

Looking Ahead: October Term 2010

*Erik S. Jaffe**

It will hardly come as news that the most interesting aspect of the coming October Term 2010 will be the presence of a new justice on the bench: former Solicitor General Elena Kagan, replacing Justice John Paul Stevens. Confirmed on August 5, 2010, by a vote of 63–37, she will be the only sitting justice to arrive at the Court without any prior judicial experience. While opinions are divided on whether her different career path to the Court is a plus or a minus, nobody seriously questions her general abilities or that she will quickly gain ample on-the-job judicial experience.

Given Justice Kagan’s clerkships for Judge Abner Mikva and Justice Thurgood Marshall, her appointment by President Obama, and what can be gleaned from her career to this point, most people reasonably assume that she will lean toward the left of the Court. But her addition to the Court is unlikely to cause a meaningful short-term change in outcome on the issues that tend to divide the Court along “political” lines given that she replaces a reliable vote on the left. She could, however, add an interesting perspective on a variety of less political issues. Indeed, her lack of judicial experience might allow her to take a fresh look at any number of questions while she evolves her own jurisprudence. Court watchers thus may find more of interest in Justice Kagan’s overall approach to deciding cases than in the particular substantive decisions she makes. Of course, the early terms of any new justice involve a steep learning curve, so we should not be too quick to leap to conclusions based on her conduct during this one. It nonetheless will be difficult to resist the temptations and pleasures of trying to read the tea leaves of Justice Kagan’s first year on the Court, and the cases granted thus far should provide us sufficient opportunity to engage in such sport.

* Solo appellate attorney, Erik S. Jaffe, P.C., Washington, D.C.

Turning to the substance of the upcoming term, while it is hardly shaping up as a blockbuster, it nonetheless has a number interesting cases—six of the ten discussed below coming from the Ninth Circuit Court of Appeals—in areas ranging from preemption, to the First Amendment, to copyright law.¹

Preemption

The amount of leeway remaining to the states to regulate in areas partially occupied by federal law is at issue in several cases this term. While none is likely to break significant jurisprudential ground for preemption in general, each case is important within its own specific substantive area.

In *Williamson v. Mazda Motor of America*, the Court will consider whether federal safety standards regarding the type and placement of seatbelts in automobiles preempts a common-law claim of negligence for failing to exceed those federal safety standards.² The case involves the use of a lap-only seatbelt rather than a combination lap/shoulder belt in a rear aisle seat of a minivan. The use of a lap-only belt at that position is permissible under federal safety standards, though it is less safe for the passenger than a combination lap/shoulder belt. A passenger sitting in the aisle seat with a lap-only belt died following an accident when her body “jackknifed” around the lap-belt, causing internal injuries.

The California Court of Appeal, Fourth Appellate District, held that the state-law claim was preempted.³ The California Supreme Court denied review. In finding the negligence claim preempted, the court of appeal relied on the U.S. Supreme Court’s decision in *Geier v. American Honda Company, Inc.*, which held that federal safety standards giving car manufacturers a choice regarding front-seat passive restraints preempted state tort suits for the failure to choose airbags rather than passive seat belts.⁴ Petitioners argue that the more relevant precedent is *Sprietsma v. Mercury Marine*, which held

¹ The discussions of the cases below are based on the petitions and other filings in those cases. Those materials are expertly collected and available on SCOTUSblog, organized by term and case.

² *Williamson v. Mazda Motor of Am., Inc.*, 130 S. Ct. 3348 (2010) (No. 08-1314).

³ *Williamson v. Mazda Motor of Am., Inc.*, 167 Cal. App. 4th 905, 905–07 (Cal. Ct. App. 4th Dist. 2008).

⁴ See *id.* at 907 (citing *Geier v. Am. Honda Co.*, 529 U.S. 861, 870–72 (2000)).

that a federal agency's decision not to mandate a particular safety device does not preempt suits based on the failure to use such a device unless it reflects a federal policy *against* using such a device.⁵

In this case, petitioners seem to have the better of the argument. The applicable federal statute expressly provides that compliance with a motor vehicle safety standard does not exempt a person from liability at common law.⁶ The mere existence of several options for satisfying a federal safety standard hardly conflicts with state-law duties that might require the safer of the available options. That is the very nature of a minimum standard: the fact that it is possible to *exceed* the minimum. While the same savings provision also applied in *Geier*, the historical circumstances and agency concerns favoring a slower phase-in of airbags were quite different from the circumstances and concerns that led the agency to allow the option of lap-only belts at inboard seating positions. Indeed, as noted by the solicitor general in response to an invitation by the Court, the agency that promulgated both safety standards—the National Highway Traffic Safety Administration—agrees with the petitioners that its lap-belt standard does not preempt state-law negligence suits. The solicitor general's brief further agreed with petitioners that the lower courts were reading *Geier* in an overly broad fashion.

Given that then-Solicitor General Kagan was counsel of record on the government's amicus brief at the certiorari stage, Justice Kagan will recuse herself from this case.

The Court will also consider preemption in the context of federal immigration law in *Chamber of Commerce v. Candelaria*, which involves an Arizona statute regulating how employers verify a prospective employee's work-authorization status and imposing penalties on employers who hire unauthorized aliens.⁷ While not quite as controversial or high-profile as the direct clash between Arizona and the federal government over state police questioning and potential arrest of suspected illegal aliens in *United States v. Arizona*,⁸ the

⁵ See Petitioners' Brief at 43–44, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314 (U.S. July 30, 2010) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 61–68 (2002)).

