I. Opinions

National Labor Relations Board v. Noel Canning, 12-1281. The Recess Appointments Clause gives the President the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, §2, cl. 2. By a 5-4 vote, the Court held that the Clause empowers the President to make recess appointments during both inter-session and intra-session recesses of the Senate and to fill any vacancies that might exist during a recess. The Court also held, however, that the particular recess appointments at issue here were invalid because the appointments were made during a 3-day recess of the Senate, which “is too short a time to bring a recess within the scope of the Clause.” In reaching that conclusion, the Court held that it must treat “pro forma sessions” of the Senate “as periods of recess,” rejecting the President’s contention that “these ‘sessions’ were sessions in name only because the Senate was in recess as a functional matter.”

On December 17, 2011, the Senate, by unanimous consent, adopted a resolution providing that it would take a series of brief recesses beginning the next day. The Senate then held pro forma sessions every Tuesday and Friday until it returned to regular business on January 23, 2012. On January 4, 2012, the President invoked the Recess Appointments Clause to appoint three individuals to the NLRB. Those appointments were made between the January 3 and January 6 pro forma sessions. Sometime later, the NLRB found that Noel Canning, a Pepsi-Cola distributor, had engaged in an unlawful employment practice. Noel Canning appealed to the D.C. Circuit, arguing that the NLRB order must be set aside because three of the Board’s five members were invalidly appointed. That is so, it argued, because a 3-day adjournment (between January 3 and 6) is too short to trigger the Recess Appointments Clause. The D.C. Circuit held that the appointments were invalid, but on broader grounds. The court construed the word “the Recess” in the Clause as referring only to recesses between formal sessions of Congress, and therefore as not authorizing appointments during recesses that occur within a formal session of Congress (intra-session recesses). And the court construed the phrase “vacancies that may happen during the recess” as meaning only vacancies that came into existence during a recess, and therefore not authorizing appointments to fill vacancies that arose any other time. In an opinion by Justice Breyer, the Court rejected those two holdings but affirmed on the ground argued by Noel Canning — that the adjournment here was too short to permit exercise of the recess power.

As background, the Court set out two relevant considerations. “First, the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States.” This instructs the Court “to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.” Second, “in interpreting the Clause, we put significant weight upon historical practice.” Among other reasons, that is because (quoting McCulloch v. Maryland, 4 Wheat. 316, 401 (1819), “longstanding ‘practice of the government’ can inform our determination of ‘what the law is.’”
“The recess of the Senate.” The Court first held that, contrary to the D.C. Circuit’s conclusion, “the recess of the Senate” includes “an intra-session recess of substantial length,” not just the one inter-session recess that separates Congress’ two formal one-year sessions. The Court looked first to the language, and — after citing Founding-era dictionaries and letters by Framers — concluded that it “literally can refer to both types of recesses.” And although the word “the” in “the recess” “might suggest that the phrase refers to a single break separating formal sessions of Congress, . . . the word can also refer ‘to a term used generically or universally.’ 17 OED 879.” With the text ambiguous, the Court looked at purpose and concluded that the Clause’s objective of “ensur[ing] the continued functioning of the Federal Government when the Senate is away applied as much during intra-session recesses as during inter-session recesses. The Court next looked at history and concluded that it, too, “offers strong support for the broad interpretation.” The Court found that “between the founding and the Great Depression, Congress took substantial intra-session breaks . . . in four years: 1867, 1868, 1921, and 1929. . . . And in each of those years, the President made intra-session recess appointments.” Since then the practice continued apace, with Presidents making “thousands of intra-session recess appointments.” Further, observed the Court, all but one of the opinions of Presidential legal advisors supported that power; and neither the Senate as a body nor its committees objected to that understanding of the Clause.

The Court rejected several arguments supporting a contrary result. First, the Court said it does not matter that the Framers may not have anticipated the existence of long intra-session recesses. The relevant question, held the Court, is whether “the Founders intended to limit the scope of the Clause to the form of congressional recess then prevalent, or did they intend a broader scope permitting the Clause to apply, where appropriate, to somewhat changed circumstances?” The Court concluded it was the latter. In addition, the Court rejected the argument that its interpretation creates vagueness problems, particularly as to how long an intra-session recess must be for the Clause to be invoked. The Court stated that “the most likely reason the Framers did not place a textual floor underneath the word ‘recess’ is that they did not foresee the need for one.” Resolving the issue, the Court stated that it “agree[s] with the Solicitor General that a 3-day recess would be too short.” Based on the historical record of very few recess appointments made during recesses shorter than 10 days, the Court ruled “that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.”

