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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.

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1. ***Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (10th Cir., 723 F.3d 1114; cert. granted Nov. 26, 2013; consolidated with *Conestoga Wood Specialties v. Sebelius*, No. 13-356; argued on Mar. 25, 2014). Whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, which provides that the Government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest, allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.**

   Decided June 30, 2014 (573 U.S. __). Tenth Circuit/Affirmed; Third Circuit/Reversed and remanded. Justice Alito for a 5-4 Court (Kennedy, J., concurring; Ginsburg, J., dissenting, joined by Sotomayor, J., and by Breyer and Kagan, J.J., as to all but Part III-C-1; Breyer and Kagan, J.J., dissenting). The Court held that regulations enforcing the Patient Protection and Affordable Care Act of 2010 ("ACA") that have the effect of forcing closely held corporations to provide health-insurance coverage for methods of contraception that violate the company owners' sincerely held religious beliefs contravene the Religious Freedom Restoration Act of 1993 ("RFRA"). Subject to certain exceptions, the ACA requires employers' group health-insurance coverage to provide "preventive care and screenings" for women without "any cost sharing." This mandate has been defined through regulation to include all FDA-approved methods of contraception—including four methods that may have the effect of preventing pregnancy after an egg has been fertilized. In two cases consolidated in the Court, closely held corporations and their owners challenged this mandate under RFRA and the First Amendment. In each case, the owners believe that human life begins at conception and that it would violate their religious beliefs to provide health-

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insurance coverage that encompasses the four challenged methods of contraception. Yet because the corporations operate for-profit, they did not fall within any of the recognized exemptions to the contraception mandate, such as those applying to religious employers and certain religious nonprofits. Finding no need to address the constitutional issues raised in the case, the Court held that the contraception mandate, as applied to closely held corporations, violates RFRA. RFRA was enacted "to provide very broad protection for religious liberty" and prevents the federal government from substantially burdening "a person's" exercise of religion unless the Government can show that it has adopted the least restrictive means to further a compelling governmental interest. The Court concluded, first, that closely held corporations are "persons" under RFRA. Artificial entities are included in the general statutory definition of "person," and the entities' corporate form and for-profit nature do not preclude them from furthering religious objectives. For-profit corporations support a wide variety of charitable causes, and it is not uncommon for such corporations to further humanitarian or other altruistic endeavors. There is no reason why a for-profit corporation cannot pursue religious objectives as well. The Court next determined that the contraception mandate imposed a substantial burden on the exercise of religion because "the economic consequences will be severe" if the corporate owners act on their sincerely held religious beliefs. Finally, the Court found it unnecessary to determine whether the contraception mandate advanced a compelling governmental purpose because it did not employ the least restrictive means to attain such a goal. The Department of Health and Human Services already allows exceptions to the mandate for nonprofit organizations claiming religious objections; because the Department could extend the exemption to similarly situated for-profit corporations, the Department "has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs."

2. ***Harris v. Quinn*, No. 11-681 (7th Cir., 656 F.3d 692; CVSG June 28, 2012; cert. opposed May 10, 2013; cert. granted Oct. 1, 2013; SG as amicus, supporting respondents; argued on Jan. 21, 2014). 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.**

Decided June 30, 2014 (573 U.S. __). Seventh Circuit/Reversed in part, affirmed in part, and remanded. Justice Alito for a 5-4 Court (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, J.J.). The Court held that the First Amendment bars a State from compelling personal care providers—who provide home healthcare services at the expense of state-run Medicaid, but who function as employees of the individual receiving the care—to subsidize speech by a union that they do not wish to join or support. Previously, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that state employees who choose

not to join a public union may be compelled to pay an agency fee to support union work related to collective bargaining, although they may not be compelled to fund the union's political or ideological advocacy. The Court declined to overrule *Abood*, but nevertheless stated that *Abood* was "questionable on several grounds." The Court criticized *Abood*'s reliance on cases involving private-sector unions, explaining that public-sector unions raise greater First Amendment concerns because the core issues that they address (e.g., wages, pensions, and benefits) are inherently political. Precisely because of the political valence of such issues, the Court noted that the distinction between ideological and non-ideological expenditures adopted by *Abood* has raised significant conceptual and practical difficulties. *Abood* also did not anticipate practical problems that would face objecting non-members, who bear a heavy burden if they wish to challenge a union's actions. Given those concerns, the Court declined to extend *Abood* to personal care providers who serve as public employees only for the purpose of collective bargaining, and who in other respects are treated by the State as private-sector employees. The Court noted that the government has a greater interest in regulating "full" public employees. The Court also explained that *Abood*'s rationale of preventing free riding was less applicable to personal care providers, given limits on their union's role. Finally, having declined to extend *Abood* to individuals other than full public employees, the Court applied "generally applicable First Amendment standards" to invalidate the requirement that personal care providers pay union fees. The provision was not justified by the State's interest in promoting "labor peace" because non-members did not seek to form a rival union and did not challenge the union's status as their exclusive representative in bargaining with the State. Moreover, because many members would willingly pay union dues even absent compulsion, there was no evidence that the provision was necessary to the union's success in achieving greater benefits for personal assistants.

3. ***McCullen v. Coakley*, No. 12-1168 (1st Cir., 708 F.3d 1; cert. granted June 24, 2013; SG as amicus, supporting respondents; argued on Jan. 15, 2014). The Questions Presented are: (1) Whether the First Circuit erred in upholding Massachusetts's selective exclusion law—which makes it a crime for speakers other than clinic "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within thirty-five feet of an entrance, exit, or driveway of "a reproductive health care facility"—under the First and Fourteenth Amendments, on its face and as applied to petitioners. (2) Whether, if *Hill v. Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, *Hill* should be limited or overruled.**

   Decided June 26, 2014 (573 U.S. __). First Circuit/Reversed and remanded. Chief Justice Roberts for a unanimous Court (Scalia, J., concurring in the judgment, joined by Kennedy and Thomas, J.J.; Alito, J., concurring in the judgment). The Massachusetts Reproductive Health Care Facilities Act ("the Act") criminalizes "knowingly enter[ing] or remain[ing] on a public way or sidewalk" within thirty-five feet of a reproductive health care facility, but includes exceptions for "persons entering or leaving" the facility, for law enforcement and others acting within the scope of their employment, and for persons "using the

sidewalk or street" to reach a destination "other than the facility." The petitioners challenged the law because it prevented them from engaging in "sidewalk counseling," or offering information about alternatives to abortion to women entering the clinics. The Court agreed that the Act violates the First Amendment. The Court found that the Act by its terms regulates access to public fora ("public way[s]" and "sidewalk[s]") that receive special First Amendment protection. Precisely because sidewalks and public ways are places where individuals often encounter speech they might otherwise avoid, a government's ability to restrict speech in those fora has historically been limited. Although the Act was neither content nor viewpoint based, it nevertheless had to be "narrowly tailored to serve a substantial governmental interest." The Act failed that test. The Court recognized Massachusetts's interest in protecting public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways, but the Court found that the Act burdened "substantially more speech than is necessary to further the government's legitimate interests." The Court noted that the Act deprived the petitioners of their two primary methods of communicating with patients—handing out literature and engaging in close, personal conversations—and therefore imposed an especially significant First Amendment burden. The Court also noted that Massachusetts has at its disposal other, less intrusive methods of protecting its interests. For example, Massachusetts could rely on some combination of prohibitions on harassment and intimidation; anti-loitering statutes; criminal assault statutes; or laws making it a crime to congregate in the vicinity of a clinic and then failing to disperse when ordered by police. While Massachusetts argued that it had tried other approaches and that they had not worked, that contention was unsupported by the record, which did not reveal a single prosecution under such laws within the last 17 years.

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4. ***NLRB v. Noel Canning*, No. 12-1281 (D.C. Cir., 705 F.3d 490; cert. granted June 24, 2013; argued on Jan. 13, 2014). The Questions Presented are: (1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate. (2) Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess. (3) Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.**

Decided June 26, 2014 (573 U.S. __). D.C. Circuit/Affirmed. Justice Breyer for a unanimous Court (Scalia, J., concurring in the judgment, joined by Roberts, C.J., and Thomas and Alito, J.J.). The Court held that the President lacked authority to make recess appointments to the NLRB, while the Senate was convening every three days in *pro forma* sessions. Although the Court affirmed the D.C. Circuit on this ground alone, the Court concluded that "it was important to answer all three questions that this case presents" because other cases raising similar challenges were pending in the Courts of Appeals. Thus, the Court first held that the President could make recess appointments both during recesses between congressional sessions (inter-session recesses) as well as during recesses in the

midst of a congressional session (intra-session recesses). The Court explained that limiting the President's recess appointment power to inter-session recesses would make the power "dependent on a formalistic distinction of Senate procedure" and ignore that the Senate "has done nothing to deny the validity of this practice for at least three-quarters of a century." Second, the Court held that the President could use the recess-appointment power both to fill vacancies that occur during a recess as well as to fill vacancies that occur while Congress is in session but persist into a recess. Because it deemed this "broader interpretation more consistent with the Constitution's 'reason and spirit'" and because the Senate "has not countered this practice for nearly three-quarters of a century," the Court was "reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long." Finally, the Court held that the President could not exercise this power when the Senate was convening every three days in *pro forma* sessions. The Court explained that, "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business." Under this test, the Court held that the *pro forma* sessions at issue were not a recess because the Senate "said it was in session" and its rules made clear that it "retained the power to conduct business." Accordingly, the President was not authorized to make recess appointments during that period. The Court dismissed the Government's concern that deferring to the Senate in this manner would prevent "'the Executive Branch from accomplishing its constitutionally assigned functions,'" noting that "the Recess Appointments Clause is not designed to overcome serious institutional friction."

5. ***ABC, Inc. v. Aereo, Inc.*, No. 13-461 (2d Cir., 712 F.3d 676; cert. granted Jan. 10, 2014; SG as amicus supporting petitioners; argued on Apr. 22, 2014). Whether a company "publicly performs"—pursuant to 17 U.S.C. § 106(4)—a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.**

Decided June 25, 2014 (573 U.S. __). Second Circuit/Reversed and remanded. Justice Breyer for a 6-3 Court (Scalia, J., dissenting, joined by Thomas and Alito, J.J.). Aereo provides a video-streaming service that utilizes thousands of dime-sized antennae to allow subscribers to watch television programs over the Internet at the same time that the programs are broadcast over the air. The Court held that Aereo infringes copyright holders' exclusive right to "publicly perform" their copyrighted works under the Transmit Clause of the Copyright Act of 1976, which defines copyright holders' public performance right to include the right to "transmit or otherwise communicate a performance . . . to the public, by means of any device or process." 17 U.S.C. § 101. The Court decided, first, that Aereo "performs." The Court found it significant that Congress enacted the Transmit Clause to overturn *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), which found that certain cable system providers merely provided equipment to facilitate viewers' receipt of over-the-air broadcasts. In light of this history, Aereo could not be viewed as a mere equipment provider. It was true that Aereo's system differed from those in *Fortnightly* and *Teleprompter* insofar as it

transmitted only when a subscriber asked to view a channel (and then only that particular channel), but this difference was invisible to both the broadcaster and subscriber and did not change the fact that Aereo effectively operated as a cable system. Second, the Court decided that Aereo performs "publicly." The Court assumed *arguendo* that the relevant "performance" was Aereo's transmission, and not the prior broadcast, but determined that Aereo's transmission to its subscribers was "to the public." Aereo's use of individualized antennae and hard drives to make individualized transmissions did not alter Aereo's commercial objectives or the viewing experience of subscribers, and was irrelevant to Congress's regulatory objectives. Because Aereo communicated the same contemporaneously perceptible images and sounds to a large number of people who were unrelated and unknown to each other, it transmitted to the "public." Finally, the Court noted that its "limited" holding was not intended to address different questions involving cloud computing technologies.

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6. ***Fifth Third Bancorp v. Dudenhoeffer*, No. 12-751 (6th Cir., 692 F.3d 410; CVSG Mar. 25, 2013; cert. supported Nov. 12, 2013; cert. granted Dec. 13, 2013; SG as amicus supporting respondents; argued on Apr. 2, 2014). Whether the Sixth Circuit erred by holding that respondents were not required to plausibly allege in their complaint that the fiduciaries of an employee stock ownership plan abused their discretion by remaining invested in employer stock, in order to overcome the presumption that their decision to invest in employer stock was reasonable, as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101 *et seq*. ("ERISA"), and every other circuit to address the issue.**

Decided June 25, 2014 (573 U.S. __). Sixth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. The Court held that the fiduciary of an employee stock ownership plan ("ESOP") is not entitled to any special presumption of prudence under ERISA. The Court explained that the relevant statutory provisions are in some tension: ERISA subjects all pension plan fiduciaries to a duty of prudence, but other provisions in the statute express Congress's interest in encouraging use of ESOPs notwithstanding that these plans are designed to invest primarily in the stock of the participants' employer and thus by their nature are not prudently diversified. ERISA specifically provides that "the prudence requirement" is not violated by acquisition of employer stock, but "only to the extent that it requires diversification." 29 U.S.C. § 1104(a)(2). Several circuit courts had gone beyond ERISA's specific provision that ESOP fiduciaries need not diversify by applying a "presumption of prudence" to ESOP fiduciaries when their decisions to buy or hold employer stock were challenged as imprudent following a decline in the employer stock price. The Court, however, found that ERISA merely modified the general duty of prudence for ESOP fiduciaries in a precisely defined way—by exempting ESOP fiduciaries from the prudence requirement "to the extent that it requires diversification." Aside from that distinction, the duty of prudence applies to ESOP fiduciaries just as it does to all other ERISA fiduciaries.

7. ***Riley v. California*, No. 13-132 (Cal. App., 2013 WL 475242; cert. granted Jan. 17, 2014; SG as amicus supporting respondent; consolidated with *United States v. Wurie*, No. 13-212; argued on Apr. 29, 2014). Whether evidence at petitioner's trial was obtained in a search of petitioner's cell phone that violated petitioner's Fourth Amendment rights.**

   Decided June 25, 2014 (573 U.S. __). California Court of Appeal/Reversed and remanded; First Circuit/Affirmed. Chief Justice Roberts for a unanimous Court (Alito, J., concurring in part and concurring in the judgment). The Court held that police generally may not search digital information on a cellphone seized from an individual who has been arrested without a warrant. The Court acknowledged that the Fourth Amendment generally permits police to conduct a search of the person of the arrestee incident to arrest, and that in *United States v. Robinson*, 414 U.S. 218 (1973), this had been applied to permit an officer to look inside a cigarette package found in the pocket of an arrestee's coat. While mechanical application of *Robinson* might support the warrantless searches at issue in this case, the Court emphasized that the Fourth Amendment ultimately requires a balancing of legitimate governmental interests against the individual's privacy. Given the special considerations that attend the digital data on a cellphone, the Court found that police should be required to obtain a warrant before conducting a search of the contents of a cellphone. The data on a cellphone cannot itself be used as a weapon to harm an officer. There also is no significant risk that—once the cellphone is physically secure—the arrestee will be able to conceal or destroy evidence. While a phone can be remotely wiped, that can be prevented by turning off the phone or by storing it in an enclosure that is isolated from radio waves. On the other side of the ledger, the Court noted that a search of an individual's cellphone implicates substantial privacy concerns, as most cellphones contain a digital record of "nearly every aspect" of their owners' lives. Moreover, if the data contained on a cell phone is stored on a remote server, a search of the cellphone could extend beyond the physical proximity of the arrestee, heightening an individual's privacy interests in the data. These concerns are also exacerbated by the fact that cellphones are pervasive, owned by more than 90% of American adults. Cellphones thus differ in both a qualitative and quantitative sense from other objects that might be kept on an arrestee's person, and the rationales for the search incident to arrest exception simply do not apply.

8. ***Halliburton Co. v. Erica P. John Fund*, No. 13-317 (5th Cir., 718 F.3d 423; cert. granted Nov. 15, 2013; SG as amicus, supporting respondent; argued on Mar. 5, 2014). The Questions Presented are: (1) Whether the Court should overrule or substantially modify the holding of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), to the extent that it recognizes a presumption of classwide reliance on fraudulent securities information derived from the fraud-on-the-market theory. (2) Whether, in a case where the plaintiff invokes the presumption of reliance to seek class certification, the defendant may rebut the presumption and prevent class certification by introducing evidence that the alleged misrepresentations did not distort the market price of its stock.**

Decided June 23, 2014 (573 U.S. ___). Fifth Circuit/Vacated and remanded. Chief Justice Roberts for a unanimous Court (Ginsburg, J. concurring, joined by Breyer and Sotomayor, J.J.; Thomas, J., concurring in the judgment, joined by Scalia and Alito, J.J.). The Court declined to overrule the presumption, established by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), that the price of stock traded in an efficient market reflects all public, material information, but also held that defendants in a securities action must be permitted to rebut the *Basic* presumption at the class certification stage by "showing that the alleged misrepresentation did not actually affect the stock's price—that is, that the misrepresentation had no 'price impact.'" The Court concluded that the petitioner failed to establish the "special justification" necessary to overturn long-settled precedent. The petitioner argued that economic theory no longer supported the belief that information is always incorporated into the price of a security, but the Court concluded that this argument failed to take *Basic* on its own terms, as *Basic* itself allowed its presumption to be rebutted and thus did not rest on a conclusion that information is *always* incorporated by the market. The Court also rejected the argument that *Basic* is inconsistent with recent decisions refusing to accept theories of liability that would alter the requirements for the Rule 10b-5 cause of action; while *Basic* makes it easier to prove reliance, it does not alter the elements of a Rule 10b-5 cause of action. And while petitioner argued that *Basic* gives rise to harmful consequences, such concerns were better addressed to Congress. Petitioner also urged the Court to modify *Basic* by requiring plaintiffs to prove price impact in order to invoke the presumption, but the Court rejected this request as well. Because this proposal would radically alter the required showing under *Basic*, the Court rejected it for the same reasons that it refused to overrule *Basic*. Lastly, however, the Court agreed that defendants should be allowed to rebut the *Basic* presumption at the class certification stage by presenting evidence that the misrepresentation did not affect the stock price. Precluding defendants from presenting such evidence, the Court said, "makes no sense, and can readily lead to bizarre results." Price impact is an essential precondition for any Rule 10b-5 class action: absent the *Basic* presumption, reliance would have to be established separately for each class member, meaning individual issues would almost certainly predominate. Preventing a defendant from contesting *Basic*'s application would mean that a class action would be allowed to proceed even if the fraud-on-the-market theory did not apply and common reliance could not be presumed. That would be inconsistent with *Basic* itself, which establishes a rebuttable presumption. *Basic* allows plaintiffs to establish reliance indirectly, but it does not require courts to ignore a defendant's presentation of more salient evidence showing that an alleged misrepresentation did not in fact affect the market price.

