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2013

**The Constitution, The Roberts Court & Business:  
The Significant Business Impact of the Supreme  
Court's 2011-2012 Term**

Corey A Ciocchetti, *University of Denver*



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# THE CONSTITUTION, THE ROBERTS COURT & BUSINESS: THE SIGNIFICANT BUSINESS IMPACT OF THE 2011-2012 SUPREME COURT TERM

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# TABLE OF CONTENTS

<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. EVALUATING &amp; CATEGORIZING THE 2011-2012 SUPREME COURT TERM BASED ON BUSINESS IMPACT ....</b>	<b>2</b>
(A) The 30,000-Foot View of the Court’s 2011-2012 Term .....	3
Chart I – Categorization of Questions Presented over the Supreme Court’s 2011-2012 Term.....	8
(B) Culling Cases with Potential to Impact the Business Arena.....	10
(1) Input Factor #1: Does the Question Presented Address a Classic Business Law Topic?.....	11
Chart II – Twenty Classic Business Law Topics .....	12
(2) Input Factor #2: Were Amicus Curiae Briefs filed by Businesses or Business Interest Groups? 12	
(3) Input Factor #3: Do Business-Focused Facts Predominate?.....	13
(4) Rubric Input #4: Does a Business-Related Constitutional Provision/Amendment and/or Federal Statute Govern?.....	14
(C) The Rubric at Work.....	14
Chart III – Sample Rubric Classification .....	15
<b>III. THE INTELLECTUAL PROPERTY CASES .....</b>	<b>15</b>
(A) The Court Favored a Generic Manufacturer & Quickly Moving Generics to Market.....	16
Chart IV – Caraco v. Novo Nordisk Vote Breakdown.....	18
(B) The Court Uphold Congressional Copyright Grants to Works in the Public Domain.....	18
Chart V – Golan v. Holder Vote Breakdown .....	20
<b>IV. THE EMPLOYMENT LAW CASES.....</b>	<b>20</b>
(A) The Court Allows Religious Employees to Control the Hiring & Firing of Minister-Employees .....	21
Chart VI – Hosanna-Tabor v. EEOC Vote Breakdown.....	23
(B) The Court Evaluates Exceptions to the FLSA’s Overtime Rule .....	23
Chart VII – Christopher v. SmithKline Predictions .....	26
(C) The Court Analyzes an Employee’s Right Not to Speak .....	26
Chart VIII – Knox v. SEIU Vote Breakdown.....	29
<b>V. THE CONSUMER PROTECTION CASES .....</b>	<b>29</b>
(A) Consumer Protection: Bad Credit, No Credit and Your Right to Sue a Credit Repair Organization .....	30
Chart IX – CompuCredit v. Greenwood Vote Breakdown .....	32
(B) Consumer Protection: Residential Mortgages, Unearned Fees and Kickbacks .....	33
Chart X – Freeman v. Quicken Loans Vote Breakdown .....	35
<b>VI. THE LONE SECURITIES REGULATION CASE.....</b>	<b>36</b>
Chart XI – Credit Suisse Securities v. Simmonds Vote Breakdown .....	40

<b>VII. FOUR IMPRESSIONS OF THE TERM’S BUSINESS IMPACT .....</b>	<b>41</b>
(A) This Term was Different at the Roberts Court – at Least from a Business Perspective .....	41
(B) The Business Impact Decisions Favor Business in Areas Crucial to America’s Economic Recovery .....	43
(C) The Liberal-Leaning Justices Voted Consistently in Favor of Business Interests.....	45
Chart XII – Liberal-Leaning Justices Siding with the Conservative Majority .....	45
(D) Constitutional Amendments & Statutes were Expanded and Narrowed .....	46
<b>VIII. CONCLUSIONS.....</b>	<b>49</b>
<b>APPENDIX ONE.....</b>	<b>51</b>
Chart XIII – The Supreme Court’s 2011-2012 Term & A Business Impact Rubric .....	51

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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 witness 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 fourteen business cases, eight of which were cherry picked for this article. Each case chosen covered a classic business law topic, generated strong interest within the business community, contained predominately business-focused facts, and had a connection to a business-related constitutional provision/amendment or statute. These eight 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 opinion in each case had as strong pro-business slant with business interests receiving fifty out of fifty-two potential votes. This slant is significantly different from the previous term where the Court unanimously voted against business interests several times; (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 involved subjects critical to America’s economic recovery; (3) perhaps surprisingly, the Court’s liberal-leaning justices voted with the Court’s conservatives in twenty out of a possible

twenty-two opportunities. They did so in cases that presented compelling arguments from both a conservative and liberal perspective and where the facts allowed for a strong four-justice dissent; (4) perhaps unsurprisingly, the Court proved willing to narrow or expand Constitutional provisions or state/federal statutes to reach its desired result. There appeared to be no concerted effort to adhere to a minimalist or living Constitutionalist philosophy. In the end, the results in the business cases of the term could prove to be a fluke. Or, they could indicate a pivot at 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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## I. 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. Outrage followed an opinion upholding strip-searches of petty offenders arrested and briefly detained in the general prison population. The Court also entertained arguments in other intriguing yet less sensationalized cases. One case analyzed the relatively unknown Ambassadors Clause of the Constitution. The issue was whether the Executive Branch alone has the right to decide if citizens born in Jerusalem may list "Israel" as their birthplace on United States passports. 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. 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. He approached within inches of the Vice President in a Colorado mall, criticized the administration's policies on Iraq and slapped him on the shoulder. Upon arrest the man told Secret Service agents, "If you don't want other people sharing their opinions, you should have him avoid public places" and later argued the arrest violated his First Amendment right to political speech.<sup>1</sup> The justices also heard their fair share of criminal law, immigration, international relations, and social issues cases. 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. The inmate subsequently missed a filing deadline that ended his habeas corpus petition and left the Court to scold the lawyers by name and fashion a remedy for a confessed murderer. Election law took its usual place on the docket including a Voting Rights Act case scrutinizing Texas' census-based electoral maps labeled as discriminatory by minority groups. The Ninth Circuit took its usual beating with sixteen of its twenty-five opinions at the Court reversed.<sup>2</sup>

The term was also compelling because of its impact on the business arena. The justices granted certiorari in fourteen cases touching on business issues, eight of which covered classic business law topics, generated interest among the larger business community, contained predominately business-focused facts, and had a strong connection to a business-related constitutional provision/amendment or statute. These eight 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

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<sup>1</sup> See e.g., Adam Liptak, *Court Appears to Be Wary Hearing Free-Speech Case*, WWW.NYIMES.COM, Mar. 22, 2012, <http://www.nytimes.com/2012/03/22/us/supreme-court-hears-secret-service-case.html>.

<sup>2</sup> This is compared to four affirmances as of June 1, 2012. See SCOTUSBLOG, *Statistics: Circuits: Circuit Report for October Term 2011*, <http://www.scotusblog.com/statistics/> (last visited June 1, 2012). This may partially be due to the fact that the Court granted 25 certiorari petitions from the Ninth Circuit alone and only 37 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*, WWW.ARTICLES.LATIMES.COM, 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.").

intensive legwork spent evaluating the issues, briefs, oral arguments and opinions from these eight cases lead to the following four-pronged theory of the 2011-2012 term's impact on business:

- (1) The Court's opinions were extremely pro-business with business interests receiving fifty out of fifty-two potential votes. This unbalanced tilt towards business is significantly 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 out of a possible twenty-two times. They did so in cases that presented compelling arguments from both a conservative and liberal perspective and where the facts allowed for a strong four-justice dissent;
- (4) Perhaps unsurprisingly, 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.

This paper evaluates this business impact theory in eight parts. This first part briefly introduces why analyzing the Supreme Court's current term from a business perspective is consequential. Part II presents a big picture perspective of the term and then hones in on the eight 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 III evaluates the term's two major intellectual property cases looking for clues as to the Court's current thinking on business. Part IV does the same while evaluating the term's three most prominent employment law cases. Part V continues by analyzing the term's two consumer protection cases while Part VI covers the lone, yet significant, securities regulation case on the docket. Part VII forms the theoretical heart of the paper and elaborates on the business impact theory introduced above. Part VIII concludes.

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## II. EVALUATING & 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. Section (A) of this Part 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 can be identified. The focus is on the specific issue the Supreme Court has chosen to consider or the Question Presented. The goal is to decipher and separate the dominant issue in the case from its various sub-issues.<sup>3</sup> Cases that at least touch on business issues make the short list while others are removed. From there, Section (B) of this Part introduces a business impact

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<sup>3</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., The 'Lectric Law Library, *DICTA*, WWW.LECTLAW.COM, <http://www.lectlaw.com/def/d047.htm> (last visited May 31, 2012) (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.").

rubric capable of culling the short list down to the handful of cases most likely to impact the business community in a significant way. It is not always easy, however, to buttonhole a case by its issue 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. Grinding through the process resulted in all sixty-nine cases being slotted into one of twelve categories.

The twelve categories chosen for this 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. 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 discredited, surprisingly, 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, however, is an explanation how this evaluation process identified the eight cases from this term that are most likely to impact the business arena in the near future. To this end, Section (B) moves from the big picture, evaluation and categorization process and considers the business impact rubric governing this culling process.

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## (A) THE 30,000-FOOT VIEW OF THE COURT'S 2011-2012 TERM

Beginning at 10:00 a.m. on the first Monday of October 2011, the Supreme Court entertained its first oral arguments of the 2011-2012 term.<sup>4</sup> The justices continued to hear arguments on many Mondays, Tuesdays and Wednesdays well into April 2012.<sup>5</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>6</sup> by looking to three 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

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<sup>4</sup> The Court granted certiorari in 74 cases but only 69 were argued. See SCOTUSblog.com, *Term Snapshot*, <http://www.scotusblog.com/case-files/terms/ot2011/> (last visited May 23, 2012). The Supreme Court's oral argument schedule is available online in various places. See e.g., SCOTUSBlog, *Calendar of Events*, SCOTUSBLOG.COM, <http://www.scotusblog.com/events/2011-10> (last visited May 26, 2012) [hereinafter *Oral Argument Calendar*]. The first oral argument was in a case styled *Reynolds v. United States*, 132 S. Ct. 975 (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. In. Liv'g Ctr. of S. Cal.*, 132 S. Ct. 1204 (2012) (analyzing a California statute reducing Medicaid reimbursements to doctors under the preemption doctrine), *Douglas v. Cal. Pharm. Ass'n*, 132 S. Ct. 1204 (2012) (same) and *Douglas v. S.R. M. Hospital*, 132 S. Ct. 1204 (2012) (same).

<sup>5</sup> See *Oral Argument Calendar*, *supra* note 4.

<sup>6</sup> See e.g., Supreme Court of the United States, *Frequently Asked Questions: General Information*, WWW.SUPREMECOURT.GOV, <http://www.supremecourt.gov/faq.aspx#faqgi9> (last visited May 26, 2012) (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.").



decision to have important precedential value.<sup>7</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>8</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>9</sup> This 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>10</sup> The survey asks a series of policy questions, evaluates responses and advises users about which 2012 presidential candidate would have been most compatible to their interests.<sup>11</sup> Dissecting these survey questions yields the twelve categories most important to Americans' family, social and work lives. Therefore, this article uses these same categories to sort each case from the 2011-2012 term: (1) the economy,<sup>12</sup> (2) taxes, entitlement programs,<sup>13</sup> and government spending<sup>14</sup> (3) military

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<sup>7</sup> See e.g., United States Courts, *U.S. Supreme Court Procedures*, WWW.USCOURTS.GOV, <http://www.uscourts.gov/EducationalResources/ConstitutionResources/SeparationOfPowers/USSupremeCourtProcedures.aspx> (last visited May 26, 2012) [hereinafter *Supreme Court Procedures*].

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

<sup>9</sup> See e.g., Jonathan Turley, *Justice Scalia is a Political Star - and That's Bad for the Supreme Court*, WWW.WASHINGTONPOST.COM, Jan. 21, 2011, [http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012102923\\_2.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012102923_2.html) (stating, "Justices clearly can make mistakes. Few can resist public adoration. However, as they justices yield to that temptation, citizen 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), History Learning Site, *Can the Supreme Court Be Neutral?*, WWW.HISTORRYLEARNINGSITE.CO.UK, [http://www.historylearningsite.co.uk/supreme\\_court\\_neutral.htm](http://www.historylearningsite.co.uk/supreme_court_neutral.htm) (last visited May 23, 2012) (stating that:

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.)

and CBS News, *McCain: Supreme Court Ignorant on Politics*, WWW.CBSNEWS.COM, Jan. 5, 2012, [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/) (stating that "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>10</sup> See e.g., Select Smart, *2012 Presidential Candidate Selector*, WWW.SELECTSMART.COM, <http://www.selectsmart.com/president/> (last visited May 22, 2012) [hereinafter *Select Smart*].

<sup>11</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>12</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 (1) *Hall v. U.S.*, 2012 U.S. LEXIS 3781 (2012) (analyzing whether proceeds from the

intervention and terrorism,<sup>15</sup> (4) balancing civil liberties and national security,<sup>16</sup> (5) business<sup>17</sup> and employment<sup>18</sup> (particularly job creation, minimum wage, and unemployment insurance), (6) global trade and international relations,<sup>19</sup> (7) social issues (particularly: (a) abortion, (b) marijuana

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sale of a family farm are “incurred by the estate” under a specific provision of the Bankruptcy Code) and (2) *RadLAX v. Amalgamated Bank*, 132 S. Ct. 845 (2011) (showing the grant of the certiorari petition in a case 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>13</sup> The Court heard one trust and estates case during the 2011-2012 term. *See Astrue v. Capato*, 2012 U.S. LEXIS 3782 (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>14</sup> The Court heard one tax case during the 2011-2012 term. *See* (1) *U.S. v. Home Concrete & Supply*, 132 S. Ct. 1836 (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).

<sup>15</sup> The Court heard one case at least tangentially covering the military and terrorism during the 2011-2012 term. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012) (analyzing whether the term “individual” in the Torture Victim Protection Act allows torture victims to sue individual people or organizations as well).