“Vacancies that may happen during the recess.” The Court next held that this phrase covers not only vacancies that initially occur during a recess, but also “vacancies that occur before a recess and continue to exist during the recess.” The Court acknowledged “that the most natural reading of ‘happens’ as applied to a ‘vacancy’ (at least to the modern ear) is that the vacancy ‘happens’ when it initially occurs.” But citing a letter by Thomas Jefferson and an interpretation by Attorney General William Wirt, the Court found that “happen” “can refer to a continuing state.” For example, a statute that “gives the President authority to act in respect to ‘any financial crisis that may happen during his term’ can easily be interpreted to include crises that arise before, and continue during, that term.” Having found the phrase ambiguous, the Court turned to purpose and history. As to the former, the Court concluded that the President might greatly need the assistance of an officer in a position that became vacant near the end of a Senate’s session. And it is no
response, held the Court, that the President could appoint an acting officer. “Acting officers may have less authority than Presidential appointments,” and they require the convening of special sessions of Congress. Further, although there is a risk that Presidents will abuse the Clause by routinely appointing officers without the Senate’s “advice and consent,” the Court found the risk of preventing the President from effectively exercising his powers even greater.

The Court once again found that “[h]istorical practice over the past 200 years strongly favors the broader interpretation.” Among other historical indicia relied on by the Court were: Starting with President Monroe’s Attorney General, William Wirt, nearly all Attorneys General have concluded that the recess power extends to vacancies that exist during a recess; “Presidents since Madison have made many recess appointments filling vacancies that initially occurred prior to a recess”; and “[t]he Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer.”

**Length of recess.** Finally, the Court held that the recess appointments at issue were invalid because the recesses were too short. In so holding, the Court rejected the Solicitor General’s contention that *pro forma* sessions of the Senate must be treated as periods of recess. In his view, “these ‘sessions’ were sessions in name only because the Senate was in recess as a *functional* matter.” The Court disagreed, holding that “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.” That approach, the Court held, is consistent with the Constitution’s empowering the Senate to “determine the Rules of its Proceedings” and to control its schedule. The Court found that standard met during the *pro forma* sessions in question because “the Senate said it was in session”; its rules provide that the Senate can conduct business during its *pro forma* sessions; and the Senate has enacted legislation during *pro forma* sessions (including the second *pro forma* session after its December 17 adjournment).

The Court concluded by noting that Justice Scalia’s dissent (which embraced the D.C. Circuit’s conclusions) “would render illegitimate thousands of recess appointments reaching all the way back to the founding era” and “would basically read [the Clause] out of the Constitution.” The Court “fail[ed] to see how excising the Recess Appointments Clause preserves freedom.”

Justice Scalia filed a lengthy opinion concurring in the judgment, which Chief Justice Roberts and Justices Thomas and Alito joined. The dissent would have affirmed the D.C. Circuit on the same grounds as the D.C. Circuit ruled: that the Recess Appointments Clause permits the President to make recess appointments only during inter-session breaks and only as to vacancies that first arose during such a recess. Justice Scalia accused the majority of adopting “an adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor, so the Court should not ‘upset the compromises and working arrangements that the elected branches of Government themselves have reached.’” That approach, argued Justice Scalia, ignores “the plain, original meaning of the constitutional text” and “forebodes a diminution of this Court’s role in controversies involving the separation of powers and the structure of government.” The dissent went on to find that the language of both phrases at issue — ”the recess of the Senate” and “vacancies that may happen during the recess” — support
the narrower interpretation and that historical practice does not support the majority’s broader interpretation. In short, “[w]hat the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice.”

