

ACLU SUMMARY
of the
2011 SUPREME COURT TERM

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Major Civil Liberties Decisions

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Dated: June 28, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
HEALTH CARE.....	1
FIRST AMENDMENT.....	1
A. Freedom of Speech	1
B. Establishment Clause	2
C. Free Exercise Clause.....	2
FOURTH AMENDMENT.....	3
FIFTH AMENDMENT	3
A <i>Miranda</i>	3
B. Double Jeopardy	4
SIXTH AMENDMENT.....	4
A. Ineffective Assistance of Counsel.....	4
B. Confrontation Clause	5
C. Jury Trials	6
EIGHTH AMENDMENT.....	6
ELEVENTH AMENDMENT.....	6
EQUAL PROTECTION.....	6
DUE PROCESS	6
<i>BIVENS</i> CLAIMS	7
QUALIFIED IMMUNITY	7
IMMIGRATION.....	8
STATUTORY CIVIL RIGHTS CLAIMS.....	9
A. Family and Medical Leave Act.....	9
B. Privacy Act.....	9
C. Torture Victim Protection Act	9
VOTING RIGHTS.....	10
SOCIAL SECURITY ACT.....	10
COPYRIGHT.....	10
HABEAS CORPUS	10
FEDERAL CRIMINAL LAW	12
FEDERAL CRIMINAL PROCEDURE.....	12
PATENTS.....	13

JURISDICTION	13
PREEMPTION	13
POLITICAL QUESTION DOCTRINE.....	14
ARBITRATION	14
ATTORNEY’S FEES & COSTS.....	14

TABLE OF AUTHORITIES

<i>American Tradition Partnership, Inc. v. Bullock</i> , 2012 WL 2368660 (June 25, 2012)	2
<i>Arizona v. U.S.</i> , 2012 WL 2368661 (June 25, 2012)	8, 14
<i>Armour v. City of Indianapolis</i> , 132 S.Ct. 2073 (June 4, 2012)	6
<i>Astrue v. Capato</i> , 132 S.Ct. 2021 (May 21, 2012).....	10
<i>Blueford v. Arkansas</i> , 132 S.Ct. 2044 (May 24, 2012).....	4
<i>Bobby v. Dixon</i> , 132 S.Ct. 26 (Nov. 7, 2011)	3
<i>Cavazos v. Smith</i> , 132 S.Ct. 2 (Oct. 31, 2011).....	10
<i>Coleman v. Court of Appeals of Maryland</i> , 132 S.Ct. 1327 (Mar. 20, 2012).....	6, 9
<i>Coleman v. Johnson</i> , 132 S.Ct. 2060 (May 29, 2012)	11
<i>CompuCredit Corp. v. Greenwood</i> , 132 S.Ct. 665 (Jan. 10, 2012)	14
<i>Dorsey v. U.S.</i> , 2012 WL 2344463 (June 21, 2012)	12
<i>Douglas v. Independent Living Center</i> , 132 S.Ct. 1204 (Feb. 22, 2012).....	13
<i>Elgin v. Dep’t of the Treasury</i> , 2012 WL 2076340 (June 11, 2012)	13
<i>FCC v. Fox Television Stations, Inc.</i> , 2012 WL 2344462 (June 21, 2012)	1
<i>Federal Aviation Administration v. Cooper</i> , 132 S.Ct. 1441 (Mar. 28, 2012)	9
<i>Filarsky v. Delia</i> , 132 S.Ct. 1657 (Apr. 17, 2012).....	8
<i>Florence v. Board of Chosen Freeholders</i> , 132 S.Ct. 1510 (Apr. 2, 2012).....	3
<i>Golan v. Holder</i> , 132 S.Ct. 873 (Jan. 18, 2012)	10
<i>Gonzalez v. Thaler</i> , 132 S.Ct. 641 (Jan. 10, 2012)	11
<i>Greene v. Fisher</i> , 132 S.Ct. 38 (Nov. 8, 2011).....	11
<i>Hardy v. Cross</i> , 132 S.Ct. 490 (Dec. 12, 2011)	5, 12
<i>Holder v. Martinez</i> , 132 S.Ct. 2011 (May 21, 2012)	8
<i>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</i> , 132 S.Ct. 694 (Jan. 11, 2012).....	2
<i>Howes v. Fields</i> , 132 S.Ct. 1181 (Feb. 21, 2012)	4
<i>Judulang v. Holder</i> , 132 S.Ct. 476 (Dec. 12, 2011)	8
<i>Kawashima v. Holder</i> , 132 S.Ct. 1166 (Feb. 21, 2012).....	8
<i>Knox v. SEIU</i> , 2012 WL 2344461 (June 21, 2012)	2
<i>Lafler v. Cooper</i> , 132 S.Ct. 1376 (Mar. 21, 2012).....	5
<i>Maples v. Thomas</i> , 132 S.Ct. 912 (Jan. 18, 2012)	11
<i>Marmet Health Care Center v. Brown</i> , 132 S.Ct. 1201 (Feb. 21, 2012)	14
<i>Martel v. Clair</i> , 132 S.Ct. 1276 (Mar. 5, 2012)	12
<i>Martinez v. Ryan</i> , 132 S.Ct. 1309 (Mar. 20, 2012).....	11

