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# GIBSON DUNN
# Supreme Court Round-Up

## Overview

The Supreme Court Round-Up previews upcoming cases, summarizes opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case, as well as a substantive analysis of the Court's actions.

## October Term 2014

## Decided Cases

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

   **Decided June 29, 2015** (576 U.S. ___). District of Arizona/Affirmed. Justice Ginsburg for a 5-4 Court (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, J.J.; Scalia, J., dissenting, joined by Thomas, J.; Thomas, J., dissenting, joined by Scalia, J.). The Court held that the Elections Clause of the Constitution permits Arizona's use of an independent redistricting commission to draw the State's congressional and state legislative district maps. Arizona, by popular referendum, amended its constitution to establish the Arizona Independent Redistricting Commission. The Arizona legislature sued, challenging the Commission's congressional district map. The Court first held that the Arizona legislature had standing to bring the claim, reasoning that its allegation that the Commission deprived the Arizona legislature of its authority over redistricting was a sufficient injury. The Court then addressed the Elections Clause, which requires the "Times, Places, and Manners of holding" congressional elections to be "prescribed" by each state's "Legislature." The Court concluded that the term "Legislature" was not limited to a state's institutional house of representatives. States, the Court held, retain the autonomy to establish their own governmental processes. Thus, the Court concluded, they are at liberty to place a portion of the "Legislature's" power in an independent commission.

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2. ***Glossip v. Gross*, No. 14-7955 (10th Cir., 2015 WL 137627; cert. granted Jan. 23, 2015; argued on Apr. 29, 2015). The Questions Presented are: (1) Whether it is constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain-relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious. (2) Whether the plurality stay standard of *Baze v. Rees*, 553 U.S. 35 (2008), applies when states are not using a protocol substantially similar to the one that this Court considered in *Baze*. (3) Whether a prisoner must establish the availability of an alternative drug formula even if the state's lethal-injection protocol, as properly administered, will violate the Eighth Amendment.**

   **Decided June 29, 2015** (576 U.S. __). Tenth Circuit/Affirmed. Justice Alito for a 5-4 Court (Scalia, J. concurring, joined by Thomas, J.; Thomas, J. concurring, joined by Scalia, J.; Breyer, J. dissenting, joined by Ginsburg, J.; Sotamayor, J. dissenting, joined by Ginsburg, Breyer, and Kagan, J.J.J.). The Court held that the petitioners had failed to show a likelihood of success on their claim that Oklahoma's use of midazolam as a sedative in connection with lethal injections violated the Eighth Amendment ban on cruel and unusual punishment. Petitioners—prisoners sentenced to death row—claimed that midazolam "fails to render a person insensate to pain." But the Court found that evidence did not establish that a demonstrated risk of severe pain from the drug was substantial when compared to known and available alternative methods of execution—a required element of a method-of-execution claim. Because capital punishment is constitutional, the Court stated, there must be a constitutional means of carrying it out. And because "some risk of pain is inherent in any method of execution, . . . the Constitution does not require the avoidance of all risk of pain." Further, the district court did not commit clear error by finding that midazolam is likely to render a person unable to feel pain associated with the other drugs in the protocol: numerous courts have reached the same conclusion, the State's expert provided persuasive testimony unrebutted by contrary scientific proof, and federal courts should not "embroil themselves in ongoing scientific controversies beyond their expertise."

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

   **Decided June 29, 2015** (576 U.S. ___). D.C. Circuit/Reversed and remanded. Justice Scalia for a 5-4 Court (Thomas, J., concurring; Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, J.J.). The Court held that the Environmental Protection Agency ("EPA") interpreted the Clean Air Act unreasonably when it deemed cost irrelevant to the decision to regulate power

plants. The Clean Air Act directs EPA to regulate emissions of hazardous air pollutants from power plants if it concludes that "regulation is appropriate and necessary" after studying hazards to public health from power-plant emissions. 42 U.S.C. § 7412. EPA estimated that regulation would cost power plants $9.6 billion per year, but that the benefits from reducing hazardous air pollutants would be $4 to $6 million per year. Nonetheless, EPA decided to regulate, and did not consider that cost-benefit analysis in making its decision. Applying the agency deference framework established in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court concluded that "EPA strayed far beyond" the bounds "of reasonable interpretation" when it read the statute "to mean that it could ignore cost." The term "appropriate" is an "all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." "One would not say that it is even rational, never mind 'appropriate,'" the Court reasoned, "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." Although EPA may determine "how to account for cost," it may not interpret the statute to make cost irrelevant to its decision whether to regulate.

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4. ***Johnson v. United States*, No. 13-7120 (8th Cir., 526 F. App'x 708; cert. granted Apr. 21, 2014; argued on Apr. 20, 2015). The Questions Presented are: (1) Whether mere possession of a short-barreled shotgun should be treated as a violent felony under the Armed Career Criminal Act. (2) Whether the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague.**

**Decided June 26, 2015** (576 U.S. ___). Eighth Circuit/Reversed and remanded. Justice Scalia for an 8-1 Court (Kennedy, J., concurring; Thomas, J., concurring; Alito, J., dissenting). Under the Armed Career Criminal Act of 1984 ("ACCA"), a defendant convicted of being a felon in possession of a firearm faces a more severe punishment if he has three or more previous convictions for a "violent felony," a term that includes any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The Court held that this final clause—known as the "residual clause"—is unconstitutionally vague. The Court reasoned that the residual clause "fails to give ordinary people fair notice of the conduct it punishes, [and is] so standardless that it invites arbitrary enforcement." The Court identified two key characteristics of the residual clause that makes it unconstitutionally vague. First, because courts are to utilize the "categorical approach" to determine whether an offense under ACCA is a violent felony, they must "picture the kind of conduct that the crime involved in 'the ordinary case.'" The use of a hypothetical "ordinary case" rather than "real-world facts or statutory elements" leads to vagueness regarding how much risk of physical injury was involved in a particular conviction. Second, ACCA does not quantify how much risk of physical injury is required for a crime to rise to the level of a violent felony. Together, these two features produce more "unpredictability and arbitrariness" than the Due Process Clause allows. To support its conclusion, the Court pointed to the lower courts' long and persistent inability to apply the residual clause with consistency. The Court also concluded that the doctrine of *stare decisis* did not require a different result. Although the Court had previously upheld the residual clause in spite of vagueness concerns,



further experience and observation demonstrated that the Court's earlier decisions would undermine consistency rather than support it.

5. ***Obergefell v. Hodges*, No. 14-556 (6th Cir., 772 F.3d 388; cert. granted Jan. 16, 2015; consolidated with *Tanco v. Haslam*, No. 14-562; *DeBoer v. Snyder*, No. 14-571; *Bourke v. Beshear*, No. 14-574; SG as amicus, supporting petitioners; argued on Apr. 28, 2015). The Questions Presented are: (1) Whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex. (2) Whether the Fourteenth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.**

**Decided June 26, 2015** (576 U.S. ___). Sixth Circuit/Reversed. Justice Kennedy for a 5-4 Court (Roberts, C.J., dissenting, joined by Scalia and Thomas, J.J.); Scalia, J., dissenting, joined by Thomas, J.; Thomas, J., dissenting, joined by Scalia, J.; Alito, J., dissenting, joined by Scalia and Thomas, J.J.). The Court held that the Fourteenth Amendment requires States to issue marriage licenses to two people of the same sex and to recognize marriages between two people of the same sex when lawfully licensed and performed out-of-State. The Court reasoned that the Due Process Clause of the Fourteenth Amendment protects fundamental liberties, and these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. Applying these established tenets, the Court observed that it had long held that the right to marry is protected by the Constitution. Although the Court's prior marriage precedents presumed a relationship involving opposite-sex partners, the Court identified four principles and traditions that demonstrate that the reasons marriage is fundamental "apply with equal force to same-sex couples." First, the right to personal choice regarding marriage—one of the "most intimate" decisions an individual can make—"is inherent in the concept of individual autonomy" regardless of a person's sexual orientation. Second, marriage "supports a two-person union unlike any other in its importance to the committed individuals," and same-sex couples have the same right to enjoy this form of intimate association. Third, marriage safeguards children by providing them recognition, stability, and predictability in their family life. Without these same safeguards, the children of same-sex couples suffer "harm" as well as the "the stigma of knowing their families are somehow lesser." Fourth, marriage is undeniably a "keystone" of our nation's legal and social order. Denying same-sex partners the "constellation of benefits" linked to marriage not only "consign[s]" them to "an instability many opposite-sex couples would find intolerable," but also "demean[s]" same-sex couples by excluding them from "a central institution of the Nation's society." These principles make clear that limiting marriage to opposite-sex couples is "inconsis[ent] with the central meaning of the fundamental right to marry." The right of same-sex couples to marry, the Court continued, is also derived from the Equal Protection Clause of the Fourteenth Amendment. Laws prohibiting same-sex marriage are unequal because they deny same-sex couples the benefits afforded opposite-sex couples and bar them from exercising a fundamental right. The Court rejected respondents' arguments that this issue should be decided by the democratic process, reasoning that

"individuals need not await legislative action before asserting a fundamental right." The First Amendment, moreover, ensures that those opposing same-sex marriage on religious grounds will remain free to "engage those who disagree with their view in an open and searching debate." Finally, the Court also held that because States are required by the Constitution to issue marriage licenses to same-sex couples, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the basis of its same-sex character.

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

**Decided June 25, 2015** (576 U.S. ___). Fourth Circuit/Affirmed. Chief Justice Roberts for a 6-3 Court (Scalia, J, dissenting, joined by Thomas and Alito, J.J.). The Court held that the tax credits provided in the Patient Protection and Affordable Care Act (the "Act") are available in states where the Federal Government, rather than the State, have established the health insurance exchange required by the Act. The Act adopts interlocking reforms to expand health insurance coverage. First, it "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge." Second, it "generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service" ("IRS"), unless the cost of buying insurance would be more than eight percent of the person's income. Third, it "gives tax credits to certain people to make insurance more affordable." Without the tax credits, many more people would be exempt from the coverage requirement. The Act also requires each state to create an "exchange," which is essentially a marketplace that allows people to compare and purchase health insurance plans. A state may establish its own exchange, or, if it does not, the federal government will establish one. The Act provides that tax credits "shall be allowed" for any "applicable taxpayer," but the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange established by the State." 26 U.S.C. §§ 36B(a)-(c). The IRS promulgated a rule that made the tax credits available on both the state and federal exchanges. Petitioners live in Virginia, which has a federal exchange, and do not want to purchase health insurance. They challenged the IRS rule, arguing that Virginia's exchange is not "an Exchange established by the State," so they should not receive any tax credits. The Supreme Court disagreed, holding that tax credits are available even when the relevant exchange was established by the Federal Government. As an initial matter, the Court declined to defer to the IRS's interpretation of the Act under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), holding that if Congress had intended to give discretion to an agency over a question of "deep 'economic and political significance'" it "surely would have done so expressly." Instead, the Court reasoned, it was the Court's task to determine the correct reading of the Act without deference to the IRS. In performing this task, the Court read the Act's words "in their context and with a view to their place in the overall statutory

scheme." The Court concluded that the phrase "an Exchange established by the State" was ambiguous; it could be limited to state exchanges, or it could refer to all (both state and federal) exchanges. The Court, however, determined that an interpretation of the text as limited to only state exchanges would be incompatible with the overall purpose and structure of the statute. Accordingly, the Court concluded that, consistent with the Act's purpose and structure, the Act's tax credits are available in states with federal, as well as state, exchanges.

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

**Decided June 25, 2015** (576 U.S. ___). Fifth Circuit/Affirmed and remanded. Justice Kennedy for a 5-4 Court (Thomas, J., dissenting; Alito, J., dissenting, joined by Roberts, C.J., and Scalia and Thomas, J.J.). The Fair Housing Act ("FHA") provides that it shall be unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added). The FHA also provides that "[i]t shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction because of" the same attributes, as well as handicap. *Id*. § 3605(a). The Court held that these provisions encompass not only claims of disparate treatment, but also claims of disparate impact, where a plaintiff "challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." The Court looked to "two other antidiscrimination statutes that preceded" the FHA, both of which the Court had previously interpreted to cover disparate-impact claims. *See Smith v. City of Jackson*, 544 U.S. 228 (2005) (interpreting Section 4(a)(2) of the Age Discrimination in Employment Act of 1967); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (interpreting Section 703(a)(2) of Title VII of the Civil Rights Act of 1964). "Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." Applying that rule to the FHA, the Court reasoned that the phrase "'otherwise make unavailable' refers to the consequences of an action rather than the actor's intent" and is "equivalent in function and purpose" to the statutory language considered in *Griggs* and *Smith*. The Court also noted that "it is of crucial importance" that when Congress amended the FHA in 1988, "all nine Courts of Appeals to have addressed the question had concluded the [FHA] encompassed disparate-impact claims" and that Congress "accepted and ratified" those conclusions by leaving that text untouched and passing amendments "that assume the existence of disparate-impact claims." The Court emphasized that even if a plaintiff brings a *prima facie* disparate-impact claim, "housing authorities and private developers" must be allowed to defend against disparate-impact liability by "stat[ing] and explain[ing] the valid interest served

by their policies" and "prov[ing] [a challenged policy] is necessary to achieve [that] valid interest." Finally, the Court warned that lower courts must "examine with care" whether a plaintiff has brought a valid claim "demonstrating a causal connection" between a challenged policy and the alleged impact, and that remedial orders must "concentrate on the elimination of the offending practice" rather than more broadly "impos[ing] racial targets or quotas" that "might raise more difficult constitutional questions."

