I. Opinions

- **Burwell v. Hobby Lobby Stores, Inc., 13-354; Conestoga Wood Specialties Corp. v. Burwell, 13-356.** By a 5-4 vote, the Court held that the Affordable Care Act’s “contraceptive mandate” — which requires certain employers to provide health-insurance coverage of contraceptives for their employees — violates the Religious Freedom Restoration Act (RFRA) as applied to three closely held corporations that maintain a sincere religious objection to the mandate. Congress enacted RFRA in 1993 to overturn the Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that “neutral, generally applicable laws may be applied to religious practices even when not supported by compelling governmental interests.” *Smith* repudiated the balancing test the Court had sometimes used to assess Free Exercise claims, which “took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling governmental interest.” RFRA prohibits the federal “Government [from] substantially burden[ing] a person’s exercise of religion” unless the government “demonstrates that application of the burden to the person” (1) furthers “a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §2000bb-1(b). RFRA’s definition of “exercise of religion” originally was “the exercise of religion under the First Amendment.” The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) deleted that reference to the First Amendment, changing the definition to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

This case involves RFRA’s application to regulations promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act (ACA). Other than employers providing “grandfathered health plans,” ACA generally requires employers with 50 or more full-time employees to offer “a group health plan or group health coverage” that provides “minimum essential coverage.” 26 U.S.C. §5000A(f)(2). If a covered employer does not provide such coverage, it must either pay $100 per day for each affected “individual” or stop providing health insurance and instead pay $2,000 per year for each of its full time employees. Id. §§4980H(a),(c)(1). Among the services that must be covered are “preventive care and screenings.” Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to determine which types of preventive care must be covered. In 2011, HRSA issued Guidelines which, among other things, require employers to provide “coverage, without cost sharing,” for “[a]ll Food and Drug Administration approved contraceptive methods.” The Guidelines exempt churches from that so-called contraceptive mandate. And HHS allows certain non-profit religious organizations to exempt themselves by allowing them to certify that they are such an organization and have religious objectives to contraceptives. When the group-health insurer receives that certification, it must exclude contraceptive coverage from the employer’s plan, and “provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the” religious non-profit. These two cases were filed by closely held for-profit corporations, Conestoga Wood Specialties, Hobby Lobby, and Mardel, whose owners believe that life
begins at conception and that certain FDA-approved contraceptives are abortifacients. Their lawsuits alleged that ACA’s contraceptive mandate violates RFRA to the extent it requires them to provide health-insurance coverage for those contraceptives. The Third Circuit rejected that argument (in Conestoga), but the Tenth Circuit accepted it (in Hobby Lobby and Mardel). In an opinion by Justice Alito, the Court reversed the Third Circuit and affirmed the Tenth Circuit.

**RFRA applies to corporations.** The Court first rejected HHS’s contention that for-profit corporations are not protected by RFRA. The Court provided the example of Orthodox Jewish merchants who, in *Braunfeld v. Brown*, 366 U.S. 599 (1961), challenged a Pennsylvania Sunday-closing law as violating the Free Exercise Clause. “According to HHS, . . . if these merchants chose to incorporate their businesses,” they would be put “to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.” There is no reason, held the Court, to believe that “the Congress that enacted such sweeping protection [of religious liberty] put small-business owners to the choice that HHS suggests.” Turning to the text of RFRA, the Court noted that it applies to “a person’s” exercise of religion; that RFRA does not contain its own definition of “person”; and that the Dictionary Act, which applies when “determining the meaning of any Act of Congress, unless the context indicates otherwise,” defines “person” to “include corporations, companies” and the like. The Court found nothing in the context of RFRA to support departing from the Dictionary Act definition. Indeed, found the Court, it has long “entertained RFRA and free-exercise claims brought by nonprofit corporations.” And “[n]o conceivable definition of [‘person’] includes natural persons and nonprofit corporations, but not for-profit corporations.”