- **Riley v. California**, 13-132; **United States v. Wurie**, 13-212. The Court unanimously held that the police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The *Riley* case commenced when a police officer stopped David Riley for driving with expired registration tags. The officer impounded Riley’s car after he found out his license had been suspended, and during an inventory search of the car an officer found concealed weapons. After arresting Riley for possessing concealed weapons, an officer searched him incident to arrest. They found items indicating gang membership and a “smart phone.” Searches of the phone further indicated gang membership and uncovered photographs of Riley standing in front of a car the police suspected had been involved in a shooting a few weeks earlier. Riley was eventually charged in connection with that shooting. The trial court rejected his motion to suppress evidence obtained from his cell phone; Riley was convicted; and the California Court of Appeal affirmed his conviction, holding that the Fourth Amendment permits warrantless searches of cell phones incident to arrest. In *Wurie*, an officer arrested Brima Wurie for selling drugs and seized a flip phone from Wurie incident to the arrest. Officers noticed that the phone was receiving calls from a source identified as “my house” on its external screen. They opened the phone, pressed one button to access its call log, then pressed another button to determine the phone number associated with “my house.” This information allowed them to find Wurie’s apartment, where they executed a search warrant and found large amounts of drugs and other contraband. He was convicted of various offenses, but the First Circuit reversed on the ground that cell phones may not be searched incident to arrest without a warrant. Through an opinion by Chief Justice Roberts, the Court reversed in *Riley* and affirmed in *Wurie*.

The Court noted that “the ultimate touchstone of the Fourth Amendment is reasonableness,” that “reasonableness generally requires the obtaining of a search warrant,” and that “[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.” One exception is searches incident to a lawful arrest. In *Chimel v. California*, 395 U.S. 752 (1969), the Court held that a search incident to arrest is reasonable to ensure officer safety, prevent escape, and prevent the concealment or destruction of evidence. Four years later, in *United States v. Robinson*, 414 U.S. 218 (1973), the Court (in a case where an officer seized a crumpled cigarette pack, opened it, and found heroin capsules inside it) adopted a categorical rule that allows officers to search the person incident to arrest. And in *Arizona v. Gant*, 556 U.S. 332 (2009), the Court held that *Chimel* authorizes a search of a vehicle incident to arrest “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” and “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” With that background, the Court turned to searches of cell phones.

The Court observed that “while *Robinson’s* categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones.” First, “[d]igital data stored on a cell phone cannot itself be used as a
weapon to harm an arresting officer or to effectuate the arrestee’s escape.” It is one thing to check physical objects to ensure that a potential weapon is not hidden within; but “[n]o such unknowns exist with respect to physical data.” The United States and California provided no examples of officers learning from cell phones that confederates of the arrestee were headed to the scene. Second, with respect to preventing the destruction of evidence, “once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.” The Court dismissed the government’s concerns about remote wiping and encryption. First, these concerns “are distinct from Chimel’s focus” on the defendant’s response to arrest. Second, the Court found “little reason to believe that either problem is prevalent.” Third, “it is not clear that the ability to conduct a warrantless search would make much of a difference” because the remote wiping and encryption, if they are to happen, could just as well happen before the warrantless search. And fourth, law enforcement can address those threats by turning off the phone, removing its battery, or putting the phone in a “Faraday bag.”

The Court acknowledged that Robinson rested in part of an arrestee’s lessened expectation of privacy, but stated that this “does not mean that the Fourth Amendment falls out of the picture entirely.” Responding to the United States’ contention that “a search of all data stored on a cell phone is ‘materially indistinguishable’ from searches of [comparable] physical items,” the Court said “[t]hat is like saying a ride on horseback is materially indistinguishable from a flight to the moon. . . . Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.” The Court explained that cell phones are “in fact mini computers” that “could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.” Their “immense storage capacity” allows the “sum of an individual’s private life [to] be reconstructed”; “it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives — from the mundane to the intimate.” For this reason, “[a]llowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.” On top of that, noted the Court, treating cell phones as containers analogous to physical items that can be searched under Robinson fails to account for cloud computing. Cell phones often access information stored on a remote server (in the cloud); and an officer searching a phone “would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud.”

The Court then rejected fallback options suggested by the United States and California. First, the Court rejected the United States’ proposal that the Court apply the Gant standard here (i.e., that it allow warrantless searches of cell phones incident to arrest “whenever it is reasonable to believe that the phone contains evidence of the crime of arrest”). The Court stated that Gant’s rule was based in part on considerations specific to searches of vehicles; and that this proposed “limitation” is “no practical limit at all” because the vast amount of information on cell phones means that evidence of virtually any crime can be found on a phone. Second, the Court declined to adopt a rule allowing cell phone searches but restricting them “to those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee’s identity, or officer safety
will be discovered.” The Court found that “[t]his approach would again impose few meaningful constraints on officers.” Third, the Court rejected the United States’ suggestion that officers at least be permitted “to search a phone’s call log, as they did in Wurie’s case.” And finally, the Court rejected California’s proposal that “officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart.” The Court found that this approach would allow officers to search vast amount of private information on cell phones and would create difficult line-drawing problems.