8. ***City of Los Angeles v. Patel*, No. 13-1175 (9th Cir., 738 F.3d 1058; cert. granted Oct. 20, 2014; SG as amicus, supporting petitioner; argued on Mar. 3, 2015). The Questions Presented are: (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment. (2) Whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.**

   **Decided June 22, 2015** (576 U.S. ___). Ninth Circuit/Affirmed. Justice Sotomayor for a 5-4 Court (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas, J.; Alito, J., dissenting, joined by Thomas, J.). The Court held that a law requiring hotel operators to make their registries available to police on demand is facially unconstitutional under the Fourth Amendment because it does not provide an opportunity for pre-compliance review. A group of motel operators and a lodging association sued the City of Los Angeles alleging that a provision of the Los Angeles Municipal Code making it a misdemeanor to fail to make available hotel guest records "to any officer of the Los Angeles Police Department for inspection" is facially unconstitutional. The Court first addressed whether facial challenges under the Fourth Amendment are categorically barred or especially disfavored, and concluded that they are not. The Court reasoned that no other constitutional provision is limited only to as-applied challenges, and that the Court has already, on multiple occasions, declared statutes facially invalid under the Fourth Amendment. The requirement that facial challenges establish that a law is unconstitutional in all its applications is also no bar because, when assessing whether a statute meets this standard, the Court considers only applications of the statute in which it actually authorizes or prohibits conduct. The Court then turned to the merits of the claim and held the law facially unconstitutional because it failed to provide hotel operators with an opportunity for pre-compliance review. Because the law serves a special need other than crime-control, it falls within the administrative search exception to the warrant requirement, and administrative searches require the opportunity for pre-compliance review before a neutral decisionmaker. The Court saw no reason why this opportunity should not be afforded to hotel owners should they object to an inspection of their guest registries.

9. ***Kingsley v. Hendrickson*, No. 14-6368 (7th Cir., 744 F.3d 443; cert. granted Jan. 16, 2015; SG as amicus, supporting affirmance; argued on Apr. 27, 2015). Whether the requirements of a 42 U.S.C. § 1983 excessive force claim**

**brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee, and the use of force was objectively reasonable.**

**Decided June 22, 2015** (576 U.S. __). Seventh Circuit/Vacated and remanded. Justice Breyer for a 5-4 Court (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas, J.; Alito, J., dissenting). The Court held that an excessive force claim under 42 U.S.C. § 1983 only requires proof that the state actor's use of force was objectively unreasonable. The petitioner, a pretrial detainee at the time of the incident, alleged that certain jail officers used excessive force against him while removing him from a jail cell. At trial, the district court instructed the jury that the plaintiff was required to prove, among other things, that the officers acted objectively unreasonably, and that they "recklessly disregarded plaintiff's safety" and "acted with reckless disregard of [his] rights." The petitioner argued on appeal that introduction of a recklessness standard did not make clear to the jury that the correct standard was objective unreasonableness. The Seventh Circuit rejected petitioner's argument, holding instead that a § 1983 excessive force claim required a "subjective inquiry" into an officer's state of mind. In reversing the Seventh Circuit, the Supreme Court separated the state actor's "state of mind with respect to the bringing about of certain physical consequences in the world" from his "state of mind with respect to whether his use of force was 'excessive.'" With respect to the physical acts, the state actor must purposely or knowingly use force, because "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." With respect to the officer's awareness of whether his purposeful use of force was excessive, however, the Court held that an objective standard must be employed. Thus, a court evaluating a § 1983 excessive force claim must determine whether a reasonable officer would have purposely or knowingly used the same amount of force. This inquiry, the Court further held, should take into account the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained."

10. ***Horne v. Dep't of Agriculture*, No. 14-275 (9th Cir., 750 F.3d 1128; cert. granted Jan. 16, 2015; argued on Apr. 22, 2015). The Questions Presented are: (1) Whether the Government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), applies only to real property and not to personal property. (2) Whether the Government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the Government's discretion. (3) Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a *per se* taking.**

**Decided June 22, 2015** (576 U.S. ___). Ninth Circuit/Reversed. Chief Justice Roberts for a 5-4 Court (Thomas, J., concurring; Breyer, J., concurring in part and dissenting in part, joined by Ginsburg and Kagan, J.J.; Sotomayor, J., dissenting). The Court held that the Fifth Amendment's Takings Clause requires the Government to pay just compensation when it takes personal property, just as

when it takes real property. The U.S. Department of Agriculture had promulgated an order mandating that California raisin growers give a percentage of some years' crops to the Government to help maintain stable markets. Certain raisin growers refused to comply, and the Government fined them. The Court concluded that this system constituted a clear physical taking of the growers' property because title to actual raisins was transferred from the growers to the Government. The fact that growers are entitled to the net proceeds if the Government decides to sell the raisins goes only to whether the amount of compensation the growers have received for the taking is just—it does not mean the raisins have not been physically appropriated for Government use. The Court also rejected the Government's argument that the taking was part of a voluntary exchange for a valuable government benefit, reasoning that "[s]elling produce in interstate commerce . . . [is] not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." Finally, the Court held that it need not remand for a calculation of just compensation because the remedy should simply be relieving the growers of their obligation to pay the fines.

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

**Decided June 22, 2015** (576 U.S. __). Ninth Circuit/Affirmed. Justice Kagan for a 6-3 Court (Alito, J., dissenting, joined by Roberts, C.J., and Thomas, J.). The Court held that a patent holder cannot charge royalties for the use of an invention after its patent term has expired, regardless of contract provisions to the contrary, and declined to overrule its decision in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964). The Court stated that it has "carefully guarded" the twenty-year expiration date for patents, "just as it has the patent laws' subject matter limits." Acknowledging that "[r]especting *stare decisis* means sticking to some wrong decisions," the Court stated that there were especially strong justifications for adhering to prior precedent here: *Brulotte* interpreted a statute which Congress has the power to change, and over the past half a century Congress "has spurned multiple opportunities to reverse *Brulotte*." And because *Brulotte* involved property and contract rights, "considerations favoring *stare decisis* [were] 'at their acme'" because "parties are especially likely to rely on such precedents when ordering their affairs." Additionally, no "special justification" warranted reversing course. *Brulotte* has not proved unworkable, and its "close relation to a whole web of precedents means that reversing it could threaten others," unsettling "stable law." Policy justifications for reversing *Brulotte* could "give Congress cause" to upset the decision, but did not warrant the "Court's doing so." The Court therefore rejected the argument that courts should engage in "'flexible, case-by-case analysis' of post-expiration royalty clauses 'under the rule of reason,'" a concept borrowed from antitrust law. Such a freewheeling test would not be appropriate for applying patent laws which "unlike the Sherman Act—do not aim to

maximize competition" and which provide a "bright-line rule, rather than calling for practice-specific analysis."

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

    **Decided June 18, 2015** (576 U.S. ___). Fifth Circuit/Vacated and remanded. Justice Sotomayor for a 5-4 Court (Thomas, J., dissenting, joined by Roberts, C.J, and Scalia and Alito, J.J., as to all but Part I-C; Alito, J., dissenting, joined by Roberts, C.J.). The Court held that a Louisiana state court's rejection of the petitioner's request for a hearing to determine whether he was eligible for the death penalty "was premised on an 'unreasonable determination of the facts' within the meaning of" 28 U.S.C. § 2254(d)(2). In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court "recognized that the execution of the intellectually disabled contravenes the Eighth Amendment's prohibition on cruel and unusual punishment." The Louisiana Supreme Court, in turn, held in *State v. Williams*, 831 So.2d 835 (La. 2002), that an evidentiary hearing is required to evaluate an inmate's *Atkins* claim when he "has put forward sufficient evidence to raise a 'reasonable ground' to believe him to be intellectually disabled." The state court's decision to deny an evidentiary hearing in this case, the Court held, was premised on "two underlying factual determinations," both of which were unreasonable. First, the state court unreasonably determined petitioner's "IQ score was inconsistent with a diagnosis of intellectual disability," even though "[a]ccounting for th[e] margin of error" in IQ tests, his "reported IQ test result of 75 was squarely in the range of potential intellectual disability." Second, the state court unreasonably determined that petitioner "had presented no evidence of adaptive impairment," even though he had been "placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level." The Court emphasized that, to be entitled to an evidentiary hearing, petitioner "was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much." Instead, under *Williams*, he "needed only to raise a 'reasonable doubt' as to his intellectual disability." The Court vacated the decision and remanded for further proceedings regarding whether the petitioner was in fact intellectually disabled.

13. ***Davis v. Ayala*, No. 13-1428 (9th Cir., 756 F.3d 656; cert. granted Oct. 20, 2014; argued on Mar. 3, 2015). The Questions Presented are: (1) Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is**

**an "adjudicate[ion] on the merits" within the meaning of 28 U.S.C. § 2254(d). (2) Whether the court of appeals properly applied the standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993).**

**Decided June 18, 2015** (576 U.S. __). Ninth Circuit/Reversed and remanded. Justice Alito for a 5-4 Court (Kennedy, J., concurring; Thomas, J., concurring; Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, J.J.). The Court held that any federal constitutional error that may have occurred by excluding a capital defendant's attorney from part of a hearing to determine whether the prosecution's peremptory challenges were impermissibly race-based was harmless. After defense counsel objected to certain of the prosecutor's peremptory strikes during *voir dire* on the ground that they were impermissibly race-based, the trial judge permitted the prosecutor to explain the reasons for the strikes outside the presence of defense counsel. The trial judge concluded that all of the prosecutor's strikes were for valid, race-neutral reasons, and the jury ultimately convicted and sentenced petitioner to death. On direct appeal, the California Supreme Court concluded that any State or federal error that occurred as a result of these *ex parte* proceedings was harmless beyond a reasonable doubt. Even assuming that there was federal constitutional error in these proceedings, the Court concluded that petitioner was not entitled to *habeas* relief. The Court reasoned that the California Supreme Court had considered petitioner's claims on the merits. Therefore, under the Antiterrorism and Effective Death Penalty Act, a federal court cannot grant *habeas* relief unless the state court's rejection of the claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). In the context of a state court's decision on harmless error, this means that a federal court may not grant habeas relief "unless *the harmlessness determination itself* was unreasonable." And a state-court decision is not unreasonable if fairminded jurists could disagree on its correctness. Applying this standard, the Court reviewed the prosecutor's strikes and the stated reasons for those strikes, and concluded that the California Supreme Court's conclusion that any error was harmless was not unreasonable.

14. ***McFadden v. United States*, No. 14-378 (4th Cir., 753 F.3d 432; cert. granted Jan. 16, 2015; argued on Apr. 21, 2015). Whether, to convict a defendant of distribution of a controlled substance analogue—a substance with a chemical structure that is "substantially similar" to a schedule I or II drug and has a "substantially similar" effect on the user (or is believed or represented by the defendant to have such a similar effect)—the Government must prove that the defendant knew that the substance constituted a controlled substance analogue, as held by the Second, Seventh, and Eighth Circuits, but rejected by the Fourth and Fifth Circuits.**

**Decided June 18, 2015** (576 U.S. __). Fourth Circuit/Vacated and remanded. Justice Thomas for a unanimous Court (Roberts, C.J., concurring in part and concurring in the judgment). The Controlled Substances Analogue Enforcement Act of 1986 ("Analogue Act") instructs courts to treat certain specified substances that are substantially similar to those listed on the federal controlled substance schedules as controlled substances for purposes of federal law. The Controlled

Substances Act ("CSA"), in turn, makes it unlawful knowingly to manufacture, distribute, or possess with intent to distribute controlled substances. The Court held that these provisions require the Government to establish that the defendant knew he was dealing with a substance regulated under the CSA or the Analogue Act. Petitioner was charged with distributing controlled substance analogues in violation of the Analogue Act, but claimed he did not know the substances he was distributing were regulated as controlled substance analogues. At trial, petitioner asked the court to instruct the jury that it could not find him guilty unless it found that petitioner knew the distributed substances possessed the characteristics of controlled substance analogues, including their chemical structures. The district court instead instructed the jury that it need only find that petitioner knowingly and intentionally distributed a substance that had substantially similar effects on the nervous system as a controlled substance and that he intended it to be consumed by humans. Rejecting both the Government and petitioner's interpretation of the Analogue Act's mental-state requirement, the Court found that the Analogue Act expressly requires the Government to prove that "a defendant knew he was dealing with a controlled substance," even in prosecutions involving an analogue. This knowledge requirement can only be established with evidence that the defendant knew either that the substance is listed on the federal drug schedules (or is treated as such by the Analogue Act) or that the Defendant was aware of the specific substance with which he was dealing.

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

**Decided June 18, 2015** (576 U.S. __). Ohio/Reversed and remanded. Justice Alito for a unanimous Court (Scalia, J., concurring in the judgment, joined by Ginsburg, J.; Thomas, J., concurring in the judgment). The Court held that statements made by a three-year-old victim to his teachers could be admitted into evidence during a criminal trial against the child's alleged abuser without violating the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 363 (2004), the Court held that a criminal defendant's right to be confronted with the witnesses against him is violated when the trial court admits into evidence an out-of-court statement that is "testimonial," *i.e.*, when under all the "relevant circumstances" the statement's "primary purpose" was to create an out-of-court substitute for trial testimony. Although the Court declined to adopt a categorical rule that statements to persons other than law enforcement officers can never be testimonial, the Court concluded that the statements at issue in this case were not barred from admission by the Confrontation Clause. The statements were made to the child's teachers, whose questions were aimed at identifying and ending an ongoing threat involving suspected child abuse. The conversation was informal and spontaneous, occurring in the school lunchroom and classroom and immediately after discovering the child's injuries. The child's young age also

suggested his statements were non-testimonial: Because young children have "little understanding of prosecution" and thus do not intend their statements to substitute for trial testimony, "[s]tatements by young children will rarely, if ever, implicate the Confrontation Clause." And the fact that the child was speaking to his teachers was "highly relevant" because statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers. Finally, the Court concluded that teachers' mandatory reporting obligations did not convert a conversation between a concerned teacher and student into a law enforcement mission aimed at gathering evidence for prosecution.

