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GIBSON DUNN
Supreme Court Round-Up

The Supreme Court Round-Up previews upcoming cases, recaps opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case as well as a substantive analysis of the Court's actions that is organized according to the Court's argument schedule.

October Term 2012

Decided Cases

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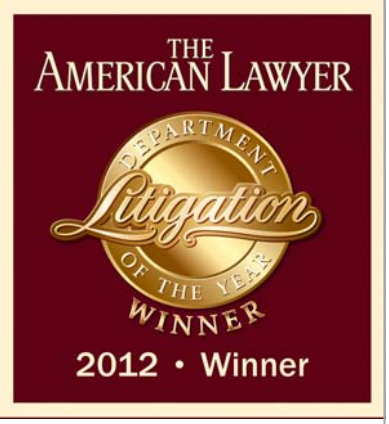
1. ***Sebelius v. Auburn Regional Medical Center*, No. 11-1231 (D.C. Cir., 642 F.3d 1145; cert. granted June 25, 2012; argued on Dec. 4, 2012). Whether the 180-day statutory time limit under 42 U.S.C. § 1395oo(a)(3), for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary is subject to equitable tolling.**

   Decided Jan. 22, 2013 (568 U.S. __). D.C. Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Sotomayor, J., concurring). The Court held that (1) Section 1395oo(a)(3)'s 180-day statutory time limit for filing an appeal of Medicare reimbursements with the Provider Reimbursement Review Board (PRRB) is not jurisdictional, (2) the HHS Secretary's regulation extending Section 1395oo(a)(3)'s 180-day window to three years after notice of the reimbursement amount upon a showing of "good cause" is a permissible interpretation of Section 1395oo(a)(3), and (3) the Secretary's regulatory requirement is not subject to equitable tolling. In 2006, Respondent hospitals learned that there had been a systematic undercalculation of their Medicare reimbursements from 1987 through 1994. Within 180-days of learning about the miscalculation, the hospitals filed an appeal with the PRRB, seeking remuneration for the underpayment. The Secretary of Health and Human Services had adopted a regulation permitting hospitals to file appeals for up to three years from the time they received word of their reimbursement rate from the financial contractor, if they could show "good cause" for failing to meet the usual 180-day deadline set by Section 1395oo(a)(3). Because the hospitals had filed more than ten years after expiration of the statutory deadline, the PRRB dismissed the appeals on grounds that it lacked jurisdiction and had no equitable powers to extend the window beyond the Secretary's three year outer limit. The D.C. Circuit reversed, finding that equitable tolling was available to the hospitals as a matter of fairness. The Supreme Court disagreed, holding that Section 1395oo(a)(3) did not limit PRRB's jurisdiction to hear the



Gibson Dunn was named the 2012 Litigation Department of the Year by *The American Lawyer* for an unprecedented second time. Appellate Group co-chair Ted Olson was named a finalist in the inaugural "Litigator of the Year" competition.

The National Law Journal named Gibson Dunn to its 2012 Appellate Hot List, which recognized 16 firms handling the "most exemplary, cutting-edge advocacy" in the country's appellate courts.

hospital's appeals because Congress did not clearly state that Section 1395oo(a)(3) was jurisdictional and that the Secretary's regulation was both reasonable and not subject to equitable tolling. The Court noted that it had never applied the presumption of equitable tolling to an agency's internal appeal deadline, and explained that the imposition of tolling would "essentially gut the Secretary's [time] requirement." Because the Secretary's administrative regime survived *Chevron* review, it was entitled to deference, and the Respondents' complaint was lawfully time-barred.

2. ***Lozman v. Riviera Beach*, No. 11-626 (11th Cir., 649 F.3d 1259; cert. granted Feb. 21, 2012; SG as amicus, supporting Petitioner; supplemental briefing on mootness ordered Aug. 14, 2012; argued on Oct. 1, 2012). Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.**

   Decided Jan. 15, 2013 (568 U.S. __). Eleventh Circuit/Reversed. Justice Breyer for a 7-2 Court. Sotomayor, J., dissenting; joined by Kennedy, J.). Petitioner Lozman's floating home was a house-like plywood structure with empty bilge space underneath the main floor to keep it afloat. He had it towed several times before deciding on a marina owned by the City of Riviera Beach. After various disputes with Lozman and unsuccessful efforts to evict him from the marina, the City brought a federal admiralty lawsuit in rem against the floating home, seeking a lien for dockage fees and damages for trespass. Lozman moved to dismiss the suit for lack of admiralty jurisdiction. The Supreme Court held that Lozman's floating home was not a "vessel" for purposes of 1 U.S.C. § 3, and therefore federal maritime jurisdiction was not triggered. The Court reasoned that, except for the fact that the structure floated, nothing about the floating home suggested that it was intended to transport people or cargo over water. The Court also observed that its interpretation of the statute was consistent with the statute's language and purpose, which "revealed little reason to classify floating homes as vessels" because owners of floating homes cannot easily escape liability by sailing away from their homes; faced no special sea dangers; and did not significantly engage in port-related commerce. Finally, the Court noted that its interpretation was consistent with state law in States in which owners of floating homes had congregated in communities, as those laws treat structures that meet the "floating home" definition like ordinary land-based homes rather than like "vessels."

3. ***Already, LLC v. Nike, Inc.*, No. 11-982 (2d Cir., 663 F.3d 89; cert. granted June 25, 2012; SG as amicus, supporting Vacatur and Remand; argued on Nov. 7, 2012). Whether a federal district court is divested of Article III jurisdiction over a party's challenge to the validity of a federally registered trademark if the registrant promises not to assert its mark against the party's then-existing commercial activities.**

   Decided Jan. 9, 2013 (568 U.S. __). Second Circuit/Affirmed. Chief Justice Roberts for a 9-0 Court (Kennedy, J., concurring; joined by Thomas, Alito, and

Sotomayor, JJ.). Nike filed suit, alleging that two of Already's athletic shoes violated Nike's Air Force 1 trademark. Already denied the allegations and filed a counterclaim challenging the validity of Nike's Air Force 1 trademark. While the suit was pending, Nike issued a "Covenant Not to Sue," promising not to raise any trademark or unfair competition claims against Already or any affiliated entity based on Already's existing footwear designs, or any future Already designs that constituted a "colorable imitation" of Already's current products. Nike then moved to dismiss its claims with prejudice, and to dismiss Already's counterclaim without prejudice on the ground that the covenant had extinguished the case or controversy. Already opposed dismissal of its counterclaim, contending that Nike had not established that its covenant had mooted the case. The Supreme Court applied the voluntary cessation doctrine and held that Nike's unconditional and irrevocable covenant not to enforce its trademark against a competitor's existing products and any future "colorable imitations" mooted Already's action to have the trademark declared invalid. The breadth of Nike's covenant was sufficient to satisfy the voluntary cessation doctrine because it was unconditional and irrevocable and covered not just current or previous designs, but also colorable imitations. Once Nike demonstrated that the covenant encompassed all of Already's allegedly unlawful conduct, it was incumbent on Already to indicate that it engages in or has sufficiently concrete plans to engage in activities that would arguably infringe Nike's trademark yet not be covered by the covenant. Because Already failed to do so, the case was moot.

4. ***Smith v. United States,*** **No. 11-8976 (D.C. Cir., 651 F.3d 30; cert. granted June 21, 2012; limited to Question 2; argued on Nov. 6, 2012). Whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, the burden of persuasion rests with the Government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period.**

Decided Jan. 9, 2013 (568 U.S. __). D.C. Circuit/Affirmed. Justice Scalia for a 9-0 Court. Petitioner was convicted of, among other things, criminal conspiracy to distribute illegal narcotics, and argued that the district court erred in instructing the jury that he must prove beyond a reasonable doubt that he did not withdraw from the conspiracy outside the applicable statute of limitations. The Court of Appeals affirmed his conviction, and the Supreme Court affirmed. The Court reasoned that requiring a defendant to prove withdrawal does not violate the Due Process Clause because "[w]ithdrawal does not negate an element of the conspiracy crimes," and "although union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability, it does not place upon the prosecution a constitutional responsibility to prove that he did not withdraw." Instead, as with other affirmative defenses, the burden is properly placed on the defendant. Moreover, although Congress could have reassigned the burden to the prosecution, it did not do so here—a "practical and fair" approach because "[o]n the matter of withdrawal, the informational asymmetry heavily favors the defendant."