<sup>16</sup> The Court heard one privacy-related case during the 2011-2012 term. *See* (1) *U.S. v. Jones*, 132 S. Ct. 945 (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>17</sup> The business category, as is relevant to the 2011-2012 term, includes three sub-categories: securities law, consumer protection and intellectual property cases. The court heard one securities law case during the 2011-2012 term. *See Credit Suisse Securities v. Simmonds*, 132 S. Ct. 1414 (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* (1) *CompuCredit v. Greenwood*, 132 S. Ct. 665 (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), (2) *Freeman v. Quicken Loans Inc.*, 132 S. Ct. 397 (2012) (showing the grant of certiorari petition in a case analyzing whether the Real Estate Settlement Procedures Act prevents real estate settlement servicers from charging an unearned fee in certain situations). The Court heard four intellectual property cases during the 2011-2012 term. *See* (1) *Golan v. Holder*, 132 S. Ct. 873 (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), (2) *Caraco v. Novo Nordisk*, 132 S. Ct. 1670 (2012) (evaluating a fight between a generic and brand name drug manufacturer under the counterclaim provision of the Hatch-Waxman Act), (3) *Mayo v. Prometheus Laboratories*, 132 S. Ct. 1289 (2012) (analyzing whether a proposed patent is too similar to a law of nature to be valid) and (4) *Kappos v. Hyatt*, 132 S. Ct. 1690 (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).

<sup>18</sup> The Court heard seven employment law cases during the 2011-2012 term. *See* (1) *Hosanna-Tabor Church v. EEOC*, 132 S. Ct. 694 (2012) (analyzing the Ministerial Exception to the First Amendment and its application to employment discrimination laws), (2) *Pacific Operators v. Valladolid*, 132 S. Ct. 680 (2012) (analyzing the Outer Continental Shelf Lands Act and an employee’s injury on land outside of covered territory), (3) *Knox v. SEIU*, 131 S. Ct. 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), (4) *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012) (analyzing the Family and Medical Leave Act’s self care provision and collision with a state’s sovereign immunity), (5) *Roberts v. Sea-Land Services*, 132 S. Ct. 1350 (2012) (analyzing the Longshore and Harbor Workers’ Compensation Act and when a disabled employee is “newly awarded compensation” for statutory purposes), (6) *Elgin v. Dep’t of the Treasury*, 132 S. Ct. 453 (2012) (showing grant of certiorari petition in a case analyzing the Civil Service Reform Act and constitutional claims for equitable relief), and (7) *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 760 (2012) (showing the grant of certiorari petition in a case analyzing the Fair Labor Standards Act and its outside salesperson exemption in relation to pharmaceutical salespeople).

<sup>19</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. Patchak* with *Salazar v. Patchak*) consolidated together by the Supreme Court bringing the total number in this area to two. *See* (1) *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 995 (2012) (showing the grant of

legalization, (c) stem cell research, (d) same sex marriage, (e) speech and other constitutional amendments<sup>20</sup> and provisions,<sup>21</sup> (f) crime,<sup>22</sup> justice<sup>23</sup> and capital punishment, (g) climate change, and

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the 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), (2) *Match-E-Be-Nash-She-Wish v. Patchak*, 132 S. Ct. 1877 (2012) (showing grant of the certiorari petition in a case analyzing whether the Quiet Title Act applies to all suits concerning land in which the United States claims an interest), and (3) *Salazar v. Patchak*, 132 S. Ct. 845 (2012) (showing grant of the certiorari petition in a case that analyzes 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). Additionally, the Court heard a case on a miscellaneous constitutional statutory provision, the Receive Ambassadors Clause; *M.B.Z. v. Clinton*, 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 (1) *M.B.Z. v. Clinton*, 132 S. Ct. 1421 (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>20</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 (1) *FAA v. Cooper*, 132 S. Ct. 1441 (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”), (2) *FCC v. Fox*, 131 S. Ct. 3065 (2012) (showing grant of the certiorari petition in a case involving the Federal Communication Commission’s indecency enforcement regime violates the First or Fifth Amendments), (3) *Minneci v. Pollard*, 131 S. Ct. 2449 (2012) (showing grant of the certiorari petition in a case 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) (4) *Armour v. Indianapolis*, 132 S. Ct. 576 (2012) (showing grant of the certiorari petition in a case 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).

<sup>21</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 (1) *Douglas v. In. Liv’g Ctr. of S. Cal.*, 132 S. Ct. 1204 (2012) (analyzing a California statute reducing Medicaid reimbursements to doctors under the preemption doctrine), (2) *Douglas v. Cal. Pharm. Ass’n*, 132 S. Ct. 1204 (2012) (same), (3) *Douglas v. S.R. M. Hospital*, 132 S. Ct. 1204 (2012) (same), (4) *National Meat Ass’n v. Harris*, 132 S. Ct. 965 (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), (5) *Kurns v. Railroad Friction Products*, 132 S. Ct. 1261 (2012) (analyzing whether the Locomotive Inspection Act preempts Pennsylvania state design and defect and failure to warn tort claims), (6) *PPL Montana, LLC v. Montana*, 131 S. Ct. 3019 (2012) (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.”) and (7) *Arizona v. U.S.*, 132 S. Ct. 845 (2011) (showing grant of certiorari petition in a case analyzing the state of Arizona’s attempt, in four provisions of a state law, to co-enforce federal immigration law).

<sup>22</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. U.S.* with *Hill v. U.S.*) were consolidated into four by the Supreme Court reducing the total number of criminal cases to twenty-one. See (1) *Reynolds v. U.S.*, 132 S. Ct. 975 (2012) (analyzing registration requirements under the Sex Offender Registration and Notification Act), (2) *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (analyzing ineffective assistance of counsel), (3) *Howes v. Fields*, 132 S. Ct. 1181 (2012) (analyzing custodial interrogations), (4) *Maples v. Thomas*, 132 S. Ct. 912 (2012) (analyzing ineffective assistance of counsel), (5) *Greene v. Fisher*, 132 S. Ct. 38 (2011) (analyzing the Antiterrorism and Effective Death Penalty Act), (6) *Florence v. Board of Freeholders*, 132 S. Ct. 1510 (2012) (authorizing routine strip searches for people arrested and held in jail awaiting case processing), (7) *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (analyzing plea offers and the ineffective assistance of counsel), (8) *Lafler v. Cooper*, 132 S. Ct. 1376

(h) gun control), (8) health care,<sup>24</sup> (9) the environment and property rights,<sup>25</sup> (10) immigration<sup>26</sup> (11) elections (particularly voter registration)<sup>27</sup> and (12) ethics (particularly the virtue of honesty).<sup>28</sup> Chart

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(2012) (analyzing plea offers and the ineffective assistance of counsel), (9) *Gonzales v. Thaler*, 132 S. Ct. 641 (2012) (analyzing the Antiterrorism and Effective Death Penalty Act and certificates of appealability), (10) *Perry v. New Hampshire*, 132 S. Ct. 716 (2012) (analyzing reliability of eye witness testimony under due process), (11) *Smith v. Cain*, 132 S. Ct. 627 (2012) (analyzing prosecutorial obligations to turn certain evidence over to the defense prior to trial), (12) *Setser v. U.S.*, 132 S. Ct. 1463 (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), (13) *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012) (analyzing qualified immunity for police officers based off of an unreasonable search warrant), (14) *Martel v. Clair*, 132 S. Ct. 1276 (2012) (analyzing ineffective assistance of counsel), (15) *Williams v. Illinois*, 131 S. Ct. 3090 (2011) (showing grant of the certiorari petition on a case analyzing the Confrontation Clause and whether it requires the presence at trial of experts who analyze DNA evidence), (16) *Blueford v. Arkansas*, 132 S. Ct. 397 (2012) (showing grant of the certiorari petition in a case analyzing the Double Jeopardy Clause and a situation where a jury deadlocks on a lesser included offense), (17) *Wood v. Milyard*, 132 S. Ct. 1826 (2012) (analyzing whether courts of appeal may raise deliberately forfeited timeliness issues on their own initiative), (18) *S. Union Co. v. U.S.*, 132 S. Ct. 756 (2012) (showing grant of certiorari petition in a case analyzing the imposition of criminal fines), (19) *Miller v. Alabama*, 132 S. Ct. 548 (2011) (showing grant of the certiorari petition in a case 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), (20) *Jackson v. Hobbes*, 132 S. Ct. 548 (2011) (same), (21) *Reichle v. Howards*, 132 S. Ct. 815 (2011) (showing grant of the certiorari petition in a case involving political speech and a confrontation with Vice President Cheney which led to an arrest), (22) *Vasquez v. U.S.*, 132 S. Ct. 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), (23) *Dorsey v. U.S.*, 132 S. Ct. 759 (2011) (showing grant of the certiorari petition analyzing a case under the Fair Sentencing Act of 2010 and whether it applies to all defendants sentenced after its enactment), (24) *Hill v. U.S.*, 132 S. Ct. 759 (2012) (same) and (25) *U.S. v. Alvarez*, 132 S. Ct. 457 (2012) (showing the grant of the certiorari petition in a case 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>23</sup> The Court heard five cases relating to the justice system and civil procedure during the 2011-2012 term. *See* (1) *Rehberg v. Paulk*, 132 S. Ct. 1479 (2012) (examining the type of immunity granted to a grand jury witness), (2) *Mims v. Arrow Fin. Servs.*, 132 S. Ct. 740 (2012) (analyzing the Telephone Consumer Protection act and whether its provisions deprive federal courts of federal question jurisdiction), (3) *First Am. Financial Corp. v. Edwards*, 131 S. Ct. 3022 (2012) (showing grant of the certiorari petition in a case analyzing whether a private purchaser of real estate settlement services has standing to sue under Article III, § 2 of the United States Constitution), (4) *Filarsky v. Delia*, 132 S. Ct. 1657 (2012) (analyzing whether a private citizen working for the government part time has qualified immunity), and (5) *Taniguchi v. Kan Pacific Saipan, Ltd.*, 2012 U.S. LEXIS 3818 (2012) (analyzing the costs that may be awarded to prevailing parties in federal lawsuits when it comes to the compensation of interpreters).

<sup>24</sup> The Court heard three health care and government services cases during the 2011-2012 term. *See* (1) *H.H.S. v. Fla.*, 132 S. Ct. 604 (2012) (showing grant of the certiorari petition in a case 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), (2) *Nat'l Fed. of Ind. Business v. Sebelius*, 132 S. Ct. 603 (2012) (showing grant of the certiorari petition in a case 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), and (3) *Fla. v. H.H.S.*, 132 S. Ct. 604 (2012) (showing grant of the certiorari petition in a case analyzing whether the federal government is coercing the states to accept terms of the Affordable Care Act's Medicaid provisions).

<sup>25</sup> The Court heard one environmental/property rights case during the 2011-2012 term. *See* (1) *Sackett v. EPA*, 132 S. Ct. 1367 (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>26</sup> The Court heard five immigration cases during the 2011-2012 term. *See* (1) *Judulang v. Holder*, 132 S. Ct. 476 (2011) (analyzing a relief from deportation proceeding under an immigration law that has since been repealed), (2)

I below summarizes the number of cases sorted into each of the twelve categories above.<sup>29</sup> Note that the business topics are broken down further into the subcategories of: (1) intellectual property, (2) employment, (3) consumer protection and (4) securities regulation because these are the dominant issues in the business impact cases chosen for analysis in Parts III – VII.<sup>30</sup>

CHART I – CATEGORIZATION OF QUESTIONS PRESENTED OVER THE SUPREME COURT’S  
2011-2012 TERM

CASE CLASSIFICATION (BUSINESS IMPACT CASES IN RED)	# OF CASES
Social Issues: Crime, Justice & Capital Punishment	21
Business: Employment	7
Immigration	5
Social Issues: Justice System (specifically Civil Procedure)	5
Social Issues: Constitutional Provisions (specifically the Supremacy Clause)	5
Business: Intellectual Property	4
Social Issues: Constitutional Amendment Interpretation (specifically the First, Fifth, Eighth, Eleventh & Fourteenth Amendments)	4
Health Care	3
Trade & International Relations: Native American & Tribal Law   Ambassadors Clause   Equal Footing Doctrine   Stolen Valor Act	3
Economy: Bankruptcy	2
Business: Consumer Protection	2
Elections (specifically voter rights)	1
Environmental & Property Rights	1
Taxes & Government Services	1

Kawashima v. Holder, 182 L. Ed. 2d 810 (2012) (analyzing whether filing false tax returns counts as a deportable “aggravated felony” for purposes of the Immigration and Nationality Act), (3) Holder v. Gutierrez, 2012 U.S. LEXIS 3783 (2012) (analyzing whether an alien seeking cancellation of removal may rely on parent’s years of residence), (4) Holder v. Sawyers, 2012 U.S. LEXIS 3783 (2012) (same; decided together with *Holder v. Gutierrez*), and (5) Vartelas v. Holder, 132 S. Ct. 1479 (2012) (analyzing the Illegal Immigration Reform and Immigrant Responsibility Act and its retroactivity).

<sup>27</sup> The Court heard three election law cases during the 2011-2012 term; all three cases were consolidated into one. See (1) Perry v. Perez, 132 S. Ct. 934 (2012) (analyzing whether a District Court judge, in drawing interim election maps for the 2012 election, adhered to the correct standards) (2) Perry v. Davis, 132 S. Ct. 934 (2012) (same).

<sup>28</sup> See *Select Smart*, *supra* note 10. Unfortunately, the virtue of honesty did not make it into any Questions Presented for the current term. It would have been fascinating to listen to the justices engage that issue from a legal perspective.

<sup>29</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.COM, Apr. 20, 2012, <http://www.scotusblog.com/?p=143506> (advancing the Supremacy Clause as the key issue in the case and stating “at 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>30</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 chart.

Social Issues: Entitlement Programs (specifically Social Security)	1
Military Intervention & Terrorism	1
Business: Securities	1
Civil Liberties v. National Security (specifically gov't. invasions of privacy)	1
<b>TOTAL MERITS CASES ON DOCKET</b>	<b>69</b>
<b>TOTAL BUSINESS-RELATED CASES ON DOCKET</b>	<b>14</b>
<b>SIGNIFICANT BUSINESS-IMPACT CASES</b>	<b>8</b>

This big picture perspective concludes with a brief summary of results of this categorization process. Crime, justice and punishment are major social issues in the United States today.<sup>31</sup> Therefore, it may be appropriate that the Criminal Law: Crime, Justice and capital Punishment category took up the most space on the docket with 21 argued cases. 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. Habeas petitions constitute the last legal recourse for inmates before their sentence is carried out in full (sometimes in the form of capital punishment). This reality explains the plethora of certiorari grants 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. Prosecutors took some heat as well for withholding important evidence from a defendant prior to trial.

