ACLU SUMMARY

of the

2012 SUPREME COURT TERM

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Major Civil Liberties Decisions

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LGBT RIGHTS

In *United States v. Windsor*, 133 S.Ct. 2675 (June 26, 2013)(5-4), the Court struck down Section 3 of the Defense of Marriage Act (DOMA), which defined marriage for all federal purposes as the "legal union between one man and one woman," and thus excluded legally married same-sex couples from over 1,100 federal laws and programs. In this particular case, Edie Windsor was required to pay $363,000 in federal estate taxes after the death of her spouse, Thea Speyer, that she would not have been required to pay if she had been married to a man. Describing DOMA as a law that "writes inequality into the entire United States Code," *id.* at 2694, Justice Kennedy held for the majority that the "avowed purpose and practical effect" of DOMA "are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." *Id*. at 2681. "No legitimate purpose," he concluded, overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." The ACLU served as co-counsel for Edie Windsor.

In *Hollingsworth v. Perry*, 133 S.Ct. 2652 (June 26, 2013)(5-4), the Court held that the proponents of Proposition 8 in California, which amended the state constitution to define marriage as a union between a man and a woman, had no standing to appeal an injunction against the state barring it from enforcing Proposition 8 on equal protection grounds. Writing for the Court, Chief Justice Roberts explained that the proponents of Proposition 8 had nothing more than a "generalized grievance" against the terms of the injunction since it was not directed against them, and this "generalized grievance" was insufficient to confer standing. "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to," he said. "We decline to do so for the first time here." *Id*. at 2668. The practical effect of the Court's opinion is to leave the district court injunction in place, and thus reinstate same-sex marriage in California. The ACLU filed an *amicus* brief arguing that Proposition 8 was unconstitutional.

VOTING RIGHTS

In *Arizona v. Inter Tribal Council of Arizona*, 133 S.Ct. 2247 (June 17, 2013)(7-2), the Court ruled that the National Voter Registration Act (NVRA), which requires all states to "accept and use" a federal mail-in registration form that includes a written affirmation of citizenship, bars Arizona from adding an additional requirement that persons seeking to register must produce documentary proof of citizenship. Writing for the majority, Justice Scalia held that the normal presumption against preemption does not apply when Congress invokes its authority under the Elections Clause to alter or supplant state regulation of federal elections. At the same time, Justice Scalia noted that Arizona remains free under the NVRA to seek approval of its documentation requirement from the federal Election Assistance Commission (which was created to help implement the NVRA and has already rejected Arizona's request on one occasion), and to seek judicial review if it chooses from an adverse administrative decision. The ACLU was co-counsel for one of the plaintiff groups challenging the Arizona law.

In *Shelby County v. Holder*, 133 S.Ct. 2612 (June 25, 2013)(5-4), the Court struck down the coverage formula used to determine which states and political subdivisions are subject to the preclearance requirement of Section 5 of the Voting Rights Act. The Court did not strike down Section 5 itself. Both the coverage formula and the preclearance requirement were reauthorized in 2006 by large, bipartisan majorities in both houses of Congress. While acknowledging the

persistence of voting discrimination, the majority opinion, written by Chief Justice Roberts, faulted Congress for not significantly updating the coverage formula since 1965 despite increases in minority registration and turnout in the covered jurisdictions. Justice Ginsburg's dissent responded by noting that Congress had compiled a voluminous legislative record in 2006 demonstrating that voting discrimination was still a disproportionate issue in the covered jurisdictions. She also criticized the majority for discounting the deterrent effect of preclearance. The ACLU represented the Alabama State Conference of the NAACP and several voters in Shelby County who intervened in the lawsuit to defend the constitutionality of the Voting Rights Act.

FIRST AMENDMENT

In *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S.Ct. 2321 (June 20, 2013)(6-2), the Court struck down a requirement that organizations participating in a federally-funded program to combat the spread of HIV/AIDS must have a policy explicitly opposing prostitution and sex trafficking. Writing for the majority, Chief Justice Roberts drew a distinction between conditions that affect how federal funds are spent and conditions that reach beyond the funded program. Here, he found, the challenged condition crossed that line because it dictated what organizations could say in parts of their program that are entirely supported by private funds. Moreover, he explained, the government's willingness to allow grant recipients to create affiliated entities that are not bound by the same condition is unsatisfactory in this context. If the affiliate's speech can be attributed to the grant recipient, it is merely an invitation to hypocrisy by allowing the same organization to express differing views on the legalization of prostitution. If the affiliate's speech cannot be attributed to the grant recipient, it does nothing to preserve the First Amendment rights of the grant recipient. The ACLU filed an *amicus* arguing that the challenged condition violates the First Amendment.

