



Alliance for Justice Supreme Court Review
Analysis of the 2008-2009 Term

The Supreme Court concluded its Term – Justice Souter’s last – on June 29, 2009. When the Court reconvenes, barring some unforeseeable event, Sonia Sotomayor will be sitting as its newest Associate Justice.

The most consistent theme of the Term was the regularity with which Chief Justice Roberts and Justice Alito voted against claims of discrimination, against criminal defendants, against the environment and in favor of federal preemption of state law. Nobody should be surprised that they have proven as ideologically conservative as the records they compiled before joining the Court suggested they would be. Interestingly, Justices Scalia and Thomas, while remaining on the far right on most issues, each broke ranks regarding searches and seizures and preemption and demonstrated that, unlike the Chief Justice and Justice Alito, they are sometimes driven by principles that transcend the desire to reach a designated result in the case before them. As in recent Terms, Justice Kennedy was the Court’s most frequent swing vote. Unfortunately, he swung to the right far more often in the Court’s most important cases.

The most ominous theme of the Term was the repeated planting of bombs by the Roberts wing of the Court designed to detonate in future Terms as the conservatives relentlessly drag the Court to the right. Whether in preparing to throw out the Voting Rights Act, eliminating disparate impact violations under the civil rights acts, dismantling campaign finance law, or further eroding the rights of criminal defendants, the ultra-conservatives let it be known that they will attempt to change drastically our legal landscape. The reactionary and radical judicial activism of these justices threatens to restrict the liberty and opportunities of the American people.

The best news from the Term was the Court’s retreat from its recent efforts to use federal preemption as a barrier to block the state law claims of injured parties. The following discusses some of the Court’s major decisions.

Civil Rights

The five conservatives continued their drive to dismantle hard-won protections against discrimination. In one of its most closely watched decisions, *Ricci v. DeStefano*, 557 U.S. ___, 2009 U.S. LEXIS 4945 (June 29, 2009), the Court held 5-4 that the City of

New Haven could not refuse to certify the results of a written test for promotion of firefighters. The City had sought to scrap the test results after it appeared that no African Americans and only one Hispanic would qualify for promotion. Title VII has long prohibited reliance on tests that have a racially disparate impact unless they are shown to be related to the job, consistent with business necessity, and there are no less discriminatory alternatives. Title VII has also long been interpreted to encourage voluntary compliance by employers with the disparate impact standard. New Haven, therefore, was acting in accordance with longstanding civil rights law and the policy of voluntary compliance when it cancelled the test results.

Since 1971, when the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 to prohibit disparate impacts, the statute has been particularly effective in desegregating police and fire departments. Major cities entered consent decrees in the 1970's and 1980's that for the first time opened significant numbers of jobs to minorities and produced police and fire departments that were more effective because they looked like the communities they served. The disparate impact standard also improved the quality of hiring by ensuring that employers focused on finding applicants whose abilities matched the jobs for which they were being hired.

In New Haven, however, white firefighters, joined by one Hispanic, who would have been eligible for promotion based on the results of a written test, sued to have the test results certified, arguing that they were victims of racial discrimination because the City had taken race into account in its decision to throw out the results. In other words, they argued, the City's effort to comply with Title VII amounted to unlawful racial discrimination. The district court, relying on established law, granted summary judgment against the white firefighters, and a panel of the Second Circuit, including Judge Sotomayor, affirmed in a summary opinion. The Second Circuit voted not to hear the case en banc, but the Supreme Court granted certiorari.

Unfortunately, it was not surprising that the five conservatives on the Court voted to reverse the Second Circuit, holding that the City's effort to comply with Title VII had subjected the white firefighters to racial discrimination. The majority sought to cloak its decision in the public empathy for one of the white firefighters, Frank Ricci, who had taken extraordinary steps to overcome his dyslexia in preparing for the exam. *Ricci*, however, represents the latest step in the war that anti-civil rights ideologues have waged against the disparate impact standard since 1971. The standard was a principal target of Ronald Reagan's Department of Justice in the 1980's when young hard-right ideologues, including John Roberts and Samuel Alito, sought ways to cut back on the effectiveness of civil rights enforcement. Their presence on the Court, along with Justices Scalia and Thomas, neither of whom has any tolerance for civil rights claims brought by minorities, and Justice Kennedy, who has generally proven hostile to the rights of racial minorities, does not bode well for the future of Title VII's disparate impact standard.

Fortunately, the *Ricci* decision is not as bad as it could have been. The Court could have adopted the view Justice Scalia laid out in his concurring opinion, that they

should strike down Title VII's disparate impact standard altogether as inconsistent with the Fourteenth Amendment's Equal Protection Clause.

The Court went to unseemly lengths to guarantee a ruling in favor of the white plaintiffs. Although it announced a new standard that had never been applied in Title VII cases as the basis for its decision, it broke from its usual practice in such situations of sending the case back to the lower courts to apply the new standard to the facts of the case in the first instance. The Court was so eager to ensure that the white firefighters would prevail that it entered summary judgment itself, thereby denying New Haven the opportunity to produce facts that would satisfy the new standard.

In a second major case involving racial discrimination, the Court reinterpreted the Voting Rights Act of 1965 to allow small jurisdictions to escape the requirements of Section 5 of the Act, which requires covered jurisdictions to preclear all voting changes with the Department of Justice or a three-judge court in the District of Columbia. The case, *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. ___, 2009 U.S. LEXIS 4539 (June 22, 2009), was viewed as a victory by some civil rights advocates only because, based on the performance of the conservative members of the Court at oral argument, the Court was widely expected to hold Section 5 unconstitutional. However, the Court's opinion, which was joined by eight justices, discusses in detail the constitutional infirmities of Section 5, even though it has repeatedly been found constitutional. Indeed, Section 5 was renewed by Congress less than three years ago following the compilation of a massive legislative record documenting the continuing need for Section 5 as a bulwark against racial discrimination in voting. The conservative justices, however, made it clear at oral argument that they were eager to overturn the judgment of Congress and strike down the law. The Court's opinion has been widely interpreted as sending a message to Congress to revisit the law or have it struck down the next time it reaches the Court.