Employment law (with seven arguments), immigration (with six arguments) and the justice system (with five arguments) categories were the next most popular topics at the Court. The highest profile case of that bunch - *Arizona v. United States* - 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 Executive Branch. 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. 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.

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. The Free Speech Clause was by far the most litigated 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. Another speech case involved television and radio stations agitated at restrictions on what the government claims is "indecent" content. Although health care dominated the national news and generated extended oral argument time, the three Affordable Care Act cases comprised only 4% of the docket. 4% or not, these opinions are sure to impact tens of millions of Americans and generate conversation for decades to come.

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<sup>31</sup> See e.g., The Week, *Social Issues: Crime and Punishment*, WWW.THEWEEK.COM, <http://theweek.com/supertopic/topic/272/crime-and-punishment> (last visited May 31, 2012).

In an interesting twist, the so-called War on Terror, 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. A few miscellaneous cases stole the show when it comes to intrigue and interesting legal issues. Along with the federal law allowing Israel to be stamped as a birthplace on a passport (mentioned in Part I), 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. The Court considered whether the law violates a person's First Amendment right to lie. Montana argued that it owns riverbeds on three major rivers flowing through its territory based on the Equal Footing Doctrine applicable the day Montana joined the Union in 1889. In tough economic times, state ownership of the riverbeds would allow Montana to tax companies operating businesses on its rivers. Federal ownership would leave the state coffers high and dry so to speak. 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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## (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>32</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>33</sup> This section starts 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

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<sup>32</sup> See e.g., *The Supreme Court: Open For Business: The Roberts Court is Showing a Willingness to Referee Corporate Concerns*, WWW.BUSINESSWEEK.COM, July 9, 2007, [http://www.businessweek.com/magazine/content/07\\_28/b4042040.htm](http://www.businessweek.com/magazine/content/07_28/b4042040.htm) (stating that 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>33</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 EMPL. RTS. & EMPLOY. POL'Y J. 207 (2010) and Daniel E. Troy and Rebecca K. Wood, *Cato Supreme Court Review: The Business of the Court: Federal Preemption at the Supreme Court, 2007 - 2008*, 2007-08 CATO SUP. CT. REV. 257, (2007). 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., Reuters, *Case by Case: The U.S. Supreme Court 2011 - 2012 Term*, WWW.REUTERS.COM, <http://www.reuters.com/supreme-court/2011-2012> (last visited May 27, 2012) [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 Business*, WWW.INSIDECOUNSEL.COM, 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), Martin J. Newhouse, *Business Cases and the Roberts Supreme Court*, WWW.FED-SOC.ORG, Dec. 6, 2011, <http://www.fed-soc.org/publications/detail/business-cases-and-the-roberts-supreme-court> [hereinafter *Newhouse*] (discussing the Roberts' Court and its orientation to business) and Eric Markowitz, *5 Supreme Court Cases Entrepreneurs Should Watch*, WWW.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). 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.

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 business law topic?
- (2) Has at least one business or business interest group filed a friend of the Court brief (known as an *amicus curiae* brief) demonstrating a serious interest in the case?
- (3) Do business-focused facts dominate the case?
- (4) Does a business-focused Constitutional provision, amendment or state/federal statute dominate in the case?

Each of the sixty-nine argued cases from the term were inputted into this rubric. In the end, eight cases (or 12% 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 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>34</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 business law topics.<sup>35</sup>

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<sup>34</sup> AACSB, *Business Accreditation Standards: Scope of Accreditation*, WWW.ACCSSB.EDU, <http://www.aacsb.edu/accreditation/business/standards/scope.asp> (last visited May 28, 2012) (stating, "For the purpose of determining inclusion in AACSB Accreditation, the following will be considered "traditional business subjects" . . . Business Law . . .").

<sup>35</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, CONTEMPORARY BUSINESS AND ONLINE COMMERCE LAW (7th ed. Pearson Education Ltd.) (2012), *Contents, available at* <http://www.pearsoned.co.uk/bookshop/detail.asp?item=100000000422737> (last visited May 27, 2012), Kenneth W. Clarkson, Roger LeRoy Miller, Gaylord A. Jentz & Frank B. Cross, BUSINESS LAW: TEXT AND CASES (11th ed. Cengage Learning) (2008), *Table of Contents, available at* [http://www.cengage.com/search/productOverview.do?N=+16+4294922239+4294966221+4294950417&Ntk=P\\_Isbn13&Ntt=9780324655223#mainTab\\_2](http://www.cengage.com/search/productOverview.do?N=+16+4294922239+4294966221+4294950417&Ntk=P_Isbn13&Ntt=9780324655223#mainTab_2) (last visited May 27, 2012), Richard A. Mann and Barry S. Roberts, SMITH AND ROBERSON'S BUSINESS LAW (15th ed. Cengage Learning) (2011), *Table of Contents, 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) (last visited May 28, 2012) and Roger LeRoy Miller, FUNDAMENTALS OF BUSINESS LAW: SUMMARIZED CASES (9th ed. Cengage Advantage Books) (2008), *Table of Contents, available at* [http://www.cengage.com/search/productOverview.do?Ntt=business+law|545965839603659913425299925658314973&N=16&Ns=P\\_CopyRight\\_Year|1&Ntk=all|P\\_EPI#mainTab\\_2](http://www.cengage.com/search/productOverview.do?Ntt=business+law|545965839603659913425299925658314973&N=16&Ns=P_CopyRight_Year|1&Ntk=all|P_EPI#mainTab_2) (last visited May 27, 2012) [hereinafter FUNDAMENTALS OF BUSINESS LAW]. See also National Business Education Association, *Business Law*, WWW.NBEA.ORG, <http://www.nbea.org/newsite/curriculum/standards/law.html> (last visited May 28, 2012) (listing its formulation of classic business law topics).



**CHART II – TWENTY CLASSIC BUSINESS LAW TOPICS<sup>36</sup>**

Administrative	E-Commerce   Technology
Antitrust	Employment: Relationships   Discrimination   Agency
Business Associations: Corporations   LLCs   etc.	Environmental Law
Civil Procedure: Courts   Jurisdiction	Intellectual Property
Constitutional Law	International
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, 55 out of 69 (nearly 80%) of the cases from the 2011-2012 term passed this initial screen.<sup>37</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 for another day). One hurdle alone, however, does not merit a case's inclusion on the business impact list. At least three more hurdles must be navigated.

**(2) INPUT FACTOR #2: WERE AMICUS CURIAE BRIEFS FILED BY BUSINESSES OR BUSINESS INTEREST GROUPS?**

Interested parties often file “friend of the court” (or amicus curiae) briefs with the Supreme Court. 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>38</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>39</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>40</sup>

<sup>36</sup> There are many topics sporadically covered in the business law textbooks and literature that might have made the list such as: 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., FUNDAMENTALS OF BUSINESS LAW, *supra* note 35 (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>37</sup> See Chart XIII *infra* Appendix One.

<sup>38</sup> Legal Information Institute, *Rule 37: Brief for an Amicus Curiae*, WWW.LAW.CORNELL.EDU, [http://www.law.cornell.edu/rules/supct/rule\\_37](http://www.law.cornell.edu/rules/supct/rule_37) (last visited May 27, 2012).

<sup>39</sup> Brenden Koerner, *Do Judges Read Amicus Curiae Briefs*, WWW.SLATE.COM, Apr. 1, 2002, [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>40</sup> *Id.* (referring to *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)).

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>41</sup> Over the past year the Chamber has filed dozens of amicus briefs in pending Supreme Court and federal appeals court cases.<sup>42</sup> The USCC is not 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. Running this factor through the rubric resulted in twenty-three cases with at least one business-based amicus brief filed with the Court.<sup>43</sup> More importantly, after combining input factors #1 and #2, only eighteen 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 cases present a perfect example. These cases are based predominately on health care and Congress' attempt to provide a minimum baseline of health insurance to more Americans. 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).

Because a plethora of 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. This lack of predominant business focus is how the Affordable Care Act cases were eliminated from the pool. Business facts predominate in cases that for the most part involve commercial transactions, consumers, employment relationships and discrimination, securities trades, and/or intellectual property. This third hurdle culled out sixteen cases from the term as presenting business-focused facts.<sup>44</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>41</sup> See *About U.S. Chamber Small Business Nation*, [WWW.USCHAMBERSMALLBUSINESSNATION.COM](http://www.uschambersmallbusinessnation.com), <http://www.uschambersmallbusinessnation.com/about-us/> (last visited May 28, 2012) and National Chamber Litigation Center, *About NCLC*, [WWW.CHAMBERLITIGATION.COM](http://www.chamberlitigation.com), <http://www.chamberlitigation.com/?n=bd> (last visited May 27, 2012) (stating that the "National Chamber Litigation Center (NCLC) is the public policy law firm of the U.S. Chamber of Commerce.").

<sup>42</sup> See National Chamber Litigation Center, *Recent Case Activity*, [HTTP://WWW.CHAMBERLITIGATION.COM/CASES](http://www.chamberlitigation.com/cases) (last visited May 27, 2012).

<sup>43</sup> See Chart XIII *infra* Appendix One.

<sup>44</sup> See Chart XIII *infra* Appendix One.

#### **(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, at least in part, to business interests. For example, the Commerce Clause sets the boundaries of the federal government's ability to regulate businesses. These boundaries have shrunk over the years with the federal government allowed to regulate even intrastate commerce in certain circumstances. The Affordable Care Act cases will test this limit further as to whether the federal government may compel people to engage in commerce (purchase insurance or pay a fine). The Commercial Speech aspect of the First Amendment also qualifies under this input. Finally, many 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. State statutes may be business-focused too 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 in the Question Presented. This occurred in twenty cases over the term. But, of course, not all twenty cases met the other three standards. In the end, eight cases met all four input factors and will be analyzed in Parts III through VII.

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#### **(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). The Sacketts owned a vacant lot near Priest Lake that they filled with dirt in order to construct their dream home. The EPA became agitated that the Sacketts "discharged pollutants" into what it classified as wetlands adjacent to navigable waters (Priest Lake) without a permit. 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>45</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. 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. 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." The Question Presented in the case was whether private landowners, alleging a Due Process violation under 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.

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<sup>45</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.").

Chart III below demonstrates why the *Sackett* case does not make the cut.<sup>46</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. Up to this point, *Sackett* clears the first two hurdles under the business-impact rubric. The case is omitted from the business impact list because it fails to meet the criteria for the final two impact factors. The case facts revolve predominantly around environmental protection and property rights issues rather than business issues. Additionally, under impact factor #4 the case is based on the Clean Water Act and the Administrative Procedure Act, both federal statutes not directly targeted at business. 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 APPENDIX ONE.

CHART III – SAMPLE RUBRIC CLASSIFICATION

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 / STATUTORY PROVISION
<i>Sackett</i>	Environmental Law   Environment & Property Rights	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>47</sup>	<input type="checkbox"/>	<input type="checkbox"/> Administrative Procedure Act   Clean Water Act

The eight cases that did make the cut fall into one of four categories: (1) intellectual property, (2) employment, (3) consumer protection, and (4) securities regulation. 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. Part III through 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 VII utilizes this analysis to form a cohesive theory business impact theory of the Court’ 2011-2012 term.

### III. THE INTELLECTUAL PROPERTY CASES

The Court heard four interesting intellectual property cases over the 2011-2012 term. Two of the Court’s decisions have the potential to significantly impact business in the near future.<sup>48</sup> One case

<sup>46</sup> 132 S. Ct. 1367 (2012).

<sup>47</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 *Case Pages, infra* note 233, at <http://www.scotusblog.com/case-files/cases/sackett-et-vir-v-environmental-protection-agency-et-al/> (last visited May 25, 2012).

<sup>48</sup> See *Caraco Pharm. Labs v. Novo Nordisk*, 132 S. Ct. 1670 (2012), *Golan v. Holder*, 132 S. Ct. 873 (2012), *Mayo Collaborate Services v. Prometheus Laboratories*, 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) and *Kappos v. Hyatt*, 132 S. Ct. 1690 (2012) (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

involved a dispute between a brand name and a generic manufacturer over two unique methods of treating diabetes. 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. The second case was more international in scope. It involved the United States joining the Berne Convention for the Protection of Literary and Artistic Works over a century after its creation. The long time gap resulted in the United States copyright regime differing greatly from Berne membership requirements. Congress granted new copyright protection for works in the United States public domain but protected internationally. Outrage ensued as people were forced to pay for licenses to conduct symphonies, reproduce music and market movies which were previously royalty-free. 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. This section analyzes both cases in turn.

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### (A) THE COURT FAVORED A GENERIC MANUFACTURER & QUICKLY MOVING GENERICS TO MARKET

*Caraco v. Novo Nordisk* investigates the world of medicine patents.<sup>49</sup> Intense competition exists between brand name drug manufacturers and their generic competitors. Many species of patents exist to protect brand manufacturers' abundant marketing, research and development expenditures.<sup>50</sup> At the same time, Congress mandates that the Food and Drug Administration quickly approve generic drugs that do not infringe on brand patents.<sup>51</sup> *Caraco* involved compound patents (protecting specific mixtures of chemicals comprising a drug)<sup>52</sup> and method patents (granting manufacturers exclusive rights to use a drug in particular ways).<sup>53</sup> Because drug treatment options constantly evolve, brand manufacturers often obtain and hold method patents after their compound patents expire.<sup>54</sup> Loss of patent protection allows generic manufacturers to copy a specific chemical combination and produce the same drugs at a much lower cost. But, generics may only be used in

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Trademark Office] beyond those already present in the Federal Rules of Evidence and the Federal Rules of Civil Procedure.”). 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>49</sup> *Caraco*, 132 S. Ct. 1670 (2012).

<sup>50</sup> See e.g., Vinod Singh, *How to Read & Understand Drug Patents*, WWW.EZINEARTICLES.COM, <http://ezinearticles.com/?How-to-Read-and-Understand-Drug-Patents&id=792091> (last visited May 19, 2012) (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*, WWW.SLATE.COM, Mar. 3, 2011, [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 the “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>51</sup> See Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98, Stat. 1585 (Sept. 24, 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*, *supra* note 49, at 1676.

