

# The Constitution, The Roberts Court, and Business: The Significant Business Impact of the 2011-2012 Supreme Court Term

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THE CONSTITUTION, THE ROBERTS COURT, AND  
BUSINESS: THE SIGNIFICANT BUSINESS IMPACT OF  
THE 2011–2012 SUPREME COURT TERM

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ABSTRACT

*The 2011–2012 Supreme Court Term created quite the media buzz. The Affordable Care Act cases and the controversial Arizona immigration law dominated the headlines. But the Term also included other fascinating yet less sensationalized cases. The Court heard its fair share of criminal law controversies involving derelict defense attorneys and prosecutors, as well as civil procedure disputes involving qualified immunity for witnesses in grand jury proceedings and private parties assisting the government in litigation. The Justices also entertained arguments on a federal law allowing United States citizens born in Jerusalem to have “Israel” stamped as their birthplace on a passport. The Secretary of State refused, arguing that the practice would inflame tensions in an already volatile Middle East. Another case pitted the First Amendment right to lie about receiving military honors against the Stolen Valor Act prohibiting that type of dishonest speech. A case from Montana hearkened back to 1889 and implicated the Equal Footing Doctrine—a constitutional provision granting territory to states upon entering the Union. Texas crafted new electoral maps based on the 2010 census and soon found them scrutinized under the Voting Rights Act. In all, the Term was extraordinary because most of its cases revolved around topics ripped from the headlines and touched on areas of public policy relevant to Americans in 2012 and beyond.*

*The Term was also compelling because of its impact on the business arena. The Justices granted certiorari in seventeen business cases, eleven of which were cherry-picked for this Article. Each case chosen covered a classic and well-established business law topic, generated strong interest within the business community, contained predominately business-focused*

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*facts, and had a connection to a business-related constitutional provision/amendment or statute. These cases provide the best glimpse into the Roberts Court's most recent stance on topics important to the business community. This Article evaluates these cases in depth and proposes the following Business Impact Theory of the Term:*

- 1. The Court's opinions came out strongly on the side of business with business interests receiving sixty-one out of seventy potential votes. This resulted in an eighty-seven percent success rate for business interests over the course of the Term. This high percentage is different from the previous Term at the Roberts Court where the Justices unanimously voted against business interests in a handful of cases.*
- 2. These pro-business decisions did not occur in ordinary, run of the mill cases. Instead, the impact of these decisions is magnified because they each involved topics critical to America's economic recovery.*
- 3. Perhaps surprisingly, the Court's liberal-leaning Justices voted with the Court's conservatives twenty-three out of a possible thirty-one opportunities—or seventy-four percent of the time—in the significant business impact cases. They did so in disputes that presented compelling arguments from both a conservative and liberal perspective and where such facts allowed for a strong four-Justice dissent. Such a split, however, occurred only once in the cases considered in the tally.*
- 4. The Court was willing to both narrow and expand constitutional provisions/amendments and state/federal statutes to reach its desired result. There appeared to be no concerted effort to adhere to a minimalist or living constitutionalist philosophy—at least in these significant business impact cases.*

*In the end, the results in the business cases of the Term could prove to be a fluke, or they could indicate a pivot of the Court towards supporting business interests to a greater extent. Time will tell because the next first Monday of October is right around the corner.*

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## INTRODUCTION

The 2011–2012 Supreme Court Term was chock-full of interesting cases of national importance. The media buzzed over the Affordable Care Act arguments and the challenge to Arizona’s controversial immigration statute.<sup>1</sup> Outrage followed an opinion upholding strip-searches of petty offenders arrested and briefly detained in the general prison population.<sup>2</sup> The Court also entertained arguments in other intriguing yet less sensationalized cases. One case analyzed the relatively unknown Ambassadors Clause of the Constitution.<sup>3</sup> The issue in that case was whether the Executive Branch alone had the right to decide if citizens born in Jerusalem may list “Israel” as their birthplace on United States passports.<sup>4</sup> Congress authorized the practice, but the Secretary of State refused to execute the law because of fears it would agitate an increasingly unstable Middle East.<sup>5</sup> The Court decided to step in and referee this inter-branch squabble. Another case involved a protestor arrested for violating Vice President Cheney’s personal space.<sup>6</sup> The protestor approached within inches of the Vice President in a Colorado mall, criticized the administration’s policies on Iraq, and slapped him on the shoulder.<sup>7</sup> Upon arrest the man told Secret Service agents, “[i]f you don’t want other people sharing their opinions, you should have him avoid public places,” and later he argued the arrest violated his First Amendment right to political speech.<sup>8</sup> The Justices also heard their fair share of criminal law, immigration, international relations, and social issues cases this past Term. One notable criminal law case involved a death penalty inmate whose pro bono lawyers abandoned him upon transferring jobs, without informing their client or the court.<sup>9</sup> The inmate subsequently missed a filing deadline that ended his habeas corpus petition, leaving the Court to scold the lawyers by name and fashion a remedy for a confessed murderer.<sup>10</sup> Election law took its usual place on the docket including a Voting Rights Act case scrutinizing Texas’s census-based

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<sup>1</sup> See *infra* notes 378–80 and accompanying text.

<sup>2</sup> See *Florence v. Bd. of Freeholders*, 132 S. Ct. 1510, 1513–14 (2012).

<sup>3</sup> See *infra* note 36.

<sup>4</sup> *M.B.Z. v. Clinton*, 132 S. Ct. 1421, 1424 (2012).

<sup>5</sup> *Id.* at 1425.

<sup>6</sup> See *Reichle v. Howards*, 132 S. Ct. 2088, 2091–92 (2012).

<sup>7</sup> *Id.* at 2091.

<sup>8</sup> See, e.g., Adam Liptak, *Court Appears to Be Wary Hearing Free-Speech Case*, N.Y. TIMES, Mar. 22, 2012, at A22.

<sup>9</sup> See *Maples v. Thomas*, 132 S. Ct. 912, 916–17 (2012).

<sup>10</sup> *Id.* at 918, 922, 924.

electoral maps labeled as discriminatory by minority groups.<sup>11</sup> The Ninth Circuit took its usual beating with seventeen of its twenty-four opinions reviewed by the Supreme Court reversed.<sup>12</sup>

The Term was also compelling because of its impact on the business arena. The Justices granted certiorari in seventeen cases that touched on business issues.<sup>13</sup> This Article focuses on eleven of those seventeen. These significant business impact cases (1) covered classic and well-established business law topics, (2) generated interest among the larger business community, (3) contained predominately business-focused facts, and (4) had a strong connection to a business-related constitutional provision/amendment or statute. These cases provide the best glimpse into the Roberts Court's most current positions on areas important to the business community and comprise the primary focus of this Article. The intensive legwork spent evaluating the issues, briefs, oral arguments, and opinions from these eleven cases lead to the following four-pronged Business Impact Theory of the 2011–2012 Term:

1. The Court's opinions came out strongly on the side of business with business interests receiving sixty-one out of seventy potential votes.<sup>14</sup> This resulted in an eighty-seven percent success rate for business interests over the course of the Term. This high percentage is different from the previous Term at the Roberts Court where the Justices

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<sup>11</sup> See *Perry v. Perez*, 132 S. Ct. 934, 939–40 (2012).

<sup>12</sup> See *Statistics: Circuits: Circuit Report for October Term 2011*, SCOTUSBLOG (June 30, 2012), [http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB\\_scorecard\\_OT11\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_scorecard_OT11_final.pdf). This may partially be due to the fact that the Court granted twenty-four certiorari petitions from the Ninth Circuit alone and only thirty-nine from the other twelve federal circuits combined. *Id.* (including the Federal Circuit and the District of Columbia Circuit). It could also stem from the conspiracy theory that the Court grants certiorari petitions from the Ninth Circuit just to reverse a liberal-leaning appellate court. See, e.g., Carol J. Williams, *U.S. Supreme Court Again Rejects Most Decisions by the U.S. 9th Circuit Court of Appeals*, L.A. TIMES, July 18, 2011, <http://articles.latimes.com/2011/jul/18/local/la-me-ninth-circuit-scorecard-20110718> (stating that it was “another bruising year for the liberal judges of the U.S. 9th Circuit Court of Appeals as the Supreme Court overturned the majority of their decisions, at times sharply criticizing their legal reasoning”).

<sup>13</sup> See *infra* Table 1.

<sup>14</sup> The total was generated as follows: There were eleven significant business impact cases selected this Term but the health care votes were omitted for the reasons stated above. This left eight cases. Barring recusal, illness, or vacancy, nine Justices have votes in each case. Multiplying these figures together provides the Justices as a whole with seventy-two potential votes (nine Justices multiplied by eight cases). However, Chief Justice Roberts recused himself from one and Justice Kagan recused herself from another of the eight cases, making the potential vote tally seventy.

unanimously voted against business interests in a handful of cases.<sup>15</sup>

2. These pro-business decisions did not occur in ordinary, run of the mill cases. Instead, the impact of these decisions is magnified because they each involved topics critical to America's economic recovery.
3. Perhaps surprisingly, the Court's liberal-leaning Justices<sup>16</sup> voted with the Court's conservatives twenty-three out of a possible thirty-one opportunities—or seventy-four percent of the time—in the significant business impact cases.<sup>17</sup> They did so in disputes that presented compelling arguments from both a conservative and liberal perspective and where such facts allowed for a strong four-Justice dissent. Such a split, however, occurred only once in the cases considered in the tally.<sup>18</sup>
4. The Court was willing to both narrow and expand constitutional provisions/amendments and state/federal statutes to reach its desired result. There appeared to be no concerted

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<sup>15</sup> Michael J. Newhouse, *Business Cases and the Roberts Supreme Court*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Nov. 2011, at 90, [http://www.fed-soc.org/doclib/20111216\\_NewhouseEngage12.3.pdf](http://www.fed-soc.org/doclib/20111216_NewhouseEngage12.3.pdf).

<sup>16</sup> This Article classifies (in order of seniority) Justices Ginsburg, Breyer, Sotomayor, and Kagan as the Supreme Court's liberal-leaning Justices. It classifies (in order of seniority) Justices Scalia, Kennedy, Thomas, Roberts, and Alito as the Supreme Court's conservative-leaning Justices. Although this topic could be a lengthy article in itself, these choices were made based on prior decisions, the rationale behind such decisions, the author's analysis of oral arguments from the Term, and conventional wisdom. *See, e.g.*, Dave Gilson, *Charts: The Supreme Court's Rightward Shift*, MOTHER JONES (June 26, 2012), <http://www.motherjones.com/politics/2012/06/supreme-court-roberts-obama-care-charts> (showing charts depicting the ideology of recent Supreme Court Justices, showing that the liberal-leaning and conservative-leaning distinctions drawn in this Article are accurate); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 24, 2010, <http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all> (portraying the conservative nature of the conservative-leaning Justices as depicted in this Article).

<sup>17</sup> The total was generated as follows: There were eleven significant business impact cases selected this Term but the health care votes were omitted for the reasons stated above. This left eight cases and four liberal-leaning Justices with votes in each case. Multiplying these figures together leads to thirty-two potential votes. However, one of the liberal-leaning Justices, Justice Elena Kagan, recused herself from one of the eight cases, making the possible vote tally equal thirty-one.

<sup>18</sup> The health care cases resulted in 5-4 split with Chief Justice Roberts joining the liberal-leaning Justices to form a majority. However, the health care cases are not included in these calculations.



effort to adhere to a minimalist or living Constitutionalist philosophy—at least in these significant business impact cases.

This Article evaluates this Business Impact Theory in eight parts. The Introduction briefly introduces why analyzing the Supreme Court’s current Term from a business perspective is consequential. Part I presents a big picture perspective of the entire Term and then hones in on the eleven key business cases by running all sixty-nine arguments through a business impact rubric. Digging deeper into the facts, issues, briefs, oral arguments, and opinions, Part II evaluates the two intellectual property cases most significant to the business arena looking for clues as to the Court’s current thinking in this area. Part III does the same while evaluating the Term’s three most relevant employment law cases. Part IV continues by analyzing the Term’s two most relevant consumer protection cases, while Part V covers the lone, yet significant, securities regulation case on the docket. Part VI concludes the line with an analysis of the Affordable Care Act opinion and debates whether it should be considered a significant business impact case. Part VII forms the theoretical heart of the Article and elaborates on the Business Impact Theory introduced above. The last Part concludes.

#### I. EVALUATING AND CATEGORIZING THE 2011–2012 SUPREME COURT TERM BASED ON BUSINESS IMPACT

It is critical to take in the 30,000-foot view of the 2011–2012 Supreme Court Term before landing on its specific business impact. This Part investigates both perspectives beginning with the big picture. Part I.A commences by evaluating each of the sixty-nine cases in which the Court entertained oral arguments. This process generates broad categories from which the cases most likely to impact business significantly can be identified. The focus is on the specific issue the Supreme Court has chosen to consider (the Question Presented). The goal is to decipher and separate the predominant issue in the case from its various sub-issues.<sup>19</sup> Cases that touch on business issues make the short list while others are removed. From there, Part I.B introduces a business impact rubric capable of culling

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<sup>19</sup> The Court’s answers to the Questions Presented define the precedential limits of its opinions and set legal standards for the field. Any discussion outside the limits of the Question Presented becomes important, yet non-precedential, dicta. *See, e.g., Legal Definition of Dicta*, LECTRIC LAW LIBRARY, <http://www.lectlaw.com/def/d047.htm> (last visited Mar. 23, 2013) (defining dicta as the “part of a judicial opinion which is merely a judge’s editorializing and does not directly address the specifics of the case at bar; extraneous material which is merely informative or explanatory”).

the short list down to the handful of cases most likely to impact the business community significantly. It is not always easy, however, to button-hole a case by its Question Presented alone. These tougher cases require digging into the merits, briefs, and certiorari petitions filed by the parties as well as the opinions issued by lower courts to decipher the predominate issue. Grinding through this process resulted in all sixty-nine cases being slotted into one of twelve categories.

The twelve categories chosen for analysis are intriguing because they are neither lawyer-centric nor couched in legalese. Instead, they touch upon the most prevalent economic, social, political issues currently facing the United States. This broad, real-world focus has at least two upsides: (1) it increases this Article's appeal and relevance to a larger audience, including business professionals, and (2) it provides a comprehensive assessment of the Term's impact on the business arena generally as opposed to its impact on an arcane business law topic of interest to the occasional law professor. Before conducting this evaluation, the hypothesis was that a select few of the Court's current cases would be relevant enough to society at large to merit inclusion into any of these real-world categories; the rest would be too obscure or complicated to matter to the average citizen. This hypothesis was surprisingly discredited, as each case fell rather neatly into at least one category without much in the way of mental gymnastics. Whether this is a coincidence, a mini-representation of the law mirroring society, the Court inserting itself into politics and public policy, or all of the above, is a topic for another day. More germane for this Article is an explanation of how this evaluation process identified the cases from this Term that are most likely to significantly impact the business arena in the near future. To this end, Part I.B moves from the big picture, evaluation, and categorization process, and considers the business impact rubric governing this culling process.

#### *A. The 30,000-Foot View of the Court's 2011–2012 Term*

Beginning at 10:00 AM on the first Monday of October 2011, the Supreme Court entertained its first oral arguments of the 2011–2012 Term.<sup>20</sup>

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<sup>20</sup> The Court granted certiorari in seventy-four cases but only sixty-nine were argued. See *Term Snapshot*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/ot2011/> (last visited Mar. 23, 2013). The Supreme Court's oral argument schedule is available online in various places. See, e.g., *Calendar of Events*, SCOTUSBLOG, <http://www.scotusblog.com/events/2011-10> (last visited Mar. 23, 2013) [hereinafter *Oral Argument Calendar*]. The first oral argument was in a case styled *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012) (analyzing the Sex Offender Registration and Notification Act). The second oral argument occurred in three Medicaid reimbursement cases consolidated by the Court into one: *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1207–08

The Justices continued to hear arguments on many Mondays, Tuesdays, and Wednesdays well into April 2012.<sup>21</sup> The cases attaining a coveted spot on the Court's docket were not randomly selected. When granting certiorari from the pool of approximately 10,000 petitions each Term, the Justices select between 70 and 80 cases<sup>22</sup> by looking to 3 primary factors: (1) the national importance of the Question Presented, (2) the potential to resolve a split of opinion in the federal circuit courts (a circuit split), and/or (3) the potential for the decision to have important precedential value.<sup>23</sup> In addition to qualifying under any or all of these three factors, the so-called Rule of Four requires the vote of at least four Justices to grant a certiorari petition in a particular case.<sup>24</sup>

As much as tradition claims that the Court does not, should not, or is unable to think politically when choosing cases, the vast majority of this Term's certiorari petitions involve issues ripped from the headlines and percolating in the country's economic, social, or political realms.<sup>25</sup> This

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(2012) (analyzing a California statute reducing Medicaid reimbursements to doctors under the preemption doctrine); *Douglas v. Cal. Pharm. Ass'n*, 132 S. Ct. 1204, 1207–08 (2012) (same); and *Douglas v. Santa Rosa Mem'l Hosp.*, 132 S. Ct. 1204, 1207–08 (2012) (same).

<sup>21</sup> See *Oral Argument Calendar*, *supra* note 20.

<sup>22</sup> See, e.g., *Frequently Asked Questions: General Information*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/faq.aspx#faqgi9> (last visited Mar. 23, 2013) (stating that the “Court receives approximately 10,000 petitions for a writ of certiorari each year. The Court grants and hears oral argument in about 75–80 cases.”).

<sup>23</sup> See, e.g., *U.S. Supreme Court Procedures*, U.S. COURTS, <http://www.uscourts.gov/EducationalResources/ConstitutionResources/SeparationOfPowers/USSupremeCourtProcedures.aspx> (last visited Mar. 23, 2013) [hereinafter *Supreme Court Procedures*].

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., Jonathan Turley, *Justice Scalia Is a Political Star—and That's Bad for the Supreme Court*, WASH. POST (Jan. 21, 2011, 7:00 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012102923.html> (“Justices clearly can make mistakes. Few can resist public adoration. However, as they [sic] justices yield to that temptation, citizens may find it hard to accept the finality of their decisions. If justices merely carry the torch for their political allies, law becomes little more than a part of politics.”); *Can the Supreme Court Be Neutral?*, HISTORY LEARNING SITE, [http://www.historylearningsite.co.uk/supreme\\_court\\_neutral.htm](http://www.historylearningsite.co.uk/supreme_court_neutral.htm) (last visited Mar. 23, 2013).

In order for America to be a democracy the judiciary, i.e. the Supreme Court, needs to be independent and a-political. If not then what is good for the people and for America may be ignored in favour of judgements that favour a particular political Party or viewpoint. In the 18th Century when the Founding Fathers were first writing the Constitution, they must have intended for the Supreme Court to be a-political, in order for it to fit into their new democracy, however, it is debatable whether or not a Supreme Court that is appointed by the President, can ever truly be independent from political influences.

reality makes it difficult not to analyze the Court's cases via a public policy lens. After much research, an online survey of voter preferences for the upcoming presidential election proved to be the most accurate, concise, and representative model of America's most relevant and current public policy issues.<sup>26</sup> The survey asked a series of policy questions, evaluated responses, and advised users about which 2012 presidential candidate (or primary challenger) would be most compatible with their interests.<sup>27</sup> Dissecting these survey questions yields the twelve categories most important to Americans' familial, social, and work lives.<sup>28</sup> Therefore, this Article uses these same categories to sort each case from the 2011–2012 Term:

1. The economy;<sup>29</sup>
2. Taxes, entitlement programs,<sup>30</sup> and government spending;<sup>31</sup>
3. Military intervention and terrorism;<sup>32</sup>

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*Id.*; see also *McCain: Supreme Court Ignorant on Politics*, CBS NEWS (Jan. 5, 2012, 9:56 AM), [http://www.cbsnews.com/8301-500202\\_162-57352743/mccain-supreme-court-ignorant-on-politics/](http://www.cbsnews.com/8301-500202_162-57352743/mccain-supreme-court-ignorant-on-politics/) (“Sen. John McCain (R-Ariz.) says the U.S. Supreme Court showed its ‘ignorance’ about politics in its landmark *Citizens United* ruling.”) (emphasis added).

<sup>26</sup> See, e.g., *2012 Presidential Candidate Selector*, SELECTSMART.COM, <http://www.selectsmart.com/president/> (last visited Mar. 23, 2013) [hereinafter SELECTSMART].

<sup>27</sup> This survey concludes by identifying the user's best option, based on submitted answers to questions based on these twelve categories, between the candidates who entered the 2012 presidential race (and which is now purely academic for the 2012 presidential election): “Barack Obama, Buddy Roemer, Gary Johnson, Jill Stein, Kent Mesplay, Mitt Romney, Newt Gingrich, Rick Santorum, Robby Wells, Rocky Anderson, Ron Paul, Stewart Alexander, Donald Trump, Herman Cain, Jon Huntsman, Joseph Biden, Michael Bloomberg, Michele Bachmann, Rick Perry and Tim Pawlenty.” *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> The economy is impacted by most of the cases on the 2011–2012 docket. Therefore, this Article assigns each case to a more specific category. That said, the Court's bankruptcy cases most appropriately fall under the topic of the economy more generally and do not easily fall into any of the other eleven categories. The Court heard two bankruptcy law cases during the 2011–2012 Term. *See Hall v. United States*, 132 S. Ct. 1882, 1885 (2012) (analyzing whether proceeds from the sale of a family farm are “incurred by the estate” under a specific provision of the Bankruptcy Code); *RadLAX v. Amalgamated Bank*, 132 S. Ct. 2065, 2068 (2012) (analyzing whether a debtor may pursue a bankruptcy plan under Chapter 11 proposing to sell assets free of liens without allowing the secured creditor to bid).

<sup>30</sup> The Court heard one trust and estates case during the 2011–2012 Term. *See Astrue v. Capato*, 132 S. Ct. 2021, 2025–26 (2012) (analyzing the Social Security Administration's interpretation about whether to allow children conceived after their father's death to qualify for survivor benefits under the Social Security Act).

<sup>31</sup> The Court heard one tax case during the 2011–2012 Term. *See United States v. Home Concrete & Supply*, 132 S. Ct. 1836, 1839 (2012) (analyzing the statute of limitations the Internal Revenue Service operates under when it attempts to assess a deficiency against a taxpayer based on a misstated basis from the sale of real property).

4. Balancing civil liberties and national security;<sup>33</sup>
5. Business<sup>34</sup> and employment<sup>35</sup> (particularly job creation, minimum wage, and unemployment insurance);

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<sup>32</sup> The Court heard one case at least tangentially covering the military and terrorism during the 2011–2012 Term. *See* *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012) (analyzing whether the term “individual” in the Torture Victim Protection Act allows torture victims to sue individual people or organizations as well).

<sup>33</sup> The Court heard one privacy-related case during the 2011–2012 Term. *See* *United States v. Jones*, 132 S. Ct. 945, 948 (2012) (addressing whether a police placement of a GPS tracking device underneath a suspect’s car without a warrant constitutes a search under the Fourth Amendment).

<sup>34</sup> The business category, as is relevant to the 2011–2012 Term, includes subcategories such as: securities law, consumer protection and intellectual property cases. The Court heard one securities law case during the 2011–2012 Term. *See* *Credit Suisse Sec. (USA) L.L.C. v. Simmonds*, 132 S. Ct. 1414, 1417 (2012) (analyzing the Securities Exchange Act of 1934 and its statute of limitations for suing executives and other insiders for short swing trades). The Court heard two consumer protection cases during the 2011–2012 Term. *See* *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2037–38 (2012) (analyzing whether the Real Estate Settlement Procedures Act prevents real estate settlement servicers from charging an unearned fee in certain situations); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012) (analyzing the non-waivable “right to sue” provision of the Credit Repair Organizations Act and whether a mandatory arbitration, as opposed to an actual trial, falls under its scope). The Court heard four intellectual property cases during the 2011–2012 Term. *See* *Kappos v. Hyatt*, 132 S. Ct. 1690, 1693–94 (2012) (analyzing a patent applicant’s ability to produce new evidence in front of a district court when challenging a denial by the Patent and Trademark Office); *Caraco Pharm. Labs., Ltd. v. Novo Nordisk*, 132 S. Ct. 1670, 1675–76 (2012) (evaluating a fight between a generic and brand name drug manufacturer under the counterclaim provision of the Hatch-Waxman Act); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1290 (2012) (analyzing whether a proposed patent is too similar to a law of nature to be valid); *Golan v. Holder*, 132 S. Ct. 873, 877–78 (2012) (analyzing the federal government’s decision, as part of joining an international copyright convention, to grant new copyright protection to orphan works in the public domain).

<sup>35</sup> The Court heard seven employment law cases during the 2011–2012 Term. *See* *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 760, 760 (2012) (showing grant of certiorari petition in a case analyzing the Fair Labor Standards Act and its outside salesperson exemption in relation to pharmaceutical salespeople); *Coleman v. Md. Ct. App.*, 132 S. Ct. 1327, 1332 (2012) (analyzing the Family and Medical Leave Act’s self-care provision and collision with a state’s sovereign immunity); *Roberts v. Sea-Land Servs.*, 132 S. Ct. 1350, 1353–54 (2012) (analyzing the Longshore and Harbor Workers’ Compensation Act and when a disabled employee is “newly awarded compensation” for statutory purposes); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699 (2012) (analyzing the Ministerial Exception to the First Amendment and its application to employment discrimination laws); *Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 684 (2012) (analyzing the Outer Continental Shelf Lands Act and an employee’s injury on land outside of covered territory); *Elgin v. Dep’t of the Treasury*, 132 S. Ct. 453, 453 (2012) (showing grant of certiorari petition in a case analyzing the Civil Service Reform Act and constitutional



6. Global trade and international relations;<sup>36</sup>
7. Social issues—particularly: (1) abortion, (2) marijuana legalization, (3) stem cell research, (4) same sex marriage, (5) speech and other constitutional amendments<sup>37</sup> and provisions,<sup>38</sup>

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claims for equitable relief); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 131 S. Ct. 3061, 3061 (2011) (showing grant of certiorari petition in a case involving the notice used to collect mandatory union assessments used for political and ideological purposes).

<sup>36</sup> Native American/Tribal law constitutes a segment of global trade and *relations between sovereigns*. This Term, the Court heard three cases involving Native American/Tribal law with two of these cases (*Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchakwas* and *Salazar v. Patchak*) consolidated together by the Supreme Court bringing the total number in this area to two. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2202–03 (2012) (analyzing whether the Quiet Title Act applies to all suits concerning land in which the United States claims an interest); *Salazar v. Patchak*, 132 S. Ct. 2199, 2203 (2012) (analyzing whether federal law waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian Tribe); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 995, 995 (2012) (showing grant of certiorari petition in a case analyzing whether the federal government is required to pay contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act where Congress has imposed a statutory cap on the appropriations applicable to such costs and the costs exceed the cap). Additionally, the Court heard *M.B.Z. v. Clinton*, a case on a miscellaneous constitutional statutory provision, the Receive Ambassadors Clause, which has the potential to alter global trade and international relations (at least according to the Secretary of State who is a party in the case). *See M.B.Z. v. Clinton*, 132 S. Ct. 1421, 1424–25 (2012) (analyzing whether a statute allowing United States citizens born in Jerusalem to place “Israel” on their passports as a birthplace is a political question that must be worked out between the Legislative and Executive branches).

<sup>37</sup> The Court heard four cases covering Constitutional Amendments (in particular the First, Fifth, Eighth, Eleventh and Fourteenth Amendments) during the 2011–2012 Term. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2311 (2012) (involving whether the Federal Communication Commission’s indecency enforcement regime violates the First or Fifth Amendments); *Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012) (analyzing whether an inmate in a prison run by a private contractor could sue for an Eighth Amendment violation when he had adequate state lawsuit options); *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2077 (2012) (analyzing, under the Equal Protection Clause, whether a local taxing authority must refund payments made by people paying a sewer system improvement assessment in full, while forgiving the obligations of identically situated taxpayers who opted into a multi-year installment payment plan); *FAA v. Cooper*, 132 S. Ct. 1441, 1446 (2012) (analyzing whether suits for mental and emotional distress under the Privacy Act of 1974 may abrogate a state’s Eleventh Amendment sovereign immunity where the statute allows such immunity to be abrogated in cases involving “actual damages”).