9. ***United States v. Loughrin*, No. 13-316 (10th Cir., 710 F.3d 1111; cert. granted Dec. 13, 2013; argued on Apr. 1, 2014). Whether the Government must prove that a defendant intended to defraud a bank and expose it to risk of loss in every prosecution under 18 U.S.C. § 1344.**

Decided June 23, 2014 (573 U.S. ___). Tenth Circuit/Affirmed. Justice Kagan for a unanimous Court (Scalia and Thomas, J.J., joining the majority opinion as to Parts I and II, Part III-A except the last paragraph, and the last footnote of Part III-

B; Scalia, J., concurring in part and concurring in the judgment, joined by Thomas, J.; Alito, J., concurring in part and concurring in the judgment). The Court held that a prosecution under 18 U.S.C. § 1344(2), which criminalizes a knowing scheme to obtain bank property "by means of false or fraudulent pretenses, representations, or promises," is not required to prove that the defendant intended to defraud a bank. Nothing in the statutory text requires specific intent to deceive a bank, and imposing such a requirement would prevent the statute from applying to a host of cases that fall within its clear terms—for instance, deception of a non-bank custodian to obtain bank property. In addition, the *first* clause of Section 1344 includes an intent requirement, and reading Section 1344(2) to impose a similar requirement would impermissibly render Section 1344(2) superfluous. The Court distinguished *McNally v. United States*, 483 U.S. 350 (1987), which construed similar language in the federal mail fraud statute. While *McNally* found that the two clauses in the mail fraud statute merely clarified each other—and thus rejected the superfluity argument adopted by the Court here—the two clauses in the bank fraud statute differ from the two clauses in the mail fraud statute insofar as they are separately numbered and separated by line breaks. Moreover, Congress enacted the bank fraud statute prior to *McNally*. At that time, every court of ppeals to have addressed the issue had held that the two clauses of the mail fraud statute had different meanings. Congress could not have predicted *McNally* at the time it enacted the bank fraud statute. The Court also rejected the argument that the presumption against federal intrusion on traditional state authority, articulated in *Bond v. United States*, 572 U.S. ___ (2014), required a different result. The Court found that the statute's use of the words "by means of" limited the law's application to schemes in which a defendant's false statement was "the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control." That textual limitation would prevent the law from applying to run-of-the-mill frauds, and thus made it unnecessary to go beyond the text to limit the law's effect.

10. ***Utility Air Regulatory Corp. v. EPA*, No. 12-1146 (D.C. Cir., 684 F.3d 102; cert. granted Oct. 15, 2013; consolidated with *Am. Chemistry Council v. EPA*, No. 12-1248; *Energy-Intensive Manufacturers v. EPA*, No. 12-1254; *Southeastern Legal Foundation v. EPA*, No. 12-1268; *Texas v. EPA*, No. 12-1269; *Chamber of Commerce v. EPA*, No. 12-1272; argued on Feb. 24, 2014). Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.**

    Decided June 23, 2014 (573 U.S. ___). D.C. Circuit/Affirmed in part, reversed in part. Justice Scalia for a partially 5-4 and partially 7-2 Court (Thomas and Alito, J.J., joining Parts I, II-A, and II-B-1; Ginsburg, Breyer, Sotomayor, and Kagan, J.J., joining Part II-B-2; Breyer, J., concurring in part and dissenting in part, joined by Ginsburg, Sotomayor, and Kagan, J.J.; Alito, J., concurring in part and dissenting in part, joined by Thomas, J.). Addressing EPA's regulation of stationary sources of greenhouse gases, the Court held (by a vote of 5-4) that EPA exceeded its statutory authority when it determined that a source of emissions may be subject to permitting requirements solely because it emits greenhouse gases, but

also held (by a vote of 7-2) that EPA permissibly determined that a source *already* subject to permitting because of its emission of conventional permits may be required to limit its greenhouse gas emissions. The relevant statutory provisions require permitting of major emitters of "any air pollutant," and since 1978, EPA had construed those provisions as limited to a narrow class of pollutants defined by regulation that does not include greenhouse gases. Here, EPA reversed course, arguing that its contrary construction was compelled by the statutory language. The Court rejected this interpretation, noting that EPA's reading was not owed *Chevron* deference because EPA's construction would place excessive demands on limited governmental resources, and would bring about an enormous and transformative expansion of EPA's regulatory authority without clear congressional authorization. The Court explained that it would expect Congress to speak clearly before it would find in a long-extant statute an unheralded power to regulate a significant portion of the economy, and that Congress had not done so here. Nonetheless, the Court agreed with EPA that sources *already* subject to permitting for other air pollutants could be required to employ best available technology ("BACT") for greenhouse gases, as the provision governing BACT requirements referred to "each pollutant subject to regulation under this chapter" (i.e., the entire Clean Air Act) and could not reasonably be construed to exclude greenhouse gases. The Court recognized the potential for this interpretation to lead to an unreasonable degree of regulation, and stressed that its holding should not be taken as an endorsement of EPA's regulatory approach. The Court also emphasized that sources are subject to BACT requirements only if they emit more than a *de minimis* amount of greenhouse gases.

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11. ***Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, No. 13-298 (Fed. Cir., 717 F.3d 1269; cert. granted Dec. 6, 2013; SG as amicus supporting respondents; argued on Mar. 31, 2014). Whether claims to computer-implemented inventions—including claims to systems and machines, processes, and items of manufacture—are directed to patent-eligible subject matter within the meaning of 35 U.S.C. § 101.**

Decided June 19, 2014 (573 U.S. __). Federal Circuit/Affirmed. Justice Thomas for a unanimous Court (Sotomayor, J., concurring, joined by Ginsburg and Breyer, J.J.). The Court held that patent claims that call for generic computer implementation of abstract ideas are not patent-eligible under 35 U.S.C. § 101. The Court began by reiterating two longstanding principles: first, that laws of nature, natural phenomena, and abstract ideas are not patentable; and, second, that this restriction on patentability must itself be limited to avoid swallowing all of patent law. The Court explained that it had set forth a framework to determine patent-eligibility in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. ___ (2012), under which courts first ask whether a patent is directed to one of these patent-ineligible concepts, and, if it is, then ask whether the patent contains some "inventive concept" that transforms the claim into something more than a patent on the abstract idea. Applying that two-step framework, the Court first determined that the petitioner's claims were directed to an abstract idea—specifically, use of a third-party intermediary to mitigate settlement risk in financial transactions. Then, the Court concluded that the petitioner's claims did

not transform that abstract idea into a patent-eligible invention, as the claims merely required generic computer implementation of the abstract idea. The Court canvassed a number of its prior precedents, which it read to stand for the proposition that the mere addition of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.

12. ***Lane v. Franks*, No. 13-483 (11th Cir., 523 F. App'x 709; cert. granted Jan. 17, 2014; SG as amicus supporting affirmance in part and reversal in part; argued on Apr. 28, 2014). The Questions Presented are: (1) Whether the Government is categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities; and (2) whether qualified immunity precludes a claim for damages in such an action.**

Decided June 19, 2014 (573 U.S. __). Eleventh Circuit/Affirmed in part, reversed in part, and remanded. Justice Sotomayor for a unanimous Court (Thomas, J., concurring, joined by Scalia and Alito, J.J.). The Court held that the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities. Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the First Amendment shields a public employee from his public employer only when the employee speaks as a citizen on a matter of public concern. The Court found the first part of that test satisfied because, in testifying under oath, a public employee speaks "as a citizen" subject to a duty to tell the truth that is separate and independent from any professional obligation to the employer. The mere fact that an employee's testimony concerns information that was learned in the course of employment does not transform the speech into employee—rather than citizen—speech. In addition, the Court found that the particular speech in this case, regarding corruption in a public program and misuse of state funds, involved a matter of public concern. Finally, applying *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 568 (1968), the Court balanced "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The Court found no countervailing government interest in this case, as there was no evidence, for example, that the testimony was false or erroneous, or that it disclosed any sensitive information. The Court concluded that the petitioner's speech was entitled to First Amendment protection, and reversed the contrary determination of the Eleventh Circuit. Nevertheless, the Court affirmed the Eleventh Circuit's determination that the petitioner's supervisor was entitled to qualified immunity as to claims against him in his individual capacity. At the time the supervisor terminated the petitioner's employment, it was not "clearly established" that the petitioner's speech fell within the protections of the First Amendment.

13. ***United States v. Clarke*, No. 13-301 (11th Cir., 517 F. App'x 689; cert. granted Jan. 10, 2014; argued on Apr. 23, 2014). Whether an unsupported allegation that the Internal Revenue Service ("IRS") issued a summons for an improper**

purpose entitles an opponent of the summons to an evidentiary hearing to question IRS officials about their reasons for issuing the summons.

Decided June 19, 2014 (573 U.S. __). Eleventh Circuit/Vacated and remanded. Justice Kagan for a unanimous Court. The Court held that, when the IRS brings an enforcement proceeding in federal district court against a taxpayer who has failed to comply with a summons to produce documents or give testimony, the taxpayer may question IRS officials about their reasons for issuing the summons only when the taxpayer points to specific facts or circumstances plausibly giving rise to an inference of bad faith. The Court reiterated that IRS summons enforcement proceedings are "summary in nature." A summons is merely investigatory, and is a crucial backstop in a tax system based on self-reporting. Accordingly, courts in a summons enforcement proceeding ask only if the summons was issued in good faith and eschew broader inquiry into the investigation. In light of those background principles, a taxpayer must point to specific facts or circumstances plausibly raising an inference of bad faith before a court can allow the taxpayer to inquire into the reasons for issuing the summons. Bare assertion or conjecture by the taxpayer would not be sufficient to give rise to such an inference, but neither must the taxpayer present a fully fleshed out case. The taxpayer need only point to facts giving rise to a "plausible inference." Because the Eleventh Circuit applied a different legal standard, the Court vacated and remanded, observing that on remand the determination by the district court regarding the sufficiency of the taxpayer's showing would be entitled to deference to the extent the district court applied the proper legal standard.

14. ***Abramski v. United States*, No. 12-1493 (4th Cir., 706 F.3d 307; cert. granted Oct. 15, 2013; argued on Jan. 22, 2014). The Questions Presented are: (1) Whether a gun buyer's intent to sell a firearm to another lawful buyer in the future is a fact "material to the lawfulness of the sale" of the firearm under 18 U.S.C. § 922(a)(6). (2) Whether a gun buyer's intent to sell a firearm to another lawful buyer in the future is a piece of information "required . . . to be kept" by a federally licensed firearm dealer under § 924(a)(I)(A).**

Decided June 16, 2014 (573 U.S. ___). Fourth Circuit/Affirmed. Justice Kagan for a 5-4 Court (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas and Alito, J.J.). Federal law prohibits knowingly making a false statement "with respect to any fact material to the lawfulness of the sale" of a gun. 18 U.S.C. § 922(a)(6). The Court held that a person who buys a gun on someone else's behalf while falsely claiming that it is for himself has made a material misrepresentation under that provision, irrespective of whether or not the true buyer could have legally purchased the gun. The Court noted that the primary purpose of the statutory scheme regulating the purchase of firearms is to keep guns out of the hands of those not legally entitled to possess them. In light of that purpose, the Court determined that the "person" or "transferee" who is the focus of Section 922 is the individual ultimately intended to receive the firearm, not the fictitious straw buyer. Petitioner's position, that the statute is concerned only with the identity of the immediate purchaser, and that a false response regarding the true

buyer's identity is therefore not material, runs counter to the statute's context, structure, and purpose. The Court found no reason to read the statutory scheme differently in a case where the ultimate buyer himself could have legally purchased the handgun; regardless of that fact, the straw purchaser still would have made a false statement about who ultimately would receive the gun. The Court also determined that a straw buyer violates a separate statutory provision, 18 U.S.C. § 924(a)(1)(A), which prohibits knowingly making a false statement with respect to information required to be maintained in the records of a federally licensed firearm dealer. A straw buyer would necessarily misrepresent the actual buyer's identifying information on a form that is required by federal regulation to be retained in the firearm dealer's records.

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15. ***Argentina v. NML Capital, Ltd.*, No. 12-842 (2d Cir., 695 F.3d 201; CVSG Apr. 15, 2013; cert. supported Dec. 4, 2013; cert. granted Jan. 10, 2014; SG as amicus supporting petitioner; argued on Apr. 21, 2014). Whether post-judgment discovery in aid of enforcing a judgment against a foreign state can be ordered with respect to all assets of a foreign state regardless of their location or use, as held by the Second Circuit, or is limited to assets located in the United States that are potentially subject to execution under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq*., as held by the Seventh, Fifth, and Ninth Circuits.**

Decided June 16, 2014 (573 U.S. ___). Second Circuit/Affirmed. Justice Scalia for a 7-1 Court (Ginsburg, J., dissenting; Sotomayor, J., not participating). The Court held that the Foreign Sovereign Immunities Act ("FSIA") does not limit a federal district court's authority to order discovery from third parties about the assets of a foreign-sovereign judgment debtor. The FSIA, the Court explained, is comprehensive in scope and sets outs every sort of immunity defense a foreign sovereign may assert in an American court. The FSIA confers two kinds of immunity: jurisdictional immunity and execution immunity. Addressing each of these in turn, the Court determined that Argentina had waived its jurisdictional immunity in the bond agreements that were the subject of the underlying suit, and that the FSIA's execution-immunity provision conferred immunity from execution—not immunity from discovery. Beyond these provisions, there was "no third provision forbidding or limiting discovery in aid of execution." The Court accordingly determined that the text of the law simply did not contain the kind of plain statement that would be necessary to preclude ordinary application of the discovery provisions set forth in the Federal Rules of Civil Procedure. The Court also rejected Argentina's argument that the discovery requests were invalid because they would encompass property potentially entitled to immunity from execution—such as military or diplomatic property. The Court concluded that Argentina's creditors were entitled to seek information concerning the location of Argentina's assets in order to identify property that would be subject to execution, and that Argentina could not shield assets from discovery based on its "self-serving legal assertion" that those assets were immune from execution. Finally, while Argentina and the United States argued that this construction of the FSIA would pose "worrisome international-relations consequences," such concerns were better directed to Congress.

16. ***Susan B. Anthony List v. Driehaus*, No. 13-193 (6th Cir., 525 F. App'x 415; cert. granted Jan. 10, 2014; SG as amicus supporting partial reversal; argued on Apr. 22, 2014). The Questions Presented are: (1) To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would *certainly* and *successfully* prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold? (2) Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?**

Decided June 16, 2014 (573 U.S. ___). Sixth Circuit/Reversed. Justice Thomas for a unanimous Court. The Court held that the petitioners alleged a sufficiently imminent injury to satisfy Article III's justiciability requirements in its pre-enforcement challenge to an Ohio law prohibiting "false statements" during the course of a political campaign. The Court explained that under its prior cases a plaintiff satisfies Article III's injury-in-fact requirement where the plaintiff alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution. That standard was satisfied in this case. The petitioners had identified specific statements that they intended to make in future election cycles, and because those statements concerned political speech they were certainly imbued with a constitutional interest. Those statements also were arguably prohibited under the Ohio law, which sweeps broadly and covers the subject matter of the intended speech. Indeed, state officials had already found probable cause to believe that one of the petitioners had violated the Ohio law when making statements similar to those that petitioners intended to make in the future. Finally, the threat of future enforcement was substantial. There was a history of past enforcement in prior election cycles; the credibility of the enforcement threat was bolstered by the fact that "any person" with knowledge could file a complaint; and administrative proceedings prompted by complaints were "not a rare occurrence." The Court also noted that it was not required to decide whether the threat of administrative proceedings alone would give rise to an Article III injury, as the administrative proceedings here were backed by an additional threat of criminal prosecution. Lastly, the Court concluded by questioning the Sixth Circuit's consideration in its analysis of two "prudential ripeness" factors—whether the factual record was sufficiently developed and whether hardship to the parties would result if relief were denied—but ultimately declined to determine the continuing vitality of the prudential ripeness doctrine because the "fitness" and "hardship" factors were easily met in this case.

17. ***Clark v. Rameker*, No. 13-299 (7th Cir., 714 F.3d 559; cert. granted Nov. 26, 2013; argued on Mar. 24, 2014). Whether an individual retirement account that a debtor has inherited is exempt from the debtor's bankruptcy estate under Section 522 of the Bankruptcy Code, 11 U.S.C. § 522, which exempts "retirement funds to the extent that those funds are in a fund or account that**

is exempt from taxation" under certain provisions of the Internal Revenue Code.

Decided June 12, 2014 (573 U.S. ___). Seventh Circuit/Affirmed. Justice Sotomayor for a unanimous Court. Under Section 522 of the Bankruptcy Code, a debtor's "retirement funds" may be exempt from the bankruptcy estate. 11 U.S.C. § 522. Resolving a split between the Seventh and Fifth Circuits, the Court held that an inherited individual retirement account ("IRA") does not qualify as "retirement funds," as that phrase is used in Section 522. Giving the phrase "retirement funds" its ordinary meaning, the Court held that the phrase is "properly understood to mean sums of money set aside for the day an individual stops working." Funds held in inherited IRAs are not objectively set aside for the purpose of retirement, as (1) holders of inherited IRAs may never invest additional money in the account; (2) holders of inherited IRAs are required to withdraw money from such accounts, regardless of how near they are to retirement; and (3) holders of inherited IRAs may withdraw the entire balance at any time without penalty. Funds held in inherited IRAs constitute a pot of money that can be freely used for current consumption, not funds objectively set aside for retirement. To allow a debtor to shield such funds from bankruptcy would convert the Bankruptcy Code's purpose to offer a "fresh start" into a "free pass."

