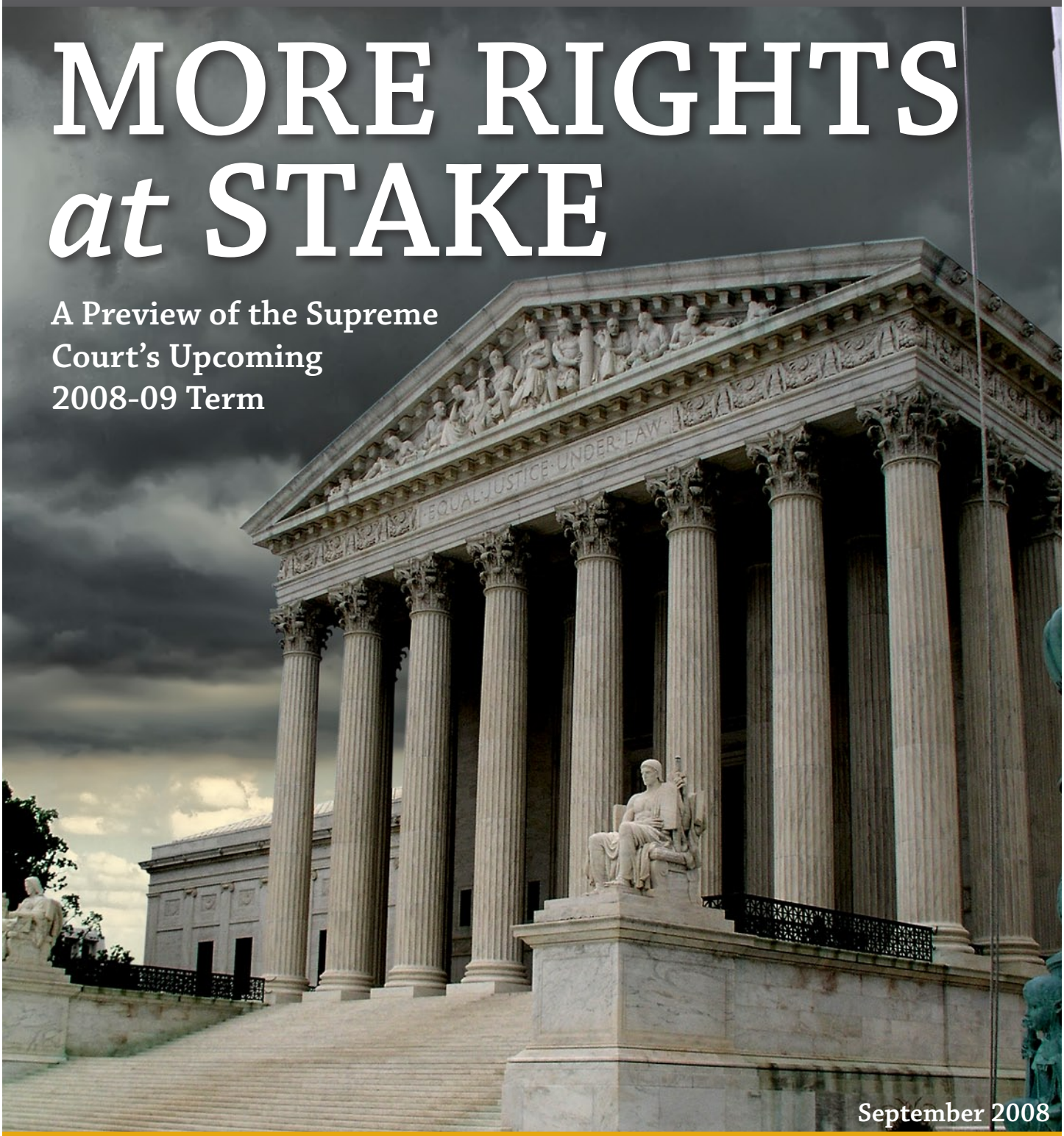
MORE RIGHTS *at* STAKE

A Preview of the Supreme Court's Upcoming 2008-09 Term



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A Preview of the Supreme Court's Upcoming 2008-09 Term

The Supreme Court's new term beginning on October 6, 2008 — the proverbial "first Monday in October" — will be the third full term with the Court's two newest justices, Chief Justice John Roberts and Justice Samuel Alito, on the bench. As their first two terms together have shown, President George W. Bush's nominees have joined Justices Scalia and Thomas in case after case to form an ultraconservative voting bloc. When these four justices were joined, as they often were, by Justice Anthony Kennedy in critical cases, the result was a series of 5-4 rulings that undermined Americans' rights and interests in a number of areas, including employment discrimination, reproductive freedom, and access to justice, often by overturning or effectively ignoring precedent.[1]

This coming term, the Court is already set to consider a number of important cases involving voting rights, employment discrimination, free speech, and access to justice. It will also hear a case involving federal preemption of injured consumers' state law claims against the manufacturers of inadequately labeled prescription drugs. Last term, the Court held that injured consumers' state law claims for damages against the makers of negligently manufactured medical devices were preempted by federal law if the devices had received premarket approval from the FDA. This term's case presents the Court with another opportunity to rule in favor of big business and further erode the rights of Americans to obtain redress for their injuries.

