argument that the FDA must be presumed to have established a specific labeling standard that leaves no room for different state-law judgments, Wyeth relies not on any statement by Congress but on the preamble to a 2006 FDA regulation declaring that state-law failure-to-warn claims threaten the FDA's statutorily prescribed role. Although an agency regulation with the force of law can pre-empt conflicting state requirements, this case involves no such regulation but merely an agency's assertion that state law is an obstacle to achieving its statutory objectives. Where, as here, Congress has not authorized a federal agency to pre-empt state law directly, the weight this Court accords the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness. Cf., *e.g., Skidmore* v. *Swift & Co.*, 323 U. S. 134. Under this standard, the FDA's 2006 preamble does not merit deference: It is inherently suspect in light of the FDA's failure to offer interested parties notice or opportunity for comment on the pre-emption question; it is at odds with the available evidence of Congress' purposes; and it reverses the FDA's own longstanding position that state law is a complementary form of drug regulation without providing a reasoned explanation. *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, is distinguished. Pp. 17–25.

___ Vt. ___, 944 A. 2d 179, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA, J., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FOX TELEVISION STATIONS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07–582. Argued November 4, 2008—Decided April 28, 2009

Federal law bans the broadcasting of "any . . . indecent . . . language," 18 U. S. C. §1464, which includes references to sexual or excretory activity or organs, see *FCC* v. *Pacifica Foundation*, 438 U. S. 726. Having first defined the prohibited speech in 1975, the Federal Communications Commission (FCC) took a cautious, but gradually expanding, approach to enforcing the statutory prohibition. In 2004, the FCC's *Golden Globes Order* declared for the first time that an expletive (nonliteral) use of the F-Word or the S-Word could be actionably indecent, even when the word is used only once.

This case concerns isolated utterances of the F- and S-Words during two live broadcasts aired by Fox Television Stations, Inc. In its order upholding the indecency findings, the FCC, *inter alia,* stated that the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionable; declared that under the new policy, a lack of repetition weighs against a finding of indecency, but is not a safe harbor; and held that both broadcasts met the new test because one involved a literal description of excrement and both invoked the F-Word. The order did not impose sanctions for either broadcast. The Second Circuit set aside the agency action, declining to address the constitutionality of the FCC's action but finding the FCC's reasoning inadequate under the Administrative Procedure Act (APA).

Held: The judgment is reversed, and the case is remanded.

489 F. 3d 444, reversed and remanded.

JUSTICE SCALIA delivered the opinion of the Court, except as to Part III–E, concluding:

1. The FCC's orders are neither "arbitrary" nor "capricious" within

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the meaning of the APA, 5 U. S. C. §706(2)(A). Pp. 9–19.

(a) Under the APA standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. In overturning the FCC's judgment, the Second Circuit relied in part on its precedent interpreting the APA and *State Farm* to require a more substantial explanation for agency action that changes prior policy. There is, however, no basis in the Act or this Court's opinions for a requirement that all agency change be subjected to more searching review. Although an agency must ordinarily display awareness that it *is* changing position, see *United States* v. *Nixon*, 418 U. S. 683, 696, and may sometimes need to account for prior factfinding or certain reliance interests created by a prior policy, it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change adequately indicates. Pp. 9–12.

(b) Under these standards, the FCC's new policy and its order finding the broadcasts at issue actionably indecent were neither arbitrary nor capricious. First, the FCC forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent prior FCC and staff actions, and explicitly disavowing them as no longer good law. The agency's reasons for expanding its enforcement activity, moreover, were entirely rational. Even when used as an expletive, the F-Word's power to insult and offend derives from its sexual meaning. And the decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with *Pacifica*'s context-based approach. Because the FCC's prior safe-harbor-for-single-words approach would likely lead to more widespread use, and in light of technological advances reducing the costs of bleeping offending words, it was rational for the agency to step away from its old regime. The FCC's decision not to impose sanctions precludes any argument that it is arbitrarily punishing parties without notice of their actions' potential consequences. Pp. 13–15.

(c) None of the Second Circuit's grounds for finding the FCC's action arbitrary and capricious is valid. First, the FCC did not need empirical evidence proving that fleeting expletives constitute harmful "first blows" to children; it suffices to know that children mimic behavior they observe. Second, the court of appeals' finding that fidelity to the FCC's "first blow" theory would require a categorical ban on *all* broadcasts of expletives is not responsive to the actual policy under review since the FCC has always evaluated the patent offensive-

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ness of words and statements in relation to the context in which they were broadcast. The FCC's decision to retain some discretion in less egregious cases does not invalidate its regulation of the broadcasts under review. Third, the FCC's prediction that a *per se* exemption for fleeting expletives would lead to their increased use merits deference and makes entire sense. Pp. 15–18.

(d) Fox's additional arguments are not tenable grounds for affirmance. Fox misconstrues the agency's orders when it argues that that the new policy is a presumption of indecency for certain words. It reads more into *Pacifica* than is there by arguing that the FCC failed adequately to explain how this regulation is consistent with that case. And Fox's argument that the FCC's repeated appeal to "context" is a smokescreen for a standardless regime of unbridled discretion ignores the fact that the opinion in *Pacifica* endorsed a context-based approach. Pp. 18–19.

2. Absent a lower court opinion on the matter, this Court declines to address the FCC orders' constitutionality. P. 26.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A through III–D, and IV, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part III–E, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., and GINSBURG, J., filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

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UNITED STATES *v.* EURODIF S. A. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 07–1059. Argued November 4, 2008 —Decided January 26, 2009*

Nuclear utilities generally procure their fuel, "low enriched uranium" (LEU), through one of two types of contracts. Under an "enriched uranium product" (EUP) contract, the utility simply pays the enricher cash for LEU of a desired quantity and "assay," *i.e.,* its percentage of the isotope necessary for a nuclear reaction. The amount of energy required to enrich a quantity of "feed uranium" to a given assay is described in terms of an industry standard called a "separative work unit" (SWU). Under a "SWU contract," the utility provides a quantity of feed uranium and pays the enricher for the SWUs to produce the required LEU quantity and assay. SWU contracts do not require that the required number of SWUs actually be applied to the utility's uranium. Because feed uranium is fungible and essentially trades like a commodity, and because profitable operation of an enrichment plant requires the constant processing of feed uranium from the enricher's undifferentiated stock, the LEU provided to a utility under a SWU contract cannot be traced to the particular unenriched uranium the utility provided.

Petitioners (collectively, USEC), who run the only uranium enrichment factory in the United States, petitioned the Commerce Department (Department) for relief under the Tariff Act of 1930, which calls for "antidumping" duties on "foreign merchandise" sold in this country at "less than its fair value," 19 U. S. C. §1673, but does not touch international sales of services. USEC alleged that LEU imported from European countries under both EUP and SWU contracts was being sold in the United States at less than fair value and was

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*Together with No. 07–1078, *USEC Inc. et al.* v. *Eurodif S. A. et al.,* also on certiorari to the same court.

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materially harming domestic industry. In its final determination, the Department concluded that LEU from France, including LEU acquired under SWU contracts, was being sold here at less than fair value. Among other things, the Department rejected the claim that such transactions were sales of enrichment services, as provided in SWU contracts. The Court of International Trade (CIT) ultimately reversed, noting the "legal fiction" expressed in SWU contracts that the very feed uranium delivered by a utility to an enricher is enriched and then returned as LEU to the utility. Finding that the record did not support a determination that the enricher has any ownership rights, the CIT reasoned that the Department's decision was unsupported by substantial evidence and not in accordance with law. The Federal Circuit affirmed, approaching the issues much as the CIT had.

Held: The Department's take on the transactions at issue as sales of goods rather than services reflects a permissible interpretation and application of §1673. Because §1677(1) gives this determination to the Department in the first instance, the Department's interpretation governs in the absence of unambiguous statutory language to the contrary or an unreasonable resolution of ambiguous language. See, *e.g., Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. Two threshold propositions must be accepted. First, the Department reasonably concluded that §1673 is not limited by its terms to cash-only sales. If that were the case, any sale of a manufactured product could be exempted from the section's operation by a contractual term stating part of the purchase price in terms of a commodity. Second, since public law is not constrained by private fiction, see, *e.g., Tcherepnin* v. *Knight*, 389 U. S. 332, 336, the Department is not bound by the legal fiction created by SWU contracts that the very feed uranium delivered by a utility to an enricher is enriched and then returned as LEU to the utility. Thus, the test of the Department's position turns first on whether the statute clearly excludes a transaction involving mixed payment for LEU that may and almost certainly will be produced from uranium feed distinct from what the utility provides. Although it is undisputed that §1673 applies to the sale of goods, not services, the section simply does not speak with the precision necessary to say definitively whether it applies to the LEU and the agreement giving the utility a right to get it. This is the very situation in which the Court looks to an authoritative agency for a decision about a statute's scope. Once the choice is made, the Court asks only whether the Department's application of the statute was reasonable. Where, as here, cash plus an untracked fungible commodity are exchanged for a substantially transformed version of the same commodity, the Department may reasonably

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treat the transaction as the sale of a good under §1673. Cf. *Powder Co.* v. *Burkhardt*, 97 U. S. 110, 116. The Department's position is reinforced by practical reasons aimed at preserving antidumping duties' effectiveness. It is undisputed that such duties apply to LEU sold to a domestic utility by foreign enrichers under an EUP contract calling for a single cash price that is less than fair value. Such a transaction obviously opens the domestic enrichment industry to material injury, the very threat that §1673 was meant to counter. But the same injury will occur if a SWU contract is untouchable. Under a SWU contract, the domestic utility pays cash to a third party for unenriched uranium and provides this along with additional cash in exchange for LEU; any EUP contract could be structured as a SWU contract simply by splitting the transaction in two, one contract to buy unenriched uranium and another to enrich it. And the restructuring would not stop with uranium; contracts for many types of goods would be replaced by separate contracts for the goods and for processing services, and antidumping duties would primarily chastise the uncreative. The Department's attempt to foreclose this absurd result by treating such transactions as sales of goods is eminently reasonable. Pp. 9–16.

506 F. 3d 1051, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

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SUPREME COURT OF THE UNITED STATES

Syllabus

14 PENN PLAZA LLC ET AL. *v.* PYETT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07–581. Argued December 1, 2008—Decided April 1, 2009

Respondents are members of the Service Employees International Union, Local 32BJ (Union). Under the National Labor Relations Act, the Union is the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doorpersons. The Union has exclusive authority to bargain on behalf of its members over their "rates of pay, wages, hours of employment, or other conditions of employment," 29 U. S. C. §159(a), and engages in industry-wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreement for Contractors and Building Owners (CBA). The CBA requires union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures.

Petitioner 14 Penn Plaza LLC is a member of the RAB. It owns and operates the New York City office building where respondents worked as night lobby watchmen and in other similar capacities. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), a maintenance service and cleaning contractor. After 14 Penn Plaza, with the Union's consent, engaged a unionized security contractor affiliated with Temco to provide licensed security guards for the building, Temco reassigned respondents to jobs as porters and cleaners. Contending that these reassignments led to a loss in income, other damages, and were otherwise less desirable than their former positions, respondents asked the Union to file grievances alleging, among other things, that petitioners violated the CBA's ban

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on workplace discrimination by reassigning respondents on the basis of their age in violation of Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq*. The Union requested arbitration under the CBA, but after the initial hearing, withdrew the age-discrimination claims on the ground that its consent to the new security contract precluded it from objecting to respondents' reassignments as discriminatory. Respondents then filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners had violated their ADEA rights, and the EEOC issued each of them a right-to-sue notice. In the ensuing lawsuit, the District Court denied petitioners' motion to compel arbitration of respondents' age discrimination claims. The Second Circuit affirmed, holding that *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, forbids enforcement of collective-bargaining provisions requiring arbitration of ADEA claims.

Held: A provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. Pp. 6–25.

(a) Examination of the two federal statutes at issue here, the ADEA and the National Labor Relations Act (NLRA), yields a straightforward answer to the question presented. The Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including ADEA claims, would be resolved in arbitration. This freely negotiated contractual term easily qualifies as a "conditio[n] of employment" subject to mandatory bargaining under the NLRA, 29 U. S. C. §159(a). See, *e.g., Litton Financial Printing Div., Litton Business Systems, Inc.* v. *NLRB*, 501 U. S. 190, 199. As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer, and courts generally may not interfere in this bargained-for exchange. See *NLRB* v. *Magnavox Co.*, 415 U. S. 322, 328. Thus, the CBA's arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628. It does not. This Court has squarely held that the ADEA does not preclude arbitration of claims brought under the statute. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 26–33. Pp. 6–10. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Pp. 6–10.

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(b) The CBA's arbitration provision is also fully enforceable under the *Gardner-Denver* line of cases. Respondents incorrectly interpret *Gardner-Denver* and its progeny as holding that an agreement to arbitrate ADEA claims provided for in a collective-bargaining agreement cannot waive an individual employee's right to a judicial forum under federal antidiscrimination statutes.. Pp. 11–23.