5. ***Los Angeles County Flood Control v. Natural Resources*, No. 11-460 (9th Cir., 673 F.3d 880; cert. granted June 25, 2012; limited to Question 2; SG as amicus, supporting Neither Party; argued on Dec. 4, 2012). In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), the Supreme Court held that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Clean Water Act. The question presented is whether when water flows from one portion of a river that is navigable water of the United States into a lower portion of the same river, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, there can be a "discharge" from an "outfall" under the Clean Water Act.**

   Decided Jan. 8, 2013 (568 U.S. __). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Alito, J., concurring in the judgment only). The Court held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the Clean Water Act. The district court found that the record was insufficient to warrant a finding that Petitioner's "municipal separate storm sewer systems," concrete channels within the Los Angeles and San Gabriel Rivers, had discharged pollutants into the rivers. The Ninth Circuit reversed, holding that a discharge had occurred when polluted water detected in the improved portion of the waterways flowed downstream into the unimproved portions of the same waterways. In keeping with the Court's holding in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 109-112 (2004), where it held that the transfer of polluted water between "two parts of the same water body" is not a discharge, the Court reversed. Because of its prior holding in *Miccosukee*, the Court noted that it was "hardly surprising" that both parties and the United States as *amicus curiae* agreed that the flow of polluted water from one portion of a river, through a concrete channel, and then into a lower portion of the same river does not constitute a "discharge." In *Miccosukee*, polluted water was removed from and then returned to the same water body; here, the Court reasoned, polluted water simply flowed "from one portion of the water body to another." Unless the transfer of polluted water is between "meaningfully distinct water bodies," as the Court explained in *Miccosukee*, it does not qualify as a "discharge" under the Clean Water Act.

6. ***Tibbals v. Carter*, No. 11-218 (6th Cir., 644 F.3d 329; cert. granted Mar. 19, 2012; argued on Oct. 9, 2012). (1) Whether capital prisoners have a right to competence in habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966), which involved an incompetent death row inmate's attempt to withdraw his certiorari petition. (2) Whether a court can order an indefinite stay of habeas proceedings under *Rees*.**

   Decided Jan. 8, 2013 (568 U.S. __). Sixth Circuit/Reversed. Justice Thomas for a 9-0 Court. Decided with *Ryan v. Gonzales*, No. 10-103. The Court held that state prisoners adjudged incompetent have no statutory right to a stay of their federal habeas corpus proceedings. The Ninth Circuit and the Sixth Circuit, citing

different federal statutes, had both concluded that death row inmates are entitled to a suspension of their federal habeas proceedings when found incompetent. The Supreme Court reversed both courts. Specifically, the Court held that its prior decision in *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam), did not recognize a statutory right to competence in federal habeas proceedings. The Court also held that 18 U.S.C. § 3599, which guarantees a right to federally funded counsel, does not provide a state prisoner with the right to suspend his federal habeas proceedings when he is adjudged incompetent. The Court reasoned that the assertion of such a right lacked any basis in the provision's text and would be difficult to square with the Court's constitutional precedents. The Court went on to note that given the backward-looking, record-based nature of habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence. After rejecting 18 U.S.C. § 3599 as a statutory basis for the right to competence in habeas proceedings, the Court also held that 18 U.S.C. § 4241 does not include a right to competence in habeas proceedings because it is inapplicable to habeas proceedings on its face, applying only to federal defendants and to trial proceedings prior to sentencing and at any time after the commencement of probation or supervised release. Finally, the Court held that where competence is questioned and the prisoner's claims could potentially benefit from his or her assistance, a district court should "take into account the likelihood that the petitioner will regain competence in the foreseeable future" and should not issue an indefinite stay that would "merely frustrate[] the State's attempts to defend its presumptively valid judgment."

7. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011; cert. opposed Feb. 9, 2012; cert. granted Mar. 19, 2012; SG as amicus, supporting Petitioners; argued on Oct. 9, 2012). Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys," entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel.**

   Decided Jan. 8, 2013 (568 U.S. __). Ninth Circuit/Reversed. Justice Thomas for a 9-0 Court. Decided with *Tibbals v. Carter*, No. 11-218. A summary of that opinion appears above

8. ***Kloeckner v. Solis*, No. 11-184 (8th Cir., 639 F.3d 834; cert. granted Jan. 13, 2012; argued on Oct. 2, 2012). The Merit Systems Protection Board is authorized to hear appeals by federal employees regarding certain adverse actions, such as dismissals. If in such an appeal the employee asserts that the challenged action was the result of unlawful discrimination, that claim is referred to as a "mixed case." The Question Presented is: If the Board decides a "mixed case" without determining the merits of the discrimination claim, whether the Court of Appeals for the Federal Circuit or a district court has jurisdiction over that claim.**

   Decided Dec. 10, 2012 (568 U.S. ___). Eighth Circuit/Reversed. Justice Kagan for a 9-0 Court. The Court held that when the Merit Systems Protection Board

("MSPB") dismisses an employee's claim on procedural grounds, the employee must seek judicial review in federal district court, not the Federal Circuit. The Civil Service Reform Act ("CSRA") permits a federal employee to seek judicial review of MSPB decisions regarding federal personnel actions. The statute provides that judicial review of the MSPB's decision should be sought in the Federal Circuit, or, if the action is a "mixed case" involving claims of discrimination under federal antidiscrimination statutes, in federal district court. 5 U.S.C. § 7703(b)(1)–(2). The court below interpreted the statute to require that mixed cases dismissed on procedural grounds be reviewed in the Federal Circuit. The Court, resolving a circuit split, found the statute straightforward: "cases of discrimination subject to [§ 7702]" shall be filed in district court, and "cases of discrimination subject to [§ 7702]" are mixed cases alleging discrimination. Therefore, the Court held, mixed cases shall be filed in district court, regardless of whether the MSPB's decision was procedural or on the merits. The Court rejected the Government's contrary argument that a procedural ruling is not a "judicially reviewable action" subject to review in the district court. The Government's reading of the statute would have stretched the meaning of "judicially reviewable action" beyond normal legal parlance, causing a strange result: under the Government's view, "to say that an agency action is not 'judicially reviewable' is to say that it is subject to judicial review in the Federal Circuit (even though not in district court)."

9. ***Arkansas Game & Fish Commission v. United States*, No. 11-597 (Fed. Cir., 637 F.3d 1366; cert. granted Apr. 2, 2012; argued on Oct. 3, 2012). Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause of the Fifth Amendment.**

   Decided Dec. 4, 2012 (568 U.S. ____). Federal Circuit/Reversed and remanded. Justice Ginsburg for an 8-0 Court (Kagan, J. did not participate). The Court held that the Government's recurrent flooding of an owner's land may constitute a taking under the Fifth Amendment, even where the flooding is temporary. In prior decisions, the Court had separately held that flooding can constitute a taking, and that a taking need not be permanent to be compensable. The Government argued here, however, that floodings are compensable only where they are permanent, relying on a line from *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924) ("it is, at least, necessary that the overflow . . . constitute an actual, permanent invasion of the land"). The Court disagreed. It held that this dicta from *Sanguinetti* was meant to summarize the Court's flooding cases to that point, all of which had involved permanent flooding, rather than to set forth a fixed rule of Takings jurisprudence. The Court dismissed the Government's concern that every passing flood, no matter how brief, would create liability; the Court's cases establish that Takings cases must be decided by weighing the relevant factors in each case. Those relevant factors include the length of the intrusion, its degree, the character of the land at issue, and the owner's reasonable, investment-backed expectations for the land's use. The Court declined to address the Government's other justification for the Federal Circuit's judgment, because that argument was not raised to the court below.

