



# ***Big Wins for Big Business***

## **Themes and Statistics in the Supreme Court's 2010-2011 Business Cases**

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### **Introduction**

The Supreme Court's October 2009 Term, featuring the Court's blockbuster ruling in *Citizens United v. Federal Election Commission* and producing an overall 81% success rate (13 wins in 16 cases) for the U.S. Chamber of Commerce, focused a national spotlight on the business rulings of the Roberts Court. The Court's just-concluded October 2010 Term featured even more cases of considerable importance to business interests and may ultimately prove just as momentous. While the Chamber's success rate dipped to 57% (12 wins in 21 cases), the Chamber prevailed in the term's biggest cases and all but one of the cases split the Court along ideological lines. Overall, the Chamber has prevailed in 65% of its cases before the Roberts Court, a figure that is still significantly higher than the Chamber's success rate of 56% in our study of the Rehnquist Court, and dramatically higher than its success rate in our study of the Burger Court, when the Chamber only won 43% of its cases.

This Issue Brief highlights two themes that join together some of the Court's most important and most sharply divided business cases of the October 2010 Term. The first theme concerns corporate accountability. A series of closely divided cases including *Wal-Mart v. Dukes*, *AT&T v. Concepcion*, and *PLIVA v. Mensing* make it increasingly difficult for Americans to hold corporations accountable for serious misconduct, including widespread discrimination and fraud. The second theme involves corporate speech. In *Arizona Free Enterprise v. Bennett*, the Court reaffirmed and extended the impact of the *Citizens United* ruling in the campaign finance arena, and in *Sorrell v. IMS*, the Court appears to be extending *Citizens United's* protection of political speech by corporations into the separate arena of commercial speech. The final section of this Issue Brief updates Constitutional Accountability Center's empirical analysis of the trends in the success rate of the Chamber of Commerce before the Court over the past 30 years to include this Term's decisions.

### **I. Barriers to Justice and Corporate Accountability**

In a series of 5-4 cases this Term, a sharply divided Supreme Court issued rulings that limit access to justice, impinge upon American ideals of equality, and threaten the integrity of our markets and workplaces. These Supreme Court decisions make it increasingly difficult for

Americans to hold powerful corporations accountable for serious misconduct, including widespread discrimination and fraud. In addition, the Court has also made it harder for states to protect their citizens in two major, and disappointing, preemption rulings.

### ***Wal-Mart v. Dukes: Too Big to Be Sued?***

In a blow to group claims of gender discrimination and class actions more generally, the Supreme Court rejected a class-action lawsuit, *Wal-Mart Stores, Inc. v. Dukes et al.*, brought by female employees of Wal-Mart who claim they suffered discriminatory pay and promotion practices resulting from the company's alleged corporate culture of discrimination. The massive lawsuit could have involved up to 1.6 million women, with Wal-Mart, the nation's largest private employer, facing potentially billions of dollars in damages. But a divided Court blocked the class action, ruling that the women of Wal-Mart did not have enough in common to band together in a class-action suit. This has led some critics of the ruling to suggest that it sets out a blueprint for discrimination: delegate nearly unfettered discretion to lower level managers and do it on a massive scale; the bigger the company, the more varied and decentralized its job practices, the less likely it will have to face a class-action claim.

While the central question in *Wal-Mart* of whether the women had enough in common to press a class-based claim was the subject of sharp disagreement between the majority and the dissent, the Court was unanimous in holding that the lower courts should not have allowed the case to move forward under Federal Rule of Civil Procedure 23(b)(2). This Rule allows litigants to proceed as a class when they are seeking primarily non-monetary relief, for example, an injunction against discriminatory hiring practices or a declaration from the court that a certain policy is discriminatory. Because the class action in *Wal-Mart* raised significant questions regarding backpay, all of the Justices agreed that it was not suited to Rule 23(b)(2). Unfortunately, the majority, led by Justice Antonin Scalia, went further, shutting the courthouse doors to the women's class action altogether. Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan, dissented from the majority's ruling on this point, arguing that the female employees should have been given the opportunity to try to make their case together under another part of the class-action rules (Fed. R. Civ. Pro. 23(b)(3)).