The Court closed by stating that officers will often be able to obtain warrants to search cell phones, and that exigent circumstances will permit warrantless searches of cell phones in individual cases. In short, “Our answer to the question of what police must do before searching a cell phone seized incident to arrest is accordingly simple — get a warrant.” Justice Alito filed an opinion concurring in part and concurring in the judgment to express his view on two points. First, searches incident to arrest were not linked historically to the need to protect officers and prevent the destruction of evidence. Second, he “would reconsider the question presented here if either Congress or state legislatures . . . enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.”

McCullen v. Coakley, 12-1168. Without dissent, the Court held that a Massachusetts law that bars persons from entering or remaining “on a public way or sidewalk” within 35 feet of an abortion clinic violates the First Amendment. In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act in response to confrontations between abortion opponents and advocates of abortion rights outside clinics where abortions were performed. Modeled after the law upheld in Hill v. Colorado, 530 U.S. 703 (2000), the law provided that within an 18-foot radius around the entrances and driveways of such facilities, no one could knowingly approach within six feet of another person, absent consent, to pass leaflets, display signs, or engage in oral protest, education, or counseling. In 2007, the legislature held hearings based on concerns that the 2000 statute was inadequate. In the end, the legislature amended the statute to create “a 35-foot fixed buffer zone from which individuals are categorically excluded.” The Act exempts, among others, “persons entering or leaving such facility” and “employees or agents of such facility acting within the scope of their employment.” Petitioners are individuals who, rather than protesting, “attempt to engage women approaching the clinics in what they call ‘sidewalk counseling,’ which involves offering information about alternatives to abortion and help pursuing those options.” In 2008, they sued various state officials alleging that the Act makes it far more difficult for them to engage in sidewalk counseling and therefore violates the First Amendment. Through two different opinions, the district court rejected petitioners’ facial and as-applied challenges; and the First Circuit affirmed both opinions. In an opinion by Chief Justice Roberts, the Court reversed.

The Court began by noting that the Act “regulates access to ‘public way[s]’ and ‘sidewalk[s],’” which are traditional public fora that receive special First Amendment protection. The level of scrutiny applicable to a speech restriction on public streets depends on whether the restriction is content-based or instead is a content-neutral “time, place, or manner” regulation. The
Court concluded that the Act is the latter, rejecting petitioners’ argument that “virtually all speech affected by the Act is speech concerning abortion,’ thus rendering the Act content based.” The Court explained that “a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.” Rather, found the Court, the Act is “justified without reference to the content of the regulated speech,” namely, “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” And although the Act operates only outside abortion clinics, “States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.” The Court also disagreed that the Act’s exemption for “employees or agents of such facility acting within the scope of their employment” makes the law content based. That exemption, found the Court, simply allows clinic employees “to do their jobs” — and “[t]here is no suggestion in the record that any of the clinics authorize their employees to speak about abortions in the buffer zones.”

Having found the Act content neutral, the Court turned to whether it satisfied the test for content-neutral limits on speech in public fora: whether it is “narrowly tailored to serve a significant governmental interest.” The Court held that it is not. After noting the importance of the governmental interests served by the Act, the Court found that “the buffer zones impose serious burdens on petitioners’ speech.” They do that by “pushing petitioners well back from the clinics’ entrances and driveways,” thereby diminishing their “ability to initiate the close, personal conversations.” As a result, they have been able to persuade far fewer women not to terminate their pregnancies than before the 2007 amendment. With that background, the Court held that the statute violates the First Amendment because it “burden[s] substantially more speech than is necessary to further the government’s legitimate interests.” The Court found that the state had various less-speech-restrictive alternatives available to it, including (1) adopting a law, similar to the federal FACE Act, making it a crime to obstruct entry to a reproductive health-care facility, (2) adopting a law, like one New York City adopted, that makes it a crime “to follow and harass another person within 15 feet of the premises of a reproductive health care facility,” (3) adopting an ordinance “requir[ing] crowds blocking a clinic entrance to disperse when ordered to do so by the police,” and (4) using targeted injunctions that “focus[ ] on the precise individuals and the precise conduct causing a particular problem.” The Court rejected the state’s contention that it tried other approaches and they failed. The Court noted that the state could “identify not a single prosecution brought under [other] laws within at least the last 17 years”; that the last injunction the state obtained dated to the 1990s; and that no evidence showed that the state “considered different methods that other jurisdictions have found effective.” Given the alternatives, the Court rejected Massachusetts’ reliance on “the extreme step of closing a substantial portion of a traditional public forum to all speakers.”