18. ***POM Wonderful LLC v. The Coca-Cola Co.*, No. 12-761 (9th Cir., 679 F.3d 1170; CVSG Mar. 25, 2013; cert. opposed Nov. 27, 2013; cert. granted Jan. 10, 2014; SG as amicus supporting neither party; argued on Apr. 21, 2014). Whether the court of appeals erred in holding that a private party cannot bring a Lanham Act claim, 15 U.S.C. §§ 1051 *et seq*., challenging a product label regulated under the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq*.**

Decided June 12, 2014 (573 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for an 8-0 Court (Breyer, J., did not participate). The Court held that the regulatory regime established by the Food, Drug, and Cosmetic Act ("FDCA") does not preclude unfair competition claims under the Lanham Act alleging that food and beverage labels are false or misleading. The Court thus reversed the Ninth Circuit, which had held that allowing such claims to proceed would unduly undermine the Food and Drug Administration's ("FDA") authority to regulate product labels. The Court explained that neither the text nor the structure of either statute indicates that Congress intended to forbid Lanham Act claims challenging FDA-regulated labels. Instead, the two statutes "complement each other" in the area of product labeling. While the FDCA "protects public health and safety," the Lanham Act shields "commercial interests against unfair competition." Thus, even though the FDA had expertise in the area of public health, it lacked the "expertise in assessing market dynamics that day-to-day competitors possess." By contrast, the Lanham Act—"by empowering private parties to sue competitors"—would harness "market expertise" to "enhance the protection of competitors and consumers." Because it was "unlikely that Congress intended the FDCA's protection of health and safety to result in less policing of misleading food and beverage labels than in competitive markets for other

products," the Court rejected arguments by the respondent and the United States that the FDA's actions set "a ceiling" on labeling regulation.

19. ***CTS Corp. v. Waldburger*, No. 13-339 (4th Cir., 723 F.3d 434; cert. granted Jan. 10, 2014; SG as amicus supporting petitioner; argued on Apr. 23, 2014). For certain state-law tort actions involving environmental harms, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") preempts the state statute of limitations' commencement date and replaces it with a delayed commencement date provided by federal law. Specifically, 42 U.S.C. § 9658 provides that if "the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute." *Id.* § 9658(a)(1). Section 9658, in turn, defines "applicable limitations period"—i.e., the state laws to which § 9658 applies—to "mean[] the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought." *Id.* § 9658(b)(2). The Question Presented is whether the Fourth Circuit correctly interpreted § 9658 to apply to state statutes of repose, which abolish a cause of action as to a particular defendant after a period of time, regardless of whether the claim has accrued, in addition to state statutes of limitation.**

    Decided June 9, 2014 (573 U.S. ___). Fourth Circuit/Reversed. Justice Kennedy for a 7-2 Court (Roberts, C.J., and Scalia, Thomas, and Alito, J.J., joining the opinion except as to Part II-D; Scalia, J., concurring in part, joined by Roberts, C.J., and Thomas and Alito, J.J.; Ginsburg, J., dissenting, joined by Breyer, J.). The Court held that Section 9658 of CERCLA, 42 U.S.C. § 9658, which preempts state statutes of limitations in certain tort actions arising from release of hazardous substances into the environment, does not preempt state statutes of repose. The Court emphasized that Section 9658 refers only to statutes of limitations, and explained that the distinction between statutes of limitations and repose was well established when Section 9658 was enacted in 1986. Although statutes of limitations and repose both encourage timely filing of claims, they serve different purposes: statutes of limitations ensure that plaintiffs diligently pursue their claims after they accrue, whereas statutes of repose relieve defendants of liability after a fixed period in order to provide a "fresh start" or freedom from liability. Thus, for instance, whereas statutes of limitations are subject to equitable tolling, statutes of repose are not. The Court rejected the Fourth Circuit's conclusion that Section 9658 should be interpreted liberally in light of CERCLA's remedial purpose, explaining that almost every statute can be described as remedial in some sense, and that this is no reason to disregard text and structure. If the Court were to adopt any presumption to resolve the case, it would presume that Congress did not intend to restrict States' sovereign capacity to regulate.

20. ***Exec. Benefits Ins. Agency v. Arkison*, No. 12-1200 (9th Cir., 702 F.3d 553; cert. granted June 24, 2013; SG as amicus, supporting respondent; argued on Jan. 14, 2014). The Questions Presented are: (1) Whether Article III permits**

the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III. (2) Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. § 157(b).

Decided June 9, 2014 (573 U.S. ___). Ninth Circuit/Affirmed. Justice Thomas for a unanimous Court. In a prior decision, *Stern v. Marshall*, 564 U.S. ___ (2011), the Court held that even though bankruptcy courts are statutorily authorized to enter final judgment on a class of bankruptcy-related claims (so-called "core" claims), Article III of the Constitution prohibits bankruptcy courts from finally adjudicating certain of those claims. Here, the Court held that where, under its reasoning in *Stern v. Marshall*, 564 U.S. __ (2011), Article III does not permit a bankruptcy court to enter a final judgment on a bankruptcy-related claim, the Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 151 *et seq.*, nevertheless permits the bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by a district court. The petitioner had argued that a statutory "gap" precluded this procedure, as 28 U.S.C. § 157 directs bankruptcy courts to enter final judgment only on so-called "core" claims and to enter proposed findings for "non-core" claims (i.e., claims that are "not . . . core" but are "otherwise related to a case under title 11"), but does not authorize a bankruptcy court to enter proposed findings in a "core" proceeding. The Court rejected this argument in light of the statute's severability provision, reasoning that when a bankruptcy court determines that Article III does not permit a claim to be adjudicated as a "core" claim, it necessarily holds invalid those provisions that would allow the bankruptcy court to enter final judgment on the claim. Nonetheless, under the severability provision, that does not prevent the court from giving effect to the remainder of the statute, including those provisions that allow the bankruptcy court to treat the claim as "non-core" and enter proposed findings. Finally, turning to the facts of the case, the Court held that the Ninth Circuit had properly concluded that the fraudulent conveyance claims at issue could be subject to such a procedure. Moreover, although the courts below had not followed precisely this procedure, any initial error by the bankruptcy court in entering judgment on the claims was cured by the fact that the district court conducted a *de novo* review and entered its own valid final judgment.

21. ***Scialabba v. Cuellar de Osorio*, No. 12-930 (9th Cir., 695 F.3d 1003; cert. granted June 24, 2013; argued on Dec. 10, 2013). The Questions Presented are: (1) Whether Section 1153(h)(3) of the Immigration and Nationality Act ("INA")—which provides rules for determining whether particular aliens qualify as "children" so that they can obtain visas or adjustments of their immigration status as derivative beneficiaries of sponsored family member immigrants (also known as "primary beneficiaries")—unambiguously grants relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes**

available to the primary beneficiary. (2) Whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3) of the INA.

Decided June 9, 2014 (573 U.S. ___). Ninth Circuit/Reversed and remanded. Plurality opinion (Kagan, J., announcing the judgment, joined by Kennedy and Ginsburg, J.J.; Robert, C.J., concurring, joined by Scalia, J.; Alito, J., dissenting; Sotomayor, J., dissenting, joined by Breyer and Thomas, J.J.). Immigration laws allow citizens and lawful permanent residents to petition for certain family members to obtain visas; these family members are referred to as "principal beneficiaries." In addition, minor children of principal beneficiaries are "derivative beneficiaries" entitled to the immigration status of their parents. The Board of Immigration Appeals ("BIA") interpreted the Child Status Protection Act ("CSPA") to prevent a derivative beneficiary from "aging out" of a visa application (and thus losing "priority" in the application process) if the immigrant could qualify as a principal beneficiary without identifying a new sponsor. An en banc panel of the Ninth Circuit rejected that interpretation, concluding that the CSPA's plain language grants priority retention to all aged-out aliens, but the Supreme Court reversed. For a plurality, Justice Kagan explained that "[t]his is the kind of case *Chevron* [deference] was built for." The relevant provision of the CSPA, 8 U.S.C. § 1153(h)(3), contains two parts, one of which "points toward broad-based relief" by apparently encompassing all aged-out beneficiaries, and a second, remedial provision that applies only to beneficiaries who qualify for a new preference classification without needing a new sponsor. The ambiguity created by these "ill-fitting" and "self-contradictory" clauses required the BIA to determine how best to reconcile the statute's competing commands, and the BIA's "textually reasonable" resolution of that problem was entitled to deference. Meanwhile, Chief Justice Roberts, joined by Justice Scalia, concurred in the judgment. The Chief Justice expressed concern that the plurality opinion could be read to suggest that deference is warranted to resolve a direct conflict between two statutory provisions. The Chief Justice wrote that ambiguity is different from a direct conflict, and that resolving a conflict between opposing statutory directives "is not statutory construction but legislative choice." Nevertheless, the Chief Justice agreed that the Board had adopted a reasonable construction of the statute. In his view, the first clause of the statute merely defined the persons potentially affected by the provision, whereas the second clause was the "operative provision." The BIA's construction of that "operative" clause was reasonable and entitled to deference.

22. ***Bond v. United States*, No. 12-158 (3d Cir., 681 F.3d 149; cert. granted Jan. 18, 2013; argued on Nov. 5, 2013). The Questions Presented are: (1) Whether the Constitution's structural limits on federal authority impose any constraints on the scope of Congress's 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*, 252 U.S. 416 (1920)?

Decided June 2, 2014 (572 U.S. ___). Third Circuit/Reversed and remanded. Chief Justice Roberts for a unanimous Court (Scalia, J., concurring in the judgment, joined by Thomas, J., and joined in part by Alito, J.; Thomas, J., concurring in the judgment, joined by Scalia, J., and joined in part by Alito, J.; Alito, J., concurring in the judgment). The Court held the Chemical Weapons Convention Implementation Act of 1998, prohibiting use of a "chemical weapon," did not apply to a woman who assaulted her husband's mistress by spreading an irritating chemical on the mistress's car, mailbox, and doorknob. The case was largely framed as a dispute about Congress's power to implement international treaties: the petitioner had argued that the implementing legislation exceeded Congress's enumerated powers, whereas the Government argued that the Framers deliberately chose not to place subject matter limitations on the treaty power. The Court sidestepped this dispute by construing the treaty not to reach the petitioner's conduct. The Court noted that Congress legislates against the backdrop of unexpressed presumptions, including background principles of federalism, and that a clear expression of congressional intent is necessary before a statute will be read to intrude on the police power of the States. No such clear indication was present here. While the term "chemical weapon" was broadly defined, that statutory definition had to be read in light of the ordinary meaning of the defined term. The Court would not disregard that ordinary meaning, when doing so would transform legislation implementing an international chemical weapons treaty into a law that would make it a federal offense to poison a goldfish.

23. ***Limelight Networks, Inc., v. Akamai Technologies, Inc.*, No. 12-786 (Fed. Cir., 692 F.3d 1301; CVSG June 24, 2013; cert. supported Dec. 10, 2013; cert. granted Jan. 10, 2014; SG as amicus supporting petitioner; argued on Apr. 30, 2014) (linked with *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, No. 12-960). Whether the Federal Circuit erred in holding that a defendant may be held liable for inducing patent infringement under 35 U.S.C. § 271(b) even though no one has committed direct infringement of the patent at issue under § 271(a).**

Decided June 2, 2014 (572 U.S. ___). Federal Circuit/Reversed and remanded. Justice Alito for a unanimous Court. The Court held that a defendant may not be held liable for inducing infringement of a patent under Section 271(b), 35 U.S.C. § 271(b), where no single person or entity has directly infringed the patent under Section 271(a) or any other provision of the patent laws. The Court observed that neither the parties nor the court below disputed that a claim for induced infringement must be predicated on direct infringement. The Federal Circuit had reasoned that direct infringement could exist "independently of a violation" of the patent laws, but the Court concluded that this analysis fundamentally misunderstood what it meant to "infringe" a patent. A contrary view would deprive courts of any ascertainable standard to determine when induced infringement had occurred; courts would have to develop two entirely separate

bodies of case law to define direct and induced infringement. This conclusion also was bolstered by a separate provision of the patent laws, Section 271(f)(1), which imposes liability on a party who induces certain conduct "outside of the United States" that "would infringe the patent if such combination occurred within the United States." This provision illustrates that, when Congress wishes to impose liability for inducing activity that does not constitute direct infringement, Congress knows how to do so. Turning to the facts of the case, the Court rejected the theory that Limelight induced infringement simply because the steps that Limelight and its customers perform would constitute infringement if all of those steps were performed by the same person. Because performance of all of the steps could not be attributed to the same person, there had been no direct infringement under the Federal Circuit's governing precedent, and there accordingly could be no induced infringement. The Court acknowledged the concern that this holding would permit evasion of a patent by dividing performance of the patent's steps among separate entities, but found that this risk arose from the Federal Circuit's conclusion in a separate case that direct infringement cannot occur unless all steps of a patent are performed by the same person. The Court declined to review the Federal Circuit's test for direct infringement, as it was not part of the question presented.

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24. ***Nautilus, Inc. v. Biosig Instruments*, No. 13-369 (Fed. Cir., 715 F.3d 891; cert. granted Jan. 10, 2014; SG as amicus, supporting respondent; argued on Apr. 28, 2014). The Questions Presented are: (1) Whether the Federal Circuit's acceptance of ambiguous patent claims with multiple reasonable interpretations—so long as the ambiguity is not "insoluble" by a court—defeats the statutory requirement of particular and distinct patent claiming. (2) Whether the presumption of validity dilutes the requirement of particular and distinct patent claiming.**

Decided June 2, 2014 (572 U.S. ____). Federal Circuit/Vacated and remanded. Justice Ginsburg for a unanimous Court. The Patent Act requires that a patent specification "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter" of the invention. 35 U.S.C. § 112, ¶ 2. The Federal Circuit had held that a patent claim cleared this threshold so long as the claim was not "insolubly ambiguous." The Supreme Court rejected this construction, and held that a patent is invalid for indefiniteness if its claims, read in light of the patent's specifications and prosecution history, that fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention. The Court recognized that any interpretation of Section 112 must strike a "delicate balance" between competing concerns. On the one hand, language is often inherently ambiguous, and patents in particular are often directed to those skilled in the relevant art rather than to the general public. On the other hand, a patent must provide clear notice of what is claimed, in order to avoid a "zone of uncertainty" that would discourage innovation. Patent applicants, moreover, have powerful incentives to inject ambiguity into their claims. The Court found that its interpretation of Section 112 would balance these concerns. The Court recognized that there were some indications in the Federal Circuit's case law that the standard it applied was similar to that articulated by the Court, but nonetheless found remand warranted given other language in Federal Circuit opinions suggesting a

greater tolerance for ambiguous claims. The Court declined to address in the first instance the proper application of the standard to the facts of the case.

25. ***Hall v. Florida*, No. 12-10882 (Sup. Ct. Fla., 109 So. 3d 704; cert. granted Oct. 21, 2013; argued on Mar. 3, 2014). Whether Florida's scheme for identifying mentally retarded defendants in capital cases—defining mental retardation to require a bright-line standardized IQ score of 70 or below—violates *Atkins v. Virginia*'s prohibition on executions of mentally retarded criminals.**

Decided May 27, 2014 (572 U.S. __). Florida Supreme Court/Reversed and remanded. Justice Kennedy for a 5-4 Court (Alito, J., dissenting, joined by Roberts, C.J., and Scalia and Thomas, J.J.). The Court held that Florida violated the constitutional prohibition on execution of intellectually disabled persons, recognized in *Atkins v. Virginia*, 536 U.S. 304 (2002), when it defined intellectual disability to require an IQ test score of 70 or below. Giving the States complete autonomy to define intellectual disability could allow them to improperly circumvent the decision in *Atkins*. And, notably, Florida was "one of just a few States" to adopt a rigid IQ test score cutoff, which indicated "that our society does not regard this strict cutoff as proper." Florida's rule conflicted with "'the unanimous professional consensus'" against rigid IQ score cutoffs, as well as "the views of those who design, administer, and interpret the IQ test." An IQ test score is an approximation, not a final and infallible assessment of intellectual functioning. And intellectual disability is a condition, not a number. By precluding sentencing courts from considering other evidence of intellectual disability, the Court concluded, Florida's rule created an unacceptable risk that Florida might execute an intellectually disabled individual. And Florida's rule also deprived persons facing capital punishment of a "fair opportunity to show that the Constitution prohibits their execution."

26. ***Michigan v. Bay Mills Indian Community*, No. 12-515 (6th Cir., 695 F.3d 406; CVSG Jan. 7, 2013; cert. opposed May 14, 2013; cert. granted June 24, 2013; SG as amicus, supporting respondent; argued on Dec. 2, 2013). The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. ("IGRA"), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on "Indian lands." 25 U.S.C. § 2710(d)(1). The Questions Presented are: (1) Whether a federal court has jurisdiction to enjoin activity that violates the IGRA but takes place outside of Indian lands; and (2) whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating the IGRA outside of Indian lands.**

Decided May 27, 2014 (572 U.S. __). Sixth Circuit/Affirmed and remanded. Justice Kagan for a 5-4 Court (Sotomayor, J., concurring; Scalia, J., dissenting; Thomas, J., dissenting, joined by Scalia, Ginsburg, and Alito, J.J.; Ginsburg, J., dissenting). The Court held that tribal immunity bars suit against an Indian tribe to enjoin operation of a casino located outside of tribal lands. The Court declined to overrule the holding of *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), that tribal immunity extends to suits based on a tribe's off-

reservation commercial activities. The Court further held that the Indian Gaming Regulatory Act ("IGRA") does not abrogate tribal immunity for suits to enjoin operation of an off-reservation casino. The Court emphasized that congressional abrogation of tribal immunity must be "unequivocal." Although IGRA partially abrogates tribal immunity with respect to certain gaming activities "located on Indian lands," 25 U.S.C. § 2710(d)(7)(A)(ii), that provision does not unequivocally abrogate sovereign immunity for casinos located outside the reservation. This is true regardless of whether related administrative functions are performed on a reservation, as the text of the statute turns on the location of the games themselves, and by its terms applies only when the games are located on Indian lands. The Court emphasized that States retain authority to enforce state gaming laws against off-reservation casinos by, *inter alia*, seeking injunctive relief against individual tribal officials, criminally prosecuting casino operators or patrons, or negotiating for waivers of sovereign immunity in future gaming compacts.