<sup>38</sup> The Court heard seven Supremacy Clause/preemption cases during the 2011–2012 Term; three of these cases (styled with the name Douglas as the petitioner) were consolidated into one bringing the total to Supremacy Clause/preemption cases to five. *See Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1207–08 (2012)

(6) crime,<sup>39</sup> justice,<sup>40</sup> and capital punishment, (7) climate change, and (8) gun control;

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(analyzing a California statute reducing Medicaid reimbursements to doctors under the preemption doctrine); *Douglas v. Cal. Pharmacists Ass'n*, 132 S. Ct. 1204, 1207–08 (2012) (same); *Douglas v. Santa Rosa Mem'l Hosp*, 132 S. Ct. 1204, 1207–08 (2012) (same); *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 968 (2012) (analyzing whether the Federal Meat Inspection Act preempts, by its terms, a California law regulating the treatment of non-ambulatory pigs at federally inspected slaughterhouses); *Kurns v. R.R. Friction Prods.*, 132 S. Ct. 1261, 1264 (2012) (analyzing whether the Locomotive Inspection Act preempts Pennsylvania state design, defect, and failure to warn tort claims); *PPL Montana, LLC v. Montana*, 131 S. Ct. 3019, 3019 (2011) (showing grant of the certiorari petition in a case analyzing whether the federal government or the state of Montana owns riverbeds in three rivers running through Montana based on the Equal Footing Doctrine based on Article I, Section III of the Constitution, which reads: “New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”); *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012) (analyzing the state of Arizona’s attempt, in four provisions of a state law, to co-enforce federal immigration law).

<sup>39</sup> The Court heard twenty-five criminal cases during the 2011–2012 Term—eight of which (*Missouri v. Frye* with *Lafler v. Cooper*, *Holder v. Gutierrez* with *Holder v. Sawyers*, *Miller v. Alabama* with *Jackson v. Hobbes*, and *Dorsey v. United States* with *Hill v. United States*) were consolidated into four by the Supreme Court, reducing the total number of criminal cases to twenty-one. See *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (analyzing the imposition of a life without parole sentence, under the Eighth Amendment Cruel and Unusual Punishment Clause, on a juvenile who was fourteen years old at the time of the offense); *Jackson v. Hobbes*, 132 S. Ct. 2455, 2460 (2012) (same); *Dorsey v. United States*, 132 S. Ct. 2321, 2325–26 (2012) (analyzing a case under the Fair Sentencing Act of 2010 and whether it applies to all defendants sentenced after its enactment); *Hill v. United States*, 132 S. Ct. 2321, 2325–26 (2012) (same); *S. Union Co. v. United States*, 132 S. Ct. 2344, 2348–49 (2012) (analyzing the imposition of criminal fines); *Reichle v. Howards*, 132 S. Ct. 2088, 2091 (2011) (involving political speech and a confrontation with Vice President Cheney, which led to an arrest); *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012) (analyzing the Confrontation Clause and whether it requires the presence at trial of experts who analyze DNA evidence); *Blueford v. Arkansas*, 132 S. Ct. 2044, 2048 (2012) (analyzing the Double Jeopardy Clause and a situation where a jury deadlocks on a lesser included offense); *Wood v. Milyard*, 132 S. Ct. 1826, 1829–30 (2012) (analyzing whether courts of appeal may raise deliberately forfeited timeliness issues on their own initiative); *Florence v. Bd. of Freeholders*, 132 S. Ct. 1510, 1513–14 (2012) (authorizing routine strip searches for people arrested and held in jail awaiting case processing); *Vasquez v. United States*, 132 S. Ct. 1532, 1532 (2012) (dismissing the writ of certiorari as improvidently granted after oral argument in a case analyzing ineffective assistance of counsel where the defendant’s counsel publicly stated that the defendant would lose the case); *Setser v. United States*, 132 S. Ct. 1463, 1466 (2012) (analyzing a federal judge’s decision to hand down a concurrent or consecutive sentence when a state trial court has not yet handed down its sentence for the same crime); *Lafler v. Cooper*, 132 S. Ct. 1376, 1382–83 (2012) (analyzing plea offers and the

8. Health care;<sup>41</sup>
9. Environment and property rights;<sup>42</sup>
10. Immigration;<sup>43</sup>

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ineffective assistance of counsel); *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012) (analyzing plea offers and the ineffective assistance of counsel); *Martinez v. Ryan*, 132 S. Ct. 1309, 1313 (2012) (analyzing ineffective assistance of counsel); *Martel v. Clair*, 132 S. Ct. 1276, 1281 (2012) (analyzing ineffective assistance of counsel); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1240–41 (2012) (analyzing qualified immunity for police officers based off of an unreasonable search warrant); *Howes v. Fields*, 132 S. Ct. 1181, 1185 (2012) (analyzing custodial interrogations); *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012) (analyzing registration requirements under the Sex Offender Registration and Notification Act); *Maples v. Thomas*, 132 S. Ct. 912, 916 (2012) (analyzing ineffective assistance of counsel); *Perry v. New Hampshire*, 132 S. Ct. 716, 720 (2012) (analyzing reliability of eyewitness testimony under due process); *Gonzalez v. Thaler*, 132 S. Ct. 641, 646 (2012) (analyzing the Antiterrorism and Effective Death Penalty Act and certificates of appealability); *Smith v. Cain*, 132 S. Ct. 627, 629–30 (2012) (analyzing prosecutorial obligations to turn certain evidence over to the defense prior to trial); *Greene v. Fisher*, 132 S. Ct. 38, 42 (2011) (analyzing the Antiterrorism and Effective Death Penalty Act).

<sup>40</sup> The Court heard five cases relating to the justice system and civil procedure during the 2011–2012 Term. *See First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536, 2536 (2012) (dismissing the writ of certiorari as improvidently granted in a case analyzing whether a private purchaser of real estate settlement services has standing to sue under Article III, Section 2 of the Constitution); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 1999–2000 (2012) (analyzing the costs that may be awarded to prevailing parties in federal lawsuits when it comes to the compensation of interpreters); *Filarsky v. Delia*, 132 S. Ct. 1657, 1660 (2012) (analyzing whether a private citizen working for the government part-time has qualified immunity); *Rehberg v. Paulk*, 132 S. Ct. 1497, 1500 (2012) (examining the type of immunity granted to a grand jury witness); *Mims v. Arrow Fin. Servs.*, 132 S. Ct. 740, 744–45 (2012) (analyzing the Telephone Consumer Protection Act and whether its provisions deprive federal courts of federal question jurisdiction).

<sup>41</sup> The Court heard three health care and government services cases during the 2011–2012 Term. *See Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 2566, 2582 (2012) (analyzing whether Congress had the power under Article I of the Constitution to pass the Affordable Care Act health insurance mandate/minimum care provision and whether the case is barred by the Anti-Injunction Act as a tax passed by Congress but not yet collected); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (analyzing whether the Affordable Care Act's health care mandate/minimum care provision may be severed from the rest of the Act if the mandate/minimum care provision itself is found unconstitutional); *Florida v. Dep't of Health & Human Servs.*, 132 S. Ct. 2546, 2601 (2012) (analyzing whether the federal government is coercing the states to accept terms of the Affordable Care Act's Medicaid provisions).

<sup>42</sup> The Court heard one environmental/property rights case during the 2011–2012 Term. *See Sackett v. EPA*, 132 S. Ct. 1367, 1369 (2012) (analyzing whether citizen petitioners may bring an Administrative Procedure Act claim to challenge an administrative compliance order issued by the Environmental Protection Agency under the Clean Water Act).

<sup>43</sup> The Court heard five immigration cases during the 2011–2012 Term. *See Holder v. Gutierrez*, 132 S. Ct. 2011, 2014–15 (2012) (analyzing whether an alien seeking cancellation



11. Elections (particularly voter registration);<sup>44</sup> and
12. Ethics (particularly the virtue of honesty).<sup>45</sup>

Table 1 summarizes the cases as sorted into one of the twelve categories *supra*.<sup>46</sup> Note that the business topics are broken down further into the subcategories of: (1) intellectual property; (2) employment; (3) consumer protection; (4) securities regulation; and (5) health care because these are the dominant issues in the significant business impact cases chosen for analysis in Parts III–VII.<sup>47</sup> The social issues cases are also broken down into subcategories to display a more accurate picture of the Term (note: social issues topics comprised thirty-five of the sixty-nine argued cases).<sup>48</sup>

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of removal may rely on parent's years of residence); *Holder v. Sawyers*, 132 S. Ct. 2011, 2014–15 (2012) (same; decided together with *Holder v. Gutierrez*); *Vartelas v. Holder*, 132 S. Ct. 1479, 1483–84 (2012) (analyzing the Illegal Immigration Reform and Immigrant Responsibility Act and its retroactivity); *Kawashima v. Holder*, 132 S. Ct. 1166, 1170 (2012) (analyzing whether filing false tax returns counts as a deportable “aggravated felony” for purposes of the Immigration and Nationality Act); *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011) (analyzing a relief from deportation proceeding under an immigration law that has since been repealed).

<sup>44</sup> The Court heard three election law cases during the 2011–2012 Term; all three cases were consolidated into one. *See Perry v. Perez*, 132 S. Ct. 934, 393–40 (2012) (analyzing whether a district court judge, in drawing interim election maps for the 2012 election, adhered to the correct standards); *Perry v. Davis*, 132 S. Ct. 934, 393–40 (2012) (same).

<sup>45</sup> The Court heard one case that directly implicated the virtue of honesty. *See United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012) (analyzing whether the Stolen Valor Act—criminalizing false representations by a person claiming to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States—is invalid under the Free Speech Clause of the First Amendment).

<sup>46</sup> Although many cases could slot into more than one category, this Article chose the predominate topic for the classification process. For instance, the Arizona immigration case—styled *Arizona v. United States*—is an immigration law as well as a Supremacy Law/preemption case. An evaluation of the case facts and the opinion below, however, lead this Article to classify the issue as a Supremacy Clause/preemption case. *See, e.g.,* Lyle Denniston, *Argument Preview: Who Controls Immigrants' Lives?*, SCOTUSBLOG (Apr. 20, 2012, 2:42 PM), <http://www.scotusblog.com/?p=143506> (advancing the Supremacy Clause as the key issue in the case and stating “[a]t issue before the Justices is the enforceability at this stage of those four provisions [of the Arizona law]. If the Court concludes that—as written—they would unconstitutionally conflict with federal law or disrupt federal enforcement, it would not allow them to take effect. If it finds that they have no such impact on federal law or enforcement, it would let Arizona start enforcing them.”).

<sup>47</sup> Because of the varied topics involved in the social issues cases, each one is also broken down into subcategories to add clarity to the table.

<sup>48</sup> *See infra* Table 1.

TABLE 1  
 CATEGORIZATION OF QUESTIONS PRESENTED OVER THE SUPREME COURT'S  
 2011–2012 TERM

Case Classification (significant business impact cases in italics)	Cases
Social Issues: Crime (Justice, Capital Punishment   Civil Liberties vs. National Security)	22
Social Issues: Justice System (specifically Civil Procedure, Immunity, and Evidence)	8
<i>Business: Employment</i>	7
Immigration	4
Social Issues: Constitutional Provisions (Supremacy Clause   Equal Footing Doctrine)	4
Taxes, Government Services, and Entitlement Programs	4
<i>Business: Consumer Protection</i>	3
<i>Business: Health Care</i>	3
<i>Business: Intellectual Property</i>	3
Trade and International Relations: Native American and Tribal Law   Ambassadors Clause	3
Economy: Bankruptcy	2
<i>Business: Securities</i>	1
Elections (specifically voter rights)	1
Environmental and Property Rights	1
Ethics (Stolen Valor Act)	1
Military Intervention and Terrorism	1
Social Issues: Constitutional Amendment Interpretation (specifically the First, Fifth, Eighth, Eleventh, and Fourteenth Amendments)	1
<b>Total Merits Cases on Docket</b>	69
<b>Total Business Cases on Docket</b>	17
<b>Total Significant Business-Impact Cases</b>	8

This big picture perspective concludes here with a brief summary of results of this categorization process. Crime, justice, punishment, and civil

liberties/national security are major social issues in the United States today.<sup>49</sup> Therefore, it may be appropriate that this category took up the most space on the docket with twenty-two argued cases.<sup>50</sup> Many of these cases stemmed from habeas corpus petitions filed in federal courts after the exhaustion of an inmate's state criminal post-conviction relief.<sup>51</sup> Habeas petitions constitute the last legal recourse for inmates before their sentence is carried out in full (sometimes in the form of capital punishment).<sup>52</sup> This reality explains the plethora of certiorari grants and arguments in habeas cases. The handful of other criminal cases dealt with the right to "effective" counsel and downright awful performances by defense attorneys in criminal cases.<sup>53</sup> Prosecutors took some heat as well for withholding important evidence from a defendant prior to trial.<sup>54</sup>

The next most popular topics with the Court were civil procedure (eight arguments), employment law (seven arguments), immigration (four arguments), constitutional provisions such as the Supremacy Clause (four arguments), and taxes, government services, and entitlement programs (four arguments) categories.<sup>55</sup> The highest profile case of that bunch—*Arizona v. United States*—came from the constitutional provisions category and involved the state of Arizona, fed up with what it believed to be the slow pace of federal enforcement, passing legislation designed to co-enforce federal immigration law over the objection of the Obama administration.<sup>56</sup> Other interesting immigration cases involved removal proceedings for aliens convicted of crimes unrelated to their immigration status but now facing removal because of the convictions.<sup>57</sup> The justice system cases involved qualified immunity from lawsuits—either for grand jury witnesses or for private employees assisting a short-staffed government legal team as counsel.<sup>58</sup>

As always, the First (Speech and Religion Clauses), Fifth (Due Process Clause), Eleventh (State Sovereign Immunity Clause), and Fourteenth (Due Process and Equal Protection Clauses) Amendments had a prominent seat at the table.<sup>59</sup> The Free Speech Clause was by far the most litigated

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<sup>49</sup> See, e.g., *Social Issues: Crime and Punishment*, THE WEEK, <http://theweek.com/supertopic/topic/272/crime-and-punishment> (last visited Mar. 23, 2013).

<sup>50</sup> See *supra* Table 1.

<sup>51</sup> See *supra* note 39.

<sup>52</sup> *Habeas Corpus*, LEGAL INFORMATION INSTITUTE (Aug. 15, 2010, 5:17 PM), [http://www.law.cornell.edu/wex/habeas\\_corpus](http://www.law.cornell.edu/wex/habeas_corpus).

<sup>53</sup> See *supra* note 39.

<sup>54</sup> *Smith v. Cain*, 132 S. Ct. 627, 630 (2012).

<sup>55</sup> See *supra* Table 1.

<sup>56</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2497–98 (2011).

<sup>57</sup> See *supra* note 43.

<sup>58</sup> See *supra* note 40.

<sup>59</sup> See *supra* note 37.

Constitutional Amendment of the Term. One speech case involved employees advocating their right not to speak in unison with their union by being forced to fund a political “fight back” campaign against anti-union California state ballot measures.<sup>60</sup> Another speech case involved television and radio stations agitated by restrictions on what the government claimed was “indecent” content.<sup>61</sup> Although health care dominated the national news and generated extended oral argument time, the three Affordable Care Act cases comprised only four percent of the docket.<sup>62</sup> Four percent or not, these opinions are sure to impact tens of millions of Americans and generate conversation for decades to come.

In an interesting twist, the so-called War on Terror, including military law and detainee rights, made only one appearance in a case concerning torture victim’s rights, or lack thereof as the Court held, to sue certain individuals with a hand in their torture.<sup>63</sup> A few miscellaneous cases stole the show when it came to intrigue and interesting legal issues. Along with the federal law allowing Israel to be stamped as a birthplace on a passport (mentioned in the Introduction), the Stolen Valor Act made news when a citizen and board member of a county water district was punished for lying about receiving military honors when, in actuality, he served no time in the military.<sup>64</sup> The Court considered whether the law violated a person’s First Amendment right to lie.<sup>65</sup> Montana argued that it owned riverbeds on three major rivers flowing through its territory based on the Equal Footing Doctrine applicable the day Montana joined the Union in 1889.<sup>66</sup> In tough economic times, state ownership of the riverbeds would allow Montana to tax companies operating businesses on its rivers.<sup>67</sup> Federal ownership would leave the state coffers high and dry, so to speak.<sup>68</sup> While this big picture look at the Court’s Term could comprise a stand-alone article, this Article is more focused on the cases most likely to impact business. The culling of these cases from the whole described in this overview is the subject of the next Section.

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<sup>60</sup> *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2284–85 (2012).

<sup>61</sup> *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2311–12 (2012).

<sup>62</sup> *See supra* Table 1.

<sup>63</sup> *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012).

<sup>64</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012).

<sup>65</sup> *Id.*

<sup>66</sup> *See* Thomas Merrill, *Opinion Analysis: Montana Dunked on Riverbeds*, SCOTUSBLOG (Feb. 23, 2012, 11:03 AM), <http://www.scotusblog.com/?p=139571>.

<sup>67</sup> *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1222 (2012).

<sup>68</sup> *Id.*

*B. Culling Cases with Potential to Impact the Business Arena*

The Roberts Court tends to grant certiorari in more business-related cases than its predecessor Rehnquist Court.<sup>69</sup> Therefore, it is somewhat shocking to find such a small array of academic papers and popular press articles analyzing the impact of a specific Supreme Court Term on the business arena.<sup>70</sup> This Section joins the conversation by implementing a business-impact rubric designed to cull out the cases with the best chance of significantly impacting the business arena. The rubric is designed to identify cases where, for example, the Court's decision lessens the burden for plaintiffs in securities cases to sue corporate insiders, or where the Court's opinion limits causes of action designed to protect consumers in real estate or credit transactions. To do so the rubric asks the following four questions:

1. Does the Question Presented cover a classic and well-established business law topic?
2. Has at least one business or business interest group filed a "friend of the Court" (amicus curiae) brief demonstrating a serious interest in the case?

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<sup>69</sup> See, e.g., Michael Orey, *The Supreme Court: Open for Business*, BUSINESSWEEK (July 8, 2007), [http://www.businessweek.com/magazine/content/07\\_28/b4042040.htm](http://www.businessweek.com/magazine/content/07_28/b4042040.htm) ("The true sea change brought about by the Roberts court stems from its willingness to take business cases for review. The group presided over by his predecessor, William H. Rehnquist, simply wasn't interested, instead favoring cases involving criminal law, school prayer, or other matters involving fundamental constitutional rights.").

<sup>70</sup> Twenty-seven articles arose in a Lexis search over the past five years using the words "Supreme Court and Business" in the title. See, e.g., Melissa Hart, *Business-Like: The Supreme Court's 2009–2010 Labor and Employment Decisions*, 14 EMP. RTS. & EMP. POL'Y J. 207 (2010); Daniel E. Troy & Rebecca K. Wood, *Federal Preemption at the Supreme Court, 2007–2008* CATO SUP. CT. REV. 257 (2008). It is important to note that these articles pick a specific business topic, such as employment or preemption, and analyze the Court's cases on that front. In addition, only a few popular press articles arose using the same search terms. See, e.g., *Case by Case: The U.S. Supreme Court 2011–2012 Term*, REUTERS.COM, <http://www.reuters.com/supreme-court/2011-2012> (last visited Mar. 23, 2013) [hereinafter REUTERS] (classifying, without much business impact analysis, each of the cases docketed this Term); Melissa Maleske, *6 More Supreme Court Cases That Matter to Businesses*, INSIDE COUNSEL (Nov. 1, 2011), <http://www.insidecounsel.com/2011/11/01/6-more-supreme-court-cases-that-matter-to-business> (discussing six cases likely to have business impact, four of which make the cut in this Article); Eric Markowitz, *5 Supreme Court Cases Entrepreneurs Should Watch*, INC.COM (Oct. 7, 2011), <http://www.inc.com/articles/201110/5-supreme-court-cases-entrepreneurs-should-watch.html> (discussing five cases from the 2011–2012 Term that are of interest to entrepreneurs); Newhouse, *supra* note 15 (discussing the Roberts's Court and its orientation to business). Interestingly, none of the five cases Inc.com finds of interest to entrepreneurs make the cut for business impact based on the rubric in this Article.

3. Do business-focused facts dominate the case, or are the business focused-facts on its periphery?
4. Does a business-focused constitutional provision or amendment or a state or federal statute dominate in the case?

Each of the sixty-nine argued cases from the Term were inputted into this rubric. In the end, eleven cases (nearly sixteen percent of the docket) were culled from the list for further analysis in Parts III–VII. This Section concludes with a brief breakdown of each of the four rubric inputs.

*1. Input Factor #1: Does the Question Presented Address a Classic and Well-Established Business Law Topic?*

Business Law is a topic covered in law school and undergraduate business curricula across the country. This is, in part, because the business school accreditation body (the Association to Advance Collegiate Schools of Business) looks for accreditation purposes at whether an institution includes business law courses in its curriculum.<sup>71</sup> Topics covered in textbooks for survey business law courses are relatively standard across institutions and allow for an accurate gauge of what the academy considers important subjects. This Article employs: (1) these prominent business law textbooks combined with (2) topic lists from nationally recognized business law education associations and (3) the author’s extensive experience teaching the subject to whittle down this universe to a list of twenty classic and well-established business law topics.<sup>72</sup>

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<sup>71</sup> *Business Accreditation Standards: Scope of Accreditation*, AACSB, <http://www.aacsb.edu/accreditation/business/standards/scope.asp> (last visited Mar. 23, 2013) (“For the purpose of determining inclusion in AACSB Accreditation, the following will be considered ‘traditional business subjects’ ... Business Law ...”).

<sup>72</sup> Law school casebooks are too focused on specific areas of business law, such as corporation law or tax law, to be helpful. This makes it tough to cull generalized categories of business law from their tables of contents. Therefore, business law textbooks prove to be the more appropriate vehicle for this analysis. *See, e.g.*, HENRY CHEESEMAN, *Contents, CONTEMPORARY BUSINESS AND ONLINE COMMERCE LAW* (7th ed. 2012), available at <http://www.pearsoned.co.uk/bookshop/detail.asp?item=10000000422737>; KENNETH W. CLARKSON, ET AL., *Table of Contents, BUSINESS LAW: TEXT AND CASES* (11th ed. Cengage Learning) (2008), available at [http://www.cengage.com/search/productOverview.do?N=+16+4294922239+4294966221+4294950417&Ntk=P\\_Isbn13&Ntt=9780324655223#TableofContents](http://www.cengage.com/search/productOverview.do?N=+16+4294922239+4294966221+4294950417&Ntk=P_Isbn13&Ntt=9780324655223#TableofContents); RICHARD A. MANN & BARRY S. ROBERTS, *Table of Contents, SMITH AND ROBERSON’S BUSINESS LAW* (15th ed. 2011), available at [http://www.cengage.com/search/productOverview.do?Ntt=13109640763068193154555477591824670257&N=16+4294922453+167&Ntk=P\\_EPI](http://www.cengage.com/search/productOverview.do?Ntt=13109640763068193154555477591824670257&N=16+4294922453+167&Ntk=P_EPI); ROGER LEROY MILLER, *Table of Contents, FUNDAMENTALS OF BUSINESS LAW: SUMMARIZED CASES* (9th ed. 2008), available at [http://www.cengage.com/search/productOverview.do?N=16&Ntk=P\\_Isbn13&Ntt=9781111530624](http://www.cengage.com/search/productOverview.do?N=16&Ntk=P_Isbn13&Ntt=9781111530624); *see also Business*



TABLE 2  
 TWENTY CLASSIC AND WELL-ESTABLISHED BUSINESS LAW TOPICS<sup>73</sup>

Administrative Law	E-Commerce   Technology
Antitrust	Employment: Relationships   Discrimination   Agency
Business Associations: Corporations   LLCs   Et cetera	Environmental Law
Civil Procedure: Courts   Jurisdiction	Intellectual Property
Constitutional Law	International Law
Consumer Protection	Property
Contracts: Performance   Breach	Sales   Negotiable Instruments   Secured Transactions
Creditors' Rights   Bankruptcy	Securities Regulation
Criminal Law   Cyber Crimes	Torts   Strict Liability   Products Liability
Dispute Resolution	Trusts   Estates

A case receives credit for Input Factor #1 if its Question Presented revolves around one of these classic business law topics. Amazingly, fifty-five out of sixty-nine (nearly eighty percent) of the cases from the 2011–2012 Term passed this initial screen.<sup>74</sup> This demonstrates both the prevalence of business law topics on the Court's docket and perhaps the overbroad focus of today's business law curricula (another topic outside the scope of this Article). Of course, an analysis of fifty-five cases only marginally related to business does not make for a satisfying undertaking of the Term's significant impact on the business arena. Therefore, one hurdle alone does not merit a case's inclusion on the list. At least three more hurdles also exist.

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*Law*, NATIONAL BUSINESS EDUCATION ASSOCIATION, <http://www.nbea.org/newsite/curriculum/standards/law.html> (last visited Mar. 23, 2013) (listing its formulation of classic business law topics).

<sup>73</sup> There are many topics sporadically covered in the business law textbooks and literature that might have made the list such as the following: Ethics and Business Decision Making, Election Law, Government Law, Health Care Law, Immigration Law, Insurance Law, Native American/Tribal Law, Professional Liability, and Tax Law. *See, e.g.*, MILLER, *supra* note 72 (listing "Liability of Accountants and Other Professionals" and "Ethics and Business Decision Making" in its Table of Contents). These topics are not as widely taught in the field and, therefore, not considered as classic business law topics for this rubric.

<sup>74</sup> *See infra* Appendix, Table 15.

2. *Input Factor #2: Were Amicus Curiae Briefs Filed by Businesses or Business Interest Groups?*

Interested parties often file amicus curiae briefs with the Supreme Court.<sup>75</sup> Amicus briefs are directed at specific cases and bring to the Court's attention "relevant matter not already brought to its attention by the parties [that] may be of considerable help to the Court."<sup>76</sup> The Justices have the option of ignoring these briefs completely or reading and potentially availing themselves of them during oral argument or in a written opinion. In the end, amicus briefs do matter and although "they rarely, if ever, make or break a case[,] ... they're most effective when they succinctly point out potential long-term consequences that the court might not otherwise recognize."<sup>77</sup> Justice Stephen Breyer, in an important abortion rights case, claimed that amicus briefs played an "important role in educating judges on potentially relevant technical matters, helping to make us, not experts but educated laypersons, and thereby helping to improve the quality of our decisions."<sup>78</sup>

Amicus briefs filed on behalf of businesses or business-interest groups help demonstrate the importance of a specific case to the business community. This Article defines business interest groups as including any type of business association, including trade associations or political action committees, with a mission statement advocating for issues important to the business community or the fair treatment of business. An appropriate example of a business interest group is the United States Chamber of Commerce. The USCC is the world's largest business federation that represents over three million businesses; the organization even operates a litigation wing that "advocates for fair treatment of business in the courts and before regulatory agencies."<sup>79</sup> Over the past year, the USCC filed dozens of amicus briefs in pending Supreme Court and federal appeals court cases.<sup>80</sup> The USCC is not

<sup>75</sup> SUP. CT. R. 37.

<sup>76</sup> *Id.*

<sup>77</sup> Brenden Koerner, *Do Judges Read Amicus Curiae Briefs*, SLATE MAGAZINE (Apr. 1, 2003, 6:22 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2003/04/do\\_judges\\_read\\_amicus\\_curiae\\_briefs.html](http://www.slate.com/articles/news_and_politics/explainer/2003/04/do_judges_read_amicus_curiae_briefs.html).

<sup>78</sup> *Id.* (referring to *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989)).

<sup>79</sup> See *About U.S. Chamber Small Business Nation*, U.S. CHAMBER OF COMMERCE SMALL BUS. NATION, <http://www.uschambersmallbusinessnation.com/about-us/> (last visited Mar. 23, 2013); *About NCLC*, U.S. CHAMBER OF COMMERCE NATIONAL CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/?n=bd> (last visited Mar. 23, 2013) ("The National Chamber Litigation Center (NCLC) is the public policy law firm of the U.S. Chamber of Commerce.").