10. ***United States v. Bormes*, No. 11-192 (Fed. Cir., 626 F.3d 574; cert. granted Jan. 13, 2012; argued on Oct. 2, 2012). Whether the Little Tucker Act, 28 U.S.C. § 1346(a)(2), waives the sovereign immunity of the United States with respect to damages actions for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*.**

    Decided Nov. 13, 2012 (568 U.S. ____). Federal Circuit/Vacated and remanded. Justice Scalia for a 9-0 Court. The plaintiff, James Bormes, paid a fee to the United States over the Internet and then brought suit against the U.S. for damages under the Fair Credit Reporting Act on grounds that the fee receipt displayed too much information about his credit card. The Government countered that it was immune from lawsuits seeking money damages. The Supreme Court agreed, holding that the Little Tucker Act, 28 U.S.C. § 1346(a)(2), does not waive the Government's sovereign immunity with respect to Fair Credit Reporting Act damages actions. The Court observed that the Little Tucker Act provides the Government's consent to suit for certain damages claims premised on other laws, unless the other laws include their own judicial remedies. The Fair Credit Reporting Act, the Court reasoned, provides a detailed remedial scheme, including monetary relief in certain circumstances. Thus, the Little Tucker Act does not waive sovereign immunity with respect to Fair Credit Reporting Act claims.

Pending Cases

1. ***Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (2d Cir., 621 F.3d 111; cert. granted Oct. 17, 2011, argued in tandem with *Mohamad v. Rajoub*, No. 11-88; SG as amicus, supporting Petitioners; argued on Feb. 28, 2012; restored to calendar on Mar. 5, 2012; SG supplemental brief as amicus, supporting Petitioners; argued on Oct. 1, 2012). The Questions Presented are: (1) Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question or an issue of subject matter jurisdiction. (2) Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or whether they may be sued in the same manner as any other private party defendant under the ATS. (3) Whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.**

2. ***Johnson v. Williams*, No. 11-465 (9th Cir., 646 F.3d 636; cert. granted Jan. 13, 2012, limited to Question 1; argued on Oct. 3, 2012). Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.**

3. ***Moncrieffe v. Holder*, No. 11-702 (5th Cir., 662 F.3d 387; cert. granted Apr. 2, 2012; argued on Oct. 10, 2012). Whether a conviction under a provision of state law that encompasses, but is not limited to, the distribution of a small**

amount of marijuana without remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal felony.

Gibson Dunn – Co-Counsel for University of Texas at Austin

4. ***Fisher v. University of Texas at Austin*, No. 11-345 (5th Cir., 631 F.3d 213; cert. granted Feb. 21, 2012; SG as amicus, supporting Respondents; argued on Oct. 10, 2012). Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that University of Michigan's narrowly tailored use of race as a factor in student admissions did not violate the Equal Protection Clause), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.**

5. ***Clapper v. Amnesty Int'l USA*, No. 11-1025 (2d Cir., 638 F.3d 118; cert. granted May 21, 2012; argued on Oct. 29, 2012). Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance under Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a (Supp. II 2008), and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.**

Gibson Dunn – Counsel for John Wiley & Sons, Inc.

6. ***Supap Kirtsaeng, dba Bluechristine99 v. John Wiley & Sons, Inc.*, No. 11-697 (2d Cir., 654 F.3d 210; cert. granted Apr. 16, 2012; SG as amicus, supporting Respondent; argued on Oct. 29, 2012). How do Section 602(a)(1) of the Copyright Act, which makes it impermissible to import a work "without the authority of the owner" of the copyright, and Section 109(a), which allows the owner of a copy "lawfully made under this title" to sell or otherwise dispose of the copy without the copyright owner's permission, apply to a copy that was made and legally acquired abroad and then imported into the United States? Can such a foreign-made product never be resold in the United States without the copyright owner's permission; sometimes be resold within the United States without permission, but only after the owner approves an earlier sale in the United States; or always be resold without permission within the United States, so long as the copyright owner authorized the first sale abroad?**

7. ***Roselva Chaidez v. United States*, No. 11-820 (7th Cir., 655 F.3d 684; cert. granted Apr. 30, 2012; argued on Nov. 1, 2012). Whether *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in which the Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation, apply to persons whose convictions became final before its announcement.**

8. ***Bailey v. United States*, No. 11-770 (2d Cir., 652 F.2d 197; cert. granted June 4, 2012; argued on Nov. 1, 2012). Whether, pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the**

execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.

9. ***Florida v. Jardines*, No. 11-564 (Fl., 73 So. 3d 34; cert. granted Jan. 6, 2012, limited to Question 1; SG as amicus, supporting Petitioner; argued on Oct. 31, 2012). Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.**

10. ***Florida v. Harris*, No. 11-817 (Supreme Court of Florida, 71 So. 3d 756; cert. granted Mar. 26, 2012; SG as amicus, supporting Petitioner; argued on Oct. 31, 2012). Whether an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle.**

Gibson Dunn – Counsel for Comcast Corp.

11. ***Comcast Corp. v. Behrend*, No. 11-864 (3d Cir., 655 F.3d 182; cert. granted June 25, 2012; argued on Nov. 5, 2012). Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.**

12. ***Amgen, Inc. v. Connecticut Retirement Plan*, No. 11-1085 (9th Cir., 660 F.3d 1170; cert. granted June 11, 2012; argued on Nov. 5, 2012; SG as amicus, supporting Respondent). The Questions Presented are: (1) Whether, in a misrepresentation case under SEC Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory. (2) Whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.**

13. ***Evans v. Michigan*, No. 11-1327 (Mich. Sup. Ct., 491 Mich. 1; cert. granted June 11, 2012; SG as amicus, supporting Respondent; argued on Nov. 6, 2012). Whether the Double Jeopardy Clause of the U.S. Constitution bars retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a mistrial directed verdict of acquittal because the prosecution failed to prove that fact.**

14. ***Marx v. General Revenue Corp.*, No. 11-1175 (10th Cir., 668 F.3d 1174; cert. granted May 29, 2012; SG as amicus, supporting Petitioner; argued on Nov. 7, 2012). Whether a prevailing defendant in a case under the Fair Debt Collection Practices Act may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment" under 15 U.S.C. § 1692k(a)(3).**

15. ***FTC v. Phoebe Putney Health*, No. 11-1160 (11th Cir., 663 F.3d 1369; cert. granted June 25, 2012; argued on Nov. 26, 2012). The Questions Presented are: (1) Whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and**

other property, has "clearly articulated and affirmatively expressed" a "state policy to displace competition" under the "state action doctrine" in the market for hospital services. (2) Whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.

16. ***Vance v. Ball State University*, No. 11-556 (7th Cir., 646 F.3d 461; cert. granted June 25, 2012; argued on Nov. 26, 2012). Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.**

17. ***US Airways, Inc. v. McCutchen*, No. 11-1285 (3d Cir., 663 F.3d 671; cert. granted June 25, 2012; SG as amicus, supporting Neither Party; argued on Nov. 27, 2012). Whether the Third Circuit correctly held—in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits—that Section 502(a)(3) of the Employee Retirement Income Security Act authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits paid, even where the plan's terms give it an absolute right to full reimbursement.**

18. ***Henderson v. United States*, No. 11-9307 (5th Cir., 646 F.3d 223; cert. granted June 25, 2012; argued on Nov. 28, 2012). Whether, when the governing law is unsettled at the time of trial but settled in the defendant's favor by the time of appeal, an appellate court reviewing for "plain error" should apply the time-of-appeal standard in *Johnson v. United States*, 520 U.S. 461 (1997), as the First, Second, Sixth, Tenth, and Eleventh Circuits do, or should apply the Ninth Circuit's time-of-trial standard, which the D.C. Circuit and Fifth Circuit have adopted.**

19. ***Genesis Healthcare Corp. v. Symczyk*, No. 11-1059 (3d Cir., 656 F.3d 189; cert. granted June 25, 2012; SG as amicus, supporting affirmance; argued on Dec. 3, 2012). Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.**

20. ***Decker v. Northwest Envtl. Defense Ctr.*, No. 11-338, *Georgia-Pacific West v. Northwest Envtl. Defense Ctr.*, No. 11-347 (9th Cir., 640 F.3d 1063; cert. granted June 25, 2012, cases consolidated; SG as amicus, supporting Petitioners; argued on Dec. 3, 2012). The Questions Presented are: (1) Whether the Ninth Circuit erred when, in conflict with other circuits, it held that a citizen may bypass judicial review of a National Pollutant Discharge Elimination System ("NPDES") permitting rule under 33 U.S.C.**

§ 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the Clean Water Act ("CWA"). (2) Whether the Ninth Circuit erred when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater.