27. ***Plumhoff v. Rickard*, No. 12-1117 (6th Cir., 509 F. App'x 388; cert. granted Nov. 15, 2013; SG as amicus, supporting petitioners; argued on Mar. 4, 2014). The Questions Presented are: (1) Whether the Sixth Circuit wrongly denied qualified immunity to Petitioners by analyzing whether force used in 2004 was distinguishable from factually similar force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007). Stated otherwise, the question presented is whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was *supported* by subsequent case decisions as opposed to *prohibited* by clearly established law at the time force was used. (2) Whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspecte weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.**

Decided May 27, 2014 (572 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Alito for a unanimous Court (Ginsburg, J., joining as to the judgment and Parts I, II, and III-C; Breyer, J., joining except as to Part III-B-2). Police officers fired multiple shots at a vehicle during a chase. The fleeing suspect died as a result, and the surviving daughter filed suit claiming the officers used excessive force under the Fourth and Fourteenth Amendments. The district court and the court of appeals held that the officers were not entitled to qualified immunity, as their conduct violated clearly established law. The Supreme Court first held that the court of appeals properly exercised jurisdiction. Although an order denying summary judgment is generally not immediately appealable, that rule does not apply when the summary judgment motion is based on a claim of qualified immunity and an appeal raises legal issues and not merely a claim of evidentiary sufficiency. The claims in this case were legal in nature, as the officers did not contest that they shot the fleeing suspect but rather claimed that their conduct did not violate clearly established law. Then, turning to the merits, the Court held in Part III-B that the tactics used by the officers were not unreasonable and

accordingly did not violate the Fourth Amendment. Although the suspect's car was at a near standstill when the first shots were fired, the wheels of the car were spinning, and a reasonable officer could accordingly conclude that the suspect was intent on resuming his flight (Part III-B-1). The officers also did not act unreasonably by firing a total of 15 shots, as officers may continue shooting until a threat has ended (Part III-B-2). Finally, the Court concluded in Part III-C that, even if the officers had violated the Fourth Amendment, they did not violate clearly established law. The Court in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), held that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent harm to other officers or to nearby citizens. Because *Brosseau* was decided after the conduct at issue here, and addressed similar facts, the conduct in this case also could not have violated clearly established law. The Court reached no decision as to whether the estate of the passenger in the car—who also died—might have a constitutional claim.

28. ***Wood v. Moss*, No. 13-115 (9th Cir., 711 F.3d 941; cert. granted Nov. 26, 2013; argued on Mar. 26, 2014). The Questions Presented are: (1) Whether the court of appeals erred in denying qualified immunity to Secret Service agents protecting the President by evaluating a claim of viewpoint discrimination by anti-Bush demonstrators at a high level of generality and concluding that pro- and anti-Bush demonstrators needed to be positioned an equal distance from the President while he was dining on an outdoor patio, and while he was travelling by motorcade. (2) Whether a group of anti-Bush demonstrators have adequately pleaded viewpoint discrimination in violation of the First Amendment when no factual allegations support their claim of discriminatory motive, and there was an obvious security-based rationale for moving the nearby anti-Bush group and not the farther-away pro-Bush group.**

Decided May 27, 2014 (572 U.S. ___). Ninth Circuit/Reversed. Justice Ginsburg for a unanimous Court. The Court held that two Secret Service agents who ordered that protestors be moved away from an outdoor area where President George W. Bush was dining—thereby placing the protestors farther from the President than the President's supporters—were entitled to qualified immunity from the protestors' First Amendment viewpoint discrimination claims. As a preliminary matter, the Court assumed without deciding that *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), gave rise to an implied right of action for First Amendment violations. Then, turning to the qualified immunity issue, the Court explained that the relevant question is whether the relevant conduct violated "clearly established" law. The Court explained that, while it is paradigmatic that government officials may not limit peaceful public speech based solely on its content, the First Amendment's protections are not without limitation as to the time, place, and manner of that speech. The Court, moreover, was aware of no decision that would alert Secret Service agents that they bear a First Amendment obligation to ensure that groups with different viewpoints are in comparable locations at all times. While it might be true that the agents would have violated clearly established law had they acted solely to inhibit expression of disfavored views, without any objectively reasonable security rationale, on the facts of the case the agents had a security justification for their

actions. Only the protestors, and not the President's supporters, had a direct line of sight to the President and were within weapons range of the dining area.

29. ***Petrella v. MGM, Inc.*, No. 12-1315 (9th Cir., 695 F.3d 946; cert. granted Oct. 1, 2013; SG as amicus, supporting petitioner; argued on Jan. 21, 2014). Whether the nonstatutory defense of laches is available without restriction to bar all remedies for civil copyright claims filed within the three-year statute of limitations prescribed by Congress, 17 U.S.C. § 507(b).**

Decided May 19, 2014 (572 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a 6-3 Court (Breyer, J., dissenting, joined by Roberts, C.J., and Kennedy, J.). The Court held that the equitable defense of laches—which protects against a plaintiff's unreasonable, prejudicial delay in bringing suit—cannot be applied to bar a copyright infringement action brought within the Copyright Act's three-year limitations period. Under the "separate-accrual rule," the Copyright Act's statutory limitations period runs separately for each distinct act of infringement; thus, under the statute, an action is timely for any violations occurring within three years of suit, but not for "prior acts of the same or similar kind." This statutory scheme cannot be altered by application of the equitable doctrine of laches, which instead is properly applied to claims of an equitable cast for which Congress has provided no fixed time limitation. A more expansive role for laches would disregard the essentially gap-filling, not legislation-overriding, function of the doctrine. Moreover, responding to the concern that copyright plaintiffs may wait to sue until after a defendant has invested heavily in a derivative work, the Court observed that "there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work," and that a contrary rule would encourage needless litigation. Application of laches also was not necessary to protect against "loss or dilution of evidence," as Congress must have rejected such concerns when it allowed an author's heirs to renew a copyright unburdened by any assignment of the copyright previously made by the author. Finally, although the Court held that the Ninth Circuit "erred in treating laches as a complete bar" to suit, the Court noted that laches may bar claims for equitable relief "in extraordinary circumstances" and that "a plaintiff's delay can always be brought to bear at the remedial stage" when determining appropriate injunctive relief.

30. ***Robers v. United States*, No. 12-9012 (7th Cir., 698 F.3d 937; cert. granted Oct. 21, 2013; argued on Feb. 25, 2014). Whether a defendant—who has fraudulently obtained a loan and thus owes restitution for the loan under 18 U.S.C. § 3663A(b)(1)(B)—returns "any part" of the loan money by giving the lenders the collateral that secures the money.**

Decided May 5, 2014 (572 U.S. ___). Seventh Circuit/Affirmed. Justice Breyer for a unanimous Court (Sotomayor, J., concurring, joined by Ginsburg, J.). The Mandatory Victims Restitution Act requires certain offenders to restore property lost by victims as a result of the crime, and provides that, where return of the property is not possible, the offender must pay the victim an amount equal to the value of the property less the value "of any part of the property that is returned."

18 U.S.C. § 3663A. The Court held that the phrase "any part of the property" refers only to the specific property lost by a victim. The Court based this conclusion on the plain language of the statute, as the words "the property" naturally refer to the property damaged, lost, or destroyed as a result of the crime. In the case of a fraudulently obtained loan, the Court explained that the phrase refers to the money lent. No "part of the property" is "returned" to a victim in such a case until the collateral is sold and the victim receives money from the sale. Thus, the Court rejected the petitioner's argument that he "returned" a fraudulently obtained loan to the victim banks when the banks foreclosed on the mortgage and took title to the homes that were used as collateral. Instead, the property was "returned" to the banks at the time that the banks sold the homes—at which point their value had decreased. The Court explained that this result would facilitate administration of the statute, as it would often be difficult to determine the value of collateral at the time it was received by a victim.

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31. ***Town of Greece v. Galloway*, No. 12-696 (2d Cir., 681 F.3d 20; cert. granted May 20, 2013; SG as amicus, supporting petitioner; argued on Nov. 6, 2013). Whether the Second Circuit erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.**

Decided May 5, 2014 (572 U.S. __). Second Circuit/Reversed. Justice Kennedy for 5-4 Court (Scalia and Thomas, J.J., joining as to all but Part II-B; Alito, J., concurring, joined by Scalia, J.; Thomas, J., concurring in part and concurring in the judgment, joined in part by Scalia, J.; Breyer, J., dissenting; Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, J.J.). The Court held that the Town of Greece did not engage in an impermissible establishment of religion by opening its monthly board meetings with a prayer. The town invited local religious leaders to serve as "chaplain for the month," and did not review prayers in advance or provide guidance as to tone and content. Some ministers spoke in a distinctly Christian idiom, and invoked religious holidays, scripture, or doctrine. In assessing this practice, the Court took as its starting point the decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the practice of legislative prayer in light of its long history. While respondent argued that the town's practice violated the Establishment Clause because only nonsectarian prayer is permitted by *Marsh*, the Court reasoned that, in fact, the history of legislative prayer that informed the *Marsh* decision includes much distinctly religious prayer. Even today, Congress allows its chaplains to express themselves using religious idiom. The Court also believed that courts would have difficulty drawing a line between sectarian and nonsectarian prayer, and could not require ministers to set aside their personal religious beliefs for vague and artificial ones. Despite reason to doubt whether it would be possible to reach a consensus as to what prayer counts as "nonsectarian," the Court explained that there could be constraints on the content of legislative prayer. If a course of practice over time showed that prayers denigrated nonbelievers or religious minorities, threatened damnation, or preached conversion, that would present a different case. Here, with the exception of a few

isolated remarks, the prayers did not fall outside the tradition that the Court has previously recognized.

32. ***EPA v. EME Homer City*, No. 12-1182 (D.C. Cir., 696 F.3d 7; cert. granted June 24, 2013; consolidated with *American Lung Association v. EME Homer City*, No. 12-1183; argued on Dec. 10, 2013). The Questions Presented are: (1) Whether the court of appeals lacked jurisdiction to consider the challenges to the Clean Air Act on which it granted relief. (2) Whether states are excused from adopting state implementation plans prohibiting emissions that "contribute significantly" to air pollution problems in other states until after the EPA has adopted a rule quantifying each state's inter-state pollution obligations. (3) Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind state's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind state's physically proportionate responsibility for each downwind air quality problem.**

Decided Apr. 29, 2014 (572 U.S. ___). D.C. Circuit/Reversed. Justice Ginsburg for a 6-2 Court (Scalia, J., dissenting, joined by Thomas, J.; Alito, J., took no part in the consideration or decision of the case). The Court held that the EPA had reasonably interpreted the "Good Neighbor Provision" of the Clean Air Act ("CAA"), and thus was entitled to *Chevron* deference. Under the Good Neighbor Provision, each State must submit a State Implementation Plan ("SIP") including provisions "adequate" to prohibit emissions of "air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interference with maintenance" of air quality standards by another State. 42 U.S.C. § 7410(a)(2)(D)(i). Applying this provision, EPA identified those States whose emissions made more than a *de minimis* contribution to downwind air pollution and conducted an analysis to determine the most cost-efficient allocation of emissions reductions between those States. Finding that States' SIPs did not adequately conform to that approach, the EPA issued Federal Implementation Plans ("FIPs") directing States to make the reductions suggested by its cost analysis. The D.C. Circuit held that the EPA was required to give the States an opportunity to issue amended SIPs prior to issuing its own FIPs, but the Court disagreed, holding that the plain text of the CAA allowed the agency to issue a FIP "at any time within two years" after rejecting a SIP, 42 U.S.C. § 7410(c)(1), and thus imposed no such requirement. In addition, while the D.C. Circuit held that States could not be responsible for eliminating more than their ratable share of downwind pollution, the Court found EPA's contrary approach to be a reasonable interpretation of the Good Neighbor Provision. Nothing in the text of the law required EPA to allocate reductions among States according to the extent of their contribution to downwind pollution. In addition, requiring proportionate reductions would be difficult to implement, as a single State may contribute to pollution in several downwind States in different proportions. Indeed, that approach could lead to over-regulation, as every State would be required to reduce pollution in proportion to the State where it made the greatest contribution to downwind pollution. By contrast, EPA's interpretation of

the Good Neighbor Provision as requiring the most cost-effective reductions in pollution was an efficient and equitable solution to the problem.

33. ***Highmark Inc. v. Allcare Health Mgmt. Sys.*, No. 12-1163 (Fed. Cir., 687 F.3d 1300; cert. granted Oct. 1, 2013; SG as amicus, supporting petitioner; argued on Feb. 26, 2014). Whether a district court's exceptional-case finding under 35 U.S.C. § 285 (which permits the court to award attorney's fees in exceptional cases), based on its judgment that a suit is objectively baseless, is entitled to deference.**

Decided Apr. 29, 2014 (572 U.S. ___). Federal Circuit/Vacated and remanded. Justice Sotomayor for a unanimous Court. The Supreme Court held that a court of appeals should review all aspects of a district court's determination that an award of "reasonable attorney fees" is appropriate under 35 U.S.C. § 285 for abuse of discretion. The Court's decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, issued the same day, explained that 35 U.S.C. § 285, which permits courts to award attorneys' fees in exceptional cases, commits the question whether a case merits an award of attorneys' fees to the discretion of the district court. Because "decisions on 'matters of discretion' are 'reviewable for abuse of discretion,'" it followed from the decision in *Octane Fitness* that the district court's decision whether to approve an award of fees ought to be reviewed for abuse of discretion.

34. ***Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, No. 12-1184 (Fed. Cir., 496 F. App'x 57; cert. granted Oct. 1, 2013; SG as amicus, supporting petitioner; argued on Feb. 26, 2014). Whether the Federal Circuit's promulgation of a rigid and exclusive two-part test for determining whether a case is "exceptional" under 35 U.S.C. § 285 improperly appropriates a district court's discretionary authority to award attorney fees to prevailing accused infringers in contravention of statutory intent and this Court's precedent, thereby raising the standard for accused infringers (but not patentees) to recoup fees and encouraging patent plaintiffs to bring spurious patent cases to cause competitive harm or coerce unwarranted settlements from defendants.**

Decided Apr. 29, 2014 (572 U.S. ___). Federal Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court (Scalia, J., joining except as to footnotes 1–3). The Court held that the Federal Circuit's framework for awarding attorney's fees under the Patent Act's fee-shifting provision is unduly rigid and impermissibly restricts the statutory grant of discretion to district courts. Section 285 of the Patent Act permits a district court to award attorney's fees to the prevailing party in patent litigation "in exceptional cases." The Federal Circuit, in *Brooks Furniture Manufacturing, Inc. v. Dutailier International, Inc.*, 393 F.3d 1378 (Fed. Cir. 2005), outlined two limited circumstances in which this standard could be met: where there has been "some material inappropriate conduct," or where the case is both "brought in subjective bad faith" and is "objectively baseless." Noting that the Patent Act does not define "exceptional," the Court relied on the word's ordinary meaning in holding that an exceptional case "is

simply one that stands out from others with respect to the substantive strength of a party's litigating position" or "the unreasonable manner in which the case was litigated." The Federal Circuit's framework had improperly superimposed an inflexible framework on this inherently flexible statutory language. And that framework was also so demanding that it would appear to render the fee provisions of Section 285 largely superfluous. Finally, the Court held that the Federal Circuit's requirement that litigants prove entitlement to fees by clear and convincing evidence was unsupported by the statutory text.

35. ***Paroline v. United States*, No. 12-8561 (5th Cir., 701 F.3d 749; cert. granted June 27, 2013; argued on Jan. 22, 2014). What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the Government or the victim establish in order to recover restitution under 18 U.S.C. § 2259.**

Decided Apr. 23, 2014 (572 U.S. ____). Fifth Circuit/Vacated and remanded. Justice Kennedy for a 5-4 Court (Roberts, C.J., dissenting joined by Scalia and Thomas, J.J.; Sotomayor, J., dissenting). Title 18 U.S.C. § 2259(b)(1), enacted as a component of the Violence Against Women Act, requires a court to order restitution for "the full amount of the victim's losses," which include "any other losses suffered by the victim as a proximate result of the offense," in a variety of cases including violations of child pornography laws. The Supreme Court held that Section 2259 requires restitution from an individual who possesses child pornography, but only to the extent that the individual's offense proximately caused the victim's loss. In other words, defendants who possess child pornography should be held liable for the consequences and gravity of their own conduct, not the conduct of others who possess the same image. The district court had, instead, denied restitution on the grounds that the Government failed to prove that the victim's losses "would not have occurred without [petitioner's] possession of [the victim's] images," whereas the Fifth Circuit sitting *en banc* had held that petitioner was responsible for the *entire* amount of the victim's losses. In vacating the Fifth Circuit's disposition, the Supreme Court acknowledged the broad restitutionary purpose of Section 2259, but reasoned that the use of the phrase "as a proximate result of the offense" at the end of the enumerated losses for which a victim could seek restitution worked to modify all six categories of losses, not merely the last catch-all category. The Court also reasoned that holding one individual liable for all losses, without regard to proximate cause, would be unworkable and could raise questions under the Eighth Amendment's Excessive Fines Clause. The Court acknowledged the difficulty of making a proximate cause assessment in such cases and offered guidance to district courts, stating that "a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." Eschewing a rigid mathematical formula, the Court listed several factors to be considered in awarding "reasonable and circumscribed" restitution beyond "a token or nominal amount."

36. ***White v. Woodall*, No. 12-794 (6th Cir., 685 F.3d 574; cert. granted June 27, 2013; argued on Dec. 11, 2013). The Questions Presented are: (1) Whether**

the Sixth Circuit violated 28 U.S.C. § 2254(d)(1) by granting habeas relief on the trial court's failure to provide a no-adverse-inference instruction even though the Supreme Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances. (2) Whether the Sixth Circuit violated the harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in ruling that the absence of a no-adverse-inference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty pleas to the crimes and aggravators.

Decided Apr. 23, 2014 (572 U.S. ___). Sixth Circuit/Reversed. Justice Scalia for a 6-3 Court (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, J.J.). The Court held that the Sixth Circuit violated the requirement of 28 U.S.C. § 2254(d) that a writ of habeas corpus be granted only to remedy an unreasonable application of clearly established federal law. The Sixth Circuit had held that a state trial court violated the Fifth Amendment because it failed to instruct the jury that no adverse inference should be drawn from the defendant's failure to testify during a capital penalty phase following a guilty plea to the crimes and aggravating circumstances. The Supreme Court reversed, holding that its precedents did not clearly establish any such requirement. *Carter v. Kentucky*, 450 U.S. 288 (1981), found such an instruction required at the *guilt* phase; *Estelle v. Smith*, 451 U.S. 454 (1981), concerned the introduction of involuntary, un-Mirandized psychiatric examination; and *Mitchell v. United States*, 526 U.S. 314 (1999), only disapproved a trial judge's drawing of an adverse inference from the defendant's silence at sentencing "with regard to factual determinations respecting the circumstances and details of the crime." The Court explained that it is not uncommon for constitutional rules to apply differently at the penalty and guilt phases, and the Court's decision in *Mitchell* left open the possibility that some form of adverse inference could be drawn from the defendant's failure to testify. While the "next logical step" from the Supreme Court's existing precedent might be to require a no-adverse-instruction in cases like this one, the Supreme Court had not taken that step, and thus Section 2254(d) barred a grant of habeas relief.