The Court rejected HHS’s contention that a corporation is not protected by RFRA because it cannot engage in the “exercise of religion.” Non-profit corporations can exercise religion, meaning it is not the corporate form that is decisive. And as the example of the Orthodox Jewish merchants in *Braunfeld* showed, one can exercise religion through one’s actions, which include one’s business practices. Nor is it correct, held the Court, that the purpose of for-profit corporations is solely to make money. “[M]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so” (by, for example, giving to charitable causes or taking actions to protect the environment). The Court also rejected HHS’s contention that “RFRA did no more than codify this Court’s pre-Smith Free Exercise Clause precedents, and . . . none of those cases squarely held that a for-profit corporation has free-exercise rights.” First, stated the Court, RFRA’s text — particularly as amended by RLUIPA — does not tie “exercise of religion” to the Court’s pre-Smith interpretation of the First Amendment. Moreover, “the one pre-Smith case involving the free-exercise rights of a for-profit corporation” — *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617 (1961) — “suggests, if anything, that for-profit corporations possess such rights.” Finally, the Court rejected HHS’s argument that “it is difficult as a practical matter to ascertain the sincere ‘beliefs’ of a corporation.” HHS’s examples, found the Court, pertained to publicly traded corporations, not closely held corporations such as petitioners here. “[A]nd it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims,” for it “seems improbable” that “unrelated shareholders . . . would agree to run a corporation under the same religious beliefs.” Beyond that, stated the Court, “the scope of RLUIPA” —
which protects prisoners — shows that Congress was confident of the ability of the federal courts to weed out insincere claims."

**RFRA substantially burdens the exercise of religion.** Having found that RFRA applies, the Court asked whether the HHS contraceptive mandate “substantially burden[s]” the plaintiffs’ exercise of religion. The Court had “little trouble holding that it does.” The owners of the three corporations have a sincere religious objection to providing health insurance that covers methods of birth control that may result in the destruction of an embryo. If they do not “yield” to the HHS mandate, the burden will be substantial: They will be taxed $100 per day for each affected individual (around $475 million per year for Hobby Lobby) or have to drop their health insurance coverage and pay $2,000 per employee each year (around $26 million for Hobby Lobby). The Court rejected amici’s contention that the burden is not substantial because “the $2,000 per-employee penalty is actually less than the average cost of providing health insurance.” That argument ignores that the “companies have religious reasons for providing health-insurance coverage for their employees”; and it ignores that they would have to provide additional compensation to their employees or face a competitive disadvantage in attracting workers.

The Court dismissed HHS’s “main argument,” which is “that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception . . .) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated.” That argument, held the Court, improperly entangles courts in the delicate business of addressing the reasonableness of a religious belief. The owners of the companies believe the connection “is sufficient to make it immoral for them to provide the coverage.” It is not for courts to disagree and purport “to provide a binding national answer to this religious and philosophical question.” The Court distinguished its decisions rejecting claims that “the use of general tax revenue to subsidize activities of religious institutions violated the Free Exercise Clause.” The Court found that the challengers in those cases “never articulated a religious objection to the subsidies” (as opposed to an objection based on their view of proper church-state relations).

**RFRA is not the least-restrictive means of furthering a compelling governmental interest.** The Court assumed for the sake of argument “that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.” Before it did so, however, the Court stated that “it is arguable that there are features of ACA that support” plaintiffs’ view that “HHS has not shown that the mandate serves a compelling governmental interest.” In particular, the Court pointed to the many employees who are not given contraceptive coverage through the mandate: “those covered by grandfathered plans and those who work for employers with fewer than 50 employees.” Moreover, grandfathered plans must provide what HHS calls “particularly significant protections,” but the contraceptive mandate is not one of those. Nonetheless, the Court found “it unnecessary to adjudicate this issue.”

Instead, assuming the compelling governmental interest, the Court held that the contraceptive mandate is not the least-restrictive means of furthering it. The Court noted that the “most straightforward way” the government could ensure contraceptive coverage “would be for the
Government to assume the cost of providing the four contraceptives.” That cost, observed the Court, “would be minor when compared with the overall cost of ACA.” The Court noted HHS’s position “that RFRA does not permit us to take this option into account because ‘RFRA cannot be used to require creation of whole new programs.’” Although the Court saw “nothing in RFRA that supports this argument,” it concluded that it “need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive means test.” That is because, held the Court, HHS itself has already established a less-restrictive approach: the accommodation it already provides for religious non-profit organizations, under which they can self-certify their opposition to providing coverage, at which time the insurer must exclude contraceptive coverage from the employer’s plan, and “provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the” religious non-profit.