<sup>52</sup> See *Caraco*, *supra* note 49, at 1676.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

ways that do not violate a brand's existing method patents. To determine a generic drug's eligibility, the FDA requires brand manufacturers to submit "use codes" describing the scope of their patented methods.<sup>55</sup> The FDA assumes submitted use codes are accurate and analyzes applications for generic drugs according to them.<sup>56</sup>

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>57</sup> The FDA approved Prandin to treat diabetes in three unique ways<sup>58</sup> but, over time, two of Novo's method patents expired.<sup>59</sup> Caraco desired to gain market share via its generic version for those two methods and filed an abbreviated new drug application.<sup>60</sup> Later, Novo filed an updated use code incorrectly claiming patents for all three uses. Caraco understood the use code was inaccurate and continued to seek approval. Novo sued for patent infringement. Caraco counterclaimed that Novo's new use code was overbroad. Novo contended that use codes could not be challenged via counterclaim as long as the use code description correctly stated least one accurate patented use.<sup>61</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>62</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>63</sup> The argument continued that allowing these claims honors Congress' desire, is better public policy and incentivizes brand names to file accurate use codes. Justice Sotomayor's concurrence joined the ruling but went further and scolded the FDA and Congress for making the rules in this area too opaque for brand name manufacturers to clearly interpret.<sup>64</sup>

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<sup>55</sup> *Id.* (stating that 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>56</sup> *Id.* at 1677 (stating that 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.'").

<sup>57</sup> *Id.* at 1678.

<sup>58</sup> The Food and Drug Administration "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>59</sup> *Id.* at 1678-79 (stating, "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>60</sup> *Id.*

<sup>61</sup> *Id.* at 1680-81 (stating that 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 counter-claim 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>62</sup> *Id.* at 1688.

<sup>63</sup> *Id.* at 1681 (stating that 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>64</sup> *Id.* at 1689 (stating, "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.").

CHART IV – CARACO V. NOVO NORDISK VOTE BREAKDOWN

CARACO V. NOVO NORDISK   (9-0)	
JUSTICE	VOTE
LIBERAL-LEANING (BY SENIORITY)   VOTE: 4-0 FOR MAJORITY	
GINSBURG	MAJORITY
BREYER	MAJORITY
SOTOMAYOR	MAJORITY & CONCURRENCE (AUTHOR): LAW IS TOO OPAQUE IN THIS AREA FOR BRAND NAME MANUFACTURERS TO GET CLARITY ON DISCLOSURE REQUIREMENTS
KAGAN	MAJORITY (AUTHOR): GENERIC DRUG MAKERS MAY SUE FOR OVERBROAD USE CODES TO FURTHER PUBLIC POLICY OF HURRYING GENERICS TO MARKET
CONSERVATIVE-LEANING (BY SENIORITY)   VOTE: 5-0 FOR MAJORITY	
SCALIA	MAJORITY
KENNEDY	MAJORITY
THOMAS	MAJORITY
ROBERTS	MAJORITY
ALITO	MAJORITY

**(B) THE COURT UPHOLD 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>65</sup> These “orphan works”<sup>66</sup> were being used, royalty-free, by American conductors, producers and educators among others for concerts, movies and other commercial uses.<sup>67</sup> This legal double standard angered foreign governments who withheld copyright protection for American

<sup>65</sup> 132 S. Ct. 873 (2012). The federal law at issue is § 514 of the Uruguay Round Agreements Act of 1994 (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994) (codified at 17 U.S.C. §104A) *available at* <http://www.uspto.gov/web/offices/com/doc/uruguay/uraaact.html> [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 copyright “subsists . . . in restored works, and vests automatically on the date of restoration” and “any work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.” *URAA* at § 514(a)(1).

<sup>66</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*, *supra* note 65, at 878. With no United States copyright protection, these orphaned works found their way into the public domain. *Id.*

<sup>67</sup> *See e.g.*, Joan McGivern & Christine Pepe, *Golan v. Holder: The Long Road to Restoration*, ENTERTAINMENT, ARTS AND SPORTS LAW BLOG, Dec. 20, 2010, [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.”).

works used in their commercial sphere.<sup>68</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>69</sup> - took effect in 1886. The United States joined Berne over a century later in 1989.<sup>70</sup> Berne requires reciprocal copyright relationships between member countries; these membership requirements<sup>71</sup> persuaded the federal government to grant copyright protection to orphan works thus avoiding potential tariffs, retaliation and sanctions by the World Trade Organization.<sup>72</sup> United States copyright holders also gained protection in foreign countries withholding it before their orphan works became protected. In the end, this restoration process removed works from the public domain and prior users were forced to obtain licenses. Budgets were strained and lawsuits filed alleging First Amendment and Copyright Clause violations.<sup>73</sup>

The Court upheld the copyright restoration law under both alleged constitutional deficiencies.<sup>74</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>75</sup> and new license fees do not hinder the “Progress of Science” as prohibited by the Constitution.<sup>76</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 copy ideas.<sup>77</sup> In the end the majority proclaimed:

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<sup>68</sup> See e.g., *Golan*, *supra* note 59, at 879-80 (collecting reports of international retribution for United States copyright policy relating to orphaned works and stating that the “minimalist approach essayed by the United States did not sit well with other Berne members.”).

<sup>69</sup> See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

<sup>70</sup> See e.g., Free Dictionary, *Copyright, International*, WWW.LEGAL-DICTIONARY.THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/The+United+States+and+the+Berne+Convention> (last visited May 18, 2012) (stating that 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.”) and *Golan*, *supra* note 59, at 877.

<sup>71</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 (TRIPs). TRIPs requires its signatories to comply with Article 18, among others, of the Berne Convention. See TRIPs, Art. 9.1, 33 I. L. M. 1197, 1201 (1994) and World Trade Organization, *Uruguay Round Agreements: TRIPs: Section 9(1)*, 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) (stating that Members “shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”). This compliance provision motivated the United States to extend copyright protection to all works of foreign origin whose term of protection had not expired.

<sup>72</sup> See *Golan*, *supra* note 59, at 881.

<sup>73</sup> *Id.* at 883.

<sup>74</sup> *Id.* at 894 (stating that 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>75</sup> See *id.* at 876 (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>76</sup> See *id.* at 889 (holding that the law does not infringe the Copyright Clause because while 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>77</sup> See *id.* at 877 (stating that “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.”).



“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>78</sup> Justice Breyer’s dissent objected to damming the free flow of important information lubricated by the public domain. The idea is that there were less restrictive alternatives Congress should have taken to satisfy Berne membership requirements as opposed to pulling works from the public domain.<sup>79</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>80</sup>

CHART V – GOLAN V. HOLDER VOTE BREAKDOWN

GOLAN V. HOLDER   (6-2)	
JUSTICE	VOTE
LIBERAL-LEANING (BY SENIORITY)   VOTE: 2-1 FOR MAJORITY	
GINSBURG	MAJORITY (AUTHOR): NO COPYRIGHT CLAUSE/FIRST AMENDMENT VIOLATION WHEN WORKS IN PUBLIC DOMAIN GRANTED COPYRIGHTS TO SATISFY INTERNATIOANL OBLIGATIONS
BREYER	DISSENT (AUTHOR): LESS-RESTRICTIVE WAYS TO SATISFY MEMBERSHIP IN BERNE THAN STIFLING SPEECH BY REMOVING WORKS FROM PUBLIC DOMAIN
SOTOMAYOR	MAJORITY
KAGAN	RECUSED
CONSERVATIVE-LEANING (BY SENIORITY)   VOTE: 4-1 FOR MAJORITY	
SCALIA	MAJORITY
KENNEDY	MAJORITY
THOMAS	MAJORITY
ROBERTS	MAJORITY
ALITO	DISSENT

## IV. THE EMPLOYMENT LAW CASES

Seven interesting employment law cases made the Court’s 2011-2012 docket,<sup>81</sup> three of which merit deeper analysis based on their potential impact on business.<sup>82</sup> *Hosanna-Tabor Church v. EEOC* looks

<sup>78</sup> *Id.* at 894.

<sup>79</sup> *Id.* at 912 (Breyer, J. dissenting).

<sup>80</sup> *Id.*

<sup>81</sup> See (1) *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012) (evaluating the tension between the Ministerial Exception to the First Amendment and employment discrimination statutes), (2) *Knox v. Service Employees Int’l Union, Local 1000*, 131 S. Ct. 3061 (showing grant of the certiorari petition in a case where a state employer (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), (3) *Christopher v. SmithKline Beecham*, 132 S. Ct. 760 (2011) (showing grant of the certiorari petition in a case 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), (4) *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012) (holding by a five to four conservative-leaning majority that lawsuits against states under the self-care provision of the Family and Medical Leave Act [allowing

at the interaction of the First Amendment and employment discrimination law. 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? The Court held that the ministerial exception, located in the First Amendment, prohibits courts from second guessing a religious organization's employment actions against its ministers and upheld the termination. Here, a unanimous majority expanded the First Amendment to protect the employment interests of a commercial, albeit religious in nature, entity.

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## (A) THE COURT ALLOWS RELIGIOUS EMPLOYEES TO CONTROL THE HIRING & FIRING OF MINISTER-EMPLOYEES

*Hosanna-Tabor Church v. EEOC* examined the synergy between employment law and the First Amendment's religion clauses.<sup>83</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>84</sup> During her employment she developed narcolepsy and took disability leave.<sup>85</sup> Eight months later, she aspired to return to teaching but the school had filled her position and asked her to resign. She presented herself at the school, refused to resign and threatened to sue under the Americans with Disabilities Act.<sup>86</sup> Hosanna-Tabor terminated her based on "insubordination and

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employees time off to tend to their own serious health condition when the condition interferes with the employee's ability to perform at work] are barred by sovereign immunity), (5) *Roberts v. Sea-Land Services*, 132 S. Ct. 1350 (2012) (holding via an eight to one 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), (6) *Pacific Operators Offshore v. Valladolid*, 132 S. Ct. 680 (2012). This case held eight to one that "the Outer Continental Shelf Lands Act covers injuries 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." SCOTUSBlog.com, *Pacific Operators Offshore v. Valladolid: Holding*, <http://www.scotusblog.com/case-files/cases/pacific-operations-offshore-llp-v-valladolid/> (last visited May 20, 2012) and (7) *Elgin v. U.S. Dep't. of the 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).

<sup>82</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 (i.e., 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>83</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). The Question Presented was stated by Chief Justice Roberts as "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." *Id.* at 699.

<sup>84</sup> *Id.* at 700 (stating that "Perich led the chapel service herself about twice a year" as well).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (stating that the principal:

[A]lso 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 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.

disruptive behavior” and well as damaging her working relationship with the administration by threatening to take legal action.<sup>87</sup> The Equal Employment Opportunity Commission sued on her behalf alleging retaliation for threatening an ADA claim.<sup>88</sup> The school argued that the suit was barred under the First Amendment and its ministerial exception.<sup>89</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>90</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>91</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>92</sup> Chief Justice Roberts, writing for a unanimous Court stated:

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>93</sup>

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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.

The ADA “prohibits an employer from discriminating against a qualified individual on the basis of disability. 42 U. S. C. § 12101 *et seq.*, § 12112(a) (2012). 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.* at § 12203(a)

<sup>87</sup> *Hosanna-Tabor*, *supra* note 83 at 696.

<sup>88</sup> *Id.* (stating that 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>89</sup> *Id.* at 701 (stating that “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>90</sup> *Id.* at 705 (collecting federal appellate cases making that same point).

<sup>91</sup> Brief of Plaintiff-Respondent Cheryl Perich at 61, *Hosanna-Tabor Evangelical Lutheran Church and Sch. V. EEOC*, No. 10-553 (U.S. Aug. 2, 2011).

<sup>92</sup> *Hosanna-Tabor*, *supra* note 83 at 706.

<sup>93</sup> *Id.*

The opinion concluded by holding that the ministerial exception applies to Perich as a minister.<sup>94</sup> Even though Perich claimed to be a lay teacher the Court found that “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>95</sup> This case is important as it represents the first time the Court evaluated the “freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment.”<sup>96</sup>

CHART VI – HOSANNA-TABOR V. EEOC VOTE BREAKDOWN

HOSANNA-TABOR V. EEOC   (9-0)	
JUSTICE	VOTE
LIBERAL-LEANING (BY SENIORITY)   VOTE 4-0 FOR MAJORITY	
GINSBURG	MAJORITY
BREYER	MAJORITY
SOTOMAYOR	MAJORITY
KAGAN	MAJORITY   CONCURRENCE (JOINED ALITO)
CONSERVATIVE-LEANING (BY SENIORITY)   VOTE 5-0 FOR MAJORITY	
SCALIA	MAJORITY
KENNEDY	MAJORITY
THOMAS	MAJORITY   CONCURRENCE (AUTHOR): LOOK AT WHETHER RELIGIOUS ORGANIZATION “SINCERELY BELIEVES” EMPLOYEE TO BE A MINISTER
ROBERTS	MAJORITY (AUTHOR): MINISTERIAL EXCEPTION CONSTITUTIONAL; PERICH FALLS UNDER ITS REACH; CHURCH LEGALLY TERMINATED HER
ALITO	MAJORITY   CONCURRENCE (AUTHOR): “MINSTER” IS MISLEADING; FOCUS ON FUNCTION PERFORMED EMPLOYEES AT RELIGIOUS BODIES

**(B) THE COURT EVALUATES EXCEPTIONS TO THE FLSA’S OVERTIME RULE**

*Christopher v. SmithKline Beecham Corp.* evaluates the Fair Labor Standards Act and its outside salesperson exemption. The FLSA exempts employers from paying certain categories of workers overtime pay. GlaxoSmithKline is an international pharmaceutical company employing salespeople it considers exempt from overtime. Two former pharmaceutical salesmen alleged they were required to work ten to twenty hours of overtime per week without compensation.<sup>97</sup> The salesmen disagreed

<sup>94</sup> 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.* at 668 (Stating, “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>95</sup> *Id.* at 708.