FOURTH AMENDMENT

In *Bailey v. United States*, 133 S.Ct. 1031 (Feb. 19, 2013)(6-3), the Court held that the rule announced in *Michigan v. Summers*, 452 U.S. 692 (1981), which permits the police to detain individuals found in the immediate vicinity of a home when executing a search warrant, did not justify the detention in this case, which occurred more than a mile away from the home being searched. Writing for the majority, Justice Kennedy emphasized that *Summers* represents an exception to the general rule that detentions without probable cause are unconstitutional. He then held that each of the justifications offered in *Summers* for this exception related to safely implementing the search, and none apply once the person detained has left the immediate vicinity of the home. The ACLU submitted an *amicus* brief urging the Court to reject the government's proposed extension of *Summers.*

In *Florida v. Harris*, 133 S.Ct. 1050 (Feb. 19, 2013)(9-0), the Court unanimously held that an alert by a trained drug-sniffing dog is normally enough to create probable cause for a search unless there is some reason to doubt the quality of the dog's training or the circumstances surrounding the particular alert at issue (e.g., the dog received improper cues from his handler). Writing for the majority, Justice Kagan specifically rejected the notion that the dog alert cannot be accepted as credible unless there is evidence in the record of the dog's prior performance in the field. To the contrary, she wrote, field performances are uniquely susceptible to both false positives and false negatives and thus less indicative of a dog's capability than controlled

training exercises. The ACLU submitted an *amicus* brief arguing that a training certificate should not be enough to establish reliability based on an increasing body of evidence showing that even trained dogs have very different rates of success in actually detecting drugs.

In *Florida v. Jardines*, 133 S.Ct. 1409 (Mar. 26, 2013)(5-4), the Court held that the use of a drug-sniffing dog on the front porch of a home constitutes a search that violates the Fourth Amendment in the absence of consent or a warrant. The majority opinion, written by Justice Scalia, rested on traditional property notions. It also rejected the dissent's reliance on the doctrine of implied consent. According to Justice Scalia, the doctrine of implied consent allows visitors to approach the front door without committing trespass but does not extend to an investigative search by the police who are seeking evidence, not entry. Justice Kagan's concurring opinion, joined by Justices Ginsburg and Sotomayor, argued that the police conduct in this case violated the defendant's reasonable expectation of privacy, as well as his property rights.

In *Missouri v. McNeely*, 133 S.Ct. 1552 (April 17, 2013)(8-1), the Court ruled that the mere fact that alcohol naturally dissipates in the bloodstream over time does not, by itself, constitute an exigent circumstance that justifies a warrantless blood test in all DUI cases. Instead, Justice Sotomayor said, the existence of exigent circumstances must be determined on a case-by-case basis. Because the state had not claimed any exigent circumstances in this case beyond the drunk driving arrest, she found it unnecessary to determine what factors might give rise to exigent circumstances in another case. Chief Justice Roberts suggested in a separate opinion that the police should be required to obtain a warrant if they can do so within the time necessary to transport the suspect to the hospital for a blood test, but not otherwise. That proposal, however, was only supported by three Justices. The ACLU represented Tyler McNeely.

In *Maryland v. King*, 133 S.Ct. 1958 (June 3, 2013)(5-4), the Court upheld DNA testing of arrestees without the need for individualized suspicion. Writing for the majority, Justice Kennedy characterized DNA testing as an administrative tool for identifying the arrestee and thus legally indistinguishable from photographing and fingerprinting. Applying a rule of reasonableness, he then ruled that the state's interest in proper identification outweighed the minimal intrusion of a DNA swab. Finally, Justice Kennedy emphasized that Maryland's law prohibits the use of the DNA sample for any person other than identification. In dissent, Justice Scalia argued that the only sense in which the DNA sample is used for identification is to identify the arrestee as a suspect in an unrelated crime. Because this purpose is part of normal law enforcement it must, in his view, be supported by individualized suspicion linking the person arrested to the unsolved crime. Summing up, Justice Scalia wrote: "I doubt that the proud men who wrote the charter of or liberties would have been eager to open their mouths for royal inspection." *Id*. at 1989. The ACLU submitted an *amicus* brief arguing that the Fourth Amendment prohibited routine DNA testing of all arrestees.