⁶ 49 U.S.C. § 30103(e) (2006).

⁷ *Chamber of Commerce of the United States v. Candelaria*, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115).

⁸ *United States v. Arizona*, No. CV 10-1413-PHX-SRB, 2010 WL 2926157 (D. Ariz. July 28, 2010) (order granting preliminary injunction).

issues in this case could certainly influence the trailing case should it reach the Court later this or next term.

The Arizona statute at issue in *Chamber of Commerce* requires employers to use a computerized federal system (the so-called E-Verify system) to check the work-authorization status of prospective employees and imposes penalties—including the potential revocation of a company’s articles of incorporation—on employers that hire unauthorized aliens.⁹ Federal law, however, makes the use of the E-Verify system optional and expressly preempts state or local laws imposing civil or criminal sanctions “other than through licensing and similar laws” on those who hire unauthorized aliens.¹⁰

The Ninth Circuit held that the Arizona law was not preempted.¹¹ The court relied on an earlier Supreme Court case finding no preemption of state law prior to the enactment of the current federal statute governing employment of unauthorized aliens.¹² It also held that the penalties imposed on employers who hire illegal aliens fell within the current statute’s savings clause for penalties imposed through “licensing” laws.¹³

The case has drawn considerable interest from groups spanning the political spectrum. At the invitation of the Court, the solicitor general filed a brief supporting certiorari only for the employer-penalties issue. The brief agreed with petitioners that both aspects of the law were preempted but argued that the E-Verify system was subject to change and hence that issue was not yet appropriate for review.¹⁴ The Court, however, granted certiorari on both aspects of the Arizona law. Although the amicus brief was filed under Acting Solicitor General Neal Katyal’s name, it is possible that then-Solicitor General Kagan had some involvement in the case before her nomination to the Supreme Court. It is thus unclear at this point whether Justice Kagan will recuse herself.

⁹ Arizona Workers Act, Ariz. Rev. Stat. § 23.211–216 (2009).

¹⁰ 8 U.S.C. §§ 1324a notes, 1324a(h)(2) (2006).

¹¹ *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008), reh’g denied, 558 F.3d 856 (9th Cir. 2009) (amending and superseding initial opinion).

¹² *Chicanos Por La Causa*, 558 F.3d at 864–67 (citing *De Canas v. Bica*, 424 U.S. 351, 355–65 (1976)).

¹³ *Id.* at 868–69.

¹⁴ See Brief for the United States as Amicus Curiae at 9–21, *Chamber of Commerce of the United States v. Candelaria*, No. 09-115 (U.S. May 28, 2010).

The petitioners seem to have the better argument in this case as well, though it is a close call on both the E-Verify and employer-sanctions issues. Congress set up E-Verify as a pilot program and seems intentionally to have made participation voluntary while the federal government works through any potential issues with that system. The option given to employers here thus seems much closer to the intentionally phased transition to passive restraints in *Geier* than does the minimum seatbelt standard at issue in *Williamson*, discussed above. On the other hand, the solicitor general's tepid approach to this issue—and the government's prior inconsistent position regarding Arizona's E-Verify requirement in a suit involving a similar requirement imposed by a federal agency¹⁵—tend to undermine any claim that Arizona's requirement conflicts with a federal interest in *not* making the use of E-Verify mandatory.

The penalties imposed on employers who hire unauthorized aliens also are a close question given that an express exception to the statute's preemption clause allows states to penalize such conduct through licensing and other similar laws.¹⁶ While it seems a stretch to call the Arizona statute here a licensing law—and an overly broad reading of the preemption exception could swallow the general rule—the very existence of the exception for at least some type of penalty tends to undercut the argument for sweeping preemption. The difficulty will be in drawing a coherent line between permissible and impermissible penalties, and it is hard to predict how the Court will draw that line.

Veteran Supreme Court litigator Carter Phillips is counsel of record for the Chamber of Commerce, along with a host of co-counsel, including Steven Shapiro of the ACLU, on behalf of the other petitioners.

Arbitration

In yet another preemption case, though in a category worthy of its own heading, the Federal Arbitration Act makes another of its frequent appearances at the Court in *AT&T Mobility v. Concepcion*.¹⁷

¹⁵ See Stewart Baker, The Solicitor General Lays an Egg, <http://volokh.com/2010/05/29/the-solicitor-general-lays-an-egg> (last visited Aug. 13, 2010).

¹⁶ 8 U.S.C. § 1324a(h)(2) (2006).

¹⁷ *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-893).

The Court will consider whether the FAA precludes states from forbidding class-arbitration waivers as unconscionable components of arbitration agreements.

Notwithstanding the FAA's mandate that arbitration agreements are valid and enforceable, arbitration agreements may be invalidated or rendered unenforceable on such grounds as are applicable to the revocation of "any contract."¹⁸ California case law makes agreements to arbitrate (or to litigate) certain types of consumer claims unenforceable unless they permit class-wide arbitration.¹⁹ The Ninth Circuit held that an agreement requiring individual arbitration in the consumer context was unconscionable under such precedent favoring class actions.²⁰ The court further held that there was no preemption because the rule also applied to agreements to litigate and would not decrease the efficiency or speed of arbitration in general.²¹

The narrow though important legal issue presented by this case is whether the fact that state law also forbids class-litigation waivers, in addition to class-arbitration waivers, renders the ground for unenforceability one that applies to "any contract." If the Ninth Circuit is correct, states would seemingly be free to impose all manner of litigation procedures on arbitration on the theory that such procedures were equally non-waivable in litigation agreements.