Among the cases the Court will consider this term are:

- an employment discrimination case in which the Court will decide whether an employee who cooperates in her employer's internal investigation of sexual harassment by a male supervisor can nonetheless be fired or otherwise retaliated against for having done so

- another employment discrimination case in which the issue is whether an employer can calculate current retirement benefits based on its discriminatory treatment of temporary disability leave taken by pregnant employees prior to the time when federal law expressly prohibited such discriminatory treatment

- a case challenging the constitutionality of Section 5 of the Voting Rights Act, one of our country's most important civil rights laws

- a First Amendment case involving a city's refusal to display in a city park a monument containing the religious principles of the Summum, a minority faith group, although the park contains a Ten

1 *See, e.g.,* People For the American Way Foundation, "Civil Rights and Civil Liberties in the Supreme Court's 2007-08 Term" (July 2008), available at: <http://media.pfaw.org/legalfiles/sc-eot-07-08.pdf>, and People For the American Way Foundation, "Civil Rights And Civil Liberties in the Supreme Court's 2006-07 Term" (July 2007), available at: <http://media.pfaw.org/PDF/CourtWrapUp0607.pdf>.

Commandments monument; the case pits religious right organizations against each other, with Pat Robertson's American Center for Law and Justice — usually a proponent of government-endorsed religion — representing the city in its efforts to block the Summum monument, and the Rutherford Institute filing an *amicus curiae* brief in support of Summum

- a free speech case involving the FCC's decision to regulate "fleeting expletives" (*i.e.*, a one-time or isolated vulgar utterance that is not obscene) on broadcast television as "indecent," an abrupt reversal of longstanding policy pursuant to which the FCC required repeated use of "indecent" language before proceeding against a broadcast

- a free speech case involving a state's efforts to stifle political activities by unions through the prohibition of voluntary payroll deductions from employees of local government units

- a case involving federal preemption of injured consumers' claims for damages under state law against the manufacturers of inadequately labeled drugs when the labels have been approved by the FDA; in this particular case, a musician treated for nausea caused by a migraine wound up losing her hand and forearm as the result of gangrene caused by the intravenous injection of an anti-nausea drug

This memorandum summarizes these and other non-criminal cases that the Court is already poised to consider during its 2008-09 term that raise civil rights, civil liberties, and other critical issues.[2] In addition to the significance of these cases, the Court will be hearing a number of them, and possibly deciding them, earlier in the term than usual. During the Court's October and November argument sessions, and for the first time in years, the Court has scheduled three cases a day for oral argument rather than two, creating what Supreme Court reporter Tony Mauro has called a front-loaded, "fatter, faster calendar."[3] As reported by Mauro, the intention, according to Chief Justice Roberts, is to give the Court "more decisions to write and issue through the winter, alleviating the Court's usual headlong race to finish the term's work in May and June."[4]

The Court will no doubt add additional cases to its docket after its long conference on September 29, 2008, and as the term progresses. Given the sharp ideological divisions that have emerged on the Roberts Court, it is likely that a number of the Court's cases will be decided by narrow margins, once again demonstrating the importance of who is chosen to fill vacant seats on the Court, and who is elected to the White House to nominate them and the Senate to confirm them.

2 People For the American Way Foundation does not necessarily have a position on each of these cases.
3 Tony Mauro, "Next Term: A Fatter, Faster Calendar," *Legal Times* (June 30, 2008), at 11.
4 *Id*.

Selected Case Summaries

- **Employment discrimination: retaliation against employees for cooperating with employer's internal investigation of sexual harassment**

  - *Crawford v. Metropolitan Government of Nashville*, No. 06-1595, reviewing 211 Fed. Appx. 373 (6th Cir. 2006)

In this case, the Supreme Court will decide whether Title VII prohibits an employer from firing or otherwise retaliating against an employee who has cooperated with the employer's investigation into sexual harassment or other discrimination prohibited by Title VII.