<i>Mayo Collaborative Services v. Prometheus Laboratories, Inc.</i> , 132 S.Ct. 1289 (Mar. 20, 2012)	13
<i>Messerschmidt v. Millender</i> , 132 S.Ct. 1235 (Feb. 22, 2012)	7
<i>Miller v. Alabama</i> , 2012 WL 2368659 (June 25, 2012)	6
<i>Mims v. Arrow Financial Services</i> , 132 S.Ct. 740 (Jan. 18, 2012).....	13
<i>Minneci v. Pollard</i> , 132 S.Ct. 617 (Jan. 10, 2012)	7
<i>Missouri v. Frye</i> , 132 S.Ct. 1399 (Mar. 21, 2012).....	4
<i>Mohamad v. Palestinian Authority</i> , 132 S.Ct. 1702 (Apr. 18, 2012)	9
<i>National Federation of Independent Business v. Sebelius</i> , 2012 WL 2427810 (June 28, 2012).....	1
<i>Parker v. Matthews</i> , 2012 WL 2076341 (June 11, 2012).....	12
<i>Perry v. New Hampshire</i> , 132 S.Ct. 716 (Jan. 11, 2012).....	7
<i>Perry v. Perez</i> , 132 S.Ct. 934 (Jan. 20, 2012).....	10
<i>Rehberg v. Paulk</i> , 132 S.Ct. 1497 (Apr. 2, 2012).....	7
<i>Reichle v. Howards</i> , 132 S.Ct. 2088 (June 4, 2012)	1, 8
<i>Reynolds v. U.S.</i> , 132 S.Ct. 975 (Jan. 23, 2012)	12
<i>Ryburn v. Huff</i> , 132 S.Ct. 987 (Jan. 23, 2012).....	3, 7
<i>Sackett v. EPA</i> , 132 S.Ct. 1367 (Mar. 21, 2012).....	13
<i>Setser v. United States</i> , 132 S.Ct. 1463 (Mar. 28, 2012)	12
<i>Smith v. Cain</i> , 132 S.Ct. 627 (Jan. 10, 2012).....	6
<i>Southern Union Co. v. U.S.</i> , 2012 WL 2344465 (June 21, 2012).....	6
<i>Taniguchi v. Kan Pacific Saipan, LTD</i> , 132 S.Ct. 1997 (May 21, 2012)	14
<i>U.S. v. Jones</i> , 132 S.Ct. 945 (Jan. 23, 2012).....	3
<i>United States v. Alvarez</i> , 2012 WL 2427808 (June 28, 2012).....	2
<i>Vartelas v. United States</i> , 132 S.Ct. 1479 (Mar. 28, 2012)	8
<i>Williams v. Illinois</i> , 2012 WL 2202981 (June 18, 2012)	5
<i>Wood v. Milyard</i> , 132 S.Ct. 1826 (Apr. 24, 2012).....	11
<i>Zivotofsky v. Clinton</i> , 132 S.Ct. 1421 (Mar. 26, 2011).....	14

HEALTH CARE

In *National Federation of Independent Business v. Sebelius*, 2012 WL 2427810 (June 28, 2012)(5-4), the Court upheld the challenged provisions of the Patient Protection and Affordable Care Act with one major caveat. Chief Justice Roberts joined with Justices Ginsburg, Breyer, Sotomayor and Kagan in ruling that the individual mandate was a constitutional exercise of congressional power under the Taxing Clause. He reached this result by focusing on the fact that individuals who choose not to purchase health insurance are required to pay a “shared responsibility payment” as part of their federal income taxes. The power of the federal government to impose new taxes, he then noted, was well-established. The individual mandate therefore survived even though Chief Justice Roberts joined with the four dissenters in rejecting the government’s principal defense of the individual mandate under the Commerce Clause. Although recognizing that the Commerce Clause has been broadly construed, he held that it was not broad enough to allow the government to require individuals to engage in commerce in order to then regulate their commercial activity. The second challenged provision of the Act required states to substantially expand their Medicaid coverage or else forfeit all their federal Medicaid funding. On this issue, Chief Justice Roberts, joined by Justices Breyer and Kagan, held that the statute’s all-or-nothing requirement was unconstitutionally coercive under the Spending Clause. In doing so, he emphasized that the Medicaid expansion was a “shift in kind, not merely in degree.” *Id.* at ___. Rather than invalidate the provision, however, he construed it to mean that states that did not agree to expand their Medicaid coverage would only lose the additional federal funds allocated for that expansion. Although Justices Ginsburg and Sotomayor took the position that the Medicaid expansion provision was constitutional as written, they accepted the plurality’s remedy in lieu of total invalidation, providing a majority of five. The practical consequences of the Medicaid ruling will depend on how many states now choose to opt out. The dissenters – Justices Scalia, Kennedy, Thomas and Alito – took the position that the health care law is unconstitutional in its entirety. The ACLU filed an *amicus* brief urging the Court to uphold the individual mandate.

FIRST AMENDMENT

A. Freedom of Speech

In *Reichle v. Howards*, 132 S.Ct. 2088 (June 4, 2012)(8-0), the Court unanimously ruled that Secret Service agents who had been sued for damages under *Bivens* for allegedly arresting the plaintiff in response to his protected speech were entitled to qualified immunity. Writing for the Court, Justice Thomas declined to decide whether retaliatory arrests violate the First Amendment if they are otherwise supported by probable cause. Instead, he concluded that qualified immunity was appropriate because the law was not clearly established at the time of the arrest. The Court’s resolution of the case, however, leaves that law unresolved. Justice Ginsburg, joined by Justice Breyer, wrote a concurring opinion. It began by stating that she would have ruled differently “[w]ere defendants ordinary law enforcement officers” *Id.* at 2097. The ACLU submitted an *amicus* brief arguing against qualified immunity.

In *FCC v. Fox Television Stations, Inc.*, 2012 WL 2344462 (June 21, 2012)(8-0), a unanimous Court held that CBS and Fox were denied due process when the FCC found that they had violated a ban on “fleeting expletives” that was not adopted until after their shows were broadcast. By focusing on fair notice, the Court did not address the constitutionality of applying an indecency rule to television and radio that does not apply to other communication media, nor did it decide whether the FCC’s current interpretation of that rule is constitutional. Even so,

Justice Kennedy’s emphasis on the necessity of clear rules when regulating speech casts at least some doubt on the future prospects of an indecency rule that has been subject to such inconsistent application in the past. In a separate concurring opinion, Justice Ginsburg called on the Court to reconsider its decision upholding the indecency rule in *FCC v. Pacifica*, 556 U.S. 502 (2009), saying that decision “was wrong when it was issued,” and has since been overtaken by “technological advances” that have blurred the distinction between broadcast and other media. *Id.* at _____. The ACLU submitted an *amicus* brief urging the Court to reverse the FCC’s ruling in this case and strike down the indecency rule more broadly.

In *Knox v. SEIU*, 2012 WL 2344461 (June 21, 2012)(7-2), the Court ruled that the First Amendment prohibits a public employee union from collecting a special assessment from non-union members working in an agency shop unless those non-members are told what portion of the assessment will fund the union’s political activities, and affirmatively agree to pay for that portion. It is the first time that the Court has imposed an opt-in requirement prior to collection of so-called agency fees. Writing for a five-person majority, Justice Alito distinguished between annual assessments, where the Court’s cases allow an opt-out rule, and the special assessments involved in this case. The language and logic of his opinion, however, cast doubt on the continued viability of those precedents. Justice Sotomoyar wrote a concurring opinion, joined by Justice Ginsburg, which agreed that the challenged assessment here was unconstitutional because of deficiencies in the opt-out procedure that the Union had offered, but criticized the majority for imposing an opt-in rule that plaintiffs had not sought and the parties had not briefed.

In *American Tradition Partnership, Inc. v. Bullock*, 2012 WL 2368660 (June 25, 2012)(5-4), the Court summarily reversed a decision by the Montana Supreme Court upholding its state law barring corporations from using their general treasury funds to support or oppose a candidate for office. The Court’s *per curiam* opinion was only two paragraphs long and concluded with this observation: “Montana’s arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.” *Id.* at _____.