But as the petitioner correctly notes, class-wide arbitration is very risky given the broad consequences and limited judicial review of a class-wide arbitration ruling.²² Many arbitration agreements, therefore, require that arbitration be conducted on an individual basis. As a matter of both the text and policy of the FAA, the petitioner seems to have the better argument that a policy-based restriction specific to dispute resolution agreements does not constitute grounds for unenforceability of "any" contract and that requiring arbitration to use the same procedures as litigation contravenes core FAA policies. Far from involving a mere application of general

¹⁸ 9 U.S.C. § 2 (2006).

¹⁹ See, e.g., *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005); *Shroyer v. New Cingular Wireless Services*, 498 F.3d 976, 981–84 (9th Cir. 2007) (applying *Discover Bank*).

²⁰ See *Laster v. AT&T Mobility LLC*, 584 F.3d. 849, 852 (9th Cir. 2009).

²¹ *Id.* at 857–58 (quoting *Shroyer*, 498 F.3d at 989–91).

²² See Brief for Petitioner at 21–23, *AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S. Aug. 2, 2010).

unconscionability rules, the particulars of the case suggest that the arbitration agreement was anything but unconscionable, and in fact may have been more favorable to individual consumers even if it provided less of a potential deterrent to the company.²³ Coupled with the Supreme Court's recent decision in *Stolt-Nielsen v. Animal Feeds Int'l*, which forbade arbitrators from imposing class arbitration where the agreement is silent on the subject, it should not require any heavy lifting to find preemption.²⁴ However, the empathetic lure of class-action remedies for consumers—combined with the 5–3 decision in *Stolt-Nielsen*²⁵—might well result in a 5–4 split along the usual lines.

Veteran Supreme Court litigator Ken Geller is counsel of record for the petitioner. Public Citizen Litigation Group takes the laboring oar for the respondents.

ERISA

In *CIGNA Corporation v. Amara*, the Court will consider whether the terms of an Employee Retirement Income Security Act—required summary plan description (“SPD”) or summary of material modifications (“SMM”) can trump the terms of the actual ERISA plan.²⁶ The Second Circuit summarily affirmed the district court, which held that an inconsistent SPD or SMM will be deemed to modify the actual ERISA plan if a participant can demonstrate some “likely harm” to the class of plan beneficiaries even absent any individual showing of reliance, prejudice, or actual harm.²⁷ The district court went on to hold that a deficient SMM and SPD—regarding a conversion from a traditional defined benefit plan to a “cash balance” plan—required modification of the new plan to provide substantially greater benefits and preserved at least a part of the prior benefits.²⁸

²³ See *Laster v. AT&T*, 584 F.3d at 853 (“Under this clause, AT&T will pay a customer \$7,500 if the arbitrator issues an award in favor of a California customer that is greater than AT&T’s last written settlement offer made before the arbitrator was selected.”).

²⁴ *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. ____, 130 S. Ct. 1758, 1775 (2010).

²⁵ Justice Sotomayor did not participate in the case.

²⁶ *CIGNA Corp. v. Amara*, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-804).

²⁷ *Amara v. CIGNA Corp.*, 348 F. App’x 627 (2d Cir. 2009) (unpub.) (affirming 559 F. Supp.2d 192 (D. Conn. 2008) and 534 F. Supp.2d 288 (D. Conn. 2008)).

²⁸ *Amara*, 559 F. Supp.2d at 210–14.

The Second Circuit's holding takes a middle ground between six circuits that require a showing of reliance or prejudice before a deficient SMM or SPD can lead to modification of an ERISA plan and three circuits that require no showing of harm at all.²⁹

While the legal issue itself is rather technical and lacks much jurisprudential interest, the consequences of the case are of considerable importance to employers and employees both. As the petitioner notes, the issue of when allegedly deficient SPDs can alter ERISA plans arises often and, for national companies with employees in multiple circuits, the inconsistent standards can be administratively burdensome.³⁰ As a practical matter, multi-circuit companies would likely be forced to accommodate the standard most favorable to plaintiffs—no requirement of prejudice or harm at all—given that such standard could apply to at least a portion of their employees or even all of them via a class action filed in a favorable circuit. The potentially high cost of unintended plan modifications based on allegedly flawed SPDs could have significant effects on the decisions of companies to adopt or retain ERISA plans, as well as on the potential solvency of existing plans.

Before granting certiorari, the Court called for the views of the solicitor general. Per Acting Solicitor General Katyal, the government recommended denying review, agreed with the standard applied below, and noted that the specific issue in the case regarding conversion to cash balance plans has been addressed by statute such that the remedy ordered by the district court is now the required method of calculating benefits for such conversions.³¹ It is not currently clear whether then-Solicitor General Kagan had any involvement in this case or the government's amicus brief sufficient to trigger her recusal.

Apart from the specifics of cash balance plans, the broader issue of when SPDs or SMMs can modify an ERISA plan remains significant. Given the absurdity of awarding plan participants windfall benefits

²⁹ Petition for a Writ of Certiorari at 12–17, *CIGNA Corp. v. Amara*, No. 09-804 (U.S. Jan. 4, 2010) (discussing cases from the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits, which require a showing of reliance or prejudice, and cases from the Third, Fifth, and Sixth Circuits, which do not require a showing of harm).