<sup>80</sup> See *Recent Case Activity*, U.S. CHAMBER OF COMMERCE NATIONAL CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/cases> (last visited Mar. 23, 2013).



alone, however, in its interest in Supreme Court cases. Organizations as varied as General Electric, the National Federation of Independent Business Small Business Legal Center, and the National Association of Realtors also filed at least one amicus brief with the Court during the 2011–2012 Term.<sup>81</sup> Running this factor through the rubric resulted in twenty-five cases with at least one business-based brief filed with the Court.<sup>82</sup> More importantly, after combining input factors #1 and #2, only twenty potential business-impact cases remain in the mix.

### *3. Input Factor #3: Do Business-Focused Facts Predominate?*

Many cases that reach the Supreme Court are complex and revolve around multiple sets of facts and legal issues. The Affordable Care Act case presents a perfect example.<sup>83</sup> This case is based predominately on health care and Congress's attempt to provide a minimum baseline of health insurance to more Americans.<sup>84</sup> But the case also encompasses other topics such as business (Commerce Clause, interstate commerce and the individual mandate that the vast majority of Americans purchase health care), entitlement programs (Medicare and Medicaid changes under the Affordable Care Act), and tax law (the relevance of the Anti-Injunction Act—a federal law disallowing tax challengers before the tax is collected).<sup>85</sup> Part VII discusses this case more specifically and whether it should be considered a case where business facts predominate.

Because so many Supreme Court cases merely touch on the business arena, this input factor requires rummaging through the factual scenario of each case to determine whether a business-focused set of facts predominates. Over this Term, business-focused facts predominated in cases that involved commercial transactions for products and services, consumers, employment relationships and discrimination, securities trades, and/or intellectual property.<sup>86</sup> This third hurdle culled out sixteen cases from the Term that presented business-focused facts.<sup>87</sup> The whittling down process continued and, after utilizing input factors #1, #2, and #3, only eleven potential business-impact cases remained in the mix.

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<sup>81</sup> See *infra* note 107.

<sup>82</sup> See *infra* Appendix, Table 15.

<sup>83</sup> See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580–82 (2012).

<sup>84</sup> *Id.* at 2580.

<sup>85</sup> *Id.* at 2578–79.

<sup>86</sup> See *supra* notes 34–35.

<sup>87</sup> See *infra* Appendix, Table 15.

4. *Rubric Input #4: Does a Business-Related Constitutional Provision/Amendment and/or Federal Statute Govern?*

There are a select few constitutional provisions and amendments aimed towards or interpreted to apply directly to business interests. For example, the Commerce Clause sets the boundaries of the federal government's ability to regulate businesses.<sup>88</sup> These boundaries have shrunk over the years with the federal government allowed to regulate even intrastate commerce in certain circumstances.<sup>89</sup> The Affordable Care Act consolidated cases tested this limit further concerning whether the federal government may compel people to engage in commerce (purchase insurance or pay a fine).<sup>90</sup> The Commercial Speech aspect of the First Amendment also qualifies under this input. Commercial speech is the primary means by which businesses advertise their products and services.<sup>91</sup> Finally, many federal and state statutes are business-focused and primarily regulate commercial transactions or employment relationships. Examples of business-focused statutes arising in the 2011–2012 Term are the Securities and Exchange Act of 1934 and the Fair Labor Standards Act of 1938.<sup>92</sup> State statutes may be business-focused as well but are less likely to reach the Court other than through a dormant Commerce Clause question.

Overall, a case surmounts this fourth hurdle when one of these business-focused constitutional provisions, amendments, or statutes predominates via the Question Presented. This occurred in twenty-three cases over the Term. Nevertheless, of course, not all twenty-three cases met the other three standards. In the end, eleven cases met all four input factors and this Article will analyze them in Parts III–VII.

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<sup>88</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>89</sup> *Id.*

<sup>90</sup> See Brad Plumer, *Supreme Court Puts New Limits on Commerce Clause. But Will It Matter?*, WASH. POST WONKBLOG (June 28, 2012, 12:58 PM), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/28/the-supreme-court-put-limits-on-commerce-clause-but-does-it-matter/>.

<sup>91</sup> *Commercial Speech*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/commercial\\_speech](http://www.law.cornell.edu/wex/commercial_speech) (last visited Mar. 23, 2013).

<sup>92</sup> See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2161 (2012) (analyzing the Fair Labor Standards Act and its outside salesperson exemption in relation to pharmaceutical salespeople); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1417 (2012) (analyzing the Securities Exchange Act of 1934 and its statute of limitations for suing executives and other insiders for short swing trades).

*C. The Rubric at Work*

It is useful to showcase this rubric at work by analyzing a randomly chosen case from the 2011–2012 Term. *Sackett v. EPA* involved a dispute between the Environmental Protection Agency and private landowners in the small Idaho town of Priest Lake (population 750 in the off-season).<sup>93</sup> The Sacketts owned a vacant lot near Priest Lake that they filled with dirt in order to construct their dream home.<sup>94</sup> The EPA became agitated that the Sacketts “discharged pollutants” into what it classified as wetlands adjacent to navigable waters (Priest Lake) without a permit.<sup>95</sup> The agency issued a compliance order under the Clean Water Act requiring the Sacketts to restore the lot to its natural state immediately or face daily \$37,500 fines.<sup>96</sup> The Sacketts did not feel that their property was close enough to the lake to qualify as wetlands and asked the EPA for a hearing.<sup>97</sup> The EPA denied this request and the Sacketts then filed a lawsuit in federal court, not willing to let the huge fines accumulate any longer.<sup>98</sup> The Sacketts brought suit under the Administrative Procedure Act—a federal law that provides for judicial review of “final agency action for which there is no other adequate remedy in a court.”<sup>99</sup> The Question Presented in the case was whether private landowners, alleging a Due Process violation under

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<sup>93</sup> See, e.g., Lyle Denniston, *Argument Preview: Jousting with the EPA*, SCOTUSBLOG (Jan. 4, 2012, 7:07 PM), <http://www.scotusblog.com/2012/01/argument-preview-jousting-with-the-epa/> (discussing the case and stating the population of the Idaho town).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> The Clean Water Act bans the release of pollutants in wetlands adjacent to navigable waters such as lakes without a permit. 33 U.S.C. §§ 1344, 1344(a) (2012) (stating the “Secretary [of the Environmental Protection Agency] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”).

<sup>97</sup> See, e.g., Denniston, *supra* note 93 (discussing the case and stating the population of the Idaho town).

<sup>98</sup> *Id.*

<sup>99</sup> 5 U.S.C. § 704 (2012) stating in full:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

the Fifth Amendment, may use the Administrative Procedure Act to sue the EPA over an administrative compliance order in cases where the EPA denies a hearing.<sup>100</sup> The government argued that the mere issuing of a compliance letter was not final agency action.<sup>101</sup> The homeowners claimed that, if a court finds that their land was subject to the Clean Water Act, the EPA's compliance letter was final agency action as the fines were pending and their hearing request was denied.<sup>102</sup>

Table 3 demonstrates why the *Sackett* case, although interesting and tangentially related to business interests, does not make the cut.<sup>103</sup> The case is based on the classic business law topic of environmental law. In addition, business-interest groups filed nine amicus briefs with the Court, all in favor of the property owners.<sup>104</sup> Up to this point, *Sackett* clears the first two hurdles under the business impact rubric. The case is omitted from the list because it fails to meet the criteria for the final two impact factors. While the case may have repercussions to the business community down the road, its facts revolve predominantly around environmental protection and property rights issues rather than business. Additionally, under impact factor #4, the case is based on the Clean Water Act and the Administrative Procedure Act.<sup>105</sup> These are both federal statutes that are predominately focused on regulating the activities of administrative agencies and protecting the environment.<sup>106</sup> With only two out of four hurdles cleared, *Sackett* does not have the potential to impact the business arena enough to merit inclusion. Each of the sixty-nine argued cases over the 2011–2012 Term are evaluated in this manner in the Appendix.

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<sup>100</sup> See, e.g., Denniston, *supra* note 93 (discussing the Court's rephrasing of the question presented).

<sup>101</sup> *Id.*

<sup>102</sup> See *Sackett v. EPA*, 132 S. Ct. 1367, 1371, 1374 (2012).

<sup>103</sup> See *infra* Table 3.

<sup>104</sup> See *Sackett v. Environmental Protection Agency*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/sackett-et-vir-v-environmental-protection-agency-et-al/> (last visited Mar. 23, 2013).

<sup>105</sup> See *infra* Table 3.

<sup>106</sup> See *Summary of the Clean Water Act*, U.S. EPA, <http://www.epa.gov/lawsregs/laws/cwa.html> (last visited Mar. 23, 2013); *Summary of the Administrative Procedure Act*, U.S. EPA, <http://www.epa.gov/lawsregs/laws/apa.html> (last visited Mar. 23, 2013).

TABLE 3  
 SAMPLE RUBRIC CLASSIFICATION FOR *SACKETT V. EPA*

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Predominate	Application of a Business-Related Constitutional or Statutory Provision
<i>Sackett</i>	Environmental Law Environment and Property Rights	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>107</sup>	<input type="checkbox"/>	<input type="checkbox"/> Administrative Procedure Act   Clean Water Act

The eleven cases that did make the cut fall into one of four categories: (1) intellectual property, (2) employment, (3) consumer protection, and (4) securities regulation.<sup>108</sup> Each of these cases received four out of four checks via the rubric and represent the best vehicles to evaluate the Term's impact on business. Parts III–VI take each category in order. The case facts are synthesized and followed by a breakdown of each Justice's vote in the case. Part VI debates the merits of the health care cases to determine whether they should make the cut. Part VII utilizes this analysis to form a cohesive theory Business Impact Theory of the Court's 2011–2012 Term.

## II. THE INTELLECTUAL PROPERTY CASES

The Court heard three interesting intellectual property cases over the 2011–2012 Term.<sup>109</sup> Two of the decisions have the potential to significantly impact business in the near future.<sup>110</sup> One case involved a dispute between a

<sup>107</sup> Nine business-related groups filed amicus briefs in this case: (1) the National Association of Home Builders et al., (2) the National Institute of Manufacturers, (3) the Wet Weather Partnership et al., (4) the American Petroleum Institute et al., (5) the American Farm Bureau Federation et al., (6) a combined brief filed for the Center for Constitutional Jurisprudence and the National Federation of Independent Business Small Business Legal Center, (7) the Chamber of Commerce of the United States of America, (8) the Competitive Enterprise Institute, and (9) General Electric Co. *Case Pages: October Term 2011*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/ot2011/> (last visited Mar. 23, 2013); *see also Sackett v. Environmental Protection Agency*, *supra* note 104.

<sup>108</sup> *See infra* Appendix, Table 15.

<sup>109</sup> *See supra* note 34.

<sup>110</sup> *See generally* *Caraco Pharm. Labs., Ltd. v. Novo Nordisk*, 132 S. Ct. 1670 (2012); *Golan v. Holder*, 132 S. Ct. 873 (2012); *see also Kappos v. Hyatt*, 132 S. Ct. 1690 (2012)

brand name and a generic manufacturer over two unique methods of treating diabetes.<sup>111</sup> A patent infringement lawsuit ensued. The Court came out in favor of the generic manufacturer based on the public policy of rapidly getting generic drugs to market and a disfavoring of overbroad patent claims.<sup>112</sup> The second case was more international in its scope. It involved the United States joining the Berne Convention for the Protection of Literary and Artistic Works over a century after Berne's creation.<sup>113</sup> The long time gap resulted in the United States copyright regime differing greatly from Berne membership requirements.<sup>114</sup> Congress granted new copyright protection for works in the United States public domain that were protected internationally.<sup>115</sup> Outrage ensued as people were forced to pay for licenses to conduct symphonies, reproduce music, and market movies that were previously royalty-free.<sup>116</sup> The Court held that Congress may choose to remove works from the public domain without violating the Copyright Clause or the First Amendment to satisfy Berne's membership obligations.<sup>117</sup> This Section analyzes both cases in turn.

#### *A. The Court Favored a Generic Manufacturer and Quickly Moving Generics to Market*

*Caraco v. Novo Nordisk* investigated the world of medicine patents.<sup>118</sup> Intense competition exists between brand name drug manufacturers and their generic competitors. Many species of patents exist to protect brand manufacturers' abundant marketing and research and development expenditures.<sup>119</sup> At

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(holding unanimously that “there are no limitations on a patent applicant’s ability to introduce new evidence in a [judicial proceeding to reconsider a denied patent application by the Patent and Trademark Office] beyond those already present in the Federal Rules of Evidence and the Federal Rules of Civil Procedure”); *Mayo Collaborate Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1305 (2012) (holding unanimously that “the patent claims at issue here effectively claim the underlying laws of nature themselves” and are thereby non-patentable). The *Mayo* and *Kappos* cases are not discussed in this section because they are pure intellectual property and evidence law cases likely to have little impact on business as compared to *Caraco* and *Golan*.

<sup>111</sup> See *Caraco*, 132 S. Ct. at 1675.

<sup>112</sup> *Id.* at 1688.

<sup>113</sup> *Golan*, 132 S. Ct. at 877–88.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 894.

<sup>118</sup> *Caraco Pharm. Labs., Ltd. v. Novo Nordisk*, 132 S. Ct. 1670, 1675 (2012).

<sup>119</sup> See, e.g., Vinod Singh, *How to Read & Understand Drug Patents*, EZINEARTICLES (Oct. 20, 2007), <http://ezinearticles.com/?How-to-Read-and-Understand-Drug-Patents&id>



the same time, Congress mandates that the Food and Drug Administration quickly approve generic drugs that do not infringe on brand patents.<sup>120</sup> *Caraco* involved compound patents (protecting specific mixtures of chemicals comprising a drug) and method patents (granting manufacturers exclusive rights to use a drug in particular ways).<sup>121</sup> Because drug treatment options constantly evolve, brand manufacturers often obtain and hold method patents after their compound patents expire.<sup>122</sup> Loss of patent protection allows generic manufacturers to copy a specific chemical combination and produce the same drugs at a much lower cost.<sup>123</sup> Generics may only be used, however, in ways that do not violate a brand's existing method patents.<sup>124</sup> To determine a generic drug's eligibility, the FDA requires brand manufacturers to submit "use codes" describing the scope of their patented methods.<sup>125</sup> The FDA assumes submitted use codes are accurate and analyzes applications for generic drugs according to them.<sup>126</sup>

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=792091 (listing eight different types of medical patents: (1) "composition," (2) "formulation," (3) "compound," (4) "dosage," (5) "method," (6) "use," (7) "drug delivery," and (8) "devices"); see also Timothy Noah, *The Make-Believe Billion: How Drug Companies Exaggerate Research Costs to Justify Absurd Profits*, SLATE (Mar. 3, 2011, 9:19 PM), [http://www.slate.com/articles/business/the\\_customer/2011/03/the\\_makebelieve\\_billion.html](http://www.slate.com/articles/business/the_customer/2011/03/the_makebelieve_billion.html) (arguing that pharmaceutical companies do not spend as much on marketing and R & D as they claim and that "[t]he statistic Big Pharma typically cites ... is that the cost of bringing a new drug to market is about \$1 billion. Now a new study indicates the cost is more like, um, \$55 million.").

<sup>120</sup> See Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585, 1585-86 (1984) (codified as amended in scattered sections of 15, 21, 35, and 42 U.S.C.). This Act is also known as the Hatch-Waxman Act for its original sponsors, Senator Orrin Hatch (Republican of Utah) and Representative Henry Waxman (Democrat of California); see, e.g., *Caraco*, 132 S. Ct. at 1676.

<sup>121</sup> *Caraco*, 132 S. Ct. at 1676.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See *id.* at 1676-77.

<sup>125</sup> *Id.* at 1676 ("To facilitate the approval of generic drugs as soon as patents allow, [federal statutes] and FDA regulations direct brand manufacturers to file information about their patents. The statute mandates that a brand submit in its [new drug application] 'the patent number and the expiration date of any patent which claims the drug for which the [brand] submitted the [NDA] or which claims a method of using such drug.'"). Once the new drug application is approved, "the brand [must] provide a description of any method-of-use patent it holds" or a use code. *Id.*

<sup>126</sup> *Caraco*, 132 S. Ct. at 1677 ("The FDA takes that code as a given: It does not independently assess the patent's scope or otherwise look behind the description authored by the brand. According to the agency, it lacks 'both [the] expertise and [the] authority' to review patent claims; although it will forward questions about the accuracy of a use code to the brand, its own 'role with respect to patent listing is ministerial.'").

The diabetes drug repaglinide is manufactured and sold by Caraco Pharmaceutical Laboratories (in a generic version) and Novo Nordisk (the brand name version called Prandin).<sup>127</sup> The FDA approved Prandin to treat diabetes in three unique ways,<sup>128</sup> but Novo only held a patent for one of those methods.<sup>129</sup> Caraco desired to gain market share via its generic version for the two non-patented methods and filed an abbreviated new drug application.<sup>130</sup> Later, Novo filed an updated use code incorrectly claiming patents for all three uses.<sup>131</sup> Caraco understood the use code was inaccurate and continued to seek approval.<sup>132</sup> Novo sued for patent infringement.<sup>133</sup> Caraco counterclaimed that Novo's new use code was overbroad.<sup>134</sup> Novo contended that use codes could not be challenged via counterclaim as long as the use code description correctly stated at least one accurate patented use.<sup>135</sup>

The Court unanimously concluded that a generic manufacturer may file a counterclaim in a patent infringement suit to correct a brand's overbroad use code.<sup>136</sup> The Justices argued that counterclaims in patent infringement lawsuits allow the issue to be resolved more quickly and speed up approvals of generic drugs to market.<sup>137</sup> The argument continued that allowing these claims honors Congress's desire, is better public policy, and incentivizes brand names to file accurate use codes.<sup>138</sup> Justice Sotomayor's concurrence joined the ruling but went further and scolded the FDA and Congress for

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<sup>127</sup> *Id.* at 1678.

<sup>128</sup> The FDA "has approved three uses of Prandin to treat diabetes: repaglinide by itself; repaglinide in combination with metformin; and repaglinide in combination with thiazolidinediones (TZDs)." *Id.*

<sup>129</sup> *Id.* at 1678–79 ("Novo currently holds a patent for one of the three FDA-approved uses of repaglinide—its use with metformin. But Novo holds *no* patent for the use of repaglinide with TZDs or its use alone.").

<sup>130</sup> *Id.* at 1679.

<sup>131</sup> *Id.*

<sup>132</sup> *Caraco*, 132 S. Ct. at 1678.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1680–81 ("[A generic manufacturer] sued for patent infringement may bring a counterclaim 'on the ground that the patent does not claim ... an approved method of using the drug.' The parties debate the meaning of this language. Novo (like the Federal Circuit) reads 'not an' to mean 'not any,' contending that 'the counterclaim is available only if the listed patent does not claim *any* (or, equivalently, claims *no*) approved method of using the drug.'" (internal citations omitted)).

<sup>136</sup> *Id.* at 1688.

<sup>137</sup> *Id.* at 1681–82 ("The Hatch-Waxman Amendments authorize the FDA to approve the marketing of a generic drug for particular unpatented uses[, and a counterclaim in a patent infringement lawsuit] provides the mechanism for a generic company to identify those uses, so that a product with a label matching them can quickly come to market.").

<sup>138</sup> *Caraco*, 132 S. Ct. at 1682–85.



making the rules in this area too opaque for brand name manufacturers to interpret clearly.<sup>139</sup>

TABLE 4  
CARACO V. NOVO NORDISK VOTE BREAKDOWN

<i>Caraco v. Novo Nordisk</i>   (9-0)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote: 4-0 for majority</b>	
<b>Ginsburg</b>	Majority
<b>Breyer</b>	Majority
<b>Sotomayor</b>	Majority and concurrence (author): law is too opaque in this area for brand name manufacturers to get clarity on disclosure requirements
<b>Kagan</b>	Majority (author): generic drug makers may sue for overbroad use codes to further public policy of hurrying generics to market
<b>Conservative-leaning (by seniority)   Vote: 5-0 for majority</b>	
<b>Scalia</b>	Majority
<b>Kennedy</b>	Majority
<b>Thomas</b>	Majority
<b>Roberts</b>	Majority
<b>Alito</b>	Majority

*B. The Court Upheld Congressional Copyright Grants to Works in the Public Domain*

The second significant intellectual property case, *Golan v. Holder*, reviewed a Congressional grant of copyright protection to foreign works protected internationally yet residing in the United States public domain.<sup>140</sup>

<sup>139</sup> *Id.* at 1689 (Sotomayor, J., concurring) (“Precisely because the regulatory scheme depends on the accuracy and precision of use codes, I find FDA’s guidance as to what is required of brand manufacturers in use codes remarkably opaque.”).

<sup>140</sup> *Golan v. Holder*, 132 S. Ct. 873, 878 (2012). The federal law at issue is the Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976 (1994) (codified at 17 U.S.C. § 104A) [hereinafter URAA] (discussing the specific requirements for works to be restored under Berne and at issue in *Golan v. Holder*). More specifically, the statute proclaims that “[c]opyright subsists ... in restored works, and vests automatically on the date of restoration” and “[a]ny work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the

These “orphan works”<sup>141</sup> were being used, royalty-free, by American conductors, producers, and educators among others for concerts, movies, and other commercial uses.<sup>142</sup> This legal double standard angered foreign governments who protected American copyrighted works used in their commercial sphere.<sup>143</sup> The problem arose from unfortunate timing. The primary international accord governing international copyright relations—the Berne Convention for the Protection of Literary and Artistic Works<sup>144</sup>—took effect in 1886. The United States joined Berne over a century later in 1989.<sup>145</sup> Berne requires reciprocal copyright relationships between member countries; these membership requirements<sup>146</sup> persuaded the federal government

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work would have otherwise been granted in the United States if the work never entered [sic] the public domain in the United States.” URAA § 514(a)(1).

<sup>141</sup> Works found themselves orphaned in the United States for three primary reasons: (1) the United States did not protect works from the origin country at the time of their publication, (2) the United States did not protect sound recordings fixed before 1972, or (3) the foreign author failed to comply with United States statutory formalities [no longer applicable under copyright law] for copyright protection. *See, e.g., Golan*, 132 S. Ct. at 878. With no United States copyright protection, these orphaned works found their way into the public domain. *Id.*

<sup>142</sup> *See, e.g., Joan McGivern & Christine Pepe, Golan v. Holder: The Long Road to Restoration*, ENT., ARTS & SPORTS L. BLOG (Dec. 20, 2010, 10:46 PM), [http://nysbar.com/blogs/EASL/2010/12/golan\\_v\\_holder\\_the\\_long\\_road\\_t.html](http://nysbar.com/blogs/EASL/2010/12/golan_v_holder_the_long_road_t.html) (stating that these royalty-free users claimed that “Section 514 [of the URAA] not only harmed their free speech, but also their economic interests, having spent time and money restoring or preparing the works on the expectation that the works would remain in the public domain”).

<sup>143</sup> *See Golan*, 132 S. Ct. at 880 (examining reports of international retribution for United States copyright policy relating to orphaned works and stating that “[t]he minimalist approach essayed by the United States did not sit well with other Berne members”).

<sup>144</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 (as revised at Paris on July 24, 1971 and amended in 1979).

<sup>145</sup> *Golan*, 132 S. Ct. at 877; *Copyright, International Definition*, THEFREECTIONARY, <http://legal-dictionary.thefreedictionary.com/The+United+States+and+the+Berne+Convention> (last visited Mar. 23, 2013) (“In 1989, the United States for the first time became a signatory to the oldest and most widely approved international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works.... In doing so, the United States ended a long history of noncompliance with the Berne Convention, finally joining the vast majority of developed countries.”).

<sup>146</sup> Once the United States joined Berne, it became responsible to comply with the Uruguay Round General Agreement on Tariffs and Trade, which included the Agreement on Trade Related Aspects of Intellectual Property Rights [hereinafter TRIPs]. TRIPs requires its signatories to comply with Article 18, among others, of the Berne Convention. TRIPs art. 9.1, Apr. 15, 1994, 33 I.L.M. 1197, 1201, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm) (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”). This compliance provision

to grant copyright protection to orphan works thus avoiding potential tariffs, retaliation, and sanctions by the World Trade Organization.<sup>147</sup> United States copyright holders also gained protection in foreign countries withholding it before their orphan works became protected.<sup>148</sup> In the end, this restoration process removed works from the public domain and prior users were forced to obtain licenses.<sup>149</sup> Lawsuits were filed alleging First Amendment and Copyright Clause violations.<sup>150</sup>

The Court upheld the copyright restoration law under both alleged constitutional deficiencies.<sup>151</sup> The majority claimed the law does not violate the Copyright Clause because Congress has historically been able to remove works from the public domain<sup>152</sup> and new license fees do not hinder the “Progress of Science” as prohibited by the Constitution.<sup>153</sup> Additionally, the law did not offend the First Amendment because these users may still use the work under the Fair Use doctrine and copyright holders are still not allowed to copyright ideas.<sup>154</sup> In the end, the majority proclaimed: “Congress determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection. Those interests include ensuring exemplary compliance with our international obligations, securing greater protection for U.S. authors abroad, and remedying unequal treatment of foreign authors.”<sup>155</sup>

Justice Breyer’s dissent objected to damming the free flow of important information lubricated by the public domain.<sup>156</sup> The idea is that Congress

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motivated the United States to extend copyright protection to all works of foreign origin whose term of protection had not expired. *Golan*, 132 S. Ct. at 881.

<sup>147</sup> See *Golan*, 132 S. Ct. at 881.

<sup>148</sup> See *id.* at 884.

<sup>149</sup> See *id.* at 883.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 894 (“[The copyright restoration legislation] lies well within the ken of the political branches. It is our obligation, of course, to determine whether the action Congress took, wise or not, encounters any constitutional shoal. For the reasons stated, we are satisfied it does not.”).

<sup>152</sup> See *id.* at 887 (stating that “Congress has also passed generally applicable legislation granting patents and copyrights to inventions and works that had lost protection” and cataloging Congressional acts to restore copyright to works in the public domain).

<sup>153</sup> *Golan*, 132 S. Ct. at 889 (“The provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning. We hold ... that it is not the sole means Congress may use ‘[t]o promote the Progress of Science.’”).

<sup>154</sup> See *id.* at 891 (“And nothing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain.”).

<sup>155</sup> *Id.* at 894.

<sup>156</sup> *Id.* at 900 (Breyer, J., dissenting).

should have taken less restrictive alternatives to satisfy Berne membership requirements instead of pulling works from the public domain.<sup>157</sup> The dissent stated that the “Copyright Clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute.”<sup>158</sup>

TABLE 5  
*GOLAN V. HOLDER* VOTE BREAKDOWN

<i>Golan v. Holder</i>   (6-2)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote: 2-1 for majority</b>	
<b>Ginsburg</b>	Majority (author): no Copyright Clause/First Amendment violation when works in public domain granted copyrights to satisfy international obligations
<b>Breyer</b>	Dissent (author): less-restrictive ways to satisfy membership in Berne than stifling speech by removing works from public domain
<b>Sotomayor</b>	Majority
<b>Kagan</b>	Recused
<b>Conservative-leaning (by seniority)   Vote: 4-1 for majority</b>	
<b>Scalia</b>	Majority
<b>Kennedy</b>	Majority
<b>Thomas</b>	Majority
<b>Roberts</b>	Majority
<b>Alito</b>	Dissent

### III. THE EMPLOYMENT LAW CASES

Seven interesting employment law cases made the Court’s 2011–2012 docket,<sup>159</sup> three of which merit deeper analysis based on their potential impact

<sup>157</sup> *Id.* at 912 (Breyer, J., dissenting).

<sup>158</sup> *Id.* (Breyer, J., dissenting).