In *United States v. Alvarez*, 2012 WL 2427808 (June 28, 2012)(6-3), the Court struck down the Stolen Valor Act, a federal statute that makes it a crime to lie about receiving a military honor. Justice Kennedy’s plurality opinion rejected the government’s contention that false statements of fact are categorically unprotected by the First Amendment. “That governmental power,” he wrote, “has not clear limiting principle.” *Id.* at _____. He then held that the statute fails the strict scrutiny applied to content-based regulations. Justices Breyer and Kagan concurred in the judgment but offered a different rationale for invalidating the statute. Applying intermediate scrutiny, they agreed that the statute was unconstitutional as written but suggested that a different statute might be upheld if it narrowly focused on actual harms. The ACLU submitted an *amicus* brief arguing that the law should be struck down on First Amendment grounds, largely for the reasons stated in Justice Kennedy’s opinion.

B. Establishment Clause

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (Jan. 11, 2012)(9-0) – see summary on p. 2.

C. Free Exercise Clause

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (Jan. 11, 2012)(9-0), the Court unanimously ruled that anti-discrimination laws are subject to a “ministerial exception” compelled by principles of religious autonomy embodied in the Free

Exercise and Establishment Clauses. Applying that principle in this case, Chief Justice Roberts held that the plaintiff qualified as a “minister” because of her title and religious functions; accordingly, she could not sue the Lutheran Church School that employed her for allegedly violating the anti-retaliation provisions of the ADA. He further noted that this principle applied regardless of whether the reasons for her dismissal were in fact religious. That is because a religion is constitutionally entitled, in his view, to choose its “ministers” without interference from civil authorities and without any need to explain the basis for its decision. Finally, the Court’s opinion makes clear that the determination of who qualifies for the “ministerial exemption” is more functional than formal. The ACLU submitted an *amicus* brief arguing that the “ministerial exception” should not apply unless the religious employer had acted for doctrinal reasons.

FOURTH AMENDMENT

In *U.S. v. Jones*, 132 S.Ct. 945 (Jan. 23, 2012)(9-0), the Court unanimously ruled that the placement of a GPS device on a suspect’s car constitutes a search under the Fourth Amendment. Writing for five members of the Court, Justice Scalia held that the physical intrusion would have been regarded as a search when the Fourth Amendment was adopted, and found it unnecessary to go further. Justice Sotomayor joined Justice Scalia’s opinion but also wrote separately to express her concern about the impact of new technology, and the government’s ability to exploit it, on our reasonable expectations of privacy. Justice Alito, joined by Justices Ginsburg, Breyer and Kagan, concurred in the judgment but rejected Justice Scalia’s reliance on common law notions of trespass because they deemed it too narrow to address, for example, the related problem of cell phone tracking. As Justice Alito noted, it is the intrusion on our private lives not the intrusion on our property that triggers Fourth Amendment protection. The ACLU submitted an *amicus* brief highlighting the threat to privacy posed by new technologies, and urging the Court to find a Fourth Amendment violation in this case.

In *Florence v. Board of Chosen Freeholders*, 132 S.Ct. 1510 (Apr. 2, 2012)(5-4), the Court upheld a jail policy subjecting all new detainees, including those arrested on minor offenses, to a visual strip search. Justice Kennedy’s majority opinion is filled with broad language about the danger of prisons, the need to defer to prison officials on security matters, and the difficulty of asking those officials to make case-by-case determinations of reasonable suspicion. In separate concurring opinions, however, Chief Justice Roberts and Justice Alito stressed the limits of the majority’s holding. Most significantly, perhaps, Justice Alito noted that “admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable [for detainees arrested for a minor offense], particularly if an alternative procedure is feasible.” *Id.* at 1524. Justice Breyer’s dissent emphasized the humiliation involved in a strip search and the lack of evidence that such strip searches are necessary in all cases to preserve jail security. The ACLU submitted an *amicus* brief on behalf of five former NJ Attorney Generals arguing that the challenged strip search policy violated New Jersey law and arguing in favor of a reasonable suspicion standard under the Fourth Amendment.

Ryburn v. Huff, 132 S.Ct. 987 (Jan. 23, 2012)(9-0) – *see* summary on p. 7.

FIFTH AMENDMENT

A *Miranda*

In *Bobby v. Dixon*, 132 S.Ct. 26 (Nov. 7, 2011)(9-0)(*per curiam*), a unanimous Court summarily ruled that the Sixth Circuit had made two errors of Fifth Amendment law in reversing

the murder conviction in this habeas proceeding. First, the Court held that the Fifth Amendment does not forbid the police from encouraging a suspect to confess by telling him (accurately or not) that another suspect is already cooperating. Second, the Court held that the defendant's confession to murder after receiving *Miranda* warnings was not tainted by an earlier and excluded confession to forgery without *Miranda* warnings. Specifically, the Court distinguished *Missouri v. Seibert*, 542 U.S. 600 (2004), by noting that in this case, unlike *Seibert*, the *Mirandized* murder confession did not follow an un-*Mirandized* confession to the same crime, and the two confessions were separated by hours, not minutes. The Court also noted that the forgery confession was properly excluded because it was made without the benefit of *Miranda* warnings.

In *Howes v. Fields*, 132 S.Ct. 1181 (Feb. 21, 2012)(9-0), the Court rejected the proposition that a prisoner who is removed from the general population and questioned about a crime that occurred outside of prison is automatically in custody for *Miranda* purposes. Writing for a unanimous Court, Justice Alito held instead that the custodial determination must be based on the totality in circumstances. Here, he stressed that the prisoner was repeatedly told that he was free to leave the interrogation room, even though he was never given the option of declining the interrogation in the first place. Justices Ginsburg wrote a separate opinion, joined by Justices Breyer and Sotomayor. While agreeing that the law that applied in this context was not clearly established, and thus *Fields* was not entitled to habeas corpus, she would have reached a different conclusion on the merits if this case had been heard on direct review.

B. Double Jeopardy

In *Blueford v. Arkansas*, 132 S.Ct. 2044 (May 24, 2012)(6-3), the Court ruled that the Double Jeopardy Clause did not bar the state from retrying the defendant for capital murder and first degree murder even though the jury in his first trial had announced in open court that they had unanimously voted against both charges. According to Chief Justice Roberts, that declaration in open court was not equivalent to a verdict of acquittal because the jury was sent back to deliberate on the lesser included charges of manslaughter and negligent homicide and might have revisited its initial decision on the top charges during those extended deliberations. Justice Sotomayor dissented on two grounds. First, Arkansas is a "hard transition" state, which requires the jury to reach a verdict on charges in order of severity. The jury's declaration that it was deadlocked on the lesser charges in this case was thus tantamount to a declaration that it had acquitted on the top charges. Second, the judge could have resolved any ambiguity by simply asking the jury for a partial verdict. Given that available alternative, there was no "manifest necessity" to declare a mistrial.