³⁰ *Id.* at 11.

³¹ Brief for the United States as Amicus Curiae at 10, *Amara v. CIGNA Corp.* and *CIGNA Corp. v. Amara*, Nos. 09-784 & 09-804 (U.S. May 27, 2010).

where they neither relied upon nor were prejudiced by the supposedly deficient summaries, and given that then-Judge Stephen Breyer was the author of an early First Circuit decision staking out the majority position requiring reliance or prejudice,³² it seems more likely that the Supreme Court will endorse the majority view and require some showing of reliance or prejudice.

Veteran Supreme Court litigator and former Solicitor General Ted Olson is counsel of record for the petitioners.

Copyright

In *Costco v. Omega*, the Court will consider whether copyright law's "first-sale" doctrine applies to imported goods manufactured abroad.³³ Under that doctrine, embodied in 17 U.S.C. § 109(a), the owner of a copy "lawfully made under this title" may resell that copy without the permission of the copyright holder. The Copyright Act, however, also contains a provision, 17 U.S.C. § 602(a)(1), relating directly to importation of goods into the United States, which provides that absent authority of the copyright owner, importation of copies acquired outside the United States infringes the exclusive right to distribute copies under § 106. The Supreme Court in *Quality King Distributors v. L'Anza Research*, held the first-sale doctrine applicable to copies manufactured in the United States, sold abroad, and then re-imported, notwithstanding § 602(a)(1).³⁴

The Ninth Circuit in this case, however, held that the first-sale doctrine did not apply to goods originally manufactured abroad, first sold abroad, and then imported into the United States for resale.³⁵ The court distinguished *Quality King* based on a brief solo concurrence by Justice Ruth Bader Ginsburg in that case suggesting that the treatment of foreign-manufactured goods under the first-sale doctrine remained an open question.³⁶ The court then applied its own earlier precedent to hold that the first-sale doctrine did not apply to goods manufactured abroad, that a contrary ruling would render

³² *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am.*, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J.).

³³ *Costco Wholesale Corp. v. Omega S.A.*, 130 S. Ct. 2089 (2010) (No. 08-1423).

³⁴ *Quality King Distributors, Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 145 (1998).

³⁵ *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d. 982, 988-90 (9th Cir. 2008).

³⁶ *Id.* at 989 (quoting *Quality King*, 523 U.S. at 154 (Ginsburg, J., concurring)).

the importation limits in § 602(a)(1) meaningless, and that extending the doctrine to foreign-made copies would constitute extraterritorial application of U.S. copyright laws.³⁷

The issue has significant consequences for manufacturers and distributors of high-end goods that sell for a premium in the United States and for discount resellers who seek to import such goods less expensively from abroad. Such importation is often referred to as the “gray market,” and imports of copyrighted materials constitute tens of billions of dollars of goods per year.³⁸

The case has attracted considerable attention from amici curiae. Then-Solicitor General Kagan signed the amicus brief for the United States recommending that certiorari be denied and arguing that the decision below was consistent with *Quality King*.³⁹ Justice Kagan thus will recuse herself from hearing this case.

At first blush, the stronger argument seems to be that *Quality King* resolves the matter, notwithstanding Justice Ginsburg’s individual reservation of the issue. That the Court granted certiorari notwithstanding the position of the solicitor general also tends to suggest some doubt regarding the decision below. But the question whether the production of copies abroad is a function of the U.S. copyright (making such copies lawfully made under “this title” for purposes of the first-sale doctrine) or instead is a function of foreign copyrights, hence rendering the first-sale doctrine inapplicable, is a more interesting question than might first appear. Dicta in *Quality King* distinguished the category of copies made pursuant to foreign law as not constituting copies lawfully made under this title, and hence not subject to the first-sale doctrine.⁴⁰ That interpretation, however, threatens to eviscerate the first-sale doctrine absent an extra-textual extension of the doctrine to copies lawfully “sold” in the United States under the Copyright Act, in addition to those lawfully “made” under the act. The issue is thus closer than it first seems, with both sides having difficulties in their construction of the Copyright Act.

³⁷ *Id.* at 987–90 (citing *Miller v. Gamme*, 335 F.3d 889, 900 (9th Cir. 2003); *Suba-films, Ltd., v. MGM-Pathé Communications Co.*, 24 F.3d 1088, 1096 (9th Cir. 1994)).

³⁸ Petition for Writ of Certiorari at 20–21, *Costco Wholesale Corp. v. Omega S.A.*, No. 08-1423 (U.S. May 18, 2009).

³⁹ Brief for the United States as Amicus Curiae at 5–8, 17–22, *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (U.S. Mar. 17, 2010).

⁴⁰ See *Quality King*, 523 U.S. at 145 n.14.

Supreme Court veteran Roy Englert is counsel of record for the petitioner, while Michael Kellogg is counsel of record for the respondent.

First Amendment

The Free Speech Clause makes two appearances this term in cases involving violent or offensive speech.