21. ***Chafin v. Chafin*, No. 11-1347 (11th Cir., 2012 WL 231213; cert. granted Aug. 13, 2012; SG as amicus, supporting Petitioner; argued on Dec. 5, 2012). Whether an appeal of a District Court's ruling on a Petition for Return of Children pursuant to the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction becomes moot after the child at issue returns to his or her country of habitual residence, as in the Eleventh Circuit's *Bekier v. Bekier*, 248 F.3d 1051 (2001), leaving the United States Court system lacking any power or jurisdiction to affect any further issue in the matter or should the United States Courts retain power over their own appellate process, as in the Fourth Circuit's *Fawcett v. McRoberts*, 326 F.3d 491 (2003), and maintain jurisdiction throughout the appellate process giving the concerned party an opportunity for proper redress.**

22. ***Descamps v. United States*, No. 11-9540 (9th Cir., 466 Fed. App'x 563; cert. granted Aug. 31, 2012; argued on Jan. 7, 2013). Whether the Ninth Circuit's ruling in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), that a state conviction for burglary where the statute is missing an element of the generic crime, may be subject to the "modified categorical approach" wherein judges are permitted to use the record of conviction to determine whether a state law offense is identical to a federal offense that triggers an increased sentence under the Armed Career Criminal Act, even though most other Circuit Courts of Appeal would not allow it.**

23. ***Standard Fire Insurance Company v. Knowles*, No. 11-1450 (8th Cir., No. 11-8030, unreported; cert. granted Aug. 31, 2012; argued on Jan. 7, 2013). Whether, after *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), when a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, *absent* the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?**

24. ***Gabelli v. SEC*, No. 11-1274 (2d Cir., 653 F.3d 49; cert. granted Sept. 25, 2012; argued on Jan. 8, 2013). Whether for purposes of applying the five-year limitations period under 28 U.S.C. § 2462—which provides that "except as otherwise provided by Act of Congress" any penalty action brought by the Government must be "commenced within five years from the date when the claims first accrued"—the Government's claim first accrues when the**

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Government can first bring an action for a penalty, where Congress has not enacted a separate controlling provision.

25. ***Delia v. E.M.A.*, No. 12-98 (4th Cir., 674 F.3d 290; cert. granted Sept. 25, 2012; SG as amicus, supporting Respondents; argued on Jan. 8, 2013). The Question Presented is whether N.C. Gen. Stat. § 108A-57 is preempted by the Medicaid Act's anti-lien provision as it was construed in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), an issue on which the North Carolina Supreme Court and the United States Court of Appeals for the Fourth Circuit are in conflict.**

26. ***Missouri v. McNeely*, No. 11-1425 (Supreme Court of Missouri, 358 S.W.3d 65; cert. granted Sept. 25, 2012; SG as amicus, supporting Petitioner; argued on Jan. 9, 2013). Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.**

27. ***Maracich v. Spears*, No. 12-25 (4th Cir., 675 F.3d 281; cert. granted Sept. 25, 2012; argued on Jan. 9, 2013). The Questions Presented are: (1) Whether the Fourth Circuit erred in holding, contrary to every other court heretofore to have considered the issue, that lawyers who obtain, disclose, or use personal information solely to find clients to represent in an incipient lawsuit—as opposed to evidence for use in existing or potential litigation—may seek solace under the litigation exception of the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725. (2) Whether the Fourth Circuit erred in reaching the conclusion (in conflict with prior precedent) that a lawyer who files an action that effectively amounts to a "place holder" lawsuit may thereafter use DPPA-protected personal information to solicit plaintiffs for that action through a direct mail advertising campaign on the grounds that such use is "inextricably intertwined" with "use in litigation."**

28. ***Alleyne v. United States*, No. 11-9335 (4th Cir., 457 F. App'x 348; cert. granted Oct. 5, 2012; argued on Jan. 14, 2013). Whether the Court should overrule its decision in *Harris v. United States*, 536 U.S. 545 (2002), in which it held that the Constitution does not require facts which increase a mandatory minimum sentence to be determined by a jury.**

29. ***Boyer v. Louisiana*, No. 11-9953 (La. Ct. App., 56 So.3d 1119; cert. granted Oct. 5, 2012 limited to Question One; argued on Jan. 14, 2013). Whether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes.**

30. ***Levin v. United States*, No. 11-1351 (9th Cir., 663 F.3d 1059; cert. granted Sept. 25, 2012; argued on Jan. 15, 2013). Whether suit may be brought**

against the United States for battery committed to a civilian by military medical personnel acting within the scope of their employment.

31. ***Koontz v. St. Johns River Water Management*, No. 11-1447 (Fl., 77 So.3d 1220; cert. granted Oct. 5, 2012; SG as amicus, supporting Respondent; argued on Jan. 15, 2013). The Questions Presented are: (1) Whether the Government can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (2) Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.**

32. ***Arlington, Texas v. FCC*, No. 11-1545; *Cable, Telecommunications & Tech. v. FCC*, No. 11-1547 (5th Cir., 668 F.3d 229; cert. granted Oct. 5, 2012 limited to Question One and cases consolidated; argued on Jan. 16, 2013). Whether a court should apply *Chevron* deference to review an agency's determination of its own statutory jurisdiction.**

33. ***Gunn v. Minton*, No. 11-1118 (Tex., 355 S.W.3d 634; cert. granted Oct. 5, 2012; argued on Jan. 16, 2013). Did the Federal Circuit depart from the standard this Court articulated in *Grable & Sons Metal Products, Inc. u. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), for "arising under" jurisdiction of the federal courts under 28 U.S.C. § 1338, when it held that state law legal malpractice claims against trial lawyers for their handling of underlying patent matters come within the exclusive jurisdiction of the federal courts? Because the Federal Circuit has exclusive jurisdiction over appeals involving patents, are state courts and federal courts strictly following the Federal Circuit's mistaken standard, thereby magnifying its jurisdictional error and sweeping broad swaths of state law claims—which involve no actual patents and have no impact on actual patent rights—into the federal courts?**

Cases To Be Argued

1. ***Millbrook v. United States*, No. 11-10362 (3d Cir., 2012 WL 1384918; cert. granted Sept. 25, 2012; argument scheduled for Feb. 19, 2013). Whether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of federal law.**

2. ***Bowman v. Monsanto Co.*, No. 11-796 (Fed. Cir., 657 F.3d 1341; cert. granted Oct. 5, 2012; SG as amicus, supporting Respondents; argument scheduled for Feb. 19, 2013). Patent exhaustion delimits rights of patent holders by eliminating the right to control or prohibit use of the invention after an authorized sale. In this case, the Federal Circuit refused to find exhaustion**

where a farmer used seeds purchased in an authorized sale for their natural and foreseeable purpose-namely, for planting. The Question Presented is: Whether the Federal Circuit erred by (1) refusing to find patent exhaustion in patented seeds even after an authorized sale and by (2) creating an exception to the doctrine of patent exhaustion for self-replicating technologies?