37. ***Navarette v. California*, No. 12-9490 (Ct. App. Cal., 2012 BL 268067; cert. granted Oct. 1, 2013; limited to Question 1; SG as amicus, supporting respondent; argued on Jan. 21, 2014). Whether the Fourth Amendment requires an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle.**

Decided Apr. 22, 2014 (572 U.S. __). Court of Appeal of California, First Appellate District/Affirmed. Justice Thomas for a 5-4 Court (Scalia, J. dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that a police officer complied with the Fourth Amendment when he stopped a pickup truck matching the description of a vehicle that a 911 caller had recently reported as having run her off the road, as the caller's report gave the officer reasonable suspicion to conduct an investigative stop under *United States v. Cortez*, 449 U.S. 411 (1981), and *Terry v. Ohio*, 392 U.S. 1 (1968). Even assuming the call was

anonymous, it bore sufficient indicia of reliability for the officer to credit the caller's account. First, by identifying the specific vehicle, the caller claimed eyewitness knowledge of the alleged dangerous driving. Second, as reflected in the "present sense impression" and "excited utterance" exceptions to the hearsay rule, Fed. R. Evid. 803(1) & (3), the short amount of time that elapsed between the conduct and the report reduced the likelihood of fabrication. Third, the caller's use of the 911 emergency system reduced the likelihood of fabrication because 911 calls can be traced and recorded, subjecting false tipsters to prosecution. The Court, finally, concluded that reasonable suspicion was not defeated by the officer having followed the vehicle for five minutes without observing any additional indicia of intoxication. Five minutes of apparently safe driving was not enough to disprove intoxication, and the officer was not required to survey the car to confirm the anonymous tip when the officer already had reasonable suspicion.

38. ***Schuette v. Coalition to Defend Affirmative Action*, No. 12-682 (6th Cir. 652 F.3d 607; cert. granted Mar. 25, 2013; argued on Oct. 15, 2013). Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.**

Decided Apr. 22, 2014 (572 U.S. __). Sixth Circuit/Reversed. Justice Kennedy for a 6-2 Court (Roberts, C.J., concurring; Scalia, J., concurring in the judgment, joined by Thomas, J.; Breyer, J., concurring in the judgment; Sotomayor, J., dissenting, joined by Ginsburg, J.; Kagan, J., took no part in the consideration or decision of the case). In 2006, Michigan voters adopted an amendment to the Michigan constitution prohibiting the use of race- and sex-based preferences in the public university admissions process. Relying on the Supreme Court's political-process doctrine, the Sixth Circuit held that this amendment violated the Equal Protection Clause. The Supreme Court reversed, although no single opinion garnered five votes. Justice Kennedy announced the judgment of the Court and delivered an opinion in which Chief Justice Roberts and Justice Alito joined. Justice Kennedy rejected the Sixth Circuit's view that the political-process doctrine—primarily set forth in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969)—mandated strict scrutiny for "any state action with a 'racial focus' that makes it 'more difficult for certain racial minorities than for other groups' to 'achieve legislation that is in their interest.'" Instead, he understood those decisions to reach only those state actions that "had the serious risk, if not purpose, of causing specific injuries on account of race." Because the amendment to the Michigan constitution did not implicate these concerns, Justice Kennedy concluded that it complied with the Equal Protection Clause. Justice Scalia, writing for himself and Justice Thomas, concluded that the Sixth Circuit should be reversed on different grounds. Justice Scalia concluded that while the amendment would not pass muster under the Court's political-process cases, those decisions should be overruled because the political-process doctrine is "atextual, unadministrable, and contrary to our traditional equal protection jurisprudence." Justice Scalia would have held that an equal protection plaintiff must show intent and causation, and "not merely the existence of racial disparity." Justice Breyer also believed that the Sixth Circuit

should be reversed on different grounds, concluding that the court of appeals erred only because this case did not "involve a reordering of the *political* process," but merely the transfer of decision-making authority from "an unelected administrative body"—a collection of university faculty members and administrators—"to a politically responsive one"—the Michigan electorate.

39. ***McCutcheon v. Federal Election Commission*, No. 12-536 (D.D.C., 2012 WL 4466482; probable jurisdiction noted Feb. 19, 2013; argued on Oct. 8, 2013). Federal law imposes two types of limits on individual political contributions: Base limits restrict the amount an individual may contribute to a candidate committee ($2,500 per election), a national-party committee ($30,800 per calendar year), a state, local, and district party committee (combined $10,000 per calendar year), and a political-action committee ($5,000 per calendar year). 2 U.S.C. § 441a(a)(1). Biennial limits restrict the aggregate amount an individual may contribute biennially to candidate committees ($46,200) and all other committees ($70,800). 2 U.S.C. § 441a(a)(3). The Questions Presented are: (1) Whether the biennial limit on contributions to non-candidate committees is unconstitutional for lacking a constitutionally cognizable interest as applied to contributions to national-party committees. (2) Whether the biennial limits on contributions to non-candidate committees are facially unconstitutional for lacking a constitutionally cognizable interest. (3) Whether the biennial limits on contributions to non-candidate committees are unconstitutionally too low, as applied and facially. (4) Whether the biennial limit on contributions to candidate committees is unconstitutional for lacking a constitutionally cognizable interest. (5) Whether the biennial limit on contributions to candidate committees is unconstitutionally too low.**

Decided Apr. 2, 2014 (572 U.S. __). United States District Court for the District of Columbia/Reversed and remanded. Chief Justice Roberts for a 5-4 Court (Thomas, J., concurring in the judgment, and Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that limits on the total amount of money a donor may contribute to all political candidates and committees under the Bipartisan Campaign Reform Act of 2002 ("BCRA") are an invalid restriction on First Amendment speech and association rights. In addition to "base limit" restrictions on contributions to specific candidates or committees, the BCRA sets out "aggregate limits" on an individual donor's total contributions to all candidates and committees during a two-year election cycle. After a three-judge district court rejected a challenge to the BCRA's aggregate limits, the Supreme Court reversed. Without addressing the constitutionality of base limits, the Court concluded that aggregate contribution limits "do little, if anything" to address the Government's interest in combatting *quid pro quo* corruption, "while seriously restricting participation in the democratic process." The Court emphasized that the First Amendment must be interpreted with a view to safeguarding individual rights, not "a generalized conception of the public good." The only legitimate government interest for restricting contributions of this kind is avoiding *quid pro quo* corruption and its appearance, not other types of corruption or a general interest in leveling the playing field by limiting the amount of money in political campaigns. Although *Buckley v. Valeo*, 424 U.S. 1 (1976), concluded

that aggregate limits were a "corollary" to the Government's legitimate anti-corruption goal, the statutory safeguards against circumvention have been considerably strengthened in the intervening years. New earmarking and anti-proliferation rules, for example, as well as disclosure requirements, "disarm" many of the hypothetical examples of abuse raised by both the dissenting Justices and the district court. Furthermore, aggregate limits are not "closely drawn" to avoid unnecessary restrictions on First Amendment rights because there are "multiple alternatives available to Congress" to prevent *quid pro quo* corruption and no reasons to suspect that parties or candidates "would dramatically shift their priorities if the aggregate limits were lifted." In light of this mismatch between the restriction and the Government's objective, the aggregate limits failed even *Buckley*'s "closely drawn" test, and so the Court had no occasion to determine whether strict scrutiny applied.

40. ***Northwest, Inc. v. Ginsberg*, No. 12-462 (9th Cir., 695 F.3d 873; cert. granted May 20, 2013; SG as amicus, supporting reversal; argued on Dec. 3, 2013). Whether the Ninth Circuit erred in holding that respondent's implied covenant of good faith and fair dealing was not preempted under the Airline Deregulation Act because such claims are categorically unrelated to a price, route, or service, notwithstanding that respondent's claim arises out of a frequent-flyer program and manifestly enlarged the terms of the parties' undertakings, which allowed termination in Northwest's sole discretion.**

    Decided Apr. 2, 2014 (572 U.S. ___). Ninth Circuit/Reversed. Justice Alito for a unanimous Court. The Court held that the Airline Deregulation Act ("ADA") pre-empts a state-law claim for breach of the implied covenant of good faith and fair dealing where, as in this case, the claim seeks to enlarge the contractual obligations that the parties voluntarily undertook. Under the ADA, a state is prohibited from enacting any "law, regulation, or other provision" having the force and effect of law related to the rates, routes, or services of an air carrier. The Court first found that state common-law rules are "provisions" that dictate binding standards of conduct, and thus fall within the ADA pre-emption clause. The Court next determined that the respondent's claim challenging his exclusion from a frequent-flyer program "relates to" the airline's "rates, routes, or services," as the respondent sought entry into the program in order to obtain reduced rates and enhanced services. Then, with those preliminary matters resolved, the Court addressed the "central issue" of whether respondent's claim sought to enforce or enhance voluntarily imposed obligations. Whatever the rule in other States, in Minnesota parties cannot contract out of the implied covenant, and so, the covenant must be regarded as a state-imposed obligation supplementing the parties' voluntary undertakings. The Court declined to extend this holding to implied covenant claims brought under the law of States where parties are free to contract around the doctrine. The Court also noted that a breach-of-contract claim not based on the implied covenant likely would not be preempted.

41. ***United States v. Castleman*, No. 12-1371 (6th Cir., 695 F.3d 582; cert. granted Oct. 1, 2013; argued on Jan. 15, 2014). Whether the respondent's Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly**

causing bodily injury to the mother of his child qualifies as a conviction for a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9).

Decided Mar. 26, 2014 (572 U.S. ____). Sixth Circuit/Reversed. Justice Sotomayor for a unanimous Court (Scalia, J., concurring in part and concurring in the judgment; Alito, J., joined by Thomas, J., concurring in the judgment). Section 922(g)(9) prohibits possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), which, in turn, is defined to include "the use or attempted use of physical force," *id.* § 921(a)(33)(A). Here, the petitioner argued that his conviction for having "intentionally or knowingly cause[d] bodily injury" to the mother of his child did not qualify as "a misdemeanor crime of domestic violence" for purposes of Section 922(g)(9)'s prohibition on gun possession because it did not include the "use . . . of physical force." The Court disagreed. Relying on *Johnson v. United States*, 559 U.S. 133 (2010), the Court held that Congress had incorporated the common-law meaning of "force," which extended to "even the slightest offensive touching," in the statutory definition. Because perpetrators of domestic violence offenses are routinely prosecuted under assault or battery laws, it made sense for Congress to have classified as a "misdemeanor crime of domestic violence" the type of conduct that supports a common law battery conviction. Moreover, whereas the word "violence," standing alone, connotes substantial force, that is less true of the phrase "domestic violence," which is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context. The Court observed that its interpretation was bolstered by the fact that the statute groups "misdemeanor crimes of violence" separately from offenses warranting the perpetrator's classification as an "armed career criminal." Finally, the Court rejected the petitioner's "nontextual arguments," concluding that the legislative history did not support petitioner's interpretation; that the rule of lenity did not apply absent "ambiguity or uncertainty in the statute"; and that the Court need not entertain the petitioner's argument that Section 922(g)(9) should be narrowly construed because it implicated his constitutional right to bear arms because he had not challenged the statute as unconstitutional, and the meaning of the statute was clear.

42. ***Lexmark International, Inc. v. Static Control Components, Inc.*, No. 12-873 (6th Cir., 697 F.3d 387; cert. granted June 3, 2013; argued on Dec. 3, 2013). Whether the appropriate analytic framework for determining a party's standing to maintain an action for false advertising under the Lanham Act is (1) the factors set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45 (1983), as adopted by the Third, Fifth, Eighth, and Eleventh Circuits; (2) the categorical test, permitting suits only by an actual competitor, employed by the Seventh, Ninth, and Tenth Circuits; or (3) a version of the more expansive "reasonable interest" test, either as applied by the Sixth Circuit in this case or as applied by the Second Circuit in prior cases.**

Decided Mar. 25, 2014 (572 U.S. ___). Sixth Circuit/Affirmed. Justice Scalia for a unanimous Court. The Court held that an indirect competitor could assert a false or misleading advertising claim under the Lanham Act, 15 U.S.C. § 1125(a). To

establish that the competitor's claim was within the "zone of interests" protected by the statute, the competitor would have to allege injury to a commercial interest in reputation or sales; and, to establish proximate cause, the competitor would have to show economic or reputational injury flowing directly from the deception. Even though false advertising affects indirect competitors only through its effect on consumers, that causal chain is nevertheless sufficiently direct to sustain a cause of action. The Sixth Circuit had considered and rejected several approaches to deciding the "prudential standing" question at issue, including applying the *Associated General Contractors* antitrust standing factors or the "reasonable interest" approach favored in some Circuits. The Court flatly disagreed that the question was one of "prudential standing." The Court affirmed the Sixth Circuit's use of the "zone of interests" test, but stressed that the zone of interests analysis is a question of statutory interpretation, not prudential standing, to be decided using traditional tools of statutory interpretation.

43. ***United States v. Quality Stores, Inc.*, No. 12-1408 (6th Cir., 693 F.3d 605; cert. granted Oct. 1, 2013; argued on Jan. 14, 2014). Whether severance payments made to employees whose employment was involuntarily terminated are taxable under the Federal Insurance Contributions Act, 26 U.S.C. § 3101, *et seq*.**

Decided Mar. 25, 2014 (572 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Kennedy for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the case). The Court held that severance payments made to employees who are involuntarily terminated are taxable wages for purposes of the Federal Insurance Contributions Act ("FICA"). FICA's relevant text defines "wages" as "all remuneration for employment," and severance payments (which are remunerative payments made to employees only) fall within the plain meaning of this broad definition. A contrary interpretation would, the Court explained, render superfluous a statutory exemption excluding a defined subset of severance payments from the definition of wages, and also would deny effect to Congress's decision to repeal a FICA provision that had exempted all severance payments from the definition of wages. The Court also concluded that § 3402(*o*) of the Internal Revenue Code—which provides in relevant part that "any supplemental unemployment compensation benefit paid to an individual . . . shall be treated as if it were a payment of wages"—does not exclude severance payments from FICA's definition of wages. The Court reasoned that "§ 3402(*o*)'s command that all severance payments be treated 'as if' they were wages is in all respects consistent with the proposition that at least some severance payments are wages." The Court explained that Congress enacted § 3402(*o*) to address a tax-withholding problem that arose in a specific, narrow set of circumstances, not for the purpose of revising the Code's definition of "wages." Finally, the Court pointed out that severance payments like the ones at issue fall squarely within the definition of "wages" under the relevant provision of the Code. And Congress, the Court emphasized, intended the term "wages" to have the same meaning under FICA that it has under that provision of the Code.

44. ***Brandt Revocable Trust v. United States*, No. 12-1173 (10th Cir., 710 F.3d 1369; cert. granted Oct. 1, 2013; argued on Jan. 14, 2014). Whether the United States retained an implied reversionary interest in rights-of-way created by the General Railroad Right-of-Way Act of 1875 rights-of-way after the underlying lands were patented into private ownership.**

Decided Mar. 10, 2014 (572 U.S. ___). Tenth Circuit/Reversed and remanded. Chief Justice Roberts for an 8-1 Court (Sotomayor, J., dissenting). The Court held that a right of way conveyed to a railroad through the General Railroad Right-of-Way Act of 1875 was an easement that was terminated by the railroad's abandonment, and was not tantamount to a limited fee with an implied reversionary interest in the United States. The Court determined that the land which the United States had conveyed to the petitioner in a 1976 land patent, through which the 1875 Act right of way passed, was left unburdened after the railroad's abandonment of the easement. The Court relied on its decision in *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), in which the Court had adopted in full the United States' position that the 1875 Act "clearly grants only an easement, and not a fee." *Id.* at 271. In light of well-established common law property principles dictating that an easement disappears when abandoned by its beneficiary, the Court found that Brandt retained a full and unencumbered interest in the land after the railroad's abandonment of the right of way. The Court determined that the text of the 1875 Act did not support the United States' position that *Great Northern*'s characterization of the Act was limited only to the question of who owned oil and mineral rights beneath a right of way. The Court also declined to credit the Government's reliance on Supreme Court cases decided prior to *Great Northern* or the Government's citation to statutes enacted subsequent to the Act's passage, finding that later-enacted statutes do not define or shed light on the nature of the interest conveyed to a railroad pursuant to the 1875 Act.

45. ***BG Group PLC v. Argentina*, No. 12-138 (D.C. Cir., 665 F.3d 1363; CVSG Nov. 5, 2012; cert. opposed May 10, 2013; cert. granted June 10, 2013; SG as amicus, supporting vacatur and remand; argued on Dec. 2, 2013). Whether, in disputes involving a multi-staged dispute resolution process, a court or the arbitrator determines whether a precondition to arbitration has been satisfied.**

Decided Mar. 5, 2014 (572 U.S. __). D.C. Circuit/Reversed. Justice Breyer for a 7-2 Court (Sotomayor, J., concurring in part; Roberts, C.J., dissenting, joined by Kennedy, J.). The Court held that arbitrators, rather than courts, bear primary responsibility for determining whether parties to a dispute have adequately complied with the "local litigation" requirement (requiring parties to seek a decision from a local court prior to taking a dispute to arbitration) imposed by an investment treaty between the United Kingdom and Argentina. The Court found that the parties to the treaty intended the issue to be decided by arbitrators, as courts generally presume that parties intend for arbitrators to decide disputes about procedural preconditions to arbitration. The fact that this case involved a treaty made no difference to the Court's conclusion. In the Court's view, treaties are essentially contracts, and the parties' intent accordingly governs. The Solicitor

General had argued that courts should rigorously review compliance with procedural conditions, as such conditions might be a precondition of entering into the treaty. But, even if true, the importance of the condition was not conclusive, as parties often submit important issues to arbitration. In any event, the treaty at issue did not expressly state that the local litigation requirement was a "condition of consent," and the Court did not reach the question whether the result would be different if it did. Moreover, nothing in the treaty demonstrated the parties' intent to overcome the ordinary presumption that such issues are to be decided by arbitrators.

