

LECOM Primary Care 2017 CME Conference at Peek'n Peak.

The Supreme Court in 2016 Decisions That May Affect You



Richard E. Ferretti, Esquire
Jeffrey E. Myers, Esquire

The Court 2016



The Court in 2016

Justice	Home State	Appointed by	Philosophy
John Roberts, CJ	New York	Bush II	Conservative
Anthony Kennedy	California	Reagan	Leans Conservative
Clarence Thomas	Georgia	Bush I	Conservative
Ruth Ginsberg	New York	Clinton	Liberal
Stephen Breyer	California	Clinton	Leans Liberal
Samuel Alito	New Jersey	Bush II	Conservative
Sonia Sotomayor	New York	Obama	Liberal
Elena Kagan	New York	Obama	Liberal

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Trump's Nominee: Judge

1. Denver native; 49 years old.
2. Columbia/Harvard/Oxford education.
3. Former law clerk to Justices White & Kennedy.
4. Award winning attorney with the Department of Justice.
5. Clearly conservative.
6. Strict constructionist.
7. Held for claimants in Hobby Lobby and Little Sisters of the Poor cases against ACA contraceptive mandates. Decisions reversed by the Court.
8. Fair minded: in *A.M. vs. Holmes* wrote a dissent on due process grounds favoring a juvenile defendant.
9. The Judge is not in favor of giving broad discretion to agencies, as he sees it as potentially inconsistent with the separation of powers doctrine.
10. The Judge is a supporter of the 4th amendment right to privacy.



<http://www.usatoday.com/story/news/politics/2017/02/01/supreme-court-neil-gorsuch-conservative-opinions/97322712/> <http://www.politico.com/blogs/donald-trump-administration/2017/01/trump-supreme-court-gorsuch-234466>

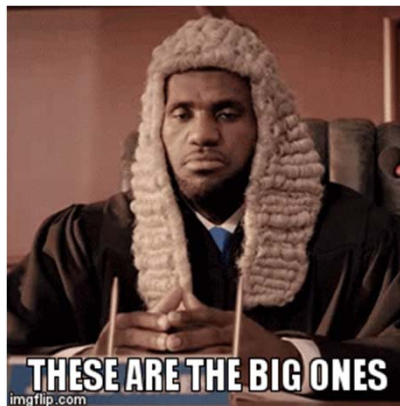
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The Process: How does a Case Get to the Supreme Court?

1. Original Jurisdiction: Cases involving ambassadors, consular matters or suits by one state against another.
2. *Certiorari*: a Latin word meaning "to be informed of, or to be made certain in regard to..."
 - a. This is discretionary with 100-150 cases taken out of almost 7000 submitted, on average each year;
 - b. Jurisdiction is appellate;
 - c. Initiated by "Writ";
 - d. Must involve "important federal question"; and
 - i. Conflicts between the Circuits Courts of Appeal or between a Court of Appeals and a state Supreme Court; or
 - ii. Decisions declaring a statute unconstitutional; or
 - iii. Decisions inconsistent with a prior decision of the Court.

<http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1>

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Disraeli's Disdain: Statistics Rule *Tyson Foods vs. Bouaphakeo, et. al.*

1. Parties and Facts.
 - a. Tyson Foods operates meat processing plants around the country. This case arose out of the operations of a pork processing plant in Iowa.
 - b. Tyson was sued by a group of employees working at the plant seeking a class action for allegedly unpaid overtime compensation for time spent donning and doffing protective clothing. Some, by not all, such time was actually compensated.
 - c. Problem for the workers: they did not know exactly how much time they were talking about and it varied from job to job, so they relied upon a statistical survey done by an industrial relations expert.
2. The Law.
 - a. The Federal Fair Labor Standards Act calls for overtime (time and a half) pay for all hours worked in excess of 40 in any pay week. This includes all time spent on activities integral to one's job. The law also puts record keeping burdens on employers.

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Tyson Foods vs. Bouaphakeo, et. al. (cont.)

2. Law (cont.)
 - b. Federal Rule of Civil Procedure 23 allows for class actions when:
 - i. The class is so numerous that joinder of all members is impracticable;
 - ii. There are questions of law or fact common to the class;
 - iii. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 - iv. The representative parties will fairly and adequately protect the interests of the class.
3. Action Below.
 - a. The U.S. District Court allowed the case to proceed as a class action and a jury awarded the workers \$2.9M.
 - b. The 8th Circuit affirmed despite arguments against both the certification of the class; the calculation of the damages; and the fact that some uninjured workers may have been included in the class.