(i) The facts underlying *Gardner-Denver* and its progeny reveal the narrow scope of the legal rule they engendered. Those cases "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims," but "the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gilmer, supra,* at 35. *Gardner-Denver* does not control the outcome where, as here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims. Pp. 11–15.

(ii) Apart from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta highly critical of using arbitration to vindicate statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned. First, contrary to *Gardner-Denver*'s erroneous assumption, 415 U. S., at 51, the decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance, see, *e.g., Gilmer*, *supra,* at 26. Second, *Gardner-Denver*'s mistaken suggestion that certain informal features of arbitration made it a forum "well suited to the resolution of contractual disputes," but "a comparatively inappropriate forum for the final resolution of [employment] rights." 415 U. S., at 56, has been corrected. See, *e.g., Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 232. Third, *Gardner-Denver*'s concern that, in arbitration, a union may subordinate an individual employee's interests to the collective interests of all employees in the bargaining unit, 415 U. S., at 58, n. 19, cannot be relied on to introduce a qualification into the ADEA that is not found in its text. Until Congress amends the ADEA to meet the conflict-of-interest concern identified in the *Gardner-Denver* dicta, there is "no reason to color the lens through which the arbitration clause is read." *Mitsubishi, supra,* at 628. In any event, the conflict-of-interest argument amounts to an unsustainable collateral attack on the NLRA, see *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U. S. 50, 62, and Congress has accounted for the conflict in several ways: union members may bring a duty of fair representation claim against the union; a union can be subjected to direct liability under the ADEA if it discriminates on the basis of age; and union

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members may also file age-discrimination claims with the EEOC and the National Labor Relations Board. Pp. 15–23.

(c) Because respondents' arguments that the CBA does not clearly and unmistakably require them to arbitrate their ADEA claims were not raised in the lower courts, they have been forfeited. Moreover, although a substantive waiver of federally protected civil rights will not be upheld, see, *e.g., Mitsubishi, supra,* at 637, and n. 19, this Court is not positioned to resolve in the first instance respondents' claim that the CBA allows the Union to prevent them from effectively vindicating their federal statutory rights in the arbitral forum, given that this question would require resolution of contested factual allegations, was not fully briefed here or below, and is not fairly encompassed within the question presented. Resolution now would be particularly inappropriate in light of the Court's hesitation to invalidate arbitration agreements based on speculation. See, *e.g.*, *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79. Pp. 23–25.

498 F. 3d 88, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

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ENTERGY CORP. *v.* RIVERKEEPER, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07–588. Argued December 2, 2008—Decided April 1, 2009*

Petitioners' powerplants have "cooling water intake structures" that threaten the environment by squashing against intake screens ("impingement") or suctioning into the cooling system ("entrainment") aquatic organisms from the water sources tapped to cool the plants. Thus, the facilities are subject to regulation under the Clean Water Act, which mandates that "[a]ny standard established pursuant to section 1311 . . . or section 1316 . . . and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U. S. C. §1326(b). Sections 1311 and 1316, in turn, employ a variety of "best technology" standards to regulate effluent discharge into the Nation's waters. The Environmental Protection Agency (EPA) promulgated the §1326(b) regulations at issue after nearly three decades of making the "best technology available" determination on a case-by-case basis. Its "Phase I" regulations govern new cooling water intake structures, while the "Phase II" rules at issue apply to certain large existing facilities. In the latter rules, the EPA set "national performance standards," requiring most Phase II facilities to reduce "impingement mortality for [aquatic organisms] by 80 to 95 percent from the calculation baseline," and requiring a subset of facilities to reduce entrainment of such organisms by "60 to 90 percent from [that] baseline." 40 CFR §125.94(b)(1), (2). However, the EPA expressly declined to mandate closed-cycle cooling systems, or equivalent re-

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*Together with No. 07–589, *PSEG Fossil LLC et al.* v. *Riverkeeper, Inc., et al.,* and No. 07–597, *Utility Water Act Group* v. *Riverkeeper, Inc., et al.,* also on certiorari to the same court.

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ductions in impingement and entrainment, as it had done in its Phase I rules, in part because the cost of rendering existing facilities closed-cycle compliant would be nine times the estimated cost of compliance with the Phase II performance standards, and because other technologies could approach the performance of closed-cycle operation. The Phase II rules also permit site-specific variances from the national performance standards, provided that the permit-issuing authority imposes remedial measures that yield results "as close as practicable to the applicable performance standards." §125.94(a)(5)(i), (ii). Respondents—environmental groups and various States—challenged the Phase II regulations. Concluding that cost-benefit analysis is impermissible under 33 U. S. C. §1326(b), the Second Circuit found the site-specific cost-benefit variance provision unlawful and remanded the regulations to the EPA for it to clarify whether it had relied on cost-benefit analysis in setting the national performance standards.

Held: The EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations. Pp. 7–16.

(a) The EPA's view that §1326(b)'s "best technology available for minimizing adverse environmental impact" standard permits consideration of the technology's costs and of the relationship between those costs and the environmental benefits produced governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844. The Second Circuit took "best technology" to mean the technology that achieves the greatest reduction in adverse environmental impacts at a reasonable cost to the industry, but it may also describe the technology that *most efficiently* produces a good, even if it produces a lesser quantity of that good than other available technologies. This reading is not precluded by the phrase "for minimizing adverse environmental impact." Minimizing admits of degree and is not necessarily used to refer exclusively to the "greatest possible reduction." Other Clean Water Act provisions show that when Congress wished to mandate the greatest feasible reduction in water pollution, it used plain language, *e.g.,* "elimination of discharges of all pollutants," §1311(b)(2)(A). Thus, §1326(b)'s use of the less ambitious goal of "minimizing adverse environmental impact" suggests that the EPA has some discretion to determine the extent of reduction warranted under the circumstances, plausibly involving a consideration of the benefits derived from reductions and the costs of achieving them. Pp. 7–9.

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(b) Considering §1326(b)'s text, and comparing it with the text and statutory factors applicable to parallel Clean Water Act provisions, prompts the conclusion that it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden. In the Phase II rules the EPA sought only to avoid extreme disparities between costs and benefits, limiting variances from Phase II's "national performance standards" to circumstances where the costs are "significantly greater than the benefits" of compliance. 40 CFR §125.94(a)(5)(ii). In defining "national performance standards" the EPA assumed the application of technologies whose benefits approach those estimated for closed-cycle cooling systems at a fraction of the cost. That the EPA has for over thirty years interpreted §1326(b) to permit a comparison of costs and benefits, while not conclusive, also tends to show that its interpretation is reasonable and hence a legitimate exercise of its discretion. Even respondents and the Second Circuit ultimately recognize that some comparison of costs and benefits is permitted. The Second Circuit held that §1326(b) mandates only those technologies whose costs can be reasonably borne by the industry. But whether it is reasonable to bear a particular cost can very well depend on the resulting benefits. Likewise, respondents concede that the EPA need not require that industry spend billions to save one more fish. This concedes the principle, and there is no statutory basis for limiting the comparison of costs and benefits to situations where the benefits are *de minimis* rather than significantly disproportionate. Pp. 9–16.

475 F. 3d 83, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

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PACIFIC BELL TELEPHONE CO., DBA AT&T CALIFORNIA, ET AL. *v.* LINKLINE COMMUNICATIONS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–512. Argued December 8, 2008—Decided February 25, 2009

Petitioners (hereinafter AT&T) own infrastructure and facilities needed to provide "DSL" service, a method of connecting to the Internet at high speeds over telephone lines. As a condition for a recent merger, the Federal Communications Commission requires AT&T to provide wholesale DSL transport service to independent firms at a price no greater than the retail price of AT&T's DSL service. The plaintiffs in this case, respondents here, are independent Internet service providers that compete with AT&T in the retail DSL market in California. The plaintiffs do not own all the facilities needed to supply DSL service, and must lease wholesale DSL transport service from AT&T. They filed suit under §2 of the Sherman Act, asserting that AT&T unlawfully "squeezed" their profit margins by setting a high price for the wholesale DSL transport service it sells and a low price for its own retail DSL service. This maneuver allegedly placed the plaintiffs at a competitive disadvantage, allowing AT&T to maintain monopoly power in the DSL market. AT&T moved for judgment on the pleadings, arguing that the plaintiffs' claims were foreclosed by *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 410, in which this Court held that a firm with no antitrust duty to deal with its rivals has no obligation to provide those rivals with a "sufficient" level of service. The District Court found that AT&T had no antitrust duty to deal with the plaintiffs, but nonetheless denied the motion, holding that *Trinko* did not address price-squeeze claims. The court certified its order for interlocutory appeal on the question whether *Trinko* bars price-squeeze claims when the parties are required to deal by federal communications law, but not

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antitrust law. The Ninth Circuit affirmed, holding that *Trinko* did not address the viability of price-squeeze claims, and thus the plaintiffs' complaint stated a potentially valid §2 claim.

Held:

1. The case is not moot. The plaintiffs now agree that their claims must meet the *Brooke Group* test for predatory pricing, apparently apart from their price-squeeze theory. That test established two requirements for predatory pricing: below-cost retail pricing and a " 'dangerous probability' " that the defendant will recoup any lost profits, see *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 222–224. Despite the plaintiffs' new position, the parties continue to seek different relief: AT&T seeks reversal of the decision below and dismissal of the complaint, while the plaintiffs seek leave to amend their complaint to allege a *Brooke Group* claim. It is also not clear that the plaintiffs have unequivocally abandoned their price-squeeze claims. Prudential concerns favor answering the question presented; absent a decision on the merits, the Circuit conflict that this Court granted certiorari to resolve would persist. Pp. 5–7.

2. A price-squeeze claim may not be brought under §2 when the defendant has no antitrust duty to deal with the plaintiff at wholesale. Pp. 7–17.

(a) Businesses are generally free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. See *United States* v. *Colgate & Co.*, 250 U. S. 300, 307. But in rare circumstances, a dominant firm may incur antitrust liability for purely unilateral conduct, such as charging "predatory" prices. *Brooke Group*, *supra,* at 222–224. There are also limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U. S. 585, 608–611. Here, plaintiffs do not allege predatory pricing, and the District Court concluded that there was no antitrust duty to deal. Plaintiffs challenge a different type of unilateral conduct in which a firm "squeezes" its competitors' profit margins. This requires the defendant to operate in both the wholesale ("upstream") and retail ("downstream") markets. By raising the wholesale price of inputs while cutting its own retail prices, the defendant can raise competitors' costs while putting downward pressure on their revenues. Price-squeeze plaintiffs assert that defendants must leave them a "fair" or "adequate" margin between wholesale and retail prices. Pp. 7–9.

(b) Where there is no duty to deal at the wholesale level and no predatory pricing at the retail level, a firm is not required to price both of these services in a manner that preserves its rivals' profit margins. Pp. 9–12.

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(1) Any challenge to AT&T's *wholesale* prices is foreclosed by a straightforward application of *Trinko*. The claim in *Trinko* addressed the quality of Verizon's support services, while the claims in this case challenge AT&T's pricing structure. But for antitrust purposes, there is no meaningful distinction between price and nonprice components of a transaction. The nub of the complaint in both cases is identical—the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in the retail market. But a firm with no antitrust duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors. See *Trinko, supra,* at 410. Had AT&T simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Thus, it was not required to offer this service at the wholesale prices the plaintiffs would have preferred. Pp. 9–10.

(2) The other component of a price-squeeze claim is the assertion that the defendant's *retail* prices are "too low." Here too plaintiffs' claims find no support in existing antitrust doctrine. "[C]utting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 594. To avoid chilling aggressive price competition, the Court has carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that the defendant's prices are too low. See *Brooke Group, supra,* at 222–224. The complaint at issue here has no allegation that AT&T's conduct met either *Brooke Group* requirement. Recognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the precise harm the Court sought to avoid in *Brooke Group*: Firms might raise retail prices or refrain from aggressive price competition to avoid potential antitrust liability. See 509 U. S., at 223. Pp. 11–12.

(c) Institutional concerns also counsel against recognizing such claims. This Court has repeatedly emphasized the importance of clear rules in antitrust law. Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. Courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze. Moreover, firms seeking to avoid price-squeeze liability will have no safe harbor for their pricing practices. The most commonly articulated standard for price squeezes is that the defendant must leave its rivals a "fair" or "adequate" margin between wholesale and retail prices; this test is nearly impossible for courts to apply without conducting complex proceedings like rate-setting agencies. Some amici argue that a price squeeze should be presumed if the defendant's wholesale price ex-

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ceeds its retail price. But if both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price is greater than or equal to its retail price. Pp. 12–15.

(d) The District Court on remand should consider whether an amended complaint filed by the plaintiffs states a claim upon which relief may be granted under the pleading standard articulated in *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 561–563; whether plaintiffs should be given leave to amend their complaint to bring a *Brooke Group* claim; and such other matters properly before it. Pp. 15–17.