Vicky Crawford, who worked for the Metropolitan Government of Nashville, was fired after she cooperated with an internal investigation conducted by her employer into allegations that a male supervisor had sexually harassed female employees. The investigator conducting the internal investigation asked to interview Crawford. She complied and in the course of the interview informed the investigator that the supervisor had sexually harassed her as well as other employees. The investigator concluded that the supervisor had acted inappropriately, but apparently no disciplinary action was taken against him. Several months later, Crawford was fired.

Crawford filed suit under Title VII, claiming that her firing was in retaliation for having cooperated with the investigation. Title VII prohibits an employer from retaliating against an employee who has "opposed any practice" that is unlawful under that statute (including sexual harassment) or who has "made a charge, testified, assisted or participated in any manner in any investigation, proceeding, or hearing" under the statute.

The district court granted summary judgment against Crawford, and the Sixth Circuit upheld that decision, holding that Crawford's cooperation with the internal investigation did not trigger either of the provisions of Title VII protecting an employee from retaliation. According to the court of appeals, Crawford's participation in an internal investigation did not constitute "opposition" to sexual harassment within the meaning of Title VII. In the court's view, "opposition" consists of such "overt" conduct as complaining to management and does not encompass merely "relating unfavorable information." 211 Fed. Appx. at 376. In addition, the court held that participating in an internal investigation is "not a protected activity under the participation clause." *Id.* Rather, the court held that a charge of discrimination must first be filed with the EEOC before that clause is triggered, and none had been filed here.[5]

- **Sex discrimination in education: foreclosure of equal protection claim**

  - *Fitzgerald v. Barnstable School Committee*, No. 07-1125, reviewing 504 F.3d 165 (1st Cir. 2007)

At issue in this case is whether an individual who brings a claim of unlawful sex discrimination in education under Title IX is precluded from bringing an equal protection claim under 42 U.S.C. § 1983, which provides remedies to those whose constitutional or federal statutory "rights, privileges or immunities" have been violated by state actors. The courts of appeals are divided on the answer, and this case therefore calls on the Supreme Court to resolve a circuit split.

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5 People For the American Way Foundation has joined an *amicus curiae* brief in this case urging the Supreme Court to reverse the Sixth Circuit's ruling.

The case was brought by the parents of Jacqueline Fitzgerald, a kindergarten student who allegedly had been subjected to sexual harassment by an older student on the school bus. According to Jacqueline, the older student had repeatedly forced her to lift her skirt, pull down her underwear, and spread her legs. Jacqueline's parents sued the school, claiming a violation of Jacqueline's rights under Title IX as well as under the Equal Protection Clause. The latter claim was brought under Section 1983. The district court granted summary judgment to the school on the Title IX claim. In addition, the district court dismissed the Fitzgeralds' equal protection claim, holding that it was foreclosed by Title IX.

The Fitzgeralds appealed to the First Circuit, which agreed that the school had not violated Title IX. In addition, the court of appeals upheld the dismissal of the equal protection claim brought under Section 1983, holding that this claim was precluded by Title IX's remedial scheme. The Fitzgeralds have asked the Supreme Court to consider only the Section 1983 preclusion issue.[6]

- **Sex discrimination: pregnancy leave and retirement benefits**

  - *AT&T Corp. v. Hulteen*, No. 07-543, reviewing 498 F.3d 1001 (9th Cir. 2007) (*en banc*)

This is another case in which the Court has been asked to resolve a split among the circuit courts. At issue is whether an employer's calculation of retirement benefits *after* the passage of the federal Pregnancy Discrimination Act can include a denial of credit for time spent by female employees on pregnancy disability leave *prior* to passage of the Act if time spent on leave for other temporary disabilities is included in computing an employee's length of service.

In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA"), which among other things "requires employers to accord women who take pregnancy leave the same benefits as employees who take other types of temporary disability leave." 498 F.3d at 1003. Prior to passage of the PDA, AT&T had discriminated against its pregnant employees by treating temporary disability leave due to pregnancy less favorably than it did leave taken because of other disabilities for purposes of calculating future retirement benefits. In particular, AT&T calculates pension and retirement benefits based on credits for length of service, and prior to 1978 had restricted the number of days of service credit for pregnancy-related disability leave but had no restrictions on the amount of service credit an employee received when on leave because of any other temporary disability. Accordingly, female employees retiring after 1978 who had taken pregnancy disability leave during their tenure at AT&T were not fully credited for time spent on that leave.

Noreen Hulteen and three other past and present employees of AT&T who had taken pregnancy leave before 1978 brought suit against AT&T under Title VII, charging that AT&T had engaged in unlawful sex discrimination after 1978 by failing to fully credit their pregnancy disability leave for purposes of their retirement benefits.