A fierce defender in the Supreme Court of the Constitution's guarantee of equal citizenship and equal treatment of the sexes, Justice Ginsburg noted in her *Wal-Mart* dissent substantial evidence that "gender bias suffused Wal-Mart's corporate culture." For example, Justice Ginsburg observed that women fill 70% of the hourly jobs but only 33% of management positions, and that "senior management often refer to female associates as 'little Janie Qs.'" By leaving pay and promotion decisions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria," the company, as Justice Ginsburg observed, arguably does little to prevent biases and stereotypes from tainting such decisions.

These are pretty powerful claims of a widespread, discriminatory corporate culture that Justice Scalia and his fellow Justices in the majority brushed aside. But however strong this evidence of discrimination may or may not be, the Supreme Court's ruling was *not* about whether Wal-Mart was guilty of discriminating against its female employees. The ruling was solely about whether the courthouse doors would remain open to the class action filed by the plaintiffs, past and present female employees of Wal-Mart, who had banded together to seek a company-wide solution to an alleged company-wide problem. While Justice Ginsburg and the three other Justices who joined her opinion would have allowed the female employees an opportunity to show that their claims could proceed under a more appropriate class-action rule, the five-Justice majority closed the courthouse door to the class altogether.

The majority's skepticism toward the Wal-Mart employees' ability to pursue their class action does not bode well for core American values of access to justice and equal employment opportunity. The Framers of the Equal Protection Clause and the very first civil rights statutes designed to enforce the guarantees of the Fourteenth Amendment recognized that they could not achieve their goal of rooting out discrimination without meaningful access to courts. Class actions can be crucial for victims of discrimination who may not have the means to bring their own individual lawsuits—no doubt including many of the Wal-Mart employees who earn modest wages. The plaintiffs alleged that they and over a million-and-a-half other women of Wal-Mart experienced discrimination because of the corporate culture and practices of America's largest retailer. The experiences of these plaintiffs may be diverse in many ways, but as Justice Ginsburg explained, these female employees have in common their claims of pay and promotion discrimination.

On Wall Street it might be all about "too big to fail," but with the *Wal-Mart* decision, it appears that a majority on the Supreme Court believes that corporations can be too big to be held accountable.

### ***AT&T v. Concepcion*: Corporate Fraud a Few Dollars and One Consumer at a Time**

The *Wal-Mart* case was merely the biggest-scale example of a disturbing trend in this year's Supreme Court Term. Justice Scalia, who wrote for the majority in *Wal-Mart*, also authored the pro-corporate, anti-consumer ruling in *AT&T v. Concepcion*. *Concepcion*, like *Wal-Mart*, will likely make it harder for Americans—consumers, injured people, employees, and those who have faced discrimination—to secure justice in the face of corporate misconduct.

In *Concepcion*, a sharply divided Supreme Court tossed out the lawsuit brought against AT&T by Vincent and Liza Concepcion on behalf of themselves and all others who were charged \$30.32 in sales tax for a supposedly free mobile phone. If successful, the class action could have yielded a remedy for all of AT&T's customers who allegedly had been improperly charged, and possibly served as a deterrent for the rest of corporate America. However, because Justice Scalia's majority opinion enforced an arbitration agreement containing a provision banning class actions, the

Concepcions are now left with fighting just for their own \$30—an amount over which it hardly makes sense to spend the time and money of pressing a legal claim against a corporate giant like AT&T.

Asserting that state law was preempted by the Federal Arbitration Act (FAA), the Supreme Court in *Concepcion* blessed a contract provision—contained in the lengthy, legalese-heavy, fine print that many people never read in cell phone contracts (or employment contracts, health insurance agreements, or other contracts that consumers are effectively forced to sign these days in order to obtain goods and services)—that basically allows corporations to get away with wrongdoing so long as they do it on an individually small scale. The fine print of the Concepcions’ contract with AT&T required that all disputes be resolved through arbitration, not through the court system, while banning class actions. The five-Justice majority upheld the contract provision and reversed the court of appeals’ application of California law, which holds a contractual ban on class actions unconscionable—and thus unenforceable—if it serves to insulate one party to the contract from liability for wrongdoing. The four dissenting Justices would have found this general principle of state contract law applicable to the class-action arbitration ban in AT&T’s cell phone contract because the FAA, which prohibits states from discriminating against arbitration contracts, specifically preserves generally applicable state contract law.

