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GIBSON DUNN
Supreme Court Round-Up

Overview

The Supreme Court Round-Up previews upcoming cases, summarizes 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.

October Term 2014

Decided Cases

1. ***Toca v. Louisiana*, No. 14-6381 (La., 141 S.3d 265; cert. granted Dec. 12, 2014). The Questions Presented are: (1) Whether the rule announced in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), applies retroactively; and (2) Whether a federal question is raised by a claim that a state collateral review court erroneously failed to find an exception under *Teague v. Lane*, 489 U.S. 288 (1989).**

   Decided Feb. 3, 2015. The petition for a writ of certiorari was dismissed pursuant to Supreme Court Rule 46.1 because the case was moot.

2. ***M&G Polymers USA v. Tackett*, No. 13-1010 (6th Cir., 733 F.3d 489; cert. granted May 5, 2014; limited to Question 1; argued on Nov. 10, 2014). Whether, when construing collective bargaining agreements in Labor Management Relations Act ("LMRA") cases, courts should presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue indefinitely), as the Sixth Circuit holds; or should require a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement, as the Third Circuit holds; or should require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely, as the Second and Seventh Circuits hold.**

   Decided Jan. 26, 2015 (574 U.S. __). Sixth Circuit/Vacated and remanded. Justice Thomas for a unanimous Court (Ginsburg, J., concurring, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that Sixth Circuit precedent, which established a presumption that retiree benefits in collective-bargaining

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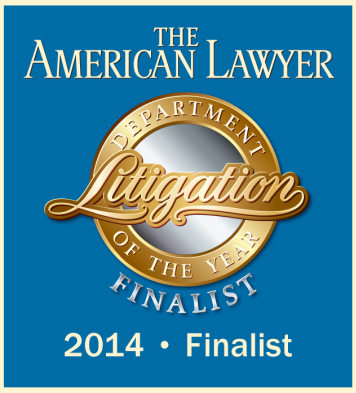

Acclaimed as a litigation powerhouse, Gibson Dunn has a long record of outstanding successes. In awarding its 2014 Litigation Department of the Year Finalist honors, *The American Lawyer* noted our "cascade of litigation triumphs" and our wins of "seemingly unwinnable defense verdicts." This award follows our unprecedented back-to-back wins as the 2010 and 2012 Litigation Department of the Year.

Partner Miguel A. Estrada was named a 2014 Litigator of the Year winner by *The American Lawyer*, and partner Theodore B. Olson was named a finalist in the publication's inaugural 2012 Litigator of the Year competition.

The National Law Journal named Gibson Dunn to its 2014 Appellate Hot List, which recognized law firms demonstrating "outstanding achievements before the U.S. Supreme Court, federal circuit courts and state courts of last resort."

Theodore Olson was named to *The National Law Journal*'s 2013 "100 Most Influential Lawyers in America," recognizing "100 lawyers in the United States who have shaped the legal world through their work in the courtroom, at the negotiating table, in the classroom or in government."

agreements vest for life absent a specific termination date, was incompatible with ordinary principles of contract law. A group of retired employees contended that their collective-bargaining agreement with a former employer vested certain health care benefits. Applying a set of inferences derived from circuit precedent, the court of appeals concluded that the parties intended the benefits "to vest for life." The Supreme Court explained that collective-bargaining agreements—including those that establish retiree benefits—should be interpreted using ordinary contract principles. Rather than relying on evidence about customs and usages in a particular industry, however, the court of appeals applied its own "suppositions" about likely behavior across many different industries. The court of appeals also ignored other relevant contract doctrines, such as the "traditional principle" that courts should not interpret "ambiguous writings to create lifetime promises." Because the Sixth Circuit had not applied ordinary contract law, the Court remanded for it to do so in the first instance.

3. ***Dep't of Homeland Security v. MacLean*, No. 13-894 (Fed. Cir., 714 F.3d 1301; cert. granted May 19, 2014; argued on Nov. 4, 2014). Whether certain statutory protections codified at 5 U.S.C. § 2301(b)(8)(A), which are inapplicable when an employee makes a disclosure "specifically prohibited by law," can bar an agency from taking an enforcement action against an employee who intentionally discloses Sensitive Security Information, based on regulations promulgated by the Transportation Security Administration.**

   Decided Jan. 21, 2015 (574 U.S. ___). Federal Circuit/Affirmed. Chief Justice Roberts for a 7-2 Court (Sotomayor, J., dissenting, joined by Kennedy, J.). The Court held that a federal air marshal who publicly disclosed a Transportation Security Administration ("TSA") plan to remove air marshals from certain long-distance flights was entitled to whistleblower protection. Federal law provides whistleblower protection to an employee who discloses information revealing "any violation of any law, rule, or regulation," or a "substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). An exception exists, however, for disclosures that are "specifically prohibited by law." *Id.* The Court determined that the exception did not apply because respondent's disclosure was not "specifically prohibited by law." In doing so, the Court rejected the Government's arguments that respondent's disclosures were specifically prohibited by 49 U.S.C. § 114(r)(1), which directs the TSA to prescribe regulations prohibiting disclosure of certain information, and the TSA regulations that were promulgated pursuant to that provision. The Court reasoned that § 114(r)(1) is simply an authorizing statute that does not prohibit anything. The Court further explained that Congress had intentionally excluded "regulations" from the scope of § 2302(b)(8)(A). Thus, although respondent's disclosure may have been specifically prohibited "by regulation," it was not "specifically prohibited by law."

4. ***Hana Financial Inc. v. Hana Bank*, No. 13-1211 (9th Cir., 735 F.3d 1158; cert. granted June 23, 2014; argued on Dec. 3, 2014). Whether trademark "tacking"—whereby an older trademark may be "tacked" to a newer one for purposes of determining trademark priority—is a question of fact for a jury or a question of law for a court.**

Decided Jan. 21, 2015 (574 U.S. ___). Ninth Circuit/Affirmed. Justice Sotomayor for a unanimous Court. The Court held that whether trademark tacking is warranted in a given case is a question for the jury. Rights to a trademark are determined by the date of the mark's first use in commerce: The party who first uses a mark in commerce has priority over other users. The doctrine of tacking permits a party to claim priority based on the first-use date of a similar, but technically distinct mark, if the previously used mark is the "legal equivalent" of the mark in question. In 2007, petitioner sued respondent, alleging infringement of its "Hana Financial" trademark. Respondent denied infringement by invoking the tacking doctrine and claiming that it had priority over petitioner. The district court initially granted summary judgment to respondent, but the Ninth Circuit reversed, holding that genuine issues of material fact existed as to priority. A jury then returned a verdict in favor of respondent, and the district court denied petitioner's motion for judgment as a matter of law. The Ninth Circuit affirmed, explaining that tacking "requires a highly fact-sensitive inquiry" that is "reserved for the jury." The Court affirmed. The Court explained that "two marks may be tacked when the original and revised marks are 'legal equivalents'"—that is, when they "create the same, continuing commercial impression" such that consumers "consider both as the same mark." Application of that kind of test, the Court said, "falls comfortably within the ken of a jury."

5. ***Gelboim v. Bank of America Corp.*, No. 13-1174 (2d Cir., No. 13-3565; cert. granted June 30, 2014; argued on Dec. 9, 2014). Whether and in what circumstances the dismissal of an action that has been consolidated with other suits is immediately appealable.**

   Decided Jan. 21, 2015 (574 U.S. ___). Second Circuit/Reversed and remanded. Justice Ginsburg for a unanimous Court. The Court held that an order dismissing one of the discrete cases in a multidistrict litigation ("MDL") is a final decision under 28 U.S.C. § 1291 from which an immediate appeal may be taken, even if other cases consolidated into the MDL remain pending. Petitioners filed a class-action complaint, alleging that a number of banks had violated federal antitrust law. Their case was consolidated for pretrial proceedings with approximately sixty other cases. The district court granted a motion to dismiss the case, which terminated the specific case in its entirety. Other cases involved in the pretrial proceedings, however, remained before the district court. The Court held that this dismissal was a final decision subject to appellate jurisdiction under 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over appeals from "all final decisions of the district courts of the United States." The Court explained that "[c]ases consolidated for MDL pretrial proceedings ordinarily retain their separate identities, so an order disposing of one of the discrete cases in its entirety should qualify under § 1291 as an appealable final decision."

