Appendix B: Remarks of Justice Ginsburg, June 13, 2014

Because the Second Circuit held no Judicial Conference last year, I will include in these remarks descriptions of Supreme Court decisions from last term (2012-2013) as well as the (2013-2014) term still underway. About the same number of cases were fully briefed and argued both terms, 73 last term, 70 in the current term. Last term's decisions swelled to 78, because we decided five cases per curiam, without full briefing and with no oral argument. This year, we have so far decided five cases that summary way.

Last term, as usual, our unanimity rate was high. We agreed, at least on the bottom line judgment, in 38 of the 78 decisions handed down. In contrast to that 49% agreement rate, we divided 5 to 4 (or 5 to 3 with one justice recused) in 23 of the post-argument dispositions, a sharp disagreement rate just above 30%. This term, we have so far unanimously agreed on the bottom-line judgment in 46% of the argued cases plus unanimous *per curiam* dispositions. Five to four divisions were returned in 10% of total argued cases, a disagreement rate likely to increase in the term's final weeks. In short, although not broadcast in the media, we agree much more often than we disagree. That is notable, I think, because we tend to grant review only when other courts have divided on the answer to the issue we take up.

Highest agreement rate, 2012-2013, Justice Kagan and me. We were together in 96% of the cases on which both of us voted. Highest disagreement rate last term, Justice Alito and me, agreeing in 45 of the 77 cases in which both of us participated. Most likely to appear in the majority, for the fifth consecutive term, Justice Kennedy, voting with the majority last term in 91% of the decisions handed down. Least likely to appear in the majority last term, Justice Scalia, voting with the majority in 78% of the total decisions rendered. Most active at oral argument 2012-2013, Justice Sotomayor outran Justice Scalia. Her average number of questions per argument, 21.6, Justice Scalia's, 20.5. It is too soon to report similar information for the current Term.

Honing in on the Second Circuit, last term we granted review in ten cases from the Circuit, reversing six and affirming four. Most attention garnering among the ten, *United States v. Windsor*. This term, we granted review in only five cases from the Circuit, so far affirming two and reversing one that drew headlines, *Town of Greece v. Galloway*. I will say more about *Windsor* and *Town of Greece* later in this account of the 2012 and 2013 terms.

Some other cases of large importance. With an eye on the clock, I will describe them in short order. *Shelby County v. Holder*, decided the final week of the 2012-2013 term. In that 5 to 4 decision, the Court invalidated the Voting Rights Act's coverage formula, the mechanism used to identify which state and local governments had to seek federal preclearance before altering their election laws. I wrote for the dissenters. By overwhelming majorities in both Houses, and based on a voluminous record, Congress had renewed the Voting Rights Act's coverage formula unchanged. The dissent explains why four of us thought the Court should have accorded greater respect for the judgment of the Political Branches. Like the currently leading

campaign finance decision, *Citizens United v. Federal Election Commission*, I regard *Shelby County* as an egregiously wrong decision that should not have staying power.

Among headline cases from the current term are *Sebelius v. Hobby Lobby Stores* and *Conestoga Wood Specialties Corp. v. Sebelius*, cases brought by for-profit corporations challenging the Affordable Care Act's so-called contraceptive mandate. The corporations, both commercial enterprises, assert a right under the Free Exercise Clause of the First Amendment, and the Religious Freedom Restoration Act, to refuse to cover under their health insurance plans certain contraceptives—specifically, IUDs and morning and week after pills. The question presented: Can Congress lawfully confine exemptions from contraceptive coverage to churches and nonprofit religion-oriented organizations? The Tenth Circuit ruled in favor of the corporation; the Third Circuit upheld the law as Congress wrote it. The Court's decision will be among the last released this month.

I should mention too *NLRB v. Noel Canning*, a case from the D. C. Circuit, argued in January and still awaiting decision. At issue, the President's authority to make recess appointments. The questions presented: May the power be exercised during an interim break, or only during an end-of-session recess? Must the vacancy arise during the recess or may it already exist prior to the recess? Finally, does a period count as a recess when the Senate convenes every three days in pro forma sessions?