Accordingly, not only does the ruling in *Concepcion* threaten access to justice, it also continues the Court’s unfortunate line of precedent that attempts to re-write the Federal Arbitration Act to preempt state law. In enacting the FAA, Congress recognized that state courts are vital in protecting the rights of American consumers, and the federal law specifically preserves a critical role for state law. However, the Court’s conservatives have been very aggressive in interpreting the Federal Arbitration Act to protect businesses from liability in both federal and state courts, reading a sweeping policy favoring arbitration into the Act. In *Concepcion*, the Court continued this trend, using the judicially-created pro-arbitration policy to trump the words of the Act itself, as well as the text and history of the Constitution.

The majority’s opinion in *Concepcion* is blatant judicial policymaking. The Federal Arbitration Act is in no way hostile to class actions, and its text expressly preserves a critical role for state law. No plausible reading of the text and history of the Constitution’s Supremacy Clause supports the Court’s ruling in favor of broad preemption of state law in this case.

### ***PLIVA, Inc. v. Mensing*: “Impossible” Preemption Logic Threatens Drug Safety**

Two years ago in *Wyeth v. Levine*, the Supreme Court held that federal food and drug law did not displace state consumer-safety law. Instead, the Court ruled that Diana Levine, a Vermont musician whose arm had to be amputated after she suffered adverse effects from Wyeth’s brand-name drug, Phenergan, could hold the drug manufacturer liable under state failure-to-warn laws—laws that hold drug and other manufacturers responsible for inadequate safety labels. But in a 5-4

ruling, the Supreme Court held this Term in *PLIVA, Inc. v. Mensing* that *generic* drug manufacturers may not be sued under state failure-to-warn law because it would be “impossible” for the generic drug manufacturers to comply with both state failure-to-warn law and federal law. As in *Concepcion*, the majority—led this time by Justice Thomas—applied an improperly broad preemption doctrine, ignoring the text of federal law and the logic of recent precedent.

To be sure, there are important differences between the labeling laws for brand-name drugs, at issue in *Wyeth*, and for generic drugs. Federal law, for example, requires a generic drug to carry the same label as the brand-name drug it replicates. But this “duty of sameness” for generic manufacturers is tempered by a duty under federal law to report problems with generic drugs. So, while generic drug manufacturers cannot unilaterally change their labels, they can—and must—approach the Food and Drug Administration (FDA) to seek to revise a drug’s label when they have reasonable evidence of a serious problem with the drug. Such a label change would then go into effect for both the brand-name and generic drugs. There is no guarantee, of course, that the FDA will act based on the information provided by the generic drug manufacturer, but the manufacturer’s attempt to achieve a safe and adequate warning label would nonetheless likely serve as a defense to state liability. In other words, if the generic manufacturer did what it could under federal law, a state failure-to-warn claim should be preempted by federal law because it would then be impossible for the manufacturer to comply with both federal and state law.

But if a generic drug manufacturer doesn’t even *try* to comply with federal drug safety law and state failure-to-warn standards by seeking to have a drug’s label revised, it is difficult to see how it is “impossible” for the manufacturer to comply with both sets of laws. As Justice Sotomayor explained in her *PLIVA* dissent, “because federal law affords generic manufacturers a mechanism for attempting to comply with their state-law duties to warn, . . . federal law does not categorically preempt state-law failure-to-warn claims against generic manufacturers.” For the majority to find impossibility preemption in this context is to twist the word “impossibility” beyond recognition.

The *PLIVA* ruling also interferes with the long-standing partnership between state and federal laws on consumer safety. In *Wyeth*, the Court recognized that “state law offers an additional, and important, layer of consumer protection that complements FDA regulation.” However, with the majority’s opinion in *PLIVA*, as Justice Sotomayor pointed out in her dissent, this additional layer of consumer protection is now gone for generic drugs. It is true that brand-name drug manufacturers will continue to have an incentive based on state-law liability to monitor and disclose drug safety risks, but many brand-name manufacturers leave the market once generic drugs are introduced. Given that more than 70% of prescriptions filled in the United States are filled with generic drugs, and that about a third of generic drugs have no brand-name competitors, this is no small thing.

State common law claims can work in conjunction with federal oversight, and neither the Constitution nor the principles behind it support displacing the states’ traditional role in protecting

consumer safety and health in the absence of a direct conflict between state and federal law. The federal Food, Drug and Cosmetic Act (FDCA) preserves state tort remedies as a complementary form of consumer protection. While the FDCA has been amended to encourage development of low-cost generic drugs, there is nothing in the statutory text of these amendments to suggest that the amendments were intended to override the FDCA's general preservation of state tort remedies. The *PLIVA* ruling inappropriately interferes with the states' ability to protect their citizens.