<sup>159</sup> See generally *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2156 (2012) (involving a state employer who (a) conditions employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a notice and/or opportunity to object, and (b) conditions employment on the payment of union fees to finance ballot measures); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (examining the deference owed to the Secretary of Labor’s interpretation of the Fair Labor Standards Act outside salesperson exemption and whether the exemption applies to pharmaceutical salespeople); *Coleman v. Md. Ct. App.*, 132 S. Ct. 1327 (2012) (holding by a 5-4 conservative-leaning majority that lawsuits against states under the self-care provision of the Family and Medical Leave Act [allowing employees time off to tend to their own serious

on business.<sup>160</sup> *Hosanna-Tabor Church v. EEOC* looked at the interaction of the First Amendment and employment discrimination law.<sup>161</sup> What happens when an ordained minister (teaching both secular and religious subjects at a religious school) becomes disabled, recovers with a desire to return to work, and finds that the administration hired a replacement and now wishes to terminate employment?<sup>162</sup> The Court held that the ministerial exception, located in the religion clauses of the First Amendment, prohibits courts from second-guessing a religious organization's employment actions against its ministers.<sup>163</sup> In the end, a unanimous majority expanded the First Amendment to protect the employment interests of a commercial, albeit religious in nature, entity.<sup>164</sup>

The second case, *Christopher v. SmithKline Beecham Corp.*, dealt with whether the outside salesperson exemption in the Fair Labor Standards Act exempts pharmaceutical sales representatives from overtime pay.<sup>165</sup> The sticky part of the case revolved around the idea that these representatives were not allowed to actually sell drugs to the doctors they called on as they worked over forty hours per week.<sup>166</sup> The Court held that the exemption

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health condition when the condition interferes with the employee's ability to perform at work] are barred by sovereign immunity); *Roberts v. Sea-Land Servs.*, 132 S. Ct. 1350 (2012) (holding via an 8-1 majority that employees are "newly awarded compensation" as required under the Longshore and Harbor Workers' Compensation Act when they first become disabled regardless of when an authority issues compensation orders on their behalf); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (evaluating the tension between the Ministerial Exception to the First Amendment and employment discrimination statutes); *Elgin v. U.S. Dep't of Treasury*, 132 S. Ct. 453 (2011) (showing grant of the certiorari petition on a case involving the Civil Service Reform Act and an employee wishing to bypass the usual Merits Systems Protection Board hearing and, instead, have a wrongful termination claim heard by a district court); *Pacific Operators Offshore, LLP v. Valladolid*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/pacific-operators-offshore-llp-v-valladolid/> (last visited Mar. 23, 2013) (citing *Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680 (2012)) ("The Outer Continental Shelf Lands Act extends coverage for injury occurring as the result of operations conducted on the outer continental shelf to an employee who can establish a substantial nexus between his injury and his employer's extractive operations on the shelf.").

<sup>160</sup> Four cases do not touch on the business realm closely enough to merit consideration in this Section. *Coleman*, *Roberts*, *Pacific*, and *Elgin* are cases that either deal with obscure federal statutes (that is, the Outer Continental Shelf Lands Act (*Pacific*), the Longshore and Harbor Workers' Compensation Act (*Roberts*), and the Civil Service Reform Act (*Elgin*), or constitutional issues somewhat distant from business such as sovereign immunity (*Coleman*)).

<sup>161</sup> *Hosanna-Tabor*, 132 S. Ct. at 699.

<sup>162</sup> *See id.* at 699–700.

<sup>163</sup> *Id.* at 710.

<sup>164</sup> *Id.* at 698.

<sup>165</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2161 (2012).

<sup>166</sup> *Id.* at 2165.

was properly applied to this class of employees because they were the type of workers to whom this exemption was meant to apply.<sup>167</sup>

The third case, *Knox v. Service Employees International Union, Local 1000*, dealt with a public sector employer in California and the union representing all of its employees.<sup>168</sup> The union made a mid-year assessment of all members without giving them notice or the chance to object.<sup>169</sup> The assessment was intended to cover only expenses related to a political campaign against anti-labor ballot propositions in California.<sup>170</sup> Nonmember, dues-paying employees sued the union alleging that the assessment was unconstitutional.<sup>171</sup> The Court agreed and created an opt-in scheme by which nonmembers are now allowed to choose whether to pay such assessments.<sup>172</sup>

#### *A. The Court Allows Religious Employees to Control the Hiring and Firing of Minister-Employees*

*Hosanna-Tabor Church v. EEOC* examined the synergy between employment law and the First Amendment's religion clauses.<sup>173</sup> Cheryl Perich, a commissioned minister, taught secular and religious classes, led her students in prayer and took her students to weekly chapel at Hosanna Tabor School.<sup>174</sup> During her employment, she developed narcolepsy and took disability leave.<sup>175</sup> Eight months later, she aspired to return to teaching but the school had filled her position and asked her to resign.<sup>176</sup> She presented herself at the school, refused to resign and threatened to sue under the Americans with Disabilities Act.<sup>177</sup> Hosanna-Tabor terminated her based on "insubordination and

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<sup>167</sup> *Id.* at 2172–73.

<sup>168</sup> *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2284 (2012).

<sup>169</sup> *Id.* at 2285–86.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 2286.

<sup>172</sup> *Id.* at 2298.

<sup>173</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699 (2012) ("The question presented [by Chief Justice Roberts] is whether the Establishment and Free Exercise Clauses of the First Amendment bar [the termination of a teacher leading secular and religious classes] when the employer is a religious group and the employee is one of the group's ministers.").

<sup>174</sup> *Id.* at 700 ("Perich led the chapel service herself about twice a year.").

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 700–01 ("[The principal] also expressed concern that Perich was not yet ready to return to the classroom.... Hosanna-Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a "peaceful release" from her call, whereby the congregation would pay a portion of her



disruptive behavior” as well as damaging her working relationship with the administration by threatening to take legal action.<sup>178</sup> The Equal Employment Opportunity Commission sued on her behalf alleging retaliation for threatening an ADA claim.<sup>179</sup> The school argued that the suit was barred under the First Amendment and its ministerial exception.<sup>180</sup> This exception has been held to preclude “application of employment discrimination legislation to claims concerning the employment relationship between a religious institution and its ministers.”<sup>181</sup> Perich claimed she was a lay employee performing secular functions in a commercial context and “the government has a strong interest in assuring that she and others in her position can do so free of invidious discrimination.”<sup>182</sup>

The Court held that the ministerial exception, legally enforceable in eleven federal circuits, is constitutional under the Free Exercise and Establishment Clauses of the First Amendment.<sup>183</sup> Chief Justice Roberts, writing for a unanimous Court stated:

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health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign. On ... the first day she was medically cleared to return to work—Perich presented herself at the school. [The principal] asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, [the principal] called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.” (internal citations omitted). “The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability.” *Id.* at 701 (citing 42 U.S.C. § 12112(a) (1990)). The law “also prohibits an employer from retaliating ‘against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].’” *Id.* (citing 42 U.S.C. § 12203(a) (1990)).

<sup>178</sup> *Id.* at 700.

<sup>179</sup> *Hosanna-Tabor*, 132 S. Ct. at 701 (“The EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Perich intervened in the litigation ....”).

<sup>180</sup> *Id.* (“Hosanna-Tabor moved for summary judgment [under the ministerial exception] .... According to the Church, Perich was a minister, and she had been fired for a religious reason—namely, that her threat to sue the Church violated the Synod’s belief that Christians should resolve their disputes internally.”).

<sup>181</sup> *Id.* at 705 (collecting federal appellate cases making that same point).

<sup>182</sup> Brief for Respondent at 61, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 3380507, at \*61.

<sup>183</sup> *Hosanna-Tabor*, 132 S. Ct. at 706.

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>184</sup>

The opinion concluded by holding that the ministerial exception applies to Perich as a minister.<sup>185</sup> Even though Perich claimed to be a lay teacher, the Court found that because of “the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church[,] .... Perich was a minister covered by the ministerial exception.”<sup>186</sup> This case is important as it represents the first time the Court evaluated how the “freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment.”<sup>187</sup>

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 710. The Court also limited the holding to the idea that the ministerial exception bars an employment discrimination lawsuit against a church employer and a minister employee. *Id.* (“We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”).

<sup>186</sup> *Id.* at 708.

<sup>187</sup> *Id.* at 705. This is true even though the “Courts of Appeals, in contrast, have had extensive experience with this issue.” *Id.*



TABLE 6  
*HOSANNA-TABOR V. EEOC* VOTE BREAKDOWN

<i>Hosanna-Tabor v. EEOC</i>   (9-0)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote 4-0 for majority</b>	
<b>Ginsburg</b>	Majority
<b>Breyer</b>	Majority
<b>Sotomayor</b>	Majority
<b>Kagan</b>	Majority   Concurrence (joined Alito)
<b>Conservative-leaning (by seniority)   Vote 5-0 for majority</b>	
<b>Scalia</b>	Majority
<b>Kennedy</b>	Majority
<b>Thomas</b>	Majority   Concurrence (author): look at whether religious organization “sincerely believes” employee to be a minister
<b>Roberts</b>	Majority (author): ministerial exception constitutional. Perich falls under its reach; Church legally terminated her
<b>Alito</b>	Majority   Concurrence (author): the term “minster” is misleading. Court should focus on function performed employees at religious bodies

*B. The Court Evaluates Exceptions to the FLSA’s Overtime Rule*

*Christopher v. SmithKline Beecham Corp.* evaluated the Fair Labor Standards Act (FLSA) and its overtime requirements and exemptions.<sup>188</sup> The FLSA requires overtime pay of at least 1.5 times the employee’s regular rate for hours worked over forty per workweek.<sup>189</sup> However, the law exempts employers from paying certain categories of workers such overtime

<sup>188</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2161 (2012). *See generally* Fair Labor Standards Act of 1938, 29 U.S.C. § 207(a)(1) (2006) (stating laws for maximum hours).

<sup>189</sup> 29 U.S.C. § 207(a)(1) (“Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”).

pay.<sup>190</sup> One such exempted category is the outside salesperson.<sup>191</sup> The exact range of what types of jobs fall within this exemption has been up for debate; this is especially true when it comes to pharmaceutical sales representatives (PSRs).<sup>192</sup> GlaxoSmithKline (GSK or Glaxo) is an international pharmaceutical company.<sup>193</sup> GSK employs PSRs to pitch its drugs to doctors in hopes of having them prescribed to patients.<sup>194</sup> Even though its PSRs cannot make sales to doctors or patients in the traditional sense of the word, GSK believes that its PSRs are exempt from overtime under the outside salesperson exemption.<sup>195</sup> Two former GSK representatives alleged they were thereby required to work ten to twenty hours of overtime per week without compensation.<sup>196</sup> The sales representatives filed an action against the company seeking back overtime pay and liquidated damages.<sup>197</sup> GSK responded to the charges that both men are properly classified “outside salesmen” and properly exempted from overtime.<sup>198</sup>

The major issue in the case revolved around whether pharmaceutical salespeople actually make sales and thus qualify for the exemption.<sup>199</sup> Since

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<sup>190</sup> 29 U.S.C. § 213(a)(1) (2006).

<sup>191</sup> *Id.*

<sup>192</sup> See *Christopher*, 132 S. Ct. at 2164–65; *Overtime Exemption for Outside Sales Reps: A New Wrinkle*, HRWEBADVISOR (May 14, 2012), <http://www.hrwebadvisor.com/headlines/article/overtime-exemption-outside-sales-reps-new-wrinkle> (“Questions regarding the entitlement to overtime pay are especially murky with regard to [pharmaceutical sales representatives (PSRs)] who ... do not actually ‘sell’ pharmaceutical drugs to physicians but simply promote them. Only when a doctor, heeding a PSR’s pitch, later prescribes the drugs for his or her patients are sales actually made. As a result, plaintiffs [in FLSA overtime cases] argue that PSRs should be entitled to overtime pay because they do not fall under the outside salesman exemption.”).

<sup>193</sup> See *Christopher*, 132 S. Ct. at 2163 (“SmithKline Beecham Corporation is in the business of developing, manufacturing, and selling prescription drugs.”); *About Us*, GLASKOSMITHKLINE, <http://www.gsk.com/about-us.html> (last updated Feb. 7, 2013). SmithKline Beechman was doing business as GlaxoSmithKline. *Christopher*, 132 S. Ct. at 2156.

<sup>194</sup> *Christopher*, 132 S. Ct. at 2163–64.

<sup>195</sup> *Id.* at 2164.

<sup>196</sup> *Id.* (“Outside of normal business hours, petitioners [(the two former pharmaceutical salespeople)] spent an additional 10 to 20 hours each week [above the 40 hours per week they called on doctors offices] attending events, reviewing product information, returning phone calls, responding to e-mails, and performing other miscellaneous tasks. Petitioners were not required to punch a clock or report their hours, and they were subject to only minimal supervision.”); *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 385 (9th Cir. 2011) (discussing the petitioners’ terminations and stating that one employee was terminated from the company and the other accepted a similar position at another pharmaceutical company).

<sup>197</sup> *Christopher*, 132 S. Ct. at 2164.

<sup>198</sup> *Christopher*, 635 F.3d at 388.

<sup>199</sup> *Christopher*, 132 S. Ct. at 2161.

they are not legally allowed to sell drugs to patients, they must (1) sell their product to pharmacies and (2) market specific drugs to physicians in hopes of future patient prescriptions.<sup>200</sup> They claim to have spent their time outside of corporate offices but within a specified geographic area.<sup>201</sup> When not making physician calls, sales representatives “study Glaxo products and relevant disease states. They will prepare new presentation modules, respond to phone calls and e-mails, generate reports, and attend evening and weekend seminars. These tasks are typically performed outside of customary business hours.”<sup>202</sup> Part of their pay is salary and part incentive based.<sup>203</sup> Incentive-based compensation “is paid if Glaxo’s market share for a particular product increases in a PSR’s territory, sales volume for a product increases, sales revenue increases, or the dose volume increases. Glaxo aims to have a PSR’s total compensation be approximately 75% salary and 25% incentive compensation.”<sup>204</sup> These duties are similar across the industry.

The district court granted SmithKline’s summary judgment motion and held that these salespeople “unmistakably fit within the terms and spirit of the exemption.”<sup>205</sup> The Ninth Circuit affirmed under the theory that:

[Pharmaceutical salespeople] are driven by their own ambition and rewarded with commissions when their efforts generate new sales. They receive their commissions in lieu of overtime and enjoy a largely autonomous work-life outside of an office. The pharmaceutical industry’s representatives—detail men and women—share many more similarities than differences with their colleagues in other sales fields, and we hold that they are exempt from the FLSA overtime-pay requirement.<sup>206</sup>

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<sup>200</sup> *Christopher*, 635 F.3d at 385 (“Because Glaxo is proscribed from selling Rx-only products directly to the public, it sells its prescription pharmaceuticals to distributors or retail pharmacies, which then dispense those products to the ultimate user, as authorized by a licensed physician’s prescription.”). These requirements are found in the Controlled Substances Act of 1970; see 21 U.S.C. § 829(b)–(d) (2006).

<sup>201</sup> *Christopher*, 635 F.3d at 386.

<sup>202</sup> Sam Wiczorek, *Argument Preview: The “Outside Salesman” Exception to the FLSA’s Overtime-Pay Requirement*, SCOTUSBLOG (Apr. 5, 2012, 10:44 AM), <http://www.scotusblog.com/?p=142535>.

<sup>203</sup> *Christopher*, 635 F.3d at 387.

<sup>204</sup> *Id.*

<sup>205</sup> *Christopher v. SmithKlein Beecham Corp.*, 2009 WL 4051075, at \*5 (D. Ariz. Nov. 20, 2009) (stating that the district court observed that pharmaceutical sales representatives “are not hourly workers, but instead earn salaries well above minimum wage—up to \$100,000 a year,” and that they receive bonuses in lieu of overtime as “an incentive to increase their efforts”).

<sup>206</sup> See *Christopher*, 623 F.3d at 400–01.

The Supreme Court affirmed as well, and held in favor of GSK.<sup>207</sup> Writing for the majority, Justice Alito held that the intent of the FLSA overtime exemptions was honored in this case.<sup>208</sup> These PSRs made a great deal of money while the FLSA exemptions were meant to protect employers earning lower salaries and benefits.<sup>209</sup> In this vein, the majority opinion held:

Petitioners—each of whom earned an average of more than \$70,000 per year and spent between 10 and 20 hours outside normal business hours each week performing work related to his assigned portfolio of drugs in his assigned sales territory—are hardly the kind of employees that the FLSA was intended to protect.<sup>210</sup>

Additionally, the majority did not believe the PSRs' arguments that they merely stimulated sales and sold nothing more than a "concept" of the drug's treatment potential.<sup>211</sup> The Court also brushed aside the Department of Labor's rather recent position that PSRs should not be exempt and did not grant the Department the traditional deference granted to administrative agencies.<sup>212</sup>

Justice Breyer's dissent—joined by Justices Ginsburg, Sotomayor and Kagan—would have held that these PSRs are non-exempt.<sup>213</sup> The dissent analyzed the FLSA, Department of Labor regulations, ethical codes (particularly the Pharmaceutical Research and Manufacturers of America Code on Interactions with Health Care Professionals), and Labor Department Reports to come to its conclusion.<sup>214</sup> In the end, to the dissenters, a PSR "does not take orders, he does not consummate a sale, and he does not direct his efforts towards the consummation of any eventual sale (by the pharmacist)."<sup>215</sup> Therefore, he is not an outside salesperson and must be paid overtime.<sup>216</sup>

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<sup>207</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012).

<sup>208</sup> *See id.* at 2173.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 2162.

<sup>211</sup> *See id.* at 2173–74.

<sup>212</sup> *Id.* at 2170 ("We find the DOL's interpretation of its regulations quite unpersuasive. The interpretation to which we are now asked to defer—that a sale demands a transfer of title—plainly lacks the hallmarks of thorough consideration. Because the DOL first announced its view that pharmaceutical sales representatives do not qualify as outside salesmen in a series of amicus briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the Department's internal decision making process proved to be untenable.").

<sup>213</sup> *Christopher*, 132 S. Ct. at 2175 (Breyer, J., dissenting).

<sup>214</sup> *Id.* at 2178–79.

<sup>215</sup> *Id.* at 2178–80.

<sup>216</sup> *Id.* at 2179.

Interestingly, the oral arguments did not help predict the controversial 5-4 opinion in this case. For example, Justice Ginsburg appeared to favor GSK's position in oral argument by noting that these representatives expect time and one half in overtime pay even though they often play golf and otherwise entertain doctors.<sup>217</sup> She asked the following set of questions: "[W]hat about the extras? I mean, we're told that part of this job is to have a good relationship with the doctors. It includes dinners. It may be conventions. Entertainment, maybe golf. If—if you're right, would the time on the golf course get time and a half?"<sup>218</sup> The audience in the courtroom laughed.<sup>219</sup> In the end, she was apparently not persuaded by her own question and dissented from the ruling.<sup>220</sup> Justice Kennedy, on the other hand, tipped his hand in oral argument and stuck to his initial stance; the Justice with the critical swing vote in close cases like this one indicated that he wanted to vote for Glaxo when he asked the attorney for the company:

What's the case that I cite if this opinion is written the way you—you propose, and the—this Court says, well, this has been 70 years [that these types of salespeople have been exempt from overtime] ... and the Department [of Labor] has never made an objection. And, therefore, it follows that the Department's interpretation is implausible or improper, and then I cite some case from our Court. What—how do I write this?<sup>221</sup>

When the attorney tried to dodge the question and state that he did not want to provide such a case, Justice Kennedy responded, "Well, I'd like one."<sup>222</sup>

Another issue raised by the Justices was that a ruling for the plaintiffs would mean that pharmaceutical companies would be on the hook for millions of dollars of overtime pay to tens of thousands of pharmaceutical salespeople.<sup>223</sup> Based on oral arguments it appeared unlikely that the Court would allow this retroactive punishment to occur.<sup>224</sup> A few Justices made the point that the Department of Labor, if it wants to change the scope of this exception so drastically, should provide the change with a notice and comment period.<sup>225</sup> Justice Breyer took this position and seemed to side with the conservative-leaning Justices by adding:

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<sup>217</sup> Transcript of Oral Argument at 9, *Christopher*, 132 S. Ct. 2156 (2012) (No. 11-204) [hereinafter *Christopher* Oral Arguments].

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 10.

<sup>220</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. at 2174.

<sup>221</sup> *Christopher* Oral Arguments, *supra* note 217, at 49.

<sup>222</sup> *Id.* at 50.

<sup>223</sup> *Id.* at 27.

<sup>224</sup> *Id.* at 27–28.

<sup>225</sup> *Id.* at 22–24.

That's where I'm sort of bothered, just exactly what Justice Scalia said, that if you look through what I've seen so far by the materials, they're pretty evenly balanced, and there are tens of thousands of people who work in this industry, and there's a history of 75 years of nobody said anything. So you would think—and it isn't the only problem that has just been recognized in other industries, too. If the agency is going to reverse, not reverse, but suddenly do something it hasn't done for 75 years, the right way to do it is to have notice and comment, hearings, allow people to present their point of view, and then make some rules or determine what should happen. Perhaps they'd say for the future let's do this, but not let's give people a windfall for the past.<sup>226</sup>

Justices Sotomayor and Kagan were the only two Justices at oral argument who appeared likely to reverse the Ninth Circuit opinion.<sup>227</sup> In oral arguments they both grilled the lawyer for GSK on the Court's historical preference of giving deference to the Department of Labor's (relatively new) interpretation that these workers should qualify for overtime.<sup>228</sup> In the end, the business won the day, the outside salesperson exemption was not narrowed, and the PSRs were not entitled to the back overtime and liquidated damages they sought.<sup>229</sup>

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<sup>226</sup> *Id.* at 22–23.

<sup>227</sup> *Id.* at 45–47.

<sup>228</sup> *Id.* (quoting Justice Sotomayor questioning the attorney for Glaxo and stating: “Tell me ... why your rule has to win. Meaning, aren't we supposed to give deference to the expertise of the agency, especially when Congress lets them define.”).

<sup>229</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2161 (2012).



TABLE 7  
*CHRISTOPHER V. SMITHKLINE* VOTE BREAKDOWN

<i>Christopher v. SmithKline</i>   (5-4)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote 4-0 in dissent</b>	
<b>Ginsburg</b>	Dissent
<b>Breyer</b>	Dissent (author): A PSR's primary duty is not to take orders and make sales without giving the term a special meaning and, therefore, a PSR cannot be an outside salesperson under the FLSA
<b>Sotomayor</b>	Dissent
<b>Kagan</b>	Dissent
<b>Conservative-leaning (by seniority)   Vote 5-0 in the majority</b>	
<b>Scalia</b>	Majority
<b>Kennedy</b>	Majority
<b>Thomas</b>	Majority
<b>Roberts</b>	Majority
<b>Alito</b>	Majority (author): PSRs are properly classified as exempt from overtime pay because they properly made "sales" for purposes of the FLSA

*C. The Court Analyzes an Employee's Right Not to Speak*

*Knox v. Service Employees International Union, Local 1000* dealt with a compelled, mid-year assessment of union dues collected solely for political purposes.<sup>230</sup> The Service Employees International Union is the officially recognized bargaining unit for California state employees.<sup>231</sup> State employees are required to: (1) become SEIU members or, (2) at a minimum, have union fees deducted from their paychecks each year of their employment.<sup>232</sup> The

<sup>230</sup> *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2284 (2012).

<sup>231</sup> *Knox v. Cal. State Emps. Ass'n, Local 1000*, 628 F.3d 1115, 1117 (9th Cir. 2011).

<sup>232</sup> The court stated more specifically:

The Union and the State of California have entered into a series of Memoranda of Understanding controlling the terms and conditions of employment for employees, including a provision requiring that all State employees in these bargaining units join the Union as formal Union members, or if opting not to join, pay an "agency" or "fair share" fee to the Union for its representational efforts on their behalf (known as an

justification for such compelled payments is that unions spend time and money collectively bargaining on behalf of all of an organization's employees.<sup>233</sup> Allowing nonmembers to receive these work-related benefits without paying for them would lead to free riding.<sup>234</sup>

Each year, SEIU officials would analyze audited expenditures from the prior year to determine the current year's dues.<sup>235</sup> Any discrepancy between what was charged at the beginning of the year and what the union actually spent would be charged or deducted in the next year's assessment.<sup>236</sup> Union officials must disclose the amount of and reasons behind the assessment to all members and nonmembers in a so-called *Hudson* notice.<sup>237</sup> This notice requirement comes from a United States Supreme Court case styled *Chicago Teachers Union v. Hudson*, where the Supreme Court held "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending."<sup>238</sup> In the notice, the union explains that some of these expenses are chargeable to nonmembers (such as expenditures related to union's position as official bargaining representative) and others are not (such as political and other ideological expenditures).<sup>239</sup> The union may charge nonmembers up front for all expenditures unless a nonmember objects.<sup>240</sup> Upon objection, the union must reduce the charge to the proper portion of chargeable expenditures used for collective bargaining purposes.<sup>241</sup>

For 2005, the union declared that 99.1% of all expenditures for the upcoming year would be proportionally deducted from employees' paychecks in relatively small amounts based on their wages.<sup>242</sup> Nonmembers who objected would have the percentage reduced to 56.35%.<sup>243</sup> Later that year, however, the political scene changed in California. There were several proposals

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"agency shop agreement"). The agency fee is calculated as a percentage of the Union dues paid by members of the Union.

*Id.* (citation omitted).

<sup>233</sup> *Id.* at 1127 (Wallace, J., dissenting).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 1118 (majority opinion).

<sup>236</sup> *Id.*

<sup>237</sup> *Knox*, 628 F.3d at 1118.

<sup>238</sup> 475 U.S. 292, 310 (1986).

<sup>239</sup> *See Knox*, 628 F.3d at 1118.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

in the upcoming election that caught the attention of organized labor.<sup>244</sup> The SEIU proposed an “Emergency Temporary Assessment to Build a Political Fight-Back Fund,” applicable to all covered employees, to fight against any measures union officials deemed against the interests of state employees.<sup>245</sup> No new *Hudson* notice was sent out along with the mid-year assessment demand.<sup>246</sup> The union made clear that the assessment was due from members and nonmembers alike.<sup>247</sup> Eight state employees sued and argued that SEIU’s initial *Hudson* notice from earlier in the year did not provide warning concerning the mid-year assessment.<sup>248</sup>

The district court granted the plaintiffs’ motion for summary judgment ordering the union

to issue, within sixty (60) days following the date of this Order, a proper *Hudson* notice as to the 2005 Assessment, offering nonmembers a forty-five (45) day period in which to object. The Union shall thereafter issue to those nonmembers who object to this new *Hudson* notice a refund of the nonchargeable portion of the Assessment.<sup>249</sup>

The Ninth Circuit reversed and found that a second *Hudson* notice was not necessary “when adopting a temporary, mid-term fee increase.”<sup>250</sup>

The Supreme Court could have held that the case was moot and avoided deciding it on the merits. In fact, the issue of mootness arose prior to oral arguments.<sup>251</sup> New SIEU leadership changed its policy to provide a fresh *Hudson* notice for mid-year assessments and, in 2011, sent “a one-dollar bill to all members of the petitioners’ class, along with a promise to refund one hundred percent of the fee increase they paid.”<sup>252</sup> The union alleged that this satisfied the remedy fashioned by the district court below and

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<sup>244</sup> *Id.*

<sup>245</sup> *Knox*, 628 F.3d at 1118–19 (stating that the assessment notice claimed that that the fund “will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement”).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 1124 (Wallace, J., dissenting).

<sup>249</sup> *Knox v. Westly*, 2008 U.S. Dist. LEXIS 25579, at \*33–34 (2008) (emphasis added).

<sup>250</sup> See *Knox v. Cal. State Emps. Ass’n, Local 1000*, 628 F.3d 1115, 1117.

<sup>251</sup> Ross Runkel, *Argument Recap: Mootness Could Squelch Union Fees Case*, SCOTUSBLOG (Jan. 12, 2012), <http://www.scotusblog.com/2012/01/argument-recap-mootness-could-squelch-union-fees-case/>.