<sup>96</sup> *Id.* at 705. This is true even though the “Courts of Appeals, in contrast, have had extensive experience with this issue.” *Id.*

<sup>97</sup> See *Christopher v. Smithkline Beecham Corp.*, 623 F.3d 383, 385 (9th Cir. 2011) [hereinafter *SmithKline*] (stating that one employee was terminated from the company and the other accepted a similar position at another pharmaceutical company).

with their FLSA categorization and filed a class action against the company. Glaxo responded to the charges that both men are properly classified “outside salespeople” and exempted from overtime.<sup>98</sup>

The major issue in the case is whether pharmaceutical salespeople actually make sales and qualify for the exemption. Since 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>99</sup> They spent their time outside of corporate offices but within a specified geographic area. When not making physician calls, sales representatives will “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>100</sup> Part of their pay is salary and part incentive based. 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>101</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>102</sup> The Ninth Circuit affirmed under the holding 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>103</sup>

The Supreme Court has not issued an opinion as of June 1, 2012 so this article offers a prediction. While predicting any Supreme Court decision is very difficult and often unwise, it is also an interesting academic exercise. At oral arguments the Justices seemed very receptive to the argument that these salespeople fall under the outside salesperson exemption. Justice Ginsburg, for example, may have tipped her hand by noting that these representatives want time and one half in overtime pay even though they often play golf and otherwise entertain doctors.<sup>104</sup> She then asked the following

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<sup>98</sup> *Id.* at 388.

<sup>99</sup> *Id.* at 385 (stating, “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. § 801 et seq., § 829(b)-(d) (2012).

<sup>100</sup> Sam Wiczorek, *Argument Preview: The “Outside Salesman” Exception to the FLSA’s Overtime-Pay Requirement*, WWW.SCOTUSBLOG.COM, Apr. 5, 2012, <http://www.scotusblog.com/?p=142535>.

<sup>101</sup> *SmithKline*, *supra* note 97, at 387.

<sup>102</sup> *Christopher v. SmithKlein Beecham Corp.*, 2009WL 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>103</sup> See *SmithKline*, *supra* note 97, at 400-01.

<sup>104</sup> Transcript of Oral Argument at 9, *Christopher*, 132 S. Ct. 760 (No. 11-204) [hereinafter *Christopher Oral Arguments*].

question, “What 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>105</sup> Justice Kennedy may have tipped his hand as well; the Justice with the critical swing vote in close cases 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 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>106</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>107</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. Based on oral arguments it appears unlikely that the Court will allow this retroactive punishment to occur. 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. Justice Breyer took this position and seemed to side with the conservative-leaning Justices by adding:

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>108</sup>

Justices Sotomayor and Kagan appeared to be the most likely to reverse the Ninth Circuit opinion. In oral arguments they both grilled the lawyer for Glaxo on the Court's preference of giving deference to the Department of Labor's relatively new interpretation that these workers should qualify for overtime.<sup>109</sup>

In the end, this article predicts that, at a minimum, each of the conservative-leaning Justices will vote to affirm the Ninth Circuit's holding that these plaintiffs are exempted from overtime pay. There is a chance that Justices Ginsburg and Breyer would join the holding and perhaps offer a

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 48.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 22-23.

<sup>109</sup> *Id.* at 45 (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.”).

concurrence that advocates that they would defer to the Department of Labor’s position only after a notice and comment period on changing the exemption’s scope.

Finally, a prominent Supreme Court prediction site, FantasySCOTUS.com, seconds this prediction. The Court observers voting on that site believe that there is a 71% chance that the Court will affirm the Ninth Circuit seven to two and leave these salespeople exempt from overtime.<sup>110</sup> This affirmance percentage increased from the mid 60s in January 2012 but is down from its high of 80% in late 2011.<sup>111</sup> Chart VII below details Fantasy SCOTUS users’ as well as this author’s best guess as to the final vote count and as to each Justice’s likely vote.

CHART VII – CHRISTOPHER V. SMITHKLINE PREDICTIONS

CHRISTOPHER V. SMITHKLINE   PREDICTED TO BE AFFIRMED (7-2) <sup>112</sup>		
JUSTICE	PREDICTED VOTE	
	FANTASY SCOTUS PREDICTION	CIOCCHETTI PREDICTION
LIBERAL-LEANING (BY SENIORITY)   VOTE: 2-2 FOR AFFIRMANCE		
GINSBURG	56% CHANCE OF AFFIRMING THE NINTH CIRCUIT	MAJORITY   CONCURRENCE
BREYER	60% CHANCE OF AFFIRMING THE NINTH CIRCUIT	MAJORITY   CONCURRENCE
SOTOMAYOR	55% CHANCE OF REVERSING THE NINTH CIRCUIT	DISSENT
KAGAN	52% CHANCE OF REVERSING THE NINTH CIRCUIT	DISSENT
CONSERVATIVE-LEANING (BY SENIORITY)   VOTE: 5-0 FOR AFFIRMANCE		
SCALIA	74% CHANCE OF AFFIRMING THE NINTH CIRCUIT	MAJORITY
KENNEDY	72% CHANCE OF AFFIRMING THE NINTH CIRCUIT	MAJORITY
THOMAS	66% CHANCE OF AFFIRMING THE NINTH CIRCUIT	MAJORITY
ROBERTS	80% CHANCE OF AFFIRMING THE NINTH CIRCUIT	MAJORITY
ALITO	67% CHANCE OF AFFIRMING THE NINTH CIRCUIT	MAJORITY

### (C) THE COURT ANALYZES AN EMPLOYEE’S RIGHT NOT TO SPEAK

*Knox v. SEIU* deals with the compelled payment of union dues. The Service Employees International Union is the state-recognized official bargaining unit for California state employees.<sup>113</sup> State employees must become SEIU members or have union fees deducted from their paychecks.<sup>114</sup> Each

<sup>110</sup> See Fantasy SCOTUS, *FantasySCOTUS Case Tracker: Christopher v. SmithKline Beecham Corp.* WWW.FANTASYSCOTUS.NET, <http://www.fantasyscotus.net/tracker/christopher-v-smithkline-beecham-corp/> (last visited May 29, 2012).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (showing the percentage of user’s predicting that a Justice will vote to either affirm or reverse).

<sup>113</sup> *Knox v. Cal. State Employees Ass'n, Local 1000*, 628 F.3d 1115, 1117 (9th Cir. 2011) [hereinafter *Cal. State*]

<sup>114</sup> *Id.* (stating more specifically:

year SEIU officials analyzed audited expenditures from the prior year to determine the current year's agency fees and disclose the total in a so-called *Hudson* notice. This notice comes from a United States Supreme Court styled *Chicago Teachers Union v. Hudson* where the 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>115</sup> Some of these expenses are chargeable to non-members (i.e., expenditures related to union's position as official bargaining representative) and others are not (i.e., political and other ideological expenditures).<sup>116</sup> The union may charge non-members for all expenditures unless a non-member objects; at that point the Union must reduce the charge to the proper portion of chargeable expenditures.<sup>117</sup>

For 2005, the union declared that 99.1% of all expenditures would be deducted from member and non-member paychecks.<sup>118</sup> Objectors would have 56.35% deducted.<sup>119</sup> Later that year, the union SEIU proposed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund," applicable to all covered employees, to fight against ballot measures union officials deemed against the interests of state employees.<sup>120</sup> Eight state employees sued arguing that SEIU's *Hudson* notice did not provide warning concerning the mid-year fee.

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>121</sup> The Ninth Circuit reversed and found that a second *Hudson* notice is not necessary "when adopting a temporary, mid-term fee increase."<sup>122</sup>

The case is not decided as of June 1, 2012 and, therefore, this article makes an educated in this case as well. It is important to note that there is a chance that the Court will hold that the case is moot and not reach the merits. The issue of mootness arose prior to oral arguments. New SIEU leadership changed its policy to now provide notice for mid-year assessments and, in 2011, sent "a one-dollar

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

<sup>115</sup> 475 U.S. 292, 310 (1986).

<sup>116</sup> See *Cal. State*, *supra* note 114, at 1118.

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

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* 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>121</sup> *Knox v. Westly*, 2008 U.S. Dist. LEXIS 25579, \*34 (2008) (emphasis added).

<sup>122</sup> See *Cal. State*, *supra* note 114, at 1117.



bill to all members of the petitioners' class, along with a promise to refund one hundred percent of the fee increase they paid."<sup>123</sup> The Court will need to decide whether this specific issue is now non-repeatable and not evading review. If the Justices find both the Court might punt.<sup>124</sup> To this end, the Justices began the oral arguments asking the attorney for the plaintiffs/petitioners to address the mootness issue.<sup>125</sup> If the Justices muster a majority to reach the merits, however, it is likely that the Ninth Circuit opinion will be reversed.<sup>126</sup> This means that the union violated the First Amendment in failing to send out a second *Hudson* notice for this special assessment. The remedy on remand will be tricky because the assessment was made almost seven years ago; at a minimum the District Court could issue a declaratory judgment that the union erred in failing to send another notice and allowing members to object.

On the merits, *Knox* may be the rare business case this term to divide the Justices five to four. At oral arguments the conservative-leaning Justices argued that this type of assessment, without notice and the ability to object, provides unions with interest-free loans for speech certain assessed members do not agree with.<sup>127</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>128</sup> 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>129</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>130</sup> Justice Breyer picked up on this idea and argued that "the 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>131</sup>

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<sup>123</sup> Ross Runkel, *Argument Recap: Mootness could Squelch Union Fees Case*, Jan. 12, 2012, WWW.SCOTUSBLOG.COM, <http://www.scotusblog.com/?p=136669> [hereinafter *Mootness*].

<sup>124</sup> *Id.* (stating 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.").

<sup>125</sup> Transcript of Oral Argument at 4-9, *Knox*, 131 S. Ct. 3061 (No. 10-1121) [hereinafter *Knox Oral Arguments*].

<sup>126</sup> Not everyone agrees with this assessment. See e.g., *Mootness*, *supra* note 123 (stating that if:

The Court reaches the merits, there is strong inertia in support of allowing the union to rely on annual notices. Those notices are based on the prior year's audited expenditures, and a mid-year Hudson notice would be based on the union's unverifiable statement as to how it plans to use the money. The Justices seemed to be looking at the practicalities involved, and nobody seemed able to articulate exactly what a mid-year Hudson notice would say or how that notice would fit in with the annual notice procedure.)

<sup>127</sup> *Knox Oral Arguments*, *supra* note 125 at 37.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 14.

<sup>130</sup> *Id.* at 51.

<sup>131</sup> *Id.* at 52.

FantasySCOTUS.com also seconds this article’s educated guess in *Knox*. The Court observers voting on that site believe that there is a 57% chance that the Court will reverse the Ninth Circuit in a five to four vote and hold that the one and only *Hudson* notice sent by the Union was insufficient.<sup>132</sup> This represented a major shift in public opinion on the site; prior to oral arguments in the case, the percentage of users predicting affirmance of the Ninth Circuit decreased drastically from 51% to 43%.<sup>133</sup> This was likely due to the comments and tone of the conservative-leaning Justices, particularly Justice Kennedy. Chart VIII below details Fantasy SCOTUS users’ as well as this author’s best guess as to the final vote count and as to each Justice’s likely vote in *Knox*.

CHART VIII – KNOX V. SEIU VOTE BREAKDOWN

KNOX V. SEIU   PREDICTED TO BE REVERSED (5-4) <sup>134</sup>		
JUSTICE	PREDICTED VOTE	
	FANTASY SCOTUS PREDICTION IF COURT REACHES MERITS	CIOCCHETTI PREDICTION IF COURT REACHES MERITS
LIBERAL-LEANING (BY SENIORITY)   VOTE: 4-0 FOR AFFIRMANCE		
GINSBURG	61% CHANGE OF AFFIRMING THE NINTH CIRCUIT	DISSENT
BREYER	57% CHANGE OF AFFIRMING THE NINTH CIRCUIT	DISSENT
SOTOMAYOR	61% CHANGE OF AFFIRMING THE NINTH CIRCUIT	DISSENT
KAGAN	60% CHANGE OF AFFIRMING THE NINTH CIRCUIT	DISSENT
CONSERVATIVE-LEANING (BY SENIORITY)   VOTE: 5-0 FOR REVERSAL		
SCALIA	60% CHANGE OF REVERSING THE NINTH CIRCUIT	MAJORITY
KENNEDY	51% CHANGE OF REVERSING THE NINTH CIRCUIT	MAJORITY
THOMAS	64% CHANGE OF REVERSING THE NINTH CIRCUIT	MAJORITY
ROBERTS	60% CHANGE OF REVERSING THE NINTH CIRCUIT	MAJORITY
ALITO	61% CHANGE OF REVERSING THE NINTH CIRCUIT	MAJORITY

## V. THE CONSUMER PROTECTION CASES

The Court heard three consumer protection cases over the 2011-2012 term, two of which are relevant for their potential business impact.<sup>135</sup> The first case involved a mandatory arbitration clause in a credit card contract. The clause was pitted against a law granting an aggrieved consumer the

<sup>132</sup> See Fantasy SCOTUS, *FantasySCOTUS Case Tracker: Knox v. Service Employees Int’l Union*, WWW.FANTASYSCOTUS.NET, <http://www.fantasyscotus.net/tracker/knox-v-service-employees-intl-union/> (last visited May 29, 2012).

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

<sup>134</sup> *Id.* (showing the percentage of the site’s users predicting each Justice’s vote).

<sup>135</sup> See *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012) and *Freeman v. Quicken Loans*, 2012 U.S. LEXIS 3940 (2012).

non-waivable “right to sue” the card issuer. The Court held that the statutory “right to sue” was broad enough to encompass a lawsuit proceeding through arbitration. The second case revolved around real estate mortgages and settlement fees charged by lenders. The Real Estate Settlement Procedures Act bans lenders from giving and receiving kickbacks and unearned fees. Angry borrowers paid settlement fees without a corresponding interest rate decrease. The lender argued that RESPA allowed it to keep these unearned fees because they were not split with another party. The Court interpreted the statute and ruled that the lender could not both give and receive these unearned fees. In both cases consumer protection went toe-to-toe with business interests and lost (17 votes to 1 to be specific).

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## (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. 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. Credit repair organizations<sup>136</sup> flourished after the Great Recession and the corresponding consumer credit devastation.<sup>137</sup> The process of repairing consumer credit benefitted some by rejuvenating credit scores and ability to borrow<sup>138</sup> and harmed others by offering products unlikely to help economically weak borrowers.<sup>139</sup> Long before the recent turbulent economic times, Congress offered protection to consumers with poor credit via the Credit Repair Organizations Act. CROA outlaws unfair/deceitful credit practices and unintelligible legalese in credit repair transactions.<sup>140</sup> More specifically, the law contains mandatory disclosure provisions, rules governing consumer credit contracts (and consumer contact more generally) and cancellation rights for credit

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<sup>136</sup> The Credit Repair Organization Act defines credit repair organizations as follows: “any 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 (Sept. 30, 1996) (codified at 15 U.S.C. § 1679 (2012)), at 1679A(3)(A)(i) & (ii) [hereinafter CROA].