Two significant questions emerge from the decision. First, why did the five conservatives stop short of striking the law down? One possible answer is that Justice Kennedy, who is regarded as caring a great deal about his legacy, was not ready to take that momentous step so long as an alternative ground for decision existed. A second possibility is that the Chief Justice recognized the blow that such a holding would strike against the legitimacy of the Court. The Voting Rights Act is the crown jewel of the nation's civil rights laws that has just been renewed by Congress. Even an activist Chief Justice with a deep-seated hostility to minority claims of discrimination must realize that the political branches, which are dominated by supporters of the Voting Rights Act, would likely react in ways that could damage the Court. The response to the Court's stunning rejection of Lily Ledbetter's meritorious claim of pay discrimination may have been fresh in his mind.

The second intriguing question is why the four less conservative justices, all of whom can be expected ultimately to vote to uphold Section 5, signed on to the Chief Justice's opinion. One possibility is that they wanted to join in sending a message to Congress in the hope that Congress would respond in time to save Section 5. Another

possibility is that their willingness to sign on prevented Justice Kennedy from voting to strike down the Act or from writing a separate opinion.

In another important discrimination case, the Court made it considerably more difficult for victims of age discrimination to prevail in court. The Court granted certiorari in *Gross v. FBL Financial Services*, 557 U.S. ___, 129 S. Ct. 2343 (2009), to decide the narrow question whether a plaintiff in an age discrimination case had to produce direct evidence of discrimination in order to obtain a “mixed motive” instruction to a jury. Instead, however, the unrestrained conservatives on the Court took the much larger step of untethering the Age Discrimination in Employment Act from Title VII of the Civil Rights Act of 1964 and imposing a new, tougher standard for ADEA plaintiffs to meet. The Court held that the plaintiff would have to prove that age was the “but for” cause of the discrimination and would bear the evidentiary burden of production on each element.

The Court also struck a blow against victims of discrimination by upholding the validity of a clause in a collective bargaining agreement requiring the submission of statutory discrimination claims to arbitration. *14 Penn Plaza LLC v. Pyett*, 556 U.S. ___, 129 S. Ct. 1456 (2009). Such agreements thwart the will of Congress in enacting civil rights protections. They undermine the protection of civil rights by preventing victims from getting to court or using the leverage of a potential court claim to obtain appropriate relief

Finally, in *AT&T v. Hulteen*, 556 U.S. ___, 129 S. Ct. 1962 (2009), the Court enforced the effects of entrenched discrimination against women by holding that employers need not include in calculations for retirement benefits maternity leave taken before passage of the Pregnancy Discrimination Act in 1978. Over a vigorous dissent by Justice Ginsburg, the Court held that before 1978 employers were under no obligation to credit such leave.

By contrast, in a bit of good news for victims of discrimination, the Court appropriately held that Title IX was not the exclusive remedy for sexual harassment of a student and that constitutional claims could be pursued as well. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. ___, 129 S. Ct. 788. And in *Crawford v. Metropolitan Government of Nashville*, 555 U.S. ___, 129 S. Ct. 846 (2009), the Court held that Title VII prohibits retaliation against workers who voice opposition to discriminatory practices or who participate in any type of investigation conducted under the statute.

In the education area, the Court’s record was mixed. In *Horne v. Flores*, 557 U.S. ___, 2009 U.S. LEXIS 4733 (June 25, 2009), the Court cut back on Arizona’s obligation to assist students of limited English proficiency, but in *Forest Grove School District v. T.A.*, 557 U.S. ___, 2009 U.S. LEXIS 4645 (June 22, 2009), it upheld the obligation of a school district to reimburse parents for the cost of sending a child with special needs to a special school for services that were unavailable in public school, even though the child had never attended public school. Finally, in *Safford Unified School District #1 v. Redding*, 557 U.S. ___, 2009 U.S. LEXIS 4735 (June 25, 2009), the Court held that school authorities violated the Fourth Amendment right of a 13-year old girl who was

suspected of having ibuprofen. The Court, however, denied her relief, holding unconvincingly that the law was unsettled and the school officials were therefore immune from liability.

Judicial Integrity

In a curious decision that may prove to be an outlier, the Court held that the failure of the Chief Justice of the West Virginia Supreme Court to recuse himself violated the due process rights of a party whose opponent had invested roughly \$3 million dollars to elect the Chief Justice to the court. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S. Ct. 2252 (2009). While the dissenters, led by Chief Justice Roberts, fulminated about the impossibility of establishing a workable standard for determining such due process violations, the majority correctly found the West Virginia Chief Justice's participation intolerable. Any other decision would have left an obvious injustice in place and could only have harmed the legitimacy of the justice system. The facts in this case were so egregious that it was possible to find a violation and put off until future cases the definition of the precise contours of the right.

Criminal Law

In the criminal area, defendants generally – but not uniformly – lost as the Roberts Court took aim at Warren Court precedents. In a high-profile case, *District Attorney's Office v. Osborne*, 557 U.S. ___, 129 S. Ct. 2308 (2009), the Court refused to find that defendants had a constitutional right to gain access to DNA evidence for purposes of a post-conviction petition. The defendant had agreed to pay for the testing and simply needed Alaska to give him the evidence. In light of advances in DNA testing and its reliability in determining innocence, it is essential that all defendants have access to tests that might prove conclusive. Fortunately, a majority of states are providing such access.

In *Herring v. United States*, 555 U.S. ___, 129 S. Ct. 695 (2009), the Court weakened protections against searches and seizures by holding that it was not necessary to exclude evidence that had been obtained pursuant to a warrant based on erroneous evidence that was negligently supplied by a police clerk. The opinion suggests a broader trend toward allowing the use of evidence obtained through police negligence. This decision continues what appears to be the Roberts Court's inexorable march toward allowing the use of any evidence as long as it was not obtained in bad faith.

The Court also expanded the relative power of the state in criminal investigations and prosecutions. In *Van de Kamp v. Goldstein*, 555 U.S. ___, 129 S. Ct. 855 (2009), it strengthened the immunity from prosecution that prosecutors enjoy. It also expanded the stop and frisk power of the police in *Arizona v. Johnson*, 555 U.S. ___, 129 S. Ct. 781 (2009), and overruled a longstanding precedent to make it easier for police to obtain a waiver of counsel from suspects in *Montejo v. Louisiana*, 556 U.S. ___, 129 S. Ct. 2079 (2009). Defendants did, however, prevail in restraining the power of the police to search a vehicle seized in the course of an arrest in *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct.