<sup>252</sup> *Id.* (stating prior to the opinion in the case that there “is a strong argument that this case is moot. It could be moot under Article III standards, or instead as a matter of judicial prudence. If so, the Court’s normal course is to vacate the judgment of the lower court .... Then the issue would be whether the Court would leave the district court judgment in place or declare it moot as well.”).

mooted the case.<sup>253</sup> The Supreme Court disagreed as the majority found that the union made it difficult for nonmembers to apply for refunds of collected mid-year assessments and that a “live controversy” still existed.<sup>254</sup>

With the mootness argument dismissed, the Court ruled 7-2 that the union violated the First Amendment speech rights of the nonmembers by failing to send out a fresh *Hudson* notice.<sup>255</sup> This is where the seven-Justice majority fell apart. The conservative-leaning Justices formed a second majority and took the analysis one step further.<sup>256</sup> They held that any time a union imposes a special assessment it must: (1) send out a fresh *Hudson* notice and (2) allow nonmembers to decide whether to pay the assessment (the so-called opt-in requirement).<sup>257</sup> In Justice Alito’s words: “Therefore, when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent.”<sup>258</sup> The holding in *Knox* made a major change to existing law in this area as Justices Sotomayor and Ginsburg pointed out in their concurrence.<sup>259</sup> These two Justices would have held for the plaintiffs/nonmembers solely because the union failed to send out a new *Hudson* notice.<sup>260</sup> However, they scolded the majority they joined for adding the opt-in requirement when the issue was not squarely presented in the case.<sup>261</sup> As Justice Sotomayor stated:

I concur only in the judgment, however, because I cannot agree with the majority’s decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing. By doing so, the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court’s proper role in our system of separated powers.<sup>262</sup>

The dissenters—Justices Breyer and Kagan—held that the union acted properly in this case in not sending a fresh *Hudson* notice for the mid-year

<sup>253</sup> *Id.*

<sup>254</sup> *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (holding that “the nature of the notice may affect how many employees who object to the union’s special assessment will be able to get their money back. The union is not entitled to dictate unilaterally the manner in which it advertises the availability of the refund. For this reason, we conclude that a live controversy remains, and we proceed to the merits.”).

<sup>255</sup> *Id.* at 2295–96.

<sup>256</sup> *Id.* at 2296 (Sotomayor & Ginsburg, JJ., concurring).

<sup>257</sup> *Id.* (majority opinion).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 2296 (Sotomayor & Ginsburg, JJ., concurring).

<sup>260</sup> *Knox*, 132 S. Ct. at 2296.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

assessment.<sup>263</sup> Any nonmembers who object to the mid-year assessment, according to Justice Breyer, have two options.<sup>264</sup> They may object when the current year's *Hudson* notice is sent out or they may object via next year's *Hudson* notice process.<sup>265</sup> Either way, the nonmembers will be made whole at some point.<sup>266</sup> Justices Alito, Scalia, Kennedy, Thomas and Roberts were uncomfortable with this process because nonmembers who wait to object until the next year are forced to give the union an interest-free loan.<sup>267</sup> The dissenters also claimed that the Court should not be interfering with the union's historical practice of requiring an opt-out for nonmembers to get a refund. In Justice Breyer's words:

Where, as here, nonchargeable political expenses are at issue, there may be a significant number of represented nonmembers who do not feel strongly enough about the union's politics to indicate a choice either way. That being so, an "opt-in" requirement can reduce union revenues significantly, a matter of considerable importance to the union, while the additional protection it provides primarily helps only those who are politically near neutral.... There is no good reason for the Court suddenly to enter the debate, much less now to decide that the Constitution resolves it.<sup>268</sup>

As with the *Christopher* case, the oral arguments in *Knox* presaged the outcome of the case.<sup>269</sup> At the end of the allotted hour it was clear that the conservative-leaning Justices disfavored this type of assessment, without notice and the ability to object.<sup>270</sup> They were most disturbed by the idea that this situation provides unions with interest-free loans for speech certain assessed members do not agree with.<sup>271</sup> For example, Justice Alito stated that the objecting members

may have very strong partisan and ideological objections [to the political campaign]. So, why should they not be given a notice at that time ... and given the opportunity not to give what would be at a minimum ... an interest-free loan for the purpose of influencing an election campaign?<sup>272</sup>

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<sup>263</sup> *Id.* at 2307 (Breyer & Kagan, JJ., dissenting).

<sup>264</sup> *Id.* at 2306.

<sup>265</sup> *Id.*

<sup>266</sup> *Knox*, 132 S. Ct. at 2306.

<sup>267</sup> *Id.* at 2292–93 (majority opinion).

<sup>268</sup> *Id.* at 2307 (Breyer & Kagan, JJ., dissenting).

<sup>269</sup> *E.g.*, *Christopher* Oral Arguments, *supra* note 217, at 37.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 37–38.

Justice Scalia argued that the Court should lean towards requiring a *Hudson* notice whenever the union asks for a “material” new assessment such as this.<sup>273</sup>

The liberal-leaning Justices seemed to favor the idea that no *Hudson* notice is required for this type of mid-year assessment because the amount spent on political, non-chargeable matters will be deducted from the objector’s dues the following year.<sup>274</sup> Justice Breyer picked up on this idea and argued the following:

[T]he virtue of the present system is that it does require some forced loans, that’s true, but it does wash out in the wash, and it ends up being fair to the objectors. And it’s simply hard to think of a better system that doesn’t provide more administrative problems than the existing one.<sup>275</sup>

In the end, Justices Ginsburg and Sotomayor defected from this viewpoint and would have required a fresh *Hudson* notice for mid-year assessments.

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<sup>273</sup> *Id.* at 14.

<sup>274</sup> *Id.* at 51.

<sup>275</sup> *Christopher* Oral Arguments, *supra* note 217, at 52; *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277 (2012).



TABLE 8  
*KNOX v. SEIU* VOTE BREAKDOWN

<i>Knox v. SEIU</i>   (7-2)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote 2-2 tie</b>	
<b>Ginsburg</b>	Majority and Concurrence
<b>Breyer</b>	Dissent (author): The Union acted properly in this case as any discrepancies in non-chargeable expenses will wash out in next year's assessment.
<b>Sotomayor</b>	Majority and Concurrence (author): The union should have issued a fresh <i>Hudson</i> notice but the Court goes too far in requiring non-members to opt-in to payment.
<b>Kagan</b>	Dissent
<b>Conservative-leaning (by seniority)   Vote 5-0 for majority</b>	
<b>Scalia</b>	Majority
<b>Kennedy</b>	Majority
<b>Thomas</b>	Majority
<b>Roberts</b>	Majority
<b>Alito</b>	Majority (author): The union violated the nonmembers' First Amendment speech rights by failing to issue a new <i>Hudson</i> notice. In the future, nonmembers must opt-in to paying special union assessments.

#### IV. THE CONSUMER PROTECTION CASES

The Court heard three consumer protection cases over the 2011–2012 Term, two of which are relevant for their potential to have a significant business impact.<sup>276</sup> The first case involved a mandatory arbitration clause in a credit card contract.<sup>277</sup> The clause was pitted against a law granting an aggrieved consumer the non-waivable “right to sue” the card issuer.<sup>278</sup> The Court held that the statutory right to sue was broad enough to encompass a lawsuit proceeding through arbitration.<sup>279</sup> The second case revolved around

<sup>276</sup> See *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

<sup>277</sup> *CompuCredit*, 132 S. Ct. at 668.

<sup>278</sup> *Id.* at 669.

<sup>279</sup> *Id.* at 670.

real estate mortgages and settlement fees charged by lenders.<sup>280</sup> The Real Estate Settlement Procedures Act bans lenders from giving and receiving kickbacks and unearned fees.<sup>281</sup> Angry borrowers paid settlement fees without a corresponding interest rate decrease—this made the fees “un-earned” under RESPA.<sup>282</sup> The lender argued that RESPA allowed it to keep these unearned fees because they were not split with another party.<sup>283</sup> The Court interpreted the statute and ruled that the lender could not both give *and* receive these unearned fees.<sup>284</sup> In both cases, consumer protection went toe-to-toe with business interests and lost (seventeen votes to one, to be specific).<sup>285</sup>

*A. Consumer Protection: Bad Credit, No Credit, and Your Right to Sue a Credit Repair Organization*

In *CompuCredit v. Greenwood* the Justices entertained arguments on the juxtaposition of mandatory arbitration clauses and a statutorily granted right to sue.<sup>286</sup> The issue in *Greenwood* was whether such arbitration clauses trump a consumer’s express right to sue a credit repair organization for unfair and deceptive practices.<sup>287</sup> Credit repair organizations<sup>288</sup> flourished after the Great Recession and the corresponding consumer credit devastation.<sup>289</sup>

<sup>280</sup> *Freeman*, 132 S. Ct. at 2036.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 2038–39.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 2041.

<sup>285</sup> *Freeman*, 132 S. Ct. at 2044; *CompuCredit*, 132 S. Ct. at 673.

<sup>286</sup> *CompuCredit*, 132 S. Ct. at 668–69.

<sup>287</sup> *Id.* at 669–70.

<sup>288</sup> The Credit Repair Organization Act defines credit repair organizations as follows:

[A]ny person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of (i) improving any consumer’s credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in [other sections of the statute].

See Pub. L. No. 104-208, 110 Stat. 3009-455 (1996) (codified at 15 U.S.C. § 1679 (2012)), at §§ 1679A(3)(A)(i), (ii).

<sup>289</sup> See, e.g., *What You Should Know About Credit Repair Companies*, PRIVACY RIGHTS CLEARINGHOUSE (May 3, 2010), <http://www.privacyrights.org/credit-repair-companies> [hereinafter *Companies*] (stating that while “the economy has faltered in recent years credit repair companies have flourished”); Susan Tompor, *Consumers’ Credit Scores Improving* (May 14, 2012), LOANSAFE.ORG (May 14, 2012), <http://www.loansafe.org/susan-tompor-consumers-credit-scores-improving> (stating that credit scores “turned into one ugly

The process of repairing consumer credit benefitted some by rejuvenating credit scores and ability to borrow,<sup>290</sup> and harmed others by offering products unlikely to help economically weak borrowers.<sup>291</sup> Long before the recent turbulent economic times, Congress offered protection to consumers with poor credit via the Credit Repair Organizations Act (CROA).<sup>292</sup> CROA outlaws unfair/deceitful credit practices and unintelligible legalese in credit repair transactions.<sup>293</sup> More specifically, the law contains mandatory disclosure provisions, rules governing consumer credit contracts (and consumer contact more generally), and cancellation rights for credit repair recipients.<sup>294</sup> An important disclosure provision in CROA informs consumers: “You have a *right to sue* a credit repair organization that violates the Credit Repair Organization Act.”<sup>295</sup> The statute also states that consumers cannot waive this statutorily granted right to sue.<sup>296</sup>

*Greenwood* involved special credit cards marketed and sent to individuals in need of credit repair; the cards were touted as having attractive credit limits and included the typical terms and conditions contract that no one reads.<sup>297</sup> One such section covered mandatory arbitration and stated:

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number for many consumers throughout the recession—putting a halt to how much buying and borrowing consumers could do”).

<sup>290</sup> See, e.g., Tompor, *supra* note 289 (discussing the uptick in consumer credit quality and stating, “it’s pretty upbeat news to hear that more consumers are edging near perfect FICO scores. The number of consumers in the top FICO score range—800 to 850—is now at the highest level since October 2008, according to researchers at FICO Labs.”).

<sup>291</sup> See, e.g., *Companies*, *supra* note 289 (listing common consumer protection issues with credit repair companies and stating: “If you’re losing sleep over bad credit, ads promising a quick fix can seem like a dream come true. But, hook up with the wrong company and your dreams of clean credit can quickly turn into a living nightmare.”).

<sup>292</sup> 15 U.S.C. § 1679.

<sup>293</sup> *Id.*

<sup>294</sup> 15 U.S.C. §§ 1679B(a)(i) (banning misleading statements to consumers); 1679C(a) (codifying the CROA’s disclosure requirements); 1679D (discussing consumer contact and the contract terms required by credit repair organizations pertaining to such contact); and 1679E (codifying the consumer’s right to cancel a credit contract without fees or penalties for a certain period of time).

<sup>295</sup> The relevant mandatory disclosure provision reads: “Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed: ... You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. ...” 15 U.S.C. § 1679C(a) (emphasis added).

<sup>296</sup> 15 U.S.C. § 1679F(A) (stating that “[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this title—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person”).

<sup>297</sup> See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668; see also Connie Prater, *U.S. Credit Card Agreements Unreadable to 4 out of 5 Adults*, CREDITCARDS.COM (July

“Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account ... upon the election of you or us, will be resolved by binding arbitration.”<sup>298</sup> A group of cardholders filed a class action in federal court alleging violations of CROA such as initiation fees that effectively lowered the advertised credit limit.<sup>299</sup> The lower federal courts denied CompuCredit’s motion to compel arbitration because of the express right to sue granted to aggrieved consumers in the statute.<sup>300</sup> CompuCredit argued that right to sue provisions are generally interpreted as including arbitration as a valid forum.<sup>301</sup> The class action plaintiffs disagreed.<sup>302</sup>

The Justices, forming an eight to one majority, reversed and reiterated the strong federal policy behind the Federal Arbitration Act favoring arbitration over trials.<sup>303</sup> Justice Scalia authored the majority opinion and opined that, if Congress wanted the right to sue to mean only a trial, Congress would have expressly barred arbitration.<sup>304</sup> Instead, the right-to-sue clause is located in the consumer disclosure section and is merely a colloquial

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22, 2010), <http://www.creditcards.com/credit-card-news/credit-card-agreement-readability-1282.php> (stating that credit card “agreements contain the fine print of the credit card terms and dictate how millions of credit cards issued in the United States may be used. Banks and credit unions mail them when card users first open their accounts or when customers request copies. They are often put away in a drawer or tossed with the junk mail. Credit counselors and consumer advocates say the truth is that very few cardholders ever read their agreements—until something goes wrong.”).

<sup>298</sup> *CompuCredit*, 132 S. Ct. at 668.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* (stating that the “District Court denied the defendants’ motion to compel arbitration of the claims, concluding that ‘Congress intended claims under the CROA to be non-arbitrable.’ A panel of the United States Court of Appeals for the Ninth Circuit affirmed ....”) (internal citations omitted).

<sup>301</sup> *Id.* at 669 (writing that the Ninth Circuit also accepted this position in its holding for the class action plaintiffs). The Court stated that the “Ninth Circuit adopted the following line of reasoning, urged upon us by respondents here: The disclosure provision gives consumers the ‘right to sue,’ which ‘clearly involves the right to bring an action in a court of law.’” *Id.*

<sup>302</sup> *Id.* at 670 (reiterating the class action plaintiffs’ argument that “the CROA’s civil-liability provision ... demonstrates that [CROA] provides consumers with a ‘right’ to bring an action in court. They cite the provision’s repeated use of the terms ‘action,’ ‘class action,’ and ‘court’—terms that they say call to mind a judicial proceeding.”) (internal citations omitted).

<sup>303</sup> *Id.* at 669 (stating that the FAA “requires courts to enforce agreements to arbitrate according to their terms.... That is the case even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”) (internal citations omitted).

<sup>304</sup> *Id.* at 673.

way of informing consumers that courts can award them damages for injuries arising under the act.<sup>305</sup> The opinion continued, “[w]e think most consumers would understand it this way, without regard to whether the suit in court has to be preceded by an arbitration proceeding.”<sup>306</sup> Justice Ginsburg dissented and reiterated her concerns from the oral argument as follows:

The CROA differs from the statutes we have construed in the past .... The Act does not merely create a claim for relief. It designates that claim as an action entailing a “right to sue”; mandates that consumers be informed, prior to entering any contract, of that right; and precludes the waiver of any “right” conferred by the Act.<sup>307</sup>

TABLE 9  
*COMPU CREDIT V. GREENWOOD* VOTE BREAKDOWN

<i>CompuCredit v. Greenwood</i>   (8-1)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote 3-1 for majority</b>	
<b>Ginsburg</b>	Dissent (author): Congress clearly intended these CROA suits to be in front of a court rather than an arbitrator
<b>Breyer</b>	Majority
<b>Sotomayor</b>	Majority
<b>Kagan</b>	Majority
<b>Conservative-leaning (by seniority)   Vote 5-0 for majority</b>	
<b>Scalia</b>	Majority (author): FAA favors arbitration; Congress could have clearly stated that a right to sue under CROA precluded arbitration
<b>Kennedy</b>	Majority
<b>Thomas</b>	Majority
<b>Roberts</b>	Majority
<b>Alito</b>	Majority

*B. Consumer Protection: Residential Mortgages, Unearned Fees, and Kickbacks*

In *Freeman v. Quicken Loans*, the Court scrutinized the federal Real Estate Settlement Procedures Act of 1974 (RESPA) and its bar against certain

<sup>305</sup> *Id.* at 672 (stating that the right to sue clause is a “colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA”).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 679 (Ginsburg, J., dissenting).

kickbacks and unearned fees.<sup>308</sup> RESPA governs much of the real estate closing/settlement process for residential mortgage loans.<sup>309</sup> Kickbacks and referral fees (generally paid to real estate agents, builders, and title insurance agents for referring borrowers to particular lenders) were common before RESPA and are barred because they increase mortgage costs.<sup>310</sup> The statute bans both kickbacks and unearned fees in two consecutive provisions.<sup>311</sup> The operative language for the kickback ban reads:

*No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.*<sup>312</sup>

The very similar operative language for the unearned fee ban reads:

*No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed [for example, unearned fees].*<sup>313</sup>

The statute provides consumers a private right of action to recover an amount equal to three times the unlawful charge paid by the plaintiff for

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<sup>308</sup> 132 S. Ct. 2034 (2012).

<sup>309</sup> See Pub. L. No. 93-533, 88 Stat. 1727 (Dec. 22, 1974) (codified at 12 U.S.C. §§ 2601–2617). The statute defines the settlement process as including:

[A]ny service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement ....

12 U.S.C. § 2602(3).

<sup>310</sup> See *More Information About RESPA*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/ramh/res/respamor](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/ramh/res/respamor) (last visited Mar. 23, 2013).

<sup>311</sup> See 12 U.S.C. § 2607(a) (barring the gift and receipt of kickbacks); 12 U.S.C. § 2607(b) (barring the gift and receipt of unearned fees).

<sup>312</sup> 12 U.S.C. § 2607(a) (emphasis added).

<sup>313</sup> 12 U.S.C. § 2607(b) (emphasis added).



the settlement service at issue.<sup>314</sup> A separate provision also allows for criminal penalties of up to one year in prison or up to a \$10,000 fine.<sup>315</sup>

The plaintiffs in *Freeman* (three married couples) applied for mortgages through Quicken Loans and asserted they were charged fees for services they never received.<sup>316</sup> More specifically, they sued based on loan discount, loan processing, and loan origination fees for which they received no corresponding interest rate reductions.<sup>317</sup> Quicken removed the case to federal court, where the three actions were consolidated and then petitioned for summary judgment.<sup>318</sup> Quicken claimed that RESPA violations require unearned fees to be split between a lender and another party based on the statutory language of “give” and “accept.”<sup>319</sup> In other words, one party must give part of an unearned fee and another party must accept it for a violation to occur.<sup>320</sup> It defies the English language for a lender to both give itself and receive unto itself the same kickback or unearned fee. The borrower/plaintiffs relied on a 2001 Department of Housing and Urban Development policy statement that interpreted the RESPA provisions at issue as not being limited to fee splitting situations.<sup>321</sup> The district court granted summary judgment for Quicken and a split panel of the Fifth Circuit affirmed.<sup>322</sup>

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<sup>314</sup> 12 U.S.C. § 2607(d)(2).

<sup>315</sup> 12 U.S.C. § 2607(d)(1).

<sup>316</sup> These plaintiffs filed three separate actions in a Louisiana state court in 2008. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2038 (2012) (identifying the plaintiffs and stating that “the Freemans and the Bennetts allege that they were charged loan discount fees of \$980 and \$1,100, respectively, but that respondent did not give them lower interest rates in return. The Smiths’ allegations focus on a \$575 loan ‘processing fee’ and a ‘loan origination’ fee of more than \$5,100.”).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 2039.

<sup>320</sup> *Id.*

<sup>321</sup> Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,059 (Oct. 18, 2001). HUD’s consumer protection functions under RESPA were transferred to the Bureau of Consumer Financial Protection (Bureau) under the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Pub. L. No. 11-203, 124 Stat. 1376, 2039–40, 2103–04, 2112 (July 21, 2010) (codified in scattered sections of the U.S. Code). The Bureau has issued a notice stating that “it would enforce HUD’s RESPA regulations and that, pending further Bureau action, it would apply HUD’s previously issued official policy statements regarding RESPA.” Bureau of Consumer Financial Protection: Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43,569-01 (July 21, 2011), stating more specifically that the CFPB will give due consideration to the application of other written guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency [i.e., HUD] in light of all relevant factors,

The Court unanimously affirmed that RESPA allows lenders to keep one hundred percent of unearned mortgage settlement fees.<sup>323</sup> The statutory text is clear that a violation occurs only when any part of an unearned fee is “split” with other parties.<sup>324</sup> Justice Scalia called the HUD policy statement relied on by the plaintiffs an overreach and not entitled to deference as it “goes beyond the meaning that the statute can bear.”<sup>325</sup> The Court looked at the normal usage of the words “give” and “receive” to determine that it would be irrational to interpret this provision as covering a lender that gives and accepts the same fee.<sup>326</sup>

The Court concluded its opinion sternly. The plaintiffs argued that RESPA targets unreasonably high settlement fees in general; this makes it proper to interpret its provisions as barring all unearned fees and kickbacks regardless of whether they are split.<sup>327</sup> The majority, however, labeled this argument as outside of Congressional intent.<sup>328</sup> He continued that borrowers who charged excessive or dishonest mortgage-based fees have state law fraud actions at their disposal.<sup>329</sup> These RESPA provisions, on the other hand, are purposefully limited only to *split* fees because Congress believed: (1) that state law fraud remedies were inadequate to prevent fee splitting and kickbacks, and (2) that federal legislative action was necessary to protect consumers from these harmful practices.<sup>330</sup>

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including: whether the agency had rulemaking authority for the law in question; the formality of the document in question and the weight afforded it by the issuing agency; the persuasiveness of the document; and whether the document conflicts with guidance or interpretations issued by another agency.

*Id.*

<sup>322</sup> *Freeman v. Quicken Loans, Inc.*, 2009 WL 2448033, at \*22–23 (E.D. La., Aug. 10, 2009), *aff'd*, 626 F.3d 799, 800, 806 (5th Cir. 2010).

<sup>323</sup> *Freeman*, 132 S. Ct. at 2041–42, 2044.

<sup>324</sup> *Id.* at 2042.

<sup>325</sup> *Id.* at 2040 (internal citations omitted).

<sup>326</sup> *Id.* at 2040.

<sup>327</sup> *Id.* at 2043–44.

<sup>328</sup> *Id.* at 2044.

<sup>329</sup> *Freeman*, 132 S. Ct. at 2041.

<sup>330</sup> *Id.* at 2044.

TABLE 10  
*FREEMAN V. QUICKEN LOANS* VOTE BREAKDOWN

<i>Freeman v. Quicken Loans</i>   (9-0)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote 4-0 for majority</b>	
<b>Ginsburg</b>	Majority
<b>Breyer</b>	Majority
<b>Sotomayor</b>	Majority
<b>Kagan</b>	Majority
<b>Conservative-leaning (by seniority)   Vote 5-0 for majority</b>	
<b>Scalia</b>	Majority (author): RESPA only prohibits <i>splitting</i> unearned real estate settlement fees between a lender and at least one other party. That did not happen in this case.
<b>Kennedy</b>	Majority
<b>Thomas</b>	Majority
<b>Roberts</b>	Majority
<b>Alito</b>	Majority

The Term's consumer protection cases demonstrate the Roberts Court favoring business interests over consumer interests. Granted, the sample size of two cases is small and the issues are limited to credit repair organizations and residential mortgage settlement services. Viewed via a wider lens, however, the cases cover two issues responsible for the Great Recession and key to America's economic recovery: (1) consumer credit and (2) real estate.<sup>331</sup> In the end, business interests garnered seventeen votes and consumer protection interest garnered one. The final case-analysis section *infra* looks at the lone securities law case on the 2011–2012 docket.

<sup>331</sup> See, e.g., Jacob Weisberg, *What Caused the Economic Crisis? The 15 Best Explanations for the Great Recession*, SLATE.COM (Jan. 9, 2010, 6:59 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_big\\_idea/2010/01/what\\_caused\\_the\\_economic\\_crisis.html](http://www.slate.com/articles/news_and_politics/the_big_idea/2010/01/what_caused_the_economic_crisis.html).

There are no strong candidates for what logicians call a sufficient condition—a single factor that would have caused the [Great Recession] in the absence of any others. There are, however, a number of plausible necessary conditions—factors without which the crisis would not have occurred. Most analysts find former Fed Chairman Alan Greenspan at fault, though for a variety of reasons. Conservative economists—ever worried about inflation—tend to fault Greenspan for keeping interest rates too low between 2003 and 2005 as the real estate and credit bubbles inflated.

*Id.*

## V. THE LONE SECURITIES REGULATION CASE

The Court's lone securities regulation case involved the Securities Exchange Act of 1934 (colloquially called the '34 Act).<sup>332</sup> In *Credit Suisse Securities v. Simmonds*, the Justices examined a shareholder's right under the '34 Act to sue corporate insiders who engage in certain short swing securities trades.<sup>333</sup> Directors, officers, and principal shareholders owning more than ten percent of any class of a company's securities are classified as insiders for purposes of this analysis.<sup>334</sup> More specifically, the '34 Act states:

For the purpose of preventing the unfair use of information which may have been obtained by [insiders] by reason of [their] relationship to the [company], any profit realized ... from any purchase and sale ... within any period of less than six months ... shall inure to and be recoverable by the issuer, irrespective of any intention on the part of [the insiders] in entering into such transaction ....

[Lawsuits] to recover such profit may be instituted ... by the [company], or by the owner of any security of the [company] in the name and in behalf of the [company] ... *but no such suit shall be brought more than two years after the date such profit was realized.*<sup>335</sup>

Many interesting discussion topics arise from this statutory language. One of the most notable is the mandate that *any* profits from short swing trades “shall inure to and be recoverable” by the company.<sup>336</sup> That is an extraordinary concept because all profits earned within a six-month period by a corporate insider, even if made without inside information or bad intent, must be returned or disgorged to the company.<sup>337</sup> In other words, the '34 Act makes it unprofitable for insiders to trade in the short-term so that they will hold their shares for the long-term and, theoretically, work in the company's as well as their own best interests.<sup>338</sup>

The gravamen of the *Credit Suisse* case, however, revolves around the last sentence *supra*—the two-year deadline for shareholders to file suit against insiders trading within the six-month window.<sup>339</sup> Assume an insider knows it is illegal to trade within the restricted period. It follows that the same investor, who has already broken the law, will be savvy enough to keep the trade quiet. Under these circumstances, how are individual shareholders to

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<sup>332</sup> Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified at 15 U.S.C. § 78a).

<sup>333</sup> *Credit Suisse Sec.(USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1417–19 (2012).

<sup>334</sup> *Id.* at 1418.

<sup>335</sup> Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (2012) (emphasis added).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

know when corporate insiders finalize short swing trades so that they may exercise their statutorily granted right to sue within the two-year deadline? According to the plaintiff in *Credit Suisse*, section 16(a) of the '34 Act provides some guidance.<sup>340</sup> That section requires corporate insiders to file a so-called Form 4<sup>341</sup> with the Securities and Exchange Commission every time their ownership holdings in the company change. Form 4s must be filed within two days after trades of company stock are finalized.<sup>342</sup> The plaintiff argued that any deadline must be tolled until shareholders have the opportunity to see the Form 4 and learn of the trades. Sections 16(a) and 16(b) were scrutinized together to form the question presented in this case.<sup>343</sup>

The plaintiff in *Credit Suisse* proves to be one of the most resourceful found in any case this Term. In 2007, Vanessa Simmonds filed fifty-five actions (that is not a misprint) against various financial institutions that served as underwriters of initial public offerings in the late 1990s and early 2000s.<sup>344</sup> At the time, she was a twenty-two-year-old college senior; her father served as one of her attorneys in the case.<sup>345</sup> She sued as an individual shareholder in the name of each company of which she owned stock seeking more than \$500 million in stock sales.<sup>346</sup> In a typical complaint, “she alleged that the underwriters and the [company] insiders employed various mechanisms to inflate the aftermarket price of the stock to a level above the IPO price, allowing them to profit from the aftermarket sale.”<sup>347</sup> Another allegation in the same complaint stated that, as a group, “the underwriters and [company] insiders owned in excess of ten percent of the outstanding stock during the relevant time period, which subjected them to both disgorgement of profits under § 16(b) and the reporting requirements of

<sup>340</sup> *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1418 (2012).

