National Council for the Social Studies
Seattle, Washington
November 16, 2012
Room 3B
10:15 – 11:15

AGENDA – "Preview of the Supreme Court's 2012- 2013 Term"

1. Review of the 2011 – 2012 Term (Source: www.scotusblog.com)

2. Affirmative Action in Higher Education and Dog Sniffs and the 4th Amendment – case study activity.

3. Cases to Watch this Term

4. The Supreme Court Summer Institute, co-sponsored by Street Law and the Supreme Court Historical Society.
   www.streetlaw.org/supremecourt

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A complete copy of this material can be found at
www.streetlaw.org/NCSS2012.

Circuit Scorecard

OT 2011

	Number	Percent	Aff'd	Rev'd	Aff'd %	Rev'd %
CA1	2	3%	1	1	50%	50%
CA2	2	3%	0	2	0%	100%
CA3	7	9%	3	4	43%	57%
CA4	2	3%	2	0	100%	0%
CA5	3	4%	3	0	100%	0%
CA6	5	7%	0	5	0%	100%
CA7	3	4%	1	2	33%	67%
CA8	-	-				
CA9	24	32%	7	17	29%	71%
CA10	4	5%	2	2	50%	50%
CA11	4	5%	1	3	25%	75%
CA DC	4	5%	3	1	75%	25%
CA Fed	3	4%	1	2	33%	67%
State	11	15%	4	7	36%	64%
Dist. Court	1	1%	0	1	0%	100%
Original	-	-	N/A	N/A	N/A	N/A
	75	**100%**	**28**	**47**	**37%**	**63%**

OT 2012

	Number	Percent
CA1	-	-
CA2	5	17%
CA3	3	10%
CA4	-	-
CA5	3	10%
CA6	2	7%
CA7	2	7%
CA8	1	3%
CA9	4	13%
CA10	1	3%
CA11	2	7%
CA DC	2	7%
CA Fed	2	7%
State	3	10%
Dist. Court	-	-
Original	-	-
	30	**100%**

* The number of cases granted from a given circuit does not include cases that were later dismissed.

Cases by Vote Split

9-0 33 (44%)	8-1 8 (11%)	7-2 6 (8%)	6-3 13 (17%)	5-4 15 (20%)
KPMG v. Cocchi (PC)	Smith v. Cain	Maples v. Thomas	Cavazos v. Smith (PC)	Douglas v. Ind. Living Center
Bobby v. Dixon (PC)	CompuCredit v. Greenwood	Golan v. Holder (6-2)	Kawashima v. Holder	Coleman v. Maryland
Greene v. Fisher	Minneci v. Pollard	Reynolds v. U.S.	Wetzel v. Lambert (PC)	Missouri v. Frye
Judulang v. Holder	Gonzalez v. Thaler	Messerschmidt v. Millender	Kurns v. Railroad Friction	Lafler v. Cooper
Hardy v. Cross (PC)	Perry v. New Hampshire	Martinez v. Ryan	Setser v. U.S.	FAA v. Cooper (5-3)
Hosanna-Tabor v. EEOC	Roberts v. Sea-Land	Knox v. SEIU	Vartelas v. Holder	Florence v. Bd. of Chosen Freeholders
Pacific Op. v. Valladolid	Zivotofsky v. Clinton		Taniguchi v. Kan Pacific	U.S. v. Home Concrete
Mims v. Arrow Financial	Match-E-Be-Nash-She-Wish v. Patchak		Blueford v. Arkansas	Hall v. U.S.
Perry v. Perez (PC)			Armour v. Indianapolis	Williams v. Illinois
U.S. v. Jones			Elgin v. Dept. of Treasury	Christopher v. SmithKline
Nat'l Meat Ass'n v. Harris			Southern Union v. U.S.	Salazar v. Ramah Navajo
Ryburn v. Huff (PC)			Arizona v. U.S. (5-3)	Dorsey v. U.S.
Howes v. Fields			U.S. v. Alvarez	Miller v. Alabama
Marmet v. Brown (PC)				Am. Tradition P'ship v. Bullock (PC)
PPL Montana v. Montana				Nat'l Fed'n Indep. Bus. v. Sebelius
Martel v. Clair				
Mayo v. Prometheus				
Sackett v. EPA				
Credit Suisse v. Simmonds (8-0)				
Rehberg v. Paulk				
Filarsky v. Delia				
Caraco v. Novo Nordisk				
Kappos v. Hyatt				
Mohamad v. Palestinian Authority				
Wood v. Milyard				
Astrue v. Capato				
Holder v. Gutierrez				
Freeman v. Quicken Loans				
RadLAX v. Amalgamated Bank (8-0)				
Coleman v. Johnson (PC)				
Reichle v. Howards (8-0)				
Parker v. Williams (PC)				
FCC v. Fox (8-0)				