The district court granted Hulteen's motion for summary judgment based on Ninth Circuit precedent, *Pallas v. Pacific Bell*,[7] which held that an employer violated Title VII in calculating retirement benefits after the effective date of the PDA "when it gave service credit in those calculations for all pre-PDA temporary disability leave taken by employees except leave by reason of pregnancy." *Hulteen*, 498 F.3d at 1003. AT&T appealed, and a three-judge panel of the Ninth Circuit reversed, holding that *Pallas* "gave 'the PDA impermissible retroactive effect under controlling law today.'" *Hulteen*, 498 F.3d at 1005.

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6 People For the American Way Foundation has joined an *amicus curiae* brief in this case urging the Supreme Court to hold that Title IX does not foreclose the bringing of claims under Section 1983.

7 *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992).

The full Ninth Circuit then re-heard the case, and agreed with the district court, ruling in favor of the employees "that AT&T violated Title VII by failing to credit pre-PDA pregnancy leave when it calculated benefits owed Hulteen." 498 F.3d at 1005. The Ninth Circuit did not view the case as a matter of retroactive application of the PDA, but rather as one of current discrimination by AT&T, which could have credited the employees for their time on pregnancy leave but instead "simply chose to continue its systematic discrimination against women, based on pregnancy, even after Congress made it illegal." 498 F.3d at 1011. According to the court, "[t]hat AT&T's practice of applying the discriminatory pre-PDA policies constitutes a separate and actionable act of discrimination is 'too obvious to warrant extended discussion.'" 498 F.3d at 1012.

Four judges, all nominated by Republican presidents, dissented from the court's *en banc* ruling. In a dissenting opinion by Judge Diarmuid O'Scannlain (a Reagan nominee) and joined by Judges Pamela Ann Rymer (Bush I), Jay Bybee (Bush II), and Consuelo Callahan (Bush II), the four charged that the majority had "breath[ed] new life into an expired sex discrimination claim." 498 F.3d at 1019. The dissenters viewed the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire*[8] as precluding a Title VII claim in the absence of "current discriminatory intent," and found none in AT&T's current calculation of retirement benefits based on what they characterized as "then-lawful pre-PDA pregnancy leave rules." 498 F.3d at 1022, 1025.

- **Voting rights: the power of Congress to combat race discrimination**

  - *Northwest Austin Municipal Utility District Number One v. Mukasey*, No. 08-322, reviewing 557 F. Supp. 2d 9 (D.D.C. May 30, 2008) (second amended opinion issued Sept. 12, 2008)

This case may well be one of the most significant to come before the Court this term, as it involves a constitutional challenge to a portion of one of our country's most important civil rights laws, the Voting Rights Act of 1965, enacted to combat the historic denial of voting rights to African Americans. Section 5 of the Act, a non-permanent provision, prohibits "'covered jurisdictions' — those states and political subdivisions with histories of racial discrimination in voting — from making any change in their voting procedures" without preclearance from a three-judge panel of the United States District Court for the District of Columbia or from the Attorney General. 557 F. Supp. 2d at 11. In order to obtain such preclearance, the covered jurisdiction must demonstrate that the proposed change does not have the purpose, and will not have the effect, "of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

In 2006, Congress voted to extend Section 5 for another 25 years. Shortly thereafter, Northwest Austin Municipal Utility District Number One ("NAMUDNO"), a municipal utility district within Travis County, Texas, brought suit seeking what is known as "bailout" — a declaration that it was exempt from the preclearance requirement of Section 5 because in the past five years it had not used a test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973b(a). Alternatively, NAMUDNO claimed that Section 5 is unconstitutional because, in deciding to extend it, Congress "lacked sufficient evidence of racial discrimination in voting to justify the provision's intrusion upon state sovereignty." 557 F. Supp. 2d at 11. As required by the Voting Rights Act, the case was heard by a three-judge panel of the D.C. District Court.[9]

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8 *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

9 People For the American Way, an affiliate of People For the American Way Foundation, is one of the parties that intervened in this case as a defendant in the district court to support the constitutionality

In a unanimous opinion written by D.C. Circuit Judge David Tatel, the court rejected all of NAMUDNO's claims. First, the court held that NAMUDNO was not eligible for "bailout" because the Voting Rights Act limits bailout to states and political subdivisions, and NAMUDNO is neither. Second, and most important, the court upheld the constitutionality of Section 5 of the Act. In so holding, the court rejected NAMUDNO's argument that the appropriate standard of review was whether the extension of Section 5 was a "congruent and proportional" response to current evidence of racial discrimination in voting. Instead, the court held that the appropriate standard of review was the more deferential standard of whether Congress had acted rationally in deciding to extend Section 5 in order to "protect minorities from continued racial discrimination in voting." 557 F. Supp. 2d at 80.