SIXTH AMENDMENT

A. Ineffective Assistance of Counsel

In *Missouri v. Frye*, 132 S.Ct. 1399 (Mar. 21, 2012)(5-4), the Court ruled that that Sixth Amendment's right to effective assistance of counsel extends to the plea bargaining stage where, as the Court pointed out, 97% of all federal prosecutions and 94% of all state prosecutions are resolved. Writing for the majority, Justice Kennedy then held that a lawyer's failure to communicate a "formal" offer to his client will, "as a general rule," demonstrate ineffective assistance. To demonstrate prejudice, a defendant must show a reasonable probability that he would have accepted the offer, a reasonable probability that the prosecution would not have withdrawn it, and a reasonable probability that the trial judge would have ratified the bargain struck by the parties. In this case, ineffective assistance was easily shown since there was no

evidence in the record that defense counsel communicated a plea offer he had received from the prosecution that was more favorable than the plea that the defendant ultimately accepted. However, the Court remanded for a hearing to determine whether prejudice could be proved, and expressed some doubt on that point since the defendant was arrested for the same offense (driving with a revoked license) before his scheduled preliminary hearing. The ACLU submitted an *amicus* brief urging the Court to apply the Sixth Amendment to plea bargaining and leaving it to trial judges to fashion an appropriate remedy based on all the facts.

In *Lafler v. Cooper*, 132 S.Ct. 1376 (Mar. 21, 2012)(5-4), a companion case to *Missouri v. Frye*, the Court reiterated its holding that ineffective assistance of counsel at the plea bargaining stage violates the Sixth Amendment and expressly rejected the argument, made by both Michigan and the United States, that any error in the plea bargaining process is purged if the subsequent trial and conviction are fair. Here, unlike *Frye*, the defendant was told of the plea offer but rejected it based on his lawyer's mistaken description of the law and the strength of the prosecution's case. Unlike *Frye*, the defendant in this case also proceeded to trial where he was convicted, rather than plead guilty before trial on less favorable terms than the prosecution initially offered. Like *Frye*, however, the defendant ultimately received a sentence more than 3 times longer than the prosecution's plea offer. Under these circumstances, Justice Kennedy wrote, prejudice is clear and the only difficult question is remedy. Rather than prescribe a remedy, Justice Kennedy left it for trial judges to determine whether to impose the sentence that the defendant was initially offered, the sentence imposed after trial, or something in between. Justice Scalia's dissent criticized the majority for constitutionalizing the plea bargaining process in the first place, and then creating a rule that any remedy for that right is discretionary. The ACLU submitted a single *amicus* brief in both *Frye* and *Lafler* (see above.)

B. Confrontation Clause

In *Hardy v. Cross*, 132 S.Ct. 490 (Dec. 12, 2011)(9-0), the Court summarily reversed the Seventh Circuit's grant of habeas corpus. The Court's *per curiam* opinion concluded that the Seventh Circuit had given insufficient deference under the AEDPA to the state court's conclusion that the prosecution had made reasonable efforts to obtain the live testimony of a key witness before determining that the witness was unavailable to testify and therefore allowing the prosecution to read her prior, cross-examined testimony from an earlier trial.

In *Williams v. Illinois*, 2012 WL 2202981 (June 18, 2012)(5-4), a deeply divided Court continued to grapple with how the Confrontation Clause applies to scientific reports. The question in this rape case was whether the defendant's Confrontation Clause rights were violated when a prosecution expert was permitted to testify that DNA test results from an independent lab matched a DNA profile of the defendant in a police database. Writing for a four-person plurality, Justice Alito held that the Confrontation Clause did not apply for two independent reasons: First, the expert's reference to the lab report (which she did not prepare), was not admitted to establish the truth of the report but only to establish the foundation for her testimony that there was a match between the two DNA samples. Second, the lab report was not "testimonial" because it was prepared to help find the perpetrator rather than to incriminate the defendant, who had not even been identified as a suspect at the time. Finally, the plurality emphasized that this case was tried before a judge rather than a jury, reducing the risk of confusion about the disputed testimony. Justice Thomas provided the critical fifth vote in a separate concurring opinion. While disagreeing with the plurality's reasoning (meaning that the plurality's reasoning was rejected by a majority of the Court – Justice Thomas plus the four dissenters), he concluded that the lab report lacked the formality and solemnity to be deemed

“testimonial,” and thus was not covered by the Confrontation Clause. The dissent was written by Justice Kagan.

C. Jury Trials

In *Southern Union Co. v. U.S.*, 2012 WL 2344465 (June 21, 2012)(6-3), the Court held that the principle of *Apprendi v. New Jersey*, 530 U.S. 466 (2004), applies to criminal fines as well as imprisonment, and therefore any fact that increases the potential fine that a defendant faces upon conviction must be found by the jury beyond a reasonable doubt (except for the fact of a prior conviction). In this case, the corporate defendant was found guilty of violating federal environmental laws that assess a fine based on each day that the violation continues. Under these circumstances, Justice Sotomayor wrote, the jury must decide how long the violation lasted as part of its factfinding function, rather than leaving that determination to the judge in his sentencing role.

EIGHTH AMENDMENT

In *Miller v. Alabama*, 2012 WL 2368659 (June 25, 2012)(5-4), the Court held that juveniles convicted of murder cannot be subject to a mandatory sentence of life imprisonment without the possibility of parole. The decision builds on the Court’s holding two years ago in *Graham v. Florida*, 130 S.Ct. 2011 (2010), that juveniles could not be sentenced to life imprisonment without the possibility of parole for non-homicide offenses. This time, the Court stopped short of imposing a categorical ban. Instead, it concluded that the sentencing judge cannot be barred from taking the defendant’s youth (and other relevant circumstances) into consideration when imposing punishment. Writing for the majority, moreover, Justice Kagan pointedly observed: “[G]iven all we have said . . . about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.* at ____.

ELEVENTH AMENDMENT

Coleman v. Court of Appeals of Maryland, 132 S.Ct. 1327 (Mar. 20, 2012)(5-4) – see summary on p. 9.