In *Schwarzenegger v. Entertainment Merchants Association*, the Court will consider whether the First Amendment protects the sale of violent videogames to minors.⁴¹ California law prohibits the sale of certain videogames to minors where the violent content of such games appeals to a deviant or morbid interest of the minors, offends community standards as to what is suitable for minors, and lacks serious literary, artistic, scientific, or political value as a whole.⁴² California's effort to equate violence with sex for First Amendment purposes was rejected by the Ninth Circuit, which struck down the law as a violation of the First Amendment.⁴³ The court rejected the state's analogy to sexually explicit materials and rejected application of the more lenient standards for restricting the sale of such materials to minors.⁴⁴ Applying strict scrutiny, the Ninth Circuit held that the state had failed to prove a causal connection between the violent videogames and the harms it sought to avoid and, in any event, the statute was not the least restrictive means of accomplishing the state's goals.⁴⁵

Before the Supreme Court, California seeks the more lenient standards applicable to restrictions on sales of sexually explicit materials to minors and, in the alternative, seeks more lenient treatment even under strict scrutiny of its inferences that violent videogames are harmful to minors.⁴⁶

The expansion of a conceptually questionable line of precedent regarding sexual materials to encompass violent materials merely

⁴¹ *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (2010) (No. 08-1448).

⁴² Cal. Civ. Code §§ 1746–1746.5 (2009).

⁴³ *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009).

⁴⁴ *Id.* at 958–60.

⁴⁵ *Id.* at 964–65.

⁴⁶ See Petitioners' Brief at 7–10, *Schwarzenegger v. Entm't Merchs. Ass'n*, No. 08-1448 (U.S. July 12, 2010).

because the state believes that such speech is harmful is an important question. The notion that speech can be restricted because it leads to disfavored thoughts among minors seems to contradict a core premise of the First Amendment—that it is not the state’s place to dictate or seek to control how people think. Insofar as the law is limited to direct sales to minors, but does not restrict a parent’s ability to purchase the same materials and allow their minor children access, however, it might be viewed as simply facilitating parental control rather than forbidding minor’s access to such speech *per se*. However, to the extent it is a first step in declaring violent speech unprotected at all, and hence allowing the state to substitute its judgment for that of the parents, it constitutes a more meaningful assault on First Amendment principles and is a different matter altogether. That the state claims the right to say when an interest in violence is “deviant” or “morbid” should be troubling to civil libertarians. Similarly, that the state gets to decide the artistic or social value of speech, or to allow local community tastes to dictate the content of speech, is just as troubling here as it is in the context of sexually themed speech.

Furthermore, the state’s desire to minimize its burden of proof under strict scrutiny threatens to weaken the scrutiny of restrictions across a variety of substantive speech areas. Although in some cases the Supreme Court has suggested a degree of deference to the government’s predictive judgments of future events, the Ninth Circuit in this case rejected the state’s claims that violent videogames caused psychological and neurological harm because the evidence presented by the state was entirely based on correlation rather than causation.⁴⁷ The quality of proof required as justification for regulating speech seems to be the more important question contained herein.

It is hard to predict which way the Supreme Court will go on this issue given that the California law is aimed at “protecting” children, who generally get less consideration under the First Amendment. It will be interesting to see how Justice Kagan approaches this case given that the First Amendment is an area in which she has considerable academic background—though her writings do not suggest

⁴⁷ Video Software Dealers Ass’n., 556 F.3d at 964.

how she might view this case other than that she seems to take a generally strong view of the First Amendment.⁴⁸

Supreme Court veteran Paul Smith is counsel of record for the respondents.

The Court will also take up the First Amendment in *Snyder v. Phelps*,⁴⁹ in which the Fourth Circuit held that an offensive anti-gay, anti-Catholic, anti-military protest staged near the funeral of a fallen marine was protected by the First Amendment.⁵⁰ The court of appeals reversed a verdict against the protestors for intentional infliction of emotional distress and invasion of privacy by intrusion upon seclusion.⁵¹ It found that the protests related to matters of public concern and contained only rhetorical hyperbole—rather than assertions of actual facts—that was absolutely protected by the First Amendment under cases such as *Hustler Magazine v. Falwell* and *Milkovich v. Lorain Journal*.⁵²

The petitioner argues that the First Amendment is inapplicable or less protective where the speech is directed at a private, rather than a public, figure; where there is a captive audience attending a funeral; and where the relevant tort is intentional infliction of emotional distress, which, unlike defamation, does not necessarily turn on the presence of false factual assertions.⁵³

Given the sensitive context in which the speech in this case took place, and the broad implications of the rule proposed by the petitioner, it is not surprising that it has attracted the interest of numerous amici. A group of 42 senators filed an amicus brief in support of the petitioner, though, ironically, their brief tends to demonstrate the public and expressive nature of military funerals rather than the purely private nature of such events.⁵⁴ It also spends considerable

⁴⁸ See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996).

⁴⁹ *Snyder v. Phelps*, 130 S. Ct. 1737 (2010) (No. 09-751).

⁵⁰ *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009).

⁵¹ *Id.* at 211, 221.

⁵² *Id.* at 218–22 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)).

⁵³ Brief for Petitioner at 18–21, *Snyder v. Phelps*, No. 09-751 (U.S. May 24, 2010).