Next, I will concentrate, although not exclusively, on cases coming to us from the Second Circuit, and describe them less summarily. We heard the first day of the 2012-2013 term, *Kiobel v. Royal Dutch Petroleum Co*. *Kiobel* was initially argued the preceding term. The petitioner had asked the Court to resolve this question: Are corporations amenable to suit under the Alien Tort Statute, a law on the books since 1789, authorizing suit in federal court by an alien for a tort "committed in violation of the law of nations"? (The "law of nations," a term appearing in Article I, §8 of the Constitution, is what we today call "international law.") A panel of this Circuit had answered: Suit under the Act lies only against individuals; corporations are not covered.

On brief and at the initial argument, the respondent corporations proposed an alternative ground for affirmance: The Alien Tort Statute, they contended, should not apply offshore, that is, to conduct occurring in a foreign nation. The claim in *Kiobel* was that three oil companies with operations in Nigeria, all three headquartered abroad, had aided and abetted the Nigerian military's gross human rights violations. Plaintiffs in the case were victims, or the survivors of victims, of the alleged atrocities. Inviting full briefing on the alternative theory, the Court set the case for reargument in October 2012.

Writing for the majority, the Chief Justice did not address the corporate liability question resolved by the Second Circuit, the question on which review initially had been granted. Instead, the Chief embraced the presumption against extraterritorial application of domestic laws. Under that presumption, the Court held, the plaintiffs' claims could not be entertained because "all . . . relevant conduct took place outside the United States." The Court added that "even where the [plaintiffs'] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."

Justice Breyer, joined by Justices Sotomayor, Kagan, and me, agreed with the majority's bottom line, but not with the potential breadth of the Court's reasoning. *Kiobel*, Justice Breyer acknowledged, did not belong in a U.S. court, for nothing linked the case to this country. But rather than announcing a sweeping presumption against extraterritoriality, Justice Breyer invoked "principles and practices of foreign relations law." Jurisdiction would lie under the Alien Tort Statute, he maintained, when "the defendant's conduct substantially and adversely affects an important American national interest." One such interest, he identified, was ensuring that the United States would not become "a safe harbor . . . for a torturer or other common enemy of mankind." Thus, if a human rights violator acted abroad against foreign nationals and later shows up in the United States, Justice Breyer urged, the victims could sue him here. The Second Circuit so held in the famous *Filartiga* case. It remains to be seen whether a majority will uphold *Filartiga* should the issue come before us.

Kirtsaeng v. John Wiley & Sons, Inc., another Second Circuit decision the Court took up last term, involved a clash between copyright owners and proponents of less restrictive access to printed works. The question presented: Does the U.S. Copyright Act empower a copyright owner to bar the importation of a copy of her work lawfully manufactured and sold abroad? The petitioner in the case, Supap Kirtsaeng, was an enterprising foreign student taking courses at universities in the United States. Seeing a business opportunity, he imported low-priced textbooks from his native Thailand, enlisting his relatives in Thailand to buy the books there. He then resold the books for a profit in the United States. The textbooks' publisher sued Kirtsaeng for copyright infringement, invoking a provision of the Copyright Act, 17 U. S. C. §602(a)(1), that provides: "Importation into the United States, without the authority of the [copyright] owner . . . , of copies . . . of a work . . . acquired outside the United States is an infringement of the exclusive right to distribute copies."

In an opinion written by Justice Breyer, the Court ruled in favor of Kirtsaeng, overturning the $600,000 judgment the District Court had entered against him and reversing the decision of the Second Circuit. Kirtsaeng's importations, the Court held, were permitted by the "first sale doctrine." That doctrine allows the "owner of a particular copy" of a copyrighted work "to sell or otherwise dispose of . . . that copy" without first obtaining the copyright owner's permission. As statutorily codified, the first-sale doctrine applies only to copies "lawfully made under this title"—that is, Title 17, the Copyright Title of the U. S. Code. The textbooks Kirtsaeng imported satisfied this requirement, the Court said, because they had been "manufactured abroad with the permission of the copyright owner," thus they were "lawfully made."

I sided with the Second Circuit and dissented in an opinion joined by Justice Kennedy in full and by Justice Scalia in part. If "lawfully made" was key to the Court's decision, "under this title" was critical to the dissent. The phrase "lawfully made under this title," as I read it, refers to copies whose creation is governed, not by foreign law, but by Title 17 of the U. S. Code. And that meant made in the U.S.A., because the U. S. Copyright Act does not apply extraterritorially. The foreign-manufactured textbooks Kirtsaeng imported, though lawfully made in Thailand in accord with Thai law, were, in the dissent's view, not "lawfully made under [Title 17]," the crucial precondition for application of the codified first-sale doctrine. That reading would have avoided "shrink[ing] to insignificance" the copyright protection Congress provided against the unauthorized importation of foreign-made copies.