6. ***Holt v. Hobbs*, No. 13-6827 (8th Cir., 509 F. App'x 561; cert. granted Mar. 3, 2014; SG as amicus, supporting petitioner; argued on Oct. 7, 2014). Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*., to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.**

Decided Jan. 20, 2015 (574 U.S. ___). Eighth Circuit/Reversed and remanded. Justice Alito for a 9-0 Court (Ginsburg, J., concurring, joined by Sotomayor, J.; Sotomayor, J., concurring). The Court held that an Arkansas Department of Correction grooming policy, which prohibited a Muslim inmate from growing a one-half-inch beard in accordance with his religious beliefs, violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). RLUIPA prevents state governments from imposing "a substantial burden on the religious exercise" of a prisoner unless the government shows that the burden "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a). The district court had concluded that the policy was not a substantial burden because Muslim inmates could exercise their faith in other ways, a beard is not compelled by the Muslim faith, and not all Muslims share this belief. The Supreme Court disagreed, stating that RLUIPA protects even practices that are not compelled or that are idiosyncratic. The Court also rejected the Department's attempts to justify the grooming policy because it prevents prisoners from hiding contraband and disguising their identity, holding that the policy was not the least restrictive means of furthering these interests. The Department's interest in regulating contraband could be satisfied by searching the beard, and its interest in prisoner identification could be furthered by requiring inmates to be photographed without beards when first admitted. The Department's grooming policy is "substantially underinclusive," the Court reasoned, because it allows inmates with dermatological problems to grow quarter-inch beards and allows head-hair length to "the middle of the nape of the neck." Finally, the Court concluded, "the Department failed to show why the vast majority of States and the Federal Government permit inmates to grow ½-inch beards, either for any reason or for religious reasons, but it cannot."

7. ***Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, No. 13-854 (Fed. Cir., 723 F.3d 1363; cert. granted Mar. 31, 2014; SG as amicus, supporting neither party; argued on Oct. 15, 2014). Whether a district court's factual finding in support of its construction of a patent claim term may be reviewed de novo, as the Federal Circuit requires (and as the panel explicitly did in this case), or only for clear error, as Federal Rule of Civil Procedure 52(a) requires.**

   Decided Jan. 20, 2015 (574 U.S. ___). Federal Circuit/Vacated and remanded. Justice Breyer for a 7-3 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that a district court's resolution of subsidiary factual issues in construing a patent claim must be reviewed for clear error under Federal Rule of Civil Procedure 52(a)(6), not *de novo*. Although the proper construction of a patent claim is a question of law, *see Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the Court explained that "subsidiary factfinding is sometimes necessary." The Court analogized patent claim construction to the interpretation of "deeds, contracts, or tariffs," in which a court sometimes must make factual determinations before reaching the ultimate legal conclusion of how to interpret the document. When the district court reviews only "evidence intrinsic to the patent," such as the patent claims and specifications, "the judge's determination will amount solely to a determination of law" subject to *de novo* review. But when the district court must "look beyond the patent's intrinsic evidence . . . in order to understand, for example, the background science or the

meaning of a term in the relevant art during the relevant time period," findings as to those "subsidiary facts" "must be reviewed for clear error on appeal." The Court rejected the respondent's arguments that the difficulty in distinguishing factual from legal questions militated in favor of *de novo* review, noting that "even were [the Court] free to ignore [Rule 52(a)(6)]," courts of appeals commonly distinguish findings of fact from legal conclusions and review the two under different standards. Because the Federal Circuit had reviewed the district court's subsidiary factual findings *de novo*, the Court vacated the appellate court's judgment and remanded the case for application of the proper standard of review.

8. ***Jennings v. Stephens*, No. 13-7211 (5th Cir., 537 F. App'x 326; cert. granted Mar. 24, 2014; argued on Oct. 15, 2014). Whether the Fifth Circuit erred in holding that a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected even though the Fifth Circuit acquired jurisdiction over the entire claim as a result of the respondent's appeal.**

   Decided Jan. 14, 2015 (574 U.S. ___). Fifth Circuit/Reversed and remanded. Justice Scalia for a 6-3 Court (Thomas, J., dissenting, joined by Kennedy and Alito, J.J.). The Court held that a prisoner who sought federal habeas relief based on three theories of ineffective assistance of counsel, and prevailed in the district court on two of the three theories, is not required to file a cross-appeal or seek a certificate of appealability on the third theory in order to rely on it as part of his defense against the state's appeal. An appellee who does not take a cross-appeal may "urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court" so long as the appellee does not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924). The Court concluded that this rule, which was developed in the civil context, applied with equal force to appeals from a district court's judgment granting habeas relief. In this case, the district court's judgment provided the defendant the right to "release, resentencing, or commutation within a fixed time," not the more narrow right to resentencing without specific challenged errors. Because the ineffective assistance claim rejected by the district court sought precisely the same relief, the defendant could rely on it even absent a cross-appeal. The Court was careful to note, however, that not all defenses will meet this test, and provided as an example that "a habeas applicant who has won resentencing would be required to take a cross-appeal in order to raise a rejected claim that would result in a new trial." The Court also held that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is not required when defending a judgment on alternative grounds because a certificate of appealability is required only when "an appeal" is "taken to the court of appeals." Although the Court did not settle the question whether this language requires a habeas petitioner to seek a certificate of appealability when pursuing a cross-appeal, it held that the language "assuredly does not embrace the defense of a judgment on alternative grounds."

9. ***T-Mobile South v. Roswell*, No. 13-975 (11th Cir., 731 F.3d 1213; cert. granted May 5, 2014; SG as amicus, supporting neither party; argued on Nov. 10, 2014). Whether a document from a state or local government stating that an application for a cell phone tower permit has been denied, but providing no reasons whatsoever for the denial, can satisfy the Communications Act's "in writing" requirement, 47 U.S.C. § 332(c)(7)(B)(iii).**

   Decided Jan. 14, 2015 (574 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Sotomayor for a 6-3 Court (Roberts, C.J., dissenting, joined by Ginsburg, J. and Thomas, J. as to Part I; Thomas, J., dissenting). The Telecommunications Act of 1996 states that a locality's denial of an application to build a cell phone tower "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). The Court held that this provision also requires localities to explain the reasons for the denial in writing. Those reasons, however, need not appear in the written denial so long as they appear in some other written record, are sufficiently clear to enable judicial review, and are provided or made accessible to the applicant essentially contemporaneously with the written denial notice. The Court reasoned that "specific limitations" in the Act "necessarily implied" that localities must provide written reasons for an application denial at essentially the same time as the denial. First, the Act requires denials to be "supported by substantial evidence," a term of art that describes how an administrative record is to be judged by a reviewing court. It is "commonsensical," the Court reasoned, that courts must be able to identify the reasons a locality denied an application if they are to determine whether the denial was supported by substantial evidence. Second, the Act provides for judicial review of denials, and when localities fail to provide reasons essentially contemporaneous with the denial, they "stymie" judicial review. The Court found delay particularly problematic because the Act requires companies to seek review within thirty days of an application denial. If localities could delay providing reasons for thirty days, they could force companies to forgo review or file suit based on conjecture. The Court was clear, however, that localities need not provide reasons in any specific document, as long as they produce "some" written record. The Act does not explicitly impose such a requirement, and the Act's text and the system of "cooperative federalism" on which it is premised preclude courts from imposing unenumerated requirements under the Act. In light of these requirements, the Court held that the City of Roswell violated the Act because the City did not publish its meeting minutes or otherwise provide written reasons for its denial of T-Mobile's application until twenty-six days after its decision.