EQUAL PROTECTION

In *Armour v. City of Indianapolis*, 132 S.Ct. 2073 (June 4, 2012)(6-3), the Court rejected an equal protection challenge to the city’s method for administering refunds created by a change in the local tax laws. Writing for the majority, Justice Breyer held that the classification system was subject to rational basis review because it involved neither suspect classifications nor fundamental rights. Under these circumstances, he wrote, “administrative considerations can justify a tax-related distinction.” *Id.* at 2081. The “administrative consideration” that he found sufficient in this case was the administrative burden that the city avoided by adopting a bright line rule. On one side of the line were those who paid their taxes in installments and were relieved of the obligation to make future payments; on the other side were those who paid their taxes in a lump sum and were denied any refund.

DUE PROCESS

In *Smith v. Cain*, 132 S.Ct. 627 (Jan. 10, 2012)(8-1), the Court held that the prosecution’s failure to turn over exculpatory evidence impeaching the only eyewitness to connect the defendant to the crime required reversal of the defendant’s murder conviction under *Brady v.*

Maryland, 373 U.S. 83 (1963). Writing for the majority, Chief Justice Roberts explained that exculpatory evidence is “material” for *Brady* purposes if there is a “reasonable probability” that it might have affected the jury’s verdict. That standard, he found, was easily met in this case.

In *Perry v. New Hampshire*, 132 S.Ct. 716 (Jan. 11, 2012)(8-1), the Court held that due process does not require trial judges to assess the reliability of an eyewitness identification before submitting it to the jury, even if the identification was obtained under suggestive circumstances, unless the police were responsible for creating those suggestive circumstances. Writing for the majority, Justice Ginsburg emphasized that it is generally up to the jury to decide the reliability of evidence in our criminal justice system. Justice Sotomayor’s dissent emphasized the unique persuasiveness of eyewitness testimony and its well-documented fallability.

BIVENS CLAIMS

In *Minneci v. Pollard*, 132 S.Ct. 617 (Jan. 10, 2012)(8-1), the Court held that private prison guards could not be sued for violating the constitutional rights of federal prisoners in their custody “where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here.)” *Id.* at 626. Writing for the majority, Justice Breyer ruled that the availability of state tort remedies is a “special factor” that eliminates the need for a *Bivens* claim in this context. Justice Ginsburg was the sole dissenter. The ACLU submitted an *amicus* brief urging the Court to recognize a *Bivens* claim in this case, in part on the ground that state tort remedies are inconsistent and often inadequate.

QUALIFIED IMMUNITY

In *Ryburn v. Huff*, 132 S.Ct. 987 (Jan. 23, 2012)(9-0), the Court held, in a *per curiam* opinion, that the police officers in this case who entered a house without a warrant had reasonably believed that there was an imminent threat of violence under all the circumstances, and were therefore entitled to qualified immunity in this § 1983 suit.

In *Messerschmidt v. Millender*, 132 S.Ct. 1235 (Feb. 22, 2012)(6-3), the Court held that police officers executing a search warrant are entitled to qualified immunity unless it was “objectively unreasonable” for them to believe that the warrant met the requirements of probable cause. Writing for the majority, Chief Justice Roberts then analyzed the evidence in detail and concluded that the defendants in this case had acted reasonably in executing a warrant that authorized them to search for “any” guns and “any” indicia of gang membership. He further noted that it was appropriate to consider the fact that the defendants had sought approval from their police supervisors and the prosecutor’s office before seeking a warrant in determining whether their actions were objectively reasonable. The ACLU submitted an *amicus* brief arguing that the presence of a search warrant should not provide absolute immunity in a § 1983 lawsuit alleging violations of the Fourth Amendment, and that the reliance on the warrant in this case was not “objectively reasonable” for reasons set out in Justice Sotomayor’s dissent.

In *Rehberg v. Paulk*, 132 S.Ct. 1497 (Apr. 2, 2012)(9-0), the Court held unanimously that grand jury witnesses are entitled to absolute immunity for their grand jury testimony. Noting that the Court had previously held that trial witnesses are entitled to absolute immunity for their trial testimony, Justice Alito concluded that “there was no sound reason to draw a distinction” for purposes of qualified immunity. *Id.* at 1500. He also ruled that absolute immunity applies to police officers as well as private citizens who testify before the grand jury.

In *Filarsky v. Delia*, 132 S.Ct. 1657 (Apr. 17, 2012)(9-0), the Court unanimously ruled that part-time government employees sued under § 1983 for allegedly unconstitutional acts under color of state law are entitled to the same qualified immunity as full-time employees. Writing for the Court, Chief Justice Roberts observed that the need to ensure that public officials are not unduly chilled in the performance of their duties by the threat of personal liability “is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis.” *Id.* at 1665. He also distinguished *Richardson v. McKnight*, 521 U.S. 399 (1997), which held that private prison guards are not entitled to qualified immunity, by noting that their actions and the actions of their corporate employer are driven by a profit motive that creates a different set of incentives.

Reichle v. Howards, 132 S.Ct. 2088 (June 4, 2012)(8-0) – see summary on p. 1.

IMMIGRATION

In *Judulang v. Holder*, 132 S.Ct. 476 (Dec. 12, 2011)(9-0), the Court unanimously struck down the BIA’s test for determining whether aliens found deportable based on criminal convictions prior to 1996 (when the law was changed) could seek discretionary relief from deportation. Under the co-called “comparable grounds” test, the BIA asked whether the ground for deportation is closely analogous to a ground for exclusion. It did so because the immigration law at the time recognized a right to discretionary relief for excludable aliens but not for deportable aliens. Writing for the Court, Justice Kagan wrote that a test for determining eligibility for discretionary relief “that neither focuses on nor relates to an alien’s fitness to remain in the country is arbitrary and capricious.” *Id.* at 485.

In *Kawashima v. Holder*, 132 S.Ct. 1166 (Feb. 21, 2012)(6-3), the Court held that the failure to file a federal tax return is a crime involving fraud and deceit, and therefore qualifies as an aggravated felony that triggers deportation if more than \$10,000 is at stake.

In *Vartelas v. United States*, 132 S.Ct. 1479 (Mar. 28, 2012)(6-3), the Court considered the retroactive effect of a 1996 law subjecting lawful permanent residents who have been convicted of certain crimes to exclusion from the United States after even a short trip abroad. The petitioner in this case was convicted of a crime in 1994, two years before the new law went into effect. Based on that conviction, he was barred from re-entering the United States in 2003 after traveling to Greece to visit ailing parents. Writing for the Court, Justice Ginsburg began by invoking the presumption that new laws apply only prospectively unless Congress has clearly indicated otherwise. She then concluded that the 1996 law had an impermissible retroactive effect because it imposed a “new disability” on a prior conviction.