## II. Expanding Constitutional Protection for Corporate Speech

Last year in *Citizens United v. FEC*, in a 5-4 opinion starkly at odds with the Constitution's text and history, the Court, through its five conservative Justices, ruled that corporations have a First Amendment right to spend unlimited amounts of money to help elect candidates of their choice, ignoring the basic constitutional differences between corporations and "We the People." At the heart of Justice Kennedy's opinion for the Court was the notion that (1) corporations are entitled to the same free speech rights as individuals; (2) laws that single out particular speakers, including corporations, for regulation are presumptively unconstitutional and must survive strict scrutiny, a standard of review that almost always proves fatal; and (3) the government's interest in preventing corruption is limited to *quid pro quo* corruption and does not permit the government to limit campaign spending on elections. One year later, the *Citizens United* majority has shown no signs of slowing down. In two critically important First Amendment rulings delivered in the last days of the 2010 Term—one concerning campaign finance, the other concerning commercial speech—the Roberts Court continued to expand the scope of the First Amendment protections available to corporations and to contract the government's authority to stamp out corruption in the electoral process and regulate corporations for the public good.

### ***Arizona Free Enterprise Club's Freedom Club PAC v. Bennett: A Sequel to Citizens United***

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the same five Justices who formed the majority in *Citizens United* struck down Arizona's Clean Elections Act, the fifth campaign finance statute to fall since John Roberts became Chief Justice. While *Arizona Free Enterprise* did not specifically focus on the rights of corporations—which perhaps explains why the Chamber of Commerce did not participate in the case—the decision gives a very broad reading to *Citizens United* and reaffirms that the Constitution grants to both individuals and corporations an unfettered, unlimited right to spend money to support or oppose political candidates of their choice.

The Arizona Clean Elections Act, adopted by the state's voters in 1998 in the wake of one of the worst public corruption scandals in the state's history, established a voluntary public financing program for candidates, including matching funds triggered by spending by the candidates' privately-financed opponents or the opponents' supporters. The Arizona Free Enterprise Club and

other challengers to the law alleged that the matching funds provisions penalized their own “speech.” The Court’s conservatives agreed.

In striking down Arizona’s matching funds program as a violation of free speech, Chief Justice Roberts reaffirmed *Citizens United*—holding that the Constitution affords the highest level of protection to spending on elections, no matter whether expenditure is made by a candidate, a corporation, or a not-for-profit organization like the Arizona Free Enterprise Club’s PAC—and applied last year’s ruling broadly to invalidate Arizona’s public financing system. Even though the Arizona statute subsidized political speech and imposed no speech restrictions of any kind, the Court held that the Clean Elections Act was a violation of the First Amendment as interpreted in *Citizens United* and other campaign finance precedents. According to the Court, Arizona could not use public financing to level the playing field between corporations and other wealthy speakers and the have-nots. In rejecting the argument that public financing could be justified as an appropriate way to combat corruption, the majority repeated the same narrow, crabbed conception of corruption limited to *quid pro quo* corruption on which it relied in *Citizens United*, ignoring that the Framers of the Constitution were equally concerned that the government could be corrupted by dependence on improper forces, such as wealth. Under the Constitution, as James Madison explained, public officials were to be “dependent on the people alone.”

In a sharp and powerful dissent, Justice Elena Kagan accused the majority of distorting fundamental constitutional principles. By providing matching funds to candidates who agreed to forego private dollars, Justice Kagan explained, the people of Arizona appropriately fostered the robust debate at the core of the First Amendment, while giving candidates an opportunity to run for office without depending on corrupting private money. “Except in a world gone topsy-turvy, additional campaign speech and electoral competition is not a First Amendment injury,” wrote Justice Kagan. As the dissent explained, even on *Citizens United*’s own terms—which recognized that “more speech, not less, is the governing rule”—the Arizona statute furthered, not abridged, the First Amendment’s protection of robust debate and political competition. Sadly, Justice Kagan remarked, quoting James Madison, the Court “invalidates Arizonans’ efforts to ensure that in their State, ‘the people . . . possess the absolute sovereignty.’”