3. ***McBurney v. Young*, No. 12-17 (4th Cir., 667 F.3d 454; cert. granted Oct. 5, 2012; argument scheduled for Feb. 20, 2013). Under the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution, whether a state may preclude citizens of other states from enjoying the same right of access to public records that the state affords its own citizens.**

4. ***PPL Corp. v. Commissioner of Internal Revenue*, No. 12-43 (3d Cir., 665 F.3d 60; cert. granted Oct. 29, 2012; argument scheduled for Feb. 20, 2013). Whether, in determining the creditability of a foreign tax, courts should employ a formalistic approach that looks solely at the form of the foreign tax statute and ignores how the tax actually operates, or should employ a substance-based approach that considers factors such as the practical operation and intended effect of the foreign tax.**

5. ***McQuiggin v. Perkins*, No. 12-126 (6th Cir., 670 F.3d 665; cert. granted Oct. 29, 2012; argument scheduled for Feb. 25, 2013). Whether, under the Antiterrorism and Effective Death Penalty Act of 1996, there is an actual-innocence exception to the requirement that a petitioner show an extraordinary circumstance that "prevented timely filing" of a habeas petition, and if so, whether there is an additional actual-innocence exception to the requirement that a petitioner demonstrate that "he has been pursuing his rights diligently."**

6. ***Trevino v. Thaler*, No. 11-10189 (5th Cir., 449 F. App'x 415; cert. granted Oct. 29, 2012, limited to Question One; argument scheduled for Feb. 25, 2013). In federal habeas proceedings, undersigned counsel raised for the first time a claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), that trial counsel were ineffective for failing to investigate the extraordinary mitigating evidence in Mr. Trevino's life. The federal proceeding was stayed to allow exhaustion, but the Texas Court of Criminal Appeals dismissed Mr. Trevino's *Wiggins* claim under state abuse of the writ rules. Thereafter, the federal district court dismissed the claim as procedurally barred, finding no cause for the default. On appeal, Mr. Trevino argued that the Court of Appeals should stay further proceedings until this Court resolved the question then-pending in several cases whether ineffective assistance of state habeas counsel in failing to raise a meritorious claim of ineffective assistance of trial counsel established cause for the default in state habeas proceedings. The Court of Appeals refused to stay Mr. Trevino's appeal for this purpose. Four months later, this Court decided in *Martinez v. Ryan*, 132 S. Ct. 1309 (March 20, 2012), that ineffective assistance of state habeas counsel in the very circumstance presented by Mr. Trevino's case could establish cause for the**

default of a claim of ineffective assistance of trial counsel. The Question Presented is whether the Court should grant certiorari, vacate the Court of Appeals opinion, and remand to the Court of Appeals for consideration of Mr. Trevino's argument under *Martinez v. Ryan*?

7. ***Peugh v. United States*, No. 12-62 (7th Cir., 675 F.3d 736; cert. granted Nov. 9, 2012; argument scheduled for Feb. 26, 2013). Whether a sentencing court violates the Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense, if the newer Guidelines create a significant risk that the defendant will receive a longer sentence.**

8. ***Maryland v. King*, No. 12-207 (Md., 425 Md. 550; cert. granted Nov. 9, 2012; argument scheduled for Feb. 26, 2013). Whether the Fourth Amendment allows the states to collect and analyze DNA from people arrested and charged with serious crimes.**

9. ***Shelby County v. Holder*, No. 12-96 (D.C. Cir., 679 F.3d 848; cert. granted Nov. 9, 2012; argument scheduled for Feb. 27, 2013). Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.**

10. ***American Express Co. v. Italian Colors Restaurant*, No. 12-133 (2d Cir., 667 F.3d 204; cert. granted Nov. 9, 2012; argument scheduled for Feb. 27, 2013). Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.**

11. ***Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71 (9th Cir., 667 F.3d 383; cert. granted Oct. 15, 2012; SG as amicus, supporting Respondents; argument scheduled for Mar. 18, 2013). Whether the court of appeals erred in (1) creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution that is contrary to this Court's authority and conflicts with other circuit court decisions, and (2) holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote.**

12. ***Bullock v. BankChampaign, N.A.*, No. 11-1518 (11th Cir., 670 F.3d 1160; cert. granted Oct. 29, 2012; SG as amicus, supporting Respondent; argument scheduled for Mar. 18, 2013). What degree of misconduct by a trustee constitutes "defalcation" under § 523(a)(4) of the Bankruptcy Code that disqualifies the errant trustee's resulting debt from a bankruptcy discharge—and does it include actions that result in no loss of trust property.**

13. ***Mutual Pharmaceutical Co. v. Bartlett*, No. 12-142 (1st Cir., 678 F.3d 30; cert. granted Nov. 30, 2012; SG as amicus, supporting petitioner; argument scheduled for Mar. 19, 2013). Whether the First Circuit erred when it created a circuit split and held—in clear conflict with the Court's decision in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); and *Cipolline v. Liggett Group, Inc.*, 505 U.S. 504 (1992)—that federal law does not preempt state law design-defect claims targeting generic pharmaceutical products because the conceded conflict between such claims and the federal laws governing generic pharmaceutical design allegedly can be avoided if the makers of generic pharmaceuticals simply stop making their products.**

14. ***Sebelius v. Cloer*, No. 12-236 (Fed. Cir., 675 F.3d 1358; cert. granted Nov. 20, 2012; argument scheduled for Mar. 19, 2013). Whether a person whose petition under the National Vaccine Injury Compensation Program is dismissed as untimely may recover from the United States an award of attorneys' fees and costs.**

15. ***Horne v. Department of Agriculture*, No. 12-123 (9th Cir., 673 F.3d 1071; cert. granted Nov. 20, 2012; argument scheduled for Mar. 20, 2013). Under federal regulations, a "handler" of raisins must turn over a percentage of his raisin crop to a federal entity in order to sell the remainder on the open market—often in exchange for no payment or payment below the cost of raisin production. The Questions Presented are: (1) Whether the Ninth Circuit erred in holding, contrary to the decisions of five other circuit courts, that a party may not raise the Takings Clause as a defense to a "direct transfer of funds mandated by the Government," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (plurality), but instead must pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims; and (2) Whether the Ninth Circuit erred in holding, contrary to a decision of the Federal Circuit, that it lacked jurisdiction over petitioners' takings defense, even though petitioners, as "handlers" of raisins under the Raisin Marketing Order, are statutorily required under 7 U.S.C. § 608c(15) to exhaust all claims and defenses in administrative proceedings before the United States Department of Agriculture, with exclusive jurisdiction for review in federal district court.**

16. ***Dan's City Used Cars, Inc. v. Pelkey*, No. 12-52 (N.H., 163 N.H. 483; cert. granted Dec. 7, 2012; argument scheduled for Mar. 20, 2013). Whether state *statutory*, common law negligence, and consumer protection act enforcement actions against a tow-motor carrier based on state law regulating the sale and disposal of a towed vehicle are related to a transportation service provided by the carrier and are thus preempted by 49 U.S.C. § 14501-c-1.**

17. ***Oxford Health Plans, LLV v. Sutter*, No. 12-135 (3d Cir., 675 F.3d 215; cert. granted Dec. 7, 2012; argument scheduled for Mar. 25, 2013). Whether an arbitrator acts within his powers under the Federal Arbitration Act (as the Second and Third Circuits have held) or exceeds those powers (as the Fifth**

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Circuit has held) by determining that parties affirmatively "agreed to authorize class arbitration," *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010), based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.