In *Holder v. Martinez*, 132 S.Ct. 2011 (May 21, 2012)(9-0), the Court unanimously held, in an opinion by Justice Kagan, that the BIA’s refusal to impute a parent’s residency to his or her unemancipated minor in determining whether the threshold requirements for cancellation of removal have been met represents a reasonable interpretation of the INA entitled to deference under *Chevron*.

In *Arizona v. U.S.*, 2012 WL 2368661 (June 25, 2012)(5-3), the Court struck down three of the four provisions of Arizona’s S.B. 1070 that had been challenged on federal preemption grounds. One of the invalidated provisions made it a state law crime for aliens to seek or hold a job without authorization; a second made it a crime for aliens to fail to comply with federal registration requirements; the third empowered police in Arizona to make warrantless arrests based on probable cause to believe a person has committed a “public offense” that makes him or her removable from the United States. Significantly, however, the Court held that the most

controversial portion of the law, the so-called “show-me-your-papers” provision, had been improperly enjoined by the lower courts. That provision directs police in Arizona to demand immigration papers from anyone who they have lawfully stopped if there is reason to believe that the person stopped is in the country illegally. Writing for the majority, Justice Kennedy was careful to note that the “show-me-your-papers” provision might be unconstitutional as applied – if, for example, it leads to racial profiling or unreasonably prolonged detention – but it was not unconstitutional on its face. The result insures that there will be further litigation as the law is implemented. The ACLU, which has already raised both the detention issue and the racial profiling issue in the lower courts, filed an *amicus* brief in this case arguing that all four provisions of the Arizona law should be struck down.

STATUTORY CIVIL RIGHTS CLAIMS

A. Family and Medical Leave Act

In *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (Mar. 20, 2012)(5-4), the Supreme Court held that the Eleventh Amendment protects the states from suits for money damages under the so-called “self-care” provision of the FMLA. Writing for a plurality of four, Justice Kennedy concluded that the legislative history of the FMLA failed to show that state employers were discriminating against women who needed to take time off during or after their pregnancies, and therefore the “self-care” provision of the FMLA, as applied to the states, was not “congruent and proportional” to a documented pattern of unconstitutional behavior. Justice Scalia agreed with the plurality’s conclusion, providing the crucial fifth vote, but disagreed with its reasoning. Justice Ginsburg dissented. She disputed the plurality’s characterization of the legislative record but, more fundamentally, argued that it was time for the Court to overrule its decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), that pregnancy discrimination is not sex discrimination. The ACLU submitted an *amicus* brief urging the Court to uphold the challenged law.

B. Privacy Act

In *Federal Aviation Administration v. Cooper*, 132 S.Ct. 1441 (Mar. 28, 2012)(5-3), the Court held that a statutory provision allowing “actual damages” for willful violations of the Privacy Act is limited to recovery for economic loss and does not permit damages based on emotional distress. Writing for the majority, Justice Alito acknowledged that a contrary interpretation of the statutory language was not “inconceivable.” *Id.* at 1453. He nonetheless resolved this statutory ambiguity in the government’s favor by relying on the statutory canon that waivers of sovereign immunity should be narrowly construed. Justice Sotomayor’s dissent observed that the majority opinion denies Privacy Act plaintiffs the opportunity to recover “what our precedents and common sense understand to be the primary, and often only, damages sustained as a result of an invasion of privacy, namely mental or emotional distress.” *Id.* at 1456.

C. Torture Victim Protection Act

In *Mohamad v. Palestinian Authority*, 132 S.Ct. 1702 (Apr. 18, 2012)(9-0), the Court unanimously ruled that the Torture Victims Protection Act, which creates a federal cause of action against “individuals” who engage in torture and extrajudicial killing under color of foreign law, only permits suits against natural persons and not against organizations. Petitioners conceded that the TVPA does not apply against sovereign nations because of the Foreign Sovereign Immunities Act but argued that the term “individuals” could be construed to cover non-sovereign entities, like the Palestinian Authority and PLO, who were sued in this case.

Writing for the Court, Justice Sotomayor rejected that interpretation based on what she described as the clear language of the text.

VOTING RIGHTS

In *Perry v. Perez*, 132 S.Ct. 934 (Jan. 20, 2012)(9-0), the Court unanimously ruled, in a *per curiam* opinion, that a federal Court in Texas had given insufficient deference to the legislative redistricting plan, which had not yet been pre-cleared under Section 5, in drawing its own redistricting map in this Section 2 lawsuit. While a state redistricting plan that has not been pre-cleared cannot take effect, the Court ruled that it should still have guided the district court except where plaintiffs had established a reasonable probability that portions of the plan would not meet the pre-clearance standard. In addition, the Court reiterated, without dissent, the “serious constitutional questions raised by § 5’s intrusion on state sovereignty.” *Id.* at 942 (internal quotation marks and citation omitted).

SOCIAL SECURITY ACT

In *Astrue v. Capato*, 132 S.Ct. 2021 (May 21, 2012)(9-0), the Court unanimously ruled that twin children born through in vitro fertilization using their father’s frozen sperm 18 months after their father’s death do not qualify for survivors benefits under the Social Security Act. Writing for the Court, Justice Ginsburg held that the Social Security Administration had acted reasonably in looking to state intestacy laws to define the term “child,” and that its interpretation of the federal statute was entitled to deference under *Chevron*. In this case, Florida’s intestacy laws did not give the twins any rights under the father’s estate.

COPYRIGHT

In *Golan v. Holder*, 132 S.Ct. 873 (Jan. 18, 2012)(6-2), the Court upheld the validity of a federal statute designed to bring the U.S. into compliance with the Berne Convention by granting copyright protection to previously unprotected foreign works, subject to certain limitations. Writing for the majority, Justice Ginsburg rejected the contention that either the Copyright Clause or the First Amendment prevented Congress from copyrighting works that had once been in the public domain. In her discussion of the relationship between the Copyright Clause and the First Amendment, Justice Ginsburg suggested that the interests of both clauses were adequately protected by copyright’s traditional distinction between ideas and expression, and by the fair use doctrine, at least absent evidence that a copyright law violates generally applicable First Amendment principles, such as the requirement of viewpoint neutrality. Justice Breyer wrote a dissenting opinion, joined by Justice Alito. In their view, a statute withdrawing works from the public domain raises sufficient First Amendment interests to justify heightened scrutiny, which this statute could not survive. The ACLU took a similar position in its *amicus* brief.