Last term, the Court heard only one First Amendment case, and it came to us from the Second Circuit, *Agency for International Development v. Alliance for Open Society International*. That case involved a condition Congress placed on federal funding for non-governmental organizations that endeavor to assist in combatting HIV/AIDS. Finding that the commercial sex industry contributed to the spread of HIV/AIDS, Congress barred federal funding "to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." I will call this prohibition the "Policy Requirement."

A group of domestic organizations engaged in efforts to combat HIV/AIDS overseas sued, arguing that the Policy Requirement violated their First Amendment rights. The organizations were not proponents of prostitution, but they feared that the Policy Requirement would make it more difficult for them to work with prostitutes to curtail the spread of HIV/AIDS. On review, a panel of the Second Circuit held that the Policy Requirement was an unconstitutional restriction on speech.

In an opinion written by Chief Justice Roberts, joined by Justices Kennedy, Breyer, Alito, Sotomayor, and me, the Court agreed with the Second Circuit. The government may set conditions that define the limits of a government spending program, we explained, but it may not leverage funding to regulate a fund recipient's speech outside the funded program. Demanding that organizations spout the government's position opposing prostitution and sex trafficking, we held, reached beyond the funded program in curtailing recipients' activities.

In dissent, Justice Scalia (joined by Justice Thomas) viewed the Policy Requirement as an appropriate means to identify organizations that would make fit partners for the fight against HIV/AIDS. The condition, Justice Scalia wrote, was "the reasonable price of admission" to the government spending program. An organization's speech was not compelled, in his view, for the organization could choose to accept or reject the government's condition (and the money that came with it) as the organization saw fit.

On the very last opinion-announcing day of the 2012-2013 term, June 26, the Court released decisions in the two same-sex marriage cases heard in tandem in March 2013. I will summarize the first announced, *United States v. Windsor*, which, as I noted earlier, came to us from the Second Circuit. The case presented a challenge to the constitutionality of §3 of the Defense of Marriage Act, or DOMA. Section 3 defined the term "marriage," for all federal law purposes, as "only a legal union between one man and one woman." Under this definition, same-sex couples, married lawfully under state law, were not recognized as married by the federal government. In all the ways in which a marital relationship matters for federal purposes—from social security benefits and taxation to joint burial privileges in veterans' cemeteries—DOMA treated these couples as unrelated persons.

The plaintiff in the case, Edith Windsor, married her partner of some 40 years, Thea Spyer, in Canada in 2007. The couple's state of residence—New York—recognized their marriage as lawful. Spyer died in 2009, leaving her estate to Windsor. If Windsor and Spyer's union had been between opposite-sex spouses, Windsor would have qualified for the marital deduction and would therefore owe no federal estate tax. But because Windsor and Spyer were same-sex spouses, Windsor incurred a tax bill in excess of $360,000.

Windsor sued for a refund. DOMA's exclusion of same-sex couples lawfully married under state law from the federal definition of marriage, she contended, violated the equal protection component of the Fifth Amendment. The District Court granted summary judgment in favor of Windsor, held DOMA's §3 unconstitutional, and awarded the refund Windsor sought. The Court of Appeals affirmed and the Supreme Court granted the government's petition for review.

But by then, the government no longer defended the constitutionality of §3. So the Court faced a threshold question: Did the executive branch's agreement with the decisions of the District Court and Second Circuit deprive the Supreme Court of jurisdiction?

In an opinion by Justice Kennedy, joined by Justices Breyer, Sotomayor, Kagan, and me, the Court first determined that Windsor's case remained a live controversy notwithstanding the government's agreement with her that §3 of DOMA was unconstitutional. The government had not refunded the estate tax Windsor paid, and the order requiring it to do so, the Court held, sufficed to render the government an aggrieved party with standing to invoke the Court's jurisdiction.

On the merits, the Court held that DOMA's §3 could not withstand measurement against the Constitution's guarantees of equal protection and due process. In design and effect, Justice Kennedy wrote, §3 treated state-sanctioned same-sex marriages "as second-class marriages for [federal law] purposes." Or, as I remarked at oral argument, DOMA rendered them skim-milk marriages. Our constitutional commitment to equality, Justice Kennedy stated, "'must at the very least mean that a bare congressional desire to harm a politically unpopular group'" does not justify disadvantageous treatment. The opinion also sounds a federalism theme: regulation of domestic relations traditionally has been left largely to state governance. Federal displacement of state law in that domain, the Court said, bears close review.