### ***Sorrell v. IMS Heath, Inc.: The Logic of Citizens United Extended to Commercial Speech***

*Arizona Free Enterprise* followed on the heels of the Court’s opinion a few days earlier in *Sorrell v. IMS Health*, a 6-3 ruling written by Justice Kennedy—the author of *Citizens United*—that lays the framework for a major expansion in the protection the First Amendment affords to commercial speech by corporations and other businesses.

*Sorrell* involved a Vermont statute regulating the marketing of drugs by pharmaceutical manufacturers. To limit the aggressive sales techniques employed by pharmaceutical companies, the statute denied to marketers information in the form of pharmacy records—collected by the

government—about the prescribing practices of individual physicians. In an opinion for six Justices, Justice Kennedy held that “[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the First Amendment. As a consequence, Vermont’s statute must be subjected to heightened scrutiny.” The majority held that the statute violated the First Amendment rights of pharmaceutical manufacturers because it singled them out and prevented them “from communicating with physicians in an effective and informed manner.” While Justice Kennedy recognized the “serious and unresolved issues with respect to personal privacy” of medical records, he concluded that Vermont “has burdened a form of protected expression it found too persuasive.”

The most important aspect of *Sorrell* may ultimately be the new, more stringent “heightened scrutiny” standard of review invoked by Justice Kennedy. *Sorrell* suggests that the Court’s commercial speech doctrine may be in a state of great flux in the years to come, and that Justice Kennedy and his colleagues are eager to expand, possibly quite substantially, the constitutional protections available to corporations and other businesses.

For the last thirty-five years, black letter First Amendment law has been that commercial speech is protected by the First Amendment, but that restrictions on speech proposing a commercial transaction are subject to a more lenient form of judicial review in light of the differences between commercial and political speech and the government’s greater interest in regulating commerce and the economy. While the Court has always held that the First Amendment affords some protection to the economic speech of corporations, it has also insisted that governments have broad latitude to regulate the commercial speech of corporations to protect consumers and safeguard the health, safety and welfare of “We the People.”

Justice Kennedy’s opinion in *Sorrell* took a step back—possibly a substantial one—from this established framework and toward something akin to strict scrutiny. In striking down the Vermont statute, Justice Kennedy invoked the same basic First Amendment precepts that he trumpeted in *Citizens United*. “Heightened judicial scrutiny is warranted,” Justice Kennedy wrote, because the law “burdens disfavored speech by disfavored speakers.” “Content- and speaker-based restrictions” on commercial speech, Justice Kennedy explained, offend basic First Amendment principles and require heightened judicial review (presumably a form of strict scrutiny). While *Sorrell* did not specifically rely on *Citizens United*, the imprint of Kennedy’s campaign finance blockbuster ruling is hard to miss.

While *Citizens United* emphasized that protection of political speech is at the core of the First Amendment, Justice Kennedy’s opinion in *Sorrell* suggested that commercial speech may be deserving of no less protection. According to Justice Kennedy, “A ‘consumer’s concern for free flow of commercial speech may often be keener than his concern for urgent political dialogue.” In explaining why the Vermont statute was unconstitutional, Justice Kennedy likened the statute to one that suppressed political speech, criticizing Vermont for “tilt[ing] public debate in a preferred direction.” Conservative jurists have long complained that the right of corporations to engage in