16. ***Reed v. Town of Gilbert*, No. 13-502 (9th Cir., 587 F.3d 966; cert. granted July 1, 2014; SG as amicus, supporting petitioners; argued on Jan. 12, 2015). Whether the Town of Gilbert's mere assertion that its sign code lacks a discriminatory motive renders its facially content-based sign code content-neutral and justifies the code's differential treatment of petitioners' religious signs.**

    **Decided June 18, 2015** (576 U.S. __). Ninth Circuit/Reversed and remanded. Justice Thomas for a unanimous Court (Alito, J., concurring, joined by Kennedy and Sotomayor, J.J.; Breyer, J., concurring in the judgment; Kagan, J., concurring in the judgment, joined by Ginsburg and Breyer, J.J.). The Court held that an Arizona town's sign code, which restricted the timing and placement of signs containing directions to public events, was a content-based regulation of speech that did not survive strict scrutiny. Because the code categorized signs based on the message each sign conveyed and subjected each category to different restrictions, it was a content-based regulation on its face. Thus, the code was subject to strict scrutiny regardless of "the government's justifications or purposes for enacting" it. And the town was unable to show that the code's differential treatment of temporary directional signs versus other categories, such as political or ideological signs, was narrowly tailored to further any compelling governmental interest. Even assuming that the town's interests in traffic safety and certain aesthetic standards were compelling, the code's distinctions were "hopelessly underinclusive," and thus not narrowly tailored.

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

    **Decided June 18, 2015** (576 U.S. __). Fifth Circuit/Reversed. Justice Breyer for a 5-4 Court (Alito, J., dissenting, joined by Roberts, C.J., Scalia, and Kennedy, J.J.). The Court held that a State's specialty license plate designs constitute

government speech, and thus the State may regulate the content of those designs without violating the Free Speech Clause of the First Amendment. The Court reasoned that the First Amendment does not prohibit a State government from deciding what to say. In other words, by speaking, a State government does not necessarily unconstitutionally discriminate on the basis of viewpoint. A government is entitled to speak for itself; "as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position." Likening a State's specialty or "vanity" license plate program to the Government choosing which monuments to place in a public park, *Pleasant Grove City v. Summum*, 555 U. S. 460 (2009), the Court held that license plates are government speech, because they communicate a message from the State, are closely identified with the State, and directly controlled by the State. The Court rejected the application of "forum analysis," which applies to government restrictions on purely private speech occurring on government property because license plates are not a public forum and represent a government speaking for itself. The Court recognized, however, that a government's ability to express itself is not unlimited. For example, a State may not compel a private party to express a view with which the party disagrees.

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

**Decided June 15, 2015** (576 U.S. ___). Fifth Circuit/Affirmed. Justice Thomas for a 6-3 Court (Sotomayor, J. concurring in part and concurring in the judgment; Breyer, J., dissenting, joined by Ginsburg and Kagan, J.J.). The Court held that 11 U.S.C. § 330(a)(1) does not permit a bankruptcy court to award attorney's fees for work performed in defending a fee application in court. Respondent filed for bankruptcy, and, relying on 11 U.S.C. § 327(a), obtained permission from the bankruptcy court to hire petitioner to provide it with legal representation during the bankruptcy. After providing various services, petitioner sought compensation under § 330(a)(1), which authorizes "reasonable compensation for actual, necessary services rendered" by a professional hired under § 327(a). Respondent contested the fee application, but the bankruptcy court awarded fees both for petitioner's representation of the trustee in bankruptcy and for its time spent litigating its fee application. The Supreme Court disagreed with the latter award. The Court stated that under the American Rule each litigant pays its own attorney's fees unless a statute or contract specifically and explicitly provides otherwise, and that § 330(a)(1)'s language does not provide otherwise. Section 330(a)(1) authorizes compensation only for "services rendered," and "services" is best understood as work performed for another. Because time spent litigating a fee application against the bankruptcy estate is not a service to the estate but rather a service to the applicant, compensation is not authorized. Compensation for fee-defense also cannot be understood as part of the "reasonable compensation" for the underlying services in the bankruptcy proceeding both because such a reading requires excising the requirement that compensation be for "services" and because the open-ended phrase "reasonable compensation" cannot by itself displace the default American Rule. Finally, the Court noted that even



were it persuaded that awarding fees for fee-defense litigation were necessary to the proper functioning of the Bankruptcy Code, it lacks the authority to rewrite the statute.

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

**Decided June 15, 2015** (576 U.S. __). Ninth Circuit/Vacated and remanded. Justice Scalia for a 5-4 Court (Kennedy, J., concurring in the judgment, joined by Alito, J.; Breyer, J. dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.). The Court held that the Due Process Clause does not require the Government to provide a specific reason—other than a citation to a section of the Immigration and Nationality Act—for the denial of a visa application to a U.S. citizen. A plurality of the Court concluded that citizens have no liberty interest that is impacted by the denial of a spouse's visa application because that interest is not rooted in the nation's history and tradition. The Government has long regulated immigration, including through restrictions on the ability of the ability of spouses of U.S. citizens to immigrate. "Even if [the Court] might 'imply' a liberty interest in marriage generally speaking, that must give way when there is a tradition denying the specific application of that general interest." The concurrence limited the holding, however, finding that there was no need to decide whether a protected liberty interest exists. According to the concurrence, the case "should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her alien spouse." Even assuming the existence of a liberty interest, the concurrence found that the Government met the due process requirement laid out in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), because it provided a "facially legitimate and bona fide" reason for the visa denial. It is facially legitimate to exclude an immigrant because he does not satisfy a statutory condition for admissibility. Because the visa applicant had worked for the Taliban and had not made a plausible affirmative showing of bad faith on the consular officer's part, there was a bona fide factual basis for denying his visa application.

20. ***Mata v. Lynch*, No. 14-185 (5th Cir., 558 F. App'x 366; cert. granted Jan. 16, 2015; argued on Apr. 29, 2015). Whether a circuit court has jurisdiction to review a petitioner's request that the Board of Immigration Appeals equitably toll the ninety-day deadline on his motion to reopen as a result of ineffective counsel under 8 C.F.R. § 1003.2(c)(2).**

**Decided June 15, 2015** (576 U.S. __). Fifth Circuit/Reversed and remanded. Justice Kagan for a 8-1 Court (Thomas, J., dissenting). The Court held that a federal court of appeals has jurisdiction over a noncitizen's petition for review of a decision by the Board of Immigration Appeals ("BIA") denying a motion to

reopen immigration proceedings as untimely. A noncitizen ordered to leave the country has a statutory right to reopen his removal proceedings. If immigration officials deny that motion, a federal court of appeals has jurisdiction to consider a petition to review their decision. This jurisdiction remains available when the BIA denies a motion to reopen on the grounds that it is untimely or when it denies a request for equitable tolling. As the Court explained, the reason for the denial of a motion to reopen makes no difference to the jurisdictional issue. Even if the noncitizen has no right to equitable tolling—an issue the Court did not decide—then the correct course on appeal is to take jurisdiction over the case, explain that equitable tolling is unavailable, and affirm the BIA's decision. In other words, the court of appeals has jurisdiction over the petition for review even if the petition lacks merit.

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Members
of the U.S.
House of
Representatives

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

    **Decided June 8, 2015** (576 U.S. ___). D.C. Circuit/Affirmed. Justice Kennedy for a 6-3 Court (Breyer, J., concurring; Thomas, J., concurring in the judgment in part and dissenting in part; Roberts, C.J. dissenting, joined by Alito, J.; Scalia, J., dissenting, joined by Roberts, C.J., and Alito, J.). Section 214(d) of the Foreign Relations Authorization Act directs the Secretary of State to "record the place of birth as Israel" on a United States passport upon the request of an American citizen born in Jerusalem. This provision is in conflict with the Executive Branch's long-standing policy declining to recognize any country as having sovereignty over Jerusalem. The Court held that Section 214(d) violated the President's exclusive power to grant formal recognition to a foreign sovereign. The Court concluded that the Reception Clause, U.S. Const. art. II, § 3, which states that the President "shall receive Ambassadors and other public ministers," gives the President the power to recognize a state's sovereignty. This conclusion is supported by the President's power to negotiate treaties and nominate ambassadors. Functional considerations show that the President's recognition power is exclusive. The President is a unitary actor with the ability to act quickly and secretly, which are often necessary attributes for recognizing foreign sovereigns. The President has exercised the unilateral power to recognize new foreign sovereigns since the founding of the country. Although Congress has participated in the recognition of foreign sovereigns, these have been examples of Congress acquiescing to the President's exclusive recognition authority. Therefore, the Court concluded, Section 214(d) infringed on the President's exclusive recognition power.

22. ***Bank of America, N.A. v. Caulkett*, No. 13-1421 (11th Cir., 566 F. App'x 879; cert. granted November 17, 2014; consolidated with *Bank of America, N.A. v. Toledo-Cardona*, No. 14-163; argued on Mar. 24, 2015). Whether, under Section 506(d) of the Bankruptcy Code, which provides that "[t]o the extent**

**that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void," a Chapter 7 debtor may "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral.**

**Decided June 1, 2015** (575 U.S. ___). Fifth Circuit/Vacated and remanded. Justice Thomas for a unanimous Court. The Court held that a debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien, even when the debt owed on a senior mortgage lien exceeds the current value of the secured property. Section 506(d) of the Bankruptcy Code allows a debtor to void a lien on his property "[t]o the extent that [the] lien secures a claim against the debtor that is not an allowed secured claim." 11 U.S.C. § 506(d). All parties agreed that the claims at issue met the statutory definition of "allowed," but disputed whether their second mortgages were "secured" because the debt owed on their primary mortgage exceeded the value of the property. The Bankruptcy Code provides that an "allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in . . . such property." 11 U.S.C. § 506(a)(1). The Court acknowledged that a plain reading of § 506(a)(1) suggested that claims to a secondary mortgage are not "secured" when the value of the property exceeds the debt owed on a primary mortgage because the secondary mortgage creditor's interest in the property is effectively zero. But, in *Dewsnup v. Timm*, 502 U.S. 410 (1992), the Court determined that a "secured claim" is a claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim. The debtors did not ask the Court to overrule *Dewsnup*, but instead argued it was distinguishable because the senior mortgage lien in that case was only partially underwater, so that the junior creditor still had some interest in the property. The Court rejected this argument, noting that limiting the *Dewsnup* definition of a secured claim to partially underwater liens and establishing a different rule for fully underwater liens would "leave an odd statutory framework in its place." That is, if a court determines that the value of the property was *equal to* or one dollar *less* than the amount of the senior mortgage, the junior mortgage can be voided. But if the court determines that the value of the property was one dollar *more* than the amount of the senior mortgage, the junior mortgage cannot be voided. Such a reading could lead to arbitrary results, especially considering the fluctuating nature of the real estate market.

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

**Decided June 1, 2015** (575 U.S. ___). Tenth Circuit/Reversed and remanded. Justice Scalia for an 8-1 Court (Alito, J., concurring in the judgment; Thomas, J., concurring in part and dissenting in part). The Court held that to prevail against

an employer on a disparate-treatment claim under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant, an applicant need show only that her need for an accommodation was a motivating factor in the employer's decision, not that the employer had actual knowledge of her need. The Equal Employment Opportunity Commission filed suit after respondent failed to hire a practicing Muslim at least in part because her practice of wearing a headscarf, consistent with her understanding of her religion's requirements, would violate respondent's policy against its employees wearing "caps" while working. The applicant, however, had not actually requested any accommodation to permit her to wear the headscarf. The Court held that Title VII contained no requirement that the respondent have "actual knowledge" of the need for an accommodation. Title VII prohibits making a protected characteristic such as religion a "motivating factor" in an employment decision and contains no explicit requirement of actual knowledge. Instead, Title VII prohibits certain motives, regardless of the state of the actor's knowledge. An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. The Court also rejected respondent's alternative argument that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate-impact claim. Title VII prohibits intentional discrimination because of an individual's "religion," which Congress defined as including "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Thus, religious practice is one of the protected characteristics that cannot be accorded disparate treatment.

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

**Decided Jun. 1, 2015** (575 U.S. ____). Third Circuit/Reversed and remanded. Chief Justice Roberts for an 8-1 Court (Alito, J. concurring in part and dissenting in part; Thomas, J. dissenting). Federal law criminalizes transmitting in interstate commerce "any communication containing any threat . . . to injure the person of another." 18 U.S.C. § 875(c). The Court held that statements that are merely negligent with respect to the communication of a threat are not sufficient to support a conviction under the statute. After petitioner's wife left him in May 2010, petitioner posted on the Internet self-styled rap lyrics containing graphically violent language and imagery regarding his ex-wife, co-workers, enforcement officers, and a kindergarten class. The posts were interspersed with disclaimers that the lyrics were fictitious. At trial, petitioner argued that the Government must have proved he intended to communicate a true threat, but the judge instead

instructed the jury that a negligence standard applied. The Court reversed petitioner's conviction, holding that mere negligence was not sufficient to convict. After concluding that the statute itself did not include a mental-state requirement, the Court observed that omission of criminal intent element in the statute should not mean dispensing with it entirely. Instead, the Court noted, it generally reads into the statute a mental-state requirement "necessary to separate wrongful conduct from otherwise innocent conduct." Here, the line of separation is the threatening nature of the communication; thus, the mental-state requirement must apply to the fact that the communication contains a threat. Because petitioner's conviction was based on whether a reasonable person believed the posts to be a threat and not on his own awareness of wrongdoing, it could not stand. However, the Court declined to address the question whether a recklessness standard would be sufficient.