Dissenting opinions were filed by the Chief Justice, Justice Alito, and Justice Scalia, joined by Justice Thomas. Justice Scalia summarized his spirited dissent from the bench. Regarding standing, he urged that the Court's "authority [under Article III] begins and ends with the need to adjudge the rights of an injured party." Once the government agreed with Windsor's position, he maintained, it was inevitable that her injury would be redressed. On the merits, Justice Scalia said, §3 of DOMA had several legitimate aims, among them, §3 provided a stable, uniform definition of marriage for the many federal statutes in which marriage matters.

From the current term, a most significant case, in addition to the contraceptive coverage and recess appointment cases, is *McCutcheon v. Federal Election Commission*. The plaintiffs in that case challenged the aggregate spending limits set by the Bipartisan Campaign Reform Act of 2002. The Act imposed two types of limits on campaign contributions: "base" limits, restricting the total amount of money a donor may contribute to an individual candidate or committee, and "aggregate" limits, restricting the total amount of money a donor may contribute to all candidates and committees in an election. The plaintiffs—the Republican National Committee and a high-dollar political donor named Shaun McCutcheon—argued that the aggregate limits impermissibly restrained political speech in violation of the First Amendment.

A three-judge District Court in the District of Columbia dismissed the suit as foreclosed by the Supreme Court's pathmarking 1976 decision in *Buckley v. Valeo*. *Buckley* upheld the then-applicable base and aggregate limits. Base limits, the Court explained in *Buckley*, served to prevent "the actuality and appearance of corruption resulting from large individual financial contributions," and aggregate limits "serve[d] to prevent evasion" of the base limits. Without an aggregate limit, *Buckley* observed, a donor could "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate," thereby rendering base limits an exercise in futility. The three-judge District Court panel in *McCutcheon* found dispositive *Buckley*'s holding that aggregate limits encounter no First Amendment shoal.

In a 5 to 4 decision, the Supreme Court reversed, invalidating aggregate limits. The Chief Justice, in a plurality opinion joined by Justices Kennedy, Scalia, and Alito, wrote that *Buckley* did not control because the "statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided." Under the current statutory regime, the plurality concluded, the base limits suffice to prevent "*quid pro quo*" corruption. Discounted by the plurality was the interest, advanced by the Solicitor General, in preventing individuals from spending large sums of money to obtain ready access to, and influence over, elected officials. Justice Thomas supplied the fifth vote to invalidate aggregate limits. He would have overruled *Buckley v. Valeo* in its entirety.

Justice Breyer's dissent, joined by Justice Sotomayor, Justice Kagan, and me, deplored the Court's narrowing of "corruption" to the *quid pro quo* kind. Congress, whose members know better than the Court what money can buy, Justice Breyer reasoned, targeted "'the broader threat from politicians too compliant with the wishes of large contributors.' "

The dissent also took issue with the Court's assertion that amendments to campaign finance legislation rendered aggregate limits obsolete. Absent aggregate limits, Justice Breyer spelled out, numerous mechanisms would enable donors to "channel millions of dollars to parties and to individual candidates," yielding the very "kind of 'corruption' or 'appearance of corruption' that previously led the Court to [up]hold aggregate limits."

Affirmative action returned to the Court this term in *Schuette v. Coalition to Defend Affirmative Action*, a case we took up from the Sixth Circuit. In *Grutter v. Bollinger*, decided in 2003, the Court had upheld the University of Michigan Law School's affirmative action plan. Thereafter, by ballot initiative, Michigan voters approved an amendment to the State's Constitution banning resort to affirmative action measures by public institutions. Proponents of affirmative action, including students and faculty at Michigan's public universities, challenged the amendment to Michigan's Constitution as incompatible with the Equal Protection Clause.

A sharply divided Sixth Circuit, sitting *en banc*, reversed the District Court's decision, which had upheld the affirmative action ban. The ballot initiative, the Sixth Circuit majority held, was at odds with Supreme Court decisions in two cases: *Hunter v. Erickson*, in 1969, and *Washington v. Seattle School District Number 1*, in 1982. Both decisions held it unconstitutional to "remov[e] the authority to address a racial problem—and only a racial problem—from [an] existing decisionmaking body, in such a way as to burden minority interests." The amendment to

Michigan's Constitution did just that, the Sixth Circuit concluded, for it removed power over race-conscious admissions policies from the governing bodies of Michigan's public universities, which had controlled such policies in the past.