10. ***Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684 (8th Cir., 729 F.3d 1092; cert. granted Apr. 28, 2014; SG as amicus, supporting petitioners; argued on Nov. 4, 2014). Whether a borrower exercises his right to rescind a transaction in satisfaction of the requirements of the Truth in Lending Act, 15 U.S.C. § 1635, by "notifying the creditor" in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must instead file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held.**

Decided Jan. 13, 2015 (574 U.S. ___). Eighth Circuit/Reversed and remanded. Justice Scalia for a unanimous Court. The Court held that a borrower exercising the right to rescind under the Truth in Lending Act need only provide written notice to the lender within the three-year period contemplated by the statute; the statute does not require the borrower to file suit within that period. The Court reasoned that 15 U.S.C. § 1635(a) "explains in unequivocal terms" that a borrower may exercise the right to rescind "by notifying the creditor, in accordance with the regulations of the [Federal Reserve] Board, of his intention to do so." 15 U.S.C. § 1635(a). This "language leaves no doubt that rescission is effected" by written notice. The Court further concluded that written notice was sufficient to exercise the right to rescind regardless of whether the right to rescind is disputed by the parties. Finally, the Court held that the Truth in Lending Act displaced any common-law requirement that a right to rescind in equity required a court decree.

11. ***Whitfield v. United States*, No. 13-9026 (4th Cir., 695 F.3d 288; cert. granted June 23, 2014; argued on Dec. 2, 2014). Whether 18 U.S.C. § 2113(e), which provides a minimum sentence of ten years in prison and a maximum sentence of life imprisonment for a bank robber who forces another person "to accompany him" during the robbery or while in flight, requires proof of more than *de minimis* movement of the victim.**

    Decided Jan. 13, 2015 (574 U.S. __). Fourth Circuit/Affirmed. Justice Scalia for a unanimous Court. Federal law establishes enhanced penalties for anyone who "forces any person to accompany him" in the course of committing or fleeing from a bank robbery. 18 U.S.C. § 2113(e). Petitioner, fleeing police after a botched bank robbery, entered the home of an elderly woman. Once inside the house, he encountered the woman and led her down a short hallway into the "computer room." There, the woman suffered a fatal heart attack. Petitioner was indicted for, among other things, violating § 2113(e). Petitioner pleaded not guilty, but a jury convicted him. On appeal, petitioner challenged the sufficiency of the evidence, arguing that § 2113(e) requires "substantial" movement and that his movement with the woman did not qualify. The Fourth Circuit disagreed, and the Court affirmed, explaining that the word "accompany" does not "connote movement over a substantial distance." According to the Court, any movement that "would normally be described as from one place to another" can suffice, "even if the movement occurs entirely within a single building or over a short distance."

12. ***Chen v. Mayor and City Council*, No. 13-10400 (4th Cir., 546 F. App'x 187; cert. granted Nov. 7, 2014). Whether, under Federal Rule of Civil Procedure 4(m), a district court has discretion to extend the time for service of process absent a showing of good cause, as the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether the district court lacks such discretion, as the Fourth Circuit has held.**

    Decided Jan. 9, 2015 (574 U.S. __). The writ of certiorari was dismissed for petitioner's failure to file a brief on the merits within 45 days of the order granting the writ of certiorari, as required by Rule 25.1.

13. ***Heien v. North Carolina*, No. 13-604 (N.C., 737 S.E.2d 351; cert. granted Apr. 21, 2014; SG as amicus, supporting respondent; argued on Oct. 6, 2014). Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.**

Decided Dec. 15, 2014 (574 U.S. __). N.C./Affirmed. Chief Justice Roberts for an 8-1 Court (Kagan, J. concurring, joined by Ginsburg, J.; Sotomayor, J., dissenting). The Court held that a police officer's reasonable mistake of law can provide the reasonable suspicion necessary to justify an investigatory traffic stop under the Fourth Amendment. A North Carolina police officer stopped a car for driving with only one working brake light and discovered a bag of cocaine. But the North Carolina Court of Appeals determined that North Carolina law requires only one working brake light and suppressed the evidence. The North Carolina Supreme Court reversed, concluding that the officer's mistake of law was reasonable and thus justified the stop. The U.S. Supreme Court explained that the Fourth Amendment requires "reasonableness," not perfection, and noted that searches or seizures based on mistakes of fact can be reasonable. "Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law." So, the Court concluded, searches or seizures based on mistakes of law can also be reasonable. The Court clarified that a mistake of law must be objectively reasonable, and that assessing whether a mistake of law is reasonable is less a "forgiving" inquiry under the Fourth Amendment than in the context of qualified immunity. The Court had "little difficulty" determining that the officer's incorrect interpretation of the state's brake light law, which the state appellate courts had not previously construed, was reasonable.

14. ***Dart Cherokee Basin v. Owens*, No. 13-719 (10th Cir., 730 F.3d 1234; cert. granted Apr. 7, 2014; argued on Oct. 7, 2014). Whether a defendant seeking removal to federal court under the Class Action Fairness Act is required to include evidence supporting federal jurisdiction in the notice of removal, or whether it is enough to allege the required "short and plain statement of the grounds for removal."**

Decided Dec. 15, 2014 (574 U.S. __). Tenth Circuit/Vacated and remanded. Justice Ginsburg for a 5-4 Court (Scalia, J. dissenting, joined by Kennedy and Kagan, J.J., and joined in part by Thomas, J.; Thomas, J. dissenting). The Court held that a defendant seeking to remove a case under the Class Action Fairness Act of 2005 ("CAFA") need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the defendant need not include evidence supporting the amount in controversy. The Court also held that it had jurisdiction to review for abuse of discretion an appellate court's refusal to review a district court's remand order. The plaintiff brought a putative class action in Kansas state court against the defendant, who removed the case to federal court. The defendant's notice of removal alleged that CAFA's $5 million amount in controversy minimum was satisfied. The district court ordered that the case be remanded back to state court because, in its notice of removal, the defendant had provided "no evidence" proving that the amount in controversy exceeded

\$5 million. Although CAFA permits a court of appeals to review remand orders, the Tenth Circuit denied the defendant's leave-to-appeal application without opinion. Reviewing for abuse of discretion, the Supreme Court concluded that the Tenth Circuit's denial of review was based on an error of law. To remove a case from state to federal court, a defendant's notice of removal must contain merely "a short and plain statement of the grounds for removal," 28 U.S.C. § 1446(a), not proof of the amount in controversy. By stating that it was denying the defendant's application "[u]pon careful consideration of the parties' submissions, as well as the applicable law," the Tenth Circuit signaled that its decision embraced the district court's erroneous requirement that CAFA removal notices contain evidence proving the amount in controversy. By relying on an error of law, the Court concluded, the Tenth Circuit abused its discretion in denying the defendant's application. The Court also explained that it has jurisdiction to review "[c]ases in the courts of appeals," 28 U.S.C. § 1254, and the case was "in" the Tenth Circuit via the defendant's leave-to-appeal application.

15. ***Integrity Staffing Solutions v. Busk*, No. 13-433 (9th Cir., 713 F.3d 525; cert. granted Mar. 3, 2014; SG as amicus, supporting petitioner; argued on Oct. 8, 2014). Whether time spent in security screenings is compensable under the Fair Labor Standards Act ("FLSA"), as amended by the Portal-to-Portal Act.**

Decided Dec. 9, 2014 (574 U.S. ___). Ninth Circuit/Reversed. Justice Thomas for a unanimous Court (Sotomayor, J., concurring, joined by Kagan, J.). The Court held that end-of-shift antitheft security screenings are postliminary activities under the FLSA and thus not compensable. The FLSA creates a minimum wage and requires overtime compensation for hours worked in excess of forty hours in a workweek. However, as noted by the Court, the FLSA fails to define "work" or "workweek." Responding to the Court's prior broad construction of those terms, Congress passed the Portal-to-Portal Act, which exempts from the FLSA "activities which are preliminary to or postliminary" to" the "principal activity or activities" the employee is employed to perform. 29 U.S.C. § 254(a). The Court emphasized that its precedents have interpreted "principal activity or activities" to encompass "all activities which are an 'integral and indispensable part of the principal activities.'" An activity is "integral and indispensable" if it forms "an intrinsic portion or element" of the employee's principal activities. Applying these standards, the Court concluded that the security screenings were not the "principal activity or activities" the warehouse employees were employed to perform; rather, they were employed to retrieve products from shelves and package them for shipment. Nor were the screenings "integral and indispensable" to employees' duties, as the elimination of the screenings would not have impaired their ability to perform those duties. The screenings, the Court concluded, were postliminary to the warehouse employees' principal activities. The Court rejected the Ninth Circuit's reasoning that the screenings were compensable because they were required by and performed for the benefit of the employer. That reasoning defies Congress's intent in passing the Portal-to-Portal Act to narrow the FLSA's application to the productive work the employee was employed to perform.