Applying the latter standard of review, the court held that "given the extensive legislative record documenting contemporary racial discrimination in voting in covered jurisdictions, Congress's decision to extend Section 5 for another twenty-five years was rational and therefore constitutional." 557 F. Supp. 2d at 5. In addition, although the court had concluded that the "congruent and proportional" standard was not applicable, the court proceeded in the alternative to apply that standard and held that even under that more stringent standard, "[g]iven Section 5's tailored remedial scheme, the extension qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting." 557 F. Supp. 2d at 11.

In accordance with the Voting Rights Act, NAMUDNO was entitled to appeal directly to the Supreme Court, and it did so on September 8, 2008 by filing a brief called a "jurisdictional statement" and asking the Court to "note probable jurisdiction."[10]

- **Voting rights: dilution of votes of racial minority group**

  - *Bartlett v. Strickland*, No. 07-689, reviewing *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007)

At issue in this case is whether a racial minority group that constitutes less than a numerical majority (50%) of a proposed legislative district's population can state a claim of vote dilution under the Voting Rights Act.

Unless federal law requires otherwise, the North Carolina Constitution prohibits a county from being divided in order to form a congressional district. In this case, the state legislature concluded that in drawing House District 18 it was required to straddle two counties in order to prevent the dilution of minority votes prohibited by Section 2 of the Voting Rights Act. Section 2 prohibits states from imposing "any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to . . . elect representatives of his or her choice." 649 S.E. 2d at 366 (citation omitted). Pender County, one of the counties across whose lines House District 18 was drawn, filed suit in state court, claiming that the drawing of House District 18 violated the state constitutional requirement of whole county districts and was not required by the Voting Rights Act.

As interpreted by the U.S. Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Voting Rights Act requires the creation of legislative districts designed to prevent the dilution of minority votes only if, among other things, there is "a minority population [that] is sufficiently large and geographically compact

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of the Voting Rights Act.

10 Once briefing is completed, the Court has the option, among other things, of dismissing the case for want of jurisdiction, summarily affirming the ruling below, or deciding to give the case full consideration on the merits.

to constitute a majority in a single-member district." 649 S.E.2d. at 367 (citation omitted). North Carolina House District 18 does not contain an African American majority population. However, it does contain an African American voting age population of 39.36%, and past election results in North Carolina have indicated that a voting district with an African American voting age population of at least 38.37% creates an effective opportunity for African Americans to elect the candidate of their choice.

The North Carolina Supreme Court thus viewed the issue in the case as whether the Court in *Gingles* "meant a quantitative majority of the minority population (i.e., greater than 50 percent), or whether it meant instead a minority group sufficiently large in population to have significant impact on the election of candidates but not of a size to control the outcome without help from other racial groups." 649 S.E.2d at 370. In a divided decision, a majority of the court adopted a "bright line rule" and held that under *Gingles*, a minority group must "constitute a numerical majority of citizens of voting age," stating that such a rule "can be applied fairly, equally, and consistently throughout the redistricting process." 649 S.E.2d at 371, 373. The majority therefore concluded that the Voting Rights Act did not require House District 18 to be drawn across county lines and that the division of a county in this manner violated the whole county provision of the state Constitution.

Two judges dissented, stating their belief that the U.S. Supreme Court has not "endorsed a bright line requirement that a minority group seeking Section 2 VRA relief constitute a numerical majority. In fact, despite having had the opportunity to do so, the Court has repeatedly declined to close the door on the issue." 649 S.E.2d at 378. The dissenters explained that an African American candidate "can be elected in House District 18, notwithstanding that the number of minority voters in the district is less than fifty percent," and that "[a]ltering the district to further reduce the minority population would result in dilution of a distinctive minority vote." 649 S.E.2d at 380. The dissenters would have adopted a "flexible standard based on political realities of the district [that] supports creation of a district in which the minority group has the ability to elect a representative of choice with crossover support from voters of other racial or ethnic groups." 649 S.E.2d at 381. Accordingly, the dissenters would have held that in drawing House District 18, the state legislature had acted properly in seeking "to maintain an effective majority district to comply with Section 2 of the VRA . . ." 649 S.E.2d. at 381.