1710 (2009), and in convincing the Court that the crime of failing to report to prison was not a crime of violence for purposes of sentencing in *Chambers v. United States*, 555 U.S. ___, 129 S. Ct. 687 (2009).

The Environment

Perhaps the Term's most consistent losers were defenders of the environment. The Court ruled in five environmental cases and ruled against the plaintiffs in every one. All five cases drew strong dissents that would have resulted in more protection for the environment, but the addition of Chief Justice Roberts and Justice Alito to the Supreme Court solidified an anti-environment voting bloc and makes it unlikely that a pro-environment position will prevail in the foreseeable future.

In a decision that could have far-ranging consequences for access to justice, the Court made it more difficult for organizations to bring cases challenging an agency's failure to follow procedures or rules. In *Summers v. Earth Island Institute*, 555 U.S. ___, 129 S. Ct. 1142 (2009), environmental organizations challenged the United States Forest Service's regulations that permitted small fire-rehabilitation and timber-salvage projects – decisions that individually affect limited areas, but that collectively have a large impact – without going through the usual notice and comment procedures. The Court held that a person or group can only sue if they show that they will suffer a “concrete injury” resulting from a government decision – it was not enough for the environmental groups to show that they had hundreds of thousands of members who use and enjoy forest land, some of which would likely be impacted by the Forest Service's regulations.

Similarly, in a decision that will likely reduce the number and scope of clean-ups of polluted areas all over the country, the Court narrowed the scope of the Superfund statute in an opinion that makes it harder to sue based on a theory that a person “arranged” for the disposal of hazardous waste and makes it harder to recover the full cost of cleaning up a polluted site. The decision was *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. ___, 129 S. Ct. 1870 (2009), and the court revisited what many thought were settled areas of environmental law. First, this case imposes a requirement that a person or entity have an “intent to dispose” of hazardous waste in order to be liable as an arranger – a requirement that courts heretofore had not imposed. Second, for decades, the general rule in environmental litigation has been joint and several liability for polluters, meaning that any polluter could be responsible for the entire cost of clean-up and then it would be up to the polluter to find other responsible parties to contribute to the cost. The Supreme Court's decision in *Burlington Northern*, however, makes it much easier for a polluter to argue that it should only be responsible for a portion of the clean-up.

In a pair of decisions that pitted business interests against environmental groups, the Supreme Court sided with the business interests. In *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. ___, 129 S. Ct. 1498 (2009), a case that overturned a Second Circuit decision penned by Judge Sonia Sotomayor, the Court ruled that the Environmental Protection Agency could take cost into account when determining what measures a

company must implement when a statute requires that “the best technology available for minimizing adverse environmental impact” be used. And in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. ___, 2009 U.S. LEXIS 4730 (June 22, 2009), the Court ruled that mining waste could be dumped into lakes if a permit was obtained from the United States Army Corps of Engineers, even though this practice is prohibited by the Environmental Protection Agency regulations.

And finally, a majority of the Court made clear that it favors the military over the environment. In *Winter v. Natural Resources Defense Council*, 555 U.S. ___, 129 S. Ct. 365 (2008), the Supreme Court overturned the Ninth Circuit and the District Court and permitted naval exercises to go forward even though environmental groups presented evidence that large numbers of marine mammals would be harmed. Justice Ginsburg, writing for the dissent, emphasized that the Navy sought to circumvent its obligation under the National Environmental Policy Act to prepare an Environmental Impact Statement before engaging in training exercises and the environmental groups thus showed “almost inevitable success on the merits.” The majority, however, ignored the Navy’s clear statutory violation and concluded that the government and public’s interest in realistic training exercises for sailors outweighs irreparable injury to marine life.

Federal Preemption of State Law

Fortunately, there is one area in which the Court took an unmitigated turn for the better: federal preemption of state law. The Court decided three cases involving preemption and held in each that federal law did not prevent the plaintiff from pursuing a state law action. In *Wyeth v. Levine*, 555 U.S. ___, 129 S. Ct. 1187 (2009), the Court held 6-3 that federal law did not preempt a claim that Wyeth had not adequately warned patients of the dangers of directly injecting Phenargen, a treatment for migraines, rather than using an IV drip. Diana Levine was injected and some of the drug entered an artery, causing her to develop gangrene and eventually necessitating the amputation of her arm. The majority opinion written by Justice Stevens held that FDA approval of the warning label did not insulate Wyeth from state law claims. Justice Thomas joined in the result on the broad ground that he will no longer vote favorably on implied preemption claims. Rather, Congress must make clear its intent to preempt state law.

In *Altria Group, Inc. v. Good*, 555 U.S. ___, 129 S. Ct. 538 (2008), the Court allowed a state law challenge to the marketing of “light” cigarettes to proceed, holding that neither the Federal Cigarette Labeling and Advertising Act nor the regulatory actions of the Federal Trade Commission preempted state claims that cigarette manufacturers had made fraudulent claims in marketing these cigarettes.

And, finally, in *Cuomo v. Clearing House Ass’n LLC*, 557 U.S. ___, 2009 U.S. LEXIS 4944 (June 29, 2009), the Court held that a regulation issued pursuant to the National Bank Act did not preempt an investigation by the New York Attorney General into possible violations of the state’s fair lending laws. The New York Attorney General sought to rely on state law to investigate several national banks based on publicly available data that the banks had targeted minority borrowers for high interest loans. In

an unusual alignment, Justice Scalia joined the four less conservative members of the Court to allow the investigation to proceed. The decision was a victory both for state law and for civil rights advocates, since the resources for federal oversight of predatory lending are woefully deficient and state laws provide an essential basis for enforcement.

Campaign Finance

In a final, surprising and unusual move, the Court held over *Citizens United v. Federal Election Commission* for reargument on September 9, 2009. 2009 U.S. LEXIS 4962 (June 29, 2009). The case involves the question of whether a 90-minute movie critical of Hillary Clinton that was to be aired in theatres and on cable-on-demand during election season fell within the disclosure and disclaimer provisions of the Bipartisan Campaign Reform Act of 2002. Rather than decide the case based on the issue initially presented, the Court has ordered the parties to submit new briefs addressing the following question: “For the disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?” The implications of the order are not clear at this point, but the Court’s suggestion that it may issue a broad ruling overturning key campaign finance precedents may result in a major constitutional shift in campaign finance law.