Without deciding “whether an approach of this type complies with RFRA for purposes of all religious claims,” the Court held that “it does not impinge on the plaintiffs’ religious belief . . . and serves HHS’s stated interests equally well.”

Finally, the Court responded to HHS’s assertion that ruling in favor of the plaintiffs would “lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions.” The Court stated that its “decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs.” Nor does the decision provide a “shield” against laws that bar “discrimination in hiring, for example on the basis of race. . . . The Government has a compelling interest in providing an equal opportunity to participate in the work-force without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”

Justice Kennedy, who provided the decisive fifth vote, filed a concurring opinion. Among the points he made were that “[t]here are many medical conditions for which pregnancy is contraindicated,” and that “[i]t is important to confirm that a premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.” Justice Kennedy also highlighted that “the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program.” Pointing to the ease with which the Government can provide for-profit corporations with the accommodation it already provides religious non-profits, he closed by stating that this “might well distinguish the instant case from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.”

Justice Ginsburg filed a dissenting opinion, which Justice Sotomayor joined in full and Justices Breyer and Kagan joined in part. (Justices Breyer and Kagan did not join the part of the dissent contending that corporations are not protected by RFRA.) Justice Ginsburg called the majority opinion “a decision of startling breadth” that allows for-profit enterprises to “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” Among the dissent’s objections to the majority’s reasoning were: (1) RFRA’s purpose was undeniably to “restore the compelling interest test set forth” in pre-Smith cases, and not to “scrap or alter[ ] the
balancing test as this Court had applied it pre-Smith.” (2) The Court’s pre-Smith law did not support “the notion that free exercise rights pertain to for-profit corporations.” For-profit corporations are not entitled to the “special solicitude” the Court has given religious organizations (including corporations) because for-profit corporations “have no consciences, no beliefs, no feelings, no thoughts, no desires,” whereas “religious organizations exist to serve a community of believers.” (3) The majority wrongly collapsed the inquiry whether the plaintiffs’ religious views are sincere with whether the burden on them is substantial. Yet pre-Smith cases asked whether the burden on religious exercise was too attenuated to be deemed substantial.

(4) The contraceptive mandate furthers the government’s compelling interests of “enabl[ing] women to avoid the health problems unintended pregnancies may visit on them and their children,” and “preventing certain cancers, menstrual disorders, and pelvic pain.” (5) The compelling interest is not undermined by the exemptions for grandfathered plans and small employers. “Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by those statutes”; and the grandfathering provision is a temporary, transitional provision. (6) “[L]et the government pay” cannot be a less restrictive alternative. Would the government have to pay part of employees’ wages if an employer had a sincere religious objection to paying the minimum wage? (7) The accommodation given to religious non-profits is not satisfactory either because neither the majority nor the plaintiffs were willing to state definitively that that accommodation complies with RFRA. (8) The Court should have adhered to United States v. Lee, 455 U.S. 252 (1982), where it stated that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity.” (9) Finally, “[t]he Court . . . has ventured into a minefield,” as employers can now be expected to assert any variety of religious-based objections to generally applicable laws, all of which must be assessed under a strict-scrutiny standard.

- Harris v. Quinn, 11-681. By a 5-4 vote, the Court held that the First Amendment does not “permit a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support.” The federal Medicaid program funds state-run programs that provide in-home care to persons who, without that care, would have to live in a nursing home or other institution. Illinois has established such a program, called the “Rehabilitation Program.” Under Illinois law, the person receiving the home care is called the “customer” and “the employer” of the “personal assistant” (PA). Among other things, the customer “control[s] all aspects of the employment relationship” by, among other things, “locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the [PA], imposing . . . disciplinary action against the PA,” and firing the PA. The state, subsidized by Medicaid, pays the personal assistants’ salaries, “sets some basic threshold qualifications for employment,” helps the customer conduct a mandated annual review, and suggests certain duties the PA should perform for the customer. In 2003, Illinois Governor Rod Blagojevich issued an Executive Order calling for state recognition of a union as the personal assistants’ exclusive bargaining representative for collective bargaining with the state. The Illinois Legislature codified that order several months later through a law which stated that PAs are not state employees for any purpose other than coverage
under the Illinois Public Labor Relations Act. Soon afterwards, PAs voted the Service Employees International Union (SEIU) to be their exclusive representative. The SEIU and the state later entered into collective-bargaining agreements that require all PAs who are not union members to pay a “fair share” of the union dues. Three PAs who are not union members filed suit in federal court alleging that Illinois law, by requiring them to make fair-share payments, violates their First Amendment rights. The district court dismissed their claims, and the Seventh Circuit affirmed based on Abood v. Detroit Board of Education, 431 U.S. 209 (1977), which held that non-union public employees can be compelled to pay fees to support a union’s collective-bargaining activities. In an opinion by Justice Alito, the Court reversed.