503 F. 3d 876, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

ASHCROFT, FORMER ATTORNEY GENERAL, ET AL. *v.* IQBAL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07–1015. Argued December 10, 2008—Decided May 18, 2009

Following the September 11, 2001, terrorist attacks, respondent Iqbal, a Pakistani Muslim, was arrested on criminal charges and detained by federal officials under restrictive conditions. Iqbal filed a *Bivens* action against numerous federal officials, including petitioner Ashcroft, the former Attorney General, and petitioner Mueller, the Director of the Federal Bureau of Investigation (FBI). See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388. The complaint alleged, *inter alia,* that petitioners designated Iqbal a person "of high interest" on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments; that the FBI, under Mueller's direction, arrested and detained thousands of Arab Muslim men as part of its September-11th investigation; that petitioners knew of, condoned, and willfully and maliciously agreed to subject Iqbal to harsh conditions of confinement as a matter of policy, solely on account of the prohibited factors and for no legitimate penological interest; and that Ashcroft was the policy's "principal architect" and Mueller was "instrumental" in its adoption and execution. After the District Court denied petitioners' motion to dismiss on qualified-immunity grounds, they invoked the collateral order doctrine to file an interlocutory appeal in the Second Circuit. Affirming, that court assumed without discussion that it had jurisdiction and focused on the standard set forth in *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, for evaluating whether a complaint is sufficient to survive a motion to dismiss. Concluding that *Twombly*'s "flexible plausibility standard" obliging a pleader to amplify a claim with factual allegations where necessary to render it plausible was inapplicable in the context of petitioners' appeal, the court held that Iqbal's complaint

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was adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law.

Held:

1. The Second Circuit had subject-matter jurisdiction to affirm the District Court's order denying petitioners' motion to dismiss. Pp. 6–10.

(a) Denial of a qualified-immunity claim can fall within the narrow class of prejudgment orders reviewable under the collateral-order doctrine so long as the order "turns on an issue of law." *Mitchell* v. *Forsyth*, 472 U. S. 511, 530. The doctrine's applicability in this context is well established; an order rejecting qualified immunity at the motion-to-dismiss stage is a "final decision" under 28 U. S. C. §1291, which vests courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." *Behrens* v. *Pelletier*, 516 U. S. 299, 307. Pp. 7–8.

(b) Under these principles, the Court of Appeals had, and this Court has, jurisdiction over the District Court's order. Because the order turned on an issue of law and rejected the qualified-immunity defense, it was a final decision "subject to immediate appeal." *Behrens, supra,* at 307. Pp. 8–10.

2. Iqbal's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination. Pp. 11–23.

(a) This Court assumes, without deciding, that Iqbal's First Amendment claim is actionable in a *Bivens* action, see *Hartman* v. *Moore,* 547 U. S. 250, 254, n. 2. Because vicarious liability is inapplicable to *Bivens* and §1983 suits, see, *e.g., Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691, the plaintiff in a suit such as the present one must plead that each Government-official defendant, through his own individual actions, has violated the Constitution. Purposeful discrimination requires more than "intent as volition or intent as awareness of consequences"; it involves a decisionmaker's undertaking a course of action " 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279. Iqbal must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason, but for the purpose of discriminating on account of race, religion, or national origin. Pp. 11–13.

(b) Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required, *Twombly,* 550 U. S., at 555, but the Rule does call for sufficient factual matter, accepted as true, to "state a claim to relief

that is plausible on its face," *id.*, at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556. Two working principles underlie *Twombly*. First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. *Id.,* at 555. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. *Id.,* at 556. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Pp. 13–16.

(c) Iqbal's pleadings do not comply with Rule 8 under *Twombly*. Several of his allegations—that petitioners agreed to subject him to harsh conditions as a matter of policy, solely on account of discriminatory factors and for no legitimate penological interest; that Ashcroft was that policy's "principal architect"; and that Mueller was "instrumental" in its adoption and execution—are conclusory and not entitled to be assumed true. Moreover, the factual allegations that the FBI, under Mueller, arrested and detained thousands of Arab Muslim men, and that he and Ashcroft approved the detention policy, do not plausibly suggest that petitioners purposefully discriminated on prohibited grounds. Given that the September 11 attacks were perpetrated by Arab Muslims, it is not surprising that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the policy's purpose was to target neither Arabs nor Muslims. Even if the complaint's well-pleaded facts gave rise to a plausible inference that Iqbal's arrest was the result of unconstitutional discrimination, that inference alone would not entitle him to relief: His claims against petitioners rest solely on their ostensible policy of holding detainees categorized as "of high interest," but the complaint does not contain facts plausibly showing that their policy was based on discriminatory factors. Pp. 16–20.

(d) Three of Iqbal's arguments are rejected. Pp. 20–23.

(i) His claim that *Twombly* should be limited to its antitrust context is not supported by that case or the Federal Rules. Because *Twombly* interpreted and applied Rule 8, which in turn governs the

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pleading standard "in all civil actions," Rule 1, the case applies to antitrust and discrimination suits alike, see 550 U. S., at 555–556, and n. 14. P. 20.

(ii) Rule 8's pleading requirements need not be relaxed based on the Second Circuit's instruction that the District Court cabin discovery to preserve petitioners' qualified-immunity defense in anticipation of a summary judgment motion. The question presented by a motion to dismiss for insufficient pleadings does not turn on the controls placed on the discovery process. *Twombly*, *supra*, at 559. And because Iqbal's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise. Pp. 20–22.

(iii) Rule 9(b)—which requires particularity when pleading "fraud or mistake" but allows "other conditions of a person's mind [to] be alleged generally"—does not require courts to credit a complaint's conclusory statements without reference to its factual context. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade Rule 8's less rigid, though still operative, strictures. Pp. 22–23.

(e) The Second Circuit should decide in the first instance whether to remand to the District Court to allow Iqbal to seek leave to amend his deficient complaint. P. 23.

490 F. 3d 143, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

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AT&T CORP. *v.* HULTEEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–543. Argued December 10, 2008—Decided May 18, 2009

Petitioner companies (collectively, AT&T) long based pension calculations on a seniority system that relied on years of service minus uncredited leave time, giving less retirement credit for pregnancy absences than for medical leave generally. In response to the ruling in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, that such differential treatment of pregnancy leave was not sex-based discrimination prohibited by Title VII of the Civil Rights Act of 1964, Congress added the Pregnancy Discrimination Act (PDA) to Title VII in 1978 to make it "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions," *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 684. On the PDA's effective date, AT&T replaced its old plan with the Anticipated Disability Plan, which provided the same service credit for pregnancy leave as for other disabilities prospectively, but did not make any retroactive adjustments for the pre-PDA personnel policies. Each of the individual respondents therefore received less service credit for her pre-PDA pregnancy leave than she would have for general disability leave, resulting in a reduction in her total employment term and, consequently, smaller AT&T pensions. They, along with their union, also a respondent, filed Equal Employment Opportunity Commission charges alleging discrimination based on sex and pregnancy in violation of Title VII. The EEOC issued each respondent (collectively, Hulteen) a determination letter finding reasonable cause to believe AT&T had discriminated and a right-to-sue letter. Hulteen filed suit in the District Court, which held itself bound by a Ninth Circuit precedent finding a Title VII violation where post-PDA retirement eligibility calculations incorporated pre-PDA accrual rules that differentiated based on pregnancy. The Circuit affirmed.

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Held: An employer does not necessarily violate the PDA when it pays pension benefits calculated in part under an accrual rule, applied only pre-PDA, that gave less retirement credit for pregnancy than for medical leave generally. Because AT&T's pension payments accord with a bona fide seniority system's terms, they are insulated from challenge under Title VII §703(h). Pp. 4–14.

(a) AT&T's benefit calculation rule is protected by §703(h), which provides: "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of . . . sex." In *Teamsters* v. *United States*, 431 U. S. 324, 356, the Court held that a pre-Title VII seniority system that disproportionately advantaged white, as against minority, employees nevertheless exemplified a bona fide system without any discriminatory terms under §703(h), where the discrimination resulted from the employer's hiring practices and job assignments. Because AT&T's system must also be viewed as bona fide, *i.e.,* as a system having no discriminatory terms, §703(h) controls the result here, just as it did in *Teamsters*. This Court held in *Gilbert* that an accrual rule limiting the seniority credit for time taken for pregnancy leave did not unlawfully discriminate on the basis of sex. As a matter of law, at that time, "an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender-based discrimination at all." 429 U. S., at 136. The only way to conclude that §703(h) does not protect AT&T's system would be to read the PDA as applying retroactively to recharacterize AT&T's acts as having been illegal when done. This is not a serious possibility. Generally, there is "a presumption against retroactivity [unless] Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 272–273. There is no such clear intent here. Section 706(e)(2)—which details when "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose"—has no application because *Gilbert* unquestionably held that the feature of AT&T's seniority system at issue here was not discriminatory when adopted, let alone intentionally so. Nor can it be argued that because AT&T could have chosen to give post-PDA credit to pre-PDA pregnancy leave when Hulteen retired, its failure to do so was facially discriminatory at that time. If a choice to rely on a favorable statute turned every past differentiation into contemporary discrimination, §703(h) would never apply. Finally, *Bazemore* v. *Friday*, 478 U. S. 385—in which a pre-Title VII compensation plan giving black em-

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ployees less pay than whites was held to violate Title VII on its effective date—is inapplicable because the *Bazemore* plan did not involve a seniority system subject to §703(h) and the employer there failed to eliminate the discriminatory practice when Title VII became law. Pp. 4–13.

(b) A recent §706(e) amendment making it "an unlawful employment practice . . . when an individual is affected by application of a discriminatory compensation decision or other practice, including each time . . . benefits [are] paid, resulting . . . from such a decision," §3(A), 123 Stat. 6, does not help Hulteen. AT&T's pre-PDA decision not to award Hulteen service credit for pregnancy leave was not discriminatory, with the consequence that Hulteen has not been "affected by application of a discriminatory compensation decision or other practice." Pp. 13–14.

498 F. 3d 1001, reversed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined.

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SUPREME COURT OF THE UNITED STATES

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COEUR ALASKA, INC. *v.* SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–984. Argued January 12, 2009—Decided June 22, 2009*

In reviving a closed Alaska gold mine using a "froth flotation" technique, petitioner Coeur Alaska, Inc., plans to dispose of the resulting waste material, a rock and water mixture called "slurry," by pumping it into a nearby lake and then discharging purified lake water into a downstream creek. The Clean Water Act (CWA), *inter alia,* classifies crushed rock as a "pollutant," §352(6); forbids its discharge "[e]xcept as in compliance" with the Act, §301(a); empowers the Army Corps of Engineers (Corps) to "issue permits . . . for the discharge of . . . fill material," §404(a); and authorizes the Environmental Protection Agency (EPA) to "issue a permit for the discharge of any pollutant," "[e]xcept as provided in [§404]," §402(a). The Corps and the EPA together define "fill material" as any "material [that] has the effect of . . . [c]hanging the bottom elevation" of water, including "slurry . . . or similar mining-related materials." 40 CFR §232.2. Coeur Alaska obtained a §404 permit for the slurry discharge from the Corps and a §402 permit for the lake water discharge from the EPA.

Respondent environmental groups (collectively, SEACC) sued the Corps and several of its officials under the Administrative Procedure Act, arguing that the CWA §404 permit was not "in accordance with law," 5 U. S. C. §706(2)(A), because (1) Coeur Alaska should have sought a CWA §402 permit from the EPA instead, just as it did for the lake water discharge; and (2) the slurry discharge would violate the "new source performance standard" the EPA had promulgated under CWA §306(b), forbidding froth-flotation gold mines to dis-

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*Together with No. 07–990, *Alaska* v. *Southeast Alaska Conservation Council et al.,* also on certiorari to the same court.

charge "process wastewater," which includes solid wastes, 40 CFR §440.104(b)(1). Coeur Alaska and petitioner Alaska intervened as defendants. The District Court granted the defendants summary judgment, but the Ninth Circuit reversed, holding that the proposed slurry discharge would violate the EPA's performance standard and §306(e).

Held:

1. The Corps, not the EPA, has authority to permit the slurry discharge. Pp. 9–13.

(a) By specifying that, "[e]xcept as provided in . . . [§404,]" the EPA "may . . . issue permit[s] for the discharge of any pollutant," §402(a) forbids the EPA to issue permits for fill materials falling under the Corps' §404 authority. Even if there were ambiguity on this point, it would be resolved by the EPA's own regulation providing that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require [EPA §402] permits." 40 CFR §122.3. The agencies have interpreted this regulation to essentially restate §402's text, *ibid.,* and the EPA has confirmed that reading before this Court. Because it is not "plainly erroneous or inconsistent with the regulation," the Court accepts the EPA's interpretation as correct. *Auer* v. *Robbins*, 519 U. S. 452, 461. Thus, the question whether the EPA is the proper agency to regulate the slurry discharge depends on whether the Corps has authority to do so. If so, the EPA may not regulate. Pp. 9–11.