FIFTH AMENDMENT

A. Self-Incrimination

In *Salinas v. Texas*, 133 S.Ct. 2174 (June 17, 2013)(5-4), the Court ruled that a defendant who does not expressly invoke his Fifth Amendment rights when questioned by the police prior to arrest or other custodial interrogation cannot object when the prosecution comments at trial on

his failure to respond to police questioning. Justice Alito's plurality opinion was joined by Chief Justice Roberts and Justice Kennedy. In a concurring opinion, Justice Thomas and Justice Scalia would have gone further. In their view, the Fifth Amendment never prevents the prosecution from commenting on a defendant's silence – including a defendant's decision not to testify at trial – and the Court's past decisions to the contrary were wrongly decided. The ACLU submitted an *amicus* brief supporting the Fifth Amendment claim in this case on various grounds, including the risk that a contrary rule would encourage the police to manipulate the timing of *Miranda* warnings.

B. Double Jeopardy

In *Evans v. Michigan*, 133 S.Ct. 1069 (Feb. 20, 2013)(8-1), the Court held that a trial court's directed verdict of acquittal bars retrial under the Double Jeopardy Clause even if it is based on a misinterpretation of the governing statute or, as here, a misunderstanding of the elements of the offense. Writing for the majority, Justice Sotomayor explained that a jury verdict of acquittal based on legally erroneous instructions still triggers the Double Jeopardy Clause, and found no meaningful distinction for double jeopardy purposes between a jury verdict and a directed verdict.

C. Takings Clause

In *Arkansas Game and Fish Comm'n v. United States*, 133 S.Ct. 511 (Dec. 4, 2012)(8-0), the Court unanimously held that the temporary flooding of private land by the Army Corps of Engineers can, in some circumstances, qualify as a taking under the Fifth Amendment, rejecting the *per se* rule advocated by the Government and adopted by the Federal Circuit. Writing for the Court, Justice Ginsburg then remanded the case to the Federal Circuit to consider a series of relevant factors in determining whether a taking had occurred, including the duration and foreseeability of the flooding, as well as the landowner's reasonable investment-backed expectations regarding the land's use.

In *Koontz v. St Johns River Water Management District*, 133 S.Ct. 2586 (June 25, 2013)(5-4), the Court unanimously agreed that the Takings Clause applies to disproportionate conditions attached to permit applications regardless of whether the challenged condition is attached to a permit approval or a permit denial. The Court split, 5-4, however, on a second issue, with the majority holding that the Takings Clause is not limited to easements or other regulatory restrictions on the use of the property but also applies "when the government commands the relinquishment of funds linked to a specific, identifiable property interest . . ." *Id.* at ___. Justice Alito wrote the majority opinion.

SIXTH AMENDMENT

In *Alleyne v. United States*, 133 S.Ct. 2151 (June 17, 2013)(5-4), the Court held that facts that increase the mandatory minimum, just like facts that increase the statutory maximum, must be found by the jury rather than the judge. Writing for the majority, Justice Thomas thus extended the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)(addressing statutory maximums) and overruled its decision in *Harris v. United States*, 536 U.S. 545 (2002) (distinguishing mandatory minimums). He also made clear that judges may continue to rely on so-called sentencing factors that need not be found by the jury beyond a reasonable doubt to determine the appropriate sentence between a mandatory minimum and a statutory maximum.

The ACLU submitted an *amicus* brief supporting the defendant and urging that *Harris* be overruled.

EQUAL PROTECTION

In *Fisher v. University of Texas*, 133 S.Ct. 2411 (June 24, 2013)(7-1), the Court considered but did not resolve the constitutionality of an admissions program at the University of Texas that considered race as one factor among many in selecting a portion of the incoming class. Writing for the majority, Justice Kennedy accepted "as given for purposes of deciding this case," *id*. at 2417, that achieving diversity in higher education is a compelling state interest. In addition, he ruled that the university is entitled to deference in deciding whether pursuing diversity is consistent with the university's educational mission. But, he held, the university is not entitled to deference on whether the means chosen to accomplish diversity satisfy strict scrutiny. On that question, he wrote, it is the university's burden to show that "no workable race-neutral alternatives would produce the educational benefits of diversity." *Id.* at 2414. The university's good faith in considering race-neutral alternative is not enough to satisfy this burden. At the same time, Justice Kennedy was careful to note that strict scrutiny "does not require exhaustion of every race-neutral alternative." *Id.* at 2420. He then remanded the case to the lower courts for a reconsideration of the record under the appropriate strict scrutiny standard. The ACLU submitted an *amicus* brief urging the Supreme Court to uphold the Texas plan.