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

**Decided June 1, 2015** (575 U.S. ___). Eighth Circuit/Reversed. Justice Ginsburg for a 7-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that a noncitizen is not deportable under 8 U.S.C. § 1227(a)(2)(B)(i) because of a state-court conviction for an offense involving drug paraphernalia unless the elements of the state crime necessarily involve a controlled substance as defined by federal law. Under 8 U.S.C. § 1227(a)(2)(B)(i), a noncitizen is deportable if he has been "convicted of a violation of . . . 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)." Section 802, in turn, limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. 21 U.S.C. § 802(6). Petitioner, who was accused of possessing a sock in which he had placed tablets of an amphetamine, pleaded guilty under a Kansas statute which criminalized "possess[ion] with intent to use any drug paraphernalia to," among other things, "store" or "conceal" a "controlled substance." Kan. Stat. Ann. § 21-5709(b)(2) (2013 Cum. Supp.). The Kansas statute defining "controlled substance," however, included at least nine substances not included in the federal schedules. The Court emphasized that Congress "predicated deportation 'on convictions, not conduct.'" Accordingly, federal courts determine deportability by using the categorical approach, under which a "state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law." Applying this approach, petitioner was not deportable because the Kansas statute under which he was convicted was broader than its federal analogue; the state prosecutor did not *necessarily* have to prove that the defendant used drug paraphernalia to conceal a substance listed in § 802. The Court rejected the argument that a drug paraphernalia conviction, as distinguished from a drug possession or distribution

conviction, relates to any and all controlled substances, whether or not the substance was listed in § 802. This, the Court reasoned, would produce an anomalous result: minor drug paraphernalia possession offenses would be treated more harshly than drug possession and distribution offenses, despite the former being a less grave offense.

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

**Decided May 26, 2015** (575 U.S. __). Federal Circuit/Vacated and remanded. Justice Kennedy for a 6-2 Court (Scalia, J., dissenting, joined by Roberts, C.J.; Breyer, J., did not participate). The Court held that a defendant's belief regarding patent validity is not a defense to an induced-infringement claim brought under 35 U.S.C. § 271(b). Petitioner was the holder of a patent for a method of implementing short-range wireless networks. Petitioner filed suit against respondent for directly infringing its patent and for inducing others to infringe through the sale of infringing equipment. Respondent defended the induced-infringement claim by arguing that it had a good-faith belief that the patent at issue was invalid. The Court held that a good-faith belief in the invalidity of a patent is not a defense to a claim of induced infringement. As the Court reasoned, patent infringement and patent invalidity are separate matters under patent law, and the *scienter* element for induced infringement concerns infringement, not invalidity. When infringement is the issue, the validity of the patent is not the question to be confronted. Allowing a defendant's belief regarding patent validity as a new defense to infringement would undermine the longstanding presumption of a patent's validity; permit plaintiffs to circumvent the proper channels for obtaining a ruling regarding a patent's validity (*e.g.*, filing a declaratory judgment action, seeking *inter partes* review at the Patent Trial and Appeal Board, or seeking *ex parte* reexamination of the patent by the Patent and Trademark Office); and render litigation more burdensome for everyone involved. Accordingly, the Court held that belief that a patent is invalid is no defense to a claim of induced infringement.

27. ***Kellogg Brown & Root v. United States, ex rel. Carter*, No. 12-1497 (4th Cir., 710 F.3d 171; CVSG Oct. 7, 2013; cert. opposed May 27, 2014; cert. granted July 1, 2014; SG as amicus, supporting respondent; argued on Jan. 13, 2015). The Questions Presented are: (1) Whether the Wartime Suspension of Limitations Act—a criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the Government "[w]hen the United States is at war," 18 U.S.C. § 3287, and which this Court**

**has instructed must be "narrowly construed" in favor of repose—applies to claims of civil fraud brought by private relators, and is triggered without a formal declaration of war, in a manner that leads to indefinite tolling. (2) Whether, contrary to the conclusion of numerous courts, the False Claims Act's so-called "first-to-file" bar, 31 U.S.C. § 3730(b)(5)—which creates a race to the courthouse to reward relators who promptly disclose fraud against the Government, while prohibiting repetitive, parasitic claims—functions as a "one-case-at-a-time" rule allowing an infinite series of duplicative claims so long as no prior claim is pending at the time of filing.**

**Decided May 26, 2015** (575 U.S. __). Fourth Circuit/Reversed in part, affirmed in part, and remanded. Justice Alito for a unanimous Court. The Court held that the Wartime Suspension of Limitations Act ("WLSA") applies only to criminal offenses, not to civil claims, and that the first-to-file bar of the False Claims Act ("FCA") does not apply after previously filed actions are dismissed. First, the Court held that the WSLA, which suspends the statute of limitations for "any offense" of fraud against the United States Government during times of war, 18 U.S.C. § 3287, does not apply to civil claims. The Court reasoned the term "offense" is most commonly used to refer to crimes. Previous versions of the WSLA had used the term "offense" in an exclusively criminal manner, and contemporary dictionaries confirmed this interpretation. Congress, moreover, codified the WSLA in Title 18 of the U.S. Code, which generally sets forth criminal provisions. Second, the Court held that the FCA's first-to-file bar does not prohibit a plaintiff from filing a claim after the first-filed action is dismissed. The first-to-file bar provides that no person may bring an action "based on the facts underlying the *pending* action." 31 U.S.C. § 3730(b)(5) (emphasis added). The Court reasoned that the ordinary dictionary meaning of the term "pending" means remaining undecided or awaiting decision. Thus, a suit is no longer a "pending action" after it has been dismissed, and the FCA does not bar a subsequent action when the previously filed case is no longer pending.

28. ***Wellness Int'l Network, Ltd. v. Sharif*, No. 13-935 (7th Cir., 727 F.3d 751; cert. granted July 1, 2014; limited to Questions 1 and 3; SG as amicus, supporting petitioners; argued on Jan. 14, 2015). The Questions Presented are: (1) Whether the presence of a subsidiary state property law issue in an 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action. (2) Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.**

**Decided May 26, 2015** (575 U.S. __). Seventh Circuit/Reversed and remanded. Justice Sotomayor for a 6-3 Court (Alito, J., concurring in part and concurring in the judgment; Roberts, C.J., dissenting, joined in part by Thomas, J.; Thomas, J., dissenting). The Court held that Article III permits bankruptcy judges to adjudicate *Stern v. Marshall*, 564 U.S. 2 (2011), claims—*i.e.*, claims designated

by statute for final adjudication by a bankruptcy judge, but prohibited from proceeding in bankruptcy court as a constitutional matter—so long as the parties knowingly and voluntarily consent. Article III's guarantee of an impartial and independent federal adjudication before an Article III court is a "personal right," and thus is subject to waiver. Article III's structural purpose, however, also bars congressional attempts to transfer jurisdiction to non-Article III courts in a way that would "threaten the institutional integrity of the judicial branch." Parties cannot "cure" such a constitutional problem by consent. But here, the Court reasoned, allowing litigants to waive Article III adjudication of *Stern* claims would not usurp the constitutional prerogatives of Article III courts. First, Article III judges can remove bankruptcy judges, and may delegate or un-assign a bankruptcy judge's jurisdiction over a claim *sua sponte* or at the request of the parties. Second, bankruptcy judges may only hear a narrow class of common-law claims incidental to the bankruptcy proceeding; thus, "the magnitude of any intrusion on the judicial branch is *de minimis*." Third, as the entire process takes place under the district court's control and jurisdiction, there is "no indication Congress gave bankruptcy courts the ability to decide *Stern* claims in an effort to aggrandize itself or humble the judiciary." The Court further held that courts may imply the requisite consent from the parties' actions, but any consent must be both knowing and voluntary.

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

**Decided May 18, 2015** (575 U.S. ___). Ninth Circuit/Certiorari dismissed in part; Reversed in part and remanded. Justice Alito for a 6-2 Court (Scalia, J., concurring in part and dissenting in part, joined by Kagan, J.). The Court held that two police officers who had forcibly entered the home of an armed, mentally ill suspect without any accommodation for her disability were entitled to qualified immunity from liability for the injuries they caused the suspect. Public officials are immune from suit under 42 U.S.C. § 1983 unless they have violated a constitutional right that was clearly established at the time of the challenged conduct. Even assuming it is a violation of the Fourth Amendment for officers to forcibly enter the home of an armed, mentally ill suspect absent "an objective need for immediate entry," that right was not clearly established at the time of the officers' conduct. The Court also dismissed as improvidently granted the question whether Title II of the Americans with Disabilities Act requires law enforcement to provide accommodations to an armed, violent, and mentally ill suspect when attempting to arrest her.

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

**Decided May 18, 2015** (575 U.S. ___). Sixth Circuit/Affirmed. Justice Breyer for a unanimous Court. Under 28 U.S.C. § 1915(g), an incarcerated litigant may not proceed in forma pauperis if he "has, on 3 or more prior occasions, while incarcerated . . . , brought an action or appeal in a court of the United States that was dismissed" on certain qualifying grounds. The Court held that Section 1915(g) bars an incarcerated litigant from proceeding in forma pauperis even if one of the previous dismissals is the subject of an ongoing appeal. The Court reasoned that "the statute refers to whether an action or appeal 'was dismissed,'" a word that does not normally include subsequent appellate activity. Reading the statute to apply only to actions where dismissal was affirmed on appeal would be contrary to a "literal reading" of the statute. It would also contravene the statute's purpose of filtering out nonmeritorious prisoner claims by permitting prisoners to flood the courts with suits while dismissals were on appeal.

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

**Decided May 18, 2015** (575 U.S. ___). Court of Appeals of Maryland/Affirmed. Justice Alito for a 5-4 Court (Scalia, J., dissenting, joined in part by Thomas, J.; Thomas, J., dissenting, joined in part by Scalia, J.; Ginsburg, J., dissenting, joined by Scalia and Kagan, J.J.). The Court held that Maryland's personal income tax scheme, which "taxes the income its residents earn both within and outside the State, as well as the income that nonresidents earn from sources within Maryland," without offering Maryland residents "a full credit against the income taxes they pay to other States," was unconstitutional under the "dormant Commerce Clause." Relying primarily on previous dormant Commerce Clause cases involving taxation of the income of corporations, rather than individuals, the Court reasoned that those precedents "all but dictate[d] the result in this case." The tax schemes held unconstitutional in those cases, the Court explained, all "had the potential to result in the discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity." *Nondiscriminatory* double taxation does not necessarily violate the dormant Commerce Clause, such as when it is "only as a result of the interaction of two different but nondiscriminatory" state tax schemes. The Court therefore tested for intent to discriminate against interstate commerce using the "'internal consistency' test," which "'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce

intrastate.'" If every state adopted Maryland's income tax scheme, a resident of State A who earned all of her income in State A would be taxed less overall than would another resident of State A who earned his income in State B, because the second resident would be taxed by *both* State A (his state of residence) *and* State B (the state in which he earned his income).

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

**Decided May 18, 2015** (575 U.S. ___). Fifth Circuit/Vacated and remanded. Justice Ginsburg for a unanimous Court. The Court held that a debtor who converts a Chapter 13 bankruptcy to a Chapter 7 bankruptcy is entitled to a return of any post-petition wages not distributed by the Chapter 13 trustee. Absent a bad-faith conversion, the Bankruptcy Code limits a converted Chapter 7 estate to property belonging to the debtor at the time that the original Chapter 13 petition was filed. Because Chapter 7 estates do not include post-petition wages, any undistributed wages in the hands of the Chapter 13 trustee do not become part of the newly converted Chapter 7 estate. Although the Code does not expressly say these wages should go to the debtor, the Court reasoned that this was "the most sensible reading" of the protection Congress provided to Chapter 7 debtors. In doing so, the Court rejected the argument that post-petition wages should be distributed to creditors. The Court reasoned that upon conversion to a Chapter 7 bankruptcy, any Chapter 13 plan is no longer binding on the debtor and creditors, and therefore, the Chapter 13 trustee no longer has the duty or authority to distribute the accumulated wages.

33. ***Henderson v. United States*, No. 13-1487 (11th Cir., 555 F. App'x 851; cert. granted Oct. 20, 2014; argued on Feb. 24, 2015). Whether a felony conviction, which makes it unlawful for the defendant to possess a firearm, prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the Government (1) transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests; or (2) sell the firearms for the benefit of the defendant.**

**Decided May 18, 2015** (575 U.S. __). Eleventh Circuit/Vacated and remanded. Justice Kagan for a unanimous Court. The Court held that federal courts have equitable authority to order law enforcement agencies to transfer firearms previously seized from convicted felons to a third party, as long as the court is satisfied that the felon will not retain control over the firearms. Pursuant to 18 U.S.C. § 922(g), federal law prohibits felons from possessing any firearms. The Government argued that § 922(g) prevents courts from approving a felon's request to transfer his firearms to any third party, because the felon would remain in constructive possession of the firearm. The Court rejected this argument, reasoning that a felon's decision regarding how to dispose of his firearms did not necessarily mean that he would maintain control over "guns in the hands of

others." Instead, the felon exercised a wholly separate element of ownership—"the right merely to sell or otherwise dispose of [an] item." A federal court may therefore grant a felon's motion to transfer firearms to a third party "if, but only if, that disposition prevents the felon from later exercising control over those weapons, so that he could either use them or tell someone else how to do so."

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

**Decided May 18, 2015** (575 U.S. ___). Ninth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. Under the Employee Retirement Income Security Act of 1974 ("ERISA"), a breach of fiduciary duty claim must be filed no more than six years after "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113. The Court held that a claim that an ERISA trustee breached her fiduciary duty by imprudently retaining an investment is timely if the alleged failure to remove the imprudent investment occurred within six years of suit. ERISA looks to the common law of trusts, and that body of law makes clear that a trustee has a continuing duty to conduct a regular review of the trust's investments to ensure that they are appropriate. The trustee must then dispose of any inappropriate investments within a reasonable time. Accordingly, failure to properly monitor investments and remove those that are imprudent constitutes a breach of fiduciary duty both substantively and for purposes of ERISA's statute of limitations. The Court did not, however, address the scope of the trustee's review, or how often it must occur. Instead, it vacated and remanded to the Ninth Circuit to consider these issues in light of the trust-law principles outlined in the Court's opinion.

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

**Decided May 4, 2015** (575 U.S. ___). First Circuit/Affirmed. Chief Justice Roberts for a unanimous Court. The Court held that a bankruptcy court's order denying confirmation of a debtor's proposed repayment plan is not a final order that the debtor may appeal immediately. Bankruptcy appeals may be taken only from "final judgments, orders, and decrees . . . in cases and proceedings." 28 U.S.C. § 158(a). The Court reasoned that an order denying confirmation is not "final," so long it leaves the debtor free to propose another plan. This is so because only plan confirmation or case dismissal alters the status quo and fixes the rights and obligations of the parties. Denial of confirmation with leave to amend, by contrast, leaves the parties' rights and obligations unsettled. In so holding, the Court rejected petitioner's argument that the relevant "proceeding"

under the statute was the submission of a single plan to the bankruptcy judge. Instead, the Court concluded, the relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward. Because an order denying confirmation with leave to submit another plan does not end this process, it is not immediately appealable.