HABEAS CORPUS

In *Cavazos v. Smith*, 132 S.Ct. 2 (Oct. 31, 2011)(6-3)(*per curiam*), the Court summarily reversed the Ninth Circuit’s decision to grant habeas relief based on insufficiency of the evidence on the grounds that the court of appeals gave insufficient deference to the state courts, as required by AEDPA, and insufficient deference to the jury, as required by *Jackson v. Virginia*, 443 U.S. 307 (1979). Justice Ginsburg dissented, joined by Justices Breyer and Sotomayor. Her principal point was that the tragic and contested facts of the case (a grandmother convicted of killing her grandchild based on an autopsy finding of shaken baby syndrome had already spent 10 years in prison) did not warrant certiorari even if the court of appeals decision was erroneous,

which she disputed. Her secondary point was that the Court should, at least, have granted plenary argument if it believed that certiorari was warranted.

In *Greene v. Fisher*, 132 S.Ct. 38 (Nov. 8, 2011)(9-0), the Court unanimously held that the determination of whether a state court has unreasonably applied Supreme Court law - a precondition to granting habeas relief under AEDPA - must be made by reference to the law as it existed at the time of the state court decision. Writing for the Court, Justice Scalia accordingly held that it is improper for a federal court to consider Supreme Court decisions announced after the final state court ruling, even if the time to petition for certiorari has not expired. The Court distinguished its holding from *Teague v. Lane*, 489 U.S. 288 (1989), which deals with retroactivity and not what Justice Scalia described as AEDPA's "relitigation bar." *Id.* at 44.

In *Gonzalez v. Thaler*, 132 S.Ct. 641 (Jan. 10, 2012)(8-1), the Court clarified two procedural rules governing federal habeas relief. First, the failure of a Certificate of Appealability (COA) to specify the substantial constitutional issue that warrants appeal when a habeas petition is denied by the district court is not jurisdictional, in contrast to the requirement for a COA prior to appealing, which is jurisdictional. Second, in cases in which a criminal defendant does not seek review in the state's highest court, the one year statute of limitations for filing a federal habeas petition begins to run when the time for seeking review in the state's highest court expires and not when the mandate issues from the lower state court that actually rendered a decision. The majority opinion was written by Justice Sotomayor.

In *Maples v. Thomas*, 132 S.Ct. 912 (Jan. 18, 2012)(7-2), the Court reinstated a habeas petition filed by a death row inmate in Alabama. The petition had been dismissed by both lower courts on the ground that petitioner was precluded from seeking federal habeas relief by his failure to meet a filing deadline in state post-conviction proceedings. Writing for the majority, Justice Ginsburg held that petitioner had been effectively abandoned by the lawyers representing him in his post-conviction proceedings, and that this abandonment constituted adequate cause to excuse his non-compliance with the state's procedural rules. The ACLU submitted an *amicus* brief arguing that the habeas petition had been improperly denied.

In *Martinez v. Ryan*, 132 S.Ct. 1309 (Mar. 20, 2012)(7-2), the Court declined to decide whether there is a right to competent counsel in state post-conviction proceedings. But, the Court held, in states where certain claims can only be raised for the first time in post-conviction proceedings, the failure to raise those claims due to the ineffective assistance of post-conviction counsel can be cause to excuse the procedural default that would otherwise bar federal habeas review. The issue arose in this case because Arizona does not allow challenges to the effectiveness of trial counsel to be raised on direct appeal; they can only be raised in state collateral proceedings.

In *Wood v. Milyard*, 132 S.Ct. 1826 (Apr. 24, 2012)(9-0), the Court unanimously held that a federal court of appeals, like a federal district court, has discretion to consider the timeliness of a federal habeas petition even if the state has not raised a statute of limitations defense. But, Justice Ginsburg concluded for the Court, it is an abuse of discretion to dismiss a habeas petition as untimely when the state has knowingly waived the statute of limitations.

In *Coleman v. Johnson*, 132 S.Ct. 2060 (May 29, 2012)(9-0), the Court summarily ruled that the evidence was sufficient to support defendant's conviction as an accomplice to murder, and that the Third Circuit therefore erred in granting a writ of habeas corpus under *Jackson v. Virginia*, 443 U.S. 307(1979). The Court stressed that two layers of deference were appropriate in a federal habeas proceeding when reviewing a claim of insufficiency of the evidence: first to

the jury and then to the state courts that upheld the conviction. “This deferential standard,” the Court wrote in a *per curiam* opinion, “does not permit the type of fine-grained factual parsing,” *id.* at 2064, engaged in by the Third Circuit.

In *Parker v. Matthews*, 2012 WL 2076341 (June 11, 2012)(9-0), the Court summarily reversed a decision by the Sixth Circuit granting a writ of habeas corpus in this murder case. In vacating the conviction, the Sixth Circuit had concluded that the Kentucky courts impermissibly required the defendant to carry the burden of proving that its actions were prompted by “extreme emotional disturbance.” It also ruled that the defendant’s due process rights were violated by certain prosecutorial comments during closing argument. In a *per curiam* opinion, the Court held that neither objection was valid. To the contrary, the Court described the Sixth Circuit’s decision as “a textbook example” of what AEDPA “proscribes.” *Id.* at ____.

Hardy v. Cross, 132 S.Ct. 490 (Dec. 12, 2011)(9-0) – see summary on p. 5.

FEDERAL CRIMINAL LAW

In *Reynolds v. U.S.*, 132 S.Ct. 975 (Jan. 23, 2012)(7-2), the Court held that sex offenders convicted before enactment of the federal Sex Offender Registration and Notification Act of 2006 (SORNA) were not subject to the Act’s registration requirements until the Attorney General exercised the authority granted by Congress to issue implementing guidelines, which happened seven months after the Act went into effect. Justice Breyer wrote the majority opinion.

In *Dorsey v. U.S.*, 2012 WL 2344463 (June 21, 2012)(5-4), the Court considered the retroactive effect of the Fair Sentencing Act, which reduced the disparity in federal sentencing between crack and powder cocaine from 100:1 to 18:1. Writing for the majority, Justice Breyer held that the new sentencing rules apply to all sentences imposed after the Act went into effect, even if the underlying conduct occurred before that date. Justice Breyer based his decision on “the language, structure, and basic objectives” of the Act, *id.* at ____, although the opinion notably omits any discussion of the racial disparities created by the old law, even though those racial disparities figured prominently in the congressional debates. The ACLU submitted an *amicus* brief urging retroactive application of the new sentencing rules.

FEDERAL CRIMINAL PROCEDURE

In *Martel v. Clair*, 132 S.Ct. 1276 (Mar. 5, 2012)(9-0), the Court unanimously held that a motion for substitution of counsel in a capital case under 18 U.S.C. § 3599 should be decided based on the “interests of justice,” as petitioner had argued in this habeas proceeding. But, writing for the Court, Justice Kagan then concluded that the district court’s denial of substitution did not offend the “interests of justice” on the particular facts of this case, although she noted that district courts addressing a substitution motion should normally do more of an inquiry into the reasons for the motion than the district court did in this case.