Not Included Above	
Stok v. Citibank (10-514)	Dismissed - Rule 46
Magner v. Gallagher (10-1032)	Dismissed - Rule 46
Kiobel v. Royal Dutch (10-1491)	Restored for Reargument during OT12
Vasquez v. United States (11-199)	Dismissed as Improvidently Granted
Jackson v. Hobbs (10-9647)	Consolidated with *Miller v. Alabama*
First American Financial v. Edwards (10-708)	Dismissed as Improvidently Granted

Past Terms					
	9-0	8-1	7-2	6-3	5-4
OT06	39%	13%	11%	4%	33%
OT07	30%	9%	29%	14%	17%
OT08	33%	5%	16%	16%	29%
OT09	46%	10%	15%	11%	18%
OT10	48%	13%	15%	5%	20%
Avg.	39%	10%	17%	10%	24%

* This chart includes both signed merits opinions and summary reversals.

** Unless otherwise noted, we treat cases with eight or fewer votes as if they were decided by the full Court. In other words, we treat a case like *Reichle v. Howards* as a 9-0 case throughout this Stat Pack. For 8-0, 7-1, and 6-3 decisions, we categorically assumed that the recused Justice would have joined the majority. In cases that were decided 5-3, we looked at each individual case to decide whether it was more likely that the recused Justice would join the majority (as in *Arizona v. United States*) or the dissent (as in *Federal Aviation Administration v. Cooper*). Our assumption that nine Justices voted in each case applies only to figures that treat each case as a whole, like the chart above and our Strength of the Majority charts on page 12, and not to figures that focus on the behavior of individual Justices, like our Frequency in the Majority figures charts on page 13 or our Justice Agreement charts on pages 20-25. We have done our best to note where we assume a full Court and where we use an incomplete Court.

Five-to-Four Cases

(continued)

Membership in a Five-to-Four Majority

Justice	Cases Decided	Frequency in Majority		OT10	OT09	OT08	OT07	OT06
Kennedy	15	12	80%	88%	69%	78%	67%	100%
Roberts	15	10	67%	63%	56%	48%	58%	67%
Thomas	15	10	67%	75%	69%	65%	67%	61%
Scalia	15	9	60%	69%	69%	70%	58%	58%
Alito	15	9	60%	63%	63%	52%	50%	71%
Breyer	15	7	47%	31%	38%	39%	45%	46%
Sotomayor	15	7	47%	38%	43%	-	-	-
Kagan	14	6	40%	38%	-	-	-	-
Ginsburg	15	5	33%	38%	25%	52%	50%	33%

Five-to-Four Majority Opinion Authorship

These percentages consider how often a Justice authors the majority opinion *when that Justice is in the majority.**

Justice	Cases Decided	Frequency in the Majority	Opinions Authored	Frequency as Author	OT10	OT09	OT08	OT07	OT06
Breyer	15	7	3	43%	20%	25%	0%	40%	18%
Kennedy	15	12	4	33%	21%	22%	28%	50%	25%
Alito	15	9	3	33%	0%	40%	8%	17%	24%
Sotomayor	15	7	2	29%	17%	0%	-	-	-
Kagan	14	6	1	17%	0%	-	-	-	-
Roberts	15	10	1	10%	30%	22%	18%	14%	19%
Scalia	15	9	0	0%	9%	18%	33%	29%	0%
Thomas	15	10	0	0%	33%	9%	13%	13%	29%
Ginsburg	15	5	0	0%	33%	50%	27%	0%	13%

* Percentages represent the number of majority opinions authored divided by the number of times a Justice was in the majority for a *signed* opinion. As such, 5-4 *per curiam* opinions are omitted entirely.

Justice Agreement - Highs and Lows - All Cases

The following tables list the Justice pairs with the highest, and lowest, agreement rates in *all cases* (drawn from the chart on page 20). Both tables consider the level of *agreement in full, in part, or in judgment only*.