The Court stated that “Illinois now asks us to sanction what amounts to a very significant expansion of Abood — so that it applies, not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization and the collection of an agency fee.” The Court declined to so expand Abood. As a first step in deciding not to, the Court examined Abood and its roots. In Abood a putative class of teachers sued to invalidate an agency-shop clause, arguing that they were being required to fund union “‘activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they have no voice.” Abood rejected their First Amendment claim on the strength of two precedents ─ both of which involved private-sector union-shop agreements, and neither of which seriously addressed the First Amendment issue. Abood concluded that the two precedents upheld union-shop agreements based on two considerations ─ the need for “labor peace” and to prevent “free riders[hip]” ─ both of which apply in the public sector as well. The Court here stated that “[t]he Abood Court’s analysis is questionable on several grounds.” In addition to over-reading its precedents, “Abood failed to appreciate the difference between” private union-shops and public union-shops: “In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.” It is therefore conceptually difficult, found the Court, to draw the required distinction between union expenditures that go toward collective-bargaining purposes (for which fair-share payments can be exacted) and those that go toward political advocacy (for which fair-share payments cannot be exacted). The Court also noted the many “practical administrative problems” Abood creates and “the practical problems that would face objecting nonmembers.”

The Court held that “[b]ecause of Abood’s questionable foundations, and because the personal assistants are quite different from full-fledged public employees, we refuse to extend Abood to the new situation now before us.” (The Court therefore declined petitioners’ invitation to overrule Abood.) As to how personal assistants are different, the Court explained that the state has little authority over them. PAs “are almost entirely answerable to the customers and not the State”; and “Illinois withholds from personal assistants most of the rights and benefits enjoyed by full-fledged state employees.” This matters, stated the Court, because Abood “is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law.” And if Abood were extended to workers who are not full-fledged public employees, “a host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion within Abood’s reach.”
Having pushed Abood aside, the Court asked whether “the payments compelled by Illinois law” are constitutional “under generally applicable First Amendment standards.” Those general standards provide that compelled funding of speech — such as the agency fees here — “imposes a significant impingement on First Amendment rights” that “cannot be tolerated unless it passes exacting First Amendment scrutiny” (internal quotation marks omitted). Such scrutiny requires the government to show, at the very least, that the provision serves a “compelling governmental interest[s] . . . that cannot be achieved through means significantly less restrictive of associational freedoms” (internal quotation marks omitted). The Court concluded that neither of the asserted governmental interests advanced by the agency-fee provision is sufficiently compelling. The first is labor peace, but that goal is accomplished by the union’s status as exclusive bargaining agent; agency fees are not also required for labor peace, as shown by the fact that federal employees do not have to pay union fees. Nor, concluded the Court, is the agency-fee provision necessary to the success of the Rehabilitation Program. The Court found that Illinois has not proven that the dues SEIU receives from union members would not allow the union to accomplish its objectives.

Justice Kagan filed a dissenting opinion, which Justices Ginsburg, Breyer, and Sotomayor joined. Justice Kagan wrote that Abood “answers the question presented in this case,” and “is the foundation for not tens or hundreds, but thousands of contracts between unions and governments around the nation.” Abood resolves the case, the dissent argued, because under its Rehabilitation Program, Illinois sets the wages, benefits, and basic qualifications. Thus, “[a]lthough a customer can manage his own relationship with a caregiver, Illinois has sole authority over every workforce-wide term and condition of the assistants’ employment — in other words, the issues most likely to be the subject of collective bargaining.” For that reason, “the State’s stake in a fair-share provision is the same as in Abood.” The dissent went on to defend Abood itself, stating: “In numerous cases decided over many decades, this Court has addressed the government’s authority to adopt measures limiting expression in the capacity not of sovereign but of employer. Abood fits — fits hand-in-glove — with all those cases, in both reasoning and result.” Specifically, the line Abood and its progeny draw between speech relating to pay and working conditions (whose funding can be compelled) and speech relating to political matters (which cannot be) corresponds to the line drawn in Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968), between public employee speech that does not relate to a matter of public concern (which is not protected by the First Amendment) and speech that does address a matter of public concern (which is protected).