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Tyson Foods vs. Bouaphakeo, et. al. (cont.)

4. Issues Presented:
 - a. Did the District Court err in certifying and maintaining the class?
 - b. Was the method of calculating damages allowable?
5. Holding: The Court in a 6-2 decision authored by Justice Kennedy answered yes to both questions and affirmed the judgment below, but remanded the case to ensure a proper distribution of damages.
6. Decision:
 - a. The Court found that the claims were indeed overwhelmingly typical as to the members of the class. Variations in time spent between different jobs and individual employees were not sufficient to defeat the class standing.
 - b. Use of statistical evidence was also upheld as long as the methodology for collecting the data is shown to be reliable.
 - c. This is especially so in employment cases where the employer did not itself keep reliable records; a failing emphasized by the Court.

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Tyson Foods vs. Bouaphakeo, et. al. (cont.)

6. Decision (cont.).
 - d. The Court held that “the ability to use a representative sample to establish class wide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study...has been permitted by the Court so long as the study is otherwise admissible.”
7. Post note: in light of a the national injunction against implementation of former President’s FLSA reforms (decision by Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas in a Nov. 22 ruling) expect workers to be making use of court actions to prosecute their wage claims (especially hours worked and overtime).

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Retaliation by Mistake? *Heffernan vs. City of Patterson*



1. Parties and Facts.
 - a. The Petitioner is a police officer working in the office of the chief of police of Patterson. The Chief was a supporter of the incumbent mayor who was embroiled in a nasty reelection campaign.
 - b. Heffernan's bedridden mother liked the challenger. She asked her son to pick up yard signs w/ his name to show her support.
 - c. Heffernan was himself prohibited by state law from involvement in the campaign.
 - d. He was observed picking up the yard sign for his ailing mother. He was demoted the next day for being involved in the challenger's campaign, which, in fact, he was not. Heffernan sued on constitutional grounds.
2. The Law:
 - a. First Amendment: "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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Heffernan vs. City of Patterson (cont.)

2. The Law (cont.).
 - b. 42 U.S.C., Section 1983 holds that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."
3. Action Below:
 - a. Heffernan's case was dismissed by the District Court which found that he had not been deprived of any constitutionally protected right because he had not engaged in any First Amendment conduct.
 - b. The Third Circuit affirmed and concluded that Heffernan's claim was actionable under §1983 only if his employer's action was prompted by Heffernan's actual, rather than his perceived, exercise of his free-speech right.

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Heffernan vs. City of Patterson (cont.)

4. Issues:
 - a. The question as framed by the Court is whether “the official’s factual mistake makes a critical legal difference?”
 - b. Even though the employee had not in fact engaged in protected political activity, did his demotion “deprive” him of a “right . . . secured by the Constitution?”
5. Holding: In a 6-2 decision authored by Justice Breyer, the Court found that Heffernan’s rights indeed had been violated. The Court reversed the decision of the Third Circuit and remanded the case.
6. Decision:
 - a. The key here for the Court was that the activities that Heffernan’s supervisors mistakenly thought he had engaged in are of a kind that they cannot constitutionally prohibit or punish; i.e. had they been factually correct they would have been attacking constitutionally protected conduct.

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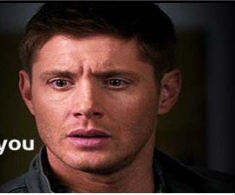
Heffernan vs. City of Patterson (cont.)

6. Decision (cont.)
 - b. The Court went on to observe that “a rule of law imposing liability despite the employer’s factual mistake is not likely to impose significant extra costs upon the employer, for the employee bears the burden of proving an improper employer motive.”
 - c. The Court remanded for a determination of whether the city may have acted under a neutral policy prohibiting police officers from overt involvement in any political campaign and whether such a policy, if it exists, complies with constitutional standards.
7. Takeaways:
 - a. Be aware that in retaliation cases are very popular in the private sector as well as the public sector.
 - b. Rights vary sometimes per state law.
 - c. In such cases, employees have a right to be wrong.
 - d. Always investigate thoroughly and provide due process in any disciplinary situation.

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Not Every Wrong Brings *Spokeo, Inc. vs. Robins*

How dare you
say that..?



1. Parties and Facts.
 - a. Spokeo is a search company that provides background information on individuals.
 - b. One of its clients requested a search on Robins.
 - c. The search produced portrayed Robins as having a master's degree, a good income a stable family, complete with children.
 - d. Problem is the data was wrong.
 - e. Robins took umbrage and sued.
2. The Law:
 - a. Article III of the U.S. Constitution requires, inter alia, "*standing to sue*" as a prerequisite to litigation.
 - b. The federal Fair Credit Reporting Act (FCRA) has a variety of procedural safeguards for individuals whose backgrounds are checked via "consumer reporting agencies" (Spokeo's status as such was not contested here).