Conclusion

Based on the Alliance for Justice’s analyses, it is difficult to predict whether Sonia Sotomayor’s addition to the Court will produce significant change. An analysis of her seventeen years on the bench suggests that she might prove slightly less sympathetic to the rights of defendants in criminal cases, more inclined toward awarding damages to plaintiffs in cases against big business, and largely in line with Justice Souter in other areas. Of course, Judge Sotomayor has been bound by Supreme Court and Second Circuit precedent throughout her career, making it impossible to predict with confidence how she will rule once she sits on the Supreme Court herself. She has, however, written frequently in her opinions about the limited role of a judge and has consistently approached change in the law in a very restrained and incremental fashion.

Her very presence on the Court, however, may have a “Marshall effect.” Justices who sat with Justice Thurgood Marshall have noted that his mere presence in conference and on the bench changed the conversation among the justices and informed their decisions. As the Court’s first “wise Latina,” Judge Sotomayor may have a similar effect. We can only hope that her influence will be felt by the five conservatives on the Court who are intent on dismantling our fundamental civil rights, environmental, criminal, and statutory protections.

Appendix: Summaries of Selected Cases from the 2008-09 Supreme Court Term

Ricci v. DeStefano, 557 U.S. ____ (2009).

In *Ricci v. DeStefano*, the “white firefighter” case, the five conservative justices announced a new interpretation of Title VII employment discrimination law that breaks with Supreme Court precedent, Congress’s intent, and employers’ ability to voluntarily remove barriers that have historically operated to exclude minorities. By a 5-4 vote, the Supreme Court found that the City of New Haven’s refusal to certify the results of its test for firefighter promotions, which disproportionately eliminated African American and Hispanic candidates, intentionally discriminated against white firefighters in violation of Title VII. Writing for the majority, Justice Kennedy concluded that, no matter how well-intentioned the City’s ultimate aim, it made an employment decision “because of race” and therefore violated Title VII. The Court’s *Ricci* ruling is the latest chapter in the efforts of right-wing ideologues to eviscerate our antidiscrimination laws.

Contrary to its depiction in the press, this case was not about affirmative action. Rather, *Ricci* involved an employer’s effort to voluntarily comply with the disparate impact provisions of Title VII. In 1971, in *Griggs v. Duke Power Co.*, a unanimous Supreme Court held that Title VII prohibited employment practices that had a disparate impact on minorities and were not necessary for the job. *Griggs* launched a generation of progress that uprooted entrenched discrimination and desegregated many of our nation’s major police and fire departments. In 1991, after the Supreme Court had tried to restrict disparate impact enforcement, Congress enacted a bipartisan amendment to Title VII that explicitly incorporated the disparate impact standard into the text of the statute. In *Ricci*, the five conservative justices departed from settled law and created a new standard that undercuts the efforts of employers to comply with disparate impact law: New Haven needed a “strong basis in evidence” before it could reject the results of a test that had the overwhelming effect of excluding African-Americans and Hispanics from promotion in the fire department. Without such a showing, the Court ruled, New Haven’s rejection of the results amounted to intentional discrimination on the basis of race.

The obligations of Title VII remain in full effect after *Ricci*, but the Court’s decision is bound to serve as a disincentive to employers who want to voluntarily comply with Title VII but don’t want to undergo the difficult and costly burden – both financially and politically -- of proving that they violated Title VII. New Haven threw out the test because it made a good faith determination that implementing its results would violate Title VII’s disparate impact provision. As Justice Ginsburg wrote for the four dissenters, none of the plaintiffs in this case was denied a job to which he was entitled; no one has a right, statutory or otherwise, to be hired under a flawed selection process. The record, as cited by Justice Ginsburg, points to different promotional tests used by other cities that proved effective without discriminatory impact. However, under the new “strong basis in evidence” standard announced by the Supreme Court, before it could withdraw the test and start over by searching for a less discriminatory alternative, New Haven was required to *prove a case against itself* and establish that it had committed a disparate impact violation. An employer is now damned if it does and damned if it doesn’t: an employer

may be liable for intentional discrimination if it throws out a test with a disparate impact; but it might still face litigation for discriminatory impact if it keeps the discriminatory test.

Much has been made in the news about *Ricci* because Judge Sotomayor, President Obama's nominee to the Supreme Court, sat on the Second Circuit panel that issued the summary opinion reversed by the Supreme Court. Nothing about the Supreme Court's decision – which exemplifies the conservative justices' willingness to exercise their judicial muscle to reshape the law according to their ideology – should affect Judge Sotomayor's nomination. The Second Circuit panel applied existing precedent that dictated deference to local officials' efforts to voluntarily comply with civil rights law and reached the same conclusion as three other courts that considered the issue. The conservative majority demonstrated its willingness to break with precedent and create new law. Moreover, in a striking departure from basic principles governing appellate review, the Court reversed *Ricci* outright, rather than remanding the case back to the lower courts to apply the new standard to the facts. The Court's eagerness to impose its judgment was unseemly. Equally disturbingly, in his concurrence, Justice Scalia appeared eager for the day when the Court could invalidate Title VII's disparate impact standard as inconsistent with the Equal Protection Clause.

Fire departments around the country, including New Haven's, have a long history of discriminatory hiring that excluded people of color and women. Title VII has served as an important tool to undo decades of discriminatory practices and its fundamental requirements remain intact. But the *Ricci* majority has erected a major obstacle to voluntary compliance with the law.

Responsibility now falls to the executive branch – through the Department of Justice, the EEOC, and the Department of Labor – to craft new guidance that will minimize the damage inflicted by the Court's ruling and ensure that Title VII's protections remain robust. If that fails, Congress may yet again have to step up to the plate to make sure that Title VII fulfills its promise of achieving true equality of employment opportunities.

***Northwest Austin Municipal Utility District v. Holder*, 557 U.S. ____ (2009).**

The Supreme Court came within a hair's breadth of striking down a key provision of the Voting Rights Act ("VRA"), which is often described as the nation's most effective and arguably most important civil rights law. In an 8-1 decision, the majority walked to the precipice before resolving the case on an alternative ground, but it issued a warning to Congress that the Act raised serious constitutional concerns.