46. ***Lozano v. Alvarez*, No. 12-820 (2d Cir., 697 F.3d 41; CVSG Mar. 18, 2013; cert. supported May 24, 2013; cert. granted June 24, 2013; SG as amicus, supporting respondent; argued on Dec. 11, 2013). Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction provides that an abducted child must be returned to the left-behind parent if that parent's petition for the child's return is filed within one year of the abduction. The question presented is whether a district court considering a petition under the Hague Convention on the Civil Aspects of International Child Abduction for the return of an abducted child may equitably toll the running of the one-year filing period when the abducting parent has concealed the whereabouts of the child from the left-behind parent.**

Decided Mar. 5, 2014 (572 U.S. __). Second Circuit/Affirmed. Justice Thomas for a unanimous court (Alito, J., concurring, joined by Breyer, J., Sotomayor, J.). The Court held that equitable tolling is not available under the Hague Convention on the Civil Aspects of International Child Abduction, which provides a near-automatic return remedy for children who have been abducted to another country if the non-abducting parent files a petition within one year after the abduction. In this case, the petitioner claimed he was unable to file a request for return of his daughter within the one year period under the Convention because his daughter's location was concealed from him. Petitioner argued that the common-law doctrine of equitable tolling applied. The Court reasoned, however, that while equitable tolling may be applied to federal statutes because Congress enacts laws against the backdrop of common law, the same may not be said for international laws and treaties. Even if the doctrine could be applied to international law, equitable tolling is only applicable to statutes of limitations, and the one-year period does not qualify as a statute of limitations, which characteristically engenders a policy of repose. Here, failure to petition within the one-year period did not eliminate the petitioner's remedies. Courts may order return of the child after one year, unless it is demonstrated that the child is now settled in her new environment. The petitioner further argued that equitable tolling was appropriate given the goals of the Convention to discourage child abductions. However, the Court reasoned that the return remedy may be trumped by the best interests of the child. The Court also noted that concealment may, as a factual matter, prevent "settlement" of a child in a new location.

47. ***Rosemond v. United States*, No. 12-895 (10th Cir., 695 F.3d 1151; cert. granted May 28, 2013; argued on Nov. 12, 2013). Whether the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) and (2), requires proof of (i) intentional facilitation or encouragement of the use of the firearm, as held by the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, or (ii) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated, as held by the Sixth, Tenth, and District of Columbia Circuits.**

Decided Mar. 5, 2014 (571 U.S. __). Tenth Circuit/Vacated and remanded. Justice Kagan for a 7-2 court (Scalia, J., joining as to all but footnotes 7 and 8; Alito, J., concurring in part and dissenting in part, joined by Thomas, J.). The Court held that to make a case against a defendant for aiding and abetting a violation of 18 U.S.C. § 924(c), which prohibits "us[ing] or carr[ying] a firearm" "during and in relation to any crime of violence or drug trafficking crime," the Government must show that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission. The Court explained that a person is liable under the federal aiding and abetting statute, 18 U.S.C. § 2, if and only if that person (1) takes an affirmative act in furtherance of the offense (2) with the intent of facilitating that offense's commission, and, as the Court has previously found (*see*, *e.g.*, *Pereira v. United States*, 347 U.S. 1, 12 (1954); *Bozza v. United States*, 330 U.S. 160, 165 (1947)), the intent requirement is satisfied when a person actively participates with full knowledge of the circumstances constituting the charged offense. Thus, an active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun, but not when he knows nothing of a gun until it appears at the scene. "Advance knowledge" is required, which the Court defined as knowledge that provides the defendant a "realistic opportunity to quit the crime."

48. ***Law v. Siegel*, No. 12-5196 (9th Cir., 435 F. App'x 697; CVSG Dec. 3, 2012; cert. opposed May 14, 2013; cert. granted June 17, 2013; SG as amicus, supporting respondent; argued on Jan. 13, 2014). Whether the Ninth Circuit erred in allowing the bankruptcy trustee to surcharge the debtor's constitutionally protected homestead property.**

Decided Mar. 4, 2014 (571 U.S. __). Ninth Circuit/Affirmed. Justice Scalia for a unanimous Court. The Court held that a bankruptcy court may not order that a debtor's exempt assets be made available to pay administrative expenses incurred as a result of the debtor's misconduct. Although bankruptcy courts have statutory authority to "carry out" the provisions of the bankruptcy code, 11 U.S.C. § 105(a), and "inherent power . . . to sanction 'abusive litigation practices,'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375-76 (2007), they may not exercise those powers in a manner that contravenes specific provisions of the Bankruptcy Code. They are accordingly bound by 18 U.S.C. § 522(b)(1), which permits a debtor to

"exempt" certain assets from the bankruptcy estate. Beyond the specific exceptions enumerated in the Code, exempt assets are not liable for the payment of expenses incurred by the trustee in administering the estate. 18 U.S.C. § 522(k). The Court acknowledged that a different result may apply where a debtor seeks to rely on exemptions created by state law, as state law governs the scope of state-created exemptions. Moreover, debtor misconduct may be grounds for denial of discharge, sanctions that survive the bankruptcy case, and criminal prosecution under 18 U.S.C. § 152, which criminalizes fraudulent conduct in a bankruptcy case.

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49. ***Lawson v. FMR, LLC*, No. 12-3 (1st Cir., 670 F.3d 61; CVSG Oct. 9, 2012; cert. opposed Apr. 9, 2013; cert. granted May 20, 2013; SG as amicus, supporting petitioners; argued on Nov. 12, 2013). 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.**

Decided Mar. 4, 2014 (571 U.S. __). First Circuit/Reversed and remanded. Justice Ginsburg for a 6-3 Court (Scalia, J., concurring in principal part and concurring in the judgment, joined by Thomas, J.; Sotomayor, J., dissenting, joined by Kennedy and Alito, J.J.). The Court held that Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A—which provides that "[n]o [public] company . . . , or any . . . contractor of such company, may discharge . . . an employee because of [whistleblowing activity]"—protects employees of privately held contractors and subcontractors that render services to public companies. The Court declined to limit the term "employee" to mean "employee of a public company" due to the lack of any such qualification in the provision's text. A narrower reading, the Court concluded, would "shrink to insignificance" Section 1514A's ban on contractor retaliation because a contractor ordinarily cannot take adverse action against a public company's employees. The Court also believed that its interpretation furthered the congressional goal of preventing "another Enron debacle" by protecting whistleblowing employees of outside contractors such as accountants and attorneys. And the Court observed that Congress borrowed Section 1514A's language from a parallel provision in another statute that had been read to cover contractor employees. While the Court acknowledged concerns over extending whistleblower protection to personal employees of public company officers, it dismissed those "hypothetical" risks as readily addressed through judicial "limiting principles" or statutory amendment. And at any rate, the Court concluded, an over-inclusive reading of Section 1514A would be far less harmful than an under-inclusive one that eliminated whistleblower protection for lawyers, accountants, and "the entire mutual fund industry."

50. ***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; SG as amicus, supporting petitioners; argued on Oct. 7, 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.

Decided Feb. 26, 2014 (571 U.S. ___). Fifth Circuit/Affirmed. Justice Breyer for a 7-2 Court (Thomas, J., concurring; Kennedy, J., dissenting, joined by Alito, J.). The Court held that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which bars state law securities class actions pertaining to misrepresentations "in connection with" certain "covered securities," does not bar state law actions in which plaintiffs allege that they purchased *uncovered* securities based on false representations that they were backed by covered securities. Plaintiffs alleged that Allen Stanford and several of his companies conducted a multi-million dollar Ponzi scheme that involved selling uncovered certificates of deposit purportedly backed by highly lucrative covered securities. The Court found that the SLUSA did not apply. The SLUSA's reference to misrepresentations "in connection with" covered securities applies only to misrepresentations that are "material to a decision by one or more individuals (other than the fraudster) to buy or sell a 'covered security.'" This conclusion was compelled by the language of the statute, which suggests "a connection that matters"; by the Court's prior case law; by the larger regulatory context of the securities laws, which generally focus on transactions involving statutorily relevant securities; and by the need to avoid unduly limiting the scope of protection under state laws that provide remedies to victims of garden-variety fraud.

51. ***United States v. Apel*, No. 12-1038 (9th Cir., 676 F.3d 1202; cert. granted June 3, 2013; argued on Dec. 4, 2013). Whether 18 U.S.C. § 1382, which prohibits a person from reentering a military installation after a commanding officer has ordered him not to reenter, may be enforced on a portion of a military installation that is subject to a public roadway easement.**

Decided Feb. 26, 2014 (571 U.S. ___). Ninth Circuit/Reversed and remanded. Chief Justice Roberts for a unanimous court (Ginsburg, J., concurring, joined by Sotomayor, J.; Alito, J., concurring). The Court held that 18 U.S.C. § 1382, which makes it illegal for a person to reenter a "military . . . installation" after having been ordered not to do so by "any officer or person in command," applies to all property within the defined boundaries of a military place that is under the command of a military officer. The Ninth Circuit's contrary rule, requiring that the military have the exclusive right of possession, would frustrate the administration of military facilities and would raise difficult questions for judges, who are not experts in military operations. The Court thus concluded that Section 1382 was properly applied to the petitioner, a protestor who was arrested after returning to a portion of a military base covered by a road easement for a public highway, as the record demonstrated that the area was under military command. The Court declined to address the petitioner's as-applied First Amendment challenge because it was not addressed by the court below.

52. ***Fernandez v. California*, No. 12-7822 (Cal. Ct. App., 208 Cal. App. 4th 100; cert. granted May 20, 2013; SG as amicus, supporting respondent; argued on Nov. 13, 2013). Whether, under *Georgia v. Randolph*, 547 U.S. 103 (2006), a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant's previously stated objection, while physically present, to a warrantless search is a continuing assertion of Fourth Amendment rights which cannot be overridden by a co-tenant.**

Decided Feb. 25, 2014 (571 U.S. ___). California Supreme Court/Affirmed. Justice Alito for 6-3 Court. (Scalia, J. concurring; Thomas, J. concurring; Ginsburg, J. dissenting, joined by Sotomayor and Kagan, J.J.). The Court held that if an occupant of a residence consents to a warrantless search, the search is reasonable even if an absent co-occupant has refused to consent. In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court had held that even if one occupant consents, another occupant's refusal to consent controls, but *Randolph* was expressly limited to situations where the non-consenting occupants are physically present at the time of the search. In this case, the petitioner refused to consent to a search but was then reasonably arrested by the police. An hour after his removal from the residence, the police began a search with the other occupant's consent. The petitioner argued that his absence should not be controlling because he had been forcibly removed by the police, and because his objection, made while he was still present in the residence, should have remained in effect after he was arrested. The Court, seeking to preserve the administrative simplicity of the *Randolph* rule, found both of these arguments unpersuasive.

53. ***Kaley v. United States*, No. 12-463 (11th Cir., 677 F.3d 1316; cert. granted Mar. 18, 2013; argued on Oct. 16, 2013). When a post-indictment, *ex parte* restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges?**

Decided Feb. 25, 2014 (571 U.S. ___). Eleventh Circuit/Affirmed. Justice Kagan for a 6-3 Court (Roberts, C.J., dissenting, joined by Breyer, and Sotomayor, J.J.). The Court held that, in a hearing to determine whether there is probable cause to believe that property will be subject to forfeiture at the conclusion of criminal proceedings (and thus whether the defendant can be barred from using the property pending trial), a criminal defendant cannot challenge a grand jury's finding of probable cause to believe the defendant committed the crimes charged. The Court stressed the singular role of the grand jury in finding the probable cause necessary to initiate a prosecution for a serious crime. If judicial review of the grand jury is not necessary before a defendant can be deprived of liberty and charged with a crime, judicial review also is not necessary before the defendant's property rights can be restrained. A contrary rule would undermine the Government's ability to prove its case or preserve forfeitable property, as the Government would be effectively required to prove its entire case (disclosing its witness list and other evidence) prior to trial.

54. ***Walden v. Fiore*, No. 12-574 (9th Cir., 688 F.3d 558; cert. granted Mar. 4, 2013; SG as amicus, supporting petitioner; argued on Nov. 4, 2013). The Questions Presented are: (1) Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State. (2) Whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue under 28 U.S.C. § 1391(b)(2) even if the defendant's alleged acts and omissions all occurred in another district.**

Decided Feb. 25, 2014 (571 U.S. ___). Ninth Circuit/Reversed. Justice Thomas for a unanimous Court. The Court held that a court in Nevada could not exercise personal jurisdiction over a defendant solely on the ground that the defendant knew his allegedly tortious conduct in Georgia would delay return of funds to plaintiffs with connections to Nevada. The "minimum contacts" required by due process must arise out of the defendant's contacts with the State, not the contacts of the plaintiff. In addition, those contacts must be with the State itself, not merely with individuals who live there. A plaintiff cannot be the sole contact between the defendant and the forum. These principles apply equally in cases involving intentional torts; where a defendant intentionally causes harm to a plaintiff in a forum, courts permit jurisdiction based on that harm only where it creates a contact between the forum and *the defendant*. Applying these principles, the Court held that jurisdiction could not be established simply because the defendant's intentional conduct caused the plaintiffs to lose access to their funds in Nevada. Plaintiffs lost access to their funds in Nevada not because anything happened in Nevada, but rather because plaintiffs lived in Nevada. That fact did not establish a sufficient link between the defendant and the forum for purposes of establishing personal jurisdiction.

55. ***Air Wisconsin Airlines Corp. v. Hoeper*, No. 12-315 (Sup. Ct. Colo., 2012 CO 19; CVSG Jan. 7, 2013; cert. supported May 17, 2013; cert. granted June 17, 2013; SG as amicus, supporting petitioner; argued on Dec. 9, 2013). Whether immunity under the Aviation and Transportation Security Act ("ATSA"), 49 U.S.C. § 44941, may be denied to airlines and their employees without a determination that the air carrier's disclosure was materially false.**

Decided Jan. 27, 2014 (571 U.S. ___). Colorado Supreme Court/Reversed. Justice Sotomayor for a 6-3 Court (Scalia, J., joined by Kagan, J., Thomas, J., concurring in part and dissenting in part). The ATSA requires airlines and their employees to report to the Transportation Security Administration ("TSA") any and all potential security threats to the Nation's air transportation system. To encourage such reports, the ATSA provides a broad grant of immunity from suit, shielding airlines and their employees from all liability, including liability for state-law defamation. *See* 49 U.S.C. § 44941. The Court held that, under the ATSA, an airline or its employee may not be denied immunity for reporting suspicious behavior to the TSA absent a finding that the report was materially false. Congress patterned the exception to ATSA immunity after the actual malice

standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and that standard has long required a finding of material falsity. The Court presumed that Congress meant to incorporate this settled understanding. The Court also held that, in this context, material falsity means the falsehood had a natural tendency to influence a reasonable TSA officer's determination of an appropriate response. Air Wisconsin's statements to the TSA—that Respondent was a Federal Flight Deck Officer ("FFDO") "who may be armed," that the airline was "concerned about his mental stability and the whereabouts of his firearm," and that an "[u]nstable pilot in [the] FFDO program was terminated today"—were, as a matter of law, not materially false. Any minor inaccuracies in those statements would not have affected a reasonable TSA officer's determination of an appropriate response. The court below erred by finely parsing the language of the airline's statements to TSA.

56. ***Burrage v. United States*, No. 12-7515 (8th Cir., 687 F.3d 1015; cert. granted Apr. 29, 2013; argued on Nov. 12, 2013). The Questions Presented are: (1) Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement. (2) Whether a person can be convicted for distribution of heroin causing death using jury instructions which allow a conviction when the heroin that was distributed "contributed to," death by "mixed drug intoxication," but was not the sole cause of death of a person.**

Decided Jan. 27, 2014 (571 U.S. __). Eighth Circuit/Reversed and remanded. Justice Scalia for a unanimous Court (Alito, J., joining as to all but Part III-B; Ginsburg, J., concurring in the judgment, joined by Sotomayor, J.). The Court held that a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C), which applies when "death or serious bodily injury results from the use of" a controlled substance distributed by the defendant, unless the use of the drug is a but-for cause of the death or bodily injury. Because the Controlled Substances Act does not define "results from," the Court applied the ordinary meaning of the phrase, which imposes a requirement of actual causation. The Court rejected the Government's argument that "results from" should include instances where use of a drug is a contributing, though not sufficient, cause, finding it inappropriate to "give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." The Court also rejected the Government's contention that the ordinary meaning of "results from" "cannot be reconciled with sound policy," observing that, although in its estimation the opposite may well be true, in any event the Court's role is to apply the statute as written. Having resolved that the defendant was not liable for penalty enhancement under § 841(b)(1)(C), the Court did not reach the second question on which it granted certiorari.

57. ***Sandifer v. United States Steel Corp.*, No. 12-417 (7th Cir., 678 F.3d 590; cert. granted Feb. 19, 2013; limited to Question 1; SG as amicus, supporting respondent; argued on Nov. 4, 2013). Under the Fair Labor Standards Act, the period of time during which a covered employee must be paid begins when the worker engages in a principal activity. Under 29 U.S.C. § 203(*o*) of**

the Act, however, an employer need not compensate worker for time spent "changing clothes" if that time is expressly excluded from compensable time under a bona fide collective bargaining agreement applicable to that worker. Does donning and doffing safety gear constitute "changing clothes" within the meaning of § 203(*o*)?

Decided Jan. 27, 2014 (571 U.S. ___). Seventh Circuit/Affirmed. Justice Scalia for a unanimous Court (Sotomayor, J., joining except as to footnote 7). The Court held that the time petitioner steel workers spend donning and doffing protective gear is not compensable by operation of the Fair Labor Standards Act, 29 U.S.C. § 203(*o*). That statute provides that the compensability of time spent "changing clothes" is an issue properly committed to the collective bargaining process, and the collective bargaining agreement between the parties made such time non-compensable. The Court adopted the plain meaning of the statutory phrase "changing clothes," as defined in dictionaries from the era of § 203(*o*)'s enactment. The Court found that "clothes" refers to "items that are both designed and used to cover the body and are commonly regarded as articles of dress," and that "changing" encompasses both substituting and altering one's dress. Applying those definitions, the Court held that petitioners' donning and doffing of the protective gear at issue—hoods, jackets, pants, and boots—qualifies as "changing clothes" within the meaning of § 203(*o*) because the protective gear was used to cover petitioners' bodies and was worn over or in place of petitioners' street clothes. The Court noted that three items of protective gear—safety glasses, earplugs, and respirators—do not satisfy this standard, but held that the relevant question was whether "the period at issue can, *on the whole*, be fairly characterized" as time spent changing clothes. The district court had found that the time donning and doffing safety glasses and earplugs was minimal and that respirators were only worn as needed, and the Court declined to disturb that factual conclusion.