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Spokeo vs. Robins (cont.)

2. The Law (cont.).
 - b. FCRA (cont.).
 - i. In the employment context, consent must be secured for checks and both pre- and post- adverse action reports must be given to individuals to correct errors and to be advised of their rights, respectively.
 - ii. In any context, the law imposes liability on "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any individual."
3. Action Below.
 - a. The District Court dismissed the case for a lack of standing.
 - b. The 9th Circuit reversed, finding that Robins had standing in that his rights were violated here and that he was able to assert a claim for individualized injury.

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Spokeo vs. Robins (cont.)

4. Issues:
 - a. Did Robins has standing to maintain an action in federal court?
 - b. More generally, when can a party, whose rights may have been technically violated, sue?
5. Holding: In a 6-2 decision by Justice Alito, the Court found that the 9th Circuit had misapplied the law and reversed.
6. Decision.
 - a. “A plaintiff invoking federal jurisdiction bears the burden of establishing the “irreducible constitutional minimum” of standing by demonstrating (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable court decision.”
 - b. The Court went on to note that compensable injuries are only those which are both “concrete and particularized.” Hypothetical injuries do not suffice.

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Spokeo vs. Robins (cont.)

6. Decision (cont.).
 - c. Here, at most, the Court saw a bare procedural violation that does not support a lawsuit.
 - d. However, the Court in no way delimited the rights or remedies of the FCRA in the decision.

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Pumping Patent Punitives

Halo Electronics vs. Pulse Electronics

1. Parties and Facts.
 - a. Both parties design and manufacture sophisticated electronic products.
 - b. Halo alleges that Pulse infringed its patents for electronic packages containing transformers designed to be mounted on circuit boards.
 - c. In 2002, Halo sent Pulse two letters offering to license its patents to Pulse.
 - d. After one of its engineers concluded that Halo's patents were invalid, Pulse rejected the offer and continued to sell the allegedly infringing products.
 - e. In 2007, Halo sued Pulse.
2. The Law.
 - a. The U.S. Patent Law (Title 35 U.S.C.) gives successful patent applicants exclusive periods to use and profit from their inventions.
 - b. It allows them to sue for infringement, i.e. recover damages for use of their patented works without permission (sections 271-2).

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Halo vs. Pulse (cont.)



2. The Law (cont.).
 - c. Under Section 284 of the Law, the minimal penalty for infringement is a "reasonable royalty." That section also allows that courts "may increase the damages up to three times the amount found or assessed."
 - d. The Federal Circuit had adopted a complicated two part test to secure treble damages.
3. Action Below:
 - a. A federal District Court jury found that Pulse had indeed infringed upon Halo's patents, with a high probability that it did so willfully (highest state of *mens rea*).
 - b. The District Court declined to award the enhanced damages finding a lack of "objective recklessness" (part of the two part test).
 - c. The Federal Circuit affirmed.

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Halo vs. Pulse (cont.)

4. Issues:
 - a. What is the proper standard for assessing enhanced damages in patent infringement cases?
 - b. Is both objective recklessness and knowledge of infringement required?
5. Holding: the Court in a unanimous decision by Chief Justice Roberts held that the two part test established by the Federal Circuit was inconsistent with the Law and was too onerous. The decision below was therefore reversed and remanded.
6. Decision:
 - a. In deciding upon rights and remedies, a court must always go back to the pertinent language of the law and apply its plain meaning.
 - b. Here the language at hand is remarkably simple: “When the damages are not found by a jury, the court *shall* assess them. In either event the court *may* increase the damages up to three times the amount found or assessed. The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.”

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Halo vs. Pulse (cont.)

6. Decision (cont.).
 - c. The Court clearly felt that the test adopted by the Federal Circuit was too complicated and that it might delimit the discretion given courts by the law.
 - d. The Courts stated, for example: “By requiring an objective recklessness finding in every case, the *Seagate* test excludes from discretionary punishment many of the most culpable offenders, including the “wanton and malicious pirate” who intentionally infringes a patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee’s business.”
 - e. Finally, the court rejected imposing a higher standard of proof (clear and convincing vs. preponderance of the evidence) to secure enhanced damages.