NATIONAL SECURITY

In *Clapper v. Amnesty International USA*, 133 S.Ct. 1138 (Feb. 26, 2013)(5-4), the Court held that plaintiffs lacked standing to challenge broad new surveillance powers authorized by Congress in the FISA Amendments Act of 2008 (FAA). Writing for the majority, Justice Alito dismissed plaintiffs' claim that their international communications would be intercepted under the FAA as too speculative to confer standing; their claim that they had incurred present expenses to mitigate that risk was likewise dismissed as a self-imposed injury that could not confer standing. The majority failed to mention that the reason plaintiffs did not know for certain whether their communications had been intercepted was because the government treated that fact as a secret and would not disclose it. In stark contrast to the majority, Justice Breyer began his dissent by observing that the interception of plaintiffs' international communications "is as likely to take place as most future events that commonsense inference and ordinary knowledge of human nature tell us will happen." *Id.* at 1155. The ACLU represented the plaintiffs in their challenge to the FAA.

IMMIGRATION

In *Moncrieffe v. Holder*, 133 S.Ct. 1678 (April 23, 2013)(7-2), the Court held that a conviction under Georgia law for distributing a small amount of marijuana without remuneration does not qualify as an "aggravated felony" triggering mandatory deportation under federal immigration law because the same conduct would only qualify as a misdemeanor if prosecuted in federal court. Writing for the majority, Justice Sotomayor applied a "categorical approach" that, she explained, does not focus on the particular facts of the case but on whether the least possible offense under the state law would constitute a felony under federal law. Justice Sotomayor ended her opinion with the observation that this case represents the third time in seven years that

the government's effort to characterize low-level drug offenses as "aggravated felonies" under the immigration law has been rebuffed.

FEDERAL TORT CLAIMS ACT

In *Levin v. United States*, 133 S.Ct. 1224 (Mar. 4, 2013)(9-0), the Court unanimously held that the "intentional tort" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h), does not preclude suits against the United States for claims of battery arising from the provision of medical services because of a carve-out contained in the Gonzalez Act**,** 10 U.S.C. § 1089(e). Justice Ginsburg wrote the Court's opinion.

In *Millbrook v. United States*, 133 S.Ct. 1441 (Mar. 27, 2013)(9-0), the Court again considered the scope of the "intentional tort" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h), which bars suits against the United States for the intentional torts of its employees, but creates an exception allowing suits for certain enumerated torts committed by law enforcement officers. The Third Circuit interpreted this so-called "law enforcement proviso" to apply only if the tortious conduct by law enforcement officers occurred in the course of executing a search, seizing evidence, or making an arrest, and thus not to apply to the alleged sexual assault by prison guards in this case. That narrowing construction was rejected in a unanimous opinion written by Justice Thomas, which upheld the right to sue the United States for the intentional torts of its law enforcement officers so long as the tortious conduct alleged in the suit was committed within the scope of the officer's employment.

ALIEN TORT STATUTE

In *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (April 17, 2013)(9-0), the Court ruled that the Alien Tort Statute, 28 U.S.C. § 1350, which grants federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States," is subject to the presumption against extraterritoriality. Applying that presumption, Chief Justice Roberts held that ATS jurisdiction does not reach torts occurring in the territory of another sovereign nation unless "the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669. The Court then dismissed this action brought by foreign nationals against a foreign corporation for torts allegedly occurring in Nigeria. Justice Breyer wrote a concurring opinion (joined by Justices Ginsburg, Sotomayor, and Kagan) that agreed with the majority's result but not its reasoning. Specifically, Justice Breyer rejected the majority's reliance on the presumption against extraterritoriality, noting that the ATS was enacted at least in part to deal with piracy. In his view, U.S. courts can exercise jurisdiction under the ATS if the denial of jurisdiction would, in effect, give a torturer (or other serious human rights abuser) a safe haven in the U.S. He did not, however, believe that the safe haven standard had been met in this case. Neither Chief Justice Roberts nor Justice Breyer addressed the question on which certiorari had originally been granted: whether corporations can be sued under the ATS. The ACLU submitted an *amicus* brief supporting jurisdiction and arguing that the presumption against extraterritoriality does not apply to the ATS.

FREEDOM OF INFORMATION ACT

In *McBurney v. Young*, 133 S.Ct. 1709 (April 29, 2013)(9-0), the Court ruled that a provision of Virginia's Freedom of Information Law restricting its use to Virginia citizens does not violate either the Privileges and Immunities Clause or the dormant Commerce Clause. As to the former, Justice Alito explained that the Privileges and Immunities Claus "forbids a State from intentionally giving its own citizens a competitive advantage in business or employment . . . [it] does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen." *Id*. at 1716. As to the latter, Justice Alito held that Virginia's Freedom of Information Law neither regulates nor burdens interstate commerce. The ACLU submitted an *amicus* brief arguing that state FOIAs could not be limited to state citizens under the Privileges and Immunities Clause.