16. ***Warger v. Shauers*, No. 13-517 (8th Cir., 721 F.3d 606; cert. granted Mar. 3, 2014; SG as amicus, supporting respondent; argued on Oct. 8, 2014). Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during *voir dire* to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.**

Decided Dec. 9, 2014 (574 U.S. ___). Eighth Circuit/Affirmed. Justice Sotomayor for a unanimous Court. Federal Rule of Evidence 606(b) provides that "[d]uring an inquiry into the validity of a verdict," testimony or other evidence "about any statement made or incident that occurred during the jury's deliberations" is prohibited. The Court held that Rule 606(b) applies when a party seeks to establish that a juror was dishonest during *voir dire* by using another juror's affidavit that reveals statements made during deliberations, and that this conclusion was dictated by the plain meaning of Rule 606(b). A motion for a new trial on the ground of juror dishonesty during *voir dire* unavoidably entails "an inquiry into the validity of a verdict," because a dishonest response to a material question posed to a juror during *voir dire* permits the invalidation of the verdict under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). The Court drew additional support from the common law rule on which Rule 606(b) is based. That common law rule—the "federal rule"—barred the introduction of jury deliberations as evidence even when used to establish juror dishonesty during *voir dire*. The Court pointed out that the language of Rule 606(b) reflects Congress's adoption of the federal rule and rejection of the "Iowa rule," which made deliberations admissible to challenge juror conduct during *voir dire*. The Court noted additionally that its leading pre-Rule 606(b) cases—*McDonald v. Pless*, 238 U.S. 264 (1915), and *Clark v. United States*, 289 U.S. 1 (1933)—adopted the federal rule, even though earlier cases expressed some approval for the Iowa rule. The Court also found unpersuasive the petitioner's alternative argument that the juror affidavit in question fit into the Rule 606(b)(2)(A) exception, which permits the introduction of evidence of jury deliberations when offered to prove that "extraneous prejudicial information was improperly brought to the jury's attention." The prejudicial information in question—the offending juror's generally negative view towards negligence liability based on a family member's experience—was "internal" to that juror because it related to "the general body of experiences that jurors are understood to bring with them to the jury room."

17. ***Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640 (2d Cir., 721 F.3d 95; cert. granted Mar. 10, 2014; argument scheduled for Oct. 6, 2014). Whether the filing of a putative class action serves, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to satisfy the three-year time limitation in Section 13 of the Securities Act, 15 U.S.C. § 77m, with respect to the claims of putative class members.**

Decided Sept. 29, 2014 (573 U.S. __). The writ of certiorari was dismissed as improvidently granted.

Cases To Be Decided

1. ***Kansas v. Nebraska and Colorado*, No. 126, Orig. (Original Jurisdiction; noted June 9, 2014; argued on Oct. 14, 2014). The issue was whether Nebraska violated a compact apportioning the waters of the Republican River between Kansas, Nebraska, and Colorado, and, if so, what relief is appropriate to remedy the violation.**

2. ***North Carolina Board of Dental Examiners v. FTC*, No. 13-534 (4th Cir., 717 F.3d 359; cert. granted Mar. 3, 2014; argued on Oct. 14, 2014). Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.**

3. ***Omnicare, Inc. v. Laborers Dist. Council*, No. 13-435 (6th Cir., 719 F.3d 498; cert. granted Mar. 3, 2014; SG as amicus, supporting vacatur and remand; argued on Nov. 3, 2014). Whether, for purposes of a claim under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, a plaintiff may plead that a statement of opinion was untrue merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit concluded, or whether a plaintiff must also allege that the statement was subjectively false—requiring allegations that the speaker's actual opinion was different from the one expressed—as the Second, Third, and Ninth Circuits have held.**

4. ***Zivotofsky v. Kerry*, No. 13-628 (D.C. Cir., 725 F.3d 197; cert. granted Apr. 21, 2014; argued on Nov. 3, 2014). Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."**

5. ***Johnson v. United States*, No. 13-7120 (8th Cir., 526 F. App'x 708; cert. granted Apr. 21, 2014; argued on Nov. 5, 2014; noticed for reargument). The Questions Presented are: (1) Whether mere possession of a short-barreled shotgun should be treated as a violent felony under the Armed Career Criminal Act. (2) Whether the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague."**

6. ***Yates v. United States*, No. 13-7451 (11th Cir., 733 F.3d 1059; cert. granted Apr. 28, 2014; limited to Question 1; argued on Nov. 5, 2014). Whether the destruction of fish falls within the purview of 18 U.S.C. § 1519, the anti-shredding provision of the Sarbanes-Oxley Act of 2002, which makes it a crime for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" with the intent to impede or obstruct an investigation, where the term "tangible object" is ambiguous and undefined in the statute.**

7. ***Comptroller of Treasury of MD v. Wynne*, No. 13-485 (Md., 431 Md. 147; CVSG Jan. 13, 2014; cert. opposed April 4, 2014; cert. granted May 27, 2014; SG as amicus, supporting petitioner; argued on Nov. 12, 2014). Whether the United States Constitution prohibits a state from taxing all the income of its residents—wherever earned—by mandating a credit for taxes paid on income earned in other states.**

8. ***Alabama Legislative Black Caucus v. Alabama*, No. 13-895 (M.D. Ala., 2013 WL 6925681; probable jurisdiction noted June 2, 2014; consolidated with *Alabama Democratic Conference v. Alabama*, No. 13-1138; SG as amicus, supporting neither party; argued on Nov. 12, 2014). Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.**

9. ***Elonis v. United States*, No. 13-983 (3d Cir., 730 F.3d 321; cert. granted June 16, 2014; argued on Dec. 1, 2014). The Questions Presented are: (1) Whether, consistent with the First Amendment and *Virginia v. Black*, 537 U.S. 343 (2003), conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort. (2) Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.**

10. ***Perez v. Mortgage Bankers Association*, No. 13-1041 (D.C. Cir., 720 F.3d 966; cert. granted June 16, 2014; consolidated with *Nickols v. Mortgage Bankers Association*, No. 13-1052; argued on Dec. 1, 2014). Whether a federal agency must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.**

11. ***B&B Hardware, Inc. v. Hargis Industries, Inc.*, No. 13-352 (8th Cir., 716 F.3d 1020; CVSG Jan. 13, 2014; cert. supported May 23, 2014; cert. granted July 1, 2014; SG as amicus, supporting petitioner; argued on Dec. 2, 2014). The Questions Presented are: (1) Whether the Trademark Trial and Appeal Board's finding of a likelihood of confusion precludes respondent from relitigating that issue in infringement litigation, in which likelihood of confusion is an element. (2) Whether, if issue preclusion does not apply, the district court was obliged to defer to the Board's finding of a likelihood of confusion absent strong evidence to rebut it.**

12. ***Young v. United Parcel Service, Inc.*, No. 12-1226 (4th Cir., 707 F.3d 437; CVSG Oct. 7, 2013; cert. opposed May 19, 2014; cert. granted July 1, 2014; SG as amicus, supporting petitioner; argued on Dec. 3, 2014). Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C.**

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§ 2000e(k), requires an employer that provides work accommodations to nonpregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