- **Consumer protection: federal preemption of state laws — prescription drug labeling**

  - *Wyeth v. Levine*, No. 06-1249, reviewing 944 A.2d 179 (VT 2006)

Last term, in a significant, pro-corporate preemption decision with broad consequences for consumers, the Supreme Court held that persons injured by a negligently manufactured medical device cannot bring state law claims against the manufacturer for damages if the device received pre-market approval from the federal Food and Drug Administration ("FDA").[11] This term, the Court has accepted a case raising preemption issues concerning the inadequate labeling of prescription drugs.

Vermont resident and musician Diana Levine suffered from nausea caused by a severe migraine headache. At a health center, medical personnel treated Levine's nausea by the intravenous injection into her arm of a drug called Phenergan using a procedure known as "IV push." The procedure "resulted in an inadvertent injection of Phenergan into an artery. As a result, the artery was severely damaged, causing gangrene. After several weeks of deterioration, [Levine's] hand and forearm were amputated." 944 A.2d at 182.

Levine filed suit in state court against the drug's manufacturer, Wyeth, asserting claims under state tort law that Wyeth's labeling of Phenergan provided inadequate warning of the known dangers of the "IV

11 *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

push" injection of the drug, and that this inadequate warning resulted in her injuries. The drug's label had been approved by the FDA, and Wyeth argued that this approval preempted Levine's state law failure-to-warn claim. The court rejected this argument, the case went to trial, and a jury ruled in Levine's favor, awarding her $7.4 million in damages (which the parties agreed to reduce to $6,774,000).

Wyeth appealed, pressing its claim that federal law preempted Levine's state law tort claim. In a divided ruling, the Vermont Supreme Court also rejected Wyeth's preemption defense. According to the majority, "federal labeling requirements create a floor, not a ceiling, for state regulation." 944 A.2d at 184. In addition, citing an FDA regulation, the majority held that despite prior FDA approval of a drug's label, a manufacturer does not need FDA approval "to change labels that are insufficient to protect consumers." 944 A.2d at 186. The majority concluded that there was "no conflict between federal objectives and Vermont common law," 944 A.2d at 190, and thus no preemption of Levine's state law claims.

One judge dissented, believing it impossible for Wyeth to have complied "with the requirements of both state and federal law." 944 A.2d at 197.

- **Consumer protection: federal preemption of state laws — cigarette advertising**

  - *Altria Group v. Good*, No. 07-562, reviewing 501 F.3d 29 (1st Cir. 2007)

This case presents the Court with another preemption question, this one involving the allegedly deceptive advertising of cigarettes in violation of state law.

Smokers sued Phillip Morris and its parent company, Altria Group, Inc., under the Maine Unfair Trade Practices Act, contending that the companies used unfair and deceptive practices in manufacturing and advertising Marlboro Lights and Cambridge Lights. The smokers claimed that Phillip Morris designed and promoted these cigarettes knowing that while they provide less tar and nicotine to machines that "smoke" them for testing, they do not result in delivering less tar and nicotine to human smokers, because human smokers tend to compensate for the lower nicotine intake by taking longer puffs, covering air holes with their fingers or lips, or by smoking more cigarettes. The smokers therefore argued that it was deceptive for Phillip Morris to advertise these cigarettes as "light" or having "lower tar and nicotine."

Philip Morris argued that the smokers' state law claims were expressly preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA") and implicitly by the longstanding efforts of Congress and the Federal Trade Commission "to implement a national, uniform policy of informing the public about the health risks of smoking." 501 F.3d at 31. The preemption clause of the FCLAA provides in relevant part 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 . . ." 501 F.3d at 34.

A federal district court accepted Philip Morris' arguments and issued summary judgment against the smokers. On appeal, the First Circuit reversed, holding that the state claims were not preempted. Analyzing the substance of the smokers' claims in accordance with Supreme Court precedent concerning the preemption clause of the FCLAA, the First Circuit held that the claims in this case were accusations of fraudulent misrepresentation, not claims concerning a failure to warn based on smoking and health, and thus were not expressly preempted by the FCLAA. The court also rejected Philip Morris' implicit preemption argument, holding, among other things, that the smokers' claims did not interfere with federal goals concerning cigarette advertising.

- **The First Amendment: religious monuments in public parks**

    - *Pleasant Grove City, Utah v. Summum*, No. 07-665, reviewing 483 F.3d 1044 (10th Cir. 2007), *reh'g en banc denied*, 499 F.3d 1170 (10th Cir. Utah 2007)

At issue in this case is the constitutionality of a city's refusal to display a religious monument donated by a minority religious group in a city park already containing a Ten Commandments monument, among other displays.