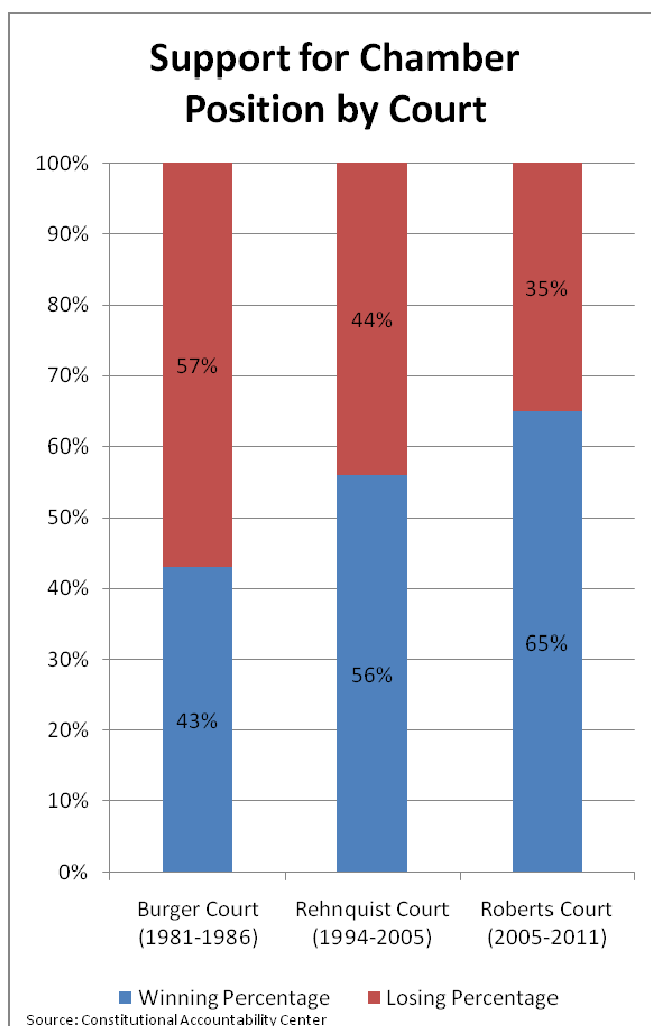


commercial speech should be on the same plane as political speech. *Sorrell* moves the law in that direction.

Justice Breyer’s dissent, joined by Justices Ginsburg and Kagan, saw in Justice Kennedy’s majority opinion a new, more demanding standard for commercial speech cases, and sharply criticized it as an unprincipled return to the infamous *Lochner* era, the heyday of constitutional protection for corporations, today reviled by both liberals and conservatives alike. As Justice Breyer properly warned, “[t]o apply heightened scrutiny, when the regulation of commercial activities is at issue (which often involves speech)” is to undercut much federal and state legislation “inextricably related to a lawful governmental effort to regulate a commercial enterprise.”

### III. Chamber of Commerce Statistics, 2010-2011

The U.S. Chamber of Commerce participated in a record 21 cases during the October 2010 Term and won 12 of these cases, a 57% win rate. While this represents an “off” year for the Chamber in comparison with the 81% win rate (13 of 16 cases) the Chamber enjoyed in the October 2009 Term, this Term still represents a hugely successful year for big business. As the Chamber itself acknowledges, it prevailed in the term’s biggest cases. For example, the Chamber’s counsel, Robin Conrad, has celebrated its wins in *Wal-Mart*, *Concepcion*, and *American Electric Power Co. v. Connecticut* (rejecting an effort by states to combat global warming by suing utility companies over greenhouse gas emissions under common law), and described these cases as “easily the most important business cases of the term.”<sup>1</sup> The Chamber’s farthest reaching wins came in rulings that were sharply divided along ideological lines, at least in part. Many of its losses came in unanimous rulings.



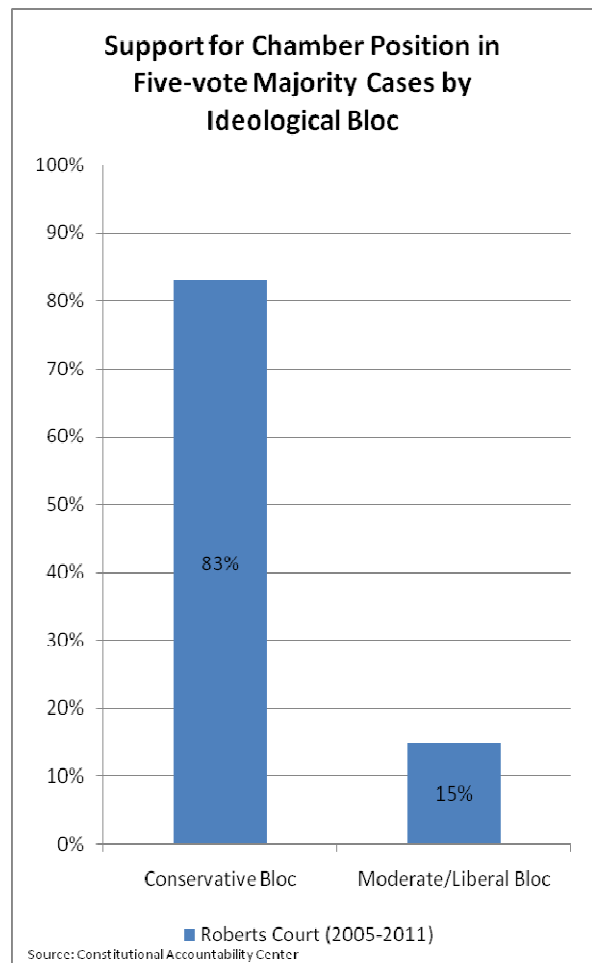
<sup>1</sup> Mark Sherman, “Business, free speech cases top Supreme Court term,” Associated Press (June 25, 2011), available at: <http://www.timesunion.com/news/article/Business-free-speech-cases-top-Supreme-Court-term-1439988.php#ixzz1Qlh8ZQpg>. See also David Savage, “Supreme Court has given firms a stronger hand,” *Los Angeles Times* (June 25, 2011)(quoting Robin Conrad as describing the Court’s rulings this Term limiting class actions as “huge wins for business”), available at: <http://www.latimes.com/business/la-fi-court-business-20110625,0,1702818.story>.