<sup>341</sup> *See* Reports of Directors, Officers and Principal Shareholders, 17 C.F.R. § 240.16a-3 (2012) (stating in section 240.16a-3(a) that “[s]tatements of changes in beneficial ownership required by that section shall be filed on Form 4”).

<sup>342</sup> 15 U.S.C. § 78p(a)(2)(c) (2012) (reading, “if there has been a change in such ownership ... [the insider must file the Form 4] before the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible”).

<sup>343</sup> *Credit Suisse*, 132 S.Ct. at 1417–18.

<sup>344</sup> *Id.* at 1418.

<sup>345</sup> *See, e.g.*, Rami Grunbaum, *Vanessa vs. The Dot-Com IPO Giants*, SEATTLE TIMES (Nov. 4, 2007, 12:00 AM), [http://seattletimes.nwsourc.com/html/business/technology/2003992306\\_sundaybuzz04.html](http://seattletimes.nwsourc.com/html/business/technology/2003992306_sundaybuzz04.html).

<sup>346</sup> *Id.* (“How did Vanessa Simmonds, barely a teen in the dot-com heyday, get involved? Her shares—a ‘relatively small’ number of each—were acquired this summer by her dad. Under 16(b), it’s not required that she owned shares when the alleged misdeeds occurred.”).

<sup>347</sup> *Credit Suisse*, 132 S. Ct. at 1418.

§ 16(a).”<sup>348</sup> Amazingly, this was the first time a plaintiff has used this line of attack to force disgorgement.<sup>349</sup> The underwriters never filed Form 4s for these trades and argued that they were exempted because they did not fit within the definition of corporate insiders.<sup>350</sup>

A major argument in the case was whether the limitations period was a statute of repose (which may never be extended or tolled) or a statute of limitations (which may be extended for extraordinary reasons).<sup>351</sup> Simmonds argued that the time limit should be tolled at least until the insider files the required 16(a) disclosure or Form 4.<sup>352</sup> Credit Suisse argued that claims like Simmonds’s are “never subject to equitable tolling because the statute requires that no suit ‘shall be brought more than two years after the date that such profit was realized.’”<sup>353</sup> The issue is relevant because Simmonds’s case ran into serious problems because she filed her legal action in this case far past two years since the insiders’ “profit was realized.”<sup>354</sup>

The district court granted summary judgment for the underwriters on twenty-four of Simmonds’s claims, finding them to be time barred.<sup>355</sup> The Ninth Circuit reversed, in relevant part adopting Simmonds’s argument and finding that the two-year deadline should be tolled until an insider files a Form 4.<sup>356</sup> The court argued that tolling could occur regardless of whether the plaintiff “knew or should have known of the conduct at issue.”<sup>357</sup> The Ninth Circuit laid out three potential interpretations of section 16(b) based on circuit precedent and chose the third interpretation:

[Interpretation One:] a “strict” approach under which the statute is treated as a statute of repose—that is, a firm bar that is not subject to

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<sup>348</sup> *Id.*

<sup>349</sup> *See, e.g.,* Grunbaum, *supra* note 345 (stating that “despite the widespread investigation and litigation of abuses surrounding the IPOs that ballooned in 1999–2001 and then popped, no one has used their line of attack before”).

<sup>350</sup> *Credit Suisse*, 132 S. Ct. at 1418.

<sup>351</sup> *Id.*

<sup>352</sup> *See, e.g.,* Steven Kaufhold, *Opinion Analysis: Occupying the “Reasonable Middle Ground” on Tolling of Insider Trading Claims*, SCOTUSBLOG (Mar. 28, 2012, 9:45 AM), <http://www.scotusblog.com/?p=142064>.

<sup>353</sup> *Id.* Additionally, Credit Suisse argued that it did not count as a beneficial owner of securities as required by section 16 because it was a mere underwriter of another company’s securities. *Credit Suisse*, 132 S. Ct. at 1418 n.4 (“Petitioners have consistently disputed § 16’s application to them, arguing that they, as underwriters, are generally exempt from the statute’s coverage.”).

<sup>354</sup> *See Credit Suisse*, 132 S. Ct. at 1418.

<sup>355</sup> *In re* Section 16(b) Litigation, 602 F. Supp. 2d 1202, 1205, 1216, 1218 (2009).

<sup>356</sup> *Simmonds v. Credit Suisse Sec. (USA) LLC*, 638 F.3d 1072, 1084–85 (9th Cir. 2011).

<sup>357</sup> *Id.* at 1095.



tolling; [Interpretation Two:] a “notice” or “discovery” approach ... “under which the time period is tolled until the Corporation had sufficient information to put it on notice of its potential § 16(b) claim”; and [Interpretation Three:] a “disclosure” approach “under which the time period is tolled until the insider discloses the transactions at issue in his mandatory § 16(a) reports.”<sup>358</sup>

The Supreme Court unanimously reversed the Ninth Circuit and held that the two-year time limit in section 16(b) may not be tolled until the corporate insider files the required Form 4.<sup>359</sup> The Court agreed that equitable tolling may apply to these 16(b) cases but never past the point at which the shareholder knew or should have known of the short swing trades.<sup>360</sup> This is the “reasonable middle ground” position advocated by the United States in its briefs and at oral arguments as well as Interpretation Two from the Ninth Circuit opinion.<sup>361</sup> In the end, the Court remanded the case to the lower courts to determine if and how tolling might apply to this specific case.<sup>362</sup> One factor on remand will surely be that Simmonds seemed to know many details about the short swing transactions even though the insiders did not file Form 4s.<sup>363</sup>

Bear in mind that the unanimous opinion in this case is somewhat misleading. All eight Justices participating agreed that the disclosure option (that is, Interpretation Three from the Ninth Circuit opinion) was not Congress’s intention in drafting section 16(b).<sup>364</sup> The majority broke down, however, on the issue of whether section 16(b) provides a statute of repose or a statute of limitations.<sup>365</sup> No tally was given as to which Justices ended

<sup>358</sup> See *id.* at 1095 (citing *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 527 (9th Cir. 1981)).

<sup>359</sup> *Credit Suisse*, 132 S. Ct. at 1421.

<sup>360</sup> *Id.* (“Having determined that § 16(b)’s limitations period is not tolled until the filing of a § 16(a) statement, we remand for the lower courts to consider how the usual rules of equitable tolling apply to the facts of this case.”).

<sup>361</sup> See Kaufhold, *supra* note 352.

<sup>362</sup> See *Credit Suisse*, 132 S. Ct. at 1421.

<sup>363</sup> Justice Scalia stated it this way:

The oddity of Simmonds’ position is well demonstrated by the circumstances of this case. Under the [Ninth Circuit] rule, because petitioners have yet to file § 16(a) statements (as noted earlier they do not think themselves subject to that requirement), Simmonds still has two years to bring suit, even though she is so well aware of her alleged cause of action that she has already sued. If § 16(a) statements were, as Simmonds suggests, indispensable to a party’s ability to sue, Simmonds would not be here.

*Id.* at 1420.

<sup>364</sup> *Id.* at 1418–19.

<sup>365</sup> *Id.* at 1421.

up in each camp—the Court merely stated that “[w]e are divided 4 to 4 concerning, and thus affirm without precedential effect, the Court of Appeals’ rejection of petitioners’ contention that § 16(b) establishes a period of repose that is not subject to tolling.”<sup>366</sup> Because the Chief Justice recused himself, the Court was able to split evenly in the voting<sup>367</sup>—an awful situation in the legal world because a plurality opinion holds no precedential weight. Based on oral arguments from the case, it would seem like an ideological split took place on this issue.

During questioning, the conservative-leaning Justices seemed to favor the statute of repose option that would limit the deadline to bring a lawsuit at two years after trades become final. The following are key comments by Justices Scalia and Alito demonstrating this position. Justices Kennedy (somewhat unusually) and Thomas (somewhat predictably) were silent throughout oral arguments.

JUSTICE ALITO: “Well, if you were drafting a statute of repose, how would you phrase it other than the way [section 16(b)] is phrased?”<sup>368</sup>

JUSTICE SCALIA (to the counsel for Ms. Simmonds): “[T]he problem I have with your argument is it’s a very strange statute of limitations.... And you want to say what it means is you have 2 years from the time [the short swing trade] was reported. Congress would have said that. It’s so easy [for Congress] to say that. Two years from the reporting.”<sup>369</sup>

If this Article’s theory that four conservative-leaning Justices voted for a state of repose proves correct (and no one may ever discover the four to four vote breakdown), the four liberal-leaning Justices must have voted for the statute of limitations option. In oral arguments, the liberal-leaning Justices were quite active in favor of a statute of limitations. The following are key comments by Justices Ginsburg, Breyer, Sotomayor, and Kagan:

JUSTICE KAGAN: “Congress surely knew how to write a statute of repose because it did it in this statute, but it didn’t

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<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 1414.

<sup>368</sup> Transcript of Oral Argument at 22, *Credit Suisse*, 132 S. Ct. 1414 (2012) (No. 10-1261) [hereinafter *Credit Suisse* Oral Arguments].

<sup>369</sup> *Id.* at 45–46.

do it with respect to these kinds of violations. This statute of limitations, I'm going to call it, reads very differently ....<sup>370</sup>

JUSTICE SOTOMAYOR: "Tell me what logic there is in reading this as a statute of repose ...."<sup>371</sup> She continued, "if Congress understood that some wouldn't do the statutory requirement and file [a Form 4] in a timely manner, why wouldn't equitable tolling be a more appropriate way to look at this?"<sup>372</sup>

JUSTICE BREYER: "[W]hy not just treat it like a ... regular statute of limitations? You say that the profit is made on day one. It was made by an insider, and if your client finds out about it or reasonably should have found out about it, then the statute begins to run.... Otherwise it's tolled, period. Simple, same as every other statute. What's wrong with that?"<sup>373</sup>

JUSTICE GINSBURG: "Here we just say—it just has what seems to me a plain vanilla statute of limitations that is traditionally subject to waiver, equitable tolling. We don't have that special kind of statute that gives you one limit and then sets a further limit that will be the outer limit."<sup>374</sup>

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<sup>370</sup> *Id.* at 8.

<sup>371</sup> *Id.* at 10.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 39.

<sup>374</sup> *Credit Suisse* Oral Arguments, *supra* note 369, at 45–46.

TABLE 11  
*CREDIT SUISSE SECURITIES V. SIMMONDS* VOTE BREAKDOWN

<i>Credit Suisse Securities v. Simmonds</i>   (8-0) and (4-4)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote 4-0 for majority   4-0 § 16(b) is a statute of limitations</b>	
<b>Ginsburg</b>	Majority   Author's theory: Justice Ginsburg held that 16(b) is a statute of limitations
<b>Breyer</b>	Majority   Author's theory: Justice Breyer held that 16(b) is a statute of limitations
<b>Sotomayor</b>	Majority   Author's theory: Justice Sotomayor held that 16(b) is a statute of limitations
<b>Kagan</b>	Majority   Author's theory: Justice Kagan held that 16(b) is a statute of limitations
<b>Conservative-leaning (by seniority)   Vote 4-0 for majority   4-0 § 16(b) is a statute of repose</b>	
<b>Scalia</b>	Majority   Author's theory: Justice Scalia held that 16(b) is a statute of repose
<b>Kennedy</b>	Majority   Author's theory: Justice Kennedy held that 16(b) is a statute of repose
<b>Thomas</b>	Majority   Author's theory: Justice Thomas held that 16(b) is a statute of repose
<b>Roberts</b>	Recused
<b>Alito</b>	Majority   Author's theory: Justice Alito held that 16(b) is a statute of repose

*Credit Suisse* is the one business impact case of the eleven where the Court found itself in a major ideological split. The unanimous majority took the middle ground between (1) protecting the interests of small shareholders and (2) removing the potential of endless litigation hovering over the heads of corporate insiders.<sup>375</sup> In choosing the middle ground approach, however, the liberal-leaning Justices conceded the chance to increase protection for small shareholders and potentially eliminate short swing transactions by insiders. On the other hand, the conservative-leaning Justices wanted to lessen the impact of section 16(b) on corporate insiders but were forced into the middle ground. The business interests are likely to prevail on remand because *Simmonds* knew so much about their financial gains even though no Form 4s were filed. This means that the statute of limitations began to run at the point she obtained this knowledge or, as the district court held, “there is no dispute that all of the facts giving rise to Ms. *Simmonds*’s

<sup>375</sup> *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1421 (2012).

complaints against [petitioners] were known ... for at least five years before these cases were filed.”<sup>376</sup> If true, these facts bar Simmonds’s case even if the courts on remand apply equitable tolling.

Finally, parties choosing to sue corporate insiders under section 16(b) are more likely to resemble the sophisticated plaintiff in this case than the average shareholder holding only a few hundred shares in a 401(k). It is likely that these savvy plaintiffs will obtain short swing transaction information even without a Form 4 filing by insiders. Therefore, the real-world impact of this case will substantially limit their time limit to file suit. This limitation on shareholder power is a boon to business interests. Part VI *infra* takes on the Court’s health care cases to (1) determine whether they pass the business impact rubric and (2) finding that they pass, analyze the vote breakdown and their impact on business.

## VI. THE COURT’S THREE HEALTH CARE CASES

This Article would not be complete without a discussion of the Affordable Care Act cases and their potential impact on business. In March 2012, the Court faced one of the most controversial sets of oral arguments in its history—so significant, in fact, that the Justices granted six hours of oral argument between the three health care cases.<sup>377</sup> So what was all the hoopla about? President Obama signed the Patient Protection and Affordable Care Act (ACA) on March 23, 2010.<sup>378</sup> The law spans 900 pages and its primary goal is to “increase the number of Americans covered by health insurance and decrease the cost of health care.”<sup>379</sup> The ACA seeks to accomplish these goals in many ways but a few prominent provisions stand out: (1) the ACA requires insurance companies to insure everyone who applies (guaranteed issue),<sup>380</sup> (2) the ACA bars insurance companies from charging individuals with pre-existing conditions higher premiums (community rating),<sup>381</sup> (3) the ACA increases Medicaid coverage to people with incomes up to 133% above the poverty line (Medicaid expansion),<sup>382</sup> and (4) the ACA mandates that the

<sup>376</sup> See *id.* at 1421 n.8.

<sup>377</sup> See, e.g., Richard Wolf, *3 Epic Days: Health Care Law Reaches High Court*, USA TODAY (Mar. 26, 2012, 6:40 PM), <http://www.usatoday.com/news/story/2012-03-26/supreme-court-health-care/53768996/1>.

<sup>378</sup> *The Affordable Care Act Becomes Law*, HEALTHCARE.GOV, <http://www.healthcare.gov/law/timeline/> (last visited Mar. 23, 2013).

<sup>379</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2571 (2012).

<sup>380</sup> 42 U.S.C. § 300gg-1(a) (2012).

<sup>381</sup> 42 U.S.C. § 300gg-4(b).

<sup>382</sup> 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2012).

vast majority of American citizens obtain insurance or pay a “penalty” (individual mandate).<sup>383</sup>

The controversy that stirred when the bill was first debated in Congress escalated after its enactment—particularly over the Medicaid expansion and the individual mandate. Thirteen states immediately sued the federal government challenging the constitutionality of these provisions and the ACA in general.<sup>384</sup> Eventually thirteen more states and the National Federation of Independent Business joined the lawsuit as plaintiffs.<sup>385</sup> The basic argument the plaintiffs made was twofold: (1) Congress did not have the constitutional authority to pass the ACA under the Commerce Clause because people without insurance are not currently engaged in interstate commerce, and (2) the mandate’s penalty clause did not impose a tax and, therefore, was not within Congress’s power to “lay and collect taxes.”<sup>386</sup> The stage was set for the cases to be heard in United States’ highest court.

Before undertaking any analysis of the outcomes of these cases it is crucial to answer the following question: Do health care focused cases pass the business impact rubric and merit a place in the discussion of cases likely to significantly impact the business arena? This Section walks through that analysis. First, health care, health insurance, and government health care programs like Medicaid are not classic and well-established business law topics. They are covered neither in business law courses nor in the prominent business law textbooks. However, Constitutional Law and Congress’s Commerce and Tax power are classic and well-established business law topics. Viewing the case via this constitutional lens rather than the health care lens allows the cases to pass through rubric input #1. This is a fair viewing because it is likely that the Court’s ACA opinion will find its way into both academic and practitioner discussions surrounding business law for years to come. Input #2 is more easily surmounted as eight business-related groups filed amicus briefs in the ACA cases.<sup>387</sup>

<sup>383</sup> 26 U.S.C. § 5000A (2012).

<sup>384</sup> See, e.g., *State Attorneys General Against the Patient Protection and Affordable Care Act of 2010*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/State\\_Attorneys\\_General\\_Against\\_the\\_Patient\\_Protection\\_and\\_Affordable\\_Care\\_Act\\_of\\_2010](http://ballotpedia.org/wiki/index.php/State_Attorneys_General_Against_the_Patient_Protection_and_Affordable_Care_Act_of_2010) (last visited Mar. 23, 2013).

<sup>385</sup> *The States’ Lawsuit Challenging the Constitutionality of the Health Care Reform Law*, HEALTH CARE LAWSUIT, <http://www.healthcarelawsuit.us/> (last visited Mar. 23, 2013) (listing the state plaintiffs as Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming).

<sup>386</sup> *Nat’l Fed’n of Indep. Businesses v. Sebelius*, 132 S. Ct. 2566, 2580–81 (2012).

<sup>387</sup> Eight business-related groups filed amicus briefs in this case: (1) a combined brief filed for the Service Employees International Union and Change to Win, (2) a combined



Rubric input #3 is surmounted because business-focused facts predominate if the case is viewed through the Commerce Clause lens. Although the majority ultimately ruled this was a tax case under Congress's Article I taxing power, Justice Robert's opinion spent sixteen pages addressing and dismissing the plaintiffs' Commerce Clause arguments.<sup>388</sup> There are other business-focused facts that also play dominant roles in the case. Businesses employing more than fifty people in 2014 will be forced to provide insurance for their employees under the ACA.<sup>389</sup> Covered employers who fail to provide such insurance will pay a \$2000 fine per year, per full time employee.<sup>390</sup> By 2014, states must set up Small Business Health Options Programs where smaller businesses and individuals may purchase health insurance coverage.<sup>391</sup> Some small businesses of fewer than twenty-five employees may also receive tax credits for providing group health insurance plans to their employees.<sup>392</sup> The stock market took note as well; the day the opinion came out, stock prices of hospital corporations rose dramatically while insurance company shares fell.<sup>393</sup> Clearly, business-related facts played a dominant role in these cases and, therefore, input #3 is surmounted as well. Finally, under the same theory, the Commerce Clause was one of the dominant constitutional provisions in the cases allowing them to pass input #4. Table 12 encapsulates why the ACA cases made the cut as significant business impact cases from the 2011–2012 Term.

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brief filed for the American Federation of Labor and the Congress of Industrial Organizations, (3) a combined brief filed for the Small Business Majority Foundation and the Main Street Alliance, (4) the American Federation of Labor and the Congress of Industrial Organizations, (5) Blue Cross and Blue Shield of Massachusetts, (6) America's Health Insurance Plans, (7) the American Hospital Association, and (8) the Chamber of Commerce of the United States of America. See *U.S. Department of Health and Human Services v. Florida*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/u-s-department-of-health-and-human-services-v-florida/> (last visited Mar. 23, 2013).

<sup>388</sup> *Sebelius*, 132 S. Ct. at 2585–94.

<sup>389</sup> *Florida v. Dep't. of Health & Human Servs.*, 648 F.3d 1235, 1260 (11th Cir. 2011).

<sup>390</sup> 26 U.S.C. § 4980H (2012) (stating also that the number of employees will be reduced by 30 for purposes of assessing the \$2000 fines).

<sup>391</sup> *What the Health Care Reform Bill Means to Employers*, MILLER LAW GROUP (Mar. 31, 2010), <http://www.millerlawgroup.com/publications/alerts/What-the-Health-Care-Reform-Bill-Means-to-Employers.html>.

<sup>392</sup> *Id.*

<sup>393</sup> *Obamacare's Insurance Rule Is Upheld by Supreme Court*, CNBC.COM (June 28, 2012, 12:45 PM), [http://www.cnbc.com/id/47946647/Obamacare\\_s\\_Insurance\\_Rule\\_Is\\_Upheld\\_by\\_Supreme\\_Court](http://www.cnbc.com/id/47946647/Obamacare_s_Insurance_Rule_Is_Upheld_by_Supreme_Court) (showing the stock changes in different industries after the option was released).

TABLE 12  
SAMPLE RUBRIC CLASSIFICATION FOR THE ACA CASES

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(61)–(63) <i>Affordable Care Act Cases</i>	Commerce Clause and Health Care Law  Social Issues: Health Care	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> Tax vs. Penalty   Constitutionality of mandate under Commerce Clause   Medicaid Changes	<input checked="" type="checkbox"/> Commerce Clause   Affordable Care Act   Anti-Injunction Act

Three primary questions faced the Court in the ACA cases:

1. “Whether Congress had the power under Article I of the Constitution to enact the [individual mandate] provision” and “[w]hether the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act?”<sup>394</sup>
2. Whether the Affordable Care Act must be invalidated in its entirety because it is nonseverable from the individual mandate that exceeds Congress’s limited and enumerated powers under the Constitution?<sup>395</sup>
3. “Does Congress exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program,” or “does the

<sup>394</sup> See, e.g., *Issue: U.S. Department of Health and Human Services v. Florida*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/u-s-department-of-health-and-human-services-v-florida/> (last visited Mar. 23, 2013).

<sup>395</sup> See, e.g., *Issue: National Federation of Independent Businesses v. Sebelius*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/national-federation-of-independent-business-v-sebelius/> (last visited Mar. 23, 2013).

limitation on Congress's spending power that this Court recognized in *South Dakota v. Dole* ... no longer apply?"<sup>396</sup>

After months of waiting and high drama, the Court released its ACA opinion and answered each of these questions.<sup>397</sup> The three cases were consolidated into one very long opinion announced as one of the Court's last acts of the Term. In a surprise to most Court observers, the Chief Justice joined the liberal-leaning Justices to uphold the individual mandate. The majority first declared that the Anti-Injunction Act does not bar the Court from hearing the case because Congress declared the fine for failure to purchase insurance as a penalty as opposed to a tax.<sup>398</sup> The majority then, rather awkwardly to the lay observer, found that the individual mandate was not constitutional under the Congress's Commerce Clause power but was constitutional under Congress's taxing power.<sup>399</sup> In the words of Chief Justice Roberts:

[The ACA] statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that [the individual mandate penalty] can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.

The Federal Government does not have the power to order people to buy health insurance. [The individual mandate] would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. [The individual mandate] is therefore constitutional, because it can reasonably be read as a tax.

....

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain

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<sup>396</sup> See, e.g., *Issue: Florida v. Department of Health and Human Services*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/florida-v-department-of-health-and-human-services/> (last visited Mar. 23, 2013) (emphasis added).

<sup>397</sup> See generally *Nat'l Fed'n of Ind. Businesses v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>398</sup> *Id.* at 2583. Chief Justice Roberts stated the reasoning as follows: "The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits." *Id.* at 2584.

<sup>399</sup> See *infra* note 400 and accompanying text.

amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.<sup>400</sup>

The majority then struck down the Medicaid expansion because it threatened to take away the states' existing Medicaid funds as well as withhold new Medicaid funds.<sup>401</sup> This was a form of unconstitutional coercion. The opinion stated:

Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction.<sup>402</sup>

The majority ended by holding that the striking down of the Medicaid expansion did not require the entire ACA to be struck down.<sup>403</sup> Justice Ginsburg and the other liberal-leaning Justices filed a concurrence agreeing that the ACA is: (1) not barred by the Anti-Injunction Act, (2) constitutional under the Commerce Clause, and (3) constitutional under Congress's Taxing power.<sup>404</sup> Justices Ginsburg and Sotomayor together added a fifth part to their concurrence declaring that the Medicaid expansion was also constitutional under Congress's Article I spending power.<sup>405</sup> Justices Breyer and Kagan were not willing to join that part of the concurrence; the total vote to strike down the Medicaid expansion provisions of the ACA was 7-2.<sup>406</sup> The conservative-leaning Justices, minus the Chief, filed a joint dissent.<sup>407</sup> These four Justices would have struck down the ACA in its entirety.<sup>408</sup>

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<sup>400</sup> *Sebelius*, 132 S. Ct. at 2600–01, 2608 (citations omitted).

<sup>401</sup> *Id.* 2608–09.

<sup>402</sup> *Id.* at 2608.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at 2609 (Ginsburg, J., concurring).

<sup>405</sup> *Id.* at 2575, 2609.

<sup>406</sup> Richard Wolf, *How Health Care Law Survived, and What's Next*, USA TODAY (June 29, 2012, 5:53 AM), [http://www.usatoday.com/NEWS/usaedition/2012-06-29-still2\\_CV\\_U.htm](http://www.usatoday.com/NEWS/usaedition/2012-06-29-still2_CV_U.htm) (stating that the total vote to strike down the Medicaid expansion provisions of the ACA was 7-2).

<sup>407</sup> *Nat'l Fed'n of Ind. Businesses v. Sebelius*, 132 S. Ct. 2566, 2575 (2012)

<sup>408</sup> *Id.* at 2643 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

TABLE 13  
ACA CASE VOTE BREAKDOWN

<i>Nat'l Fed'n of Indep. Bus. v. Sibelius</i>   (5-4) and (7-2)	
Justice	Vote
<b>Liberal-leaning (by seniority)   Vote 4-0 for majority   2-2 tie on Medicaid Expansion</b>	
<b>Ginsburg</b>	Majority and Concurrence (author): the ACA is properly within Congress's Commerce Cause power <i>and</i> Taxing power; the Medicaid expansion is constitutional.
<b>Breyer</b>	Majority and Concurrence: the ACA is properly within Congress's Commerce Cause power <i>and</i> Taxing power; the Medicaid expansion is unconstitutional coercion.
<b>Sotomayor</b>	Majority and Concurrence: the ACA is properly within Congress's Commerce Cause power <i>and</i> Taxing power; the Medicaid expansion is constitutional.
<b>Kagan</b>	Majority and Concurrence: the ACA is properly within Congress's Commerce Cause power <i>and</i> Taxing power; the Medicaid expansion is unconstitutional coercion.
<b>Conservative-leaning (by seniority)   Vote 4-1 for dissent   5-0 on Medicaid Expansion</b>	
<b>Scalia</b>	Joint Dissent (no author named): the ACA should be struck down in its entirety.
<b>Kennedy</b>	Joint Dissent: the ACA should be struck down in its entirety.
<b>Thomas</b>	Joint Dissent: the ACA should be struck down in its entirety.
<b>Roberts</b>	Majority (author): the ACA is constitutional under Congress's taxing power but not under Congress's Commerce Clause power; the Medicaid expansion is unconstitutional coercion of the states.
<b>Alito</b>	Joint Dissent: the ACA should be struck down in its entirety.

The health care cases provided the second 5-4 vote in a significant business case over the 2011–2012 Term.<sup>409</sup> However, it is difficult to weigh how this opinion will affect the business arena as some businesses will suffer and others will prosper. It is also likely that the Justices viewed this case more through the health care lens than through the business lens. Deeper analysis on the business angles of this opinion is an area for further research. What

<sup>409</sup> Adam Liptak, *Court Declines to Revisit Its Citizens United Decision*, N.Y. TIMES (June 25, 2012), <http://www.nytimes.com/2012/06/26/us/supreme-court-declines-to-revisit-citizens-united.html> (discussing the 5-4 *Citizens United* ruling).

this Article can state with some certainty is that Chief Justice Robert's sixteen-page analysis combined with the joint dissent's analysis of the Commerce Clause indicates that at least five votes would prohibit the federal government from regulating people who are not engaged in commerce.

Part VII *infra* concludes the heavy lifting of the Article by weaving together the business impact cases to create a cohesive picture showing how this Term at the Roberts Court is likely to influence the business arena significantly.