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

**Decided April 29, 2015** (575 U.S. ___). Seventh Circuit/Vacated and remanded. Justice Kagan for a unanimous Court. The Court held that courts have authority to review whether the Equal Employment Opportunity Commission ("EEOC") has fulfilled its mandatory duty under Title VII of the Civil Rights Act of 1964 to attempt conciliation of an alleged unlawful employment practice before filing suit. Under Title VII, if the EEOC finds reasonable cause to believe that a complaint has merit, then it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The Court concluded that this statutory requirement was subject to judicial review, reasoning that nothing in Title VII rebutted the strong presumption favoring judicial review of agency action. Title VII, however, is designed to be flexible so as to grant the EEOC discretion over the pace and duration of conciliation efforts. As a result, the scope of judicial review is narrow. Judicial review is limited to ascertaining whether the EEOC notified the employer about the specific allegedly discriminatory practice and whether the EEOC tried to engage the employer in some form of discussion so as to give the employer an opportunity to remedy the allegedly discriminatory practice.

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

**Decided April 29, 2015** (575 U.S. ___). Fla./Affirmed. Chief Justice Roberts for a 5-4 Court (Breyer, J., concurring; Ginsburg, J., concurring in part and concurring in the judgment, joined in part by Breyer, J.; Scalia, J., dissenting, joined by Thomas, J.; Kennedy, J., dissenting; Alito, J., dissenting). The Court held that a Florida law prohibiting candidates for judicial office from personally soliciting campaign funds did not violate the First Amendment. Canon 7(c)(1) of Florida's Code of Judicial Conduct bans judges and judicial candidates from personally soliciting campaign funds, but permits them to establish committees to secure and manage those funds. Holding that a state may place restrictions on the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest, the Court concluded that Canon 7(c)(1) satisfied this test. Specifically, Florida has a compelling interest in preserving the integrity of its judiciary and maintaining the public's confidence in an impartial judiciary. This interest extends beyond the state's interest in preventing the appearance of

corruption in legislative and executive elections, because a judge's role as neutral arbiter differs from that of a politician. Canon 7(c)(1) raises no fatal underinclusivity concerns, as it aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary—personal requests for money by judicial candidates—and applies evenhandedly to all judicial candidates, regardless of viewpoint or means of solicitation. Finally, Canon 7(c)(1) is narrowly tailored and raises no overinclusivity concerns, as it restricts only a very narrow type of speech and leaves judicial candidates free to discuss any issue with any person at any time.

38. ***United States v. Wong*, No. 13-1074 (9th Cir., 732 F.3d 1030; cert. granted June 30, 2014; argued on Dec. 10, 2014; decided with *United States v. June*, No. 13-1075 (9th Cir., 550 F. App'x 505; cert. granted June 30, 2014; argued on Dec. 10, 2014). Whether the 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.**

**Decided Apr. 22, 2015** (575 U.S. ___). Ninth Circuit/Affirmed and remanded. Justice Kagan for a 5-4 Court (Alito, J., dissenting, joined by Roberts, C.J., and Scalia and Thomas, J.J.). The Court held that the statute of limitations under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), is subject to equitable tolling. Section 2401(b) provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun with six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." Relying on *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Court explained that it applies a rebuttable presumption that equitable tolling is available for suits brought against the United States pursuant to statutes waiving sovereign immunity. The Court rejected the Government's arguments that the presumption was rebutted because Congress had either made the time bars in § 2401(b) jurisdictional or otherwise "opted to forbid equitable tolling." Applying a "clear statement rule" that "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences," the Court reasoned that nothing in the statute's text, context, or legislative history affirmatively indicated a desire to make § 2401(b)'s time bar jurisdictional. The Court described the statute's use of the phrase "shall be forever barred," for example, as "mundane," "utterly unremarkable," and "a commonplace in federal limitations statutes for many decades surrounding Congress's enactment of the FTCA." The Court accordingly rejected the Government's principal argument that Congress specifically used those words to create the same jurisdictional bar found in the Tucker Act at the time of the FTCA's passage. The Court similarly declined to hold that all time limits for claims under statutes waiving sovereign immunity are jurisdictional or otherwise disallow equitable tolling.

39. ***Oneok, Inc. v. Learjet, Inc.*, No. 13-271 (9th Cir., 715 F.3d 716; CVSG Dec. 2, 2013; cert. opposed May 27, 2014; cert. granted July 1, 2014; SG as amicus, supporting petitioners; argued on Jan. 12, 2015). Whether the Natural Gas Act preempts state-law claims challenging industry practices that directly**

**affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions.**

**Decided Apr. 21, 2015** (575 U.S. ___). Ninth Circuit/Affirmed. Justice Breyer for a 7-2 Court (Thomas, J., concurring in part and concurring in the judgment; Scalia, J., dissenting, joined by Roberts, C.J.). The Court held that the Natural Gas Act does not preempt state-law antitrust suits directed at industry practices affecting both federally regulated wholesale natural-gas prices and nonfederally regulated retail natural-gas prices. The Natural Gas Act grants the Federal Energy Regulatory Commission ("FERC") authority to regulate the interstate shipment and sale of gas to local distributors for resale. But the Act permits regulation of the production, local distribution, and direct sale of natural gas under state law. Institutions that purchased natural gas directly from interstate pipelines sued the pipelines, claiming that they violated state antitrust laws by manipulating natural gas price indices. Pointing out that FERC regulates those price indices and that their alleged behavior affected wholesale prices, the pipelines contended that the Act preempts those state antitrust laws under the doctrine of field preemption. The Court rejected this argument, explaining that the Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." As a result, whether the Act preempts a state law depends on "the *target* at which the state law *aims*." If directed at retail rates rather than wholesale rates, or intrastate transport rather than interstate transport, for example, the state law is not preempted. Here, the Supreme Court explained, the state antitrust laws were aimed at conduct affecting retail rates, so the laws were not preempted even though the conduct also affected wholesale rates. The Court rejected the dissent's argument that the proper test is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act"—under that test, the Act would preempt state laws of "broad applicability," rather than only laws "aimed directly at interstate purchasers and wholesales for resale." The Court expressly declined to resolve whether the Act preempts the state antitrust laws at issue under conflict preemption.

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

**Decided April 21, 2015** (575 U.S. ___). Eighth Circuit/Vacated and remanded. Justice Ginsburg for a 6-3 Court (Kennedy, J., dissenting; Thomas, J., dissenting, joined by Alito, J., and joined in part by Kennedy, J.; Alito, J., dissenting). The Court held that a canine sniff conducted after completion of a traffic stop was an unreasonable seizure in violation of the Fourth Amendment because it extended the stop beyond the time needed to handle the matter for which the stop was made. Because a seizure for a traffic violation justifies a police investigation of that violation, whether the seizure's duration is reasonable under *Terry v. Ohio*, 392 U.S. 1 (1968), depends on the time it takes to address the traffic violation that warranted the stop and attend to related safety concerns. Authority for the seizure terminates when these tasks are, or reasonably should have been, completed. This does not mean that officers may not conduct checks unrelated to the purpose of

the stop, but means only that these checks must not prolong the stop without reasonable suspicion. A dog sniff is unrelated to the purpose of an ordinary traffic stop because, in contrast to a traffic inquiry such as running a license, it is a measure directed at detecting evidence of ordinary criminal wrongdoing. Accordingly, prolonging the stop at issue, even by only a few minutes, in order to perform a dog sniff violated the Fourth Amendment. In so holding, the Court rejected the Eighth Circuit's *de minimis* rule that dog sniffs occurring within a short time after a traffic stop is completed are not unreasonable if they result in only a *de minimis* intrusion, reasoning that the Court's previous endorsement of a *de minimis* rule was predicated on an interest in officer safety that stems from the stop's purpose, not a general interest in criminal law enforcement.

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

    **Decided March 31, 2015** (575 U.S. __). Ninth Circuit/Reversed. Justice Scalia for a 5-4 Court (Breyer, J., concurring in part and concurring in the judgment; Sotomayor, J., joined by Kennedy, Ginsburg, and Kagan, J.J., dissenting). The Court held that Medicaid providers do not have a private cause of action to enforce Section 30(A) of the Medicaid Act against state government officials. The Act requires state Medicaid plans to establish payments to Medicaid providers that are "consistent with efficiency, economy, and quality of care" but "safeguard against unnecessary utilization of such care and services." In this case, Medicaid providers sued Idaho government officials asserting that Idaho's plan reimbursed them at lower rates than Section 30(A) allows. The Court did not consider the adequacy of the State's rates, instead finding that the providers lacked a cause of action on which to sue. It concluded that the Supremacy Clause does not create a private right of action; the clause's history and context in the Constitution as a whole show that it creates "a rule of decision" and is not the "source of any federal rights." Precedent recognizing that federal courts may sometimes enjoin state officers from violating federal law is not inconsistent with that conclusion, the Court found. The Court further concluded that the suit could not proceed in equity, because the Medicaid Act implicitly precludes private enforcement of Section 30(A). The Court found that Congress expressed its intent to foreclose equitable relief by providing an administrative remedy—the Secretary of Health and Human Services can withhold funding from states that do not comply—and through the "judicially unadministrable nature of" Section 30(A)'s text. By "conferring enforcement of [Section 30(A)'s] judgment-laden standard upon the Secretary alone," Congress showed that it "wanted to make the agency remedy that it provided exclusive."

42. ***Alabama Legislative Black Caucus v. Alabama*, No. 13-895 (M.D. Ala., 2013 WL 6925681; probable jurisdiction noted June 2, 2014; consolidated with *Alabama Democratic Conference v. Alabama*, No. 13-1138; SG as amicus, supporting neither party; argued on Nov. 12, 2014). Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race**

**by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.**

**Decided Mar. 25, 2014** (575 U.S. ___). M.D. Ala./Vacated and remanded. Justice Breyer for a 5-4 Court (Scalia, J., dissenting, joined by Roberts, C.J., Alito and Thomas, J.J.; Thomas, J., dissenting). The Court held that minimizing population deviation, in service to the one-person-one-vote principle, is not a valid basis under the Equal Protection Clause for using race as the "predominant motivating factor" in redrawing state legislative districts. *Miller v. Johnson*, 515 U.S. 900 (1995). As the Court explained, the one-person-one-vote principle is "background" that is "taken as given" and is not a "traditional redistricting criteria." Accordingly, it cannot justify racially motivated redistricting. In the alternative, the Court held that, to the extent complying with Section 5 of the Voting Rights Act remains a compelling state interest after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), that section does not mandate a particular racial ratio in a majority-minority district or prevent a jurisdiction from reducing the extent of the minority's majority. Instead, Section 5 requires only that voters in a majority-minority district maintain the ability to elect their favored candidates. To reach these conclusions, the Court made two additional holdings (each rejecting the district court). First, notwithstanding statements and evidence suggesting otherwise, the plaintiffs-appellants had challenged individual districts redrawn after the 2010 Census, rather than the state's redistricting "as a whole." Second, an organization with statewide membership deserves an opportunity to show it has standing through its members before suffering *sua sponte* dismissal.

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

**Decided Mar. 25, 2015** (575 U.S. ___). Ninth Circuit/Vacated and remanded. Justice Breyer for a 6-3 Court (Alito, J., concurring; Scalia, J., dissenting, joined by Thomas, J; Kennedy, J., dissenting). The Court, rejecting both the petitioner's and respondent's interpretation of the Pregnancy Discrimination Act, held that a pregnant worker who wishes to prove a disparate-treatment claim with indirect evidence may do so using the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, to survive summary judgment, the plaintiff must first make out a *prima facie* case of discrimination by showing: (1) she belongs to the protected class; (2) she sought accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others similar in their ability or inability to work. If the plaintiff can establish a *prima facie* case, the employer may then seek to justify its refusal to accommodate the plaintiff by presenting a "legitimate, non-discriminatory" reason for denying her the accommodation. If the employer is able to do so, the

plaintiff may either: (a) show that the employer's proffered reasons were pretextual, or (b) provide sufficient evidence that the employer's policies impose a significant burden on pregnant women *and* the proffered reasons are not sufficiently strong to justify that burden. The Court rejected Young's suggestion that the Pregnancy Discrimination Act requires employers to provide pregnant workers the same accommodation as employees impaired by non-pregnancy conditions, doubting that Congress intended such a broad "most-favored-nation" approach. The Court similarly rejected the respondent's interpretation that the Act simply defines sex discrimination to include pregnancy discrimination. Such an interpretation would fail to accomplish Congress's goal of ensuring that no employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work.

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

**Decided Mar. 24, 2015** (575 U.S. ___). Eighth Circuit/Reversed. Justice Alito for a 7-2 Court (Ginsburg, J., concurring; Thomas, J., dissenting, joined by Scalia, J.). The Court held that the standard elements of issue preclusion apply to the decisions of the Trademark Trial and Appeal Board ("TTAB"). Under the Lanham Act, a party who objects to an applicant's attempt to register a trademark with the U.S. Patent and Trademark Office may oppose the registration before the TTAB. The objector may also sue for trademark infringement in a federal court. The Eighth Circuit held that federal courts were not required to give preclusive effect to the TTAB's decisions, but the Supreme Court reversed. Generally, issue preclusion provides that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. The Court reasoned that these principles also extend to administrative agencies so long as no "statutory purpose to the contrary is evident." Nothing in the text or structure of the Lanham Act, however, would bar application of issue preclusion in cases where the ordinary elements of issue preclusion are met. Thus, issue preclusion bars relitigation in district court of issues previously decided by the TTAB so long as the issues in the two cases are indeed identical. Although the TTAB looked to different factors in deciding the registration issue than a district court considered in deciding an infringement claim, both apply the same likelihood of confusion standard. Nor do the different procedures employed by the TTAB and district courts defeat the possibility of issue preclusion. Rather, "the correct inquiry is whether the procedures used in the first proceeding were fundamentally poor, cursory, or unfair." And here, there is "no categorical reason to doubt the quality, extensiveness, or fairness" of the TTAB's procedures. Finally, the elaborate

scheme for registration, with many important rights attached and backed up by plenary review, confirms that registration decisions "can be weighty enough to ground issue preclusion."