Justice Scalia filed an opinion concurring in the judgment, which Justices Kennedy and Thomas joined. Justice Scalia stated that the majority “opinion carries forward this Court’s practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents.” Most notably, the dissent stated that “[i]t blinks reality to say . . . that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur — and where that speech can most effectively be communicated — is not content based.” Distinguishing the cases upon which the majority relied, the dissent asserted that
“[e]very objective indication shows that the provision’s primary purpose is to restrict speech that opposes abortion.” The dissent also argued that the exemption for clinic employees makes the Act a viewpoint-discriminatory restriction because there is no real doubt that “abortion-clinic employees ‘acting within the scope of their employment’ near clinic entrances may — indeed, often will — speak in favor of abortion (‘You are doing the right thing.’).” Justice Scalia expressed no view on the narrow tailoring issue, stating that he would “prefer not to take part in the assembling of an apparent but specious unanimity.” Justice Alito filed a separate opinion concurring in the judgment which expressed his view that the exemption for employees makes the law viewpoint discriminatory.

• American Broadcasting Cos. v. Aereo, Inc., 13-461. By a 6-3 vote, the Court held that Aereo, Inc. “publicly performs” copyrighted television programs within the meaning of the Copyright Act of 1976 and thereby infringes the broadcasters’ “exclusive right” to “perform the copyrighted work publicly.” Aereo “sell[s] to its subscribers a technologically complex service that allows them to watch television programs over the Internet,” much of it copyrighted, “at about the same time as the programs are broadcast over the air.” Its system works as follows. A subscriber visits Aereo’s website and selects from a list a show he wants to see. One of Aereo’s servers then dedicates a specific antenna to that subscriber alone for the duration of the selected show; the server tunes the antenna to the show, the antenna receives the broadcast, “and an Aereo transcoder translates the signal received into data that can be transmitted over the Internet.” One of Aereo’s servers “saves the data in a subscriber-specific folder on Aereo’s hard drive,” and “begins to stream the saved copy of the show to the subscriber over the Internet.” A group of television producers, marketers, distributors, and broadcasters who own the copyrights in many of the programs Aereo sends to its subscribers filed suit against Aereo for copyright infringement. They argued “that Aereo was infringing their right to ‘perform’ their works ‘publicly’” within the meaning of the Copyright Act. The district court denied the requested preliminary injunction and the Second Circuit affirmed, holding that Aereo does not perform the work publicly because each transmission involves sending only a private transmission to one individual. In an opinion by Justice Breyer, the Court reversed.

The Court first held that Aereo “perform[s]” copyrighted works. The Copyright Act grants owners of a copyright the exclusive right “to perform the copyrighted work publicly.” 17 U.S.C. §106(4); id. §101 (“To perform . . . a work ‘publicly’ means [among other things] to transmit . . . a performance . . . of the work . . . to the public . . .”). Aereo argued that it does not perform; it merely “suppl[ies] equipment that ‘emulate[s] the operation of a home antenna and [DVR],’” which “simply responds to its subscribers’ directives.” The Court found that “the language of the [Copyright] Act does not clearly indicate when an entity ‘perform[s]’ (or ‘transmit[s]’),” on the one hand, or “merely supplies equipment that allows others to do so,” on the other. The Court concluded, however, that “one of Congress’ primary purposes in amending the Copyright Act in 1976 was to overturn this Court’s determination that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the Act’s scope.” In Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), the Court held that a CATV provider — which “placed antennas on hills above the cities and used coaxial cables to carry the signals received by the antennas to the home television sets of its subscribers,” who could choose which programs to watch — did not “perform.” Rather, held the Court, it is more like a viewer who receives a broadcaster’s signals and then
carries them to additional viewers. The Court here explained that Congress amended the Copyright Act in 1976 to overturn *Fortnightly* (and another decision) by adding “new language that erased the Court’s line between broadcaster and viewer, in respect to ‘perform[ing]’ a work.”