A splintered Supreme Court reversed the Sixth Circuit's judgment. Justice Kennedy, joined by the Chief Justice and Justice Alito, authored the lead opinion. In their view, *Hunter* and *Seattle* did not govern, for the laws challenged in those cases "aggravat[ed] . . . [a pre-existing] racial injury." Concurring in the judgment only, Justice Breyer agreed that *Seattle* and *Hunter* were distinguishable. No preexisting political process was affected by the amendment, Justice Breyer said, because unelected faculty members, not any elected decisionmakers, had previously determined admissions policies at Michigan's schools. Justice Scalia, joined by Justice Thomas, also concurred in the judgment. *Hunter* and *Seattle* were on point, they thought, but those decisions, Justice Scalia said, were undermined by later rulings and should be overruled.

Justice Sotomayor dissented in an impassioned opinion I joined. By constitutionalizing the question of race-conscious admissions, the Michigan amendment, like the laws held invalid in Hunter and Seattle, Justice Sotomayor wrote, "stymie[d] the right of racial minorities to participate in the political process." Disagreeing with the view that courts should "leave race out of the picture entirely and let the voters [decide]," Justice Sotomayor described the many ways in which race still matters in our society, ways she ranked impossible to ignore.

Back to Second Circuit cases, the Court decided *Town of Greece v. Galloway*, 5 to 4. Greece, a town near Rochester with a population of 94,000, has, since 1999, invited clergy members to perform prayers at monthly meetings of its Town Board. From the inception of the practice until the Town received complaints, all the participating ministers were Christian, and about two-thirds of the prayers referred to "Jesus," "Christ," "the Holy Spirit," or made similar sectarian invocations.

The plaintiffs, Susan Galloway and Linda Stephens, were non-Christians who lived in Greece and attended Town Board meetings to speak on issues of local concern. The opening prayers, they argued, violated the First Amendment's Establishment Clause.

The District Court upheld the Town's prayer practice, relying on the Supreme Court's decision in *Marsh v. Chambers*, which rejected an Establishment Clause challenge to daily opening prayers in Nebraska's legislature. The *Marsh* Court cautioned, however, that the prayers offered must not "proselytize or advance any one, or . . . disparage any other, faith or belief." The Second Circuit reversed the District Court's decision. Aspects of the prayer program, the court concluded, conveyed the message that Greece was endorsing Christianity.

The Supreme Court reversed the Second Circuit's judgment, 5 to 4. Greece's prayer practice, Justice Kennedy wrote for the majority, was not significantly different from the practice of the Nebraska legislature upheld in Marsh.

Justice Kagan dissented, joined by Justice Breyer, Justice Sotomayor, and me. Greece's practice differed from the practice Marsh upheld, Justice Kagan reasoned, because prayers at Greece's Town Board meetings were directed not to Town Board members in particular, but to all Town residents in attendance. "[M]onth in and month out, for over a decade," Justice

Kagan wrote, "prayers steeped in only one faith [and] addressed toward members of the public [had] commenced meetings to discuss local affairs and distribute government benefits." This practice, she concluded, "d[id] not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government." No citizen, the dissent urged, should be made to feel herself an outsider.

Last on my list for this morning, a Second Circuit case still awaiting decision, *ABC v. Aereo*. Respondent Aereo allows its subscribers, in exchange for a monthly fee, to "Watch Live TV Online." To provide this service, Aereo employs thousands of dime-sized antennas. When a user opts to watch or record a program, an antenna is assigned exclusively, but temporarily, to the user and tuned to the desired channel. Aereo then saves that program in a user-specific directory. Why the thousands of individualized antennas and copies? Aereo relied on a 2008 Second Circuit decision in a case known as *Cablevision*. The court in *Cablevision* held that, under the transmit clause of the Copyright Act, no public performance is involved when a cable operator remotely records and stores particular programs for later viewing on demand by individual subscribers.

Aereo advertises its service as an innovative and convenient means for users to watch and record broadcast television. Others see Aereo as a business that free rides on copyrighted works, thereby obtaining an unfair competitive advantage over copyright licensees. Dissenting from the Second Circuit opinion now under review, Judge Chin called Aereo's scheme "a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act." Late in June, you will know which view prevails.