⁵⁴ See Brief of Senators Harry Reid, Mitch McConnell, and 40 Other Members of the U.S. Senate as Amici Curiae in Support of Petitioner, *Snyder v. Phelps*, No. 09-751 (U.S. May 28, 2010).

time defending the less restrictive and content-neutral statutory alternatives that limit *any* demonstrations—pro or con—within a defined time and place around a funeral. A brief by the Foundation for Individual Rights in Education and several law professors in support of respondents notes that petitioner’s positions would have severe consequences for free speech on university campuses and that the public/private figure dichotomy makes little sense where the speech is on matters of public concern.⁵⁵

The most interesting legal issue in this case is the delineation of the public/private dichotomy as it relates to private figures entangled—whether willingly or not—in matters of public concern. Unlike wholly private funerals, military funerals tend to be more publicly expressive events. The soldiers’ families, the government, and the press often use such funerals to convey a variety of public messages relating to patriotic service, sacrifice, the painful costs of war, or simply remembrance of a person lost. Regardless whether any individual soldier thereby becomes a public figure under prevailing legal standards, fallen soldiers certainly become public symbols in connection with any number of issues of public concern. Thus, while a soldier’s funeral is an indisputably solemn occasion, and can be protected from *direct* interference no less than any other public or semi-public gathering, it is often a publicly expressive event. As such, the funeral’s favored symbolic meanings for the surviving family, the government, and the public cannot be immunized from any and all counter-speech seeking to give it different symbolic content or purpose. That the family and the government find such counter-speech offensive and even hurtful does not justify ceding control to the family and the government of the public meaning and symbolism of military funerals. While there undoubtedly are content- and viewpoint-neutral time, place, and manner limitations that can maintain the solemnity of the occasion, the intentional infliction of emotional distress tort at issue here is far too content- and viewpoint-discriminatory to pass First Amendment muster. Moreover, the invasion of privacy tort reaches too broadly given that the protestors were in public space a considerable distance from the

⁵⁵ Brief of Amici Curiae the Foundation for Individual Rights in Education and Law Professors Ash Bhagwat, David Post, Martin Redish, Nadine Strossen, and Eugene Volokh, *Snyder v. Phelps*, No. 09-751 (U.S. July 14, 2010).

funeral itself and apparently not in violation of Maryland's statutory time, place, and manner limitations relating to funerals.⁵⁶

Despite how this case ought to come out, it is a bit more difficult to be confident that the Supreme Court will in fact agree. Cases with patriotic overtones can often be difficult notwithstanding fairly clear principles, as the flag-burning case demonstrated.⁵⁷ The case could also put Justice Kagan in a potentially uncomfortable position given the sharp questioning she received about her positions regarding military recruiting while she was dean at Harvard Law School. A vote in favor of the offensive speech and against the deceased soldier's family would no doubt be used by many to bolster their claims that she is anti-military. While I cannot imagine that any such potential criticism would directly influence her decision in this case, it will provide for ample political theater and commentary when the case is argued and decided.

Establishment Clause and Taxpayer Standing

A different clause of the First Amendment is at issue in two consolidated petitions regarding Arizona's tax credit for contributions to various private tuition scholarship funds used to pay for private schooling of Arizona students. In *Arizona Christian School Tuition Organization v. Winn* and *Garriott v. Winn* the Court will consider whether such tax credits violate the Establishment Clause and whether taxpayers have standing to challenge such an alternative to school vouchers.⁵⁸

Unlike voucher programs funded directly by the government, Arizona's program simply provides a tax credit to individuals who contribute to qualified non-profit scholarship funds.⁵⁹ The private scholarship funds are generally free to decide which schools and students are eligible for their scholarships and a fund may limit its scholarships to religious schools if it so chooses. Parents and students

⁵⁶ See *Snyder*, 580 F.3d at 230.

⁵⁷ *Texas v. Johnson*, 491 U.S. 397 (1989).

⁵⁸ *Arizona Christian School Tuition Organization v. Winn*, 130 S. Ct. 3350 (2010) (No. 09-987); *Garriott v. Winn*, 130 S. Ct. 3324 (2010) (No. 09-991). This is the second time this case has been to the Supreme Court. The previous time, in *Hibbs v. Winn*, 542 U.S. 88 (2004), the Supreme Court affirmed a Ninth Circuit holding that the suit was not barred by the Tax Injunction Act, 28 U.S.C. § 1341.

⁵⁹ *Ariz. Rev. Stat. § 43-1089* (2010).

select which private schools to attend and whether to apply for a scholarship. A majority of scholarships from such contributions go to students attending religious schools.⁶⁰

The Ninth Circuit held that taxpayers had standing to challenge the tax credit for contributions to such scholarship funds and reversed the district court's dismissal of the Establishment Clause claim, holding that respondents could bring an as-applied challenge to the tax credit program.⁶¹ Despite the facial neutrality of the statute, the court found that the Arizona program would be a sham and would have the impermissible purpose and effect of advancing religion if the majority of contributions eligible for the tax credit went to funds that selectively awarded scholarships for religious schooling.⁶² The court denied a petition for rehearing en banc over the dissent of eight judges.⁶³

The consolidated petitions granted by the Court ask whether the various layers of private choice by contributors, scholarship funds, students, and parents are sufficient to render Arizona's tax credits religiously neutral for purposes of the Establishment Clause even when those choices tend, perhaps predictably, to favor religious schools. The Supreme Court will also face the question whether taxpayers have standing to challenge a tax credit for such private contributions rather than a direct expenditure of government funds. Unlike government programs that expend government funds already extracted from taxpayers, however, the Arizona program reduces the taxes of those who contribute to qualified funds but does not directly spend tax money already obtained from the citizenry.