Section 5 of the Voting Rights Act requires designated jurisdictions with a history of discrimination to preclear changes to their voting procedures to ensure that the changes will not result in discrimination. Section 5 was first enacted in 1965 and was renewed by Congress in 1970, 1975, 1982 and 2006. In 2006, Congress held 21 hearings and amassed a 16,000 page record documenting the continued need for Section 5.

The Northwest Austin Municipal Utility District Number One (“NAMUDNO”) sued the Attorney General seeking to bailout from the coverage of Section 5 or, in the alternative, for a declaration that Section 5 was an unconstitutional exercise of Congress’s power pursuant to the 14th and 15th Amendments. NAMUDNO is a utility district created by the state of Texas to provide utility services in a portion of Austin, TX. According to the Department of Justice’s longstanding interpretation of the bailout provision of the VRA, NAMUDNO was ineligible to seek a bailout because it did not register voters.

At oral argument in April, the Chief Justice and Justices Scalia, Kennedy and Alito expressed strong reservations about Congress’s basis for renewing Section 5, suggesting that conditions in covered jurisdictions have changed, but Congress did not change the formula for determining which jurisdictions would be covered. Justices supportive of Section 5 countered that Congress had compiled a strong record of continuing discrimination in covered jurisdictions and Congress has broad power to enforce the guarantees of the post-civil war amendments. It was widely believed after the argument that if the Chief Justice could convince Justice Kennedy to join the four other conservatives, they would invalidate Section 5.

The Court, however, pulled up short. Rather, it disingenuously reinterpreted the bailout provision of the law to permit NAMUDNO to seek a bailout. In doing so, it overcame its own precedent, the interpretation of the Department of Justice, and the plain language of the statute to reach its result. The opinion should put to rest any suggestion that the more conservative members of the Court believe in strict interpretation of statutory text. In addition, though, the Chief Justice, writing for the majority, described the constitutional concerns raised by Section 5 and seemed to be sending a pointed warning to Congress that unless it acted Section 5 was unlikely to survive a second look by the Court. The four less conservative members of the Court joined the majority opinion. Only Justice Thomas dissented, stating that he would have held Section 5 unconstitutional.

Why did the conservatives pull up short? The most likely explanation is that Justice Kennedy was not ready to strike down the provision so long as an alternative solution was available. Others have speculated that the conservatives led by the Chief Justice recognized the iconic nature of the Voting Rights Act and feared the damage that they might inflict on the Court in a climate in which Democrats control the White House and large majorities in Congress and would be able to respond quickly and harshly to a decision undermining the Voting Rights Act. It is also worth noting that striking down Section 5 shortly after its enactment by a Congress that compiled an enormous body of evidence would be an extraordinary act of judicial arrogance, particularly since the texts of the 14th and 15th Amendments explicitly give Congress authority to enforce the Amendments.

Why, though, would the four less conservative members of the Court sign on to the Chief Justice’s opinion? Possibly, they, too, wanted to send a message to Congress

that it should act and should do so now while Democrats control Congress. Or, they may have signed on to keep Justice Kennedy from joining the other conservatives in striking down Section 5, or even to keep him from writing a separate opinion.

The immediate outcome will surely be an increase in the number of jurisdictions seeking to bailout from Section 5 coverage. It is likely that the Department of Justice will encourage increased bailout activity as a safety valve that will enhance Section 5's chances of withstanding constitutional scrutiny.

At this point, it appears unlikely that Congress will revisit the VRA unless it is to incorporate the Court's new bailout provision in the Act and otherwise make bailout more accessible. There is no possibility that Congress will attempt to negotiate and enact a new coverage formula. The political complexity would be insurmountable.

Gross v. FBL Financial Services, Inc., 557 U.S.____, (2009).

In what Justice Stevens called an “unabashed display of judicial lawmaking,” the five conservative justices took it upon themselves to severely limit an employee plaintiff's ability to prove discrimination on the basis of age. The simple question presented in the case *Gross v. FBL* was whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act (ADEA). Justice Thomas, writing for the majority, readily admitted that instead of reviewing the question presented, the majority decided to address a much broader, more significant question that was not raised in the petition for certiorari or fully briefed by the parties: whether a plaintiff can ever bring a “mixed motives” claim under the ADEA, alleging that he or she suffered an adverse employment action because of both permissible and impermissible considerations. To reach its ideologically driven answer – a resounding No – the majority ignored Supreme Court procedure, manipulated and undermined its own precedent, and brazenly repudiated the will of Congress.

In *Gross*, the petitioner sued his employer alleging intentional age discrimination in violation of the ADEA, asserting he was demoted because of his age. The defendant employer denied that it took Gross's age into account and argued that, even if it did, it had legitimate business reasons for changing Gross's position. Both the district court and the Eighth Circuit reviewed Gross's claim within the framework for proving “mixed motives” cases under Title VII established by the Supreme Court twenty years ago in the case *Price Waterhouse v. Hopkins*. Six Justices agreed in *Price Waterhouse* that if a Title VII plaintiff shows that discrimination was a “motivating factor” in the employer's action – that is, if it “played a part or a role” in the employer's decision – then the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of that impermissible consideration. Congress amended Title VII two years later by explicitly authorizing discrimination claims in which an improper consideration was a “motivating factor” for an adverse employment decision. Title VII and the ADEA

contain identical language prohibiting discrimination “because of” race, sex, or age, and Courts of Appeals have unanimously applied *Price Waterhouse* to the ADEA.

The only question in Gross’s case was whether he had to produce direct, as opposed to circumstantial, evidence to establish a prima facie case and shift the burden of persuasion to his employer. In a stunning display of judicial overreach, Justice Thomas boldly announced that the ADEA is no longer governed by Title VII decisions like *Price Waterhouse*. According to the five conservatives, the ADEA does not authorize a mixed-motives age discrimination claim, and the burden of persuasion never shifts to the employer to show the inconsequence of its discriminatory motive. The majority announced a stringent new standard that will severely impede a plaintiff’s ability to prove an age discrimination claim. Instead of showing that he was discriminated against “because of” his age, as the language of the ADEA instructs, a plaintiff must now prove that age was the “but-for” cause of an adverse employment discrimination. The problem with the more stringent “but-for” standard, which is ordinarily used to analyze questions of physical causation in tort cases, is that a plaintiff will have an exceedingly difficult time showing that an employer’s nuanced motivations were the sole and direct cause of an adverse employment decision. Moreover, the “but-for” standard was explicitly rejected by the Supreme Court in *Price Waterhouse*, when Justice Kennedy floated the idea in dissent, and by Congress when it amended Title VII in 1991.