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

**Decided March 24, 2015** (575 U.S. ___). Sixth Circuit/Vacated and remanded. Justice Kagan for a unanimous Court (Scalia, and Thomas, J.J, concurring). Section 11 of the Securities Act of 1933 provides purchasers of securities a right of action against the issuer and others where the registration statement "contained an untrue statement of material fact" or "omitted to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Here, the Court held that statements of opinion are not actionable under Section 11 unless the speaker either subjectively believes the statement of opinion to be untrue, or the statement of opinion includes a statement regarding an underlying fact that is untrue. The Court further held that an omission of "discrete factual representations" in a statement of opinion is not actionable under Section 11 unless the omission includes "material facts about the issuer's inquiry into or knowledge" about the opinion, and those facts "conflict with what a reasonable investor would take from the statement itself." The case arose from two statements of opinion in a registration statement filed by the petitioner in connection with a public offering of its common stock that expressed the belief that the petitioner was in compliance with applicable federal and state laws. The respondents brought suit alleging that the petitioner's statements were false because subsequent lawsuits by the Government alleged that the petitioner had violated anti-kickback laws. The district court granted the petitioner's motion to dismiss, concluding that because the statements were statements of opinion, they would give rise to liability only if the petitioner knew that they were untrue—an allegation not advanced by the respondent. The Sixth Circuit reversed, holding that a plaintiff need only allege that a statement of opinion is "objectively false" to give rise to Section 11 liability. The Court vacated that decision, concluding that "to avoid exposure for omissions under [Section] 11 an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief."

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

**preference for Amtrak's passenger trains that is required by federal law, is an unconstitutional delegation of legislative power to a private entity.**

**Decided Mar. 9, 2015** (575 U.S. __). D.C. Circuit/Vacated and remanded. Justice Kennedy for a unanimous Court (Alito, J., concurring; Thomas, J., concurring in the judgment). The Court held that Amtrak is a governmental entity for purposes of determining the validity of the metrics and standards for Amtrak's performance. In 2008, Congress passed the Passenger Rail Investment and Improvement Act ("PRIIA"). PRIIA grants the Federal Railroad Administration ("FRA"), an agency in the Department of Transportation, and Amtrak, a corporation created by Congress, joint rulemaking authority. In May 2010, Amtrak and the FRA issued metrics and standards regarding the track priority of Amtrak trains over the trains of the "host railroads," the owners of the tracks used by Amtrak trains. The respondent sued the Department of Transportation, claiming that the metrics and standards must be invalidated because they violate the Fifth Amendment and the nondelegation doctrine. Specifically, the respondent argued that Amtrak was a private entity and therefore Congress could not delegate rulemaking authority to it or allow it to wield coercive governmental power. The Supreme Court held that, for the purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Although Congress has legislated that Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a)(3), the Court held that Congressional pronouncements are not dispositive for constitutional purposes. The Court observed that Amtrak's Board of Directors is composed of the Secretary of Transportation, seven other members appointed by the President and confirmed by the Senate, and Amtrak's President, who is elected by the other eight board members. The Court also noted that the political branches exercise substantial supervision over Amtrak. Moreover, the Court had already held that Amtrak is a governmental agent or instrumentality for purposes of the First Amendment in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995). The Court therefore vacated the judgment of the Court of Appeals and remanded, instructing the lower court to consider the respondent's constitutional claims in light of Amtrak's governmental status.

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

**Decided Mar. 9, 2015** (575 U.S. __). D.C. Circuit/Reversed. Justice Sotomayor for a unanimous Court (Alito, J., concurring in part and concurring in the judgment; Scalia, J., concurring; Thomas, J., concurring). The Court held that a federal agency is not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act ("APA") when it issues a new interpretation of a regulation, even if that interpretation deviates significantly from one the agency has previously adopted. In so finding, the Court overruled *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir.

1997), and its progeny. Here, the respondents challenged the Department of Labor's 2010 interpretation of the Fair Labor Standard Act's ("FLSA") "administrative" exemption as applied to mortgage-loan officers. In 1999 and 2001, the Department issued letters opining that mortgage-loan officers did not qualify for the administrative exemption. In 2006, after new regulations were promulgated through a notice-and-comment rulemaking, the Department issued an opinion letter finding that mortgage-loan officers did fall within the administrative exemption. However, in 2010, the Department changed course and issued a letter opining that mortgage-loan officers did not qualify for the administrative exemption under the 2004 regulations. The respondents challenged the 2010 interpretation as procedurally invalid because it was not issued pursuant to notice and comment. The district court granted summary judgment in favor of the Department. The D.C. Circuit reversed, relying on *Paralyzed Veterans*, 117 F.3d 579, in which it had held that an agency must follow the APA's notice-and-comment rulemaking procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The Supreme Court disagreed, holding that the *Paralyzed Veterans* doctrine was contrary to the clear text of the APA's rulemaking provisions—which categorically exclude interpretive rules from the notice-and-comment process—and improperly imposed on agencies an obligation beyond the "maximum procedural requirements" specified in the APA.

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

**Decided Mar. 4, 2015** (574 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Scalia for a 7-2 Court (Thomas, J., dissenting, joined by Ginsburg, J.). The Court held that a State "discriminat[es] against a rail carrier" in violation of 49 U.S.C. § 11501(b)(4) when it "tax[es] diesel fuel purchases made by a rail carrier while exempting similar purchases made by its competitors"; the Court also held, however, that a State can eliminate the violation by levying a "comparable tax" on the exempted competitors. In a previous decision in the case, *see CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277 (2011), the Court concluded that "a tax discriminates under subsection (b)(4) when it treats 'groups [that] are similarly situated' differently without sufficient 'justification for the difference in treatment.'" After again granting certiorari, the Court rejected Alabama's argument that a rail carrier suffers discrimination under the statute only when its treatment differs from that of "all general and commercial taxpayers." Rather, the Court explained, the comparison class "depends on the theory of discrimination alleged in the claim," with the limitation that the

proposed comparators must be similarly situated to the rail carrier. The Court agreed with the Eleventh Circuit that "the competitors of railroads can be [a] 'similarly situated' comparison class" for purposes of § 11501(b)(4) because "discrimination in favor of that class most obviously frustrates the purpose of" the Railroad Revitalization and Regulation Reform Act of 1976, of which subsection (b)(4) is a part. But the Eleventh Circuit erred in concluding that Alabama had discriminated against CSX, the Court held, without considering the effect of other taxes Alabama imposed on competitors, but not on railroads. "It does not accord with ordinary English usage," the Court reasoned, "to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay *another* comparable tax from which the rail carrier is exempt." The Court therefore reversed the judgment of the Eleventh Circuit and remanded the case for the lower court to consider whether a fuel-excise tax on motor carriers was the rough equivalent of the diesel-fuel tax that CSX challenged as discriminatory. The Court also left to the Eleventh Circuit the question whether any of Alabama's other explanations justified the exemption it had granted water carriers, who were subject to neither tax.

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

**Decided Mar. 3, 2015** (575 U.S. ___). Tenth Circuit/Reversed and remanded. Justice Thomas for a unanimous Court (Kennedy, J., concurring; Ginsburg, J., concurring, joined by Breyer, J. and, in part, Sotomayor, J.). The Court held that the Tax Injunction Act ("TIA") did not divest the federal district court of jurisdiction over a suit seeking to enjoin the enforcement of Colorado's law requiring retailers without a physical presence in Colorado both to notify Colorado customers of their tax obligations and to report customer tax-related information to the Colorado Department of Revenue. The TIA provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" where other remedies are available in state court. 28 U.S.C. § 1341. Because the TIA is interpreted in light of the tax code, the terms "assessment," "levy," and "collection" refer to three discrete phases of the taxation process that do not include collection of information. Thus, while collecting information may improve Colorado's ability to assess, levy, and collect taxes, the TIA prohibits enjoining only those three activities. Moreover, the Court rejected the Tenth Circuit's broad reading of the term "restrain" to encompass actions merely inhibiting the assessment, levy, or collection of a tax. "Restrain" must be read narrowly due to its context and meaning in equity, as well as to give force to the TIA's precision.

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

**Decided Feb. 25, 2015** (574 U.S. ___). Fourth Circuit/Affirmed. Justice Kennedy for a 6-3 Court (Alito, J., dissenting, joined by Scalia and Thomas, J.J.). The Court held that when a majority of the members of an official state regulatory board are active market participants, the board can invoke state-action antitrust immunity only if it was subject to active supervision by the State. North Carolina's Board of Dental Examiners regulates the practice of dentistry in North Carolina, and is primarily composed of practicing dentists. Starting in 2006, the Board took actions to prevent non-dentists from offering teeth-whitening services in North Carolina. The Federal Trade Commission determined that the Board's actions violated Section 5 of the Federal Trade Commission Act, and the Fourth Circuit affirmed. The Supreme Court affirmed, rejecting the Board's argument that as a state agency, it is entitled to state-action immunity under *Parker v. Brown*, 317 U.S. 341 (1943). The Court explained that because the Board is a "nonsovereign actor controlled by market participants," to be protected by state-action immunity, the Board must satisfy the two-part test set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*., 445 U.S. 97 (1980). The State must have articulated a clear policy to allow the anticompetitive conduct, and the State must provide active supervision of the anticompetitive conduct. Here, because the Board was not actively supervised by North Carolina—for example, North Carolina did not review the Board's determination that teeth-whitening services constituted the practice of dentistry—the Board was not entitled to state-action immunity. The Court rejected the Board's argument that as a state agency it is exempt from *Midcal*'s second requirement, noting that "the need for supervision turns not on the formal designation given by the States to regulators but on the risk that active market participants will pursue private interests in restraining trade."

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

**Decided Feb. 25, 2015** (574 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Ginsburg for a 4-1-4 Court (Alito, J., concurring in the judgment; Kagan, J., dissenting, joined by Scalia, Kennedy, and Thomas, J.J.). Federal law imposes punishment on 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 an investigation. 18 U.S.C. § 1519. Petitioner, a commercial fisherman, caught undersized red grouper fish in violation of federal regulation. An officer patrolling the waters discovered the violation, segregated the undersized fish into crates, and instructed petitioner to leave the undersized fish in the crates until the boat returned to port. Instead, petitioner tossed the fish overboard and replaced them with other fish from his catch. Petitioner was charged with violating § 1519, among other things. Petitioner moved for a judgmental of acquittal on the § 1519 charge, arguing that it set forth a "documents offense" and that "tangible objects" referred to items such as hard drives and logbooks, not fish. The Court reversed petitioner's conviction, holding that § 1519 did not apply. A plurality of the Court concluded that the phrase "tangible object" "is better read to cover only objects one can use to record or preserve information, not all objects in the physical world." Focusing on the context of the statute, the plurality noted that the breadth of § 1519's scope militated in favor of a narrower reading of "tangible object." The plurality also observed that § 1519 originated in the Sarbanes-Oxley Act, an act targeted at corporate fraud, and that § 1519 was captioned "Destruction, alteration, or falsification of records…." The placement of "tangible object" in the sentence also suggests a narrow interpretation. Because it was included alongside "record" and "document" and appears after the verbs "falsif[y]" and "mak[e] a false entry in," the plurality concluded that "tangible object" refers to a subset of objects used to preserve information. Finally, the plurality invoked the rule of lenity, which declares that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Justice Alito, writing for himself, concurred in the judgment. He resolved the issue on narrow grounds. Justice Alito focused on three aspects of § 1519: its list of nouns, its list of verbs, and its title. "Although perhaps none of these features by itself would tip the case in favor of Yates, the three combined do so."

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

**Decided Feb. 24, 2015** (574 U.S. ___). Original Jurisdiction/Adopting Special Master's recommendations. Justice Kagan for a 5-4 Court (Roberts, C.J., concurring in part and dissenting in part; Scalia, J., concurring in part and dissenting in part; Thomas, J., concurring in part and dissenting in part, joined by Scalia and Alito, J.J., and, as to Part III, Roberts, C.J.). The Republican River Compact governs the allocation of "virgin water supply originating in" the Republican River Basin between Kansas and Nebraska. The states entered into a Final Settlement Stipulation that established mechanisms to calculate the states' water usage and promote compliance with the Compact. Based on the settlement's accounting procedures, Nebraska exceeded its permitted usage. The Court held that it has broad equitable authority to regulate interstate controversies, particularly those involving compacts between states to govern distribution from interstate waterways. Although it cannot order relief that is inconsistent with a compact's express terms, "the Court may exercise its full authority to remedy

violations of and promote compliance with the agreement." The Court therefore concluded that, "when a State has demonstrated reckless disregard of another, more vulnerable State's rights under" a compact, the Court can "order disgorgement of gains, if needed to stabilize a compact and deter future breaches." The amount of disgorgement should be a "fair point on the spectrum between no profits and full profits, based on the totality of facts and interests in the case." Accordingly, the Court held that disgorgement of a portion of Nebraska's gains was appropriate—aware that it was consuming more water than the Compact allowed, Nebraska implemented inadequate changes in an untimely manner, and, because water is more valuable in Nebraska than in Kansas, actual damages were insufficient to discourage continuing violation of the Compact. But the Court rejected Kansas's request for a larger award as, in light of Nebraska's recent compliance efforts, it was not "necessary to prevent another breach." The Court further held that, when states have adopted a "technical agreement" to effectuate the terms of a compact, it has the authority to modify that agreement "to correct material errors in the way it operates and thus align it with the compacting States' intended apportionment" and the Compact's terms. For that reason, it revised the settlement's accounting procedures to ensure that they would not mistakenly include imported water, rather than only the basin's "virgin water supply" when calculating each state's water consumption.