Overall, the Chamber has prevailed in 65% of its cases before the Roberts Court,<sup>2</sup> a figure significantly higher than the Chamber’s success rate of 56% (45 of 80 cases) before the Rehnquist Court,<sup>3</sup> and dramatically higher than its success rate before the Burger Court,<sup>4</sup> when the Chamber only won 43% (15 of 35) of its cases. And in close cases—those decided by five-Justice majorities—the Chamber’s success rate remains strikingly high.

### Big Wins Reveal a Court Sharply Divided Along Ideological Lines

As discussed earlier in this Issue Brief, the Court’s decisions in cases such as *Wal-Mart*, *Concepcion*, and *PLIVA* represent significant wins for business that will have far-reaching consequences for workers, consumers, and modest investors. The Chamber’s big wins in these sharply divided cases<sup>5</sup> affirm two important trends relating to the Chamber’s success before the Roberts Court.

First, the Court’s split along ideological lines is much more pronounced in the Roberts Court than it was under prior Chief Justices. In close cases—those decided by a five-Justice majority—support for the Chamber’s position from the Court’s conservative bloc is overwhelming. This Term, the Chamber won 75% of close cases (3 of 4). Overall, since early 2006, the Chamber has been successful in 74% of close cases (17 of 23). As a point of reference, during the last 11 years of the Rehnquist Court (from 1994 to 2005), the Chamber succeeded in 64% of close cases (9 of 14). The



<sup>2</sup> As noted in our prior study, [The Roberts Court and Corporations: The Numbers Tell the Story](#), our examination of cases during the Roberts Court begins when Justice Samuel Alito took the bench in January 2006.

<sup>3</sup> Our previously-published study of the Rehnquist Court, [Open for Business: Tracking the Chamber of Commerce’s Supreme Court Success Rate from the Burger Court through the Rehnquist Court and into the Roberts Court](#), ran from the October 1994 Term through the October 2004 Term (June 2005), a stable period during which there were no changes in Court membership.

<sup>4</sup> Our previously published study of the Burger Court, [A Tale of Two Courts: Comparing Corporate Rulings by the Roberts and Burger Courts](#), examined the last five Terms of that Court, a stable period from the time Justice Sandra Day O’Connor joined the Court in 1981 until the first member of the Court’s current conservative majority, Justice Antonin Scalia, joined the Court in 1986.

<sup>5</sup> Because all nine Justices in *Wal-Mart* voted to reverse the Ninth Circuit, we have scored the ruling as a unanimous victory for the Chamber for the purposes of our empirical analysis. As described earlier in this Issue Brief, however, the Court split 5-4 along ideological lines on the most important and sweeping legal issues decided in the case. As a result, we mention the case in this section, even though we are not “scoring” it as a split ruling for statistical purposes.

conservative bloc's average level of support for the Chamber's position in these close cases is 83% before the Roberts Court, compared with 68% before the Rehnquist Court. In contrast, the moderate/liberal bloc's average level of support for the Chamber has decreased from 31% during the Rehnquist Court to 15% during the Roberts Court.

Second, during the Roberts Court, the number of close cases is also increasing as a percentage of total Chamber cases. During the Rehnquist Court, just 18% of the cases in our study (14 of 80) were closely decided. This number has increased by 10%, to 28% during the Roberts Court (23 of 81). Thus, not only is the Court more divided ideologically in close Chamber cases than it was during the Rehnquist Court, but it is also sharply divided more often.