18. ***Federal Trade Commission v. Watson Pharmaceuticals*, No. 12-416 (11th Cir., 677 F.3d 1298; cert. granted Dec. 7, 2012; argument scheduled for Mar. 25, 2013). Whether reverse-payment agreements are per se lawful unless the underlying patent litigation was a sham or the patent was obtained by fraud (as the court below held), or instead are presumptively anticompetitive and unlawful (as the Third Circuit has held).**

19. ***Hollingsworth v. Perry*, No. 12-144 (9th Cir., 671 F.3d 1052; cert. granted Dec. 7, 2012; argument scheduled for Mar. 26, 2013). The Questions Presented are: (1) Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman; and (2) whether petitioners have standing under Article III, § 2 of the Constitution in this case.**

20. ***United States v. Windsor*, No. 12-307 (2d Cir., 699 F.3d 169; cert. granted Dec. 7, 2012; argument scheduled for Mar. 27, 2013). The Questions Presented are: (1) Whether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State; (2) whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and (3) whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.**

21. ***Association for Molecular Pathology v. Myriad Genetics, Inc.*, No. 12-398 (Fed. Cir., 689 F.3d 1303; cert. granted Nov. 30, 2012). The Questions Presented are: (1) Are human genes patentable; (2) Did the Federal Circuit err in upholding a method claim by Myriad that is irreconcilable with this Court's ruling in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012); and (3) Did the Federal Circuit err in adopting a new and inflexible rule, contrary to normal standing rules, and the Supreme Court's decision in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), that petitioners who have been indisputably deterred by Myriad's "active enforcement" of its patent rights nonetheless lack standing to challenge those patents absent evidence that they have been personally threatened with an infringement action.**

22. ***Tarrant Regional Water District v. Herrmann*, No. 11-889 (10th Cir., 656 F.3d 1222; CVSG Apr. 2, 2012; cert. supported Nov. 30, 2012; cert. granted Jan. 4, 2013). The Questions Presented are: (1) Whether Congress's approval of an interstate water compact that grants the contracting states "equal rights" to**

certain surface water and – using language present in almost all such compacts – provides that the compact shall not "be deemed . . . to interfere" with each state's "appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact," manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water. (2) Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.

23. ***United States v. Davila*, No. 12-167 (11th Cir., 664 F.3d 1355; cert. granted Jan. 4, 2013). Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant.**

24. ***Adoptive Couple v. Baby Girl*, No. 12-399 (S.C., 731 S.E.2d 550; cert. granted Jan. 4, 2012). The Questions Presented are: (1) Whether a non-custodial parent can invoke the Indian Child Welfare Act (ICWA), which applies to state custody proceedings involving an Indian child, to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law. (2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.**

25. ***American Trucking Association, Inc. v. Los Angeles*, No. 11-798 (9th Cir., 660 F.3d 384; CVSG Mar. 26, 2012; cert. opposed Nov. 30, 2012; cert. granted Jan. 11, 2013 limited to Questions 1 and 3). The Questions Presented are: (1) Whether 49 U.S.C. § 14501(c)(1), which provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," contains an unexpressed "market participant" exception and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services. (3) Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle v. Hayes Freight Lines Inc*., 348 U.S. 61 (1954).**

26. ***Hillman v. Maretta*, No. 11-1221 (Va., 722 S.E.2d 32; CVSG June 18, 2012; cert. supported Dec. 14, 2012; cert. granted Jan. 11, 2013). Whether 5 U.S.C. § 8705(a), any other provision of the Federal Employees Group Life Insurance Act of 1954 ("FEGLIA"), or any regulation promulgated thereunder preempts a state domestic relations equitable remedy which creates a cause of action against the recipient of FEGLIA insurance proceeds after they have been distributed.**

27. ***Agency for International Development v. Alliance for Open Society International, Inc.*, No. 12-10 (2d Cir., 651 F.3d 218; cert. granted Jan. 11, 2013). Whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7632(f), which requires an organization to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.**

28. ***Salinas v. Texas*, No. 12-246 (Tex. Crim. App., 369 S.W.3d 176; cert. granted Jan. 11, 2013). Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.**

29. ***Sekhar v. United States*, No. 12-357 (2d Cir., 683 F.3d 436; cert. granted Jan. 11, 2013). Whether the "recommendation" of an attorney, who is a salaried employee of a governmental agency, in a single instance, is intangible property that can be the subject of an extortion attempt under 18 U.S.C. § 1951(a) (the Hobbs Act) and 18 U.S.C. § 875(d).**

30. ***United States v. Kemodeaux*, No. 12-418 (687 F.3d 232; cert. granted Jan. 11, 2013). The Questions Presented are: (1) Whether the court of appeals erred in conducting its constitutional analysis on the premises that respondent was not under a federal registration obligation until the Sex Offender Registration and Notification Act (SORNA) was enacted, when pre-SORNA federal law obligated him to register as a sex offender. (2) Whether the court of appeals erred in holding that Congress lacks the Article I authority to provide for criminal penalties under 18 U.S.C. § 2250(a)(2)(A) for failing to register as a sex offender, as applied to a person who was convicted of a sex offense under federal law and completed his criminal sentence before SORNA was enacted.**

31. ***University of Texas Southwestern Medical Center v. Nassar*, No. 12-484 (5th Cir., 674 F.3d 448; cert. granted Jan. 18, 2013). Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation (*i.e.*, that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (*i.e.*, that an improper motive was one of multiple reasons for the employment action).**

32. ***Metrish v. Lancaster*, No. 12-547 (6th Cir., 683 F.3d 740; cert. granted Jan. 18, 2013). The Questions Presented are: (1) Whether the Michigan Supreme Court's recognition that a state statute abolished the long-maligned diminished-capacity defense was an "unexpected and indefensible" change in a common-law doctrine of criminal law under this Court's retroactivity habeas jurisprudence. (2) Whether the Michigan Court of Appeals' retroactive application of the Michigan Supreme Court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded**

disagreement so as to justify habeas relief under *Harrington v. Richter*, 131 S. Ct. 770 (2011).

October 2013 Term

1. ***Chadbourne & Parke LLP v. Troice*, No. 12-79; *Willis of Colorado Inc. v. Troice*, No. 12-86; *Proskauer Rose LLP v. Troice*, No. 12-88 (5th Cir., 675 F.3d 503; CVSG Oct. 1, 2012; cert. opposed Dec. 14, 2012; cert. granted Jan. 18, 2013). The Questions Presented are: (1) Whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1), prohibits private class actions based on state law only where the alleged purchase or sale of a covered security is "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud. (2) Whether the SLUSA precludes a class action in which the defendant is sued for aiding and abetting fraud, but a non-party, rather than the defendant, made the only alleged misrepresentation in connection with a covered securities transaction.**

2. ***Bond v. United States*, No. 12-158 (3d Cir., 681 F.3d 149; cert. granted Jan. 18, 2013). The Questions Presented are: (1) the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state prerogatives, and is concededly unnecessary to satisfy the Government's treaty obligations? (2) Can the provisions of the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, be interpreted not to reach ordinary poisoning cases, which have been handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing validity of the Court's decision in *Missouri v. Holland*?**

Cases Determined Without Argument

1. ***Tennant v. Jefferson County Commission*, No. 11-1184 (S.D. W.Va.; reversed and remanded Sept. 25, 2012).** Per Curiam. On direct appeal from a three-judge district court, the Court held that West Virginia's 2011 congressional redistricting plan does not violate the "one person, one vote" principle embodied in Article I, § 2 of the United States Constitution. Because West Virginia conceded that it could have adopted a redistricting plan with lower population variations between congressional districts, the only question for the Court was whether West Virginia can demonstrate that the "population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The Court held that West Virginia carried its burden. Unlike other proposed plans, the chosen redistricting plan avoided creating contests between incumbents, did not split political subdivisions, and minimized population shifts between districts. Accordingly, the Court reversed the district court's decision that West Virginia had not carried its burden.