STATUTORY CIVIL RIGHTS CLAIMS

A. Title VII

In *University of Texas, Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (June 24, 2013)(5-4), the Court held that a plaintiff alleging retaliation under Title VII must prove that the adverse action giving rise to the complaint would not have occurred but for the plaintiff's protected activity. Writing for the majority, Justice Kennedy acknowledged that the effect of the Court's holding was to establish a higher standard for retaliation claims than discrimination claims under Title VII, but he concluded that the Court's approach was consistent with congressional intent. Justice Ginsburg's dissent disputed that conclusion. She also argued that having two different standards would both complicate the task of trial judges and confuse juries since both claims were often combined in a single case.

In *Vance v. Ball State University*, 133 S.Ct. 2434 (June 24, 2013)(5-4), the Court ruled that an employee qualifies as a supervisor under Title VII -- thus making it easier to establish employer liability for alleged harassment – only if the employee has authority to hire, fire, promote, or reassign the plaintiff. Writing for the majority, Justice Alito rejected the broader definition adopted by the EEOC, which extended the term supervisor to include anyone authorized to direct the plaintiff's daily work activities. The majority branded the EEOC's definition vague and unworkable. The dissent criticized the majority's approach as unconnected to modern workplace realities.

B. Driver's Privacy Protection Act

In *Maracich v. Spears*, 133 S.Ct. 2191 (June 17, 2013)(5-4), the Court held that the lawyer-defendants in this case violated the federal Driver's Privacy Protection Act by obtaining information from the State DMV intended to help identify and solicit potential new clients in an ongoing lawsuit against certain car dealers. Writing for the majority, Justice Kennedy concluded that defendants' actions did not fit within the statutory exception that permits the use of otherwise private motor vehicle information for an "investigation in anticipation of litigation." According to Justice Kennedy, the exception was not meant to cover the kind of "bulk solicitation" of clients that occurred in this case. By contrast, Justice Ginsburg's dissenting decision quoted from the decision below saying that the defendants in this case "did what any good lawyer would have done." *Id*. at 2215.

C. Indian Child Welfare Act

In *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (June 25, 2103)(5-4), the Court held that key provisions of the Indian Child Welfare Act, which was adopted in response to an historic pattern of removing Indian children from their homes and designed to preserve the integrity of Indian families, do not apply to Indian parents who have never had physical or legal custody of their children. Writing for the majority, Justice Alito therefore upheld the adoption of an Indian child by a non-Indian family over the objection of her Indian father. The ACLU submitted an *amicus* brief supporting the claim of the Indian father in this case.

PATENTS AND COPYRIGHT

In *Kirtsaeng v. John Wiley & Sons*, 133 S.Ct. 1351 (Mar. 19, 2013)(6-3), the Court held that the "first-sale doctrine," which holds that the rights of a copyright owner are exhausted after the first sale and the buyer of the copyrighted work is then free to resell it without permission of the copyright owner, applies to works copyrighted in the United States but manufactured abroad. The issue is a significant one for publishers because U.S. works manufactured overseas are often sold at a lower price than in the U.S. market, and can therefore undercut the U.S. market if resold in the U.S. Justice Breyer wrote the majority opinion; Justice Ginsburg wrote the dissent.

In *Bowman v. Monsanto*, 133 S.Ct. 1761 (May 13, 2013)(9-0), the Court unanimously ruled that Monsanto's patent on a soybean seed that was genetically altered to resist a common herbicide barred a farmer from replanting harvested seeds to produce a new soybean crop. Describing the farmer's use of the patented seed as "simple copying," Justice Kagan concluded that it was covered by Monsanto's patent. At the same time, she cautiously added that "[o]ur holding today is limited – addressing the situation before us, rather than every one involving a self-replicating product." *Id*. at 1769.

In *Association for Molecular Pathology v. Myriad Genetics*, 133 S.Ct. 2107 (June 13, 2013)(9-0), the Court unanimously invalidated patents on two human genes, BRCA1 and BRCA2. Mutations of those genes are associated with an increased risk of hereditary breast and ovarian cancer. Writing for the Court, Justice Thomas held that DNA is a product of nature that cannot be patented, overturning a thirty year practice of the Patent and Trademark Office. Summarizing the Court's holding, Justice Thomas wrote that Myriad "found an important and useful gene" but it "did not create anything." *Id*. at 8. The Court did, however, uphold Myriad's patent on cDNA, which is a synthetic form of DNA that is made in the lab. The ACLU represented the patients, research scientists and advocacy groups that challenged the validity of the gene patents.