13. ***Direct Marketing Ass'n v. Brohl*, No. 13-1032 (10th Cir., 735 F.3d 904; cert. granted July 1, 2014; argued on Dec. 8, 2014). Whether the Tax Injunction Act, which provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.**

14. ***Dep't of Transportation v. Ass'n of Am. Railroads*, No. 13-1080 (D.C. Cir., 721 F.3d 666; cert. granted June 23, 2014; argued on Dec. 8, 2014). Whether Section 207 of the Passenger Rail Investment and Improvement Act of 2008, which requires the Federal Railroad Administration ("FRA") and Amtrak to "jointly . . . develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board ("STB") will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by federal law, is an unconstitutional delegation of legislative power to a private entity.**

15. ***AL Dep't of Revenue v. CSX Transp., Inc.*, No. 13-553 (11th Cir., 720 F.3d 863; CVSG Jan. 27, 2014; cert. opposed May 27, 2014; cert. granted July 1, 2014; SG as amicus, supporting neither party; argued on Dec. 9, 2014). The Questions Presented are: (1) Whether a State "discriminates against a rail carrier" in violation of 49 U.S.C. § 11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to railroads' competitors. (2) Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. § 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.**

16. ***United States v. Wong*, No. 13-1074 (9th Cir., 732 F.3d 1030; cert. granted June 30, 2014; argued on Dec. 10, 2014). Whether the six-month time bar for filing suit in federal court under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), is subject to equitable tolling.**

17. ***United States v. June*, No. 13-1075 (9th Cir., 550 F. App'x 505; cert. granted June 30, 2014; argued on Dec. 10, 2014). Whether the two-year time limit for filing an administrative claim with the appropriate federal agency under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), is subject to equitable tolling.**

18. ***Reed v. Town of Gilbert*, No. 13-502 (9th Cir., 587 F.3d 966; cert. granted July 1, 2014; SG as amicus, supporting petitioners; argued on Jan. 12, 2015). Whether the Town of Gilbert's mere assertion that its sign code lacks a**

discriminatory motive renders its facially content-based sign code content-neutral and justifies the code's differential treatment of petitioners' religious signs.

19. ***Oneok, Inc. v. Learjet, Inc.*, No. 13-271 (9th Cir., 715 F.3d 716; CVSG Dec. 2, 2013; cert. opposed May 27, 2014; cert. granted July 1, 2014; SG as amicus, supporting petitioners; argued on Jan. 12, 2015). Whether the Natural Gas Act preempts state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions.**

20. ***Mach Mining, LLC v. EEOC*, No. 13-1019 (7th Cir., 738 F.3d 171; cert. granted June 30, 2014; argued on Jan. 13, 2015). Whether and to what extent a court may enforce the Equal Employment Opportunity Commission's mandatory duty to conciliate discrimination claims before filing suit.**

21. ***Kellogg Brown & Root v. United States, ex rel. Carter*, No. 12-1497 (4th Cir., 710 F.3d 171; CVSG Oct. 7, 2013; cert. opposed May 27, 2014; cert. granted July 1, 2014; SG as amicus, supporting respondent; argued on Jan. 13, 2015). The Questions Presented are: (1) Whether the Wartime Suspension of Limitations Act—a criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the Government "[w]hen the United States is at war," 18 U.S.C. § 3287, and which this Court has instructed must be "narrowly construed" in favor of repose—applies to claims of civil fraud brought by private relators, and is triggered without a formal declaration of war, in a manner that leads to indefinite tolling. (2) Whether, contrary to the conclusion of numerous courts, the False Claims Act's so-called "first-to-file" bar, 31 U.S.C. § 3730(b)(5)—which creates a race to the courthouse to reward relators who promptly disclose fraud against the Government, while prohibiting repetitive, parasitic claims—functions as a "one-case-at-a-time" rule allowing an infinite series of duplicative claims so long as no prior claim is pending at the time of filing.**

22. ***Mellouli v. Holder*, No. 13-1034 (8th Cir., 719 F.3d 995; cert. granted June 30, 2014; argued on Jan. 14, 2015). Whether, to trigger deportability under 8 U.S.C. § 1227(a)(2)(B)(i), which provides that a noncitizen may be removed if he or she has been convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21) . . . ," the Government must prove the connection between a drug paraphernalia conviction and a substance listed in Section 802 of the Controlled Substances Act.**

23. ***Wellness Int'l Network, Ltd. v. Sharif*, No. 13-935 (7th Cir., 727 F.3d 751; cert. granted July 1, 2014; limited to Questions 1 and 3; SG as amicus, supporting petitioners; argued on Jan. 14, 2015). The Questions Presented are: (1) Whether the presence of a subsidiary state property law issue in an 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and**

therefore that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action. (2) Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

24. ***Armstrong v. Exceptional Child Center, Inc.*, No. 14-15 (9th Cir., 567 F. App'x 496; cert. granted Oct. 2, 2014; SG as amicus, supporting petitioners; argued on Jan. 20, 2015). Whether the Supremacy Clause gives Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against a state where Congress chose not to create enforceable rights under that statute.**

25. ***Williams-Yulee v. The Florida Bar*, No. 13-1499 (Fla., 138 So. 3d 379; cert. granted Oct. 2, 2014; SG as amicus, supporting respondent; argued on Jan. 20, 2015). Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.**

26. ***Texas Dep't Hous. & Com. Affairs v. Inclusive Communities Project*, No. 13-1371 (5th Cir., 747 F.3d 275; cert. granted Oct. 2, 2014; SG as amicus, supporting respondent; argued on Jan. 21, 2015). Whether disparate impact claims are cognizable under the Fair Housing Act.**

27. ***Rodriguez v. United States*, No. 13-9972 (8th Cir., 741 F.3d 905; cert. granted Oct. 2, 2014; argued on Jan. 21, 2015). Whether an officer may extend an already completed traffic stop for a canine sniff without reasonable suspicion or other lawful justification.**

28. ***Kerry v. Din*, No. 13-1402 (9th Cir., 718 F.3d 856; cert. granted Oct. 2, 2014; argument scheduled for Feb. 23, 2015). The Questions Presented are: (1) Whether a consular officer's refusal of a visa to a U.S. citizen's alien spouse impinges upon a constitutionally protected interest of the citizen. (2) Whether respondent is entitled to challenge in court the refusal of a visa to her husband and to require the Government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.**

29. ***Coleman v. Tollefson*, No. 13-1333 (6th Cir., 733 F.3d 175; cert. granted Oct. 2, 2014; SG as amicus, supporting respondents; argument scheduled for Feb. 23, 2015). Whether, under the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. § 1915(g), a district court's dismissal of a lawsuit counts as a "strike," while it is still pending on appeal or before the time for seeking appellate review has passed.**

30. ***Henderson v. United States*, No. 13-1487 (11th Cir., 555 F. App'x 851; cert. granted Oct. 20, 2014; argument scheduled for Feb. 24, 2015). Whether a felony conviction, which makes it unlawful for the defendant to possess a firearm, prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the**

Government (1) transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests; or (2) sell the firearms for the benefit of the defendant.

31. ***Tibble v. Edison Int'l*, No. 13-550 (9th Cir., 729 F.3d 1110; cert. granted Oct. 2, 2014; SG as amicus, supporting petitioners; argument scheduled for Feb. 24, 2015). Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U.S.C. § 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.**

32. ***EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 14-86 (10th Cir., 731 F.3d 1106; cert. granted Oct. 2, 2014; argument scheduled for Feb. 25, 2015). Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.**

33. ***Baker Botts, LLP v. Asarco, LLC*, No. 14-103 (5th Cir., 751 F.3d 291; cert. granted Oct. 2, 2014; SG as amicus, supporting reversal; argument scheduled for Feb. 25, 2015). Whether Section 330(a) of the Bankruptcy Code grants bankruptcy judges discretion to award compensation for the defense of a fee application.**

34. ***Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, No. 13-1314 (D. Ariz., 997 F. Supp. 2d 1047; SG as amicus, supporting appellees; argument scheduled for Mar. 2, 2015). The Questions Presented are: (1) Whether the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts. (2) Whether the Arizona Legislature has standing to bring this suit.**

35. ***Ohio v. Clark*, No. 13-1352 (Ohio, 999 N.E.2d 592; cert. granted Oct. 2, 2014; SG as amicus, supporting petitioner; argument scheduled for Mar. 2, 2015). The Questions Presented are: (1) Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause. (2) Whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause.**

36. ***City of Los Angeles v. Patel*, No. 13-1175 (9th Cir., 738 F.3d 1058; cert. granted Oct. 20, 2014; SG as amicus, supporting petitioner; argument scheduled for Mar. 3, 2015). The Questions Presented are: (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment. (2) Whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied**

information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.