<sup>137</sup> See e.g., Privacy Rights Clearinghouse, *Companies*, WWW.PRIVACYRIGHTS.ORG, 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”) and Susan Tompor, *Consumers’ Credit Scores Improving*, May 14, 2012, WWW.LOANSAFE.ORG, available at <http://www.loansafe.org/susan-tompor-consumers-credit-scores-improving> [hereinafter *Tompor*] (stating that credit scores “turned into one ugly number for many consumers throughout the recession - putting a halt to how much buying and borrowing consumers could do.”).

<sup>138</sup> See e.g., *Tompor*, *supra* note 137 (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>139</sup> See e.g., *Companies*, *supra* note 137 (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>140</sup> Pub. L. No. 104-208, 110 Stat. 3009-455 (Sept. 30, 1996) (codified at 15 U.S.C. §1679 (2012)).

repair recipients.<sup>141</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>142</sup> The statute also states that consumers cannot waive this statutorily granted right to sue.<sup>143</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>144</sup> One such section covered mandatory arbitration and stated: “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>145</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>146</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>147</sup> CompuCredit argued that right to sue provisions are generally interpreted as including arbitration as a valid forum.<sup>148</sup> The class action plaintiffs disagreed.<sup>149</sup>

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<sup>141</sup> See CROA, *supra* note 136, at § 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>142</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. . . .” CROA, *supra* note 136, § 1679C(a) (emphasis added).

<sup>143</sup> *Id.* at § 1679F(A) (stating that “[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter - (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.”).

<sup>144</sup> See *CompuCredit v. Greenwood*, 132 S. Ct. 665, 668. See also Connie Prater, *U.S. Credit Card Agreements Unreadable to 4 out of 5 Adults*, WWW.CREDITCARDS.COM, July 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>145</sup> *CompuCredit*, *supra* note 144 at 668.

<sup>146</sup> *Id.*

<sup>147</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>148</sup> *Id.* at 669 (writing that the Ninth Circuit also accepted this position in its holding for the class action plaintiffs). The Court stated, 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>149</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).

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>150</sup> Justice Scalia authored the majority opinion and opined that, if Congress wanted the right to sue to only mean a trial, Congress would have expressly barred arbitration.<sup>151</sup> Instead, the right to sue clause is located in the consumer disclosure section and is merely a colloquial way of informing consumers that courts can award them damages for injuries arising under the act.<sup>152</sup> The opinion continued, “We 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>153</sup> Justice Ginsburg dissented and reiterated her concerns from the oral argument that 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>154</sup>

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**CHART IX – COMPUCREDIT V. GREENWOOD VOTE BREAKDOWN**

<b>COMPUCREDIT V. GREENWOOD   (8-1)</b>	
<b>JUSTICE</b>	<b>VOTE</b>
<b>LIBERAL-LEANING (BY SENIORITY)   VOTE 3-1 FOR MAJORITY</b>	
GINSBURG	DISSENT (AUTHOR): CONGRESS CLEARLY INTENDED THESE CROA SUITS TO BE IN FRONT OF A COURT RATHER THAN AN ARBITRATOR
BREYER	MAJORITY
SOTOMAYOR	MAJORITY
KAGAN	MAJORITY
<b>CONSERVATIVE-LEANING (BY SENIORITY)   VOTE 5-0 FOR MAJORITY</b>	
SCALIA	MAJORITY (AUTHOR): FAA FAVORS ARBITRATION; CONGRESS COULD HAVE CLEARLY STATED THAT A RIGHT TO SUE UNDER CROA PRECLUDED ARBITRATION
KENNEDY	MAJORITY
THOMAS	MAJORITY
ROBERTS	MAJORITY
ALITO	MAJORITY

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<sup>150</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>151</sup> *Id.* at 673.

<sup>152</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>153</sup> *Id.*

<sup>154</sup> *Id.* at 679 (Ginsburg, J. dissenting).

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## (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 and its bar against certain kickbacks and unearned fees.<sup>155</sup> RESPA governs much of the real estate closing/settlement process for residential mortgage loans.<sup>156</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 REPSA and are barred because they increase mortgage costs.<sup>157</sup> The statute bans both kickbacks and unearned fees in two consecutive provisions.<sup>158</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>159</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 [i.e., unearned fees].*<sup>160</sup>

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<sup>155</sup> 2012 U.S. LEXIS 3940 (May 24, 2012).

<sup>156</sup> See Pub. L. 93-533, 88 Stat. 1727 (Dec. 22, 1974) (codified at 12 U.S.C. § 2601-2617) [hereinafter RESPA]. 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 . . .

*Id.* at § 2602(3).

<sup>157</sup> Wikipedia, *Real Estate Settlement Procedures Act*, [http://en.wikipedia.org/wiki/Real\\_Estate\\_Settlement\\_Procedures\\_Act](http://en.wikipedia.org/wiki/Real_Estate_Settlement_Procedures_Act) (last visited May 24, 2012) (stating that RESPA “was created because various companies associated with the buying and selling of real estate, such as lenders, real estate agents, construction companies and title insurance companies were often engaging in providing undisclosed kickbacks to each other, inflating the costs of real estate transactions and obscuring price competition by facilitating bait-and-switch tactics.”).

<sup>158</sup> See *RESPA*, *supra* note 156, at § 2607(a) (barring the gift and receipt of kickbacks) and 12 U.S.C. § 2607(b) (barring the gift and receipt of unearned fees).

<sup>159</sup> *Id.* at § 2607(a) (emphasis added).

<sup>160</sup> *Id.* at § 2607(b) (emphasis added).

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 the settlement service at issue.<sup>161</sup> A separate provision also allows for criminal penalties of up to one year in prison or up to a \$10,000 fine.<sup>162</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>163</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>164</sup> Quicken removed the case to federal court where the three actions were consolidated and then petitioned for summary judgment.<sup>165</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”. In other words, one party must give part of an unearned fee and another party must accept it for a violation to occur. 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>166</sup> The District Court granted summary judgment for Quicken and a split panel of the Fifth Circuit affirmed.<sup>167</sup>

The Court unanimously affirmed that RESPA allows lenders to keep 100% of unearned mortgage settlement fees.<sup>168</sup> The statutory text is clear that a violation occurs only when any part of an unearned fee is “split” with other parties. 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

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<sup>161</sup> *Id.* at § 2607(d)(2).

<sup>162</sup> *Id.* at § 2607(d)(1).

<sup>163</sup> These plaintiffs filed three separate actions in a Louisiana state court in 2008. *See Freeman, supra* note 155, at \*6 (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>164</sup> *Id.*

<sup>165</sup> *Id.* at \*7.

<sup>166</sup> 66 Fed. Reg. No. 202, 53059, *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)* (Oct. 18, 2001). HUD’s consumer protection functions under RESPA were transferred to the Bureau of Consumer Financial Protection [hereinafter Bureau] under the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* P. L. No. 11-203, 124 Stat. 2038, 2039-2040, 2103-2104, 2113 (July 21, 2010) (codified in scattered sections of the United States 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.” 76 Fed. Reg. No. 140, 43570-43571, *Bureau of Consumer Financial Protection: Identification of Enforceable Rules and Order* (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, 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.).

<sup>167</sup> 2009 U.S. Dist. LEXIS 69654 (E.D. La., Aug. 7, 2009) (reprinting the district court opinion) and 626 F. 3d 799 (5th Cir. 2010) (reprinting the Fifth Circuit Court of Appeals opinion).

<sup>168</sup> *Freeman, supra* note 155.

statute can bear.”<sup>169</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.

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>170</sup> The majority, however, labeled this argument as outside of Congressional intent.<sup>171</sup> He continued that borrowers charged excessive or dishonest mortgage-based fees have state law fraud actions at their disposal. These RESPA provisions, on the other hand, are purposefully limited only to *split* fees because: (1) Congress believed 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>172</sup>

CHART X – FREEMAN V. QUICKEN LOANS VOTE BREAKDOWN

FREEMAN V. QUICKEN LOANS   (9-0)	
JUSTICE	VOTE
LIBERAL-LEANING (BY SENIORITY)   VOTE 4-0 FOR MAJORITY	
GINSBURG	MAJORITY
BREYER	MAJORITY
SOTOMAYOR	MAJORITY
KAGAN	MAJORITY
CONSERVATIVE-LEANING (BY SENIORITY)   VOTE 5-0 FOR MAJORITY	
SCALIA	MAJORITY (AUTHOR): RESPA ONLY PROHIBITS <i>SPLITTING</i> UNEARNED REAL ESTATE SETTLEMENT FEES BETWEEN A LENDER AND AT LEAST ONE OTHER PARTY
KENNEDY	MAJORITY
THOMAS	MAJORITY
ROBERTS	MAJORITY
ALITO	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 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>173</sup> In the end, business interests garnered seventeen

<sup>169</sup> *Id.* at \*12 (internal citations omitted).

<sup>170</sup> *Id.* at \*23.

<sup>171</sup> *Id.* at \*24.

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

<sup>173</sup> See e.g., Jacob Weisberg, *What Caused the Economic Crisis? The 15 Best Explanations for the Great Recession*, WWW.SLATE.COM, Jan. 9, 2010, [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) (stating:



votes and consumer protection interest garnered one. The final case-analysis section below looks at the lone securities law case on the 2011-2012 docket.

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## VI. 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>174</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>175</sup> Directors, officers and principal shareholders owning more than 10% of any class of a company's securities are classified as insiders for purposes of this analysis.<sup>176</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>177</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. 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. 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.

The gravamen of the *Credit Suisse* case, however, revolves around the last sentence above - the two-year deadline for shareholders to file suit against insiders trading within the six-month window. 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 know when corporate insiders finalize short swing trades so that they may exercise their statutorily granted right to sue within the two-year deadline?

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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).

<sup>174</sup> Pub. L. No. 73-291, 48 Stat. 881 (June 6, 1934) (codified at 15 U.S.C. § 78a et seq.).

<sup>175</sup> 132 S. Ct. 1414 (2012).

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

<sup>177</sup> Securities Exchange Act of 1934, 15 U.S.C. §78(p)(b) (2012) (emphasis added).

According to the plaintiff in *Credit Suisse*, Section 16(a) of the '34 Act provides some guidance. That section requires corporate insiders to file a co-called Form 4<sup>178</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>179</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.

The plaintiff in *Credit Suisse* proves to be one of the most resourceful found in any case this term. In 2007, Vanessa Simmonds filed 55 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>180</sup> At the time she was a 22-year-old college senior; her father served as one of her attorneys in the case.<sup>181</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>182</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>183</sup> Another allegation in the same complaint stated that, as a group, “the underwriters and [company] insiders owned in excess of 10% 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 §16(a).”<sup>184</sup> Amazingly, this was the first time a plaintiff has used this line of attack to force disgorgement.<sup>185</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.

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). Simmonds argued that the time limit should be tolled at least until the insider files the required 16(a) disclosure or Form 4.<sup>186</sup> Credit Suisse argued that claims like Simmonds’ are “never subject to equitable tolling because the statute requires that no suit ‘shall be brought more than two

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<sup>178</sup> See 17 CFR 240.16a-3, Reports of Directors, Officers and Principal Shareholders, (2012) (stating in 240.16a-3 (a) that “[s]tatements of changes in beneficial ownership required by that section shall be filed on Form 4.”).

<sup>179</sup> *Id.* at § 78(p)(a)(2)(c) (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>180</sup> *Credit Suisse*, *supra* note 175, at 1418.

<sup>181</sup> See e.g., Rami Grunbaum, *Vanessa v. the Dot-Com IPO Giants*, WWW.SEATTLETIMES.NWSOURCE.COM, Nov. 4, 2007, available at [http://seattletimes.nwsourc.com/html/business/technology/2003992306\\_sundaybuzz04.html](http://seattletimes.nwsourc.com/html/business/technology/2003992306_sundaybuzz04.html) [hereinafter *Vanessa*].

<sup>182</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.” *Id.*

<sup>183</sup> *Credit Suisse*, *supra* note 175, at 1418.

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

<sup>185</sup> See e.g., *Vanessa*, *supra* note 181 (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>186</sup> See e.g., Steven Kaufhold, *Opinion Analysis: Occupying the “Reasonable Middle Ground” on Tolling of Insider Trading Claims*, WWW.SCOTUSBLOG.COM, Mar. 28, 2012, <http://www.scotusblog.com/?p=142064> [hereinafter *Reasonable Middle Ground*].

years after the date that such profit was realized.”<sup>187</sup> The issue is relevant because Simmonds’ case ran into serious problem because she filed her legal action in this case far past two years since the insiders’ “profit was realized.”<sup>188</sup>

The District Court granted summary judgment for the underwriters on 24 of Simmonds’ claims finding them to be time barred.<sup>189</sup> The Ninth Circuit reversed in relevant part adopting Simmonds’ argument and finding that the two-year deadline should be tolled until an insider files a Form 4.<sup>190</sup> The court argued that tolling could occur regardless of whether the plaintiff “knew or should have known of the conduct at issue.”<sup>191</sup> The Ninth Circuit laid out three potential interpretations of section 16(b) based on circuit precedent and chose Interpretation number three:

[Interpretation (1)]: a “strict” approach under which the statute is treated as a statute of repose - that is, a firm bar that is not subject to tolling; [Interpretation (2)] 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 (3)] 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>192</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>193</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>194</sup> This is the “reasonable middle ground” position advocated by the United States in its briefs and at oral arguments as well as Interpretation Number Two from the Ninth Circuit opinion.<sup>195</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>196</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>197</sup>

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<sup>187</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. *Id.* at n. 4 (stating that the petitioners “have consistently disputed §16’s application to them, arguing that they, as underwriters, are generally exempt from the statute’s coverage.”).

<sup>188</sup> See *Credit Suisse*, *supra* note 175, at 1418.

<sup>189</sup> In re: Section 16(b) Litigation, 602 F. Supp. 2d 1202 (2009).

<sup>190</sup> 638 F.3d 1072 (9th Cir. 2011).

<sup>191</sup> *Id.* at 1095.

<sup>192</sup> See *Simmonds v. Credit Suisse Sec.*, 638 F.3d 1072 (9th Cir. 2010) (citing *Whittaker v. Whittaker Corp.* (639 F.2d 516 (9th Cir. 1981))).