58. ***Medtronic Inc. v. Mirowski Family Ventures, LLC.*, No. 12-1128 (Fed. Cir., 695 F.3d 1266; cert. granted May 20, 2013; SG as amicus, supporting petitioner; argued on Nov. 5, 2013). Whether, in a declaratory judgment action brought by a licensee under *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), the licensee has the burden to prove that its products do not infringe the patent, or whether (as is the case in all other patent litigation, including other declaratory judgment actions), the patentee must prove infringement.**

Decided Jan. 22, 2014 (571 U.S. ___). Federal Circuit/Reversed and remanded. Justice Breyer for a unanimous Court. The Court held that, where a licensee brings a declaratory judgment action seeking a declaration of non-infringement, the patentee retains the burden of proving infringement. At the outset, responding to an argument by *amici*, the Court found that it had subject matter jurisdiction, as the defendant patentee could bring a federal suit for infringement if the plaintiff licensee did not pay royalties. Then, turning to the merits, the Court explained that it was following established case law holding that the burden of persuasion in patent infringement cases rests with the patentee. The Court observed that the Declaratory Judgment Act is "procedural," whereas the burden of proof is a

substantive aspect of a claim that does not change simply because the lawsuit is framed as a suit for declaratory judgment. The Court noted several practical considerations supporting its decision. First, shifting the burden would create uncertainty, particularly in situations where the evidence was inconclusive, and might lead either to continued infringement or to further litigation by the patentee to fully establish its rights. Second, shifting the burden could make it difficult for a licensee to determine the theory on which a patentee's infringement claim rests, as the patentee is in the best position to clarify where, how, and why a product infringes. Finally, shifting the burden could undermine the purpose of the Declaratory Judgment Act by creating a significant obstacle to the use of the mechanism by licensees to clarify their legal rights.

59. ***Ray Haluch Gravel Co. v. Central Pension Fund*, No. 12-992 (1st Cir., 695 F.3d 1; cert. granted June 17, 2013; argued on Dec. 9, 2013). Whether a district court's decision on the merits that leaves unresolved a request for contractual attorney's fees is a "final decision" under 28 U.S.C. § 1291, which provides that courts of appeals have jurisdiction of appeals from final decisions of the district court.**

Decided Jan. 15, 2014 (571 U.S. __). First Circuit/Reversed and remanded. Justice Kennedy for a unanimous Court. The Court held that, even where a claim for attorney's fees is based in contract rather than a statute, the pendency of a claim for attorney's fees does not prevent the merits of the judgment from becoming final for purposes of appeal. The Court followed its prior decision in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), which found that fee awards are collateral to the merits because they do not remedy the injury giving rise to the action, are often available to the defending party, and are, at common law, an element of "costs" awarded to a prevailing party. Even if statutes authorizing fees might sometimes support treating fees as part of the merits, the Court in *Budinich* reasoned that consistency and predictability in the overall application of § 1291 favored a uniform rule. Likewise, the Court here declined to distinguish *Budinich* on the ground the attorney's fees were liquidated damages under the contract and thus, part of the merits. The Court acknowledged a legitimate concern with avoiding piecemeal litigation, but concluded that the interest in determining with promptness and clarity whether the ruling on the merits will be appealed outweighed that consideration. Moreover, the Court noted that the rules already provide sufficient protection against piecemeal litigation, as the district court can provide that a motion for fees will toll the time to bring an appeal. Finally, the Court deemed it irrelevant that some of the claimed fees accrued before the complaint was filed.

60. ***Daimler AG v. Bauman*, No. 11-965 (9th Cir., 644 F.3d 909; cert. granted Apr. 22, 2013; SG as amicus, supporting petitioner; argued on Oct. 15, 2013). Whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.**

Gibson Dunn
Counsel for
Daimler AG

Decided Jan. 14, 2014 (571 U.S. __). Ninth Circuit/Reversed. Justice Ginsburg for a unanimous Court (Sotomayor, J., concurring in the judgment). The Court held that, under the Fourteenth Amendment's Due Process Clause, a court may exercise general personal jurisdiction over a foreign corporation only when that corporation's contacts with the forum State are so "constant and pervasive" as to render it "at home" there. Generally, a corporation's "home" is its "place of incorporation and principal place of business." The Court therefore reversed the Ninth Circuit, which had held that a court in California could exercise general personal jurisdiction over petitioner, a German corporation, in a case involving only foreign plaintiffs and conduct occurring entirely abroad, based solely on the forum contacts of the petitioner's American subsidiary. As the Court explained, even if petitioner's subsidiary both qualified as its agent and was at "home" in California, petitioner itself was neither incorporated in California nor had its principal place of business there. The Ninth Circuit consequently erred in concluding that petitioner could be subject to "claims by foreign plaintiffs having nothing to do with anything that had occurred or had its principal impact in California."

61. ***Mississippi ex rel. Hood v. AU Optronics Corp.*, No. 12-1036 (5th Cir., 701 F.3d 796; cert. granted May 28, 2013; argued on Nov. 6, 2013). Whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.**

Decided Jan. 14, 2014 (571 U.S. __). Fifth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that an action filed by a State as the sole plaintiff does not qualify as a "mass action" under the Class Action Fairness Act ("CAFA"), irrespective of whether the action in substance seeks relief for more than 100 persons. The plain text of CAFA states that a "mass action" must be brought by "100 or more persons," not "100 or more named or unnamed real parties in interest." Had Congress intended unnamed parties in interest to suffice, it would have drafted language to that effect, as it did in CAFA's "class action" provision. Congress instead used the word "persons" as it is used in Federal Rule of Civil Procedure 20, which uses "persons" to refer to named plaintiffs. Respondents' contrary interpretation also cannot be squared with the statute's requirement that the claims of the "100 or more persons" be proposed for joint trial "on the ground that the plaintiffs' claims involve common questions of law or fact," as it is difficult to conceive how the claims of unnamed and named plaintiffs could be proposed for joint trial on that basis. This difficulty cannot be reconciled by interpreting "plaintiff" to include unnamed parties, as the amount-in-controversy requirement would then require an unwieldy determination of whether the claims of each unnamed party exceed $75,000. Moreover, this reading is reinforced by statutory context. The provision governing transfer of CAFA actions, which states that mass actions cannot be transferred unless requested by "a majority of the plaintiffs," would be unworkable if it referred to unnamed parties in interest. Congress in the "mass action" provision was concerned that plaintiffs would circumvent class action removal rules by naming a large number of

individual plaintiffs; if Congress was concerned with actions brought by the State on behalf of unnamed interested parties, it would have dealt with that concern through the "class action" provision.

62. ***Heimeshoff v. Hartford Life Insurance,*** **No. 12-729 (2d Cir., 496 F. App'x 129; cert. granted Apr. 15, 2013; SG as amicus, supporting petitioner; argued on Oct. 15, 2013). The Question Presented is when a statute of limitations should accrue for judicial review of a disability adverse benefit determination under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002, *et seq*.**

Decided Dec. 16, 2013 (571 U.S. __). Second Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held enforceable a provision of an ERISA plan agreement requiring that an action to recover benefits due under the terms of the plan under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), be brought within three years after "proof of loss" is due. The Court rejected the contention that, because a plaintiff would have to exhaust administrative remedies after proof of loss was due, the provision contravened the usual rule that a limitations period should not commence until the claim accrues. Under *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586 (1947), a contractual limitations provision is enforceable so long as the limitations period is of reasonable length and there is no controlling statute to the contrary. That principle is especially appropriate in the context of an ERISA plan because of the importance of enforcing plan terms as written under Section 502(a)(1)(B). The Court held that the plan's limitations period of three years after proof of loss is due was not unreasonably short because the plan called for most claims to be resolved within one year after proof of loss is filed, leaving two years remaining to file suit. Although the review process for the petitioner's claim required more time than usual, it still left her with approximately one year to file suit. The Court further held that the contractual limitations period was not contrary to ERISA because it was unlikely to cause participants to shortchange the internal review process and unlikely to endanger judicial review. Plan administrators cannot prevent judicial review by delaying the resolution of claims in bad faith because failure to meet regulatory deadlines is grounds for immediate judicial review, and traditional defenses of waiver and estoppel are available where appropriate. Finally, the Court held that the limitations period is not tolled as a matter of course during internal review. State law tolling rules are inapplicable during internal review because the limitations period is set by contract and not borrowed from state law.

63. ***Kansas v. Cheever,*** **No. 12-609 (Kan., 284 P.3d 1007; cert. granted Feb. 25, 2013; limited to Question 1; SG as amicus, supporting petitioner; argued on Oct. 16, 2013). When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant?**

Decided Dec. 11, 2013 (571 U.S. __). Kansas Supreme Court/Vacated and remanded. Justice Sotomayor for a unanimous Court. The Court reaffirmed the "settled rule" of *Buchanan v. Kentucky*, 483 U.S. 402 (1987), that where a defense expert examines a criminal defendant and testifies that the defendant lacked the requisite mental state to commit the crime charged, the Fifth Amendment does not prohibit the Government from introducing in rebuttal evidence from a court-ordered psychological evaluation of the defendant. This rule is consistent with the principle that a criminal defendant who chooses to testify to facts favorable to himself may not then invoke the Fifth Amendment to shield himself from cross-examination on those facts. The Court explained that the Kansas Supreme Court misconstrued *Buchanan* insofar as it read its holding as limited to cases in which a defense is premised on a "mental disease or defect"—a category that would not include the defense of voluntary intoxication by ingesting methamphetamine raised by Respondent Cheever below. Rather, *Buchanan* upheld admission of psychological expert evidence to rebut defenses based on "mental status," a broader term than "mental disease or defect." The Court also found it irrelevant that Cheever's voluntary intoxication was "temporary"; the defense at issue in *Buchanan* (extreme emotional disturbance) involved a temporary condition as well. The Court declined to address in the first instance whether the testimony of the State's rebuttal expert exceeded the "limited rebuttal purpose" permitted by the Fifth Amendment or by the State's evidentiary rules (which, the Court noted, could impose requirements more stringent than the constitutional "ceiling") and remanded the case for further proceedings.

64. ***Sprint Communications Co. v. Jacobs*, No. 12-815 (8th Cir., 690 F.3d 864; cert. granted Apr. 15, 2013; argued on Nov. 5, 2013). Whether the Eighth Circuit erred by concluding, in conflict with decisions of nine other circuits and this Court, that *Younger* abstention is warranted not only when there is a related state proceeding that is "coercive" but also when there is a related state proceeding that is "remedial."**

Decided Dec. 10, 2013 (571 U.S. __). Eighth Circuit/Reversed. Justice Ginsburg for a unanimous Court. The Court held that federal court abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is inappropriate where parallel state court proceedings involve the same subject matter as the federal case but do not fall into one of the three established categories for *Younger* abstention. The Eighth Circuit had found abstention appropriate in a case involving review of an Iowa Utilities Board order because, despite clear federal jurisdiction over the action, parallel state proceedings involving the same issues were ongoing. The Court, however, noted that federal courts ordinarily have an obligation to hear cases over which federal jurisdiction is proper, and explained that the limited exceptions it has recognized to this rule under the *Younger* line of cases apply only in "exceptional circumstances." The Court has applied *Younger* in three categories, but this case falls into none of them: The underlying action is not a pending state criminal action, it does "not touch on a state court's ability to perform its judicial function," and it is not similar enough to criminal proceedings to qualify as a civil enforcement action. The Court further held that these three categories "define *Younger*'s scope." The factors the Eighth Circuit had considered in its abstention

decision—whether the ongoing state proceedings "implicate[d] important state interests" and provided "an adequate opportunity to raise [federal] challenges"—are not dispositive, but are simply "*additional* factors appropriately considered" before a federal court invokes *Younger* to abstain from a case that otherwise falls within one of the established categories.

65. ***Unite Here Local 355 v. Mulhall*, No. 12-99 (11th Cir., 667 F.3d 1211; CVSG Jan. 14, 2013; cert. opposed May 24, 2013; cert. granted June 24, 2013; SG as amicus, supporting petitioner; argued on Nov. 13, 2013). Whether an employer and union may violate Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forgo its rights to picket, boycott, or otherwise put pressure on the employer's business.**

Decided Dec. 10, 2013 (571 U.S. __). The writ of certiorari was dismissed as improvidently granted. Justice Breyer dissented, joined by Justices Sotomayor and Kagan.

66. ***Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, No. 12-929 (5th Cir., 701 F.3d 736; cert. granted Apr. 1, 2013; argued on Oct. 9, 2013). Whether the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), changed the standard for enforcement of forum-selection clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a), and (2) If so, whether district courts should allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause.**

Decided Dec. 3, 2013 (571 U.S. ____). Fifth Circuit/Reversed and remanded. Justice Alito for a unanimous Court. The Court held that a district court should not enforce a forum-selection clause by dismissing an action as filed in the "wrong" or "improper" venue, but should transfer the case absent "extraordinary circumstances." First, the Court held that a forum-selection clause is irrelevant to motions to dismiss for filing in the "wrong" venue under 28 U.S.C. § 1406(a), or an "improper" venue under Federal Rule of Civil Procedure 12(b)(3). "Wrong" and "improper" mean a failure to meet the requirements of 28 U.S.C. § 1391, the general district court venue statute, which "say[s] nothing" about forum-selection clauses. However, a court should approve a motion under 28 U.S.C. § 1404(a) to transfer the action to a bargained-for, otherwise-appropriate district court unless there are "extraordinary circumstances unrelated to the convenience of the parties" that "clearly disfavor" transfer. To avoid "unnecessarily disrupt[ing] the parties' settled expectations," the usual § 1404(a) analysis requires modification. First, the plaintiff bears the burden of establishing that transfer is unwarranted. Second, the private interests of the parties should not be considered because they are already accounted for in the contract. Third, upon transfer, the receiving court's choice-of-

law rules control, not those of the originating court. The Court further held that the same framework governs the analysis of a *forum non conveniens* motion brought to enforce a forum-selection clause specifying a nonfederal forum.

67. ***United States v. Woods*, No. 12-562 (5th Cir., 471 F. App'x 320; cert. granted Mar. 25, 2013; argued on Oct. 9, 2013). The Questions Presented are: (1) Whether Section 6662 of the Internal Revenue Code, which prescribes a penalty for an underpayment of federal income tax that is "attributable to" an overstatement of basis in property, applies to an underpayment resulting from a determination that a transaction lacks economic substance because the sole purpose of the transaction was to generate a tax loss by artificially inflating the taxpayer's basis in property. (2) Whether the district court had jurisdiction in this case under 26 U.S.C. § 6226 to consider the substantial valuation misstatement penalty.**

Decided Dec. 3, 2013 (571 U.S. ___). Fifth Circuit/Reversed and remanded. Justice Scalia for a unanimous Court. Respondents had engaged in a series of transactions for the purpose of reducing their taxable income, which included, among other things, creating partnerships and inappropriately valuing the basis in their partnership interests. The IRS determined that the Respondents' partnerships lacked economic substance and that Respondents should be subject to a tax underpayment penalty pursuant to Section 6662(b)(3) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"). The Court agreed, holding, first, that TEFRA gives courts in partnership-level proceedings jurisdiction to determine the applicability of any valuation-misstatement tax penalty that could result from an adjustment to a partnership item, even if imposing the penalty would also require determining affected or non-partnership items such as outside basis. The Court stressed that the partnership-level applicability determination is provisional: the court may decide only whether adjustments properly made at the partnership level have the potential to trigger the penalty. Each partner remains free to raise, in subsequent, partner-level proceedings, any reasons why the penalty may not be imposed on him specifically. Second, the Court held that tax underpayment penalties attributable to valuation misstatements apply to an underpayment resulting from the use of tax shelters. Specifically, Section 6662(b)(3)'s penalty applies to the portion of any underpayment that is "attributable to" a "substantial" or "gross" "valuation misstatement," which exists where "the value of any property (or the *adjusted basis* of any property) claimed on any return of tax" exceeds by a specified percentage "the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be)." 26 U.S.C. §§ 6662(a), (b)(3), (e)(1)(A), (h) (emphasis added). Because calculating an "adjusted basis" requires the application of a host of legal rules, including specialized rules for calculating the adjusted basis of a partner's interest in a partnership, the penalty provision covers not only factual misrepresentations about an asset's worth or cost, but also misrepresentations arising out of legal errors such as whether a partnership lacks economic substance and should be disregarded for tax purposes. To hold otherwise, the Court reasoned, would read "adjusted" out of the statute.

68. ***Mount Holly, N.J. v. Mt. Holly Gardens Citizens*, No. 11-1507 (3d Cir., 658 F.3d 375; CVSG Oct. 29, 2012; cert. opposed May 17, 2013; cert. granted June 17, 2013; argued on Dec. 4, 2013; petition dismissed pursuant to Rule 46 Nov. 15, 2013). Whether disparate impact claims are cognizable under the Fair Housing Act, 42 U.S.C. § 3604(a).**

Dismissed Nov. 15, 2013. The petition was dismissed pursuant to Rule 46.

69. ***Burt v. Titlow*, No. 12-414 (6th Cir., 680 F.3d 577; cert. granted Feb. 25, 2013; SG as amicus, supporting petitioner; argued on Oct. 8, 2013). The Questions Presented are: (1) Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective for allowing respondent to maintain his claim of innocence. (2) Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea. (3) Whether *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), which expanded ineffective-assistance-of-counsel claims to include rejected plea offers, always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.**

Decided Nov. 5, 2013 (571 U.S. __). Sixth Circuit/Reversed. Justice Alito for a unanimous Court (Sotomayor and Ginsburg, J.J., concurring in the judgment). The Court reaffirmed that "[w]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, . . . the federal court [must] use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt" under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Strickland v. Washington*, 466 U.S. 668 (1984). The Court explained that "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court," requires that federal habeas courts be "highly deferential" to state courts' factual and legal determinations, and "recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." Here, the Court concluded that the record "readily support[ed]" both the state court's factual findings regarding the plea bargain at issue and the state court's legal conclusion that counsel was not ineffective. The state court record contained ample evidence that the prisoner maintained his claim of innocence and had second thoughts about confessing in open court: for example, he passed a polygraph test denying that he was in the room when the victim was killed, and discussed the case with a prison guard who advised against pleading guilty if he was innocent. The Sixth Circuit's failure to credit the state court's reasonable factual finding resulted in a failure to apply the doubly-deferential standard of review required by AEDPA. The Court further concluded that the record contained no evidence that counsel gave inadequate advice on whether to withdraw the plea, and thus the silent record was insufficient to overcome *Strickland*'s "strong[] presum[ption]" that counsel "rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment."