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

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

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

    **Decided Jan. 26, 2015** (574 U.S. __). Sixth Circuit/Vacated and remanded. Justice Thomas for a unanimous Court (Ginsburg, J., concurring, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that Sixth Circuit precedent, which established a presumption that retiree benefits in collective-bargaining agreements vest for life absent a specific termination date, was incompatible with ordinary principles of contract law. A group of retired employees contended that

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

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

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

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

**Decided Jan. 21, 2015** (574 U.S. ___). Second Circuit/Reversed and remanded. Justice Ginsburg for a unanimous Court. The Court held that an order dismissing

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

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

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

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

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

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

**Decided Jan. 20, 2015** (574 U.S. ___). Federal Circuit/Vacated and remanded. Justice Breyer for a 7-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that a district court's resolution of subsidiary factual issues in construing a patent claim must be reviewed for clear error under Federal Rule of Civil Procedure 52(a)(6), not *de novo*. Although the proper construction of a patent claim is a question of law, *see Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the Court explained that "subsidiary factfinding is sometimes necessary." The Court analogized patent claim construction to the interpretation of "deeds, contracts, or tariffs," in which a court sometimes must make factual determinations before reaching the ultimate legal conclusion of how to interpret the document. When the district court reviews only "evidence intrinsic to the patent," such as the patent claims and specifications, "the judge's determination will amount solely to a determination of law" subject to *de novo* review. But when the district court must "look beyond the patent's intrinsic

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

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

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

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

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

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

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

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

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

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

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

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

**Decided Dec. 15, 2014** (574 U.S. __). Tenth Circuit/Vacated and remanded. Justice Ginsburg for a 5-4 Court (Scalia, J. dissenting, joined by Kennedy and Kagan, J.J., and joined in part by Thomas, J.; Thomas, J. dissenting). The Court held that a defendant seeking to remove a case under the Class Action Fairness Act of 2005 ("CAFA") need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the defendant need not include evidence supporting the amount in controversy. The Court also held that it had jurisdiction to review for abuse of discretion an appellate court's refusal to review a district court's remand order. The plaintiff brought a putative class action in Kansas state court against the defendant, who removed the case to federal court. The defendant's notice of removal alleged that CAFA's $5 million amount in controversy minimum was satisfied. The district court ordered that the case be remanded back to state court because, in its notice of removal, the defendant had provided "no evidence" proving that the amount in controversy exceeded $5 million. Although CAFA permits a court of appeals to review remand orders, the Tenth Circuit denied the defendant's leave-to-appeal application without opinion. Reviewing for abuse of discretion, the Supreme Court concluded that the Tenth Circuit's denial of review was based on an error of law. To remove a case from state to federal court, a defendant's notice of removal must contain merely "a short and plain statement of the grounds for removal," 28 U.S.C. § 1446(a), not proof of the amount in controversy. By stating that it was denying the defendant's application "[u]pon careful consideration of the parties' submissions, as well as the applicable law," the Tenth Circuit signaled that its decision embraced the district court's erroneous requirement that CAFA removal notices contain evidence proving the amount in controversy. By relying on an error of law, the Court concluded, the Tenth Circuit abused its discretion in denying the defendant's application. The Court also explained that it has jurisdiction to review "[c]ases in the courts of appeals," 28 U.S.C. § 1254, and the case was "in" the Tenth Circuit via the defendant's leave-to-appeal application.

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

**Decided Dec. 15, 2014** (574 U.S. __). N.C./Affirmed. Chief Justice Roberts for an 8-1 Court (Kagan, J. concurring, joined by Ginsburg, J.; Sotomayor, J., dissenting). The Court held that a police officer's reasonable mistake of law can provide the reasonable suspicion necessary to justify an investigatory traffic stop under the Fourth Amendment. A North Carolina police officer stopped a car for driving with only one working brake light and discovered a bag of cocaine. But

the North Carolina Court of Appeals determined that North Carolina law requires only one working brake light and suppressed the evidence. The North Carolina Supreme Court reversed, concluding that the officer's mistake of law was reasonable and thus justified the stop. The U.S. Supreme Court explained that the Fourth Amendment requires "reasonableness," not perfection, and noted that searches or seizures based on mistakes of fact can be reasonable. "Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law." So, the Court concluded, searches or seizures based on mistakes of law can also be reasonable. The Court clarified that a mistake of law must be objectively reasonable, and that assessing whether a mistake of law is reasonable is less a "forgiving" inquiry under the Fourth Amendment than in the context of qualified immunity. The Court had "little difficulty" determining that the officer's incorrect interpretation of the state's brake light law, which the state appellate courts had not previously construed, was reasonable.



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

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

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

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

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

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

## Cases Determined Without Argument

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

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

3. ***Carroll v. Carman*, No. 14-212 (3d Cir., 749 F.3d 192; Reversed and remanded Nov. 10, 2014).** Per Curiam. The Court held that the petitioner—a law enforcement officer who conducted a "knock and talk" at a home by way of a publicly available entrance that was not the home's front door—was entitled to qualified immunity from the homeowners' claim that he violated their Fourth Amendment rights by entering their property without a warrant. The Third Circuit had held that it was clearly established that the "knock and talk" exception to the Fourth Amendment required an officer to begin the encounter at a residence's front door. Reversing the Third Circuit's judgment, the Court declined to decide "whether a police officer may conduct a 'knock and talk' at

any entrance that is open to visitors rather than only the front door." But the Court reasoned that, even assuming that controlling circuit precedent could constitute clearly established federal law in this case, no decision from the Third Circuit answered the question with sufficient certainty to deprive the petitioner of qualified immunity. The Court also noted that other federal and state courts have rejected the rule the Third Circuit had held to be clearly established federal law.

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

5. ***Christeson v. Roper*, No. 14-6873 (8th Cir., No. 14-3389; Reversed and remanded Jan. 20, 2015).** Per Curiam (Alito, J., dissenting, joined by Thomas, J.). The Court held that an indigent death-row inmate seeking federal habeas review was entitled to substitution of appointed counsel in the "interests of justice" due to his attorneys' conflict of interest. Indigent defendants are entitled "to the appointment of counsel in capital cases, including habeas corpus proceedings." In *Martel v. Clair*, 132 S. Ct. 1276 (2012), the Supreme Court held that a court may replace appointed counsel upon a petitioner's motion "when it is in the interests of justice." The Court "further explained that the factors a court of appeals should consider in determining whether a district court abused its discretion in denying such a motion include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's responsibility, if any, for that conflict)." The petitioner, who was sentenced to death after his conviction of three counts of capital murder in Missouri state court, sought to overcome the strict one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(1), for filing his federal habeas petition. With the assistance of outside counsel, the petitioner filed a motion for substitution of counsel because his

appointed counsel—who had failed to timely file his habeas petition—could not be expected to file a motion for equitable tolling of AEDPA's statute of limitations based on their own alleged misconduct. The district court denied the motion, and the court of appeals summarily affirmed. The Supreme Court reversed, finding that the district court did not adequately account for all of the factors set forth in *Martel*. "The [district] court's principal error was its failure to acknowledge [the appointed lawyers'] conflict of interest." Because "[t]olling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for serious instances of attorney misconduct," appointed counsel could not "reasonably be expected to make such an argument, which threatens their professional reputation and livelihood." Although the Court acknowledged that the petitioner "faces a host of procedural obstacles to having a federal court consider his habeas petition," it nevertheless determined that the petitioner should have the opportunity "to show that he [is] entitled to the equitable tolling of AEDPA's statute of limitations" and that he "is entitled to the assistance of substitute counsel in doing so."

6. ***Woods v. Donald*, No. 14-618 (6th Cir., 580 F. App'x 277; Reversed and remanded Mar. 30, 2015).** Per Curiam. The Court held that the Sixth Circuit failed to comply with the requirement in 28 U.S.C. § 2254(d)(1) that a writ of habeas corpus be granted only if a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The respondent's trial attorney had been absent for a short time while prosecutors offered testimony regarding his codefendants' actions. The state court of appeals rejected the respondent's argument that counsel's absence constituted *per se* ineffective assistance. In the Sixth Circuit's view, that decision was contrary to and involved an unreasonable application of *United States v. Cronic*, 466 U.S. 648 (1984). The Court reversed, reasoning that it had "never addressed whether the rule announced in *Cronic* applies to testimony regarding codefendants' actions." Because none of the Court's "holdings address counsel's absence during testimony that is irrelevant within the defendant's own theory of the case," the state court's decision could not be "contrary to" any Supreme Court holding. Nor was that decision an "unreasonable application" of *Cronic*: "a fairminded jurist could conclude" that *Cronic*'s "presumption of prejudice" was not warranted in Donald's case. Thus, the state court's refusal to apply *Cronic* "was not the 'extreme malfunction' required for federal habeas relief."

7. ***Torrey Dale Grady v. North Carolina*, No. 14-593 (Sup. Ct. of N.C., 367 N.C. 523; Reversed and remanded March 30, 2015).** Per Curiam. The Court held that the use of a satellite-based monitoring device to track a recidivist sex offender amounted to a search within the meaning of the Fourth Amendment. The Court relied on its decision in *United States v. Jones*, 569 U.S. ___ (2012), in which it held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" The Court reemphasized that a search occurs when the Government obtains information by physically intruding on a constitutionally protected area, whether or not the target had an expectation of privacy. This principle was buttressed, the Court noted, by its decision in *Florida v. Jardines*, 59 U.S. ___

(2013), in which it held that the police conducted a search when they arranged for a drug-sniffing dog to sniff around a suspect's front porch. In so doing, the police entered and occupied a protected area—the curtilage of a house—to obtain information without the homeowner's explicit or implicit consent. The Court rejected the reasoning of the North Carolina Court of Appeals that the monitoring program was not a Fourth Amendment search because it was civil in nature rather than criminal. According to the Court, *Ontario v. Quon*, 560 U.S. 746, 755 (2010), made clear that the Fourth Amendment's protections extend beyond the criminal sphere. The Court also rejected the State's argument that there was no evidence in the record to suggest that the monitoring program was designed to obtain information. This argument was belied in the Court's view by the statute that authorized the monitoring program, which calls for the collection of data regarding a target's location. Having held that the monitoring was a search, the Court declined to decide in the first instance whether the search was reasonable, opting to remand to the North Carolina courts for a reasonableness determination.

8. ***Taylor v. Barkes*, No. 14-939 (3d Cir., 766 F.3d 307; Reversed June 8, 2015).** Per Curiam. The Court held that any Eighth Amendment "right to the proper implementation of adequate suicide prevention protocols" for incarcerated persons was not clearly established, and therefore State prison officials had qualified immunity from suit under 42 U.S.C. § 1983. No Supreme Court decision had established such a right, nor "even discusse[d] suicide screening or prevention procedures." And the weight of Court of Appeals authority at the time of the officials' conduct "suggested that such a right did *not* exist." Moreover, neither of the Third Circuit cases on which the panel relied had identified "any minimum screening procedures or prevention protocols that facilities must use." Thus, "no precedent on the books" at the time "would have made clear" to the officials "that they were overseeing a system that violated the Constitution."

## October Term 2015

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

2. ***OBB Personenverkehr AG v. Sachs*, No. 13-1067 (9th Cir., 737 F.3d 584 (en banc); CVSG May 19, 2014; cert. opposed Dec. 15, 2014; cert. granted Jan. 23, 2015; SG as amicus, supporting reversal). The Questions Presented are: (1) Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), the express definition of "agency" in the FSIA; the factors set forth in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); or common law principles of agency control. (2) Whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with**

**travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for travel entirely outside of the United States.**

3. ***Ocasio v. United States*, No. 14-361 (4th Cir., 750 F.3d 399; cert. granted Mar. 2, 2015). Whether a conspiracy to commit extortion requires that the conspirators agree to obtain property from someone outside the conspiracy.**

4. ***Hawkins v. Community Bank of Raymore*, No. 14-520 (8th Cir., 761 F.3d 937; cert. granted Mar. 2, 2015; SG as amicus, supporting petitioners). The Questions Presented are: (1) Whether "primarily and unconditionally liable" spousal guarantors are unambiguously excluded from being Equal Credit Opportunity Act ("ECOA") "applicants" because they are not integrally part of "any aspect of a credit transaction." (2) Whether the Federal Reserve Board has authority under the ECOA to include by regulation spousal guarantors as "applicants" to further the purposes of eliminating discrimination against married women.**

5. ***Hurst v. Florida*, No. 14-7505 (Fla., 147 So. 3d 435; cert. granted Mar. 9, 2015). Whether Florida's death sentencing scheme violates the Sixth Amendment in light of the Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).**

6. ***Montgomery v. Louisiana*, No. 14-280 (La., 141 So.3d 264; cert. granted Mar. 23, 2015). The Questions Presented are: (1) Whether *Miller v. Alabama*, 567 U.S. __ (2012), adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison. (2) Whether the United States Supreme Court has jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. ___ (2012).**

7. ***DIRECTV, Inc. v. Imburgia*, No. 14-462 (Cal. Ct. App., 170 Cal. Rptr. 3d 190; cert. granted Mar. 23, 2015). Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law that is preempted by the Federal Arbitration Act.**

8. ***Kansas v. Carr*, No. 14-449 (Kan., 329 P.3d 1195; cert. granted Mar. 30, 2015; consolidated with *Kansas v. Carr*, No. 14-450; and *Kansas v. Gleason*, No. 14-452; SG as amicus, supporting petitioner). The Questions Presented are: (1) Whether the Eighth Amendment requires that a capital-sentencing jury be instructed that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held, or whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances. (2) Whether the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here—a decision that comports with the traditional approach preferring joinder in circumstances**

**like this—violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless in any event.**

9. ***Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, No. 14-723 (11th Cir., 593 F. App'x 903; cert. granted Mar. 30, 2015). Whether, under the Employee Retirement and Income Security Act of 1974 ("ERISA"), a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim.**