The merits of the Establishment Clause claim seem fairly straightforward in that the tax-credit program is neutral on its face and leaves the making of contributions, the terms of the scholarships, and the enrollment in particular schools entirely to private choice. That some of those choices are made by private donors and private scholarship organizations—which choices then affect the available

⁶⁰ See *Winn v. Arizona Christian Sch. Tuition Org.*, 562 F.3d 1002, 1017 (9th Cir. 2009) (at the time of plaintiffs' complaint, over 85 percent of students receiving scholarship money under the program attended religious schools).

⁶¹ *Id.* at 1010–11, 1023.

⁶² *Id.* at 1012–23.

⁶³ *Winn v. Arizona Christian Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009) (opinions on denial of rehearing en banc).

scholarships from which parents and students may choose—would not seem to convert the program into government-directed support for religion for purposes of the Establishment Clause. While this case, like previous voucher cases, will no doubt be contentious, the merits seem to fall easily within the neutrality parameters of those earlier cases.

The standing question, however, is more interesting and more difficult at least at a theoretical level. The essential fungibility of tax credits and direct expenditures from a budget perspective lends a certain appeal to the Ninth Circuit's standing holding. The government's ability to impose conditions on the tax credits—and hence to control to some extent the use to which any contributions are put—strengthens the analogy even though the government cannot guarantee that the tax-credited contributions will be made at all or control the contributions to the same degree as direct expenditures. Petitioners' observation that the net revenue and budgetary effects of the tax credit may be uncertain—given offsetting reductions in public school costs, unknown political responses to potentially reduced tax revenues, and other factors—does little to distinguish the program here from direct expenditures on vouchers, which have similarly uncertain net effects on state budgets, revenues, and hence taxes.⁶⁴ On the other hand, the Court generally has been hostile to taxpayer standing and may be reluctant to extend such standing to situations where the government declines to collect a portion of its potential taxes as opposed to expends taxes already collected from objecting taxpayers.⁶⁵

It will be interesting to see how Justice Kagan deals with both the substantive Establishment Clause question and the jurisprudentially broader standing question, at least the first of which has tended to divide the Court along political lines.

⁶⁴ Petitioner Gale Garriott's Brief on the Merits at 44–45, *Arizona Christian Sch. Tuition Org. v. Winn*, No. 09-991 (U.S. July 30, 2010).

⁶⁵ See *Winn v. Ariz. Christian Sch.*, 562 F.3d at 1008 ("It is well established that individuals do not generally have standing to challenge governmental spending solely because they are taxpayers, because 'it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm.'") (quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (plurality opinion); see also *Flast v. Cohen*, 392 U.S. 82, 88 (1968) (recognizing a narrow exception to the general prohibition to taxpayer standing when the plaintiff contends that a use of funds violates the Establishment Clause).

Privacy

In *NASA v. Nelson*, the Court will consider the extent to which the federal government may inquire into the backgrounds of employees of federal contractors where the information will be used for employment purposes but otherwise held private.⁶⁶

The Ninth Circuit held that portions of such background checks likely violated the contract employees' substantive due process right to informational privacy and issued an injunction pending appeal.⁶⁷ The court initially found that most of the background check questions, including a question concerning prior drug use, likely did not violate the employees' rights.⁶⁸ But it went on to hold that asking whether an employee was receiving *counseling* for prior drug use went too far and was likely unconstitutional. The court also held that asking an employee's references for "any adverse information" regarding the employee was too broad and open-ended, and thus not narrowly tailored to the government's interest in seeking information relevant to employment.⁶⁹

In its petition, NASA does not take direct issue with the potential existence of a right to informational privacy. Instead, NASA argues that any such constitutional right is inapplicable in the context of the diminished expectation of privacy that accompanies employment at a federal facility pursuant to a federal contract and that an employee's interest in avoiding the dissemination of private information was adequately protected by the Privacy Act, which limits the information's use.⁷⁰

This case is noteworthy not merely because it potentially limits the scope of background checks for numerous employees of government contractors but also because its reasoning seems to apply to the background checks used for direct government employees as well. It is also important in that it extends any putative privacy right beyond the right to prevent disclosure of certain information, to

⁶⁶ *NASA v. Nelson*, 130 S. Ct. 1755 (2010) (No. 09-530).

⁶⁷ *Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008), reh'g denied, 568 F.3d 1028 (9th Cir. 2009) (opinions concurring in and dissenting from denial of rehearing en banc).

⁶⁸ *Nelson v. NASA*, 530 F.3d at 878-79.

⁶⁹ *Id.* at 879-81.

⁷⁰ See Petition for a Writ of Certiorari at 3-4, 16-20, *NASA v. Nelson*, No. 09-530 (U.S. Nov. 2, 2009).

include the right to prevent the collection of information even from non-private sources.

On the other side of the coin, it seems that the inquiries being made by NASA, and the criteria used by NASA regarding suitability for employment, were broad enough to include information of a psychological and sexual nature, increasing the privacy interests at stake yet often having little obvious relevance to job suitability. The employees in question in this case likewise are conceded to be in low-risk positions dealing with non-classified materials and had been employed in their positions for years prior to the demand for new background checks.⁷¹

Given that then-Solicitor General Kagan was counsel of record for NASA, now-Justice Kagan will recuse herself from the case. Former Assistant Solicitor General Paul Wolfson is co-counsel for the respondents.