<sup>193</sup> *Credit Suisse*, *supra* note 175, at 1421

<sup>194</sup> *Id.* (stating, “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>195</sup> See *Reasonable Middle Ground*, *supra* note 186.

<sup>196</sup> See *Credit Suisse*, *supra* note 175, at 1421.

<sup>197</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)

Bear in mind that the unanimous opinion in this case is somewhat misleading. All eight justices participating agreed that the disclosure option (i.e., Interpretation Three from the Ninth Circuit opinion) was not Congress' intention in drafting Section 16(b). The majority broke down, however, on the issue of whether Section 16(b) provides a statute of repose or a statute of limitations.<sup>198</sup> No tally was given as to which justices ended up in each camp – the Court merely stated that “We 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>199</sup> Because the Chief Justice recused himself the Court was able to split evenly in the voting – 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 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>200</sup>

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>201</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 do it with respect to these kinds of violations. This statute of limitations, I'm going to call it, reads very differently . . .”<sup>202</sup>

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statements were, as Simmonds suggests, indispensable to a party's ability to sue, Simmonds would not be here.

*Id.*

<sup>198</sup> *Id.* at 1421.

<sup>199</sup> *Id.*

<sup>200</sup> Transcript of Oral Argument at 45-46, *Credit Suisse*, 132 S. Ct. 1414 (No. 10-1261).

<sup>201</sup> *Id.* at 22.

<sup>202</sup> *Id.* at 8.

JUSTICE SOTOMAYOR: “Tell me what logic there is in reading this as a statute of repose . . . ?”<sup>203</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>204</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>205</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>206</sup>

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**CHART XI – CREDIT SUISSE SECURITIES V. SIMMONDS VOTE BREAKDOWN**

<b>CREDIT SUISSE SECURITIES V. SIMMONDS   (8-0) &amp; (4-4)</b>	
<b>JUSTICE</b>	<b>VOTE</b>
<b>LIBERAL-LEANING (BY SENIORITY)   VOTE 4-0 FOR MAJORITY   4-0 §16(B) IS A STATUTE OF LIMITATIONS</b>	
GINSBURG	MAJORITY   AUTHOR'S THEORY: 16(B) IS A STATUTE OF LIMITATIONS
BREYER	MAJORITY   AUTHOR'S THEORY: 16(B) IS A STATUTE OF LIMITATIONS
SOTOMAYOR	MAJORITY   AUTHOR'S THEORY: 16(B) IS A STATUTE OF LIMITATIONS
KAGAN	MAJORITY   AUTHOR'S THEORY: 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>	
SCALIA	MAJORITY   AUTHOR'S THEORY: 16(B) IS A STATUTE OF REPOSE
KENNEDY	MAJORITY   AUTHOR'S THEORY: 16(B) IS A STATUTE OF REPOSE
THOMAS	MAJORITY   AUTHOR'S THEORY: 16(B) IS A STATUTE OF REPOSE
ROBERTS	TOOK NO PART IN THE CASE
ALITO	MAJORITY   AUTHOR'S THEORY: 16(B) IS A STATUTE OF REPOSE

*Credit Suisse* is the one business impact case of the eight 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. 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 a ton about their

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<sup>203</sup> *Id.* at 10.

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

<sup>205</sup> *Id.* at 39.

<sup>206</sup> *Id.* at 4.

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' complaints against [petitioners] were known . . . for at least five years before these cases were filed."<sup>207</sup> If true, these facts bar Simmonds' 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 an insiders' Form 4 filing. 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 VII below takes the *Credit Suisse* case and weaves it with the other seven business impact cases to create a cohesive picture showing how this Roberts Court term is likely to significantly influence the business arena.

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## 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 II. 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 eight cases classified into the category that best described its dominant topic. These categories were: (1) intellectual property, (2) employment, (3) consumer protection and (4) securities regulation. Parts III – VI above presented the facts and issues underlying each case and evaluated the justices' votes and holdings from a business perspective. This part combines these separate analyses into a cohesive theory on the term's overall impact on business.

Four impressions stand out upon weaving these eight business impact cases together. First, this term was different from the previous term at the Court because of the preponderance of victories for business interests in 2011-2012. Second, these business interests won in cases where the underlying subject matter (real estate, consumer credit, financial markets, employment, health care) represents key facets of America's economic recovery. Third, the liberal-leaning Justices almost always voted in favor of business interests such as limiting corporate insider liability, favoring arbitration, allowing unearned fees and removing intellectual property from the public domain. Fourth, the Court both narrowed and expanded Constitutional and statutory provisions in order to reach its results. The remainder of this section discusses these impressions in order.

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### (A) THIS TERM WAS DIFFERENT AT THE ROBERTS COURT – AT LEAST FROM A BUSINESS PERSPECTIVE

The eight business impact cases each revolve around different subject matter but have enough in common to showcase a pro-business theme for the Court's 2011-2012 term. This is a somewhat different outcome from the past term where the Court, particularly its Conservative-leaning Justices alleged to be more ideologically prone to favor business, was not consistently pro-business. A recent

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<sup>207</sup> See *Credit Suisse*, *supra* note 175, at 1421.

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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[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>208</sup>

Examples of the Roberts Court rejecting the arguments of business interests 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>209</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>210</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 [where] the reports do not disclose a statistically significant number of adverse events.”<sup>211</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>212</sup> or held their majority but split five to four with the liberal-leaning justices.<sup>213</sup>

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<sup>208</sup> Martin J. Newhouse, *Business Cases and the Roberts Supreme Court*, 12(3) ENGAGE (Nov. 2011), available at <http://www.fed-soc.org/publications/detail/business-cases-and-the-roberts-supreme-court> (internal citations omitted) (discussing that the Roberts Court overall may not be as business friendly as it is perceived).

<sup>209</sup> *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011).

<sup>210</sup> *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011).

<sup>211</sup> *Matrixx Intiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

<sup>212</sup> See e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (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

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. In only one case, *Golan*, did a Conservative-leaning justice (Samuel Alito) leave the pack of five conservatives and join a liberal dissenter. Finally, it appears that only one business impact case of the eight, *Knox*, has the chance of being decided with an ideological five to four split. The others were unanimously or nearly unanimously decided in favor of business interests.<sup>214</sup> The following three sections demonstrate the pro-business thrust of this term in more detail.

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## (B) THE BUSINESS IMPACT DECISIONS FAVOR BUSINESS IN AREAS CRUCIAL TO AMERICA'S ECONOMIC RECOVERY

Each of the eight 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. The outcome of the case was favorable to business and impacted the plaintiffs (negatively) and Quicken Loans (positively). The outcome was also relevant to the 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. This interpretation could open the door for lenders to legally create and retain all sorts of new unearned mortgage fees they would be happy to retain. 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. Analyzed from this big picture perspective: (1) each of the eight business impact cases touches upon subjects crucial to the country's economic recovery and (2) the opinion in each case favored or is likely to favor the business interests involved.

The Affordable Care Act challenges this term demonstrate how important the health care debate is to Americans. This is partially because people are starting to sense that an aging country will soon face overwhelming health care costs. 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. *Caraco* was a business versus business dispute so one business interest had to win and the other lose. The winner was the generic corporation over its brand name competitor. This undoubtedly pleased the businesses that filed amici briefs in *Caraco*'s favor (Mylan Pharmaceuticals and the Generic Pharmaceutical Association) and disappointed the businesses favoring Novo Nordisk (Allergan and the Pharmaceutical Research and Manufacturers of

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error) and *Wyeth v. Levine*, 555 U.S. 555 (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>213</sup> See e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (reversing five to four a class certification in a sex discrimination class action complaint against Wal-Mart involving 1.5 million current and former female employees) and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (reversing five to four a Ninth Circuit decision that class action waivers in mobile phone contracts are per se unconscionable under the Federal Arbitration Act).

<sup>214</sup> The four to four split in *Simmonds* 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 seven to two in *Christopher*, if it occurs, makes this point even stronger.



America).<sup>215</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.

Business interests may also take satisfaction from the *Golan* opinion. 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>216</sup>

The employment law cases dealt with the hiring and firing of employees, employee retention and pay and organized labor. Each of these topics 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, limit the power of organized labor and avoid overtime obligations to pharmaceutical salespeople.

The consumer protection cases deal with consumer credit and residential real estate. 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. But, consumers 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). 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 statutory language. Businesses gained a victory because they favor arbitration as a cheaper, less risky alternative to fighting a consumer lawsuit. The Court's ruling in *Freeman*, as discussed at the beginning of this Part, is likely to alter the universe of unearned mortgage fees.

The securities regulation case revolves around the financial markets and corporate insiders. This combination formed one of the hottest topics over the past few years as it does after every economic crisis.<sup>217</sup> In *Credit Suisse*, the Court ruled in favor of underwriters and corporate insiders over shareholder plaintiffs. The Court's narrow interpretation of the Securities and Exchange Act may

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<sup>215</sup> See SCOTUSBLOG, *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, WWW.SCOTUSBLOG.COM, <http://www.scotusblog.com/case-files/cases/caraco-pharmaceutical-laboratories-ltd-v-novo-nordisk-as/> (last visited May 29, 2012) (showing all amici curiae briefs filed in the case).

<sup>216</sup> Golan, *supra* note 65 at 893.

<sup>217</sup> See e.g., Luigi Zingales, *How Financial Regulation Can Be Market Friendly*, WWW.BLOOMBERG.COM, May 31, 2012, <http://www.bloomberg.com/news/2012-05-31/how-financial-regulation-can-be-market-friendly.html> (stating that 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.").

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 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.

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**(C) THE LIBERAL-LEANING JUSTICES VOTED CONSISTENTLY IN FAVOR OF BUSINESS INTERESTS**

Business interests generated fifty out of fifty-two potential votes in the six decided cases as of June 1, 2012.<sup>218</sup> If the two pending Employment Law cases come out as predicted the final vote tally will be sixty-two votes favor of business interests to eight against.<sup>219</sup> Even with the five Conservative-leaning Justices voting in favor of business interests in all six decided cases (minus one vote for Justice Alito's dissent in *Golan*), twenty-two out of a potential twenty-four Liberal-leaning votes were required to get to the total of fifty. In fact, in four of the six decided cases, the Liberal-leaning Justices voted unanimously or one vote shy of unison with the Conservative-leaning Justices. The only real contested cases of the bunch are likely to be the two undecided employment law cases, *Christopher* and *Knox* (with *Christopher* likely to garner 2 liberal-leaning votes and *Knox* likely to garner four liberal-leaning votes).

It is important to note that these were not they 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 chart shows how often each Liberal-leaning Justice voted with the conservative majority over the 2011-2012 term.

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**CHART XII – LIBERAL-LEANING JUSTICES SIDING WITH THE CONSERVATIVE MAJORITY<sup>220</sup>**

CASE	GINSBURG	BREYER	SOTOMAYOR	KAGAN
<i>Golan</i>	IN CONSERVATIVE MAJORITY	DISSENT	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY
<i>Caraco</i>	IN CONSERVATIVE	IN CONSERVATIVE	IN CONSERVATIVE	IN CONSERVATIVE

<sup>218</sup> Bear in mind that Chief Justice Roberts and Justice Kagan each recused in one business impact case this term.

<sup>219</sup> The Intellectual Property cases came out fifteen to two in favor of business interests. The one Employment Law case decided by June 1, 2012 came out nine to zero in favor of business interests. The two pending cases are predicted to be decided seven to two (for *Christopher*) and five to four (for *Knox*). The Consumer Protection cases came out nine to zero and eight to one in favor of business interests. The lone Securities Regulation case came out eight to zero with the four to four split on timing.

<sup>220</sup> Consolidated cases are combined into one row in this chart.

	MAJORITY	MAJORITY	MAJORITY	MAJORITY
<i>Hosanna</i>	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY
<i>Christopher</i>	IN CONSERVATIVE MAJORITY (PREDICTED)	IN CONSERVATIVE MAJORITY (PREDICTED)	DISSENT (PREDICTED)	DISSENT (PREDICTED)
<i>Knox</i>	DISSENT (PREDICTED)	DISSENT (PREDICTED)	DISSENT (PREDICTED)	DISSENT (PREDICTED)
<i>Greenwood</i>	DISSENT	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY
<i>Freeman</i>	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY
<i>Credit Suisse</i>	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY	IN CONSERVATIVE MAJORITY

The *Golan* case provided the only strange ideological split in the group of business impact cases. Two liberal-leaning Justices disagreed upon the outcome with Justice Ginsburg authoring the majority<sup>221</sup> and Justice Breyer authoring the dissent.<sup>222</sup> Four of the five conservative-leaning justices joined Justice Ginsburg’s majority opinion while Justice Alito joined Justice Breyer in dissent. This outcome was somewhat predictable because the case involved a very odd set of facts, a century long gap between the intellectual property convention’s creation and the United States joining, and other various international issues.

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#### (D) CONSTITUTIONAL AMENDMENTS & STATUTES WERE EXPANDED AND NARROWED

The business impact cases showed no consistent pattern when it came to the narrowing or expansion of 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 at his confirmation hearing before the Senate Judiciary Committee when he testified, “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>223</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

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<sup>221</sup> *Golan*, *supra* note 65, at 877.

<sup>222</sup> *Id.* at 890

<sup>223</sup> Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing on S. 109-158 Before the S. Comm. on the Judiciary, 109th Cong. 66 (2005) (statement of Hon. John G. Roberts, Jr., United States Supreme Court Justice).

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>224</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.

## (I) 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. 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>225</sup> The Court found unpersuasive the employee’s argument that this type of ruling would allow rampant discrimination by religious employers. 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 fact finder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church’s overall mission.<sup>226</sup>

In *Knox*, the Court is likely to expand an employee’s First Amendment right not to speak. If the votes come out as predicted, the Court will narrowly hold that the First Amendment prohibits unions forcing members to contribute to political campaigns without proper notice and a right to object. In the end, the Court may accept 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>227</sup> If so, this holding will continue the constitutional expansion of the First Amendment via the 2011-2012 term.

The Court also expanded the scope of the Copyright and Patent Clauses in *Golan* by stating, “Neither 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>228</sup> The Court could have held that 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

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<sup>224</sup> See Justice David Souter, Address at the Commencement Ceremonies of Harvard University (May 27, 2010), available at <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

<sup>225</sup> *Hosanna-Tabor*, *supra* note 83, at 716.

<sup>226</sup> *Id.* at 673-74.