37. ***Chappell v. Ayala*, No. 13-1428 (9th Cir., 756 F.3d 656; cert. granted Oct. 20, 2014; argument scheduled for Mar. 3, 2015). The Questions Presented are: (1) Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is an "adjudicate[ion] on the merits" within the meaning of 28 U.S.C. § 2254(d). (2) Whether the court of appeals properly applied the standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993).**

38. ***King v. Burwell*, No. 14-114 (4th Cir., 759 F.3d 358; cert. granted Nov. 7, 2014; argument scheduled for Mar. 4, 2015). Whether the Internal Revenue Service may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through exchanges established by the federal government under Section 132 of the Patient Protection and Affordable Care Act.**

39. ***Walker v. Sons of Confederate Vets*, No. 14-144 (5th Cir., 759 F.3d 388; cert. granted Dec. 5, 2014; argument scheduled for Mar. 23, 2015). The Questions Presented are: (1) Whether the messages and images that appear on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality. (2) Whether Texas engaged in "viewpoint discrimination" by rejecting the license-plate design proposed by the Sons of Confederate Veterans, when Texas has not issued any license plate that portrays the confederacy or the confederate battle flag in a negative or critical light.**

40. ***City and Cnty. of San Francisco v. Sheehan*, No. 13-1412 (9th Cir., 743 F.3d 1211; cert. granted Nov. 25, 2014; SG as amicus, supporting vacatur in part and reversal in part; argument scheduled for Mar. 23, 2015). The Questions Presented are: (1) Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody. (2) Whether it was clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.**

41. ***Bank of America, N.A. v. Caulkett*, No. 13-1421 (11th Cir., 566 F. App'x 879; cert. granted November 17, 2014; consolidated with *Bank of America, N.A. v. Toledo-Cardona*, No. 14-163; argument scheduled for Mar. 24, 2015). Whether, under Section 506(d) of the Bankruptcy Code, which provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void," a Chapter 7 debtor may "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral.**

42. ***Michigan v. EPA*, No. 14-46 (D.C. Cir., 748 F.3d 1222; cert. granted Nov. 25, 2014; consolidated with *Utility Air Regulatory Corp. v. EPA*, No. 14-47; *National Mining Ass'n v. EPA*, No. 14-49; argument scheduled for Mar. 25, 2015). Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.**

43. ***Brumfield v. Cain*, No. 13-1433 (5th Cir., 744 F.3d 918; cert. granted Dec. 5, 2014; argument scheduled for Mar. 30, 2015). The Questions Presented are: (1) Whether a state court that considers the evidence presented at a petitioner's penalty phase proceeding as determinative of the petitioner's claim of mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), has based its decision on an unreasonable determination of facts under 28 U.S.C. § 2254(d)(2). (2) Whether a state court that denies funding to an indigent petitioner who has no other means of obtaining evidence of his mental retardation has denied petitioner his "opportunity to be heard," contrary to *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986), and his constitutional right to be provided with the "basic tools" for an adequate defense, contrary to *Ake v. Oklahoma*, 470 U.S. 68 (1985).**

44. ***Commil USA v. Cisco Systems, Inc.*, No. 13-896 (Fed. Cir., 720 F.3d 1361; CVSG May 27, 2014; cert. supported Oct. 16, 2014; cert. granted Dec. 5, 2014; SG as amicus, supporting petitioner; argument scheduled for Mar. 31, 2015) (linked with *Cisco Systems, Inc. v. Commil USA*, No. 13-1044). The Questions Presented are: (1) Whether a defendant's belief that a patent is invalid is a defense to induced infringement under 25 U.S.C. § 271(b). (2) Whether *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), required retrial on the issue of intent under 35 U.S.C. § 271(b) where the jury (a) found the defendant had actual knowledge of the patent and (b) was instructed that "[i]nducing third-party infringement cannot occur unintentionally."**

45. ***Kimble v. Marvel Enterprises, Inc.*, No. 13-720 (9th Cir., 727 F.3d 856; CVSG June 2, 2014; cert. opposed Oct. 30, 2014; cert. granted Dec. 12, 2014; argument scheduled for Mar. 31, 2015). Whether the Court should overrule *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), which held that "a patentee's use of a royalty agreement that projects beyond the expiration date of the patent is unlawful per se."**

46. ***Harris v. Viegelahn*, No. 14-400 (5th Cir., 757 F.3d 468; cert. granted Dec. 12, 2014; argument scheduled for Apr. 1, 2014). Whether, when a debtor in good faith converts a bankruptcy case to Chapter 7 after confirmation of a Chapter 13 plan, undistributed funds held by the Chapter 13 trustee are refunded to the debtor (as the Third Circuit has held), or distributed to creditors (as the Fifth Circuit held).**

47. ***Bullard v. Hyde Park Savings Bank*, No. 14-116 (1st Cir., 752 F.3d 483; cert. granted Dec. 12, 2014; SG as amicus, supporting petitioner; argument scheduled for Apr. 1, 2015). Whether an order denying confirmation of a bankruptcy plan is appealable.**

48. ***Mata v. Holder*, No. 14-185 (5th Cir., 558 F. App'x 366; cert. granted Jan. 16, 2015). Whether a circuit court has jurisdiction to review a petitioner's request that the Board of Immigration Appeals equitably toll the ninety-day deadline on his motion to reopen as a result of ineffective counsel under 8 C.F.R. § 1003.2(c)(2).**

49. ***Horne v. Dep't of Agriculture*, No. 14-275 (9th Cir., 750 F.3d 1128; cert. granted Jan. 16, 2015). The Questions Presented are: (1) Whether the Government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), applies only to real property and not to personal property. (2) Whether the Government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the Government's discretion. (3) Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a *per se* taking.**

50. ***McFadden v. United States*, No. 14-378 (4th Cir., 753 F.3d 432; cert. granted Jan. 16, 2015). Whether, to convict a defendant of distribution of a controlled substance analogue—a substance with a chemical structure that is "substantially similar" to a schedule I or II drug and has a "substantially similar" effect on the user (or is believed or represented by the defendant to have such a similar effect)—the government must prove that the defendant knew that the substance constituted a controlled substance analogue, as held by the Second, Seventh, and Eighth Circuits, but rejected by the Fourth and Fifth Circuits.**

51. ***Obergefell v. Hodges*, No. 14-556 (6th Cir., 772 F.3d 388; cert. granted Jan. 16, 2015; consolidated with *Tanco v. Haslam*, No. 14-562; *DeBoer v. Snyder*, No. 14-571; *Bourke v. Beshear*, No. 14-574). The Questions Presented are: (1) Whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex. (2) Whether the Fourteenth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.**

52. ***Kingsley v. Hendrickson*, No. 14-6368 (7th Cir., 744 F.3d 443; cert. granted Jan. 16, 2015). Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively reasonable.**

53. ***OBB Personenverkehr AG v. Sachs*, No. 13-1067 (9th Cir., 737 F.3d 584 (en banc); CVSG May 19, 2014; cert. opposed Dec. 15, 2014; cert. granted Jan. 23, 2015). The Questions Presented are: (1) Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the Foreign Sovereign**

Immunities Act, 28 U.S.C. § 1605(a)(2), the express definition of "agency" in the FSIA; the factors set forth in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); or common law principles of agency control. (2) Whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for travel entirely outside of the United States.