70. ***Cline v. OK Coalition for Reproductive Justice*, No. 12-1094 (Sup. Ct. Ok., 292 P.3d 27; cert. granted June 27, 2013). Oklahoma law requires that abortion-inducing drugs be administered according to the protocol described on the drugs' FDA-approved labels. The Question Presented is whether the Oklahoma Supreme Court erred in holding that this Oklahoma law is facially unconstitutional under *Planned Parenthood v. Casey*.**[1]

Decided Nov. 4, 2013 (571 U.S. ___). The writ of certiorari was dismissed as improvidently granted.

71. ***Madigan v. Levin*, No. 12-872 (7th Cir., 692 F.3d 607; cert. granted Mar. 18, 2013; argued on Oct. 7, 2013). Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.**

Decided Oct. 15, 2013 (571 U.S. __). The writ of certiorari was dismissed as improvidently granted.

October Term 2014

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

2. ***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). 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**

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[1] The Court certified to the Supreme Court of Oklahoma the question whether H.B. No. 1970, Section 1, Chapter 216, O.S.L. 2011 prohibits: (1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration; and (2) the use of methotrexate to treat ectopic pregnancies. The Supreme Court of Oklahoma submitted answers to these certified questions on October 29, 2013.

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.

3. ***Warger v. Shauers*, No. 13-517 (8th Cir., 721 F.3d 606; cert. granted Mar. 3, 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.**

4. ***North Carolina Board of Dental Examiners v. FTC*, No. 13-534 (4th Cir., 717 F.3d 359; cert. granted Mar. 3, 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.**

5. ***Holt v. Hobbs*, No. 13-6827 (8th Cir., 509 F. App'x 561; cert. granted Mar. 3, 2014; SG as amicus, supporting petitioner). Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 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.**

Gibson Dunn
Counsel for
IndyMac
MBS, Inc.

6. ***Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640 (2d Cir., 721 F.3d 95; cert. granted Mar. 10, 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.**

7. ***Jennings v. Stephens*, No. 13-7211 (5th Cir., 537 F. App'x 326; cert. granted Mar. 24, 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.**

8. ***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). 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.**

9. ***Dart Cherokee Basin v. Owens*, No. 13-719 (10th Cir., 730 F.3d 1234; cert. granted Apr. 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."**

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

11. ***Zivotofsky v. Kerry*, No. 13-628 (D.C. Cir., 725 F.3d 197; cert. granted Apr. 21, 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."**

12. ***Johnson v. United States*, No. 13-7120 (8th Cir., 526 F. App'x 708; cert. granted Apr. 21, 2014). Whether mere possession of a short-barreled shotgun should be treated as a violent felony under the Armed Career Criminal Act.**

13. ***Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684 (8th Cir., 729 F.3d 1092; cert. granted Apr. 28, 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.**

14. ***Yates v. United States*, No. 13-7451 (11th Cir., 733 F.3d 1059; cert. granted Apr. 28, 2014; limited to Question 1). 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.**

15. ***T-Mobile South v. Roswell*, No. 13-975 (11th Cir., 731 F.3d 1213; cert. granted May 5, 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).**

16. ***M&G Polymers USA v. Tackett*, No. 13-1010 (6th Cir., 733 F.3d 489; cert. granted May 5, 2014; limited to Question 1). 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.**

17. ***Dep't of Homeland Security v. MacLean*, No. 13-894 (Fed. Cir., 714 F.3d 1301; cert. granted May 19, 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.**

18. ***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). 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.**

19. ***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). 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.**

20. ***Alabama Democratic Conference v. Alabama*, No. 13-1138 (M.D. Ala., 2013 WL 6925681; probable jurisdiction noted June 2, 2014; consolidated with *Alabama Legislative Black Caucus v. Alabama*, No. 13-895). Whether aspects of Alabama's legislative redistricting map violated both the purpose and results tests of Section 2 of the Voting Rights Act and the 14th Amendment, through the systematic dilution of minority voting strength and by the elimination of certain majority-minority districts.**

21. ***Elonis v. United States*, No. 13-983 (3d Cir., 730 F.3d 321; cert. granted June 16, 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.

22. ***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). 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.**

23. ***Nickols v. Mortgage Bankers Association*, No. 13-1052 (D.C. Cir., 720 F.3d 966; cert. granted June 16, 2014; consolidated with *Perez v. Mortgage Bankers Association*, No. 13-1041). Whether agencies subject to the Administrative Procedure Act are categorically prohibited from revising their interpretive rules unless such revisions are made through notice-and-comment rulemaking.**

24. ***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). 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.**

25. ***Hana Financial Inc. v. Hana Bank*, No. 13-1211 (9th Cir., 735 F.3d 1158; cert. granted June 23, 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.**

26. ***Whitfield v. United States*, No. 13-9026 (4th Cir., 695 F.3d 288; cert. granted June 23, 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.**

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

28. ***Mellouli v. Holder*, No. 13-1034 (8th Cir., 719 F.3d 995; cert. granted June 30, 2014). Whether, to trigger deportability under 8 U.S.C. § 1227(a)(2)(B)(i), which provides that a noncitizen may be removed if he 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.**

29. ***United States v. Wong*, No. 13-1074 (9th Cir., 732 F.3d 1030; cert. granted June 30, 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.**

30. ***United States v. June*, No. 13-1075 (9th Cir., 550 F. App'x 505; cert. granted June 30, 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.**

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

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32. ***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). Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 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."**

33. ***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). 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.**

34. ***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). Whether the Natural Gas Act, which occupies the field as to matters within its scope, 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.**

35. ***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). 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.**

36. ***Reed v. Town of Gilbert*, No. 13-502 (9th Cir., 587 F.3d 966; cert. granted July 1, 2014). 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.**

37. ***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). 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.**

38. ***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). 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.**

39. ***Direct Marketing Ass'n v. Brohl*, No. 13-1032 (10th Cir., 735 F.3d 904; cert. granted July 1, 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.

Cases Determined Without Argument

1. ***Stanton v. Sims*, No. 11-1184 (9th Cir., 706 F.3d 954; Reversed and remanded Nov. 4, 2013).** Per Curiam. The Ninth Circuit had reversed a grant of qualified immunity in a 42 U.S.C. § 1983 case after concluding that it was clearly established law that an officer with probable cause to arrest a suspect for a misdemeanor may not enter a home without a warrant while in hot pursuit of that suspect. The Court reversed the Ninth Circuit on the ground that the law was not clearly established. Regarding the state of the law at the time the officer made his warrantless entry, the Court observed: "Two opinions of this Court [*Welsh v. Wisconsin*, 466 U.S. 740 (1984) and *United States v. Santana*, 427 U.S. 38 (1976)] were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided."

2. ***Ford Motor Co. v. United States*, No. 13-113 (6th Cir., 508 F. App'x 506; Reversed and remanded Dec. 2, 2013).** Per curiam. When a taxpayer overpays his taxes, he is generally entitled to interest from the Government for the period between the payment and the ultimate refund pursuant to 26 U.S.C. § 6611(a). The interest runs "from the date of overpayment." *Id.* §§ 6611(b)(1), (b)(2). Ford Motor Company had overpaid its federal taxes but disagreed with the Government on the meaning of "the date of overpayment." Ford sued the Government, asserting jurisdiction under 28 U.S.C. § 1346(a)(1). The Government did not contest jurisdiction, and the district court and Sixth Circuit held that the Government's construction of "the date of overpayment" in Section 6611 was correct. Ford sought certiorari, arguing that the Sixth Circuit erred in strictly construing Section 6611 because it was Section 1346 that waived the Government's immunity from the suit, and Section 6611 is a substantive provision that should not be strictly construed. In its response to Ford's petition for certiorari, the Government introduced a new argument – namely, that 28 U.S.C. § 1346 was not the basis for jurisdiction in the district court and that the only basis for jurisdiction was the Tucker Act, 28 U.S.C. § 1491(a), which would have required that the case be brought in the Court of Federal Claims. Because the Sixth Circuit had not passed on the Government's argument, the Court vacated and remanded for further proceedings.

3. ***Hinton v. Alabama*, No. 13-6440 (Ala. Crim. App., 2008 WL 5517591; Reversed and remanded Feb. 24, 2014).** Per curiam. The Court held that a death row inmate demonstrated ineffective assistance of counsel in violation of the

Sixth Amendment where his attorney at trial had mistakenly believed that state law limited him to $1,000 to hire an expert witness; although the attorney recognized that expert testimony was "fundamental" to his client's case, the attorney had erroneously determined that he was relegated to selecting a witness willing to work for that amount. The Court found the attorney's ignorance of this point of law objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court, however, emphasized that the unreasonable performance consisted of the attorney's mistaken belief about the law, and would not open the door to claims based on an attorney's failure to obtain the best possible expert for a given case. The Court also remanded on the issue of prejudice. Although the Alabama courts concluded that there was no prejudice because the expert said everything a more qualified expert would have said, the Court emphasized that the relevant question on remand was whether there was a reasonable probability that a better qualified expert would have been able to instill reasonable doubt in the jury.

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4. ***Tolan v. Cotton*, No. 13-551 (5th Cir., 713 F.3d 299; Vacated and remanded May 5, 2014).** Per curiam (Alito, J., concurring in the judgment, joined by Scalia, J.). The Court held that the Fifth Circuit's decision affirming a grant of summary judgment on the ground that the defendant had not violated any clearly established right disregarded the axiom that, in ruling on a motion for summary judgment, "the evidence of the nonmovant is to believed, and all justifiable inferences are to be drawn in his favor." Cotton, a police sergeant, shot Tolan, a criminal suspect, during an early-morning altercation on Tolan's parents' front porch. Tolan sued, asserting that Cotton had used excessive force in violation of the Fourth Amendment. The district court granted summary judgment for Cotton, and the court of appeals affirmed, concluding that Cotton was entitled to qualified immunity because Cotton's actions did not violate clearly established law. The Supreme Court identified four key factual conclusions that "lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." The Court therefore vacated the judgment of the Fifth Circuit and remanded for further proceedings.

5. ***Martinez v. Illinois*, No. 13-5967 (Ill., 990 N.E.2d 215; Reversed May 27, 2014).** Per curiam. The Supreme Court of Illinois had allowed the State to appeal from a directed not-guilty verdict—entered after the State declined to present any evidence because it was not prepared for trial—on the theory that jeopardy never attached because the defendant was "never at risk of conviction." The Supreme Court summarily reversed, emphasizing that its prior precedents establish a bright line rule under which jeopardy attaches whenever a jury is empaneled and sworn. There is no exception where, under the circumstances of a particular case, a defendant was never genuinely at risk of conviction. Here, there was no question that the jury was empanelled and sworn, and accordingly the State could not bring an appeal seeking to try petitioner a second time. It made no difference that the trial court referred to its action as a "dismissal" rather than an "acquittal"; as long as a court has found that the State's evidence cannot support conviction, how that court refers to its action is immaterial. Finally, a contrary rule is not necessary to

avoid unfairness to prosecutors, who need only take steps to ensure that a jury is not sworn before the case is ready to be tried.

Pending Cases Calling For The Views Of The Solicitor General

1. ***Florida v. Georgia*, No. 22O142 (Original Jurisdiction). 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. ***Moores v. Hildes*, No. 13-791 (9th Cir., 734 F.3d 854; CVSG Mar. 24, 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.**

3. ***Federal Nat'l Mortgage Ass'n v. Sundquist*, No. 13-852 (Utah, 311 P.3d 1004; CVSG May 5, 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.**

4. ***OBB v. Personenverkehr AG v. Sachs*, No. 13-1067 (9th Cir., 737 F.3d 584; CVSG May 19, 2014). 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 ("FSIA"), 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 the travel entirely outside the United States.**

5. ***Commil USA v. Cisco Systems, Inc.*, No. 13-896 (Fed. Cir., 720 F.3d 1361; CVSG May 27, 2014) (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**

(2) was instructed that "[i]inducing third-party infringement cannot occur unintentionally."

6. ***Cisco Systems, Inc. v. Commil USA*, No. 13-1044 (Fed. Cir., 720 F.3d 1361; CVSG May 27, 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.**

7. ***Kimble v. Marvel Enterprises, Inc.*, No. 13-720 (9th Cir., 727 F.3d 856; CVSG June 2, 2014). 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."**

8. ***Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817 (3d Cir., 724 F.3d 458; CVSG June 16, 2014) (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.**

9. ***KBR, Inc. v. Metzgar*, No. 13-1241 (4th Cir., 744 F.3d 326; CVSG June 16, 2014) (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.**

10. ***Teva Pharmaceuticals v. Superior Court of Cal.*, No. 13-956 (Cal. Ct. App., 217 Cal. App. 4th 96; CVSG June 30, 2014). 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.**

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Samantar v. Yousuf*, No. 12-1078 (4th Cir., 699 F.3d 763; CVSG June 24, 2013; cert. supported Dec. 10, 2013; cert. denied Jan. 13, 2014). 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.**

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Sony Computer Entertainment v. 1st Media, LLC*, No. 12-1086 (Fed. Cir., 694 F.3d 1367; CVSG May 13, 2013; cert. opposed Sept. 5, 2013; cert. denied Oct. 15, 2013). Whether the Court of Appeals for the Federal Circuit erred in restricting district courts' equitable discretion in evaluating patent unenforceability, contrary to this Court's precedent in *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933), *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), and *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945), by applying a rigid test that (a) forecloses district courts from considering the entire circumstantial record; and (b) precludes district courts from granting equitable remedies where a patent applicant has violated the Patent and Trademark Office's duty of candor.**

2. ***Akamai Technologies, Inc. v. Limelight Networks, Inc.*, No. 12-960 (Fed. Cir., 692 F.3d 1301; CVSG June 24, 2013; cert. opposed Dec. 10, 2013; cert. denied June 9, 2014) (linked with *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, No. 12-786). Whether a party may be liable for infringement under either section of the patent infringement statute, 35 U.S.C. § 271(a) or § 271(b), where two or more entities join together to perform all of the steps of a process claim.**

3. ***United States ex rel. Nathan v. Takeda Pharmaceuticals, Inc.*, No. 12-1349 (4th Cir., 707 F.3d 451; CVSG Oct. 7, 2013; cert. opposed Feb. 25, 2014; cert. denied Mar. 31, 2014). Whether Rule 9(b) of the Federal Rules of Civil Procedure requires that a complaint under the False Claims Act "allege with particularity that specific false claims actually were presented to the government for payment," as required by the Fourth, Sixth, Eighth, and Eleventh Circuits, or whether it is instead sufficient to allege the "particular details of" the "scheme to submit false claims" together with sufficient indicia that false claims were submitted, as held by the First, Fifth, Seventh, and Ninth Circuits.**

4. ***Thurber v. Aetna Life Ins. Co.*, No. 13-130 (2d Cir., 712 F.3d 654; CVSG Oct. 7, 2013; cert. opposed May 6, 2014; cert. denied June 9, 2014). The**

Questions Presented are: (1) Whether an ERISA Plan may enforce an equitable lien by agreement under Section 502(a)(3) of ERISA where it has not identified a particular fund that is in the defendant's possession and control at the time the Plan asserts its equitable lien. (2) Whether a discretionary clause in an ERISA plan mandating that an abuse-of-discretion standard of judicial review be applied to a Section 502(a)(1)(B) denial-of-benefits claim is enforceable when the clause was never disclosed to the participant in any plan document, as the Second Circuit held here, or whether the Plan must give participants and beneficiaries clear notice of such a clause, as the Seventh Circuit has required.

5. ***Arab Bank, PLC v. Linde*, No. 12-1485 (2d Cir., 706 F.3d 92; CVSG Oct. 21, 2013; cert. opposed May 24, 2014; cert. denied June 30, 2014). The Questions Presented are: (1) Whether the Second Circuit erred when, in conflict with decisions of the Court and other circuits, it failed to vacate severe sanctions for non-production of records located in countries where production would subject the bank to criminal penalties. (2) Whether the courts below erred by failing to dismiss plaintiffs' Alien Tort Statute claims, as required by the Court's decision in *Kiobel v. Royal Dutch Petroleum*.**

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6. ***Medtronic, Inc. v. Stengel*, No. 12-1351 (9th Cir., 704 F.3d 1224; CVSG Oct. 7, 2013; cert. opposed May 20, 2014; cert. denied June 23, 2014). Whether the Medical Device Amendments to the federal Food, Drug and Cosmetic Act preempt a state-law claim alleging that a medical device manufacturer violated a duty under federal law to report adverse-event information to the Food and Drug Administration.**

7. ***O'Neill v. Al Rajhi Bank*, No. 13-318 (2d Cir., 714 F.3d 659; CVSG Dec. 16, 2013; cert. opposed May 27, 2014; cert. denied June 30, 2014). The Questions Presented are: (1) Whether the civil remedy provision of the Anti-Terrorism Act, 18 U.S.C. § 2333, supports claims against defendants based on theories of secondary liability, and requires plaintiffs to establish that a defendant's support provided to a terrorist organization was a proximate cause of the plaintiffs' injury. (2) Whether U.S. Courts have personal jurisdiction over defendants who, acting abroad, provide material support to a terrorist organization that attacks the territorial United States and the defendants intend to provide support to the organization, know of the organization's objective and history of attacking U.S. interests, and can foresee that its material support will be used in attacks on the United States.**

8. ***Picard v. JPMorgan Chase & Co.*, No. 13-448 (2d Cir., 721 F.3d 54; CVSG Jan. 13, 2014; cert. opposed May 23, 2014; cert. denied June 30, 2014). The Questions Presented are: (1) Whether, in conflict with decisions of the Third and Sixth Circuits, the Securities Investor Protection Corporation's right to subrogation is limited to customers' Securities Investor Protection Act ("SIPA") claims against a failed brokerage's estate and therefore does not reach claims against third parties that share responsibility for the brokerage's collapse and customers' losses. (2) Whether, in conflict with**

decisions of the Fourth and Eighth Circuits, federal statutory silence overrides any right to contribution under state law for liabilities arising under the federal statute regardless of whether Congress intended to preempt the state law. (3) Whether, in conflict with decisions of the First and Seventh Circuits, a trustee lacks standing under SIPA or the Bankruptcy Code to assert claims against parties that hastened or deepened the bankruptcy and are therefore general to all of an estate's customers or creditors.

9. ***Missouri ex rel. KCP&L Greater Missouri Operations Co. v. Missouri Public Service Commission*, No. 13-787 (Mo., 408 S.W.3d 153; CVSG Mar. 10, 2014; cert. opposed May 27, 2014; cert. denied June 30, 2014). Whether the filed rate doctrine and Supremacy Clause permit a state public service commission to "trap" federally approved costs with a utility by recognizing the prudency of obtaining electric power from a plant in another state, but then barring the utility from recovering the Federal Energy Regulatory Commission-approved transmission costs of importing that power.**

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