In his most strident dissent since *Bush v. Gore*, Justice Stevens lambasted the majority’s “decision to engage in unnecessary lawmaking.” Because the question of reversing *Price Waterhouse* insofar as it applies to the ADEA only arose in the respondents’ brief, the court should have asked for supplemental briefing or scheduled reargument. Justice Stevens accused the majority of being “especially irresponsible” for failing to consider the views of the United States, which represents the agency charged with administering the ADEA and which urged the court at oral argument to abstain from reaching the question it chose to review. Even worse than its inattention to procedure, said Stevens, was the court’s “utter disregard of our precedent and Congress’ intent.” The majority relied heavily on the fact that Congress, when amending Title VII, did not also amend the ADEA to include “mixed motives” language – but Supreme Court precedent holds that where Congress does not explicitly amend a statute, earlier Supreme Court interpretations of the statute remain binding authority. In this case, Supreme Court precedents from the last several years clearly instruct that *Price Waterhouse* applies to the ADEA, and that a plaintiff need only present direct evidence of a mixed motives age discrimination claim to shift the burden of persuasion to the defendant. Running roughshod over precedent and blatantly flouting Congressional intent, the five conservative justices instead used this case to put a severe damper on plaintiffs’ abilities to prove their age discrimination claims.

Horne v. Flores, 557 U.S. ____ (2009).

The *Horne v. Flores* case, handed down by the Supreme Court on June 25, 2009, concerned the application of the Equal Education Opportunity Act's provision that states must "take appropriate action to overcome language barriers that impeded equal participation by its students in its instructional programs." The case was brought in 1992 by a group of students with limited English language skills and their parents who contended that Arizona was not complying with this provision. They alleged that Arizona was not providing adequate resources and chronically underfunding the English language learning programs.

After a trial in 2000, the district court agreed with the students and their parents. As a result, the court ordered the State to study the issue and determine how much it would cost to implement effectively the English-learning program and then figure out a way to fund it that would ensure that the students would have the tools to learn English. For five years, Arizona ignored these court's orders and, in 2006, the court fined the State.

Finally, in 2006, the legislature enacted a law addressing the issue. The legislature also asked the district court to consider whether the bill would suffice, to forgive the fines, and to dissolve the injunctions entered in 2000. The district court found that Arizona's programs was still deficient and the Ninth Circuit affirmed.

The Supreme Court reversed and remanded, sending the case back to the district court to determine – based on new standards outlined by the Supreme Court – whether there were changed circumstances such that Arizona should be released from the obligations imposed on it after the 2000 trial. This was, to a limited extent, a victory for the students because the Supreme Court did not order that Arizona be freed from its obligations to fully fund the English language programs.

However, the Court did invent and apply a new standard of appellate review to be applied in cases that it called "institutional reform litigation." The dissenters – Justices Breyer, Stevens, Souter, and Ginsburg – forcefully argued that this was flawed for a host of reasons: first, the case should is not a typical case "institutional reform litigation" like those involving claims that prisons or hospitals violated constitutional standards; second, the majority of the Supreme Court seemingly applied a different and new, pro-defendant standard in deciding whether it was equitable to continue to enforce the 2000 judgment; and finally, that in applying this new standard, the Supreme Court gave less deference to the trial court than is usual and tipped the scales against the students.

The upshot of this is not yet clear and whether this case has legs is yet to be seen, but imposing a more challenging standard to so-called "institutional reform litigation" could have make it more difficult for federal courts to enforce standards in cases where plaintiffs want to right a systemic wrong.

Forest Grove School District v. T.A., 557 U.S. ____ (2009).

In a 6-3 opinion, the Supreme Court affirmed the right of children with disabilities to receive a free appropriate public education designed to meet their unique needs. Justice Stevens wrote for the majority in rejecting the contention of the Forest Grove School District that the 1997 amendments to the Individuals with Disabilities Education Act (“IDEA”) barred reimbursement of private-school tuition for students who had not previously received special education services from a public school. The Supreme Court cited *Comm. Of Burlington v. Department of Ed. Of Mass*, which held that reimbursement is appropriate even when parents unilaterally enroll their children in a private school before a court or hearing officer determines such placement is appropriate. 471 U.S. 359 (1985). The Supreme Court held that neither the text nor the context of the 1997 Amendment offered evidence that Congress intended to supersede the Court’s previous decision in *Burlington*. As the reasoning in *Burlington* was found to apply equally to this case, reimbursement was proper in this case as well. By doing a careful reading of the relevant section of the 1997 Amendments to the IDEA, the Supreme Court adhered to the ultimate purpose of Congress in enacting the IDEA and its amendment, rejected the narrow inferences of the School District, and gave a child with learning disabilities a truly free and appropriate public education.

Safford Unified School District #1 v. Redding, 557 U.S. ____ (2009).

In a victory for the Constitution, the Supreme Court, in a decision joined by every justice except Clarence Thomas, held that the strip search of a 13-year-old girl over suspected ibuprofen possession was unconstitutional. The Court’s decision in *Safford v. Redding* recognized not only that Savana Redding’s account of her search was “embarrassing, frightening and humiliating” but that “adolescent vulnerability intensifies the exposure’s patent intrusiveness.” Recognizing the intrusive nature of a search of a 13-year old’s bra and underwear, Justice Souter, writing for the majority, concluded that the school administrators had no reason to suspect the drugs presented a danger or were concealed in Redding’s underwear. In *Redding*, the Court relented in its recent assault on the rights of students, and its decision on the constitutionality of the search is a triumph of the law, reason, and, yes, empathy.

Savana Redding was a 13-year-old honors student whose friend was caught with various contraband, including a cigarette, a razor, and prescription-strength ibuprofen. Redding’s friend implicated Redding to a school official, who questioned Redding about bringing painkillers and weapons to school. Redding denied any wrongdoing and agreed to allow the assistant principal to search her backpack. When nothing turned up in Redding’s bag, the assistant principal escorted her to the nurse’s office and told her to remove her clothes. Redding was then ordered to move her bra and underwear away from her skin so as to shake out any drugs she might have stashed away, humiliating and embarrassing her.