Highest Agreement

	Pair	Average
1	Scalia - Thomas	93.3%
2	Roberts - Alito	90.5%
3	Scalia - Alito	88.0%
4	Thomas - Alito	88.0%
5	Roberts - Thomas	87.8%
6	Roberts - Scalia	86.5%
7	Ginsburg - Kagan	84.5%
8	Breyer - Kagan	84.5%
9	Sotomayor - Kagan	84.3%
10	Ginsburg - Sotomayor	83.8%

Lowest Agreement

	Pair	Average
1	Scalia - Ginsburg	56.0%
2	Thomas - Ginsburg	56.0%
3	Scalia - Breyer	57.3%
4	Ginsburg - Alito	57.3%
5	Thomas - Breyer	62.7%
6	Roberts - Ginsburg	63.5%
7	Scalia - Sotomayor	63.5%
8	Thomas - Sotomayor	63.5%
9	Alito - Sotomayor	63.5%
10	Scalia - Kagan	66.2%

Fisher v. University of Texas

Argued: October 10, 2012

Publicly funded universities in the United States decide among candidates based on hundreds of distinguishing factors. At issue here is whether or not these universities can consider race as one of those elements. One side says that when public universities use race as a factor of admissions at all, they are violating the Fourteenth Amendment's Equal Protection clause by treating one race unequally. The other side, citing legal precedent established in Supreme Court cases from 1978 and 2003, says that public universities must be allowed freedom in assembling their classes so as to reap the benefits of education that can only be achieved through a "critical mass" of diversity in the student body. In this case, the specific question is whether or not the University of Texas at Austin is already meeting its "critical mass" through a race-neutral program. That said, many observers believe that the Court may use this case as an opportunity to effectively overturn its prior affirmative action decisions.

The University of Texas at Austin accepts over 90% of its students through a recent state-mandated "top-10%" rule that automatically admits any Texas high school student in the top 10% of his or her graduating class. Students not automatically admitted in this way are placed in a pool that competes for the remaining spots in the freshman class. Students are assigned a score based on academic achievement and another score based on personal achievement. One component of the personal achievement score is the consideration of "special circumstances," one of which is race.

Abigail Fisher is a White female who applied to the University of Texas at Austin in 2008. When Fisher was not admitted, she sued the school on the basis that she was being discriminated against due to her race. As evidence, she argued that her academic record was superior to many minority students who were admitted in 2008. Fisher said that the "critical mass" of diversity needed by the school had been reached by the top 10% program, which admitted 96% of the African-Americans in the 2008 freshman class. Since this race-neutral program exists and works, Fisher said, taking race into consideration during admissions should not be allowed.

The University of Texas responded that it had not yet reached a critical mass of minority students because many minorities still felt isolated on campus and there were not enough classrooms with substantial minority representation. Further, they argued that their admissions program in 2008 was identical to a program approved by the Court in a 2003 decision on affirmative action. In such a program, race is seen as a "plus factor" but is only considered in context and does not increase odds of acceptance by a specific percentage.

Amicus briefs filed on both sides argue the broader issue of affirmative action as a whole. Those on Fisher's side point to academic studies that show minorities are less likely to pursue hard sciences at affirmative-action universities because they are less prepared than their classmates. Those on the University of Texas's side cite studies that say minority students are more likely to graduate from a more selective school and that all students, regardless of race, benefit more from education as part of a diverse student body.

The District Court ruled against Fisher, saying that there was no Equal Protection Clause violation, and the Fifth Circuit Court of Appeals upheld that decision.

Florida v. Jardines

Argued: October 31, 2012

The Fourth Amendment allows for warrantless searches that are reasonable and prohibits those that are unreasonable. A search occurs when the government looks for anything in an area where a person has a reasonable expectation of privacy. People have their greatest expectation of privacy in their homes. The issue in this case is whether or not a dog sniff at the front door of a house is a "search" that is prohibited by the Fourth Amendment.

In November 2006, the Miami-Dade police received a tip that Joelis Jardines was growing marijuana in his home. A month later, Detective Bartlet went to the house to investigate. He was accompanied by a drug detection dog named Franky. Detective Bartlet and Franky walked up to the front door of the house, at which point Detective Bartlet knocked on the door and determined that Mr. Jardines was not home. After sniffing the base of the door to the house, Franky alerted, indicating that there were drugs present, by sitting down. Detective Bartlet then returned with Franky to his car and prepared information for a search warrant, using Franky's alert as probable cause, which subsequently led to the discovery of over 25 pounds of marijuana.

The Supreme Court has held that a dog sniff is not a search when sniffing a vehicle or luggage in order to detect illegal contraband. The underlying logic of these decisions was that a dog sniff can only point out the existence of illegal activity and that a person has no reasonable expectation of privacy in illegal substances. That said, the Court has also indicated that homes are special areas of Fourth Amendment protection.