(b) Because §404(a) empowers the Corps to "issue permits . . . for the discharge of . . . fill material," and the agencies' joint regulation defines "fill material" to include "slurry . . . or similar mining-related materials" having the "effect of . . . [c]hanging the bottom elevation" of water, 40 CFR §232.2, the slurry Coeur Alaska wishes to discharge into the lake falls well within the Corps' §404 permitting authority, rather than the EPA's §402 authority. The CWA gives no indication that Congress intended to burden industry with the confusing division of permitting authority that SEACC's contrary reading would create. Pp. 11–13.

2. The Corps acted in accordance with law in issuing the slurry discharge permit to Coeur Alaska. Pp. 13–28.

(a) The CWA alone does not resolve these cases. Pp. 14–18.

(i) SEACC contends that because the EPA's performance standard forbids even minute solid waste discharges, 40 CFR §440.104(b)(1), it also forbids Coeur Alaska's slurry discharge, 30% of which is solid waste, into the lake. Thus, says SEACC, the slurry discharge is "unlawful" under CWA §306(e), which prohibits "any owner . . . of any new source to operate such source in violation of any standard of performance applicable to such source." Pp. 14–16.

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(ii) Petitioners and the federal agencies counter that CWA §404 grants the Corps authority to determine whether to issue a permit allowing the slurry discharge without regard to the EPA's new source performance standard or §306(e)'s prohibition. Pp. 16–18.

(iii) The CWA is ambiguous on the question whether §306 applies to discharges of fill material regulated under §404. On the one hand, §306 provides that a discharge that violates an EPA new source performance standard is "unlawful"—without an exception for fill material. On the other hand, §404 grants the Corps blanket authority to permit the discharge of fill material—without mentioning §306. This tension indicates that Congress has not "directly spoken" to the "precise question" at issue. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842. P. 18.

(b) Although the agencies' regulations construing the CWA are entitled to deference if they resolve the statutory ambiguity in a reasonable manner, see *Chevron, supra,* at 842, the regulations bearing on §§306 and 404, like the CWA itself, do not do so. For example, each of the two principal regulations seems to stand on its own without reference to the other. The EPA's performance standard contains no exception for fill material, and it forbids any discharge of "process wastewater," including solid wastes. 40 CFR §440.104(b)(1). The agencies' joint regulation defining fill material includes "slurry or . . . similar mining-related materials," §232.2, but contains no exception for slurry regulated by an EPA performance standard. Additional regulations noted by the parties offer no basis for reconciliation. Pp. 18–20.

(c) In light of the ambiguities in the CWA and the pertinent regulations, the Court turns to the agencies' subsequent interpretation of those regulations. *Auer, supra,* at 461. The question at issue is addressed and resolved in a reasonable and coherent way by the two agencies' practice and policy, as recited in the EPA's internal "Regas Memorandum" (Memorandum), which explains that the performance standard applies only to the discharge of water from the lake into the downstream creek, and not to the initial discharge of slurry into the lake. Though the Memorandum is not subject to sufficiently formal procedures to merit full *Chevron* deference, the Court defers to it because it is not "plainly erroneous or inconsistent with the regulation[s]," *Auer, supra*, at 461. Five factors inform that conclusion: The Memorandum (1) confines its own scope to closed bodies of water like the lake here, thereby preserving a role for the performance standards; (2) guards against the possibility of evasion of those standards; (3) employs the Corps' expertise in evaluating the effects of fill material on the aquatic environment; (4) does not allow toxic compounds to be discharged into navigable waters; and (5) reconciles §§306, 402,

and 404, and the regulations implementing them, better than any of the parties' alternatives. The Court agrees with the parties that a two-permit regime is contrary to the statute and regulations. Pp. 20–23.

(d) The Court rejects SEACC's contention that the Regas Memorandum is not entitled to deference because it contradicts the agencies' published statements and prior practice. Though SEACC cites three such statements, its arguments are not convincing. Pp. 23–28.

(i) Although a 1986 memorandum of agreement (MOA) between the EPA and the Corps seeking to reconcile their then-differing "fill material" definitions suggests, as SEACC asserts, that §402 will "normally" apply to discharges of "suspended"—*i.e.,* solid—pollutants, that statement is not contrary to the Regas Memorandum, which acknowledges that the EPA retains authority under §402 to regulate the discharge of suspended solids from the lake into downstream waters. The MOA does not address the question presented by these cases, and answered by the Regas Memorandum, and is, in fact, consistent with the agencies' determination that the Corps regulates all discharges of fill material and that §306 does not apply to these discharges. Pp. 23–25.

(ii) Despite SEACC's assertion that the fill regulation's preamble demonstrates that the fill rule was not intended to displace the pre-existing froth-flotation gold mine performance standard, the preamble is consistent with the Regas Memorandum when it explicitly notes that the EPA has "never sought to regulate fill material under effluent guidelines," 67 Fed. Reg. 31135. If a discharge does not qualify as fill, the EPA's new source performance standard applies. If the discharge qualifies as fill, the performance standard does not apply; and there was no earlier agency practice or policy to the contrary. Pp. 25–26.

(iii) Remarks made by the two agencies in promulgating the fill regulation, which pledge that the EPA's "previou[s] . . . determination[s]" with regard to the application of performance standards "remain vali[d]," are not conclusive of the question at issue. The Regas Memorandum has followed this policy by applying the performance standard to the discharge of water from the lake into the creek. The remarks do not state that the EPA will apply such standards to discharges of fill material. Pp. 26–27.

(iv) While SEACC cites no instance in which the EPA has applied a performance standard to a discharge of fill material, Coeur Alaska cites two instances in which the Corps issued a §404 permit authorizing a mine to discharge solid waste as fill material. These permits illustrate that the agencies did not have a prior practice of applying EPA performance standards to discharges of mining wastes

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that qualify as fill material. Pp. 27–28.

486 F. 3d 638, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, and ALITO, JJ., joined, and in which SCALIA, J., joined in part. BREYER, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part and concurring in the judgment. GINSBURG, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

BOYLE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07–1309. Argued January 14, 2009—Decided June 8, 2009

The evidence at petitioner Boyle's trial for violating the Racketeer Influenced and Corrupt Organizations Act (RICO) provision forbidding "any person . . . associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," 18 U. S. C. §1962(c), was sufficient to prove, among other things, that Boyle and others committed a series of bank thefts in several States; that the participants included a core group, along with others recruited from time to time; and that the core group was loosely and informally organized, lacking a leader, hierarchy, or any long-term master plan. Relying largely on *United States* v. *Turkette*, 452 U. S. 576, 583, the District Court instructed the jury that to establish a RICO association-in-fact "enterprise," the Government must prove (1) an ongoing organization with a framework, formal or informal, for carrying out its objectives, and (2) that association members functioned as a continuing unit to achieve a common purpose. The court also told the jury that an association-in-fact's existence is often more readily proved by what it does than by abstract analysis of its structure, and denied Boyle's request for an instruction requiring the Government to prove that the enterprise had "an ascertainable structural hierarchy distinct from the charged predicate acts." Boyle was convicted, and the Second Circuit affirmed.

Held:

1. An association-in-fact enterprise under RICO must have a "structure," but the pertinent jury instruction need not be framed in the precise language Boyle proposes, *i.e.,* as having "an ascertainable structure beyond that inherent in the pattern of racketeering activity

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in which it engages." Pp. 4–12.

(a) In light of RICO's broad statement that an enterprise "includes any . . . group of individuals associated in fact although not a legal entity," §1961(4), and the requirement that RICO be "liberally construed to effectuate its remedial purposes," note following §1961, *Turkette* explained that "enterprise" reaches "a group of persons associated together for a common purpose of engaging in a course of conduct," 452 U. S., at 583, and "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Ibid*. Pp. 4–5.

(b) The question presented by this case is whether an association-in-fact enterprise must have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." Pet. for Cert. i. This question can be broken into three parts. First, the enterprise must have a "structure" that, under RICO's terms, has at least three features: a purpose, relationships among the associates, and longevity sufficient to permit the associates to pursue the enterprise's purpose. See *Turkette,* 452 U. S., at 583. The instructions need not actually use the term "structure," however, so long as the relevant point's substance is adequately expressed. Second, because a jury must find the existence of elements of a crime beyond a reasonable doubt, requiring a jury to find the existence of a structure that is *ascertainable* would be redundant and potentially misleading. Third, the phrase "beyond that inherent in the pattern of racketeering activity" is correctly interpreted to mean that the enterprise's existence is a separate element that must be proved, not that such existence may never be inferred from the evidence showing that the associates engaged in a pattern of racketeering activity. See *ibid.* Pp. 6–8.

(c) Boyle's argument that an enterprise must have structural features additional to those that can be fairly inferred from RICO's language—*e.g.,* a hierarchical structure or chain of command; fixed roles for associates; and an enterprise name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies—has no basis in the statute's text. As *Turkette* said, an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. The breadth of RICO's "enterprise" concept is highlighted by comparing the statute with other federal laws having much more stringent requirements for targeting organized criminal groups: *E.g.,* §1955(b) defines an "illegal gambling business" as one that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." Pp. 8–10.

(d) Rejection of Boyle's argument does not lead to a merger of the

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§1962(c) crime and other federal offenses. For example, proof that a defendant violated §1955 does not necessarily establish that he conspired to participate in a gambling enterprise's affairs through a pattern of racketeering activity. Rather, that would require the prosecution to prove either that the defendant committed a pattern of §1955 violations or a pattern of state-law gambling crimes. See §1961(1). Pp. 10–11.

(e) Because RICO's language is clear, the Court need not reach Boyle's statutory purpose, legislative history, or rule-of-lenity arguments. Pp. 11–12.

2. The instructions below were correct and adequate. By explicitly telling jurors they could not convict on the RICO charges unless they found that the Government had proved the existence of an enterprise, the instructions made clear that this was a separate element from the pattern of racketeering activity. The jurors also were adequately told that the enterprise needed the structural attributes that may be inferred from the statutory language. Finally, the instruction that an enterprise's existence "is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure" properly conveyed *Turkette*'s point that proof of a pattern of racketeering activity may be sufficient in a particular case to permit an inference of the enterprise's existence. P. 12.

283 Fed. Appx. 825, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

BURLINGTON NORTHERN & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–1601. Argued February 24, 2009—Decided May 4, 2009*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is designed to promote the cleanup of hazardous waste sites and to ensure that cleanup costs are borne by those responsible for the contamination. In 1960, Brown & Bryant, Inc. (B&B), an agricultural chemical distributor, began operating on a parcel of land located in Arvin, California. B&B later expanded onto an adjacent parcel owned by petitioners Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company (Railroads). As part of its business, B&B purchased and stored various hazardous chemicals, including the pesticide D–D, which it bought from petitioner Shell Oil Company (Shell). Over time, many of these chemicals spilled during transfers and deliveries, and as a result of equipment failures.

Investigations of B&B by the California Department of Toxic Substances Control and the federal Environmental Protection Agency (Governments) revealed significant soil and ground water contamination and in 1989, the Governments exercised their CERCLA authority to clean up the Arvin site, spending over $8 million by 1998. Seeking to recover their costs, the Governments initiated legal action against Shell and the Railroads. The District Court ruled in favor of the Governments, finding that both the Railroads and Shell were potentially responsible parties under CERCLA—the Railroads because they owned part of the facility and Shell because it had "arranged for disposal . . . of hazardous substances," 42 U. S. C. §9607(a)(3),

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*Together with No. 07–1607, *Shell Oil Co.* v. *United States et al.,* also on certiorari to the same court.

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through D–D's sale and delivery. The District Court apportioned liability, holding the Railroads liable for 9% of the Governments' total response costs, and Shell liable for 6%. On appeal, the Ninth Circuit agreed that Shell could be held liable as an arranger under §9607(a)(3) and affirmed the District Court's decision in that respect. Although the Court of Appeals agreed that the harm in this case was theoretically capable of apportionment, it found the facts present in the record insufficient to support apportionment, and therefore held Shell and the Railroads jointly and severally liable for the Governments' response costs.

Held:

1. Shell is not liable as an arranger for the contamination at the Arvin facility. Section §9607(a)(3) liability may not extend beyond the limits of the statute itself. Because CERCLA does not specifically define what it means to "arrang[e] for" disposal of a hazardous substance, the phrase should be given its ordinary meaning. In common parlance, "arrange" implies action directed to a specific purpose. Thus, under §9607(a)(3)'s plain language, an entity may qualify as an arranger when it takes intentional steps to dispose of a hazardous substance. To qualify as an arranger, Shell must have entered into D–D sales with the intent that at least a portion of the product be disposed of during the transfer process by one or more of §6903(3)'s methods. The facts found by the District Court do not support such a conclusion. The evidence shows that Shell was aware that minor, accidental spills occurred during D–D's transfer from the common carrier to B&B's storage tanks after the product had come under B&B's stewardship; however, it also reveals that Shell took numerous steps to encourage its distributors to *reduce* the likelihood of spills. Thus, Shell's mere knowledge of continuing spills and leaks is insufficient grounds for concluding that it "arranged for" D–D's disposal. Pp. 8–13.