Summum, a minority religious organization, sought to have the city of Pleasant Grove, Utah, erect a monument in a city park containing the Seven Aphorisms of Summum — a statement of the principles on which the Summum religion is based. The park already contained other permanent monuments, including a Ten Commandments monument that had been donated years earlier by the Fraternal Order of Eagles. The city refused to display the Seven Aphorisms, claiming that permanent displays in the park must either be related to Pleasant Grove's history or donated by groups with ties to Pleasant Grove.

Summum filed suit, arguing that in refusing to display the Seven Aphorisms the city had violated Summum's First Amendment right to freedom of speech. The district court denied Summum's motion for a preliminary injunction that would have required Pleasant Grove to erect the Summum monument while the case was pending. Summum appealed, and the Tenth Circuit reversed, holding that the monuments are private speech, not government speech, that the park is a public forum, and that Summum was likely to prevail on its claim that the city had engaged in an impermissible, content-based exclusion of the Seven Aphorisms.

The case has been complicated by an obsolete but not formally overruled Tenth Circuit decision holding that the Ten Commandments are principally secular, so that a government display of the Ten Commandments can never give rise to an Establishment Clause claim. For this reason, the case has been litigated to date, and decided, under the rubric of the Free Speech Clause. Thus, the courts have not considered whether the city's display of the Ten Commandments violates the Establishment Clause or whether displaying the Seven Aphorisms would do so, or whether the city was motivated by impermissible religious animus in refusing to display the Seven Aphorisms.[12]

In addition, the case has produced an unusual alignment of religious right organizations. Pat Robertson's American Center for Law and Justice — normally a proponent of government-endorsed religion and religious displays — represents Pleasant Grove and is arguing that the monuments are government speech and that, as such, the city had the right to reject the display of the Summum religious monument. Meanwhile, the Rutherford Institute has filed an *amicus curiae* brief in support of Summum, rejecting the ACLJ's "government speech" argument and contending that more fact-finding is necessary.

12 People For the American Way Foundation and Americans United for Separation of Church and State, the American Jewish Committee, the Anti-Defamation League, and the Baptist Joint Committee for Religious Liberty have filed an *amicus curie* brief in the case in support of neither party, explaining that while the permanent monuments in the park are government speech, it is the Establishment Clause, not the Free Speech Clause, that provides the proper analytic framework for deciding the case.

- **Free speech: "fleeting expletives" on broadcast television**

  - *FCC v. Fox Television Stations, Inc.*, No. 07-582, reviewing 489 F.3d 444 (2nd Cir. 2007)

At issue in this case is the whether the Federal Communications Commission ("FCC") has the power to punish the utterance of a "fleeting expletive" (*i.e.*, a one-time or isolated vulgar utterance that is "indecent" but not "obscene") on broadcast television.

Federal law prohibits the utterance of "obscene, indecent, or profane language" on broadcast radio and television. "The FCC first exercised its statutory authority to sanction indecent (but non-obscene) speech in 1975, when it found Pacifica Foundation's radio broadcast of comedian George Carlin's 'Filthy Words' monologue indecent . . ." 489 F.3d at 447. In a challenge brought by Pacifica to the FCC's order, the Supreme Court, in a 5-4 ruling, held that the Constitution permitted the FCC to regulate indecent material on the broadcast media. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court stressed that its holding was limited to the facts of the Carlin monologue and that its holding did not "speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by the respondent here." 438 U.S. at 760.

In the several decades following the *Pacifica* decision, the FCC followed a "restrained enforcement policy," proceeding only against repeated use of "indecent" language in a particular broadcast and reaffirming "the prevailing view that a fleeting expletive would not be actionable." 489 F.3d at 450.

However, in 2004, the FCC abruptly changed course. During a live broadcast by NBC of the Golden Globe Awards in January 2003, musician Bono stated during an acceptance speech that "this is really, really, fucking brilliant. Really, really, great." 489 F.3d at 451. Complaints were filed with the FCC, which "found the fleeting and isolated use of the word ['fucking'] irrelevant and overruled all prior decisions in which fleeting use of an expletive was held not indecent." 489 F.3d at 452.

And in early 2006, the FCC issued an order finding that several other broadcasts (including the Billboard Music Awards) were "indecent" because of the isolated utterance of such words as "fuck 'em," "fucking," and "bullshit." The FCC "dismissed the fact that the expletives were fleeting and isolated and held that repeated use is not necessary for a finding of indecency." 489 F.3d at 453.