II. Cases Granted Review

- Mach Mining, LLC v. EEOC, 13-1019. Under Title VII of the Civil Rights Act of 1964, the EEOC is forbidden from filing suit unless (within a specified period) it “has been unable to secure from the respondent a conciliation agreement acceptable to the Commission.” 42 U.S.C. §2000e-5(f)(1). The question presented is “[w]hether and to what extent may a court enforce the EEOC’s mandatory duty to conciliate discrimination claims before filing suit?” In 2008, an employee of Mach Mining, a coal mining company, filed a charge of discrimination with the EEOC alleging that
she had been denied employment as a coal miner because of her sex. The Commission issued a
determination that there was reasonable cause to believe Mach Mining had discriminated against a
class of female applicants. According to the company, “[t]he Commission then presented [it] with a
verbal conciliation demand, but later notified [the company] that it had determined that the concili-
ation process had failed and that further discussions would be futile.” A few days later, the EEOC
sued Mach Mining in federal district court alleging intentional employment discrimination against
women or, in the alternative, disparate-impact discrimination. Mach Mining’s answer asserted as
an affirmative defense that the Commission had failed to fulfill its statutory obligation to conciliate
in good faith. The Commission moved for partial summary judgment on that issue. The district court
denied the motion. On interlocutory appeal the Seventh Circuit reversed, holding that the EEOC’s
compliance with the conciliation precondition is not judicially enforceable. 738 F.3d 171.

The Seventh Circuit reasoned that the text of Title VII contains no “express provision for an
affirmative defense based on an alleged defect in the EEOC’s conciliation efforts,” and that judicial
enforcement of the precondition would not be practical for several reasons. First, the provision’s
confidentiality requirement would mean courts must “evaluate[] conciliation without evidence to
weigh, at least without the consent of the parties.” Second, the court found there was no “meaning-
ful standard” to evaluate a failure-to-conciliate affirmative defense. The court added that allowing
such a defense would “invite[] employers to use the conciliation process to undermine enforce-
ment of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a
dispute.” Mach Mining argues that eight circuits have held that the conciliation precondition is
enforceable — three of which ask whether the Commission acted in “good faith” or “reasonably”;
three of which specify actions the Commission must have taken to show that it acted in good faith;
and two of which have not articulated a standard of review. On the merits, Mach Mining contends
that the “Court has long treated compliance with statutory preconditions to suit as subject to
judicial review and non-compliance as a defense.” The company adds that other circuits have not
had difficulty applying a “good faith” standard, and that the National Labor Relations Act requires
employers and unions to bargain in good faith — “a requirement that has been subject to adminis-
trative and judicial review for decades.”

Act (FTCA), 28 U.S.C. §2401(b), waives the United States’ sovereign immunity for tort claims as-
serted by federal employees, but requires that (1) the claim must first be presented to the federal
agency within two years of when the claim accrues or “be forever barred”; and (2) the employee
must commence any federal action “within six months after the date” on which the agency finally
denies the claim or “be forever barred.” The June case presents the question whether the first of
those requirements is subject to equitable tolling. The Wong case presents the question whether
the second of those requirements is subject to equitable tolling. The Ninth Circuit held that neither
time bar is jurisdictional and that both are subject to equitable tolling.