<sup>227</sup> Ross Runkel, *When Union Fees Go Up, Must a “Hudson notice” Go Out?*, WWW.SCOTUSBLOG.COM, Jan. 5, 2012, <http://www.scotusblog.com/?p=135860>.

<sup>228</sup> 132 S. Ct. 873, 878 (2012).

copyrighted for the purpose of complying with an international convention. Or, 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>229</sup>

## (II) 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. The Court claimed that this expansive interpretation furthers a Congressional desire to speed generic drugs to market. 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>230</sup>

The majority in *CompuCredit* expanded the scope of CROA. 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. This opinion also expanded the Federal Arbitration Act to incorporate cases where a plaintiff has a statutory right to sue. 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.

The majority is likely to expand the Fair Labor Standards Act and its Outside Salesperson exemption in *Christopher*. The Court is predicted to hold that pharmaceutical sales representatives who act primarily outside the office and make enough money in incentive-based pay to compensate for being denied overtime. A narrower interpretation of the exemption would find 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. The most these representatives can do is propose new drugs to doctors in hopes that the doctors prescribe the drugs to their patients. As discussed above, this appears unlikely.

## (I) STATUTORY NARROWING

The majority in *Freeman* narrowed the scope of RESPA. The Court held that the statutory language prohibited only actual fee splitting between two or more entities. This holding limits the number of lawsuits that can be filed under RESPA and allows lenders to charge unearned fees as long as they

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<sup>229</sup> *Id.* at 912 (Breyer, J. dissenting).

<sup>230</sup> *Caraco*, *supra* note 48, at 1682.

keep them. A more expansive interpretation of the statutory language would have barred this practice as well 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. 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. 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. As detailed in Part VI, 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.

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## VIII. CONCLUSIONS

The impact of the 2011-2012 Supreme Court term will prove far bigger than the health care arguments and Arizona's controversial immigration case. Although those cases garnered the majority of national media attention, other cases proved to be just as extraordinary, precedential and worthy of attention. The eight business impact cases demonstrate this conclusion. The Term 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. 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 revolve 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 to join Justice Breyer in dissent but the conservative majority held and is likely to hold in the two undecided cases. Furthermore, only one business impact case is predicted to result in an ideological five to four split. 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. It is also 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. Or, this term may provide a pivot point at 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.



# APPENDIX ONE

**CHART XIII – THE SUPREME COURT’S 2011-2012 TERM & A BUSINESS IMPACT RUBRIC<sup>231</sup>**

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 / STATUTORY PROVISION
(1) <i>Douglas</i> <sup>232</sup>	Constitutional Law   Taxes, Entitlement Programs & Government Spending	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>233</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 Issues: 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 Issues: 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)
(4) <i>Howes</i>	Criminal Law   Social Issues: 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 Issues: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Abandonment of counsel cause 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>234</sup>	<input checked="" type="checkbox"/> Membership requirements in an International Intellectual Property Treaty	<input checked="" type="checkbox"/> Copyright Clause   Uruguay Round Agreements

<sup>231</sup> Consolidated cases are combined into one row in this chart.

<sup>232</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 132 S. Ct. 1204, fn\* (2012).

<sup>233</sup> Two business-related groups filed friend of the court 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 SCOTUSBLOG, *Douglas v. Independent Living Center of Southern California*, WWW.SCOTUSBLOG.COM, <http://www.scotusblog.com/case-files/cases/maxwell-jolly-v-independent-living-center-of-southern-california/> (last visited May 25, 2012).

<sup>234</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 *Case Pages*, *supra* note 233, at <http://www.scotusblog.com/case-files/cases/golan-v-holder/> (last visited May 25, 2012).



(7) <i>Hosanna</i>	Employment Law   Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>235</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
(8) <i>Greene</i>	Criminal Law   Social Issues: 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>236</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
(12) <i>Florence</i>	Criminal Law   Social Issues: 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>Missouri</i> <sup>237</sup>	Criminal Law   Social Issues: 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 Issues: 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 Issues: 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>Minnecci</i>	Criminal Law   Social Issues: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Adequate state law remedies for injured inmate	<input type="checkbox"/> Eight Amendment (Cruel/Unusual Punishment)

<sup>235</sup> One business-related group filed a friend of the court brief in this case: (1) the National Employment Lawyers Association. See *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc/> (last visited May 25, 2012).

<sup>236</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 *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/compucredit-corp-v-greenwood/> (last visited May 25, 2012).

<sup>237</sup> *Missouri v. Frye* was declared to be a companion case by the Supreme Court with *Lafler v. Cooper*. See 132 S. Ct. 1399, 1412 (2012) (Scalia, J. dissenting).

(17) <i>Gonzales</i>	Civil Procedure   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
(18) <i>Perry v. N.H.</i>	Criminal Law   Social Issues: 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 Issues: 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 Issues: Balance between Civil Liberties & 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)
(23) <i>Nat'l Meat Assn.</i>	Administrative Law   Constitutional Provisions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>238</sup>	<input type="checkbox"/> Food safety relating to disposal of non-ambulatory pigs	<input type="checkbox"/> Supremacy Clause (Conflict of state & federal food safety laws)   Fed. Meat Inspection Act
(24) <i>Kurns</i>	Administrative Law   Constitutional Provisions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>239</sup>	<input type="checkbox"/> Federal railroad safety law preempting employee tort claim	<input type="checkbox"/> Supremacy Clause (Conflict of state & federal railroad safety laws)   Locomotive Inspection Act
(25) <i>Mims</i>	Civil Procedure   Justice	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>240</sup>	<input type="checkbox"/> State court jurisdiction not exclusive in cases under this statute	<input checked="" type="checkbox"/> Telephone Consumer Protection Act

<sup>238</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 *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/national-meat-association-v-brown/> (last visited May 25, 2012).

<sup>239</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 of the United States, and (8) the National Association of Retired and Veteran Railway Employees. See *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/kurns-v-railroad-friction-products-corp/> (last visited May 25, 2012).

<sup>240</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 *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/mims-v-arrow-financial-services-llc/> (last visited May 25, 2012).

(26) <i>First Am. Fin.</i>	Consumer Protection   Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>241</sup>	<input type="checkbox"/> Standing to sue real estate settlement service providers	<input checked="" type="checkbox"/> Article III   Real Estate Settlement Procedures Act (RESPA)
(27) <i>Hall</i>	Bankruptcy   The Economy	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input 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)
(28) <i>Credit Suisse</i>	Securities Law   Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>242</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 Issues: 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 Issues: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Reasonableness of warrant & police officer immunity	<input type="checkbox"/> Fourth Amendment (Search & Seizure)
(32) <i>Caraco</i>	Intellectual Property   Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>243</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 Issues: 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 Issues: 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>241</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 Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/first-american-financial-corp-v-edwards/> (last visited May 25, 2012).

<sup>242</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 Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/credit-suisse-securities-v-simmonds/> (last visited May 25, 2012).

<sup>243</sup> Six business-related groups filed friend of the court briefs in this case: (1) Mylan Pharmaceuticals Inc., (2) the Generic Pharmaceutical Association Brief for Allergan, Inc. et al., (3) the Pharmaceutical Research and Manufacturers of America, (4) TEVA Pharmaceuticals USA, Inc. (5) the Consumer Federation of America et al. and (6) Apotex, Inc. *See Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/caraco-pharmaceutical-laboratories-ltd-v-novonordisk-as/> (last visited May 25, 2012).

(35) <i>Mayo</i>	Intellectual Property   Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>244</sup>	<input type="checkbox"/> Patent challenge for a method of use in conflict with a law of nature	<input checked="" type="checkbox"/> Patent Clause
(36) <i>PPL Montana</i>	Constitutional Law   Constitutional Provisions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>245</sup>	<input type="checkbox"/> Ownership of riverbeds flowing through Montana	<input type="checkbox"/> Equal Footing Doctrine
(37) <i>Perry v. Perez</i> <sup>246</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
(38) <i>Sackett</i>	Environmental Law   Social Issues: Environment & Property Rights	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>247</sup>	<input type="checkbox"/> EPA Administrative Compliance Order targeting privately-owned land	<input type="checkbox"/> Administrative Procedure Act   Clean Water Act
(39) <i>Kappos</i>	Evidence   Justice	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>248</sup>	<input type="checkbox"/> New evidence introduced at patent denial hearing in court	<input checked="" type="checkbox"/> Patent Act of 1952   Federal Rules of Civil Procedure   Federal Rules of Evidence
(40) <i>Fox</i>	First Amendment   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>244</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 *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/mayo-collaborative-services-v-prometheus-laboratories-inc/> (last visited May 25, 2012).

<sup>245</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 *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/ppl-montana-llc-v-montana/> (last visited May 25, 2012).

<sup>246</sup> *Perry v. Perez* and *Perry v. Davis* were consolidated into and with *Perry v. Perez*. See 132 S. Ct. 934, 934 (2012).

<sup>247</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 *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/sackett-et-vir-v-environmental-protection-agency-et-al/> (last visited May 25, 2012).

<sup>248</sup> Three 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 *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/kappos-v-hyatt/> (last visited May 25, 2012).

(41) <i>Knox</i>	Public Employment   Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>249</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>250</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)
(45) <i>Filarsky</i>	Government Law   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>251</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>Varteles</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   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>252</sup>	<input checked="" type="checkbox"/> Real estate mortgage settlement process, unearned fees & kickbacks	<input checked="" type="checkbox"/> Real Estate Settlement Procedures Act

<sup>249</sup> One business-related group filed a friend of the court brief in this case: (1) the American Federation of Labor and the Congress of Industrial Organizations. See *Case Pages*, *supra* note 233, at <http://www.scotusblog.com/case-files/cases/knox-v-service-employees-intl-union-local-1000/> (last visited May 25, 2012).

<sup>250</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 *Case Pages*, *supra* note 233, at <http://www.scotusblog.com/case-files/cases/united-states-v-home-concrete-supply-llc/> (last visited May 25, 2012).

<sup>251</sup> *Holder v. Gutierrez* was consolidated with and into *Holder v. Sawyers*, 2012 U.S. LEXIS 3783, at \*1.

<sup>252</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 *Case Pages*, *supra* note 233, at <http://www.scotusblog.com/case-files/cases/tammy-foret-freeman-et-al-v-quicken-loans-inc/> (last visited May 25, 2012).

(50) <i>Alvarez</i>	First Amendment   Constitutional Amendments	<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 Issues: Crime	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Acquittals on capital charges but mistrial on lesser charges and bars on new trials under Double Jeopardy	<input type="checkbox"/> Fifth Amendment (Double Jeopardy Clause)
(52) <i>Elgin</i>	Civil Procedure   Justice	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> Claims for equitable relief brought by federal employees	<input checked="" type="checkbox"/> Civil Service Reform Act
(53) <i>Wood</i>	Civil Procedure   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
(54) <i>Mohamad</i>	Military Law   Military Intervention & Terrorism	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>253</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 Issues: 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
(58) <i>Miller &amp; Jackson</i> <sup>254</sup>	Criminal Law   Social Issues: 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 Issues: 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)

<sup>253</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 *Case Pages*, *supra* note 233, at <http://www.scotusblog.com/case-files/cases/mohamad-v-rajoub/> (last visited May 25, 2012).

<sup>254</sup> The Court linked *Miller v. Alabama* with *Jackson v. Hobbes* for the 2011-2012 term. See 132 S. Ct. 538 (2011) (granting certiorari in *Jackson v. Hobbes* and stating that Jackson “is to be argued in tandem with No. 10-9646, *Miller v. Alabama*.”).

(60) <i>Vasquez</i>	Civil Procedure   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
(61)-(63) <i>Affordable Care Act Cases</i> <sup>255</sup>	Health Care Law   Social Issues: Health Care	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>256</sup>	<input 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
(64) <i>Christopher</i>	Employment Law   Business & Employment Arena	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>257</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>258</sup>	Criminal Law   Social Issues: 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

<sup>255</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 132 S. Ct. 618 (2012) (divvying up oral argument time into four separate arguments and stating:

Upon consideration of the motion pertaining to the allocation of oral argument time, the following allocation of 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>256</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, INC 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, (8) the Chamber of Commerce of the United States of America. See *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/u-s-department-of-health-and-human-services-v-florida/> (last visited May 25, 2012).

<sup>257</sup> Six 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 Chamber of Commerce, (5) the National Federation of Independent Business, and (6) the Pharmaceutical Research and Manufacturers of America. See *Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/christopher-v-smithkline-beecham-corp/> (last visited May 25, 2012).

<sup>258</sup> *Dorsey v. United States* was consolidated with *Hill v. United States*. See 132 S. Ct. 759 (2012) (consolidating the two cases).

(66) <i>Ramah Navajo Chapter</i>	Native America & Tribal Law   Global Trade & International Relations	<input type="checkbox"/>	<input checked="" type="checkbox"/> <sup>259</sup>	<input type="checkbox"/> Statutory caps on appropriations to tribal contractors	<input type="checkbox"/> Indian Self-Determination & Education Assistance Act
(67) <i>RadLAX</i>	Bankruptcy Law   The Economy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>260</sup>	<input checked="" type="checkbox"/> National credit & lending markets	<input type="checkbox"/> U.S. Bankruptcy Code (Chapter 11 reorganization)
(68) <i>Match-E-Be-Nash-She-Wish &amp; Patchak</i> <sup>261</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 Self-Determination and Education Assistance Act   Quiet Title Act
(69) <i>Arizona</i>	Constitutional Law   Constitutional Provisions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <sup>262</sup>	<input type="checkbox"/> Preemption of state immigration enforcement laws	<input type="checkbox"/> Supremacy Clause (Conflict between state & federal immigration laws)

<sup>259</sup> One business-related group filed a friend of the court brief in this case: (1) a combined brief filed for the Chamber of Commerce of the United States and the National Defense Industrial Association. *See Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/salazar-v-ramah-navajo-chapter/> (last visited May 25, 2012).

<sup>260</sup> One business-related group filed a friend of the court brief in this case: (1) the Loan Syndications and Trading Association et al. *See Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/radlax-gateway-hotel-llc-v-amalgamated-bank/> (last visited May 25, 2011).

<sup>261</sup> *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* was consolidated by the Court with *Salazar v. Patchak*. *See* 132 S. Ct. 845 (2012).

<sup>262</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 Case Pages, supra* note 233, at <http://www.scotusblog.com/case-files/cases/arizona-v-united-states/> (last visited May 25, 2012).