The networks sought review of the FCC's order by the Second Circuit. In a 2-1 decision, the court ruled that the FCC's abrupt change in policy to regulate "fleeting expletives" was "a dramatic change in agency policy without adequate explanation." 489 F.3d at 454. As such, the court held that the FCC's action should be set aside pursuant to the federal Administrative Procedure Act ("APA"), which prohibits agency decisions that are "arbitrary and capricious." The court remanded the case to the FCC, giving the agency an opportunity to offer a "reasoned analysis" to justify its new policy. 489 F.3d at 467. However, the court expressed its doubt that any such reasoning could satisfy the First Amendment challenges raised by the networks to the FCC's policy. Judge Leval dissented, and would have held that the FCC had given "a reasoned explanation for its change of standard" and thus was not in violation of the APA. 489 F.3d at 467.

Rather than attempt to justify its policy on remand, the FCC instead asked the Supreme Court to hear the case, and the Court agreed to do so.

- **Free speech: union political activities**

  - *Ysursa v. Pocatello Education Association*, No. 07-869, reviewing 504 F.3d 1053 (9th Cir. 2007)

At issue in this case is whether a state may prohibit voluntary payroll deductions from local government employees for "political activities."

Idaho law enacted in 2003 prohibits payroll deductions from (among others) employees of local government units for the purpose of "political activities." No other payroll deductions are prohibited. Pursuant to the statute, local government employers are prohibited "from granting an employee's request to make voluntary contributions to political activities through a payroll deduction program." 504 F.3d at 1068. The law does not prohibit payroll deductions for any other purpose.

Unions brought suit in federal court challenging the constitutionality of the law, asserting that the law violated their right to free speech. In particular, the unions argued that the statute's restriction on voluntary political contributions burdened political speech. The district court agreed, finding that "unions face substantial difficulties in collecting funds for political speech without using payroll deductions," and that the payroll deduction ban would "diminish [their] ability to engage in political speech." 504 F.3d at 1058.

On appeal, the Ninth Circuit affirmed, recognizing that while "the law does not prohibit Plaintiffs from participating in political activities . . . it hampers their ability to do so by making the collection of funds for that purpose more difficult." 504 F.3d at 1058. The court of appeals held that the ban was a content-based restriction lacking a compelling justification and thus failed the applicable strict scrutiny.

- **Access to the courts: waiver of right to sue**

  - *14 Penn Plaza LCC v. Pyett*, No. 07-581, reviewing 498 F.3d 88 (2d Cir. 2007)

At issue in this case is whether union members who have not individually waived their right to bring a lawsuit against their employer for violating federal anti-discrimination laws are nonetheless prohibited from doing so by virtue of a mandatory arbitration clause in their union's collective bargaining agreement with their employer. There is a split among the circuits on this issue.

The plaintiff employees are union members employed by a building service and cleaning contractor. They worked as night watchmen, but were reassigned to less desirable jobs as night porters and light duty cleaners when the company engaged an affiliated contractor, who had younger workers replace the plaintiff employees. The plaintiffs filed suit in federal court, charging that they had been discriminated against in violation of the federal Age Discrimination in Employment Act. Their union's collective bargaining agreement with the employer required that discrimination claims be arbitrated, and the employer therefore asked the district court to compel arbitration. The district court refused, relying on Second Circuit precedent holding that "union-negotiated waivers of statutory rights in CBAs [collective bargaining agreements] were unenforceable." 498 F.3d at 92.

On appeal, the Second Circuit affirmed, noting that the court had previously ruled that "a union-negotiated mandatory arbitration agreement purporting to waive a covered worker's right to a federal forum with respect to statutory rights is unenforceable." 498 F.3d at 92.

- **Environmental protection: injury to marine mammals from Navy sonar**

  - *Winter v. Natural Resources Defense Counsel, Inc.*, No. 07-1239, reviewing 518 F. 3d 658 (9th Cir. 2008)

At issue in this case is whether the lower courts correctly placed limitations on the Navy's use of active sonar during training exercises off the California coast, in order to protect whales and other endangered marine mammals from harm.

The Natural Resources Defense Counsel and other pro-environmental groups and individuals brought suit in federal court against the Navy, seeking to prevent the Navy from using active sonar during planned training exercises in an area off the California coast where a number of endangered species of marine mammals, including certain types of whales, are found. The plaintiffs claimed that active sonar can seriously injure marine mammals as well as have significant, negative effects on their behavior. The Navy itself admitted that active sonar "may affect both the physiology and behavior of marine mammals," potentially causing physical harm and "overtly disrupt[ing]" their "normal behavior." 518 F.3d at 665.

The district court granted the plaintiffs' motion for a preliminary injunction, and imposed certain conditions on the Navy in conducting the training exercises in order to mitigate the impact of active sonar. The Navy appealed, and a unanimous panel of the Ninth Circuit upheld the district court's ruling.

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