In *Setser v. United States*, 132 S.Ct. 1463 (Mar. 28, 2012)(5-3), the Court held that federal sentencing laws allow a district judge to determine whether a federal sentence will run consecutively or concurrently with an anticipated state sentence. Writing for the majority, Justice Scalia rejected the alternative proposed in this case by both the defendant and the government – that the Bureau of Prisons is the appropriate decisionmaker when the state sentence is not actually imposed until after the defendant has been sentenced in federal court.

PATENTS

In *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S.Ct. 1289 (Mar. 20, 2012)(9-0), the Court unanimously invalidated a patent purporting to cover the effect that certain drugs have on a patient's metabolism. More specifically, the patent described the correlation between certain metabolites in the blood and the toxicity or efficacy of certain thiopurine compounds used to treat Crohn's disease and colitis. In a broadly worded opinion written by Justice Breyer, the Court held that the patent claim merely described a law of nature, and that laws of nature were not patentable under § 101 of the Patent Act. As Justice Breyer explained, "to transform an unpatentable law of nature into a patent-eligible *application* of such a law, one must do more than simply state the law of nature while adding the words 'apply it.'" *Id.* at 1290. The ACLU submitted an *amicus* brief urging the Court to invalidate the patents.

JURISDICTION

In *Mims v. Arrow Financial Services*, 132 S.Ct. 740 (Jan. 18, 2012)(9-0), the Court unanimously ruled that the Telephone Consumer Protection Act of 1991 authorizes consumer suits in federal court. Although the Act explicitly refers only to state court actions, Justice Ginsburg, writing for the Court, noted that the cause of action "arises under federal law" and declined "to read into the TCPA's permissive grant of jurisdiction to state courts any barrier to the U.S. district courts' exercise of the general federal-question jurisdiction they have possessed since 1875." *Id.* at 745.

In *Elgin v. Dep't of the Treasury*, 2012 WL 2076340 (June 11, 2012)(6-3), the Court held that a federal employee's claim that he was discharged from his civil service job based on an unconstitutional statute must first be raised with the Merits Systems Protection Board even though the MSPB has no authority to rule on the constitutionality of a federal law. Writing for the majority, Justice Thomas recognized that a statute that barred any federal judicial review of a constitutional claim would raise serious constitutional issues; but, he held, that principle does not apply here because the employee can obtain the constitutional review he seeks on appeal to the Federal Circuit. Justice Alito dissented. He argued that it was unlikely that Congress intended the odd result "of requiring [constitutional] claims to be filed initially before the [MSPB], which can do nothing but pass them along unaddressed, leaving the Federal Circuit to act as a court of first review, but with little capacity for factfinding." *Id.* at ____.

In *Sackett v. EPA*, 132 S.Ct. 1367 (Mar. 21, 2012)(9-0), a unanimous Court held that a landowner subject to a compliance order from the EPA can seek judicial review under the Administrative Procedure Act without waiting for the agency to begin an enforcement action.

PREEMPTION

In *Douglas v. Independent Living Center*, 132 S.Ct. 1204 (Feb. 22, 2012)(5-4), the question presented to the Court was whether Medicaid providers and recipients could bring a Supremacy Clause challenge to California's reimbursement rates on the theory that they were inconsistent with the federal Medicaid Act. Writing for the majority, Justice Breyer noted that the challenged state rates had been approved by the federal government since certiorari was granted and strongly suggested that the appropriate route to now challenge that agency decision was by seeking judicial review under the Administrative Procedure Act. The majority nonetheless remanded the case to the court of appeals without deciding whether and under what circumstances private parties can enforce the Medicaid Act through Supremacy Clause litigation. Chief Justice Roberts wrote the dissent, arguing that the majority had lost the courage of his

convictions and should just have held that there is no Supremacy Clause claim when Congress has not provided a private right of action in the underlying statute. The ACLU submitted an *amicus* brief arguing that the Supremacy Clause claim should be allowed to proceed, as the Court had done many times in the past.

Arizona v. U.S., 2012 WL 2368661 (June 25, 2012)(5-3) – *see* summary on p. 8.

POLITICAL QUESTION DOCTRINE

In *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (Mar. 26, 2011)(8-1), the Court held that the political question doctrine does not bar courts from adjudicating the constitutionality of a federal statute directing that an American child born in Jerusalem is entitled to have Israel listed as her place of birth in her U.S. passport. Writing for the majority, Chief Justice Roberts concluded that the lower courts had mischaracterized the issue presented by this litigation. The relevant question, he noted, is not whether Jerusalem should be recognized as part of Israel but whether the statute passed by Congress is a constitutional one. As to that question, he wrote: “Resolution of Zivotofsky’s claims demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and the passport and recognition powers. This is what courts do.” *Id.* at 1430.

ARBITRATION

In *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (Jan. 10, 2012)(8-1), the Court held that plaintiff had waived his right to sue in federal court for violations of the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679, *et seq.*, by signing a standard credit card agreement that contained a mandatory arbitration provision. Writing for the majority, Justice Scalia held that the arbitration clause was presumptively enforceable under the Federal Arbitration Act unless Congress had clearly indicated to the contrary. The Court then held that Congress had not done so in CROA even though the statute guarantees consumers “a right to sue.” In the view of the majority, that right is satisfied by arbitration proceedings.

In *Marmet Health Care Center v. Brown*, 132 S.Ct. 1201 (Feb. 21, 2012)(9-0), the Court issued a *per curiam* holding that state law rules categorically exempting a category of cases from arbitration are preempted by the Federal Arbitration Act and, on that basis, summarily reversed a decision of the West Virginia Supreme Court which had held that claims of personal injury or wrongful death brought against nursing homes were categorically exempt from arbitration even if the nursing home resident had signed an agreement with an arbitration clause upon admission to the home. The state court’s opinion was unusual for its open disregard for Supreme Court precedent. In response, the Supreme Court wrote: “When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.” *Id.* at 1202 (citing the Supremacy Clause).

ATTORNEY’S FEES & COSTS

In *Taniguchi v. Kan Pacific Saipan, LTD*, 132 S.Ct. 1997 (May 21, 2012)(6-3), the Court held that federal law, which allows the recovery of costs for the “compensation of interpreters,” does not include the cost of translating documents. Writing for the Court, Justice Alito looked to the ordinary meaning of the term “interpreters” and concluded that it is normally limited to oral translation. He then found no reason in the text or its history to depart from the ordinary meaning.