#### VII. FOUR IMPRESSIONS OF THE TERM'S BUSINESS IMPACT

This Article took in the big picture of the Court's 2011–2012 Term in Part I.<sup>410</sup> Each of its sixty-nine argued cases were categorized into one of twelve real-world, relevant policy topics. A business impact rubric was then implemented to cull out the cases with the most potential to impact the business arena. Each of these eleven cases was classified into the category that best described its dominant topic. These categories were: (1) intellectual property, (2) employment, (3) consumer protection, (4) securities regulation, and (5) health care. Parts III–VI *supra* presented the facts and issues underlying each case and evaluated the Justices' votes and holdings from a business perspective.<sup>411</sup> This Part combines these separate analyses into a cohesive theory on the Term's overall impact on business. This jumping off point will hopefully spur additional research into this important topic.

Notably, Part VI demonstrated that the ACA and the Term's other health care cases are significant to the business arena.<sup>412</sup> The discussion *supra* also proposed that it is unclear in what way the cases will impact business in the short- and long-term. While insurance company revenue may suffer with higher payments owed to cover sicker patients, hospitals stand to gain as they add patients with insurance to their roles. Some small businesses will receive tax credits for obtaining group insurance policies while larger businesses may spend more money to comply with the ACA employer group coverage provisions. This confusion combined with the breadth and diversity of non-business topics these cases addressed, and the inability to evaluate the Justices' thought process in terms of business interests alone, make these cases unique when compared to the other eight cases covered *supra*. Therefore, the evaluation of the health care cases in Part VI *supra* will stand on its own, and the remainder of this Section will cover the other eight significant business impact cases. The good news is twofold: (1) the analysis *infra* will cover only the Term's cases that are

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<sup>410</sup> See *supra* Part I.

<sup>411</sup> See *supra* Parts III–VII.

<sup>412</sup> See *supra* Part VI.



directed primarily at businesses and business interests, allowing for a clearer picture of the impact on business; and (2) it is not difficult for the reader to build in an analysis of these cases by using the vote distribution table and other information in Part VI, adding the votes to the discussion and figures proposed *infra*.

Four impressions stand out upon weaving these eight business impact cases together to form what this Article refers to as the Business Impact Theory of the 2011–2012 Supreme Court Term:

1. The Court's opinions came out strongly on the side of business, with business interests receiving sixty-one out of seventy potential votes.<sup>413</sup> This resulted in an eighty-seven percent success rate for business interests over the course of the Term. This high percentage is different from the previous Term at the Roberts Court where the Justices unanimously voted against business interests in a handful of cases;
2. These pro-business decisions did not occur in ordinary, run of the mill cases. Instead the impact of these decisions is magnified because they each involved topics critical to America's economic recovery;
3. Perhaps surprisingly, the Court's liberal-leaning Justices<sup>414</sup> voted with the Court's conservatives twenty-three out of a possible thirty-one opportunities—or seventy-four percent of the time—in the significant business impact cases.<sup>415</sup> They

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<sup>413</sup> The total was generated as follows: There were eleven significant business impact cases selected this Term, but the health care votes were omitted for the reasons stated above. This left eight cases. Barring recusal, illness or vacancy there are nine Justices with votes in each case. Multiplying these figures together provides the Justices as a whole with seventy-two potential votes (nine Justices multiplied by eight cases). However, Chief Justice Roberts recused himself from one and Justice Kagan recused herself from another of the eight cases making the potential vote tally seventy.

<sup>414</sup> This Article classifies (in order of seniority) Justices Ginsburg, Breyer, Sotomayor, and Kagan as the Supreme Court's liberal-leaning Justices. It classifies (in order of seniority) Justices Scalia, Kennedy, Thomas, Roberts, and Alito as the Supreme Court's conservative-leaning Justices. Although this topic could be a lengthy article in itself, these choices were made based on prior decisions, rationale behind such decisions, the author's analysis of oral arguments from the Term, and conventional wisdom. *See, e.g.*, Gilson, *supra* note 16, <http://www.motherjones.com/politics/2012/06/supreme-court-roberts-obamacare-charts> (showing charts depicting the ideology of recent Supreme Court Justices showing the liberal-leaning and conservative-leaning distinctions drawn in this Article are accurate); Liptak, *supra* note 16 (depicting the conservative nature of the conservative-leaning Justices as depicted in this Article).

<sup>415</sup> The total was generated as follows: There were eleven significant business impact cases selected this Term, but the health care votes were omitted for the reasons stated

did so in disputes that presented compelling arguments from both a conservative and liberal perspective and where such facts allowed for a strong four-Justice dissent. Such a split, however, occurred only once in the eight cases considered in the tally;<sup>416</sup>

4. The Court was willing to both narrow and expand constitutional provisions/amendments and state/federal statutes to reach its desired result. There appeared to be no concerted effort to adhere to a minimalist or living Constitutionalist philosophy—at least in these significant business impact cases.

*A. This Term Was Different at the Roberts Court—At Least from a Business Perspective*

The eight chosen business impact cases each revolve around different subject matter but have enough in common to showcase a significant pro-business theme for the Court's 2011–2012 Term. This is a somewhat different outcome from the past Term where the conservative-leaning Justices, alleged to be more ideologically prone to favor business, were not as consistently pro-business as they proved to be this Term. A recent Federalist Society article describes the environment for business interests at the Roberts Court prior to 2011–2012:

The statement that the Supreme Court under Chief Justice Roberts, and more specifically the Court majority of five Republican-appointed Justices, has been unusually favorable, even biased, toward business interests is a familiar one in the media and much-repeated .... But is this true?

....

Not surprisingly, the issue of pro-business bias is complicated. To begin with, it is clear beyond dispute that none of the Justices generally identified as conservative—specifically, Chief Justice Roberts and Associate Justices Alito, Kennedy, Scalia, and Thomas—is reflexively pro-business. In numerous cases these Justices have cast their votes for, and even written the majority opinions in, decisions in which business parties have lost and investors, consumers, or employees have won.

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above. This left eight cases and four liberal-leaning Justices with votes in each case. Multiplying these figures together leads to thirty-two potential votes. However, one of the liberal-leaning Justices, Justice Elena Kagan, recused herself from one of the eight cases, making the possible vote tally equal thirty-one.

<sup>416</sup> The health care cases resulted in a 5-4 split, with Chief Justice Roberts joining the liberal-leaning Justices to form a majority. However, the health care cases are not included in these calculations.

....  
 [C]laims of an automatic or even a general pro-business bias are not well-founded, either with respect to the five more conservative Justices or with respect to the Court as a whole. That the Roberts Court has granted certiorari in more business cases than its predecessors is often pointed out, but as the cases above indicate, this may well be the result of a recognition that there are important and outstanding issues in this area that need to be resolved. For those who represent business interests, the Supreme Court's more hospitable attitude toward business cases is welcome. However, as the above analysis demonstrates, business parties should expect in the Supreme Court as elsewhere that, if they are to prevail, they must rely on the strength and cogency of their arguments and not the makeup of the bench.<sup>417</sup>

Examples of the Roberts Court rejecting the arguments of business interests in prior Terms abound. In unanimous opinions issued during the 2010–2011 Term alone, the Court (1) made it easier for securities fraud plaintiffs to certify a class action by not requiring them to prove loss causation at the certification stage,<sup>418</sup> (2) allowed an employee's Title VII retaliation claim to proceed against an employer not because the employee had engaged in protected activity but because his fiancée previously filed a sex discrimination complaint against the same employer,<sup>419</sup> and (3) held that plaintiffs could bring securities fraud cases “based on a pharmaceutical company's failure to disclose reports of adverse events associated with a product if the reports do not disclose a statistically significant number of adverse events.”<sup>420</sup> Compared to the current Term, past Terms of the Roberts Court have seen more business impact cases where the conservative-leaning Justices splintered their majority<sup>421</sup> or held their majority but split five to four with the liberal-leaning Justices.<sup>422</sup>

<sup>417</sup> Newhouse, *supra* note 15 (internal citations omitted) (discussing that the Roberts Court overall may not be as business friendly as it is perceived).

<sup>418</sup> *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011).

<sup>419</sup> *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011).

<sup>420</sup> *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1313 (2011).

<sup>421</sup> *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1328–29 (2011) (dealing with an anti-retaliation provision in the Fair Labor Standards Act and a situation where an employee filed an oral complaint about work conditions and was discharged; the conservative-leaning Justices Kennedy, Alito, and Roberts joined Justice Breyer's majority opinion holding that the employer's argument that oral complaints do not count as filed under the law was error); *Wyeth v. Levine*, 129 S. Ct. 1187, 1190, 1201 (2009) (holding that a federal law did not preempt a state law failure to warn tort claim for an anti-nausea drug made by Wyeth; the conservative-leaning Justices Kennedy and Thomas joined the liberal-leaning Justices to form a majority).

<sup>422</sup> *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546–47, 2561 (2011) (reversing 5–4 a class certification in a sex discrimination class action complaint against

With this recent history in mind, however, this Article demonstrates that the current Term cannot be classified in the same manner. The 2011–2012 Term at the Roberts Court was much more clearly pro-business. There were zero unanimous opinions holding against business interests as compared to three in 2010–2011.<sup>423</sup> In only one business case of the eight, *Golan v. Holder*, did a conservative-leaning Justice (Samuel Alito) leave the pack of five conservatives and join a liberal dissenter.<sup>424</sup> Finally, only one of the eight cases, *Christopher v. SmithKline Beecham*, was decided with an ideological 5-4 split.<sup>425</sup> The others were unanimously or nearly unanimously decided in favor of business interests.<sup>426</sup> The following three Sections demonstrate the pro-business thrust of this Term in more detail.

*B. The Business Impact Decisions Favor Business in Areas Crucial to America's Economic Recovery*

Each of the eight chosen business impact cases revolves around a very specific set of facts. For example, the *Freeman* case dealt specifically with unearned mortgage fees paid at residential real estate closings and retained in full by lenders.<sup>427</sup> The outcome of the case was favorable to business; it impacted the plaintiffs negatively and Quicken Loans positively.<sup>428</sup> The outcome was also relevant to the country's economy and millions of Americans who pay fees to obtain mortgages each year. The Court's opinion interprets RESPA as blessing unearned fees as long as the lender retains them in full.<sup>429</sup> This interpretation could open the door for lenders to legally create and retain all sorts of new unearned mortgage fees. These new mortgage fees, in turn, could negatively impact the residential real estate market, which has been a continual drag on the nation's economic recovery. The decision will obviously help drive revenue into the mortgage industry. Analyzed from a similar macro- and micro-economic perspective,

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Wal-Mart involving 1.5 million current and former female employees); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1743, 1753 (2011) (reversing 5-4 a Ninth Circuit decision that class action waivers in mobile phone contracts are per se unconscionable under the Federal Arbitration Act).

<sup>423</sup> See *infra* Table 14.

<sup>424</sup> See *infra* Table 14.

<sup>425</sup> See *infra* Table 14.

<sup>426</sup> See *infra* Table 14. The 4-4 split in *Credit Suisse* did not significantly change the pro-business outcome in the case of limiting the filing deadline for section 16(b) claims. The predicted split of 7-2 in *Christopher*, if it occurs, makes this point even stronger.

<sup>427</sup> *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2038 (2012).

<sup>428</sup> *Id.* at 2044.

<sup>429</sup> *Id.*

each of the eight business impact cases touches upon subjects crucial to the country's economic recovery, and the opinion in each case favored or is likely to favor the business interests involved.

One intellectual property decision from this Term favored business interests in a critical aspect of the health care cost arena: generic prescription drugs and the process of getting these drugs to market.<sup>430</sup> *Caraco* was a business versus business dispute; one business interest had to win and the other lose.<sup>431</sup> The winner was the generic corporation over its brand name competitor.<sup>432</sup> This undoubtedly pleased the businesses that filed amicus briefs in *Caraco*'s favor (Mylan Pharmaceuticals and the Generic Pharmaceutical Association) and disappointed the businesses favoring Novo Nordisk (Allergan, Inc. and the Pharmaceutical Research and Manufacturers of America).<sup>433</sup> Overall, the holding can be considered business friendly because it removed obstacles in the way of a company quickly moving drugs to market. Business interests generally cheer when regulatory hurdles are lowered and efficiency improves. At the end of the day, getting pharmaceutical drugs into the hands of patients at a reasonable price is crucial to the country's economic recovery.

Business interests may also take satisfaction from the other intellectual property opinion in the *Golan* case. The Court's ruling is protective of intellectual property and of the idea that the marketplace can set fair prices in which consumers of copyrights should pay for a license. In reaching its decision, the majority further discussed paying fair value in the marketplace of ideas:

The question here ... is whether would-be users must pay for their desired use of the author's expression, or else limit their exploitation to "fair use" of that work. Prokofiev's *Peter and the Wolf* could once be performed free of charge; after § 514 the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev's U.S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers.<sup>434</sup>

The employment law cases dealt with the hiring and firing of employees, employee retention and pay, and organized labor.<sup>435</sup> Each of these topics

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<sup>430</sup> *Caraco Pharm. Labs., Ltd. v. Novo Nordisk*, 132 S. Ct. 1670, 1675–76 (2012).

<sup>431</sup> *Id.* at 1678.

<sup>432</sup> *Id.* at 1680.

<sup>433</sup> See *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/caraco-pharmaceutical-laboratories-ltd-v-novo-nordisk-as/> (last visited Mar. 23, 2013) (showing all amicus curiae briefs filed in the case).

<sup>434</sup> *Golan v. Holder*, 132 S. Ct. 873, 893 (2012).

<sup>435</sup> See *infra* Table 15.

has been the subject of recent front-page news stories. Fingers remain crossed that business will begin to hire *en masse* soon. The Court took the opportunity to bolster employer strength throughout the employment cycle by allowing religious organizations to control the hiring and firing of ministers,<sup>436</sup> limit the power of organized labor,<sup>437</sup> and avoid overtime obligations to pharmaceutical salespeople.<sup>438</sup>

The consumer protection cases deal with consumer credit and residential real estate.<sup>439</sup> As mentioned previously, these subjects are both part of the cause of the Great Recession and part of the hope for future economic recovery. Any recovery requires consumers to regain confidence and spend. Consumers, however, took the hardest hit of all over the Term. The Court ruled against shareholders, employees, and unions this Term, but none of these rulings were as lopsided as the consumer protection cases (seventeen to one in favor of business interests).<sup>440</sup> The Court's ruling in *Greenwood* allowed mandatory arbitration to count as a plaintiff's right to sue and correspondingly decreased the power of that type of statutory language.<sup>441</sup> Businesses gained a victory because they favor arbitration as a cheaper, less risky alternative to fighting a consumer lawsuit.<sup>442</sup> The Court's ruling in *Freeman* is likely to alter the universe of unearned mortgage fees.

The securities regulation case revolves around the financial markets and corporate insiders.<sup>443</sup> This combination formed one of the hottest topics over the past few years as it does after every economic crisis.<sup>444</sup> In *Credit Suisse*, the Court ruled in favor of underwriters and corporate insiders over shareholder plaintiffs.<sup>445</sup> The Court's narrow interpretation of the Securities and Exchange Act may have larger consequences. A ruling by the Court allowing a longer statute of limitations on short swing lawsuits would have effectively ended the practice. Corporate insiders would face potential liability

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<sup>436</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

<sup>437</sup> *Knox v. Serv. Emps. Int'l Union, Local 1000*, 131 S. Ct. 2277, 2295–96 (2012).

<sup>438</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172–73 (2012).

<sup>439</sup> See *infra* Table 15.

<sup>440</sup> See *supra* Table 9, Table 10, and Table 11.

<sup>441</sup> *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669–70 (2012).

<sup>442</sup> Jesse J. Holland, *Court Says Vioxx Lawsuit Can Proceed*, USA TODAY (Apr. 27, 2010), [http://www.usatoday.com/money/industries/health/2010-04-27-merck-suit\\_N.htm](http://www.usatoday.com/money/industries/health/2010-04-27-merck-suit_N.htm).

<sup>443</sup> *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1417–18 (2012).

<sup>444</sup> See, e.g., Luigi Zingales, *How Financial Regulation Can Be Market Friendly*, BLOOMBERG (May 31, 2012), <http://www.bloomberg.com/news/2012-05-31/how-financial-regulation-can-be-market-friendly.html> (“The structure of financial regulation in the U.S. resembles sedimentary rock: Each layer is the legacy of a crisis, but there is nothing binding the layers together.”).

<sup>445</sup> *Credit Suisse*, 132 S. Ct. at 1421.



until two years after they file a Form 4. The Form 4 would tip off potential plaintiffs who would then be armed with the information and the time they need to sue. The Court's ruling, on the other hand, may not hinder or dissuade corporate insiders from the practice of short swing trading.

*C. The Liberal-Leaning Justices Voted Consistently in Favor of Business Interests*

Business interests generated sixty-one out of seventy potential votes over the course of the 2011–2012 Term.<sup>446</sup> Even with the five conservative-leaning Justices almost always voting in favor of business interests in all eight cases (minus one vote for Justice Alito's dissent in *Golan*), twenty-three out of a potential thirty-six liberal-leaning votes were required to get to the total of sixty-one.<sup>447</sup> In fact, in six of the eight decided cases, the liberal-leaning Justices voted unanimously or one vote shy of unison with the conservative-leaning Justices.<sup>448</sup> The only real contested cases of the bunch were two employment law cases: *Christopher* (four liberal-leaning dissenters) and *Knox* (two liberal-leaning dissenters).<sup>449</sup>

It is important to note that these were not the type of cases where the business interests had a clear path to a legal victory. The lower courts did not make clearly erroneous interpretations of constitutional provisions or statutes. The cases involved facts and legal issues with compelling arguments on both sides. For example, the liberal-leaning Justices could have easily formed a strong dissent arguing that CROA's right to sue provision mandated an actual courtroom trial based on the plain English interpretation of that phrase. They could have argued that the First Amendment's Ministerial Exception does not cover employees who teach secular and religious classes and allege disability discrimination. Such unanimous dissents never materialized. The following table shows how little each liberal-leaning Justice voted with the conservative majority over the 2011–2012 Term.

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<sup>446</sup> Bear in mind that Chief Justice Roberts and Justice Kagan both recused themselves in one business impact case this Term. See *supra* Table 5 and Table 6.

<sup>447</sup> See *infra* Table 14.

<sup>448</sup> See *infra* Table 14.

<sup>449</sup> See *infra* Table 14.

TABLE 14  
LIBERAL-LEANING JUSTICES SIDING WITH THE CONSERVATIVE MAJORITY<sup>450</sup>

Case	Ginsburg	Breyer	Sotomayor	Kagan
<i>Caraco</i>	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority
<i>Christopher</i>	Dissent	Dissent	Dissent	Dissent
<i>Credit Suisse</i>	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority
<i>Freeman</i>	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority
<i>Golan</i>	Joined the Conservative Majority	Dissent	Joined the Conservative Majority	Joined the Conservative Majority
<i>Greenwood</i>	Dissent	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority
<i>Hosanna</i>	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority	Joined the Conservative Majority
<i>Knox</i>	Joined the Conservative Majority	Dissent	Joined the Conservative Majority	Dissent
<i>Health Care Cases</i>	Joined the Liberal Majority	Joined the Liberal Majority	Joined the Liberal Majority	Joined the Liberal Majority

The *Golan* case provided the only strange ideological split in the group of business impact cases.<sup>451</sup> Two liberal-leaning Justices disagreed upon the outcome with Justice Ginsburg authoring the majority<sup>452</sup> and Justice Breyer authoring the dissent.<sup>453</sup> Four of the five conservative-leaning Justices joined Justice Ginsburg's majority opinion while Justice Alito joined Justice Breyer in dissent.<sup>454</sup> This outcome was somewhat predictable and not likely to repeat itself any time soon because the case involved a very odd set of

<sup>450</sup> Consolidated cases are combined into one row in this table.

<sup>451</sup> See *supra* Table 14.

<sup>452</sup> *Golan v. Holder*, 132 S. Ct. 873, 877 (2012).

<sup>453</sup> *Id.* at 899.

<sup>454</sup> *Id.* at 877, 899.

facts, a century-long gap between the intellectual property convention's creation and the United States joining, and other various international issues.

*D. Constitutional Amendments and Statutes Were Expanded and Narrowed*

The business impact cases showed no consistent pattern when it came to narrowing or expanding constitutional provisions/amendments or state/federal statutes. Constitutional theory predicts that conservative-leaning Justices favor minimal constitutional and statutory expansion. Chief Justice Roberts reiterated this philosophy in his response to the Senate Judiciary Committee questionnaire, when he wrote, "Judges must be constantly aware that their role, while important, is limited .... They do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law."<sup>455</sup> Correspondingly, theory holds that liberal-leaning Justices tend to favor a more expansive approach to constitutional and statutory interpretation. Former Justice David Souter stated as much in a Harvard commencement address:

The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another. Not even its most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day; and another day after that, for our cases can give no answers that fit all conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world. These are reasons enough to show how egregiously it misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments. Judges have to choose between the good things that the Constitution approves, and when they do, they have to choose, not on the basis of measurement, but of meaning.<sup>456</sup>

These judicial philosophies are drastically different. No Justice, however, is legally or ethically required to adopt either approach. It is perhaps unsurprising then that neither approach was consistently implemented this Term, as the remainder of this Section demonstrates.

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<sup>455</sup> Sheryl Gay Stolberg & David E. Rosenbaum, *Court Nominee Prizes 'Modesty,' He Tells the Senate*, N.Y. TIMES (Aug. 3, 2005), [http://www.nytimes.com/2005/08/03/politics/politicsspecial1/03confirm.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2005/08/03/politics/politicsspecial1/03confirm.html?pagewanted=print&_r=0).

<sup>456</sup> Justice David H. Souter, *Text of Justice David Souter's Speech*, HARVARD GAZETTE (May 27, 2010), <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

### 1. *Constitutional Expansion*

The 2011–2012 Term expanded First Amendment and Copyright/Patent Clause protections. In *Hosanna-Tabor*, the unanimous majority expanded the Ministerial Exception under the Freedom of Religion Clause of the First Amendment.<sup>457</sup> The Court held that the plaintiff was “the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.”<sup>458</sup> The Court found unpersuasive the employee’s argument that this type of ruling would allow rampant discrimination by religious employers.<sup>459</sup> The majority argued that religious prerogatives in hiring trumped these discrimination accusations, and:

[W]hatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church’s overall mission.<sup>460</sup>

In *Knox*, the Court expanded an employee’s First Amendment right not to speak.<sup>461</sup> The Court held that the First Amendment prohibits unions from forcing members to contribute to political campaigns without proper notice and the ability to opt in.<sup>462</sup> In the end, the Court accepted, in a bit different form, the plaintiff/employees’ arguments that “strict scrutiny should apply to the First Amendment issues in this case because it involves compelled speech and political speech .... [and] that it is unconstitutional to compel non-members to support SEIU’s political activities related to the state ballot measure.”<sup>463</sup>

The Court also expanded the scope of the Copyright and Patent Clauses in *Golan* by stating, “[n]either the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit.”<sup>464</sup> The Court could have held that

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<sup>457</sup> *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

<sup>458</sup> *Id.* at 716.

<sup>459</sup> *Id.* at 710.

<sup>460</sup> *Id.* at 715–16.

<sup>461</sup> *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2295–96 (2012).

<sup>462</sup> *Id.*

<sup>463</sup> Ross Runkel, *When Union Fees Go Up, Must a “Hudson Notice” Go Out?*, SCOTUSBLOG (Jan. 5, 2012, 10:01 AM), <http://www.scotusblog.com/?p=135860>.

<sup>464</sup> *Golan v. Holder*, 132 S. Ct. 873, 878 (2012).

Congress should have found more creative ways to comply with the Berne Convention. It could have held that the Copyright Clause does not allow works in the public domain to be retroactively copyrighted for the purpose of complying with an international convention. Alternatively, as Justice Breyer put it in the dissent:

The fact that, by withdrawing material from the public domain, the statute inhibits an important preexisting flow of information is sufficient, when combined with the other features of the statute that I have discussed, to convince me that the Copyright Clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute.<sup>465</sup>

## 2. Statutory Expansion

The majority in *Caraco* expanded the interpretation of federal patent law to allow generic manufacturers to file counterclaims challenging use codes in patent infringement claims.<sup>466</sup> The Court claimed that this expansive interpretation furthers a Congressional desire to speed generic drugs to market.<sup>467</sup> A narrower interpretation would have denied counterclaims in cases where a brand name manufacturer's use code is at least partially accurate. The Court stated this narrow interpretation as follows before rejecting it:

Novo agrees that Caraco could bring a counterclaim if Novo's assertion of patent protection for repaglinide lacked any basis—for example, if Novo held no patent, yet claimed rights to the pair of uses for which Caraco seeks to market its drug. But because Novo has a valid patent on a *different* use, Novo argues that Caraco's counterclaim evaporates.<sup>468</sup>

The majority in *CompuCredit* expanded the scope of CROA.<sup>469</sup> The Court held that a statutory right to sue (at least when written in the required consumer disclosure part of the law) encompasses mandatory arbitration proceedings in lieu of heading directly to the courtroom.<sup>470</sup> This opinion also expanded the Federal Arbitration Act to incorporate cases where a plaintiff has a statutory right to sue.<sup>471</sup> A narrower interpretation of that language would have held that a statutory right to sue should be interpreted as most Americans would understand that phrase—a right to a trial in a courtroom.

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<sup>465</sup> *Id.* at 912 (Breyer, J., dissenting).

<sup>466</sup> *Caraco Pharm. Labs., Ltd. v. Novo Nordisk*, 132 S. Ct. 1670, 1680 (2012).

<sup>467</sup> *Id.* at 1681–83.

<sup>468</sup> *Id.* at 1682.

<sup>469</sup> *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670–73 (2012).

<sup>470</sup> *Id.*

<sup>471</sup> *Id.* at 673.

The majority expanded the Fair Labor Standards Act and its Outside Salesperson exemption in *Christopher*.<sup>472</sup> The majority held that pharmaceutical sales representatives act primarily outside the office and make enough money in incentive-based pay to compensate for being denied overtime—in a way the majority believes the FLSA intended.<sup>473</sup> A narrower interpretation of the exemption would have found that a salesperson must actually sell something to someone else to qualify for the exemption, and these pharmaceutical representatives are not legally allowed to sell drugs to consumers. This narrowing of the statute would have entitled the plaintiff/employees to overtime back pay.

### 3. *Statutory Narrowing*

The majority in *Freeman* narrowed the scope of RESPA.<sup>474</sup> The Court held that the statutory language prohibited only actual fee splitting between two or more entities.<sup>475</sup> This holding limits the number of lawsuits that can be filed under RESPA and allows lenders to charge unearned fees as long as they keep them.<sup>476</sup> A more expansive interpretation of the statutory language would have barred this practice and likely eliminated unearned mortgage fees that do not lead to corresponding interest rate reductions.

Finally, the majority in *Simmonds* narrowed the scope of the Securities Exchange Act of 1934.<sup>477</sup> The Court held that lawsuits under 16(b) must be brought within two years of the date that the plaintiff knew or should have known of the short swing trades.<sup>478</sup> A more expansive interpretation would have granted these plaintiffs more time (two years from the date that the corporate insider files a Form 4 detailing the short swing trade). The Court unanimously rejected that timeline.<sup>479</sup> As detailed in Part V, a more expansive interpretation of the statute may have reduced the practice of short swing trades by corporate insiders unwilling to have section 16(b) lawsuits hanging over their heads indefinitely.<sup>480</sup>

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<sup>472</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172–73 (2012).

<sup>473</sup> *Id.*

<sup>474</sup> *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012).

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419–20 (2012).

<sup>478</sup> *Id.*

<sup>479</sup> *Id.* at 1420.

<sup>480</sup> *See supra* Part V.