That new language “clarifies that to ‘perform’ an audiovisual work means ‘to show its image in any sequence or to make the sounds accompanying it audible.’” §101. Under that definition, “both the broadcaster and the viewer of a television program ‘perform,’ because they both show the program’s images and make audible the program’s sounds.” The Court also observed that Congress, in 1976, added the Transmit Clause, which declares that an entity performs publicly when it “transmit[s] . . . a performance . . . to the public.” §101. The Court explained that this Clause “makes clear that an entity that acts like a CATV system itself performs, even if when doing so it simply enhances viewers’ ability to receive broadcast television signals.” All told, “[t]his history makes clear that Aereo is not simply an equipment provider.” Its “activities are substantially similar to those of the CATV companies that Congress amended the Act to reach” — and those activities mean that “Aereo, and not just its subscribers, ‘perform[s]’ (or ‘transmit[s]’).” The Court disagreed with Aereo and the dissent that one difference between Aereo and CATV — the latter “sent continuous programming to each subscriber’s television set,” whereas “Aereo’s system remains inert until a subscriber indicates that she wants to watch a program” — matters. The Court noted that CATV subscribers also selected what programs they wanted to watch; and found it inconsequential that under Aereo’s model the broadcasters’ “signals pursue their ordinary course of travel through the universe until today’s ‘turn of the knob’ — a click on a website — activates machinery that intercepts and reroutes them to Aereo’s subscribers on the Internet.”

The Court next ruled that Aereo performs the broadcasters’ copyrighted works “publicly,” within the meaning of the Act. Aereo contended that, “because each of these performances is capable of being received by one and only one subscriber, [it] transmits privately, not publicly.” The Court held, however, that “[i]n terms of the Act’s purposes, these differences do not distinguish Aereo’s system from cable systems, which do perform ‘publicly.’” The Court found no reason why “the behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens” matters “in terms of Congress’ regulatory objectives.” Nor was the Court persuaded that the Transmit Clause’s language (“to transmit . . . a performance”) means the transmission’s nature (as public or private) must be assessed in terms of each single transmission. “[O]ne can ‘transmit’ or ‘communicate’ something through a set of actions.” Finally, the Court acknowledged the concern expressed by many amici that a ruling against Aereo could “impose copyright liability on other technologies, including new technologies, that Congress could not possibly have wanted to reach.” The Court “agree[d] that Congress . . . did not intend to discourage or to control the emergence or use of different kinds of technologies,” and stated that it does “not believe that our limited holding today will have that effect.”

Justice Scalia filed a dissenting opinion, which Justices Thomas and Alito joined. They concluded that Aereo does not “perform” at all. Justice Scalia contrasted secondary-liability claims, where an equipment manufacturer or service provider (such as a copy shop) could be liable because its customers were making unauthorized copies, with direct-liability claims, where a defend-
ant (such as a video-on-demand service that chooses the content) must engage in volitional conduct (choosing the content) that violates the Act. Justice Scalia concluded that, although Aereo is neither akin to a copy shop nor a video-on-demand service, what matters is that the performances that arise from its service are not "the product of Aereo’s volitional conduct." “In sum,” stated the dissent, “Aereo does not ‘perform’ for the sole and simple reason that it does not make the choice of content.” For that reason, “it cannot be held directly liable for infringing the Networks’ public-performance right.” The dissent criticized the majority’s reasoning as (1) “based on a few isolated snippets of legislative history,” (2) failing to recognize “material differences between” CATV providers and Aereo, and (3) “disrupt[ing] settled jurisprudence” on the need for volitional conduct for direct liability.