HABEAS CORPUS

In *Ryan v. Gonzales*, 133 S.Ct. 696 (Jan. 8, 2013)(9-0), decided with *Tibbals v. Carter*, the Court unanimously ruled that a death row inmate who has been judged incompetent is not entitled to an indefinite stay of his federal habeas proceedings under either 18 U.S.C. § 3599(a)(2), which provides federally-funded counsel to death row inmates seeking habeas relief, or 18 U.S.C. § 4241, which governs competency determinations at trial and during sentencing. Writing for the Court, Justice Thomas emphasized that federal habeas proceedings are backward-looking and primarily record-based, diminishing the need for the prisoner's participation. While denying the existence of an absolute right to a stay, the Court's opinion nonetheless recognized

that judges are empowered to grant stays in their discretion in cases where the facts indicate that the prisoner's participation in the habeas proceeding would be beneficial, as long as the stay is not an indefinite one. The ACLU submitted an *amicus* brief detailing the many ways in which a prisoner's participation in habeas proceedings is often vital.

In *Chaidez v. United States*, 133 S.Ct. 1103 (Feb. 20, 2013)(7-2), the Court held that it had announced a new rule in *Padilla v. Kentucky*, 559 U.S. 356 (2010), when it declared that the failure to advise a criminal defendant of the immigration consequences of a guilty plea represents ineffective assistance of counsel. Accordingly, under *Teague v. Lane*, 489 U.S. 288 (1989), that new rule could not be invoked in habeas proceedings to collaterally challenge a criminal conviction that had become final before *Padilla* was filed. Justice Kagan wrote the majority opinion.

In *Johnson v. Williams*, 133 S.Ct. 1088 (Feb. 20, 2013)(9-0), the Court unanimously held that a federal habeas court reviewing a state court judgment should presume that the state court considered all federal claims properly presented to it, even if they are not discussed in the state court opinion. Although noting that the presumption is a rebuttable one, Justice Alito concluded that the defendant had failed to rebut it on the facts of this case.

In *Metrish v. Lancaster*, 133 S.Ct. 1781 (May 20, 2013)(9-0), the Court reaffirmed that a judicial reinterpretation of the law can be applied retroactively without violating due process unless it is unforeseeable. Here, the challenged judicial ruling eliminated a diminished capacity defense that had previously been recognized under Michigan law. Nonetheless, Justice Ginsburg concluded, the decision was not unforeseeable because it was consistent with the statutory language of a Michigan law adopted prior to the crime at issue that had never previously been construed by the Michigan Supreme Court. Justice Ginsburg's opinion acknowledged that the intermediate appellate courts had repeatedly ruled to the contrary and model jury instructions in Michigan assumed the existence of the diminished capacity defense. But, she emphasized, AEDPA allows federal courts to grant habeas relief only if the state court decision under review unreasonably applied clearly established law. That "demanding standard," she ruled, had not been met in this case.

In *Trevino v. Thaler*, 133 S.Ct. 1911 (May 28, 2013)(5-4), the Court held that the failure in state post-conviction proceedings to challenge the ineffectiveness of trial counsel is not a bar to federal habeas relief if the habeas petitioner received ineffective assistance in the state post-conviction proceedings as well, and those proceedings were the first time that the ineffectiveness claim could be raised as a matter of law, as in *Martinez v. Ryan*, 566 U.S. 1 (2012), or as a matter of practice, which was the case here. Justice Breyer wrote the majority opinion.

In *McQuiggin v. Perkins*, 133 S.Ct. 1924 (May 28, 2013)(5-4), the Court held that federal habeas petition may be considered even after the one-year statute of limitations established by AEDPA has expired if the petitioner presents a "tenable" claim of actual innocence based on new evidence. Writing for the majority, however, Justice Ginsburg repeatedly emphasized that such claims are rare because the petitioner must show that no juror could reasonably have voted to convict in light of the new evidence. She also cautioned that the petitioner's delay in bringing the petition may make it more difficult to meet this high standard because the credibility of the evidence may be diminished by the passage of time.