2. The District Court reasonably apportioned the Railroads' share of the site remediation costs at 9%. Calculating liability based on three figures—the percentage of the total area of the facility that was owned by the Railroads, the duration of B&B's business divided by the term of the Railroads' lease, and the court's determination that only two polluting chemicals (not D–D) spilled on the leased parcel required remediation and that those chemicals were responsible for roughly two-thirds of the remediable site contamination—the District Court ultimately determined that the Railroads were responsible for 9% of the remediation costs. The District Court's detailed findings show that the primary pollution at the site was on a portion of the facility most distant from the Railroad parcel and that the hazardous-chemical spills on the Railroad parcel contributed to no more than

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10% of the total site contamination, some of which did not require remediation. Moreover, although the evidence adduced by the parties did not allow the District Court to calculate precisely the amount of hazardous chemicals contributed by the Railroad parcel to the total site contamination or the exact percentage of harm caused by each chemical, the evidence showed that fewer spills occurred on the Railroad parcel and that not all of them crossed to the B&B site, where most of the contamination originated, thus supporting the conclusion that the parcel contributed only two chemicals in quantities requiring remediation. Pp. 13–19.

520 F. 3d 918, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. GINSBURG, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

Syllabus

CARLSBAD TECHNOLOGY, INC. *v.* HIF BIO, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 07–1437. Argued February 24, 2009—Decided May 4, 2009

Respondents filed a state-court suit alleging that petitioner had violated state and federal law in connection with a patent dispute. After removing the case to Federal District Court under 28 U. S. C. §1441(c), which allows removal if the case includes at least one claim over which the federal court has original jurisdiction, petitioner moved to dismiss the suit's only federal claim, which arose under the Racketeer Influenced and Corrupt Organizations Act (RICO). Agreeing that respondents had failed to state a RICO claim upon which relief could be granted, the District Court dismissed the claim; declined to exercise supplemental jurisdiction over the remaining state-law claims under §1367(c)(3), which allows such a course if the court "has dismissed all claims over which it has original jurisdiction"; and remanded the case to state court. The Federal Circuit dismissed petitioner's appeal, finding that the remand order could be colorably characterized as based on a "lack of subject matter jurisdiction" over the state-law claims, §1447(c), and was therefore "not reviewable on appeal," §1447(d).

Held: A district court's order remanding a case to state court after declining to exercise supplemental jurisdiction over state-law claims is not a remand for lack of subject-matter jurisdiction for which appellate review is barred by §§1447(c) and (d). With respect to supplemental jurisdiction, a federal court has subject-matter jurisdiction over specified state-law claims, see §§1367(a), (c), and its decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary, see, *e.g., Osborn* v. *Haley*, 549 U. S. 225, 245. It is undisputed that when this case was removed, the District Court had original jurisdiction

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over the federal RICO claim under §1331 and supplemental jurisdiction over the state-law claims, which were "so related to claims . . . within such original jurisdiction that they form[ed] part of the same case or controversy," §1367(a). On dismissing the RICO claim, the court retained its statutory supplemental jurisdiction over the state-law claims. Its decision not to exercise that statutory authority was not based on a jurisdictional defect, but on its discretionary choice. See *Chicago* v. *International College of Surgeons*, 522 U. S. 156, 173. Pp. 3–6.

508 F. 3d 659, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. STEVENS, J., and SCALIA, J., filed concurring opinions. BREYER, J., filed a concurring opinion, in which SOUTER, J., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

ATLANTIC SOUNDING CO., INC., ET AL. *v.* TOWNSEND

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08–214. Argued March 2, 2009—Decided June 25, 2009

Atlantic Sounding Co. allegedly refused to pay maintenance and cure to respondent Townsend for injuries he suffered while working on its tugboat, and then filed this declaratory relief action regarding its obligations. Townsend filed suit under the Jones Act and general maritime law, alleging, *inter alia,* arbitrary and willful failure to provide maintenance and cure. He filed similar counterclaims in the declaratory judgment action, seeking punitive damages for the maintenance and cure claim. The District Court denied petitioners' motion to dismiss the punitive damages claim, but certified the question for interlocutory appeal. Following its precedent, the Eleventh Circuit held that punitive damages may be awarded for the willful withholding of maintenance and cure.

Held: Because punitive damages have long been an accepted remedy under general maritime law, and because neither *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, nor the Jones Act altered this understanding, punitive damages for the willful and wanton disregard of the maintenance and cure obligation remain available as a matter of general maritime law. Pp. 2–19.

(a) Settled legal principles establish three points central to this case. Pp. 2–9.

(i) Punitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct. English law during the colonial era accorded juries the authority to award such damages when warranted. And American courts have likewise permitted such damages since at least 1784. This Court has also found punitive damages authorized as a matter of common-law doctrine. See, *e.g., Day* v. *Woodworth*, 13 How. 363. Pp. 3–5.

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(ii) The common-law punitive damages tradition extends to claims arising under federal maritime law. See *Lake Shore & Michigan Southern R. Co.* v. *Prentice*, 147 U. S. 101, 108. One of this Court's first cases so indicating involved an action for marine trespass. See *The Amiable Nancy*, 3 Wheat. 546. And lower federal courts have found punitive damages available in maritime actions for particularly egregious tortious acts. Pp. 5–6.

(iii) Nothing in maritime law undermines this general rule's applicability in the maintenance and cure context. The maintenance and cure obligation dates back centuries as an aspect of general maritime law, and the failure of a seaman's employers to provide adequate medical care was the basis for awarding punitive damages in cases decided in the 1800's. This Court has since registered its agreement with such decisions and has subsequently found that in addition to wages, "maintenance" includes food and lodging at the ship's expense, and "cure" refers to medical treatment, *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 441. Moreover, an owner's failure to provide proper medical care for seamen has provided lower courts the impetus to award damages that appear to contain at least some punitive element. Pp. 7–8.

(iv) Under these settled legal principles, respondent is entitled to pursue punitive damages unless Congress has enacted legislation that departs from the common-law understanding. P. 9.

(b) The plain language of the Jones Act does not provide a basis for overturning the common-law rule. Congress enacted the Jones Act to overrule *The Osceola*, 189 U. S. 158, where the Court prohibited a seaman or his family from recovering for injuries or death suffered due to his employers' negligence. To that end, the Act created a statutory negligence cause of action, but it did not eliminate preexisting remedies available to seamen for the separate common-law cause of action based on maintenance and cure. The Act bestows the right to "elect" to bring a Jones Act claim, thereby indicating a choice of actions for seamen—not an exclusive remedy. Because the then-accepted remedies arose from general maritime law, it necessarily follows that Congress envisioned their continued availability. See *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, 354. Had the Jones Act been the only remaining remedy available, there would have been no election to make. And, the only statutory restrictions on general maritime maintenance and cure claims were enacted long after the Jones Act's passage and limit availability for only two discrete classes: foreign workers on offshore oil and mineral production facilities and sailing school students and instructors. This indicates that "Congress knows how to" restrict the traditional maintenance and cure remedy "when it wants to." *Omni Capital Int'l, Ltd.* v. *Rudolf*

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Wolff & Co., 484 U. S. 97, 106. This Court has consistently observed that the Jones Act preserves common-law causes of action such as maintenance and cure, see. *e.g., The Arizona* v. *Anelich*, 298 U. S. 110, and its case law supports the view that punitive damages awards, in particular, continue to remain available in maintenance and cure actions, see *Vaughan* v. *Atkinson*, 369 U. S. 527. Pp. 9–13.

(i) Contrary to petitioners' argument, *Miles* does not limit recovery to the remedies available under the Jones Act. *Miles* does not address either maintenance and cure actions in general or the availability of punitive damages for such actions. Instead, it grappled with the entirely different question whether general maritime law should provide a cause of action for wrongful death based on unseaworthiness. The Court found that the Jones Act and the Death on the High Seas Act (DOHSA), along with state statutes, supported recognition of a general maritime rule for wrongful death of a seaman. However, since Congress had chosen to limit the damages available in the Jones Act and DOHSA, excluding damages for loss of society or lost future earnings, 498 U. S., at 21, 31–32, its judgment must control the availability of remedies for wrongful-death actions brought under general maritime law, *id.*, at 32–36. *Miles'* reasoning does not apply here. Unlike Miles' situation, both the general maritime cause of action here (maintenance and cure) and the remedy (punitive damages) were well established before the Jones Act's passage. And unlike *Miles'* facts, the Jones Act does not address the general maritime cause of action here or its remedy. It is thus possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which "Congress has spoken directly." See *id.,* at 31. Moreover, petitioners' contrary view was directly rejected in *Norfolk Shipbuilding & Drydock Corp.* v. *Garris*, 532 U. S. 811, 820. If *Miles* presented no barrier to the *Garris* Court's endorsement of a previously unrecognized maritime cause of action for negligent wrongful death, there is no legitimate basis for a contrary conclusion here. Like negligence, the duty of maintenance and cure and the general availability of punitive damages have been recognized "for more than a century," 532 U. S., at 820. And because respondent does not ask this Court to alter statutory text or "expand" the maritime tort law's general principles, *Miles* does not require eliminating the general maritime remedy of punitive damages for the willful or wanton failure to comply with the duty to pay maintenance and cure. The fact that seamen commonly seek to recover under the Jones Act for maintenance and cure claims, does not mean that the Jones Act provides the only remedy. See *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S.

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367, 374–375. The laudable quest for uniformity in admiralty does not require narrowing available damages to the lowest common denominator approved by Congress for distinct causes of action. Pp. 13–19.

496 F. 3d 1282, affirmed and remanded.

THOMAS, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

CAPERTON ET AL. *v.* A. T. MASSEY COAL CO., INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 08–22. Argued March 3, 2009—Decided June 8, 2009

After a West Virginia jury found respondents, a coal company and its affiliates (hereinafter Massey), liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations and awarded petitioners (hereinafter Caperton) $50 million in damages, West Virginia held its 2004 judicial elections. Knowing the State Supreme Court of Appeals would consider the appeal, Don Blankenship, Massey's chairman and principal officer, supported Brent Benjamin rather than the incumbent justice seeking reelection. His $3 million in contributions exceeded the total amount spent by all other Benjamin supporters and by Benjamin's own committee. Benjamin won by fewer than 50,000 votes. Before Massey filed its appeal, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the State's Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion, indicating that he found nothing showing bias for or against any litigant. The court then reversed the $50 million verdict. During the rehearing process, Justice Benjamin refused twice more to recuse himself, and the court once again reversed the jury verdict. Four months later, Justice Benjamin filed a concurring opinion, defending the court's opinion and his recusal decision.

Held: In all the circumstances of this case, due process requires recusal. Pp. 6–20.

(a) The Due Process Clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, *Tumey* v. *Ohio*, 273 U. S. 510, 523, but this Court has also identified additional instances which, as an objec-

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tive matter, require recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Withrow* v. *Larkin*, 421 U. S. 35, 47. Two such instances place the present case in proper context. Pp. 6–11.

(1) The first involved local tribunals in which a judge had a financial interest in a case's outcome that was less than what would have been considered personal or direct at common law. In *Tumey,* a village mayor with authority to try those accused of violating a law prohibiting the possession of alcoholic beverages faced two potential conflicts: Because he received a salary supplement for performing judicial duties that was funded from the fines assessed, he received a supplement only upon a conviction; and sums from the fines were deposited to the village's general treasury fund for village improvements and repairs. Disqualification was required under the principle that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." 273 U. S., at 532. In *Ward* v. *Monroeville*, 409 U. S. 57, a conviction in another mayor's court was invalidated even though the fines assessed went only to the town's general fisc, because the mayor faced a "'possible temptation'" created by his "executive responsibilities for village finances." *Id.,* at 60. Recusal was also required where an Alabama Supreme Court justice cast the deciding vote upholding a punitive damages award while he was the lead plaintiff in a nearly identical suit pending in Alabama's lower courts. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813. The proper constitutional inquiry was not "whether in fact [the justice] was influenced," *id.*, at 825, but "whether sitting on [that] case . . . ' "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true," ' " *ibid.* While the "degree or kind of interest . . . sufficient to disqualify a judge . . . '[could not] be defined with precision, ' " *id.,* at 822, the test did have an objective component. Pp. 7–9.

(2) The second instance emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but had determined in an earlier proceeding whether criminal charges should be brought and then proceeded to try and convict the petitioners. *In re Murchison*, 349 U. S. 133. Finding that "no man can be a judge in his own case," and "no man is permitted to try cases where he has an interest in the outcome," *id.*, at 136, the Court noted that the circumstances of the case and the prior relationship required recusal. The judge's prior relationship with the defendant, as well as the information acquired from the prior proceeding, was critical. In reiterating

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that the rule that "a defendant in criminal contempt proceedings should be [tried] before a judge other than the one reviled by the contemnor," *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 466, rests on the relationship between the judge and the defendant, *id.*, at 465, the Court noted that the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or there is an unconstitutional "'potential for bias,'" *id.,* at 466. Pp. 9–11.