DNA Testing

Finally, in *Skinner v. Switzer*, the question presented is whether a convicted prisoner seeking access to evidence for the purposes of DNA testing in support of a claim of innocence may proceed via a civil action under 42 U.S.C. § 1983, or rather is limited to a petition for habeas corpus.⁷² Applying the rule from *Heck v. Humphrey*—which bars § 1983 civil rights suits that, if successful, would necessarily imply the invalidity of the prisoner's conviction or sentence—the Fifth Circuit summarily affirmed the district court's decision that petitioner could only seek his relief in a habeas petition.⁷³

The petitioner makes the persuasive argument that a suit merely seeking access to DNA evidence for testing—the results of which tests are obviously unknown at the time of the suit—does not necessarily imply that his conviction or sentence is invalid and hence is not barred by *Heck*.⁷⁴ It is possible, however, that such a § 1983 suit implies the withholding of potentially exculpatory evidence were such evidence available prior to trial, which conduct alone may

⁷¹ See Brief for the Petitioners at 10, *NASA v. Nelson*, No. 09-530 (U.S. May 20, 2010).

⁷² *Skinner v. Switzer*, 130 S. Ct. 3323 (2010) (No. 09-9000).

⁷³ *Skinner v. Switzer*, 363 F. App'x. 302, 303 (5th Cir. 2010) (citing *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)).

⁷⁴ See Petition for Writ of Certiorari at 21–24, *Skinner v. Switzer*, No. 09-9000 (U.S. Feb. 12, 2009).

have a bearing on the conviction or sentence—but given the *ex ante* uncertainty of the test results, even that seems unlikely. The respondent’s brief opposing certiorari did not even bother to cite or discuss *Heck* or to defend the reasoning of the decisions below, despite the existence of a 5–2 circuit split on the issue, with the Fourth and Fifth Circuits in the minority.⁷⁵

The support of a majority of the circuits to have considered the issue, as well as the Supreme Court’s narrow reading of the *Heck* rule in *Wilkinson v. Dotson*, seems to favor petitioner in this case.⁷⁶ The Fifth Circuit’s inadequate reasoning regarding the *Heck* issue, its less-than-stellar history of obstruction in criminal cases, and the poor briefing in opposition to certiorari reinforce that conclusion. And while respondent has changed counsel for the merits stage—bringing on former Texas Solicitor General Gregory Coleman—new counsel will still be fighting an uphill battle.

Future Cases

In addition to the cases already before the Court, two recent district court decisions concerning gay marriage and immigration enforcement have the potential to be late entries on the docket if their appeals are expedited and promptly decided.

In *Perry v. Schwarzenegger*, the district court struck down as unconstitutional California’s Proposition 8, which banned gay marriage.⁷⁷ The district court entered only a limited stay of its ruling, but the Ninth Circuit recently extended the stay and ordered expedited

⁷⁵ Respondent’s Brief in Opposition to Petition for Writ of Certiorari at 8–12, *Skinner v. Switzer*, No. 09-9000 (2009). The Second, Third, Seventh, Ninth, and Eleventh Circuits all have allowed § 1983 suits seeking access to DNA evidence for testing. See *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007); *Grier v. Klem*, No. 06-3551, 2010 WL 92483, at *5 (3d Cir. Jan. 12, 2010); *Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006); *Osborne v. Dist. Att’y’s Office*, 423 F.3d 1050, 1054 (9th Cir. 2005), rev’d on other grounds, 129 S. Ct. 2308 (2009); *Bradley v. Pryor*, 305 F.3d 1287, 1290–91 (11th Cir. 2002). The Fourth and Fifth Circuits hold such suits barred under *Heck*. See *Harvey v. Horan*, 278 F.3d 370, 374–78 (4th Cir. 2002); *Kutzner v. Montgomery County*, 303 F.3d 339, 341 (5th Cir. 2002). The Supreme Court has previously granted certiorari on *Heck*’s application to post-conviction suits seeking DNA evidence, but resolved the case on other grounds, in *Dist. Attorney’s Office v. Osborne*, 557 U.S., 129 S. Ct. 2308, 2318–19 (2009).

⁷⁶ *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005).

⁷⁷ *Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2010 WL 3025614 (N.D. Cal., Aug. 4, 2010).

briefing with oral argument to be held on December 6, 2010.⁷⁸ A quick decision and an expedited petition to the Supreme Court might just squeeze the case onto its docket this term. However, questions concerning whether supporters of Proposition 8 have standing to appeal, and the refusal of California state officials to defend the suit or appeal the ruling, may derail the case entirely or push it into next term.

United States v. Arizona, in which the district court struck down portions of an Arizona statute adopting aggressive measures targeting illegal immigrants, also has the potential to make it onto the docket if things move sufficiently quickly.⁷⁹ Briefing on the case in the Ninth Circuit is already expedited, with argument to be held during the week of November 1, 2010. Given the political heat generated by the law and the lawsuit, it seems highly probable that whichever side loses will seek quick review in the Supreme Court. With *Chamber of Commerce v. Candelaria* already on its docket, the Court would have a convenient double-header in which to sort out uncertain issues involving immigration and preemption.

* * *

With roughly half the Court's expected docket for the term filled, there are already a number interesting cases to hold our attention. While perhaps not yet the most exciting term in recent memory, further grants over the next several months could change the term's character. In any event, the presence of new justice Elena Kagan is sure to make the term worth watching.

⁷⁸ *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

⁷⁹ *United States v. Arizona*, No. CV 10-1413-PHX-SRB, 2010 WL 2926157 (D. Ariz. July 28, 2010) (order granting in part and denying in part motion for preliminary injunction).