2. ***Lefemine v. Wideman*, No. 12-168 (4th Cir.; vacated and remanded Nov. 5, 2012)**. Per curiam. In a lawsuit alleging that the conduct of government officials violates the U.S. Constitution, a plaintiff who obtains a permanent injunction but no money damages is a "prevailing party" for purposes of attorneys' fees under 42 U.S.C. § 1988. The permanent injunction ordered the officials to change their behavior in a manner that directly benefited the plaintiff. Accordingly, the plaintiff was entitled to receive his attorneys' fees unless special circumstances would render an award unjust.

3. ***Nitro-Lift Technologies, LLC v. Howard*, No. 11-1377 (Okla.; vacated and remanded Nov. 26, 2012).** Per curiam. The Court held that the Oklahoma Supreme Court erred in preventing arbitration of a dispute over the scope of non-competition agreements in employment contracts. The employment contract at issue contained a valid arbitration clause requiring arbitration for "[a]ny dispute, difference or unresolved question between Nitro-Lift and the Employee." Nonetheless, the Oklahoma Supreme Court ruled that the arbitration clause and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, did not inhibit its review of the underlying contract's validity, and the noncompetition clauses were void and unenforceable as against Oklahoma's public policy. The Supreme Court vacated the Oklahoma Supreme Court's decision, holding that it was bound by the FAA, which is "the supreme Law of the Land," and by the prior opinions of the U.S. Supreme Court interpreting the FAA as foreclosing "judicial hostility towards arbitration." Slip Op. at 5 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, __ (2011)).

Pending Cases Calling For The Views Of The Solicitor General

1. ***Harris v. Quinn*, No. 11-681 (7th Cir., 656 F.3d 692; CVSG June 28, 2012). The Questions Presented are: (1) Whether a state may, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the state for greater reimbursements from its Medicaid programs. (2) Whether the lower court erred in holding that the claims of providers in the Home Based Support Services Program are not ripe for judicial review.**

2. ***Young v. Fitzpatrick*, No. 11-1485 (Wash. App., 262 P.3d 527; CVSG Oct. 1, 2012). The Questions Presented are: (1) Whether police officers, employed by the Puyallup Indian Tribe, but trained, certified, and cross-commissioned by the state of Washington, and armed, equipped, and provisioned by the United States, are subject to the Constitution, U.S. civil rights laws, and state tort law. (2) Whether the Shelter or Conceal Clause of the Treaty of Medicine Creek, and additional sources of federal and state law, preempts any claims of qualified immunity by individual Puyallup tribal police officer defendants in a suit for violation of the Constitution, U.S. civil rights laws, and state tort law.**

Gibson Dunn – Counsel for FMR, LLC

3. ***Lawson v. FMR, LLC*, No. 12-3 (1st Cir., 670 F.3d 61; CVSG Oct. 9, 2012). Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.**

4. ***Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (3d Cir., 658 F.3d 375; CVSG Oct. 29, 2012). The Questions Presented are: (1) Whether disparate impact claims are cognizable under the Fair Housing Act. (2) Whether, if such claims are cognizable, they should be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test: (a) what the correct test is for determining whether a prima facie case of disparate impact has been made; (b) how the statistical evidence should be evaluated; and (c) what the correct test is for determining when a defendant has satisfied its burden in a disparate impact case.**

5. ***BG Group PLC v. Argentina*, No. 12-138 (D.C. Cir., 665 F.3d 1363; CVSG Nov. 5, 2012). Whether, in disputes involving a multi-staged dispute resolution process, a court or the arbitrator determines whether a precondition to arbitration has been satisfied.**

6. ***Law v. Siegel*, No. 12-5196 (9th Cir., 2011 WL 2181386; CVSG Dec. 3, 2012). Whether the Ninth Circuit erred in allowing the bankruptcy trustee to surcharge the debtor's constitutionally protected homestead property.**

7. ***Michigan Department of Licensing and Regulatory Affairs v. Gerstenschlager*, No. 12-379 (Mich. Ct. App., 771 N.W.2d 423; CVSG Jan. 7, 2013). The Questions Presented are: (1) Whether the Trade Act of 1974 prescribes a deadline for a claimant seeking a training waiver as a prerequisite to obtaining benefits under the Act. (2) Whether a federal agency's operating instruction, which states are bound to follow by statutory agreement, is entitled to *Chevron* deference.**

8. ***Air Wisconsin Airlines Corp. v. Hoeper*, No. 12-315 (Co., 2012 WL 907764; CVSG Jan. 7, 2013). The Questions Presented are: (1) Whether a court can deny Aviation and Transportation Security Act (ATSA) immunity without deciding whether the airline's report was true. (2) Whether the First Amendment requires a reviewing court in a defamation case to make an independent examination of the record before affirming that a plaintiff met its burden of proving a statement was false.**

9. ***Michigan v. Bay Mills Indian Community*, No. 12-515 (6th Cir., 695 F.3d 406; CVSG Jan. 7, 2013). The Questions Presented are: (1) Whether a federal court has jurisdiction to enjoin activity that violates the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., but takes place outside of Indian lands. (2) Whether tribal sovereign immunity bars a state from suing**

in federal courts to enjoin a tribe from violating IGRA outside of Indian lands.

10. ***Pfizer Inc. v. Law Offices of Peter G. Angelos*, No. 12-300 (2d Cir., 676 F.3d 45; CVSG Jan. 14, 2013). Whether 11 U.S.C. § 524(g)(4)(A)(ii) of the Bankruptcy Code, which allows a bankruptcy court to bar certain suits against nondebtor third parties if the liability of those third parties is "by reason of" their taking an ownership interest or managerial involvement in the debtor, applies when the third party is an "apparent manufacturer."**

11. ***Unite Here Local 355 v. Mulhall*, No. 12-99; *Mulhall v. Unite Here Local 355*, No. 12-312 (11th Cir., 668 F.3d 1211; CVSG Jan. 14, 2013). Whether organizing assistance offered by an employer to a union violates Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186(a)(2), which makes it unlawful for employers "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization."**

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Tarrant Regional Water District v. Herrmann*, No. 11-889 (10th Cir., 656 F.3d 1222; CVSG Apr. 2, 2012; cert. supported Nov. 30, 2012; cert. granted Jan. 4, 2013). The Questions Presented are: (1) Whether Congress's approval of an interstate water compact that grants the contracting states "equal rights" to certain surface water and – using language present in almost all such compacts – provides that the compact shall not "be deemed . . . to interfere" with each state's "appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact," manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water. (2) Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.**

2. ***Hillman v. Maretta*, No. 11-1221 (Va., 722 S.E.2d 32; CVSG June 18, 2012; cert. supported Dec. 14, 2012; cert. granted Jan. 11, 2013). Whether 5 U.S.C. § 8705(a), any other provision of the Federal Employees Group Life Insurance Act of 1954 ("FEGLIA"), or any regulation promulgated thereunder preempts a state domestic relations equitable remedy which creates a cause of action against the recipient of FEGLI insurance proceeds after they have been distributed.**

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Los Angeles County Flood Control v. Natural Resources*, No. 11-460 (9th Cir., 673 F.3d 880; cert. granted June 25, 2012; limited to Question 2; SG as amicus, supporting Neither Party; argued on Dec. 4, 2012). In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), the Supreme Court held that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Clean Water Act. The question presented is whether when water flows from one portion of a river that is navigable water of the United States into a lower portion of the same river, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, there can be a "discharge" from an "outfall" under the Clean Water Act.**

   Decided Jan. 8, 2013 (568 U.S. __). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Alito, J., concurring in the judgment only). The Court held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the Clean Water Act. The district court found that the record was insufficient to warrant a finding that Petitioner's "municipal separate storm sewer systems," concrete channels within the Los Angeles and San Gabriel Rivers, had discharged pollutants into the rivers. The Ninth Circuit reversed, holding that a discharge had occurred when polluted water detected in the improved portion of the waterways flowed downstream into the unimproved portions of the same waterways. In keeping with the Court's holding in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 109-112 (2004), where it held that the transfer of polluted water between "two parts of the same water body" is not a discharge, the Court reversed. Because of its prior holding in *Miccosukee*, the Court noted that it was "hardly surprising" that both parties and the United States as *amicus curiae* agreed that the flow of polluted water from one portion of a river, through a concrete channel, and then into a lower portion of the same river does not constitute a "discharge." In *Miccosukee*, polluted water was removed from and then returned to the same water body; here, the Court reasoned, polluted water simply flowed "from one portion of the water body to another." Unless the transfer of polluted water is between "meaningfully distinct water bodies," as the Court explained in *Miccosukee*, it does not qualify as a "discharge" under the Clean Water Act.

2. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011; cert. opposed Feb. 9, 2012; cert. granted Mar. 19, 2012; SG as amicus, supporting Petitioners). Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys," entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel.**

Decided Jan. 8, 2013 (568 U.S. __). Ninth Circuit/Reversed. Justice Thomas for a 9-0 Court. Decided with *Tibbals v. Carter*, No. 11-218. The Court held that state prisoners adjudged incompetent have no statutory right to a stay of their federal habeas corpus proceedings. The Ninth Circuit and the Sixth Circuit, citing different federal statutes, had both concluded that death row inmates are entitled to a suspension of their federal habeas proceedings when found incompetent. The Supreme Court reversed both courts. Specifically, the Court held that its prior decision in *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam), did not recognize a statutory right to competence in federal habeas proceedings. The Court also held that 18 U.S.C. § 3599, which guarantees a right to federally funded counsel, does not provide a state prisoner with the right to suspend his federal habeas proceedings when he is adjudged incompetent. The Court reasoned that the assertion of such a right lacked any basis in the provision's text and would be difficult to square with the Court's constitutional precedents. The Court went on to note that given the backward-looking, record-based nature of habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence. After rejecting 18 U.S.C. § 3599 as a statutory basis for the right to competence in habeas proceedings, the Court also held that 18 U.S.C. § 4241 does not include a right to competence in habeas proceedings because it is inapplicable to habeas proceedings on its face, applying only to federal defendants and to trial proceedings prior to sentencing and at any time after the commencement of probation or supervised release. Finally, the Court held that where competence is questioned and the prisoner's claims could potentially benefit from his or her assistance, a district court should "take into account the likelihood that the petitioner will regain competence in the foreseeable future" and should not issue an indefinite stay that would "merely frustrate[] the State's attempts to defend its presumptively valid judgment."

3. ***Decker v. Northwest Envtl. Defense Ctr.*, No. 11-338 (9th Cir., 640 F.3d 1063; cert. granted June 25, 2012, case consolidated with *Georgia-Pacific West v. Northwest Envtl. Defense Ctr.*, No. 11-347; SG as amicus, supporting Petitioners; argued on Dec. 3, 2012). The Questions Presented are: (1) Whether the Ninth Circuit erred when, in conflict with other circuits, it held that a citizen may bypass judicial review of a National Pollutant Discharge Elimination System ("NPDES") permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the Clean Water Act ("CWA"). (2) Whether the Ninth Circuit erred when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater.**

4. ***Georgia-Pacific West v. Northwest Environmental Defense Center*, No. 11-347 (9th Cir., 640 F.3d 1063; CVSG Dec. 12, 2011; cert. opposed May 24, 2012; cert. granted June 25, 2012, consolidated with No. 11-338). Since passage of the Clean Water Act, the Environmental Protection Agency has considered runoff of rain from forest roads—whether channeled or not—to fall outside the scope of its National Pollutant Discharge Elimination System ("NPDES") and thus not to require a permit as a point source discharge of pollutants.**

Under a rule first promulgated in 1976, EPA consistently has defined as nonpoint source activities forest road construction and maintenance from which natural runoff results. And in regulating stormwater discharges under 1987 amendments to the Act, EPA again expressly excluded runoff from forest roads. In consequence, forest road runoff long has been regulated as a nonpoint source using best management practices, like those imposed by the State of Oregon on the roads at issue here. EPA's consistent interpretation of more than 35 years has survived proposed regulatory revision and legal challenge, and repeatedly has been endorsed by the United States in briefs and agency publications. The Ninth Circuit—in conflict with other circuits, contrary to the position of the United States as amicus, and with no deference to EPA—rejected EPA's longstanding interpretation. Instead, it directed EPA to regulate channeled forest road runoff under a statutory category of stormwater discharges "associated with industrial activity," for which a permit is required. The Question Presented is: Whether the Ninth Circuit should have deferred to EPA's longstanding position that channeled runoff from forest roads does not require a permit, and erred when it mandated that EPA regulate such runoff as industrial stormwater subject to NPDES.

5. ***Vance v. Ball State University*, No. 11-556 (7th Cir., 646 F.3d 461; CVSG Feb. 21, 2012; cert. opposed May 24, 2012; cert. granted June 25, 2012; SG as amicus, supporting Neither Party; argued on Nov. 26, 2012). In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim's co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a "supervisor" and who had the authority to direct and oversee the victim's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The Question Presented is whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.**

6. ***American Trucking Association, Inc. v. Los Angeles*, No. 11-798 (9th Cir., 660 F.3d 384; CVSG Mar. 26, 2012; cert. opposed Nov. 30, 2012; cert. granted Jan. 11, 2013 limited to Questions 1 and 3). The Questions Presented are: (1) Whether 49 U.S.C. § 14501(c)(1), which provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," contains an unexpressed "market participant" exception and permits a municipal governmental entity to take action that conflicts with the**

express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services. (3) Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle v. Hayes Freight Lines Inc*., 348 U.S. 61 (1954).

7. ***Blue Cross and Blue Shield v. Fossen*, No. 11-1155 (9th Cir., 660 F.3d 1102; CVSG June 18, 2012; cert. opposed Dec. 21, 2012; cert. denied Jan. 22, 2013). Whether a substantive state-law insurance standard saved from preemption under the insurance saving clause of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(b)(2)(A), can be enforced through state-law remedies or instead is enforceable exclusively through ERISA's enforcement scheme, 29 U.S.C. § 1132.**

8. ***GlaxoSmithKline v. Classen Immunotherapies, Inc.*, No. 11-1078 (Fed. Cir., 659 F.3d 1057; CVSG June 25, 2012; cert. opposed Dec. 13, 2012; cert. denied Jan. 14, 2013). Whether the Federal Circuit's interpretation of 35 U.S.C. § 271(e)(1)'s safe harbor from patent infringement liability for drugs – an interpretation which arbitrarily restricts the safe harbor to pre-marketing approval of generic counterparts – is faithful to statutory text that contains no such limitation and decisions of this Court rejecting similar efforts to impose extra-textual limitations on the statute.**

9. ***Retractable Technologies v. Becton, Dickinson & Co.*, No. 11-1154 (Fed. Cir., 653 F.3d 1296; CVSG June 29, 2012; cert. opposed Nov. 28, 2012; cert. denied Jan. 7, 2013). The Questions Presented are: (1) Whether a court may depart from the plain and ordinary meaning of a term in a patent claim based on language in the patent specification, where the patentee has neither expressly disavowed the plain meaning of the claim term nor expressly defined the term in a way that differs from its plain meaning. (2) Whether claim construction, including underlying factual issues that are integral to claim construction, is a purely legal question subject to de novo review on appeal.**

10. ***Chadbourne & Parke LLP v. Troice*, No. 12-79; *Willis of Colorado Inc. v. Troice*, No. 12-86; *Proskauer Rose LLP v. Troice*, No. 12-88 (5th Cir., 675 F.3d 503; CVSG Oct. 1, 2012; cert. opposed Dec. 14, 2012; cert. granted Jan. 18, 2013). The Questions Presented are: (1) Whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1), prohibits private class actions based on state law only where the alleged purchase or sale of a covered security is "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud. (2) Whether the SLUSA precludes a class action in which the defendant is sued for aiding and abetting fraud, but a non-party, rather than the defendant, made the only alleged misrepresentation in connection with a covered securities transaction.**

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