(b) Because the objective standards implementing the Due Process Clause do not require proof of actual bias, this Court does not question Justice Benjamin's subjective findings of impartiality and propriety and need not determine whether there was actual bias. Rather, the question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U. S.*,* at 47. There is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The proper inquiry centers on the contribution's relative size in comparison to the total amount contributed to the campaign, the total amount spent in the election, and the apparent effect of the contribution on the outcome. It is not whether the contributions were a necessary and sufficient cause of Benjamin's victory. In an election decided by fewer than 50,000 votes, Blankenship's campaign contributions—compared to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented." *Ibid.* The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical, for it was reasonably foreseeable that the pending case would be before the newly elected justice. There is no allegation of a *quid pro quo* agreement, but the extraordinary contributions were made at a time when Blankenship had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause. Applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal. Pp. 11–16.

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(c) Massey and its *amici* err in predicting that this decision will lead to adverse consequences ranging from a flood of recusal motions to unnecessary interference with judicial elections. They point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case, which are extreme by any measure. And because the States may have codes of conduct with more rigorous recusal standards than due process requires, most recusal disputes will be resolved without resort to the Constitution, making the constitutional standard's application rare. Pp. 16–20.

___ W. Va. ___, ___S. E. 2d ___, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

Syllabus

ARTHUR ANDERSEN LLP ET AL. *v.* CARLISLE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08–146. Argued March 3, 2009—Decided May 4, 2009

After consulting with petitioners, respondents Wayne Carlisle, James Bushman, and Gary Strassel used a shelter to minimize taxes from the sale of their company. Limited liability corporations created by Carlisle, Bushman, and Strassel (also respondents) entered into investment-management agreements with Bricolage Capital, LLC, that provided for arbitration of disputes. After the Internal Revenue Service found the tax shelter illegal, respondents filed a diversity suit against petitioners. Claiming that equitable estoppel required respondents to arbitrate their claims per the agreements with Bricolage, petitioners invoked §3 of the Federal Arbitration Act (FAA), 9 U. S. C. §3, which entitles litigants to stay an action that is "referable to arbitration under an agreement in writing." Section 16(a)(1)(A) of the FAA allows an appeal from "an order . . . refusing a stay of any action under section 3." The District Court denied petitioners' stay motions, and the Sixth Circuit dismissed their interlocutory appeal for want of jurisdiction.

Held:

1. The Sixth Circuit had jurisdiction to review the denial of petitioners' requests for a §3 stay. By its clear and unambiguous terms, §16(a)(1)(A) entitles any litigant asking for a §3 stay to an immediate appeal from that motion's denial—regardless of whether the litigant is in fact eligible for a stay. Jurisdiction over the appeal "must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order," *Behrens* v. *Pelletier*, 516 U. S. 299, 311. The statute unambiguously makes the underlying merits irrelevant, for even a request's utter frivolousness cannot turn a denial into something other than "an order . . . refusing a stay of any action under section 3," §16(a)(1)(A).

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Pp. 3–5.

2. A litigant who was not a party to the arbitration agreement may invoke §3 if the relevant state contract law allows him to enforce the agreement. Neither FAA §2—the substantive mandate making written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract"—nor §3 purports to alter state contract law regarding the scope of agreements. Accordingly, whenever the relevant state law would make a contract to arbitrate a particular dispute enforceable by a nonsignatory, that signatory is entitled to request and obtain a stay under §3 because that dispute is "referable to arbitration under an agreement in writing." Because traditional state-law principles allow enforcement of contracts by (or against) nonparties through, *e.g.,* assumption or third-party beneficiary theories, the Sixth Circuit erred in holding that §3 relief is categorically not available to nonsignatories. Questions as to the nature and scope of the applicable state contract law in the present case have not been briefed here and can be addressed on remand. Pp. 5–8

521 F. 3d 597, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which ROBERTS, C. J., and STEVENS, J., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

TRAVELERS INDEMNITY CO. ET AL. *v.* BAILEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08–295. Argued March 30, 2009—Decided June 18, 2009*

As part of the 1986 reorganization plan of the Johns-Manville Corporation (Manville), an asbestos supplier and manufacturer of asbestos-containing products, the Bankruptcy Court approved a settlement providing that Manville's insurers, including The Travelers Indemnity Company and related companies (Travelers), would contribute to the corpus of the Manville Personal Injury Settlement Trust (Trust), and releasing those insurers from any "Policy Claims," which were channeled to the Trust. "Policy Claims" include, as relevant here, "claims" and "allegations" against the insurers "based upon, arising out of or relating to" the Manville insurance policies. The settlement agreement and reorganization plan were approved by the Bankruptcy Court (1986 Orders) and were affirmed by the District Court and the Second Circuit. Over a decade later plaintiffs began filing asbestos actions against Travelers in state courts (Direct Actions), often seeking to recover from Travelers not for Manville's wrongdoing but for Travelers' own alleged violations of state consumer-protection statutes or of common law duties. Invoking the 1986 Orders, Travelers asked the Bankruptcy Court to enjoin 26 Direct Actions. Ultimately, a settlement was reached, in which Travelers agreed to make payments to compensate the Direct Action claimants, contingent on the court's order clarifying that the Direct Actions were, and remained, prohibited by the 1986 Orders. The court made extensive factual findings, uncontested here, concluding that Travelers derived its knowledge of asbestos from its insurance relationship with Manville and that the Direct Actions are based on acts or omissions by Travel-

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*Together with No. 08–307, *Common Law Settlement Counsel* v. *Bailey et al.,* also on certiorari to the same court.

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ers arising from or related to the insurance policies. It then approved the settlement and entered an order (Clarifying Order), which provided that the 1986 Orders barred the pending Direct Actions and various other claims. Objectors to the settlement (respondents here) appealed. The District Court affirmed, but the Second Circuit reversed. Agreeing that the Bankruptcy Court had jurisdiction to interpret and enforce the 1986 Orders, the Circuit nevertheless held that the Bankruptcy Court lacked jurisdiction to enjoin the Direct Actions because those actions sought not to recover based on Manville's conduct, but to recover directly from Travelers for its own conduct.

Held: The terms of the injunction bar the Direct Actions against Travelers, and the finality of the Bankruptcy Court's 1986 Orders generally stands in the way of challenging their enforceability. Pp. 9–18.

(a) The Direct Actions are "Policy Claims" enjoined as against Travelers by the 1986 Orders, which covered, *inter alia,* "claims" and "allegations" "relating to" Travelers' insurance coverage of Manville. In a statute, "[t]he phrase 'in relation to' is expansive," *Smith* v. *United States*, 508 U. S. 223, 237, and so is its reach here. While it would be possible to suggest that a "claim" only relates to Travelers' insurance coverage if it seeks recovery based upon Travelers' specific contractual obligation to Manville, "allegations" is not amenable to such a narrow construction and clearly reaches factual assertions that relate in a more comprehensive way to Travelers' dealings with Manville. The Bankruptcy Court's detailed factual findings place the Direct Actions within the terms of the 1986 Orders. Contrary to respondents' argument, the 1986 Orders contain no language limiting "Policy Claims" to claims derivative of Manville's liability. Even if, before the entry of the 1986 Orders, Travelers understood the proposed injunction to bar only such derivative claims, where a court order's plain terms unambiguously apply, as they do here, they are entitled to their effect. If it is black-letter law that an unambiguous private contract's terms must be enforced irrespective of the parties' subjective intent, it is also clear that a court, such as the Bankruptcy Court here, should enforce a court order, a public governmental act, according to its unambiguous terms. Pp. 10–13.

(b) Because the 1986 Orders became final on direct review over two decades ago, whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Second Circuit in 2008 and is not properly before this Court. The Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders, see *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239, and it explicitly retained jurisdiction to enforce its injunctions when it issued the 1986 Orders. The Second Circuit erred in holding the 1986 Orders unenforceable according to their terms on the ground that the

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Bankruptcy Court had exceeded its jurisdiction in 1986. On direct appeal of the 1986 Orders, any objector was free to argue that the Bankruptcy Court had exceeded its jurisdiction, and the District Court or Court of Appeals could have raised such concerns *sua sponte*. But once those orders became final on direct review, they became res judicata to the " 'parties and those in privity with them.' " *Nevada* v. *United States*, 463 U. S. 110, 130. So long as respondents or those in privity with them were parties to Manville's bankruptcy proceeding, and were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction, they cannot challenge it now by resisting enforcement of the 1986 Orders. The Second Circuit's willingness to entertain this collateral attack cannot be squared with res judicata and the practical necessity served by that rule. Almost a quarter-century after the 1986 Orders were entered, the time to prune them is over. Pp. 13–16.

(c) This holding in narrow. The Court neither resolves whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing, nor decides whether any particular respondent is bound by the 1986 Orders, which is a question that the Second Circuit did not consider. Pp. 17–18.

517 F. 3d 52, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined.

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SUPREME COURT OF THE UNITED STATES

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GROSS *v.* FBL FINANCIAL SERVICES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 08–441. Argued March 31, 2009—Decided June 18, 2009

Petitioner Gross filed suit, alleging that respondent (FBL) demoted him in violation of the Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U. S. C. §623(a). At the close of trial, and over FBL's objections, the District Court instructed the jury to enter a verdict for Gross if he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision, and told the jury that age was a motivating factor if it played a part in the demotion. It also instructed the jury to return a verdict for FBL if it proved that it would have demoted Gross regardless of age. The jury returned a verdict for Gross. The Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, for cases under Title VII of the Civil Rights Act of 1964 when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations—*i.e.*, a "mixed-motives" case.

Held: A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Pp. 4–12.

(a) Because Title VII is materially different with respect to the relevant burden of persuasion, this Court's interpretation of the ADEA is not governed by Title VII decisions such as *Price Water-*

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house and *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 94–95. This Court has never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now. When conducting statutory interpretation, the Court "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp.* v. *Holowecki*, 552 U. S. ___, ___. Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was "a motivating factor" for the adverse action, see 42 U. S. C. §§2000e–2(m) and 2000e–5(g)(2)(B), the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it added §§2000e–2(m) and 2000e–5(g)(2)(B) to Title VII, even though it contemporaneously amended the ADEA in several ways. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally, see *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 256, and "negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted," *Lindh* v. *Murphy*, 521 U. S. 320, 330. Pp. 5–6.

(b) The ADEA's text does not authorize an alleged mixed-motives age discrimination claim. The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. See *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610. To establish a disparate-treatment claim under this plain language, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. See *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. ___, ___. It follows that under §623(a)(1), the plaintiff retains the burden of persuasion to establish that "but-for" cause. This Court has previously held this to be the burden's proper allocation in ADEA cases, see, *e.g.*, *Kentucky Retirement Systems* v. *EEOC*, 554 U. S. ___, ___–___, ___–___, and nothing in the statute's text indicates that Congress has carved out an exception for a subset of ADEA cases. Where a statute is "silent on the allocation of the burden of persuasion," "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims." *Schaffer* v. *Weast*, 546 U. S. 49, 56. Hence, the burden of persuasion is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. Pp. 7–9.

(c) This Court rejects petitioner's contention that the proper interpretation of the ADEA is nonetheless controlled by *Price Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. It is far from clear that the

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Court would have the same approach were it to consider the question today in the first instance. Whatever *Price Waterhouse*'s deficiencies in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. The problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Cf. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 47. Pp. 10–11.

526 F. 3d 356, vacated and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

Syllabus

POLAR TANKERS, INC. *v.* CITY OF VALDEZ, ALASKA

CERTIORARI TO THE SUPREME COURT OF ALASKA

No. 08–310. Argued April 1, 2009—Decided June 15, 2009

A Valdez, Alaska, ordinance that imposes a personal property tax on certain boats and vessels contains exceptions which, in effect, largely limit its applicability to large oil tankers. Petitioner Polar Tankers, Inc., whose vessels transport crude oil from the Port of Valdez to refineries in other States, challenged the ordinance in state court, claiming (1) that the tax was unconstitutional under Art. I, §10, cl. 3, which forbids a "State . . . without the Consent of Congress, [to] lay any Duty of Tonnage," and (2) that the tax's value-allocation method violated the Commerce and Due Process Clauses. The court rejected the Tonnage Clause claim, but accepted the Commerce Clause and Due Process Clause claim. On appeal, the State Supreme Court upheld the tax, finding that because it was a value-based property tax, the tax was not a duty of tonnage. The State Supreme Court also held the allocation method was fair and thus valid under the Commerce and Due Process Clauses.

Held: The judgment is reversed, and the case is remanded.

182 P. 3d 614, reversed and remanded.

JUSTICE BREYER delivered the opinion of the Court with respect to Parts I, II–A, and II–B–1, concluding that Valdez's tax violates the Tonnage Clause. Consequently, Polar Tankers' alternative Commerce Clause and Due Process Clause arguments need not be considered. Pp. 3–8.