In 2001, the Court ruled in *Kyllo v. United States* that a thermal imaging device was a Fourth Amendment search even though it could only the presence of heat within a house. The justices said that when technology is not in common public use, it is more likely that the use of such technology constitutes a search. Jardines says that a trained drug-sniffing dog, like the thermal imaging device, is not available to the public and therefore counts as the type of technology restricted in *Kyllo*.

In response, the State argues that a thermal imaging device could potentially reveal intimate information about lawful activity occurring inside a house, whereas a dog sniff can only detect unlawful activities. In addition, they say, dogs have been aiding law enforcement agencies for over a hundred years and are commonly seen and utilized in public.

On top of these legal arguments, both sides are locked in a debate over the accuracy of drug sniffing dogs. If a dog's false alert is taken as probable cause for a warrant, then its alert will certainly reveal information about lawful activities through the subsequent search of the house. If, on the other hand, the dogs are trained well and display extraordinary low rates of false alerts, then law-abiding homeowners would have no reason to worry about dog sniff searches revealing their private information.

At trial, the evidence seized at Jardines' house was suppressed as evidence arising from an unlawful search. Florida's appellate court reversed this decision, using the Supreme Court's precedent that indicated dog sniffs were not searches. The Florida Supreme Court reversed the appellate court, saying that homes were more protected under the Fourth Amendment than luggage or cars. Further, the court said that allowing dog sniffs of homes could create an incentive for embarrassing and arbitrary dog-sniff dragnets across neighborhoods

2012 Supreme Court Cases to Watch

Fisher v. University of Texas (Affirmative Action)
The Court has heard several arguments about affirmative action over the past 40 years. As it stands, public Universities are allowed to use race as a potential "plus" factor for an applicant as part of a holistic application process in order to achieve a critical mass of diversity, but cannot assign any points or specific slots for minority students. This case challenges that precedent on the basis that there are other, race-neutral means of achieving a critical mass of minority students at the University of Texas at Austin.

Bailey v. United States (Seizure Case)
The Fourth Amendment protects us from unreasonable searches and seizures. At issue in this case is whether it is reasonable to seize and detain a suspect outside of the vicinity of his or her home immediately before a search warrant for the home is executed. Older cases have said that detentions in and near the home are reasonable, but this detention occurred almost a mile away.

Kirtsaeng v. John Wiley & Sons, Inc. (Imports and Copyrights)
Copyright holders in the United States often authorize subsidiaries in other countries to copy and sell their goods. What happens, though, when these goods are then imported back into the United States? Kirtsaeng is a student from Thailand who imported and then sold textbooks to his classmates. The publisher of the books in the United States says that such secondary sales are illegal, but Kirtsaeng argues that since he bought them legally he can legally resell them. The resolution of this case will have a huge impact on reselling goods that were purchased outside of the United States.

Florida v. Jardines **and** ***Florida v. Harris*** (Dog Sniffs)
The Court has taken two cases about dog sniffs. In *Florida v. Jardines*, a drug-sniffing dog went up to the front of a house and alerted for possible narcotics. *Florida v. Harris* is similar, but involves a car instead of a house. The outcome of these cases will determine the uses for drug sniffing dogs far into the future. At issue is the reliability of the training that drug sniffing dogs receive, whether or not their alert is a "search" under the Fourth Amendment, and whether or not such alerts are sufficient to establish the probable cause necessary to secure a warrant. Current precedent is favorable to the government, but precedent was also favorable to the government in the Fourth Amendment GPS tracking case from last year.

Evans v. Michigan (Double Jeopardy)
When a trial judge issues an acquittal due to his own misunderstanding of the law, can the state try the defendant again? The double jeopardy clause of the Fifth Amendment prevents a defendant from being charged with the same offense after an acquittal, but the Court must decide whether or not this equally applies when a clear mistake has occurred.

The Same-Sex Marriage Cases
There are at least eight cases relating to gay marriage that have been filed in the Supreme Court this term. Though the Court has yet to accept them, many believe that they will hear at least one of these cases this term. Most of these cases have arisen because several Federal Court of Appeals judges have ruled that the Defense of Marriage Act, a piece of federal

legislation that defined marriage as being between one man and one woman, was unconstitutional. It is also possible, though less likely, that a case involving the constitutionality of California's Prop 8 will be accepted. Regardless of what comes before the Court, the main issues debated will be the proper understanding of the Fourteenth Amendment's "Due Process" and "Equal Protection" clauses.