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Bad Facts Make Tough Law: *Universal Health Services, Inc. vs. Escobar*

1. Parties and Facts.
 - a. A teenage beneficiary of the Massachusetts Medicaid Program suffered an adverse reaction to medication prescribed at one of Universal's clinics for her diagnosed bipolar condition and died.
 - b. Her parents later discovered that most employees at the center were not licensed to provide treatment or medications for the child's condition.
 - c. Here, they filed a *qui tam* action against Universal under the False Claims Act.
2. The Law:
 - a. The False Claims Act, one of the principal fraud and abuse laws in healthcare, *inter alia*, bans any provider from "knowingly presenting , or causing to be presented, a false or fraudulent claim for payment or approval" to a government payor.

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Universal Health Services, Inc. vs. Escobar (cont.)

2. The Law (cont.)
 - b. The *implied certification theory* stands for the proposition that any payment request for government reimbursements contains the claimant's implied certification of compliance with relevant statutes, regulations, or contract requirements that are "material conditions of payment."
 - c. *Qui tam* lawsuits are a type of civil lawsuit whistleblowers bring under the False Claims Act, which, in turn, rewards whistleblowers if their *qui tam* cases recover funds for the government.
3. Action Below:
 - a. The District Court dismissed the case as none of the regulations allegedly violated was a condition of payment.
 - b. The First Circuit reversed and remanded.
 - c. *Cert* was granted due to inconsistent decisions from different circuits on how to construe the theory.

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Universal Health Services, Inc. vs. Escobar (cont.)

4. Issues:
 - a. When does the implied certification theory provide a basis for finding False Claims Act liability?
 - b. What regulations need to be implicated for the implied certification theory to be applicable?
5. Holding: The unanimous Court, per Justice Thomas, held: “The implied false certification theory can be a basis for FCA liability when a defendant submitting a claim makes *specific* representations about the goods or services provided, but fails to disclose noncompliance with *material* statutory, regulatory, or contractual requirements that make those representations misleading with respect to those goods or services.”
6. Decision:
 - a. It does not matter that the regulations violated were “expressly designated as conditions of payment.”

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Universal Health Services, Inc. vs. Escobar (cont.)

6. Decision (cont.)
 - b. The key is whether a provider in submitting a claim to a government payor (includes Exchange insurance, for now) makes specific representations about the goods or services provided, but fails to disclose non-compliance with *material* statutory, regulatory, or contractual requirements that make those representations misleading with respect to the services involved.
 - c. This highlights the need for careful self-auditing of all operations dealing with government payors.
 - d. Do not expect this to change.

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No to the Texas Two Step: *Whole Woman's Health vs. Hellerstedt*

1. Parties and Facts.
 - a. The case involved a Texas statute that imposed two new requirements as prerequisites to abortions:
 - i. Physicians performing abortions must have admitting privileges at a hospital within thirty miles of the site of the abortion; and
 - ii. Any place where abortions were to be performed must meet all of the requirements of a licensed ambulatory surgical center under Texas law.
 - b. The impact of the law was that the number of facilities performing abortions was cut in half and there were triple digit percentage increases in the number of women of reproductive age living more than 100-150 miles from any approved site.
 - c. After the law went into effect a group of abortion providers sued, claiming that both the admitting-privileges and the surgical-center provisions violated the Fourteenth Amendment, as interpreted in the prior Supreme Court decision in the *Casey* case.

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Whole Woman's Health vs. Hellerstedt (cont.)

2. The Law:
 - a. Amendment XIV, section 1, of the U.S. Constitution reads in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
 - b. *Planned Parenthood Of Southeastern Pa. V Casey*, (1992): the Court reaffirmed the essential holding of *Roe vs. Wade*, albeit without the strict trimester examination seen there, but did allow for certain state restrictions on pre-visibility abortions so long as they do not impose an *undue burden* on a woman's rights.

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Whole Woman's Health vs. Hellerstedt (cont.)

3. Action Below:
 - a. The District Court enjoined enforcement of the law.
 - b. The Fifth Circuit reversed finding that the new provisions are rationally related to a compelling state interest in preserving a woman's health.
4. Issue: Did the two key provisions in the Texas law violate the 14th Amendment?
5. Holding: In a 5-3 decision authored by Justice Beyer, the Court held that "Both the admitting-privileges and the surgical-center requirements place a substantial obstacle in the path of women seeking a pre-viability abortion, constitute an undue burden on abortion access, and thus violate the Constitution."
6. Decision:
 - a. Both provisions at issue in the Texas law would dramatically limit the places where a woman could obtain a legal abortion. That constitutes an undue burden.

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Whole Woman's Health vs. Hellerstedt (cont.)