(a) This Court has consistently interpreted the language of the Tonnage Clause in light of its purpose, which mirrors the intent of other constitutional provisions that seek to restrain the States from exercising the taxing power in a way that is injurious to the interests of other States. The Clause seeks to prevent States from nullifying Art. I, §10, cl. 2's prohibition against import and export duties by taxing "the vessels transporting the merchandise." *Clyde Mallory Lines*

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v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261, 265. It also reflects an effort to diminish a State's ability to obtain tax advantages based on its favorable geographic position. Because the Clause forbids a State to "do that indirectly which she is forbidden . . . to do directly," *Passenger Cases*, 7 How. 283, 458, the "prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port," *Clyde Mallory Lines, supra*, at 265–266. Pp. 3–6.

(b) This case lies at the heart of what the Tonnage Clause forbids. The ordinance seems designed to impose "a charge for the privilege of entering, trading in, or lying in a port." The tax applies almost exclusively to oil tankers, but to no other form of personal property. An oil tanker can be subject to the tax based on a single entry into the port. Moreover, the tax is closely correlated with cargo capacity. Contrary to Valdez's argument, the fact that the tax is designed to raise revenue for general municipal services argues for, not against, application of the Clause. Pp. 6–8.

JUSTICE BREYER, joined by JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE GINSBURG, rejected, in Part II–B–2, Valdez's claim that, under *State Tonnage Tax Cases*, 12 Wall. 204, its tax is "not within the prohibition of the Constitution," because it is "levied . . . upon ships . . . as property, based on a valuation of the same as property," *id.,* at 213 (emphasis deleted). This Court later made clear that the "prohibition" against tonnage duties "comes into play" where vessels "are not taxed in the *same manner* as the other property of the citizens," *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 284. This qualification, important in light of the Clause's purpose, means that, in order to fund services by taxing ships, a State must also impose similar taxes upon other businesses. Valdez fails to satisfy this requirement. The Court can find little, if any, other personal property that Valdez taxes. Because its value-related property tax on mobile homes, trailers, and recreational vehicles applies only if they are "affixed" to a particular site, it taxes those vehicles as a form of real, not personal, property. Valdez also claims that its ship tax is simply another form of a value-based tax on oil-related property provided by state law. But Valdez's tax, a purely a municipal tax, differs from the tax on other oil-related property, which is primarily a state-level tax, in several ways. As a result of these differences, an ordinary oil-related business finding the tax on its movable property too burdensome must complain to the State, which is in charge of setting the manner of assessment and valuation. At the same time, an oil tanker finding its vessel tax too burdensome must complain to Valdez, for the State

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has nothing to do with that tax's rate, valuation, or assessment. There is also no effective electorate-related check on Valdez's vessel-taxing power comparable to the check available when a property tax is more broadly imposed. Valdez's property tax hits only ships; it is not constrained by any need to treat ships and other business property alike. Thus, Valdez's tax lacks the safeguards implied by this Court's statements that a property tax on ships escapes the Tonnage Clause's scope only when that tax is imposed upon ships "in the same manner" as it is imposed on other forms of property. Pp. 8–13.

THE CHIEF JUSTICE, joined by JUSTICE THOMAS, agreed that Valdez's tax is unconstitutional, but concluded that the city's argument that its tax may be sustained as a property tax similar to ones the city imposes on other property should be rejected because an unconstitutional tax on maritime commerce does not become permissible when bundled with taxes on other activities or property. Pp. 1–3.

JUSTICE ALITO agreed that Valdez's tax is unconstitutional, but concluded that the tax is an unconstitutional duty of tonnage even if the Tonnage Clause permits a true, evenhanded property tax to be applied to vessels. P. 1.

BREYER, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and II–B–1, in which SCALIA, KENNEDY, GINSBURG, and ALITO, JJ., joined, and an opinion with respect to Part II–B–2, in which SCALIA, KENNEDY, and GINSBURG, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined.

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UNITED STATES EX REL. EISENSTEIN *v.* CITY OF NEW YORK, NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08–660. Argued April 21, 2009—Decided June 8, 2009

Petitioner filed this *qui tam* action in the name of the United States against respondent city and several of its officials under the False Claims Act (FCA), 31 U. S. C. §3729. The Government declined to exercise its statutory right to intervene, the District Court dismissed the complaint and entered judgment for respondents, and petitioner filed a notice of appeal 54 days later. Federal Rule of Appellate Procedure 4(a)(1)(A) and 28 U. S. C. §2107(a) require, generally, that such a notice be filed within 30 days of the entry of judgment, but Rule 4(a)(1)(B) and §2107(b) extend the period to 60 days when the United States is a "party." The Second Circuit held that the 30-day limit applied and dismissed petitioner's appeal as untimely.

Held: When the United States has declined to intervene in a privately initiated FCA action, it is not a "party" to the litigation for purposes of either §2107 or Rule 4. Because petitioner's time for filing a notice of appeal in this case was therefore 30 days, his appeal was untimely. Pp. 3–9.

(a) Although the United States is aware of and minimally involved in every FCA action, it is not a "party" thereto unless it has brought the action or exercised its statutory right to intervene in the case. Indeed, intervention is the requisite method for a nonparty to become a party. See *Marino* v. *Ortiz*, 484 U. S. 301, 304. To hold otherwise would render the FCA's intervention provisions superfluous, contradicting the requirement that statutes be construed in a manner that gives effect to all their provisions, see, *e.g.*, *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 166. The FCA expressly gave the United States discretion to intervene in FCA actions, and the Court cannot disregard that congressional assignment of discretion by des-

ignating the United States a "party" even after it has declined to assume the rights and burdens attendant to full party status. Pp. 3–6.

(b) Petitioner's arguments for designating the United States a party in all FCA actions are unconvincing. First, neither the United States' "real party in interest" status, see Fed. Rule Civ. Proc. 17(a), nor the requirement that an FCA action be "brought in the name of the Government," 31 U. S. C. §3730(b)(1), converts the United States into a "party" where, as here, it has declined to bring the action or intervene. Second, the Government's right to receive pleadings and deposition transcripts when it declines to intervene, see §3730(c)(3), does not support, but weighs against, petitioner's argument: If the United States were a party to every FCA suit, it would already be entitled to such materials under Federal Rule of Civil Procedure 5. Third, the fact that the United States is bound by the judgment in all FCA actions regardless of its participation in the case is not a legitimate basis for disregarding the statute's intervention scheme. Finally, given that Rule 4(a)(1)(B) hinges its 60-day time limit on the United States' "party" status, petitioner's contention that the limit's underlying purpose would be best served by applying it in every FCA case is unavailing. Pp. 6–9.

540 F. 3d 94, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court.

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SUPREME COURT OF THE UNITED STATES

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RICCI ET AL. *v.* DESTEFANO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07–1428. Argued April 22, 2009—Decided June 29, 2009*

New Haven, Conn. (City), uses objective examinations to identify those firefighters best qualified for promotion. When the results of such an exam to fill vacant lieutenant and captain positions showed that white candidates had outperformed minority candidates, a rancorous public debate ensued. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City threw out the results based on the statistical racial disparity. Petitioners, white and Hispanic firefighters who passed the exams but were denied a chance at promotions by the City's refusal to certify the test results, sued the City and respondent officials, alleging that discarding the test results discriminated against them based on their race in violation of, *inter alia,* Title VII of the Civil Rights Act of 1964. The defendants responded that had they certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The District Court granted summary judgment for the defendants, and the Second Circuit affirmed.

Held: The City's action in discarding the tests violated Title VII. Pp. 16–34.

(a) Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin, 42 U. S. C. §2000e–2(a)(1) (disparate treatment), as well as policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities, §2000e–2(k)(1)(A)(i) (disparate impact). Once a plaintiff has established a prima facie case of dispa-

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*Together with No. 08–328, *Ricci et al.* v. *DeStefano et al.,* also on certiorari to the same court.

rate impact, the employer may defend by demonstrating that its policy or practice is "job related for the position in question and consistent with business necessity." *Ibid.* If the employer meets that burden, the plaintiff may still succeed by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs. §§2000e–2(k)(1)(A)(ii) and (C). Pp. 17–19.

(b) Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. The Court's analysis begins with the premise that the City's actions would violate Title VII's disparate-treatment prohibition absent some valid defense. All the evidence demonstrates that the City rejected the test results because the higher scoring candidates were white. Without some other justification, this express, race-based decision-making is prohibited. The question, therefore, is whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination. The Court has considered cases similar to the present litigation, but in the context of the Fourteenth Amendment's Equal Protection Clause. Such cases can provide helpful guidance in this statutory context. See *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 993. In those cases, the Court held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a "strong basis in evidence" that the remedial actions were necessary. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 500; see also *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277. In announcing the strong-basis-in-evidence standard, the *Wygant* plurality recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other. 476 U. S., at 277. It reasoned that "[e]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Ibid.* The same interests are at work in the interplay between Title VII's disparate-treatment and disparate-impact provisions. Applying the strong-basis-in-evidence standard to Title VII gives effect to both provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. It also allows the disparate-impact prohibition to work in a manner that is consistent with other Title VII provisions, including the prohibition on adjusting employment-related test scores based on race, see §2000e–

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2(*l*), and the section that expressly protects bona fide promotional exams, see §2000e–2(h). Thus, the Court adopts the strong-basis-in-evidence standard as a matter of statutory construction in order to resolve any conflict between Title VII's disparate-treatment and disparate-impact provisions. Pp. 19–26.

(c) The City's race-based rejection of the test results cannot satisfy the strong-basis-in-evidence standard. Pp. 26–34.

(i) The racial adverse impact in this litigation was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability. The problem for respondents is that such a prima facie case—essentially, a threshold showing of a significant statistical disparity, *Connecticut* v. *Teal*, 457 U. S. 440, 446, and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the test results. That is because the City could be liable for disparate-impact discrimination only if the exams at issue were not job related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt. §§2000e–2(k)(1)(A), (C). Based on the record the parties developed through discovery, there is no substantial basis in evidence that the test was deficient in either respect. Pp. 26–28.

(ii) The City's assertions that the exams at issue were not job related and consistent with business necessity are blatantly contradicted by the record, which demonstrates the detailed steps taken to develop and administer the tests and the painstaking analyses of the questions asked to assure their relevance to the captain and lieutenant positions. The testimony also shows that complaints that certain examination questions were contradictory or did not specifically apply to firefighting practices in the City were fully addressed, and that the City turned a blind eye to evidence supporting the exams' validity. Pp. 28–29.

(iii) Respondents also lack a strong basis in evidence showing an equally valid, less discriminatory testing alternative that the City, by certifying the test results, would necessarily have refused to adopt. Respondents' three arguments to the contrary all fail. First, respondents refer to testimony that a different composite-score calculation would have allowed the City to consider black candidates for then-open positions, but they have produced no evidence to show that the candidate weighting actually used was indeed arbitrary, or that the different weighting would be an equally valid way to determine whether candidates are qualified for promotions. Second, respondents argue that the City could have adopted a different interpretation of its charter provision limiting promotions to the highest scoring

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applicants, and that the interpretation would have produced less discriminatory results; but respondents' approach would have violated Title VII's prohibition of race-based adjustment of test results, §2000e–2(*l*). Third, testimony asserting that the use of an assessment center to evaluate candidates' behavior in typical job tasks would have had less adverse impact than written exams does not aid respondents, as it is contradicted by other statements in the record indicating that the City could not have used assessment centers for the exams at issue. Especially when it is noted that the strong-basis-in-evidence standard applies to this case, respondents cannot create a genuine issue of fact based on a few stray (and contradictory) statements in the record. Pp. 29–33.

(iv) Fear of litigation alone cannot justify the City's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. Discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of today's holding the City can avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability. Pp. 33–34.

530 F. 3d 87, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion. ALITO, J., filed a concurring opinion, in which SCALIA and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

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CUOMO, ATTORNEY GENERAL OF NEW YORK *v.* CLEARING HOUSE ASSOCIATION, L. L. C., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08–453. Argued April 28, 2009—Decided June 29, 2009

To determine whether various national banks had violated New York's fair-lending laws, the State's Attorney General, whose successor in office is the petitioner here, sent them letters in 2005 requesting "in lieu of subpoena" that they provide certain nonpublic information about their lending practices. Respondents, the federal Office of the Comptroller of the Currency (Comptroller or OCC) and a banking trade group, brought suit to enjoin the information request, claiming that the Comptroller's regulation promulgated under the National Bank Act (NBA) prohibits that form of state law enforcement against national banks. The District Court entered an injunction prohibiting the Attorney General from enforcing state fair-lending laws through demands for records or judicial proceedings. The Second Circuit affirmed.

Held: The Comptroller's regulation purporting to pre-empt state law enforcement is not a reasonable interpretation of the NBA. Pp. 2–15.

(a) Evidence from the time of the NBA's enactment, this Court's cases, and application of normal construction principles make clear that the NBA does not prohibit ordinary enforcement of state law. Pp. 2–11.