54. ***Glossip v. Gross*, No. 14-7955 (10th Cir., 2015 WL 137627; cert. granted Jan. 23, 2015). The Questions Presented are: (1) Whether it is constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain-relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious. (2) Whether the plurality stay standard of *Baze v. Rees*, 553 U.S. 35 (2008), applies when states are not using a protocol substantially similar to the one that this Court considered in *Baze*. (3) Whether a prisoner must establish the availability of an alternative drug formula even if the state's lethal-injection protocol, as properly administered, will violate the Eighth Amendment.**

Cases Determined Without Argument

1. ***Lopez v. Smith*, No. 13-946 (9th Cir., 731 F.3d 859; Reversed and remanded Oct. 6, 2014).** Per Curiam. The Ninth Circuit had affirmed the grant of a habeas petition in which a petitioner who was charged and convicted of first-degree murder alleged that he was denied his Sixth Amendment and due process rights to notice of the charges against him. At the time of charging, the State of California did not specify whether it was proceeding under a theory of principal liability or aiding-and-abetting, but at the close of evidence, the prosecution requested and received an aiding-and-abetting jury instruction. The jury subsequently convicted the petitioner of first-degree murder without specifying which theory of guilt it adopted. The Ninth Circuit held that the petitioner's Sixth Amendment and due process right to notice had been violated because the prosecution (until it requested the aiding-and-abetting jury instruction) had tried the case only on the theory of principal liability. In so holding, the Ninth Circuit relied on its own precedent to conclude that the constitutional principle at issue was "clearly established" for purposes of satisfying the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The Court reversed the Ninth Circuit on the ground that it has "emphasized, time and again, that [AEDPA] prohibits the federal courts of appeals from relying on their own precedent in concluding that a particular constitutional principle is 'clearly established.'" The Ninth Circuit had cited three "older" Supreme Court cases, but these cases stood "for nothing more than the general proposition that a defendant must have adequate notice of the charges against him." This proposition, the Court held, was "far too abstract" to

establish clearly the constitutional principle the petitioner needed to satisfy AEDPA, and so the Court reversed and remanded.

2. ***Johnson v. City of Shelby*, No. 13-1318 (5th Cir., 743 F.3d 59; Reversed and remanded Nov. 10, 2014).** Per Curiam. The Court held that a plaintiff seeking damages for a violation of his constitutional rights need not expressly invoke 42 U.S.C. § 1983 in his complaint in order to state a claim. Summarily reversing the Fifth Circuit's contrary judgment, the Court explained that the Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." Nor do the Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), impose such a requirement, as those cases address the adequacy of a complaint's factual allegations, not its articulation of the legal theory underlying the claim.

3. ***Carroll v. Carman*, No. 14-212 (3d Cir., 749 F.3d 192; Reversed and remanded Nov. 10, 2014).** Per Curiam. The Court held that the petitioner—a law enforcement officer who conducted a "knock and talk" at a home by way of a publicly available entrance that was not the home's front door—was entitled to qualified immunity from the homeowners' claim that he violated their Fourth Amendment rights by entering their property without a warrant. The Third Circuit had held that it was clearly established that the "knock and talk" exception to the Fourth Amendment required an officer to begin the encounter at a residence's front door. Reversing the Third Circuit's judgment, the Court declined to decide "whether a police officer may conduct a 'knock and talk' at any entrance that is open to visitors rather than only the front door." But the Court reasoned that, even assuming that controlling circuit precedent could constitute clearly established federal law in this case, no decision from the Third Circuit answered the question with sufficient certainty to deprive the petitioner of qualified immunity. The Court also noted that other federal and state courts have rejected the rule the Third Circuit had held to be clearly established federal law.

4. ***Glebe v. Frost*, No. 14-95 (9th Cir., 757 F.3d 910; Reversed and remanded Nov. 17, 2014).** Per Curiam. The Court held that the Ninth Circuit failed to comply with 28 U.S.C. § 2254(d)(1)'s requirement that a writ of habeas corpus be granted only if a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The state court in which Frost was convicted prevented Frost's lawyer from contending in his closing argument both that the prosecution had failed to meet its burden of proof and that Frost had acted under duress. The Ninth Circuit, citing *Herring v. New York*, 422 U.S. 853 (1975), held that the state supreme court unreasonably applied clearly established federal law by failing to classify the restriction as a structural error. The Court reversed, reasoning that "even assuming that *Herring* established that *complete denial* of summation amounts to structural error, it did not clearly establish that the *restriction* of summation also amounts to structural error." The Court also rejected the Ninth Circuit's reliance on two of its own cases "to bridge the gap between *Herring* and this case." Finally, the Court rejected the Ninth Circuit's conclusion that the trial court's restriction amounted to several other clearly

established structural errors, as "[r]easonable minds could disagree whether requiring the defense to choose between alternative theories amounts to requiring the defense to concede guilt," or "to eliminating the prosecution's burden of proof, shifting the burden to the defendant, or directing a verdict."

5. ***Christeson v. Roper*, No. 14-6873 (8th Cir., No. 14-3389; Reversed and remanded Jan. 20, 2015).** Per Curiam (Alito, J., dissenting, joined by Thomas, J.). The Court held that an indigent death-row inmate seeking federal habeas review was entitled to substitution of appointed counsel in the "interests of justice" due to his attorneys' conflict of interest. Indigent defendants are entitled "to the appointment of counsel in capital cases, including habeas corpus proceedings." In *Martel v. Clair*, 132 S. Ct. 1276 (2012), the Supreme Court held that a court may replace appointed counsel upon a petitioner's motion "when it is in the interests of justice." The Court "further explained that the factors a court of appeals should consider in determining whether a district court abused its discretion in denying such a motion include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's responsibility, if any, for that conflict)." The petitioner, who was sentenced to death after his conviction of three counts of capital murder in Missouri state court, sought to overcome the strict one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(1), for filing his federal habeas petition. With the assistance of outside counsel, the petitioner filed a motion for substitution of counsel because his appointed counsel—who had failed to timely file his habeas petition—could not be expected to file a motion for equitable tolling of AEDPA's statute of limitations based on their own alleged misconduct. The district court denied the motion, and the court of appeals summarily affirmed. The Supreme Court reversed, finding that the district court did not adequately account for all of the factors set forth in *Martel*. "The [district] court's principal error was its failure to acknowledge [the appointed lawyers'] conflict of interest." Because "[t]olling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for serious instances of attorney misconduct," appointed counsel could not "reasonably be expected to make such an argument, which threatens their professional reputation and livelihood." Although the Court acknowledged that the petitioner "faces a host of procedural obstacles to having a federal court consider his habeas petition," it nevertheless determined that the petitioner should have the opportunity "to show that he [is] entitled to the equitable tolling of AEDPA's statute of limitations" and that he "is entitled to the assistance of substitute counsel in doing so."

Pending Cases Calling For The Views Of The Solicitor General

1. ***Coventry Health Care of Missouri, Inc. v. Nevils*, No. 13-1305 (Mo., 418 S.W.3d 451; CVSG Oct. 6, 2014). Whether the Federal Employees Health Benefits Act ("FEHBA"), which governs the Government's provision of**

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health benefits to millions of federal employees and their dependents, preempts state laws precluding carriers that administer FEHBA plans from seeking subrogation as required by their contracts with the Office of Personnel Management.