Wong. Kwai Fun Wong, a citizen of Hong King, was held in immigration detention in Oregon
for five days while awaiting expedited removal. On May 18, 2001, she filed suit in federal district
court seeking damages based on her removal and the conditions of her confinement. On that date,
she separately filed a claim with the INS under the FTCA alleging negligence based on the conditions of her confinement. In November 2001, Wong sought leave to amend her federal complaint to add an FTCA claim against the United States. The court did not act on that request because the INS had not finally denied her claim yet. The INS issued a final denial on December 3, 2001, at which time Wong had six months to bring an action in federal court under the FTCA. Although the magistrate judge recommended that she be granted leave to file a second amended complaint before the six months had expired, the district court did not adopt that recommendation until June 25, 2002 — three weeks after the six-month deadline had elapsed. Seven weeks after that, Wong filed a second amended complaint which added the FTCA claim. The United States moved for summary judgment on the ground that her FTCA claim was time-barred. The district court denied the motion, equitably tolling the six-month time period for 81 days (from the date the magistrate judge recommended she be granted leave to amend to the date the district court granted such leave). While the case was pending in district court, the Ninth Circuit decided Marley v. United States, 567 F.3d 1030 (2009), which held that the six-month time period for filing suit under the FTCA cannot be equitably tolled. Based on that decision, the district court granted the United States' motion for reconsideration and entered final judgment in favor of the United States. Wong appealed. The Ninth Circuit sua sponte ordered the case to be heard en banc and reversed. 732 F.3d 1030.

The eight-judge majority opinion held that the FTCA’s six-month time limit is not jurisdictional. The court found “nothing in the text, context, or purpose of §2401(b) clearly indicat[ing] that the FTCA’s six-month limitations period implicates the district courts’ adjudicatory authority.” The court then held that the government failed to overcome the presumption, established in Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), that statutes of limitation are subject to equitable tolling. Finally, the court concluded that Wong was entitled to equitable tolling because the delay “was not the consequence of any fault or lack of due diligence on [her] part,” but was the result of “the delay inherent in the Magistrate Judge system.” The United States argues that “[t]he text Congress chose for the FTCA’s suit-filing bar is the same that it had long used to set deadlines for damages actions against the United States under the Tucker Act. . . . And it is the same operative text this Court had repeatedly construed in Tucker Act suits against the United States as jurisdictional and not subject to equitable tolling.” The United States also points to §2401(b)’s “emphatic language” (“shall be forever barred”) and the need for “orderly administration” of “the processing of a vast multitude of claims.”

June. In February 2005, Andrew Booth was killed in a car accident on an interstate highway in Arizona. In 2006, respondent Marlene June, acting as conservator for Booth’s minor son, filed a wrongful death action against a contractor and the State of Arizona for negligently installing and maintaining the median barrier. In December 2010, more than five years after the accident, June presented a claim under the FTCA to the Federal Highway Administration (FHWA) alleging that the FHWA permitted a defective median barrier to be installed. On March 18, 2011, the FHWA denied June’s claim as untimely. On May 5, 2011, June filed this action in federal district court against the United States under the FTCA. The United States moved to dismiss for failure to file a claim with the FHWA within two years of accrual, as required by the FTCA. The district court granted the United States’ motion. A Ninth Circuit panel reversed and remanded based on its then-recent en banc
decision in Wong. The court stated that it could draw no distinction between the FTCA’s six-month suit-filing deadline and the two-year deadline for first presenting the claim to the agency.

The United States’ petition relies on much the same arguments as its petition in Wong. June’s brief in opposition argues that the “nine courts of appeals that have reached the issue have all held that the two-year statutory period is subject to equitable tolling” (though they have disagreed whether the period is jurisdictional or non-jurisdictional). On the merits, June argues “that limitations periods are customarily subject to equitable tolling,” that the “Court has found that materially identical statutory language” in other laws “supports equitable tolling,” that the FTCA’s limitations provision is in a different provision of the statute than the provision describing courts’ jurisdiction; and that “[e]quity was part and parcel of the FTCA as a whole from Day One.”

● Gelboim v. Bank of America Corp., 13-1174. The question presented is “[w]hether and in what circumstances is the dismissal of an action that has been consolidated with other suits immediately appealable?” Respondents are banks that allegedly conspired to manipulate the London Interbank Offered Rate (LIBOR), which is an important benchmark for short-term interest rates around the world. Many parties filed suit around the nation claiming they were injured by the suppression of U.S. dollar LIBOR. The Judicial Panel on Multidistrict Litigation ordered that LIBOR-related litigation be transferred for pretrial proceedings to the U.S. District Court for the Southern District of New York. That court permitted one group of non-class action claims and three separate class-action complaints to move forward, while 30 or so other LIBOR-related complaints were stayed. Petitioners filed one of the three class-action complaints to move forward. Their complaint was filed on behalf of purchasers of bonds with LIBOR-linked interest rates; and they raised just a single claim — that the defendants had violated federal antitrust law. The other three complaints going forward each raised a federal antitrust claim and one or more other claims. The district court granted respondents’ motion to dismiss most of the claims set forth in the four non-stayed cases, including the federal antitrust claim. But the court left pending a few claims in the non-stayed cases. Because petitioners’ action was rejected in its entirety, it filed a timely notice of appeal to the Second Circuit. The Second Circuit dismissed petitioners’ appeal after holding sua sponte that it lacked jurisdiction “because a final order has not been issued by the district court . . . , and the orders appealed from did not dispose of all claims in the consolidated action.”