- **Fifth Third Bancorp v. Dudenhoeffer, 12-751.** An “employee stock ownership plan” (ESOP) invests primarily in the stock of the company that employs the plan participants; its fiduciaries are required under ERISA to act prudently in managing the plan’s assets. The Court unanimously held that “when an ESOP fiduciary’s decision to buy or hold the employer’s stock is challenged in court, the fiduciary is [not] entitled to a defense-friendly standard that the lower courts have called a ‘presumption of prudence.’” Petitioner Fifth Third Bancorp is a financial services firm that maintains a defined-contribution retirement savings plan (Plan) for its employees. One of the 20 funds in which the Plan’s assets are invested is an ESOP, whose funds must be “invested primarily in shares of common stock of Fifth Third.” Respondents are former Fifth Third employees and ESOP participants who filed a class action alleging that Fifth Third and various Fifth Third officers were fiduciaries of the Plan and violated the duties of loyalty and prudence imposed by ERISA. The complaint alleges that by July 2007 the fiduciaries knew or should have known that Fifth Third’s stock was overvalued or excessively risky because (1) publicly available information provided early warning signs that the housing market would collapse, to the detriment of subprime lenders such as Fifth Third, and (2) inside information indicated that Fifth Third officers had made material misstatements about the company’s financial prospects. According to the complaint, a prudent fiduciary would have sold the ESOP’s holdings before the value of those holdings declined, refrained from purchasing any more Fifth Third stock, cancelled the ESOP option, and disclosed the inside information. Instead, petitioners continued to hold and buy Fifth Third stock, whose value fell precipitously after the market crashed. The district court dismissed the complaint for failure to state a claim, after holding that ESOP fiduciaries “start with a presumption that their ‘decision to remain invested in employer securities was reasonable.’” The Sixth Circuit reversed, holding that ESOP fiduciaries’ presumption of prudence does not apply at the pleading stage. In an opinion by Justice Breyer, the Court vacated and remanded.

The Court observed that the “presumption of prudence” adopted by lower courts, which “favors ESOP fiduciaries’ purchasing or holding of employer stock,” represents an effort to reconcile two conflicting congressional directives: (1) ERISA’s subjecting pension plan fiduciaries to a duty of prudence,” which is often accomplished by diversifying investments, 29 U.S.C. §1104(a)(1), and (2) ERISA’s “recogniz[ing] that ESOPs are ‘designed to invest primarily in’ the stock of the participant’s employer, §1107(d)(6)(A), meaning that they are not prudently diversified.” The Court concluded that ERISA “does not create a special presumption favoring ESOP fiduciaries. Rather, the same
standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversity the ESOP’s holdings.” That is so, the Court held, because the relevant ERISA provision “makes no reference to a special ‘presumption’ in favor of ESOP fiduciaries” and does not require plaintiffs to make the showing to overcome such a presumption that some lower courts have required.

The Court rejected Fifth Third’s contention that a presumption is proper given an ESOP’s additional goal of promoting employee ownership of employer stock. “Thus” argued Fifth Third, “a claim that an ESOP fiduciary’s investment in employer stock was imprudent as a way of securing retirement savings should be viewed unfavorably because, unless the company was about to go out of business, that investment was advancing the additional goal of employee ownership of employer stock.” Disagreeing, the Court stated that “the content of ERISA’s duty of prudence” does not vary “depending upon the specific nonpecuniary goal set out in an ERISA plan, such as what petitioners claim is the nonpecuniary goal here.” In support of that conclusion, the Court noted that ERISA specifically exempts an ESOP fiduciary from §1104(a)(1)(B)’s duty of prudence “only to the extent that it requires diversification” — which would have been unnecessary if that “duty of prudence were altered anyway in the case of an ESOP.”

The Court was more sympathetic to Fifth Third’s concern that “subjecting ESOP fiduciaries to a duty of prudence without the protection of a special presumption will lead to conflicts with the legal prohibition on insider trading.” The Court agreed that “[t]his concern is a legitimate one,” but stated that a presumption of prudence “is an ill-fitting means of addressing it.” To address that concern, and the more general problem of meritless claims, the Court stated that district courts should apply the pleading standard of Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), “in light of the following considerations.” First, “where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule.” Second, “[t]o state a claim for breach of duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities law” and would not have harmed the fund even more. (The latter concern arises from the fact that if an ESOP fiduciary stops purchasing company stock, the market may view that as a sign that the stock is a bad investment.) The Court remanded to allow the lower courts to apply those considerations to respondents’ complaint in the first instance.
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SUPREME COURT PROJECT STAFF

Dan Schweitzer
Supreme Court Counsel
(202) 326-6010

Andrea M. Hampton
Supreme Court & Civil Rights Project Manager
(202) 326-6011

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