## CONCLUSION

The impact of the 2011–2012 Supreme Court Term in general will prove far bigger than the health care arguments and Arizona’s controversial immigration case in particular. Although those cases garnered the majority of national media attention, other cases proved to be just as extraordinary, precedential, and worthy of attention. The eleven business impact cases discussed in this Article demonstrate this conclusion. The Business Impact Theory articulated in this Article provided four impressions of these cases and their impact on the business arena. First, this Term was much different from past Terms where the Roberts Court issued opinions far less favorable to business interests. Second, business interests prevailed in each of the eight cases (and debatably prevailed in the health care cases). In cases that did not involve a business versus another business, the Court tended to favor business interests over the interest of shareholders, consumers, unions, and employees (unless that employee was suing a union). These victories occurred in cases that revolved around issues crucial to any economic recovery in the United States. Third, the liberal-leaning Justices agreed with their conservative-leaning colleagues the vast majority of the time. Justice Alito left the conservative pack of five one time (in *Golan*) as did the Chief Justice (in health care), but the conservative majority held the rest of the time.<sup>481</sup> Only one of the eight analyzed business impact cases resulted in an ideological 5-4 split.<sup>482</sup> Fourth and finally, each case showed the Court either narrowing or expanding a constitutional provision/amendment or statute to reach its result. There seemed to be very little interest in judicial minimalism or expansionism.

This Article is meant to start a much-needed discussion about the impact of the Court’s most recent opinions on the business arena. It is important for both lawyers and business professionals to understand how the highest court in the land views their disputes in areas as important as arbitration, employment, and intellectual property protection. Also important is the gentle nudge this Article provides for these people to more closely monitor the Court and understand how its opinions are likely to treat future business issues. Furthermore, it is imperative for consumers to understand how the Court has narrowed their statutory protections in recent years and for employees to understand their evolving rights in the workplace. In the end, this could be a fluky Term without a great deal of long-term meaning. On the other hand, this Term may provide a pivot point for the Court towards supporting business interests to a greater extent. Time will tell, as the next first Monday of October is right around the corner.

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<sup>481</sup> See *supra* Table 14.

<sup>482</sup> *Id.*

## APPENDIX

TABLE 15  
 THE SUPREME COURT'S 2011–2012 TERM AND A BUSINESS IMPACT RUBRIC  
 (SIGNIFICANT BUSINESS IMPACT CASES PASSING THE RUBRIC ARE  
 HIGHLIGHTED IN LIGHT GRAY)<sup>483</sup>

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(1) <i>Douglas</i> <sup>484</sup>	Constitutional Law Taxes, Entitlement Programs & Government Spending	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>485</sup>	<input type="checkbox"/> Medicaid reimbursement dispute between federal & state governments	<input type="checkbox"/> Supremacy Clause (Conflict between state & federal Medicaid reimbursement laws)   Federal Medicaid Act
(2) <i>Reynolds</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Sex Offender registration process & retroactivity	<input type="checkbox"/> Sex Offender Registration & Notification Act
(3) <i>Martinez</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Ineffective counsel allegations at pre-trial proceedings	<input type="checkbox"/> Sixth Amendment (Assistance of Counsel)

<sup>483</sup> Consolidated cases are combined into one row in this table.

<sup>484</sup> *Douglas v. Santa Rosa Memorial Hospital* and *Douglas v. California Pharmacists Association* were consolidated into and with *Douglas v. Independent Living Center of Southern California*. See *Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1209 (2012).

<sup>485</sup> Two business-related groups filed amicus briefs in this case: (1) the Chamber of Commerce of the United States of America and (2) the National Association of Chain Drug Stores et al. See *Douglas v. Independent Living Center of Southern California*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/maxwell-jolly-v-independent-living-center-of-southern-california/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(4) <i>Howes</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Prisoner interrogation within a prison about allegations against inmate in a new case	<input type="checkbox"/> Fifth Amendment (Self-Incrimination Clause)
(5) <i>Maples</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Abandonment of counsel caused a missed habeas deadline in a capital case	<input type="checkbox"/> Sixth Amendment (Assistance of Counsel)
(6) <i>Golan</i>	Intellectual Property Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>486</sup>	<input checked="" type="checkbox"/> Membership requirements in an International Intellectual Property Treaty	<input checked="" type="checkbox"/> Copyright Clause   Uruguay Round Agreements
(7) <i>Hosanna-Tabor</i>	Employment Law Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>487</sup>	<input checked="" type="checkbox"/> Employment discrimination based on disability v. the First Amendment's Ministerial exception	<input checked="" type="checkbox"/> First Amendment (Freedom of Religion Clause applied to employment)   Americans With Disabilities Act

<sup>486</sup> Two business-related groups filed friend of the court briefs in this case: (1) the International Publishers Association et al. and (2) the Motion Picture Association of America. See *Golan v. Holder*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/golan-v-holder/> (last visited Mar. 23, 2013).

<sup>487</sup> One business-related group filed a friend of the court brief in this case: (1) the National Employment Lawyers Association. See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eoc/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(8) <i>Greene</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Redacted confessions & a defendant's ability to confront witnesses	<input type="checkbox"/> Sixth Amendment (Confrontation Clause)   Anti-Terrorism & Effective Death Penalty Act (AEDPA)
(9) <i>CompuCredit</i>	Consumer Protection Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>488</sup>	<input checked="" type="checkbox"/> Mandatory arbitration for credit card holders disputing allegedly misleading fees	<input checked="" type="checkbox"/> Federal Arbitration Act   Credit Repair Organizations Act
(10) <i>Pacific Operators</i>	Employment Law Business & Employment Arena	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> Workers' Compensation claim on non-Continental Shelf territory	<input type="checkbox"/> Outer Continental Shelf Lands Act
(11) <i>Judulang</i>	Immigration Law Immigration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Relief from removal proceedings	<input type="checkbox"/> Administrative Procedure Act

<sup>488</sup> Two business-related groups filed friend of the court briefs in this case: (1) the Consumer Data Industry Association and (2) the Consumer Data Industry Association. See *CompuCredit v. Greenwood*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/compucredit-corp-v-greenwood/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(12) <i>Florence</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Invasive pre-trial detainee searches as part of entering general inmate population	<input type="checkbox"/> Fourth Amendment (Search & Seizure)   Fourteenth Amendment (Due Process)
(13) <i>Frye</i> <sup>489</sup>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Attorney responsibilities for plea bargains	<input type="checkbox"/> Sixth Amendment (Right to Counsel)
(14) <i>Lafler</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Attorney responsibilities for plea bargains	<input type="checkbox"/> Sixth Amendment (Right to Counsel)
(15) <i>Rehberg</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Qualified immunity for grand jury witnesses	<input type="checkbox"/> Section 1983 (Civil Rights)
(16) <i>Minneeci</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Adequate state law remedies for injured inmate	<input type="checkbox"/> Eighth Amendment (Cruel/Unusual Punishment)
(17) <i>Gonzales</i>	Civil Procedure Social Issue: Justice	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Timeliness of obtaining Certificates of Appealability	<input type="checkbox"/> Sixth Amendment (Speedy Trial)   AEDPA

<sup>489</sup> *Missouri v. Frye* was declared to be a companion case by the Supreme Court with *Lafler v. Cooper*. See *Missouri v. Frye*, 132 S. Ct. 1399, 1412 (2012) (Scalia, J., dissenting).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(18) <i>Perry v. N.H.</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Unreasonable eyewitness IDs	<input type="checkbox"/> Sixth Amendment (Confrontation Clause)   Fourteenth Amendment (Due Process)
(19) <i>M.B.Z.</i>	Constitutional Law Global Trade & International Relations	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Statute allowing listing Israel as a birthplace on a U.S. citizen's passport in conflict with Executive branch	<input type="checkbox"/> Ambassadors Clause   Foreign Relations Authorization Act
(20) <i>Kawaashima</i>	Immigration Law Immigration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> False tax returns as "aggravated felonies" under specific immigration law	<input type="checkbox"/> Immigration & Nationality Act
(21) <i>Smith</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Prosecutor's failure to disclose evidence pre-trial	<input type="checkbox"/> Equal Protection   Precedent Interpretation
(22) <i>Jones</i>	Criminal Law Social Issue: Civil Liberties v. Security	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Warrantless use of GPS on drug suspect's automobile	<input type="checkbox"/> Fourth Amendment (Search & Seizure)



Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(23) <i>Nat'l Meat Assn.</i>	Administrative Law Social Issue: Constitutional Provisions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>490</sup>	<input type="checkbox"/> Food safety relating to disposal of non-ambulatory pigs (no widespread business impact)	<input checked="" type="checkbox"/> Supremacy Clause (targeted in this case to the conflict between state & federal food safety laws)   Fed. Meat Inspection Act
(24) <i>Kurns</i>	Administrative Law Social Issue: Constitutional Provisions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>491</sup>	<input type="checkbox"/> Federal railroad safety law preempting employee tort claim (no widespread business impact)	<input checked="" type="checkbox"/> Supremacy Clause (targeted in this case to the conflict between state & federal railroad safety laws)   Locomotive Inspection Act

<sup>490</sup> One business-related group filed a friend of the court brief in this case: (1) the Chamber of Commerce of the United States of America. *See National Meat Association v. Harris*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/national-meat-association-v-brown/> (last visited Mar. 23, 2013).

<sup>491</sup> Eight business-related groups filed friend of the court briefs in this case: (1) Griffin Wheel Company, (2) the Association of American Railroads, (3) ThyssenKrupp Budd Company, (4) the National Association of Manufacturers, (5) General Electric Corporation, (6) John Crane Inc., (7) the Chamber of Commerce, and (8) the National Association of Retired and Veteran Railway Employees. *See Kurns v. Railroad Friction Products Corp.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/kurns-v-railroad-friction-products-corp/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(25) <i>Mims</i>	Civil Procedure Social Issue: Justice	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>492</sup>	<input type="checkbox"/> State court jurisdiction not exclusive in cases under this statute	<input checked="" type="checkbox"/> Telephone Consumer Protection Act
(26) <i>First Am. Fin.</i>	Consumer Protection Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>493</sup>	<input type="checkbox"/> Standing to sue real estate settlement service providers (Civil Procedure facts dominate)	<input checked="" type="checkbox"/> Article III   Real Estate Settlement Procedures Act (RESPA)
(27) <i>Hall</i>	Bankruptcy Economy	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> Capital gains liability for farm sales in Chapter 12 reorganizations	<input checked="" type="checkbox"/> U.S. Bankruptcy Code (Chapter 12 covering family farms)

<sup>492</sup> Four business-related groups filed friend of the court briefs in this case: (1) the National Consumer Law Center et al., (2) ACA International, (3) the National Federation of Independent Business Small Business Legal Center and (4) DBA International. See *Mims v. Arrow Financial Services, LLC*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/mims-v-arrow-financial-services-llc/> (last visited Mar. 23, 2013).

<sup>493</sup> Fifteen business-related groups filed friend of the court briefs in this case: (1) the American Land Title Association et al., (2) the American Escrow Association et al., (3) the National Association of Title Agents, (4) the Real Estate Services Provider's Council, Inc., (5) Stewart Information Services Corporation et al., (6) the National Association of Home Builders, (7) the California Building Industry Association, (8) the National Association of Retail Collection Attorneys, (9) Experian Information Solutions, Inc., (10) Facebook, Inc. et al., (11) ACA International Law, (12) the American Land Title Association, (13) the Association of Global Automakers, Inc., (14) the Alliance of Automobile Manufacturers, and (15) the Consumer Data Industry Association. See *First American Financial v. Edwards*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/first-american-financial-corp-v-edwards/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(28) <i>Credit Suisse</i>	Securities Law Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>494</sup>	<input checked="" type="checkbox"/> Corporate insider short swing trades	<input checked="" type="checkbox"/> Securities Exchange Act of 1934
(29) <i>Setser</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Concurrent v. consecutive sentencing in federal court when state sentence is pending	<input type="checkbox"/> Sentencing Reform Act of 1984
(30) <i>Cooper</i>	Employment Law Business & Employment Arena	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Mental & emotional distress lawsuits and state sovereign immunity	<input type="checkbox"/> Privacy Act of 1974
(31) <i>Messerschmidt</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Reasonableness of warrant & police officer immunity	<input type="checkbox"/> Fourth Amendment (Search & Seizure)

<sup>494</sup> One business-related group filed a friend of the court brief in this case: the Chamber of Commerce of the United States of America. See *Credit Suisse Securities v. Simmonds*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/credit-suisse-securities-v-simmonds/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(32) <i>Caraco</i>	Intellectual Property Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>495</sup>	<input checked="" type="checkbox"/> Generic v. brand name patent dispute	<input checked="" type="checkbox"/> Patent Clause   Hatch-Waxman Act
(33) <i>Martel</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Standard of review in non-capital cases	<input type="checkbox"/> Federal Appointment of Counsel Statute
(34) <i>Williams</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Confrontation of DNA analyst at trial	<input type="checkbox"/> Sixth Amendment (Confrontation Clause)

<sup>495</sup> Seven business-related groups filed friend of the court briefs in this case: (1) Mylan Pharmaceuticals Inc., (2) the Generic Pharmaceutical Association, (3) Allergan, Inc. et al., (4) the Pharmaceutical Research and Manufacturers of America, (5) TEVA Pharmaceuticals USA, Inc., (6) the Consumer Federation of America et al., and (7) Apotex, Inc. See *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/caraco-pharmaceutical-laboratories-ltd-v-novo-nordisk-as/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(35) <i>Mayo</i>	Intellectual Property Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>496</sup>	<input type="checkbox"/> Patent challenge for a method of use in conflict with a law of nature (pure IP issue as opposed to a business-focused issue)	<input checked="" type="checkbox"/> Patent Clause
(36) <i>PPL Montana</i>	Constitutional Law Social Issue: Constitutional Provisions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>497</sup>	<input type="checkbox"/> Ownership of riverbeds flowing through Montana	<input type="checkbox"/> Equal Footing Doctrine
(37) <i>Perry v. Perez</i> <sup>498</sup>	Election Law Elections	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Census-based redistricting & Voting Rights Act challenges	<input type="checkbox"/> Voting Rights Act of 1965

<sup>496</sup> Ten business-related groups filed friend of the court briefs in this case: (1) Arup Laboratories, Inc., and Laboratory Corporation of America Holdings, (2) a combined brief for Verizon Communications, Inc., and Hewlett Packard Company, (3) a combined brief for Microsoft Corporation, EMC Corporation, and Intel Corporation, (4) Roche Molecular Systems, Inc. et al., (5) Novartis Corporation, (6) Genomic Health, Inc. et al., (7) National Venture Capital Association, (8) SAP America, Inc., (9) the Pharmaceutical Research and Manufacturers of America, and (10) Myriad Genetics, Inc. See *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/mayo-collaborative-services-v-prometheus-laboratories-inc/> (last visited Mar. 23, 2013).

<sup>497</sup> Three business-related groups filed friend of the court briefs in this case: (1) Freeport-McMoran Corporation et al., (2) the American Petroleum Institute et al., and (3) the Edison Electric Institute et al. See *PPL Montana, LLC v. Montana*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/ppl-montana-llc-v-montana/> (last visited Mar. 23, 2013).

<sup>498</sup> *Perry v. Perez* and *Perry v. Davis* were consolidated into and with *Perry v. Perez*. See *Perry v. Perez*, 132 S. Ct. 934, 934 (2012).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(38) <i>Sackett</i>	Environmental Law Social Issues: Environment & Property Rights	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>499</sup>	<input type="checkbox"/> EPA Administrative Compliance Order targeting privately owned land	<input type="checkbox"/> Administrative Procedure Act   Clean Water Act
(39) <i>Kappos v. Hyatt</i>	Evidence Social Issue: Justice	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>500</sup>	<input type="checkbox"/> New evidence introduced at patent denial hearing in court (Civil Procedure issues dominate)	<input checked="" type="checkbox"/> Patent Act of 1952   Federal Rules of Civil Procedure   Federal Rules of Evidence
(40) <i>Fox</i>	First Amendment Social Issue: Constitutional Amendments	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> Indecent speech on the TV & radio	<input checked="" type="checkbox"/> First Amendment (Speech Clause in the TV & radio business context)

<sup>499</sup> Nine business-related groups filed friend of the court briefs in this case: (1) the National Association of Home Builders et al., (2) the National Institute of Manufacturers, (3) the Wet Wet Weather Partnership et al., (4) the American Petroleum Institute et al., (5) the American Farm Bureau Federation et al., (6) a combined brief filed for the Center for Constitutional Jurisprudence and the National Federation of Independent Business Small Business Legal Center, (7) the Chamber of Commerce of the United States of America, (8) the Competitive Enterprise Institute, and (9) General Electric Co. See *Sackett v. Environmental Protection Agency*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/sackett-et-vir-v-environmental-protection-agency-et-al/> (last visited Mar. 23, 2013).

<sup>500</sup> Two business-related groups filed friend of the court briefs in this case: (1) Intel Corp. et al., and (2) Verizon Communications Inc. et al. See *Kappos v. Hyatt*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/kappos-v-hyatt/> (last visited Mar. 23, 2013).



Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(41) <i>Knox</i>	Public Employment Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>501</sup>	<input checked="" type="checkbox"/> Mandatory union assessment for political & ideological purposes	<input checked="" type="checkbox"/> First Amendment (Speech Clause in the employer context)   Fourteenth Amendment (Due Process Clause)
(42) <i>Coleman</i>	Public Employment Business & Employment Arena	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> Family & Medical Leave Act's self-care provision	<input checked="" type="checkbox"/> Family & Medical Leave Act of 1993
(43) <i>Roberts</i>	Employment Law Business & Employment Arena	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> Workers' Compensation payment structure under a federal law	<input checked="" type="checkbox"/> Longshore and Harbor Workers' Compensation Act
(44) <i>Home Concrete</i>	Tax Law Taxes, Entitlements & Government Spending	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>502</sup>	<input type="checkbox"/> Statute of limitations deadline to collect tax deficiencies	<input checked="" type="checkbox"/> Internal Revenue Code (in a business tax deficiency context)

<sup>501</sup> One business-related group filed a friend of the court brief in this case: the American Federation of Labor and the Congress of Industrial Organizations. See *Knox v. Service Employees Int'l Union, Local 1000*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/knox-v-service-employees-intl-union-local-1000/> (last visited Mar. 23, 2013).

<sup>502</sup> Six business-related groups filed friend of the court briefs in this case: (1) Grapevine Imports LTD, (2) Daniel S. Burks and Reynolds Properties, L.P., (3) Bausch & Lomb Incorporated, (4) the National Association of Home Builders, (5) a combined brief filed for the National Federation of Independent Business Small Business Legal Center and Cato Institute, and (6) Utam, Ltd. and DSDBL, Ltd. See *United States v. Home Concrete & Supply, LLC*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/united-states-v-home-concrete-supply-llc/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(45) <i>Filarsky</i>	Government Law Social Issue: Justice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Immunity of a private lawyer when acting in a government capacity	<input type="checkbox"/> Section 1983 (Civil Rights)
(46) <i>Gutierrez &amp; Sawyers</i> <sup>503</sup>	Immigration Law Immigration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Cancellation of removal proceedings based on lawful permanent resident status	<input type="checkbox"/> Immigration & Nationality Act
(47) <i>Vartelas</i>	Immigration Law Immigration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Retroactivity of an immigration law	<input type="checkbox"/> Illegal Immigration Reform & Immigrant Responsibility Act
(48) <i>Taniguchi</i>	Civil Procedure Social Issue: Justice	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Awarding costs to court interpreters	<input type="checkbox"/> Court Interpreters Act
(49) <i>Freeman</i>	Consumer Protection Law Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>504</sup>	<input checked="" type="checkbox"/> Real estate mortgage settlement process, unearned fees & kickbacks	<input checked="" type="checkbox"/> Real Estate Settlement Procedures Act

<sup>503</sup> *Holder v. Gutierrez* was consolidated with *Holder v. Sawyers*. See *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2016–17 (2012).

<sup>504</sup> Three business-related groups filed friend of the court briefs in this case: (1) the American Bankers Association et al., (2) the American Escrow Association et al., (3) the National Association of Realtors. See *Freeman v. Quicken Loans Inc.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/tammy-foret-freeman-et-al-v-quicken-loans-inc/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(50) <i>Alvarez</i>	First Amendment  Ethics (virtue of honesty)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> False claims of military honors claimed as free speech	<input type="checkbox"/> First Amendment (Speech Clause)   Stolen Valor Act
(51) <i>Blueford</i>	Criminal Law  Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Acquittals on capital charges but mistrial on lesser charges and bar on new trials under Double Jeopardy	<input type="checkbox"/> Fifth Amendment (Double Jeopardy Clause)
(52) <i>Elgin</i>	Civil Procedure  Social Issue: Justice	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Claims for equitable relief brought by federal employees (Civil Procedure issues dominate)	<input checked="" type="checkbox"/> Civil Service Reform Act
(53) <i>Wood</i>	Civil Procedure  Social Issue: Justice	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Court's ability to raise timeliness defenses on its own	<input type="checkbox"/> AEDPA

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(54) <i>Mohamad</i>	Military Law Military Intervention & Terrorism	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>505</sup>	<input type="checkbox"/> Whether a torture victim may sue a torturing organization	<input type="checkbox"/> Torture Victim Protection Act
(55) <i>Armour</i>	Government Law Taxes, Entitlement Programs & Government Spending	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> A local government cancelled an assessment without refunds after some residents paid in full	<input type="checkbox"/> Equal Protection Clause
(56) <i>Southern Union Co.</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Applying Supreme Court precedent to criminal fines	<input type="checkbox"/> Eighth Amendment (Excessive Fines Clause)   Sixth Amendment (Right to Jury Trial)   Resource Conservation & Recovery Act
(57) <i>Astrue</i>	Government Law Taxes, Entitlement Programs & Government Spending	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Social Security survivor benefits & inheritance issues	<input type="checkbox"/> Social Security Act   Precedent Interpretation

<sup>505</sup> Two business-related groups filed friend of the court briefs in this case: (1) the American Petroleum Institute et al., and (2) KBR, Inc. See *Mohamad v. Palestinian Authority*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/mohamad-v-rajoub/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(58) <i>Miller &amp; Jackson</i> <sup>506</sup>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Sentence of life without parole for a defendant who was 14 years old at the time	<input type="checkbox"/> Eighth Amendment (Cruel/Unusual Punishment)
(59) <i>Reichle</i>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Retaliatory arrests & immunity in a political speech case	<input type="checkbox"/> First Amendment (Speech Clause)
(60) <i>Vasquez</i>	Civil Procedure Social Issue: Justice	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Harmless error & untainted evidence	<input type="checkbox"/> Sixth Amendment (Right to Jury Trial)   Precedent Interpretation

<sup>506</sup> The Court linked *Miller v. Alabama* with *Jackson v. Hobbes* for the 2011–2012 Term. See *Jackson v. Hobbes*, 132 S. Ct. 548, 548 (2011) (mem.) (granting certiorari in *Jackson v. Hobbes* and stating that *Jackson* “is to be argued in tandem with No. 10-9646, *Miller v. Alabama*”).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(61)–(63) <i>Affordable Care Act Cases</i> <sup>507</sup>	Commerce Clause & Health Care Law  Social Issue: Health Care	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>508</sup>	<input checked="" type="checkbox"/> Tax v. Penalty   Constitutionality of the mandate under the Commerce Clause   Medicaid Changes	<input checked="" type="checkbox"/> Commerce Clause   Affordable Care Act   Anti-Injunction Act

<sup>507</sup> *U.S. Department of Health and Human Services v. Florida* was linked by the Court with *National Federation of Independent Business v. Sebelius* and *Florida v. Department of Health and Human Services*. See (Order List: 565 U.S.), SUPREME COURT OF THE UNITED STATES (Feb. 21, 2012), <http://www.supremecourt.gov/docket/PDFs/022112zor.pdf> (“Upon consideration of the motions pertaining to the allocation of oral argument time, the following allocation of oral argument time is adopted. On the Anti-Injunction Act issue (No. 11-398), the Court-appointed *amicus curiae* is allotted 40 minutes, the Solicitor General is allotted 30 minutes, and the respondents are allotted 20 minutes. On the Minimum Coverage Provision issue (No. 11-398), the Solicitor General is allotted 60 minutes, respondents Florida, et al. are allotted 30 minutes, and respondents National Federation of Independent Business, et al. are allotted 30 minutes. On the Severability issue (Nos. 11-393 and 11-400), the petitioners are allotted 30 minutes, the Solicitor General is allotted 30 minutes, and the Court-appointed *amicus curiae* is allotted 30 minutes. On the Medicaid issue (No. 11-400), the petitioners are allotted 30 minutes, and the Solicitor General is allotted 30 minutes.”).

<sup>508</sup> Eight business-related groups filed friend of the court briefs in this case: (1) a combined brief filed for the Service Employees International Union and Change to Win, (2) a combined brief filed for the American Federation of Labor and the Congress of Industrial Organizations, (3) a combined brief filed for the Small Business Majority Foundation and the Main Street Alliance, (4) the American Federation of Labor and the Congress of Industrial Organizations, (5) Blue Cross and Blue Shield of Massachusetts, (6) America’s Health Insurance Plans, (7) the American Hospital Association, and (8) the Chamber of Commerce of the United States of America. See *U.S. Department of Health and Human Services v. Florida*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/u-s-department-of-health-and-human-services-v-florida/> (last visited Mar. 23, 2013).



Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(64) <i>Christopher</i>	Employment Law Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>509</sup>	<input checked="" type="checkbox"/> Pharmaceutical Salesperson exemption from FLSA overtime pay	<input checked="" type="checkbox"/> Fair Labor Standards Act of 1938
(65) <i>Dorsey &amp; Hill</i> <sup>510</sup>	Criminal Law Social Issue: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Sentences of defendants committing crimes pre-FSA enactment but sentenced post-FSA enactment	<input type="checkbox"/> Fair Sentencing Act
(66) <i>Ramah Navajo Chapter</i>	Native American & Tribal Law Global Trade & International Relations	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>511</sup>	<input type="checkbox"/> Statutory caps on appropriations to tribal contractors	<input type="checkbox"/> Indian Self-Determination & Education Assistance Act

<sup>509</sup> Seven business-related groups filed friend of the court briefs in this case: (1) the National Employment Lawyers Association, (2) Medical Professionals, (3) a Certified Class of Pharmaceutical Representatives from Johnson & Johnson, (4) the Pharmaceutical Representatives, (5) Chamber of Commerce, (6) the National Federation of Independent Business, and (7) the Pharmaceutical Research and Manufacturers of America. *See Christopher v. SmithKline Beecham Corp.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/christopher-v-smithkline-beecham-corp/> (last visited Mar. 23, 2013).

<sup>510</sup> *Dorsey v. United States* was consolidated with *Hill v. United States*. *See Dorsey v. United States*, 132. S. Ct. 759, 759 (2011) (mem.).

<sup>511</sup> One business-related group filed a friend of the court brief in this case: a combined brief filed for the Chamber of Commerce of the United States and the National Defense Industrial Association. *See Salazar v. Ramah Navajo Chapter*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/salazar-v-ramah-navajo-chapter/> (last visited Mar. 23, 2013).

Case	Legal Category Social Issues Category	Classic Business Law Topic	Amicus Brief(s) Filed by Business	Business-Focused Facts Dominate	Business-Related Constitutional or Statutory Provision Dominates
(67) <i>RadLAX</i>	Bankruptcy Law Economy	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>512</sup>	<input type="checkbox"/> Bankruptcy facts dominate	<input type="checkbox"/> U.S. Bankruptcy Code (Chapter 11 reorganization)
(68) <i>Match-E-Be-Nash-She-Wish &amp; Patchak</i> <sup>513</sup>	Native American & Tribal Law Global Trade & International Relations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> U.S. sovereign immunity in suits involving “trust or restricted Indian lands”	<input type="checkbox"/> Indian Reorganization Act   Quiet Title Act
(69) <i>Arizona</i>	Constitutional Law Social Issue: Constitutional Provisions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>514</sup>	<input type="checkbox"/> Preemption of state immigration enforcement laws	<input type="checkbox"/> Supremacy Clause (Conflict between state & federal immigration laws)

<sup>512</sup> One business-related group filed a friend of the court brief in this case: the Loan Syndications and Trading Association et al. See *RadLAX v. Gateway Hotel, LLC v. Amalgamated Bank*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/radlax-gateway-hotel-llc-v-amalgamated-bank/> (last visited Mar. 23, 2013).

<sup>513</sup> *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* was consolidated by the Court with *Salazar v. Patchak*. See *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 845, 845 (2012) (mem.).

<sup>514</sup> Two business-related groups filed friend of the court briefs in this case: (1) the Service Employees International Union et al., and (2) the American Federation of Labor and Congress of Industrial Organizations. See *Arizona v. United States*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/arizona-v-united-states/> (last visited Mar. 23, 2013).