Petitioners argue that the courts are deeply divided “over whether and when the dismissal of an action that has been consolidated with other actions is an appealable final order.” The Federal, Ninth, and Tenth Circuits apply a categorical rule that the dismissal of one of several consolidated cases is not immediately appealable. The Second Circuit applies “a near-per se bar to appeal,” under which appeal is permissible only “[i]n highly unusual circumstances.” The First and Sixth Circuits apply a categorical rule that permits immediate appeals in this situation. And the D.C., Third, Fifth, Seventh, and Eighth Circuits “nominally apply a case-by-case approach” that allows an immediate appeal “whenever the underlying complaint was not consolidated with still-pending suits for all purposes.” On the merits, petitioners argue that 28 U.S.C. §1291 “gives the losing party the unqualified right to immediately appeal a ‘final decision’; and the decision here is final as to them because “the district court dismissed the[ir] complaint, which is a separate action without the
MDL.” Respondents counter that Federal Rule of Civil Procedure 54(b) satisfactorily addresses the issue by authorizing a district court to “enter final judgment as to particular claims or parties when ‘there is no just reason for delay.’” The question presented only matters, they argue, when “a party has elected not to move for certification” under Rule 54(b) or “the district court has determined in response to a Rule 54(b) request that judicial administrative interests and equity weigh against an immediate appeal.”

- **Mellouli v. Holder, 13-1034.** Under 8 U.S.C. §1227(a)(2)(B)(i), a noncitizen may be removed if he has been convicted of violating “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21) . . . .” This case addresses when a person may be deported under this provision based on possession of drug paraphernalia. Petitioner Moones Mellouli is a Tunisian citizen who entered the United States in 2004 on a student visa, became a lawful permanent resident in 2011, and now works as an actuary in Kansas. In April 2010, Mellouli was detained for driving under the influence. Jail officials discovered four tablets of Adderall hidden in his sock. Adderall is an amphetamine that is a controlled substance under state (and federal) law. Local prosecutors charged Mellouli with trafficking in contraband in jail. Mellouli later pled guilty to the reduced charge of “possession of drug paraphernalia” (namely, the sock used to conceal the Adderall). The federal government arrested Mellouli in 2012 and charged him with removability under §1227(a)(2)(B)(i) based on his drug-paraphernalia conviction. The immigration judge ordered him removed, finding that Mellouli’s conviction was “relat[ed] to a controlled substance,” and that it did not matter that “the Kansas definition of ‘controlled substance’ does not ‘map perfectly’ the definition of that term as used in section 802 of the [federal] Controlled Substances Act.” The Eighth Circuit affirmed. 719 F.3d 995.

The Eighth Circuit observed that Mellouli’s drug-paraphernalia conviction was based on the storing and concealing of controlled substances as defined by Kansas law. And “[o]f the hundreds of substances currently listed” on Kansas’s schedules, “less than a handful” were not federally scheduled as well. That means “there is little more than a ‘theoretical possibility’ that a conviction for a controlled substance offense under Kansas law will not involve a controlled substance as defined in 21 U.S.C. §802.” The court held that the Board of Immigration Appeals had reasonably concluded that a person such as Mellouli is removable under §1227(a)(2)(B)(i), and granted Chevron deference to that conclusion. Mellouli argues that the Third and Seventh Circuits have held that the federal government must specifically show that the state drug-paraphernalia conviction related to a federally listed substance. He maintains that Congress amended the immigration laws in 1986 to “allow[ ] the States to specify which drug-related offenses could support deportability while retaining for the federal government the power to define the substances for which those offenses must be tied.” In his view, the Eighth Circuit and BIA approach “cuts the mooring to the federal list of substances that Congress retained when amending the statute.”
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