SENTENCING

In *Peugh v. United States*, 133 S.Ct. 2072 (June 10, 2013)(5-4), the Court ruled that the Ex Post Facto Clause prohibits a sentence based on guidelines adopted after the crime was committed if the new guidelines provide a higher sentencing range, as they did in this case. Writing for the majority, Justice Sotomayor acknowledged that the federal sentencing guidelines are advisory, not mandatory. Nonetheless, she held that an upward adjustment in the sentencing guidelines creates a significant risk of an increased sentence since the guidelines continue to provide the framework for sentencing decisions in federal court even post-*Booker*, and that a significant risk of an increased sentence is sufficient to establish a violation of the Ex Post Facto Clause.

FEDERAL CRIMINAL LAW

In *Smith v. United States*, 133 S.Ct. 714 (Jan. 9, 2013)(9-0), the Court unanimously held that a defendant who asserts that his prosecution for criminal conspiracy is barred by the statute of limitations because he withdrew from the conspiracy outside the limitations period can be required to prove that fact without violating due process. As Justice Scalia explained for the Court: "[A]lthough union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability, it does not place upon the prosecution a constitutional responsibility to prove that he did not withdraw. As with other affirmative defenses, the burden is on him." *Id*. at 720.

In *Descamps v. United States*, 133 S.Ct. 2276 (June 20, 2103)(7-2), the Court revisited the question of how to determine whether a prior conviction counts as a predicate offense that can lead to enhanced sentencing under the Armed Career Criminals Act (ACCA). Writing for the majority, Justice Kagan held that the Ninth Circuit applied the wrong rule in this case – improperly looking to the evidence supporting the earlier conviction rather than the elements of the offense - to determine whether the prior conviction was analogous to one of the predicate offenses listed in ACCA. Applying the correct rule, she then held that the prior conviction at issue did not qualify as a predicate offense and thus the enhanced sentence under ACCA was improper.

In *United States v. Kebodeaux*, 133 S.Ct. 2496 (June 24, 2013)(7-2), the Court upheld the conviction of a former serviceman for failing to comply with the reporting requirements of the federal Sex Offender Registration and Notification Act (SORNA). Although SORNA was enacted after the defendant's military sentence was completed, the Court concluded that he was already subject to a reporting regime under a predecessor statute, that the prior regime was a necessary and proper exercise of Congress' power over the military, and that modifications of the reporting rules enacted by SORNA did not change the analysis. Justice Breyer wrote the majority opinion.

FEDERAL CRIMINAL PROCEDURE

In *Henderson v. United States*, 133 S.Ct. 1121 (Feb. 20, 2013)(6-3), the Court considered the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, which normally restricts an appeals court to reviewing legal errors that were raised below, but contains an exception for a "plain error that affects substantial rights." The specific question before the Court was whether the error had to be "plain" at the time of trial or at the time of appeal. Writing for the majority,

Justice Breyer chose the latter interpretation, which enabled the defendant in this case to take advantage of an intervening Supreme Court decision that clarified the law in the defendant's favor.

In *United States v. Davila*, 133 S.Ct. 2139 (June 13, 2013)(9-0), the Court held that a violation of Rule 11 of the Federal Rules of Criminal Procedure, which bars federal judges from participation in plea discussions, does not require automatic vacatur of a guilty plea. Rather, Justice Ginsburg wrote, the critical issue is whether the defendant was prejudiced by the violation of Rule 11, and thus the critical question is whether "it was reasonably probable that, but for the Magistrate Judge's exhortations, [the defendant] would have exercised his right to go to trial." *Id.* at 2150.

CLASS ACTIONS

In *Amgen, Inc. v. Connecticut Retirement Plans and Trust Fund*, 133 S.Ct. 1184 (Feb. 27, 2013)(6-3), the Court upheld class certification in this securities fraud case. Writing for the majority, Justice Ginsburg explained that the materiality of the alleged misrepresentation presented an objective question that was common to the class and, because materiality was an essential element of the claim, a failure to prove materiality would doom the claims of the entire class. Accordingly, she had little trouble concluding that common claims predominated under Rule 23(b)(3). She also specifically rejected the contention that plaintiffs must prove materiality prior to class certification. Instead, she wrote: "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id*. at 1191 (emphasis in original).

In *Standard Fire Insurance Co. v. Knowles*, 133 S.Ct. 1345 (Mar. 19, 2013)(9-0), the Court considered whether a plaintiff's stipulation in a class action complaint that aggregate damages for the putative class will not exceed $5 million defeats federal jurisdiction under the Class Action Fairness Act. Writing for a unanimous Court, Justice Breyer held that it did not, principally because a stipulation cannot bind putative class members prior to certification of the class.