2. ***Aetna Life Ins. Co. v. Kobold*, No. 13-1467 (Ariz. Ct. App., 309 P.3d 924; CVSG Oct. 6, 2014). Whether the Federal Employees Health Benefits Act ("FEHBA"), which expressly "preempt[s] any State or local law" that would prevent enforcement of "[t]he terms of any contract" under FEHBA that "relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)," preempts state laws precluding carriers that administer FEHBA plans from seeking reimbursement or subrogation pursuant to the terms of FEHBA contracts.**

3. ***Ridley School District v. M.R.*, No. 13-1547 (3d Cir., 744 F.3d 112; CVSG Oct. 6, 2014). Whether operation of a "stay-put" provision in 20 U.S.C. § 1415(j)—which requires that a child whose educational program under the Individuals with Disabilities Education Act is under dispute to remain in his or her then-current placement while statutory "proceedings" to resolve the dispute are pending—terminates upon entry of a final judgment by a state or federal trial court in favor of the school district, as the D.C. and Sixth Circuits have held, or whether it continues until completion of any subsequent appeal of that judgment, as the Third and Ninth Circuits have held.**

4. ***Spokeo, Inc. v. Robins*, No. 13-1339 (9th Cir., 742 F.3d 409; CVSG Oct. 6, 2014). Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.**

5. ***Athena Cosmetics, Inc. v. Allergan, Inc.*, No. 13-1379 (Fed. Cir., 738 F.3d 1350; CVSG Oct. 6, 2014). Whether, under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Federal Food, Drug, and Cosmetic Act impliedly preempts a private state-law claim for unfair competition premised on a party's purported failure to obtain FDA approval, where the FDA itself has not imposed any such requirement.**

6. ***Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (5th Cir., 746 F.3d 167; CVSG Oct. 6, 2014). Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.**

7. ***Mississippi v. Tennessee*, No. 22O143 (Original Jurisdiction; CVSG Oct. 20, 2014). The Questions Presented are: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents' use of a pumping operation to take approximately 252 billion gallons of high quality groundwater. (2) Whether Mississippi has sole sovereign authority over and control of groundwater naturally storied within its borders,**

including in sandstone within Mississippi's border. (3) Whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.

8. ***Gobeille v. Liberty Mut. Ins.*, No. 14-181 (2d Cir., 746 F.3d 497; CVSG Dec. 15, 2014). Whether ERISA preempts Vermont's health care database law, as applied to the third-party administrator of a self-funded ERISA plan.**

9. ***Google, Inc. v. Oracle America, Inc.*, No. 14-410 (Fed. Cir., 750 F.3d 1339; CVSG Dec. 15, 2014). Whether copyright protection extends to all elements of an original work of computer software, including a system or method of operation, that an author could have written in more than one way.**

10. ***Corr v. Metropolitan Washington Airports*, No. 13-1559 (4th Cir., 740 F.3d 295; CVSG Jan. 12, 2015). The Questions Presented are: (1) Whether the Metropolitan Washington Airports Authority ("MWAA") exercises sufficient federal power to mandate separation-of-powers scrutiny for purposes of a suit seeking injunctive relief and invoking the Little Tucker Act to seek monetary relief. (2) Whether the Metropolitan Washington Airports Act of 1986, 49 U.S.C. §§ 49101 *et seq*., which transferred to MWAA all of the Government's "rights, liabilities, and obligations" concerning, *inter alia*, Dulles Airport and its "access highways and other related facilities," violates the separation of powers, including the Executive Vesting, Appointments, and Take Care Clauses of Article II, by depriving the president of control over MWAA, an entity exercising executive branch functions pursuant to federal law.**

11. ***Google, Inc. v. Vederi, LLC*, No. 14-448 (Fed. Cir., 744 F.3d 1376; CVSG Jan. 12, 2015). Whether, when an applicant for a patent amends a claim to overcome the Patent and Trademark Office's earlier disallowance of the claim, a court should (i) presume that the amendment narrowed the claim and strictly construe the amended claim language against the applicant, or (ii) presume that the claim scope remained the same and require that any narrowing be clear and unmistakable.**

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Moores v. Hildes*, No. 13-791 (9th Cir., 734 F.3d 854; CVSG Mar. 24, 2014; cert. supported Aug. 27, 2014; cert. denied Oct. 6, 2014). Whether a plaintiff may state a claim under Section 11 of the Securities Act, which provides for strict liability "on account of" defective registration statements, where he made an irrevocable investment decision to acquire his securities before a registration statement covering the issuance of those securities existed.**

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Florida v. Georgia*, No. 22O142 (Original Jurisdiction; CVSG Mar. 3, 2014; leave to file a bill of complaint opposed Sept. 18, 2014; leave to file a bill of complaint granted Nov. 3, 2014). Whether Florida is entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region.**

2. ***Federal Nat'l Mortgage Ass'n v. Sundquist*, No. 13-852 (Utah, 311 P.3d 1004; CVSG May 5, 2014; cert. opposed Oct. 7, 2014; cert. denied Nov. 10, 2014). Whether a state can restrict a national bank's exercise of its fiduciary powers in connection with real property in that state if the bank is authorized to act as a fiduciary by the Comptroller of the Currency and not prohibited from doing so by the (different) state in which the bank is "located" under 12 U.S.C. § 92a and 12 C.F.R. § 9.7.**

3. ***Cisco Systems, Inc. v. Commil USA*, No. 13-1044 (Fed. Cir., 720 F.3d 1361; CVSG May 27, 2014; cert. opposed Oct. 16, 2014; cert. denied Dec. 1, 2014) (linked with *Commil USA v. Cisco Systems, Inc.*, No. 13-896). Whether, and in what circumstances, the Seventh Amendment permits a court to order a partial retrial of induced patent infringement without also retrying the related question of patent invalidity.**

4. ***Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817 (3d Cir., 724 F.3d 458; CVSG June 16, 2014; cert. opposed Dec. 16, 2014; cert. denied Jan. 20, 2015) (linked with *KBR, Inc. v. Metzgar*, No. 13-1241). The Questions Presented are: (1) Whether the political question doctrine bars state-law tort claims against a battlefield support contractor operating in an active war zone when adjudication of those claims would necessarily require examining sensitive military judgments. (2) Whether the Federal Tort Claims Act's "combatant-activities exception," 28 U.S.C. § 2680(j), preempts state-law tort claims against a battlefield support contractor that arise out of the U.S. military's combatant activities in a theater of combat.**

5. ***KBR, Inc. v. Metzgar*, No. 13-1241 (4th Cir., 744 F.3d 326; CVSG June 16, 2014; cert. opposed Dec. 16, 2014; cert. denied Jan. 20, 2015) (linked with *Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817). The Questions Presented are: (1) Whether the political question doctrine bars state-law tort claims against a battlefield support contractor operating in an active war zone when adjudication of those claims would necessarily require examining sensitive military judgments. (2) Whether the Federal Tort Claims Act's "combatant-activities exception," 28 U.S.C. § 2680(j), preempts state-law tort claims against a battlefield support contractor that arise out of the U.S. military's combatant activities in a theater of combat. (3) Whether the doctrine of derivative sovereign immunity bars state-law tort claims against a**

private contractor performing delegated public functions where the Government would be immune from suit if it performed the same functions.

6. ***Teva Pharmaceuticals v. Superior Court of Cal.*, No. 13-956 (Cal. Ct. App., 217 Cal. App. 4th 96; CVSG June 30, 2014; cert. opposed Dec. 16, 2014; cert. denied Jan. 20, 2015). Whether the federal Food, Drug, and Cosmetic Act ("FDCA") preempts state tort claims predicated on allegations that a generic drug manufacturer violated the FDCA by failing to immediately implement or otherwise disseminate notice of labeling changes that the United States Food and Drug Administration had approved for use on a generic drug product's brand-name equivalent.**

7. ***Samantar v. Yousef*, No. 13-1361 (4th Cir., 699 F.3d 763; CVSG Oct. 14, 2014; cert. opposed Jan. 30, 2015). Whether a foreign official's common-law immunity for acts performed on behalf of a foreign state is abrogated by plaintiffs' allegations that those official acts violate *jus cogens* norms of international law.**

Supreme Court Statistics:

Gibson Dunn has a strong and high-profile presence before the Supreme Court of the United States, appearing numerous times in the past decade in a variety of cases. During the Supreme Court's three most recent Terms, seven different Gibson Dunn partners have presented oral argument in 13 cases, including closely watched cases with far-reaching significance in the class action, intellectual property, separation of powers, and First Amendment fields. Moreover, while the grant rate for certiorari petitions is below 1%, Gibson Dunn's certiorari petitions have captured the Court's attention: Gibson Dunn has persuaded the Court to grant 16 certiorari petitions since 2006.

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