(i) The NBA provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts . . . , or . . . directed by Congress." 12 U. S. C. §484(a). Among other things, the Comptroller's regulation implementing §484(a) forbids States to "exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records," or, as here pertinent, "prosecuting enforcement actions" "except in limited circumstances authorized by

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federal law." 12 CFR §7.4000(a)(1). There is some ambiguity in the NBA's term "visitorial powers," and the Comptroller can give authoritative meaning to the term within the bounds of that uncertainty. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. However, the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the NBA. Pp. 2–3.

(ii) When the NBA was enacted in 1864, scholars and courts understood "visitation" to refer to the sovereign's supervisory power over the manner in which corporations conducted business, see, *e.g., Guthrie* v. *Harkness*, 199 U. S. 148, 157. That power allowed the States to use the prerogative writs to exercise control if a corporation abused its lawful power, acted adversely to the public, or created a nuisance. Pp. 3–4.

(iii) This Court's consistent teaching, both before and after the NBA's enactment, is that a sovereign's "visitorial powers" and its power to enforce the law are two different things. See, *e.g., Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 676, 681; *Guthrie, supra,* at 159, 157; *First Nat. Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 660. *Watters* v. *Wachovia Bank, N. A.*, 550 U. S. 1, 21, distinguished. And contrary to the Comptroller's regulation, the NBA preempts only the former. Pp. 4–7.

(iv) The regulation's consequences also cast its validity into doubt: Even the OCC acknowledges that the NBA leaves in place some state substantive laws affecting banks, yet the Comptroller's rule says that the State may not *enforce* its valid, non-pre-empted laws against national banks. "To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *St. Louis, supra*, at 660. In contrast, channeling state attorneys general into judicial law-enforcement proceedings (rather than allowing them to exercise "visitorial" oversight) would preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress's decision not to pre-empt substantive state law. This reading is also suggested by §484(a)'s otherwise inexplicable reservation of state powers "vested in the courts of justice." And on a pragmatic level, the difference between visitation and law enforcement is clear: If a State chooses to pursue enforcement of its laws in court, its targets are protected by discovery and procedural rules. Pp. 7–9.

(b) The Comptroller's interpretation of the regulation demonstrates its own flaw: the Comptroller is forced to limit the regulation's sweep in areas such as contract enforcement and debt collection, but those

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exceptions rest upon neither the regulation's nor the NBA's text. Pp. 9–11.

(c) The dissent's objections are addressed and rejected. Pp. 11–13.

(d) Under the foregoing principles, the Comptroller reasonably interpreted the NBA's "visitorial powers" term to include "conducting examinations [and] inspecting or requiring the production of books or records of national banks," when the State conducts those activities as supervisor of corporations. When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather sovereign-as-law-enforcer. Because such a lawsuit is not an exercise of "visitorial powers," the Comptroller erred by extending that term to include "prosecuting enforcement actions" in state courts. In this case, the Attorney General's threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but the issuance of subpoena on his own authority if his request for information was not voluntarily honored. That is not the exercise of the law enforcement power "vested in the courts of justice," which the NBA exempts from the ban on the exercise of supervisory power. Accordingly, the injunction below is affirmed as applied to the Attorney General's threatened issuance of executive subpoenas, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions. Pp. 13–15.

510 F. 3d 105, affirmed in part and reversed in part.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which ROBERTS, C. J., and KENNEDY and ALITO, JJ., joined.

BUSINESS-RELATED CASES ON THE SUPREME COURT'S OCTOBER TERM 2009 DOCKET

AS OF October 13, 2009

Supreme Court Business-Related Cases - October Term 2009

as of October 13, 2009

Case	Oral Argument	Question(s) Presented
Citizens United v. FEC (reargument) **Campaign Finance Regulation**	9/9/2009	For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?
Mohawk Industries, Inc. v. Carpenter **Appellate Jurisdiction**	10/5/2009	Whether a party has an intermediate appeal under the collateral order doctrine, as forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337US 541 (1949), of a district court's order filing waiver of the attorney-client privilege and compelling production of privileged materials
Union Pacific Railroad Company v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region **Arbitration**	10/7/2009	1. Whether the Seventh Circuit erroneously held, in square conflict with decisions of the Third, Sixth, Tenth, and Eleventh Circuits, that the RLA includes a fourth, implied exception that authorizes courts to set aside final arbitration awards for alleged violations of due process. 2. Whether the Seventh Circuit erroneously held that the Board adopted a "new," retroactive interpretation of the standards governing its proceedings in violation of due process.
Reed Elsevier, et al. v. Muchnick, et al. **Intellectual Property**	10/7/2009	Does 17 U. S. C. Sec. 411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?

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Case	Oral Argument	Question(s) Presented
Jones, et al. v. Harris Associates **Securities Regulation**	11/2/2009	Whether the court below erroneously held, in conflict with the decisions of three other circuits, that a shareholder's claim that the fund's investment adviser charged an excessive fee – more than twice the fee it charged to funds with which it was not affiliated – is not cognizable under § 36(b), unless the shareholder can show that the adviser misled the fund's directors who approved the fee.
Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company **Federal Procedure**	11/2/2009	1. Can a state legislature properly prohibit the federal courts from using the class action device for state law claims? 2. Can state legislatures dictate procedure in the federal courts? 3. Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?
NRG Power Marketing, LLC, et al. v. Maine Public Utilities Commission, et al. **Energy Regulation**	11/3/2009	Whether *Mobile-Sierra*'s public-interest standard applies when a contract rate is challenged by an entity that was not a party to the contract.
Schwab v. Reilly **Bankruptcy**	11/3/2009	1. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, is the exemption limited to the specific amount claimed, or do the numbers being equal operate to "fully exempt" the asset, regardless of its true value? 2. When a debtor claims an exemption using a specific dollar amount that

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Case	Oral Argument	Question(s) Presented
		is equal to the value placed on the asset by the debtor, must a trustee who wishes to sell the asset object to the exemptions within the thirty day period of Rule 4003, even though the amount claimed as exempt and the type of property are within the exemption statute?
Hemi Group, LLC, et al. v. City of New York **Racketeering Influenced and Corrupt Organizations Act**	11/3/2009	Whether city government meets the Racketeer Influenced and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its "business or property" by alleging non-commercial injury resulting from non-payment of taxes by nonlitigant third parties.
Bilski v. Kappos **Intellectual Property**	11/9/2009	Whether a "process" must be tied to a particular machine or apparatus, or transform a particular article into a different state or thing ("machine-or-transformation" test) to be eligible for patenting under 35 U.S.C. § 101and whether the "machine-or-transformation" test for patent eligibility, contradicts Congressional intent that patents protect "method[s] of doing business" in 35 U.S.C. § 273.
Hertz Corporation v. Friend **Federal Jurisdiction**	11/10/2009	Whether, for purposes of determining principal place of business for diversity jurisdiction citizenship under 28 U.S.C. § 1332, a court can disregard the location of a nationwide corporation's headquarters – i.e. its nerve center.
Merck & Co., Inc., et al. v. Richard	11/30/09	Did the Third Circuit err in holding, in accord with the Ninth Circuit but in

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Case	Oral Argument	Question(s) Presented
Reynolds, et al. **Securities Regulation**		contrast to nine other Courts of Appeals, that under the "inquiry notice" standard applicable to federal securities fraud claims, the statute of limitations does not begin to run until an investor receives evidence of scienter without the benefit of any investigation?
Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson **False Claims Act**	11/30/09	Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative ... report ... audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730 (e)(4)(A)?
Milavetz, Gallop, & Milavetz, P.A., et al. v. United States ; United States v. Milavetz, Gallop, & Milavetz, P.A., et al **Bankruptcy**	12/01/09	1. Whether the appellate court's interpretation of attorneys as "debt relief agencies" is contrary to the plain meaning of 11 U.S.C. § 101(I2A). 2. Whether 11 U.S.C. § 528, which as applied to attorneys, restrains commercial speech by requiring mandatory deceptive disclosures in their advertisements, violates the First Amendment free speech guarantee of the United States Constitution. 3. Whether 11 U.S.C. § 528 requiring deceptive disclosures in advertisements for consumers and attorneys, violates Fifth Amendment Due Process.
United Student Aid Funds, Inc. v. Espinosa	12/01/09	1. Student loans are statutorily non-dischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship." Debtor failed to prove undue hardship in an adversary proceeding as required by the

Supreme Court Business-Related Cases - October Term 2009

as of October 13, 2009

Case	Oral Argument	Question(s) Presented
Bankruptcy		Bankruptcy Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders confirming the plan and discharging debtor void? 2. Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor's post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of res judicata?
Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al. **Takings Clause**	12/02/09	The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. 1. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution? 2. Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution? 3. Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and

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Case	Oral Argument	Question(s) Presented
		Fourteenth Amendments to the United States Constitution?
Free Enterprise Fund and Beckstead and Watts, LLP v. Public Company Accounting Oversight Board, et al. **Separation of Powers**	12/07/09	1. Whether Sarbanes-Oxley violates the Constitution's separation of powers by vesting members of PCAOB with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it "deems best for the public interest." 2. Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the SEC, where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product. 3. If PCAOB members are inferior officers, whether the Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a "Department" under *Fre`vtag, v. Commissioner*, 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are not the "Head" of the SEC.
Black, et al. v. United States **Criminal Law**	12/08/09	1. Whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed.

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Case	Oral Argument	Question(s) Presented
		2. Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.
Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp. **Arbitration**	12/09/09	Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.
Mac's Shell Service, Inc. v. Shell Oil Products Company; Shell Oil Products Company v. Mac's Shell Service **Franchise Regulation**	Not Yet Scheduled	Whether the PMPA encompasses a claim for "constructive" nonrenewal of the franchise relationship where: i. the petitioner-franchisees filed suit prior to receiving new lease agreements that violated the Act; ii. the lease agreements were presented on a take-it-or-leave-it basis; iii. respondent-franchisor stated it would terminate the franchises unless petitioners signed the lease agreements; and iv. the franchisees signed the lease agreements, under protest, and pursued their legal claims against the franchisor.
American Needle Inc. v. NFL, et al.	Not Yet Scheduled	1. Are the NFL and its member teams a single entity that is exempt from rule of reason claims under Section 1 of the Sherman Act simply because they cooperate in the joint production of NFL football games,

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Case	Oral Argument	Question(s) Presented
Antitrust		without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league? 2. Is the agreement of the NFL teams among themselves and with Reebok International, pursuant to which the teams agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks, and not to permit any licenses to be granted to Reebok's competitors for a period of ten years, subject to a rule of reason claim under Section 1 of the Sherman Act, where the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in the licensing and sale of Team Products?
Conkright v. Frommert **Employee Retirement Income Security Act**	Not Yet Scheduled	1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other Circuits, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits. 2. Whether the Second Circuit erred in holding, in conflict with decisions of other Circuits, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

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Case	Oral Argument	Question(s) Presented
Jerman, v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al. **Fair Dept Collection Practices Act**	Not Yet Scheduled	Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692.
Granite Rock Company v. International Brotherhood of Teamsters, et al. **Arbitration**	Not Yet Scheduled	1. Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established? 2. Does Section 30l(a) of the Labor-Management Relations Act, which generally preempts otherwise available state law causes of action, provide a cause of action against an international union that is not a direct signatory to the collective bargaining agreement, but effectively displaces its signatory local union and causes a strike breaching a collective bargaining agreement for its own benefit?
Lewis v. City of Chicago **Title VII**	Not Yet Scheduled	Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file a charge within 300 days after the employer's use of the discriminatory practice?

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Case	Oral Argument	Question(s) Presented
Skilling v. United States **Criminal Law**	Not Yet Scheduled	1. Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, and, if not, whether §1346 is unconstitutionally vague. 2. When a presumption of jury prejudice arises because of the widespread community impact of the defendant's alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.
Health Care Service Corp. v. Pollitt **Preemption**	Not Yet Scheduled	1. Whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§8901-14, completely preempts -- and therefore makes removable to federal court --a state court suit challenging enrollment and health benefits determinations that are subject to the exclusively federal remedial scheme established in FEHBA. 2. Whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which authorizes federal removal jurisdiction over state court suits brought againstpersons "acting under" a federal officer when sued for actions "under color of [federal] ... office," encompasses a suit against a government contractor administering a FEHBA plan, where the contractor is sued for actions taken pursuant to the government contract.

ACC Extras

Supplemental resources available on www.acc.com

Paycheck Rule Revived for Pay Discrimination Claims with Signing of the Lilly Ledbetter Fair Pay Act.
Quick Reference. January 2009
http://www.acc.com/legalresources/resource.cfm?show=216924

Minimizing Exposure When Cuts Become Necessary: Smoother Sailing Through a RIF.
ACC Docket. April 2009
http://www.acc.com/legalresources/resource.cfm?show=181213

Current Business and Legal Trends Affecting Directors & Officers Liability.
Quick Reference. July 2009
http://www.acc.com/legalresources/resource.cfm?show=395905

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.