In *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (Mar. 27, 2013)(5-4), the Court reversed a class certification order in this antitrust action. Writing for the majority, Justice Scalia held that plaintiffs had failed to establish that damages were susceptible to class-wide determination. In a joint dissent, Justice Ginsburg and Breyer criticized the majority for addressing a question that had not been properly presented. They also described the majority holding as "good for this day and case only," *id.* at 1437, noting that "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal." *Id*.

JURISDICTION

In *United States v. Bormes*, 133 S.Ct. 12 (Nov. 13, 2012)(9-0), a unanimous Court held that the government's general waiver of sovereign immunity for claims under $10,000, set forth in the so-called Little Tucker Act, does not apply to claims against the U.S. under the Fair Credit Reporting Act. The Court then sent the case back to the Seventh Circuit to decide whether the FCRA itself represents a waiver of sovereign immunity. Writing for the Court, Justice Scalia explained: "The Tucker Act is displaced … when a law assertedly imposing monetary liability on the United States contains its own judicial remedies. In that event, the specific remedial

scheme establishes the exclusive framework for the liability Congress created under the statute." *Id*. at 18

In *Kloeckner v. Solis*, 133 S.Ct. 596 (Dec. 10, 2012)(9-0), the Court unanimously ruled, in an opinion written by Justice Kagan, that appeals from the Merit Systems Protection Board in discrimination cases should be filed in the district court rather than in the Federal Circuit, regardless of whether the employee's claim was dismissed on the merits or, as here, on procedural grounds.

In *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721 (Jan. 9, 2013)(9-0), the Court unanimously held that Nike's agreement to a covenant not to sue was sufficient to moot this trademark dispute since the covenant was both unconditional and irrevocable, therefore satisfying the conditions of the voluntary cessation doctrine. The Chief Justice wrote the Court's opinion.

ARBITRATION

In *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (June 10, 2013)(9-0), the Court reiterated that class actions are only appropriate in arbitration if the parties have agreed to them, but then held that the question of whether the parties have agreed by contract to permit class arbitration is for the arbitrator to decide. Furthermore, Justice Kagan wrote, the arbitrator's decision should only be overturned in "very unusual circumstances." *Id.* at 2068.

In *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (June 20, 2013)(5-3), the Court ruled that a provision in an arbitration agreement barring class actions is binding and enforceable even if the cost of vindicating individual claims is prohibitively expensive. Writing for the majority, Justice Scalia acknowledged prior decisions holding that arbitration provisions could be overridden if they prevented plaintiffs from "effectively vindicating" their statutory rights. He interpreted that principle, however, as limited to two situations: where the arbitration agreement waives the statutory rights that plaintiffs are seeking to vindicate, or where excessive filing fees essentially foreclose arbitration. Because this case did not present either of those situations, he concluded, the fact that litigating these claims on an individual basis was almost certain to cost many times more than any foreseeable recovery was simply irrelevant. In dissent, Justice Kagan provided a three-word summary of the majority's holding: "Too darn bad." *Id.* at 2313.

ATTORNEY'S FEES & COSTS

In *Lefemine v. Wideman*, 133 S.Ct. 9 (Nov. 5, 2012), the Court summarily ruled that anti-abortion protestors were prevailing parties, and thus entitled to attorney's fees, after obtaining an injunction against the police for threatening to arrest the protestors based on the content of their speech, even though plaintiffs' request for nominal damages was denied. As the Court noted, the injunction materially altered the legal relationship between the parties.

In *Marx v. General Revenue Corp.*, 133 S.Ct. 1166 (Feb. 26, 2013)(7-2), the Court held that Rule 54(d)(1) of the Federal Rules of Civil Procedure allows district courts to award costs to prevailing defendants in a case brought under the Fair Debt Collection Practices Act (FDCPA), even though a specific provision of the FDCPA addressing costs refers only to litigation brought in bad faith. According to Justice Thomas, who wrote the majority opinion, the bad faith language in the FDCPA was not meant to exclude an award of costs on other grounds.

In *Sibelius v. Cloer*, 133 S.Ct. 1886 (May 20, 2013)(9-0), the Court unanimously held that an individual who files a claim under the National Childhood Vaccine Injury Act (NCVIA) can recover attorney's fees even if the claim is dismissed as untimely so long as it was filed in good faith and had a plausible basis. Justice Sotomayor's opinion rested on the unusual language of the NCVIA, which does not limit attorney's fees to prevailing parties, unlike most other federal fee-shifting statutes.