The Supreme Court has long upheld the constitutionality of school officials' searches of students' lockers, bags, and outer clothing, but Redding's mother, bringing suit on behalf of her daughter, claimed that this humiliating and unnecessary strip search violated her Fourth Amendment rights. In 1985, in the case *New Jersey v. TLO*, the Supreme Court established a two-step test to determine the reasonableness of a school official's search of a student. First, the school official must have "reasonable suspicion" that the student has violated either the law or the rules of the school. Second, the search cannot be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Redding's case simply applies the long-standing *TLO* framework for student searches to a strip search of a 13-year old girl that was based on groundless suspicion that she might be hiding medicine. The school officials had no specific reason to think Savana was concealing ibuprofen in her underwear: the fellow student who fingered her as the provider of the pills did not specify when or where she got them from Savana, and was herself caught with not only pills, but also other school contraband, such as a razor blade and knives. There was also no indication of danger to other students from the power or quantity of the drugs allegedly hidden. The majority rightly concluded that these factors simply failed to create a level of suspicion that would warrant such an intrusion on a 13-year old girl. Or, as Justice Stevens put it, concurring in part and dissenting in part with Justice Ginsburg: "it does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude."

Justice Thomas, however, saw it differently. The lone dissenter on the constitutional question, Justice Thomas had no problem with a school official's unjustified search of a young girl's bra and underwear. Instead of finding a constitutional violation, he advocated reinstating the common law doctrine of *in loco parentis*, under which school administrators have all the rights and discretion of parents to establish and enforce rules they believe necessary to discipline students. Because parents are immune from the constraints of the Fourth Amendment, Justice Thomas believes, school officials should be too. Parents and students alike can be grateful that no other justice subscribes to Justice Thomas's antiquated views of school discipline or students' rights.

Unfortunately, the Court denied Savana recourse for the unconstitutional humiliation she suffered. The majority determined that the school officials had immunity from liability because the law regarding school searches was not "clearly established." But, as Justices Ginsburg and Stevens wrote in dissent, the Court ignored its own precedent in reaching that determination. The Court has clearly stated that a school search "crosses the constitutional boundary if it becomes 'excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" As Justice Ginsburg bluntly states, "[The official's] treatment of [Savana] was abusive and it was not reasonable for him to believe that the law permitted it." Justice Stevens noted that this is "a case in which clearly established law meets clearly outrageous conduct."

Although the Supreme Court's decision was not an unqualified triumph for

Savana Redding, she has secured a victory for schoolchildren nationwide. Her battle to vindicate her own rights has led the Supreme Court to issue a 'clearly established' ruling securing the constitutional right of millions of American students to be free from a humiliating, unjustified and unreasonable strip search.

District Attorney's Office v. Osborne, 557 U.S. ____ (2009).

In a very disappointing 5-4 decision, the Supreme Court held that convicted criminals have no constitutional right to access DNA evidence that might conclusively prove their innocence. In 1994, William Osborne was sentenced to 26 years in prison for the rape, beating, and kidnapping of a prostitute. At the time of his trial, available methods of DNA testing were less sophisticated and exact than today's methods. In fact, the DNA test used against Osborne, an African American, only narrowed the possible matches to about 16% of all African Americans in the population. After his conviction, Osborne sought to use new DNA technology to retest DNA found at the crime scene to prove his innocence. Despite the fact that Osborne was going to bear the expense of the test himself, the state of Alaska denied his request for the DNA. Unable to access the evidence through the state court, Osborne filed a federal lawsuit alleging that the state was violating his right to due process by imprisoning him without allowing him access to evidence that would prove his innocence.

The Supreme Court, however, decided he had no such due process right. Chief Justice Roberts, writing for the five conservatives on the Court, stated that since Osborne had had a "fair trial" he had "only a limited interest in postconviction relief," *id.* at 15, and that the task of deciding how convicted criminals can use DNA evidence to prove innocence "without unnecessarily overthrowing the established system of criminal justice" is the job of the legislature. *Id.* at 8. The Court ruled that Alaska's post-conviction relief was constitutionally adequate, although it remains unclear why allowing persons to conclusively prove their innocence might "overthrow the established system of criminal justice."

The four progressive members of the Court dissented. In a dissent written by Justice Stevens, in which Justices Ginsburg and Breyer joined, and Justice Souter joined as to part one, the four Justices agreed that Osborne's procedural due process rights had been violated by the state's refusal to grant him access to the DNA evidence. Stevens wrote that "[a]lthough States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport the demands of the Due Process Clause." *Id.* at 3. Because the state had arbitrarily denied Osborne meaningful access to postconviction relief by denying him access to DNA that might prove he was innocent, the four Justices believed that state had violated Osborne's constitutionally protected due process rights. Further, Justices Stevens, Ginsburg, and Breyer agreed that a "limited federal right of access to DNA evidence" should be recognized as a new substantive due process right. *Id.* at 14.

Justice Souter wrote a separate dissent to state his opinion that Osborne's procedural due process rights had been violated, but that there was no need to decide whether "the Fourteenth Amendment's guarantee of due process requires our recognition at this time of a substantive right of access to biological evidence for DNA analysis and comparison." *Id.* at 1. However, Souter clarified his opinion by stating that he was not "expressing skepticism that a new substantive right to test should be cognizable in some circumstances." *Id.* at 1.

***Citizens United v. Federal Election Commission* – Set for re-hearing**

Justices delayed issuing a decision in *Citizens United v. Federal Election Commission*. The rehearing is set for September 9, 2009. The Justices' asked lawyers to consider whether the Court should overturn prior precedent, *Austin v. Michigan*, which limits corporate and union contributions in federal elections. At issue in this case is a 90-minute smear video titled "Hillary: The Movie." Its creators, conservative group Citizens United, wanted to air ads for the movie during the 2008 primary season in the remaining states that were set for Democratic primaries. The group wanted to offer it through cable subscriptions without complying with federal law, namely the McCain-Feingold law. Courts at every level have termed the video one long political attack ad and have ruled that it should be regulated as one. Specifically, if the movie were to run on cable then the movie's financial backers would have to be revealed and the group would have to buy the airtime. Setting a rehearing in September is unusual, as the Court's term generally starts in October; it is unknown at this time whether Judge Sonia Sotomayor will be confirmed in time to hear the arguments in the case.