10. ***Spokeo, Inc. v. Robins*, No. 13-1339 (9th Cir., 742 F.3d 409; CVSG Oct. 6, 2014; cert. opposed Mar. 13, 2015; cert. granted Apr. 27, 2015). Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.**

11. ***Green v. Donahoe*, No. 14-613 (10th Cir., 760 F.3d 1135; cert. granted Apr. 27, 2015). Whether, under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held.**

12. ***Fed. Energy Regulatory Comm'n v. Elec. Power Supply*, No. 14-840 (D.C. Cir., 753 F.3d 216; cert. granted May 4, 2015; consolidated with *EnerNOC, Inc. v. Elec. Power Supply Ass'n*, No. 14-841). The Questions Presented are: (1) Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, to regulate the rules used by operators of wholesale electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates. (2) Whether the Court of Appeals erred in holding that the rule issued by the Federal Energy Regulatory Commission is arbitrary and capricious.**

13. ***Campbell-Ewald Co. v. Gomez*, No. 14-857 (9th Cir., 768 F.3d 871; cert. granted May 18, 2015). The Questions Presented are: (1) Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim. (2) Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified. (3) Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.**

14. ***Evenwel v. Abbott*, No. 14-940 (W.D. Tex., 2014 WL 5780507; probable jurisdiction noted May 26, 2015). Whether the three-judge district court**

**correctly held that the "one-person, one-vote" principle under the Equal Protection Clause allows States to use total population, and does not require States to use voter population, when apportioning state legislative districts.**

15. ***Foster v. Humphrey*, No. 15-8349 (Ga.; cert. granted May 26, 2015). Whether the Georgia courts erred in failing to recognize race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), where evidence discovered after the trial revealed that the prosecutor had created black-juror strike lists contradicting claims of neutrality on race during the seating of the jury.**

16. ***Lockhart v. United States*, No, 14-8358 (2d Cir., 749 F.3d 148; cert. granted May 26, 2015). Whether the mandatory minimum sentence of 18 U.S.C. § 2252(b)(2) is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involve[e] a minor or ward," in issue that divides the federal courts of appeals.**

17. ***Luis v. United States*, No. 14-419 (11th Cir., 564 F. App'x 493; cert. granted June 8, 2015). Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments.**

18. ***Shapiro v. Mack*, No. 14-990 (4th Cir., 584 F. App'x 140; cert. granted June 8, 2015). Whether a single-judge district court may determine that a complaint covered by 28 U.S.C. § 2284 is insubstantial, and that three judges therefore are not required, not because it concludes that the complaint is wholly frivolous, but because it concludes that the complaint fails to state a claim under Federal Rule of Civil Procedure 12(b)(6).**

19. ***Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (8th Cir., 765 F.3d 791; cert. granted June 8, 2015). The Questions Presented are: (1) Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample. (2) Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.**

20. ***Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496 (5th Cir., 746 F.3d 167; CVSG Oct. 6, 2014; cert. opposed May 12, 2015; cert. granted June 15, 2015). Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.**

21. ***Bruce v. Samuels*, No. 14-844 (D.C. Cir., 761 F.3d 1; cert. granted June 15, 2015). When a prisoner files more than one case or appeal in the federal**

courts *in forma pauperis*, does 28 U.S.C. § 1915(b)(2) cap the monthly exaction of filing fees at 20% of the prisoner's monthly income regardless of the number of cases or appeals for which he owes filing fees?

22. ***Kingdomware Technologies, Inc. v. United States*, No. 14-916 (Fed. Cir. 754 F.3d 923; cert. granted June 22, 2015). Whether the Federal Circuit erred in construing 38 U.S.C. § 8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.**

23. ***Gobeille v. Liberty Mut. Ins. Co.*, No. 14-181 (2d Cir., 746 F.3d 497; CVSG Dec. 15, 2014; cert. opposed May 19, 2015; cert. granted June 29, 2015). Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts Vermont's health care database law as applied to the third-party administrator for a self-funded ERISA plan.**

24. ***Musacchio v. United States*, No. 14-1095 (5th Cir., 590 F. App'x 359; cert. granted June 29, 2015). The Questions Presented are: (1) Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the Government to prove additional or more stringent elements than do the statute and indictment. (2) Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal.**

25. ***Torres v. Lynch*, No. 14-1096 (2d Cir., 764 F.3 152; cert. granted June 29, 2015). Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.**



26. ***Fisher v. Univ. of Texas*, No. 14-981 (5th Cir., 758 F.3d 633; cert. granted June 29, 2015). Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).**

27. ***Harris v. Arizona Indep. Redistricting Comm'n*, No. 14-232 (D. Ariz., 993 F. Supp. 2d 1042; probable jurisdiction noted June 30, 2015). The Questions Presented are: (1) Whether the desire to gain partisan advantage for one political party justifies intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle. (2) Whether the desire to obtain favorable preclearance review by the Justice Department permits the creation of legislative districts that deviate from the one-person, one-vote principle, and, even if creating unequal districts to obtain preclearance approval was once justified, whether this is still a legitimate justification after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).**

## Pending Cases Calling For The Views Of The Solicitor General

1. ***Nazarian v. PPL EnergyPlus, LLC*, No. 14-614 (4th Cir., 753 F.3d 467; CVSG Mar. 23, 2015; consolidated with *CPV Maryland, LLC v. PPL EnergyPlus, LLC*, No. 14-623; *CPV Power Development, Inc. v. PPL EnergyPlus, LLC*, No. 14-634; and *Fiordaliso v. PPL EnergyPlus, LLC*, No. 14-694). The Questions Presented are: (1) Whether, when a seller offers to build generation and sell wholesale power on a fixed-rate contract basis, the Federal Power Act field-preempts a state order directing retail utilities to enter into the contract. (2) Whether the Federal Energy Regulatory Commission's acceptance of an annual regional capacity auction preempts states from requiring retail utilities to contract at fixed rates with sellers who are willing to commit to sell into the auction on a long-term basis.**

2. ***Bank Markzai v. Peterson*, No. 14-770 (2d Cir., 758 F.3d 185; CVSG Apr. 6, 2015). Whether 22 U.S.C. § 8772—a statute that effectively directs a particular result in a single pending case—violates the separation of powers.**

3. ***Nebraska and Oklahoma v. Colorado*, No. 144, Orig. (Original Jurisdiction; CVSG May 4, 2015). Whether Sections 16(4) and (5) of Article XVIII of the Colorado Constitution—which permit personal marijuana manufacture, possession, and use—are preempted by federal law, and therefore unconstitutional and unenforceable under the Supremacy Clause.**

4. ***Smith v. Aegon Companies Pension Plan*, No. 14-1168 (6th Cir., 2013 WL 321632; CVSG June 1, 2015). Whether ERISA's special venue provision, § 1132(e)(2), and a plaintiff's choice of venue under that provision, may be abrogated by a more restrictive venue-selection clause in an ERISA plan.**

## CVSG Cases In Which The Solicitor General Supported Certiorari

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

2. ***Coventry Health Care of Missouri, Inc. v. Nevils*, No. 13-1305 (Mo., 418 S.W.3d 451; CVSG Oct. 6, 2014; cert. supported May 22, 2015; GVR June 29, 2015). Whether the Federal Employees Health Benefits Act ("FEHBA"), which governs the Government's provision of health benefits to millions of federal employees and their dependents, preempts state laws precluding carriers that administer FEHBA plans from seeking subrogation, as required by their contracts with the Office of Personnel Management.**

**Gibson Dunn**
Counsel for Coventry Health Care of Missouri

**Gibson Dunn**
Counsel for
Aetna Life
Ins. Co.

3. ***Aetna Life Ins. Co. v. Kobold*, No. 13-1467 (Ariz. Ct. App., 309 P.3d 924; CVSG Oct. 6, 2014; cert. supported May 22, 2015; GVR June 29, 2015). Whether the Federal Employees Health Benefits Act ("FEHBA"), which expressly "preempt[s] any State or local law" that would prevent enforcement of "[t]he terms of any contract" under FEHBA that "relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)," preempts state laws precluding carriers that administer FEHBA plans from seeking reimbursement or subrogation pursuant to the terms of FEHBA contracts.**

## CVSG Cases In Which The Solicitor General Opposed Certiorari

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

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

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

4. ***KBR, Inc. v. Metzgar*, No. 13-1241 (4th Cir., 744 F.3d 326; CVSG June 16, 2014; cert. opposed Dec. 16, 2014; cert. denied Jan. 20, 2015) (linked with *Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817). The Questions Presented are: (1) Whether the political question doctrine bars state-law tort claims against a battlefield support contractor operating in an active war zone when adjudication of those claims would necessarily require examining**

**sensitive military judgments. (2) Whether the Federal Tort Claims Act's "combatant-activities exception," 28 U.S.C. § 2680(j), preempts state-law tort claims against a battlefield support contractor that arise out of the U.S. military's combatant activities in a theater of combat. (3) Whether the doctrine of derivative sovereign immunity bars state-law tort claims against a private contractor performing delegated public functions where the Government would be immune from suit if it performed the same functions.**

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

6. ***Spokeo, Inc. v. Robins*, No. 13-1339 (9th Cir., 742 F.3d 409; CVSG Oct. 6, 2014; cert. opposed Mar. 13, 2015; cert. granted Apr. 27, 2015). Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.**

7. ***Athena Cosmetics, Inc. v. Allergan, Inc.*, No. 13-1379 (Fed. Cir., 738 F.3d 1350; CVSG Oct. 6, 2014; cert. opposed May 26, 2015; cert. denied June 29, 2015). Whether, under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Federal Food, Drug, and Cosmetic Act impliedly preempts a private state-law claim for unfair competition premised on a party's purported failure to obtain FDA approval, where the FDA itself has not imposed any such requirement.**

8. ***Gobeille v. Liberty Mut. Ins.*, No. 14-181 (2d Cir., 746 F.3d 497; CVSG Dec. 15, 2014; cert. opposed May 19, 2015; cert. granted June 29, 2015). Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts Vermont's health care database law as applied to the third-party administrator for a self-funded ERISA plan.**

9. ***Samantar v. Yousef*, No. 13-1361 (4th Cir., 699 F.3d 763; CVSG Oct. 14, 2014; cert. opposed Jan. 30, 2015; cert. denied Mar. 9, 2015). Whether a foreign official's common-law immunity for acts performed on behalf of a foreign state is abrogated by plaintiffs' allegations that those official acts violate *jus cogens* norms of international law.**

10. ***Ridley School District v. M.R.*, No. 13-1547 (3d Cir., 744 F.3d 112; CVSG Oct. 6, 2014; cert. opposed Apr. 10, 2015; cert. denied May 18, 2015). Whether operation of a "stay-put" provision in 20 U.S.C. § 1415(j)—which requires that a child whose educational program under the Individuals with Disabilities Education Act is under dispute to remain in his or her then-current placement while statutory "proceedings" to resolve the dispute are**

**pending—terminates upon entry of a final judgment by a state or federal trial court in favor of the school district, as the D.C. and Sixth Circuits have held, or whether it continues until completion of any subsequent appeal of that judgment, as the Third and Ninth Circuits have held.**

11. ***Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (5th Cir., 746 F.3d 167; CVSG Oct. 6, 2014; cert. opposed May 12, 2015; cert. granted June 15, 2015). Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.**

12. ***Mississippi v. Tennessee*, No. 143, Orig. (Original Jurisdiction; CVSG Oct. 20, 2014; leave to file bill of complaint opposed May 12, 2015). The Questions Presented are: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents' use of a pumping operation to take approximately 252 billion gallons of high quality groundwater. (2) Whether Mississippi has sole sovereign authority over and control of groundwater naturally storied within its borders, including in sandstone within Mississippi's border. (3) Whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.**

13. ***Corr v. Metropolitan Washington Airports*, No. 13-1559 (4th Cir., 740 F.3d 295; CVSG Jan. 12, 2015; cert. opposed May 22, 2015). The Questions Presented are: (1) Whether the Metropolitan Washington Airports Authority ("MWAA") exercises sufficient federal power to mandate separation-of-powers scrutiny for purposes of a suit seeking injunctive relief and invoking the Little Tucker Act to seek monetary relief. (2) Whether the Metropolitan Washington Airports Act of 1986, 49 U.S.C. §§ 49101 *et seq*., which transferred to MWAA all of the Government's "rights, liabilities, and obligations" concerning, *inter alia*, Dulles Airport and its "access highways and other related facilities," violates the separation of powers, including the Executive Vesting, Appointments, and Take Care Clauses of Article II, by depriving the president of control over MWAA, an entity exercising executive branch functions pursuant to federal law.**

14. ***Google, Inc. v. Oracle America, Inc.*, No. 14-410 (Fed. Cir., 750 F.3d 1339; CVSG Dec. 15, 2014 cert. opposed May 26, 2015; cert. denied June 29, 2015). Whether copyright protection extends to all elements of an original work of computer software, including a system or method of operation, that an author could have written in more than one way.**

15. ***Google, Inc. v. Vederi, LLC*, No. 14-448 (Fed. Cir., 744 F.3d 1376; CVSG Jan. 12, 2015; cert. opposed May 19, 2015; cert. denied June 22, 2015). Whether, when an applicant for a patent amends a claim to overcome the Patent and Trademark Office's earlier disallowance of the claim, a court should (i) presume that the amendment narrowed the claim and strictly construe the amended claim language against the applicant, or (ii) presume**

**that the scope of the claim remained the same and require that any narrowing be clear and unmistakable.**

16. ***RJR Pension Investment v. Tatum*, No. 14-656 (4th Cir., 761 F.3d 346; CVSG Mar. 9, 2015; cert. opposed May 26, 2015; cert. denied June 29, 2015). The Questions Presented are: (1) Whether the plaintiff bears the burden of proving loss of causation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1109, or whether it can shift the burden on that element to the defendant by carrying its burden on the analytically distinct elements of breach of fiduciary duty and loss to the plan. (2) Whether an ERISA fiduciary with a duty of prudence can be held liable for money damages under Section 1109 even though its ultimate investment decision was objectively prudent.**

## Supreme Court Statistics:

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

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