6. Decision (cont.).
 - b. Likewise, competent medical evidence presented shows that neither provision would provide significant health benefits for women.
 - c. The Court went onto state: "Casey requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer..."
 - d. Fifth Circuit's test also mistakenly equates the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review (rational relationship) applicable to, e.g., economic regulations.
7. Post note: While there will be much clamoring to reverse this decision, it will take at least two new appointees to do so.

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Affirmative Action Awakens: *Fisher vs. University of Texas at Austin*

1. Parties and Facts.
 - a. This is the second time to the rodeo for these parties.
 - b. The University has an undergraduate admissions system containing two components. First, per state law, it offers admission to any students who graduates from a Texas high school in the top 10% of their class. That covers 75% of the incoming class for the Longhorns.
 - c. The remaining 25%, are selected using indexes containing numerous factors, including race.
 - d. Fisher, who was not in the top 10% of her high school class, was denied admission to the University's 2008 freshman class. She filed suit, alleging that the University's consideration of race as part of its admission process violates the Equal Protection Clause of the Constitution.

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Fisher vs. University of Texas at Austin (cont.)

2. The Law.
 - a. Equal Protection Clause: same as *Hellerstedt*.
 - b. Texas "Top 10" law: not challenged.
3. Action Below:
 - a. In the first case, District Court entered summary judgment in the University's favor, and the Fifth Circuit affirmed.
 - b. The Court vacated the judgment and remanded the case to the Court of Appeals, so the University's program could be evaluated under the proper *strict scrutiny* standard.
 - c. On remand, both the District Court and the 5th Circuit held in favor of the University.

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Fisher vs. University of Texas at Austin (cont.)

4. Issue: Is a state university's admission procedure which explicitly considers race constitutionally valid?
5. Holding: In a 4-3 decision (Justice Kagan abstaining), the Court, per Justice Kennedy, held: that the procedure is lawful.
6. Decision:
 - a. Any process implicating race must meet a strict scrutiny test: necessary to achieve compelling interests.
 - b. Even though most students gain admission under the unchallenged "top 10 rule", the Court held that the "University, however, does have a continuing obligation to satisfy the strict scrutiny burden: by periodically reassessing the admission program's constitutionality, and efficacy, in light of the school's experience and the data it has gathered since adopting its admissions plan, and by tailoring its approach to ensure that race plays no greater role than is necessary to meet its compelling interests."

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Fisher vs. University of Texas at Austin (cont.)

6. The Decision (cont.).
 - c. Meeting any quota would not provide a compelling interest, but an interest in obtaining "the educational benefits that flow from student body diversity" does.
 - d. What makes this so is that the "University articulated concrete and precise goals—e.g., ending stereotypes, promoting 'cross-racial understanding,' preparing students for 'an increasingly diverse workforce and society,' and cultivating leaders with 'legitimacy in the eyes of the citizenry'—that mirror the compelling interest this Court has approved in prior cases."

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What does the Future Hold? Upcoming Issues

1. Additional faith based challenges to Obamacare (E.g. *Saint Peters Healthcare*).
2. Transgender issues and whether sexual orientation falls under the sex discrimination provision of Title VII (*Gloucester County School Board*).
3. Wellness Programs under the ADA.
4. Patent disputes between biologic products (*Sandoz vs. Amgen*).
5. “Ban the box” legislation (e.g., Pa Commonwealth Court decision in *Peake et al. vs. the Commonwealth*).
6. NLRA rights vs. private arbitration agreements (*Murphy Oil*).
7. Arbitration agreements in health care (*Kindred Nursing*).
8. Entitlement to educational benefits of disabled children (*Douglas County School District*).

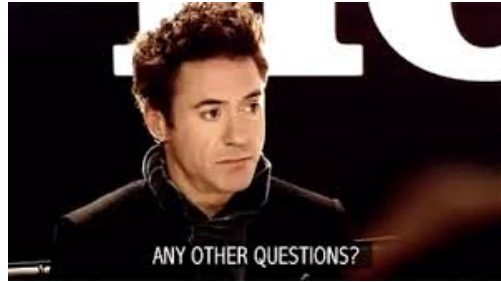
https://ballotpedia.org/Supreme_Court_cases,_October_term_2016-2017
<http://blog.constitutioncenter.org/2017/01/supreme-court-cases-to-watch-in-2017/>

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Takeaways

1. The Court will soon have a new conservative Justice.
2. Two of the most reliable liberals: Ginsberg and Breyer are aging.
3. Kennedy is drifting left (e.g. same sex marriage decision author).
4. The Court is still generally business and employer friendly.
5. The Court should be significantly more conservative in two years.

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