***Wyeth v. Levine*, 555 U.S. ____ (2009).**

In a huge victory for consumers, the Supreme Court ruled in *Wyeth v. Levine* that drug companies are not immune from state-law claims. Drug maker Wyeth alleged that federal regulatory law preempted a claim that it did not adequately warn patients about the dangers of a method of administering an anti-nausea drug. The Court disagreed and upheld the Vermont Supreme Court's ruling that a common-law failure-to-warn claim was not preempted, even though the drug had been approved by the Federal Food and Drug Administration ("FDA").

Diana Levine, a musician who played the guitar, sought medical treatment after suffering a severe migraine. She was injected with an anti-nausea drug, Phenergen. Although the drug was injected directly into Diana's vein, some of the medication came into contact with an artery. This subsequently caused her to develop gangrene, requiring amputation of her arm.

Diana brought a state-law claim against Wyeth alleging that the company failed to provide an adequate warning on its label about the dangers of arterial interaction. A

Vermont jury agreed, and awarded her damages for her pain and suffering, medical expenses, and loss of her livelihood as a professional musician.

On appeal, Wyeth contended that it was impossible to comply with both the national regulatory scheme set out by the FDA and Vermont's consumer protection law. Although the company knew of similar gangrene reactions, Wyeth made no attempt to change its label because, it alleged, once a drug was approved for market it was prohibited from changing the label to reflect new information. Moreover, in 2006, under the direction of Bush appointees, language was inserted into the preamble of an FDA regulation providing for federal preemption of state tort law claims. As a result, Wyeth argued that state laws like Vermont's requiring additional consumer protections in labeling should be preempted.

The Supreme Court, in a 6-3 decision written by Justice Stevens, rejected these arguments, holding that the FDA did not prohibit all label changes – especially those in response to newly discovered drug dangers. Wyeth's "cramped reading" of the regulations was held to be based upon a "fundamental misunderstanding" that the FDA, rather than the company that had immediate access to patient safety reports, bore the responsibility of drug labeling. Additionally, Congress had not directly authorized the agency to preempt state laws, and the Court ruled that the agency's 2006 preemption preamble failed to merit deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Vermont court decision was upheld, and Diana Levine was awarded damages for the loss of her arm.

Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. ____ (2009).

The *Cuomo v. Clearing House* case, decided by the Supreme Court on June 29, 2009, addressed whether a federal agency's interpretation of provisions of the National Banking Act, 12 U.S.C. § 484(a), which would have preempted enforcement of state fair-lending laws, was reasonable. In an unusual lineup of Justices – Justice Scalia wrote for the majority and was joined by Justices Ginsburg, Stevens, Souter, and Breyer – the Court held that it was not.

In 2005, then-Attorney General Eliot Spitzer¹ sought information from several nationally chartered banks about their lending practices. Based on publicly available data, many banks appeared to issue a disproportionately large number of high-interest loans to minority borrowers. In an effort to gather more data, Spitzer sent letters in lieu of formal subpoenas asking banks about their lending practices.

The federal agency charged with administering the National Bank Act ("NBA"), the Office of the Comptroller of Currency ("OCC"), and a banking trade group sought to enjoin the request, alleging that the OCC's rules promulgated under the NBA precluded the Attorney General from accessing the information. Both the United States District

¹ Spitzer's successor in office, Andrew Cuomo, was the petitioner before the Court.

Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit upheld the request.

The NBA creates a federal framework under which national banks operate. The law prohibits banks from being subject to “visitorial powers,” *id.*, an ambiguous phrase referring to the right to oversee or supervise corporate affairs, which the OCC interpreted broadly to preempt enforcement of many state laws. Generally, courts defer to an agency’s reasonable interpretation of a statute it is charged with administering. *See Chevron U.S.A. Inc. v. Nat’l Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But, here the majority held that the OCC’s interpretation went too far. While states could lawfully be prohibited from exercising visitorial powers, such as managing internal governance structures, states could not be prohibited from enforcing its laws regulating banks.

The decision was a victory for consumer and low-income advocates. Although the Court affirmed the decision below as it applied to the Attorney General’s attempt to gather information through letters in lieu of a subpoena, it vacated the decision as it was previously applied to judicial law-enforcement actions. Thus, the Court clarified that state attorneys general are not prohibited from enforcing state fair-lending laws meant to protect consumers in the home buyers market.

Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008).

The Supreme Court, in a 5-4 decision by Justice Stevens, held in *Altria Group v. Good* that neither the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), nor actions of the Federal Trade Commission prohibited state fraud claims against cigarette manufacturers. Smokers in Maine sued Altria Group, a subsidiary of Philip Morris alleging violations of the Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. Tit. 5, § 207, (“MUTPA”), which prohibited deceptive trade practices.

For years, the tobacco industry sold and marketed “light” cigarettes containing lower tar and nicotine levels as a healthier alternative to regular cigarettes. Although smokers assumed that these cigarettes were less lethal, they were not actually receiving less tar or nicotine. Consumers asserted that Altria knew its lighter cigarettes were not safer for consumers but used the “light” designation as a way to deceive them into making purchases based on this false information.

The federal district court granted summary judgment in favor of the tobacco company. On appeal, the First Circuit reversed. The Supreme Court resolved a Circuit split by upholding the Circuit Court’s decision and allowing the case to proceed in federal court.

Although the text of the Federal Cigarette Labeling and Advertising Act (“FCLAA”) explicitly preempts claims “based on smoking or health,” the Supreme Court held that the MUTPA didn’t address these issues. The language was interpreted not to

encompass a general duty not to make fraudulent statements. Additionally, the Court rejected the argument that the smokers' claims were impliedly preempted by actions of the Federal Trade Commission ("FTC"). Altria alleged that the FTC encouraged reliance on test results indicating less tar and nicotine in various light cigarette products. Rejecting this argument, the Court held that the FTC had never forced the tobacco industry to disclose yield from its tests, and the agency had never approved of the terms used in marketing light cigarettes.