These divisions are sharpest when it comes to the two newest members of the Court's conservative bloc, Chief Justice Roberts and Justice Alito. In close cases, the Chamber has won Chief Justice Roberts's vote 87% of the time. Justice Alito has been even more consistent, voting for the Chamber position in 95% of close cases. Indeed, Justice Alito had never voted against the Chamber before in a close case until he did so this Term in *Chamber of Commerce v. Whiting*. But this may be the exception that proves the rule. In *Whiting*, the Chamber joined forces with attorneys from the ACLU to argue that an Arizona law sanctioning employers for hiring undocumented aliens should be invalidated because it is preempted by federal law. A five-Justice majority consisting of Justice Alito and his fellow conservative Justices disagreed, upholding the Arizona law. Thus, apart from a fairly anomalous case in which the Chamber's interests aligned with the interests of the ACLU, Justice Alito has never voted against the Chamber in a close case.

### **Chamber Losses Reflect an Aggressive Agenda Before the Court**

This Term, the Chamber set a record for the number of cases in which it participated—21—a quarter of the Court's total docket. As noted earlier, the Chamber prevailed in 12 of these cases, for a win percentage of 57%. To put this in context, over the course of our study of the Roberts Court, the Chamber's success rate has ranged from a high of 86% (12 of 14 cases) during the Oct. 2006 Term to a low of 45% (5 of 11) during the Oct. 2008 Term. The Chamber's success rate during the Oct. 2010 Term is identical to the success rate it enjoyed in the Oct. 2007 Term, when it also won 57% of its cases (8 of 14).

Seven of the Chamber's 9 losses this term were unanimous rulings and, in some cases, this reflects how aggressive its arguments have become. For example, on the heels of the Court's holding in *Citizens United* that corporations have the same constitutional rights as individuals to spend money to influence elections, the Chamber this Term supported AT&T's position in *Federal Communications Commission v. AT&T* that corporations should have a protected interest in "personal privacy" under the Freedom of Information Act (FOIA), a claim so lacking in common sense that the Court did not even take it seriously. In his opinion on behalf of a unanimous Court

rejecting the position of AT&T and the Chamber, Chief Justice Robert joked that “[w]e trust AT&T will not take it personally.”

Not all the Chamber’s losses were so funny: the Chamber did suffer some important defeats this Term. Notably, the Chamber’s position did not prevail in *Thompson v. North American Stainless, LP*, in which the Court, in a unanimous ruling, allowed a fired worker to proceed with a retaliation claim against his employer (an area of the law in which the Roberts Court has been consistently protective of employees), and *Williamson v. Mazda Motor of America, Inc.*, in which the Court, also in a unanimous ruling, rejected a claim that federal seatbelt law displaces the right of consumers to sue auto manufacturers under state tort law for the lack of adequate safety-belts.

## Conclusion

As described in this Issue Brief, the Court’s most important and most sharply divided business rulings of the October 2010 Term make it more difficult for individual Americans to hold large corporations accountable for wrongdoing. Building on its decision last Term in *Citizens United*, the Court’s rulings this Term also extended constitutional protections for corporate speech in a manner that will make it more difficult for government to protect its citizens.

The Chamber’s lopsided losses in cases like *FCC v. AT&T*, *Thompson* and *Williamson*, along with its unanimous wins in five cases this Term, tell an important story that should not be underappreciated. Every Justice on the Supreme Court looks hard to find the right answer in the cases that come before the Court. In many cases, the Justices can agree that the law points clearly in a particular direction, and in these cases the Chamber loses just about as often as it wins.

But, these lopsided rulings tell only part of the story of the Roberts Court’s rulings in business cases. Its rulings in cases such as this Term’s *Wal-Mart*, *Arizona Free Enterprise*, *Concepcion*, *PLIVA* and *Sorrell*, along with prior blockbusters such as *Citizens United v. FEC*, reveal a Court sharply divided along ideological lines. In these cases, the Justices have disagreed profoundly on such issues as the utility of class actions and the propriety of awarding corporations the same rights as individual Americans.

CAC’s empirical research into Court rulings in Chamber cases over the last 30 years demonstrates that the number of ideologically divided rulings is increasing and that the Chamber is prevailing overwhelmingly in this growing number of cases that split the Court along ideological lines. Those two disturbing trends continued during the October 2010 Term.