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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 2015

## Decided Cases

1. ***Green v. Brennan*, No. 14-613 (10th Cir., 760 F.3d 1135; cert. granted Apr. 27, 2015; argued on Nov. 30, 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.**

   **Decided May 23, 2016** (578 U.S. __). Tenth Circuit/Vacated and remanded. Justice Sotomayor for a 7-1 Court (Alito, J., concurring in the judgment; Thomas, J., dissenting). The Court held that the "matter alleged to be discriminatory" in a constructive-discharge claim under Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1614.105(a)(1), includes the employee's resignation; thus, the 45-day period within which an aggrieved employee must contact the Equal Employment Opportunity Commission—a prerequisite to seeking relief in court—starts running only when the employee resigns. In reaching that holding, the Court applied the "standard rule" that a limitations period begins to run only when a "plaintiff has a complete and present cause of action." *Graham Cnty. Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 418 (2005). Here, resignation is required to complete a cause of action for constructive discharge, and nothing in the text of Title VII or its implementing regulation "suggests that the standard rule should be displaced." Moreover, requiring an employee to file a complaint before resigning would undermine the remedial purpose of Title VII, and would ignore the fact that some employees might delay resignation until they can afford to leave or might "be reluctant to complain about discrimination while still employed."

2. ***Wittman v. Personhuballah*, No. 14-1504 (E.D. Va., 2015 WL 3604029; argued on Mar. 21, 2016; SG as amicus, supporting appellees). The Questions Presented are: (1) Whether the court below erred in failing to make the**

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**required finding that race rather than politics predominated in District 3, where there is no dispute that politics explains the Enacted Plan. (2) Whether the court below erred in relieving plaintiffs of their burden to show an alternative plan that achieves the General Assembly's political goals, is comparably consistent with traditional districting principles, and brings about greater racial balance than the Enacted Plan. (3) Whether, regardless of any other error, the finding of a violation by the court below was based on clearly erroneous fact-finding. (4) Whether the majority erred in holding that the Enacted Plan fails strict scrutiny because it increased District 3's black voting-age population percentage above the benchmark percentage, when the undisputed evidence establishes that the increase better complies with neutral principles than would reducing the percentage, and no racial bloc voting analysis would support a reduction capable of realistically securing Section 5 preclearance.**

**Decided May 23, 2016** (578 U.S. __). E.D. Va./Dismissed. Justice Breyer for a unanimous Court. The Court held that none of the appellants—three Republican Congressmen from Virginia—had standing to pursue the appeal, which sought to invalidate Virginia's 2013 congressional redistricting plan, because none of them could show an injury-in-fact. One Congressman could not demonstrate injury-in-fact because, although he initially asserted that he would run in a different congressional district if the redistricting plan went into effect, he later changed positions and said that he would seek reelection in his original district regardless of the outcome of the appeal. The other two Congressmen lacked standing because they did not identify any "record evidence establishing their alleged harm"—namely, that the redistricting plan would replace a portion of the electorate in their districts with "unfavorable Democratic voters."

3. ***Foster v. Chatman*, No. 15-8349 (Ga.; cert. granted May 26, 2015; argued on Nov. 2, 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.**

**Decided May 23, 2016** (578 U.S. __). Ga./Reversed and remanded. Chief Justice Roberts for a 7-1 Court (Alito, J., concurring in judgement; Thomas, J., dissenting). The Court held that the Georgia Supreme Court clearly erred in not recognizing a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), where defense lawyers had discovered compelling evidence in the State's case files that prosecutors were racially motivated when they used peremptory challenges to strike all four black potential jurors. Among other evidence of racial motivation, the State's files included (1) a copy of the venire list with the name of each black prospective juror highlighted in bright green, and a legend indicating that the highlighting "represents Blacks;" (2) a copy of the jury questionnaire with circles around each prospective juror's response indicating his or her race; (3) a handwritten document titled "definite NO's," with the first names on the list being the qualified black prospective jurors; and (4) a draft affidavit from an investigator describing one prospective black juror that "might be okay" if "it

comes down to having to pick one of the black jurors." This and other evidence of a "persistent focus on race in the prosecution's file," as well as proof that prosecutors had made "misrepresentations to the trial court" for why they struck black jurors, provided overwhelming evidence that "prosecutors were motivated in substantial part by race" when they exercised preemptory strikes, in violation of *Batson*.



4. ***Torres v. Lynch*, No. 14-1096 (2d Cir., 764 F.3d 152; cert. granted June 29, 2015; argued on Nov. 3, 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.**

   **Decided May 19, 2016** (578 U.S. __). Second Circuit/Affirmed. Justice Kagan for a 5-3 Court (Sotomayor, J., dissenting, joined by Thomas and Breyer, J.J.). The Court held that a state crime is an "aggravated felony" under 8 U.S.C. § 1101(a)(43) when the crime shares all but the jurisdictional elements of a federal "aggravated felony." Aliens convicted of an "aggravated felony" may be swiftly deported. An "aggravated felony" includes those offenses "described in" 18 U.S.C. § 844(i). Petitioner Torres was convicted of arson under a New York statute that is identical to the federal arson provision in § 844(i), with one exception: the New York statute does not include § 844(i)'s federal "jurisdictional hook" that requires a connection to interstate or foreign commerce. Despite that difference, the Court held that the New York arson offense was "described in" § 844(i)—and thus qualified as an "aggravated felony" subjecting Torres to immediate deportation—because the state statute and § 844(i) shared all of the same *substantive* elements. Congress was clear that it intended the phrase "aggravated felony" to encompass state and federal crimes, and requiring state crimes to share the "interstate commerce element" used in many federal statutes as a jurisdictional hook would undermine that congressional purpose.

5. ***CRST Van Expedited, Inc. v. EEOC*, No. 14-1375 (8th Cir., 774 F.3d 1169; cert. granted Dec. 4, 2015; argued on Mar. 28, 2016). Whether a dismissal of a Title VII case, based on the Equal Employment Opportunity Commission's total failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, can form the basis of an attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k).**

   **Decided May 19, 2016** (578 U.S.__ ). Eighth Circuit/Reversed and remanded. Justice Kennedy for a unanimous Court (Thomas, J., concurring). The Court held that a favorable ruling on the merits is not necessary for a defendant to receive attorney's fees as a "prevailing party" under Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission ("EEOC") brought several claims against CRST Van Expedited, Inc., and the district court dismissed the claims for reasons unrelated to the merits—namely, that the EEOC did not comply with its pre-suit statutory duties to investigate, make reasonable cause determinations, and attempt to conciliate the claims. The district court then awarded CRST more than $4 million in attorney's fees, which Title VII authorizes for "prevailing parties." 42 U.S.C. § 2000e-5(k). The Eighth Circuit vacated the award, reasoning that a party must win on the merits to qualify as a

prevailing party. Reversing, the Court explained that a defendant may "prevail" by defeating the plaintiff's suit "irrespective of the precise reason for the court's decision." A key purpose behind awarding attorney's fees to a prevailing defendant is discouraging frivolous suits, and it would make little sense if defendants could recover fees for merits-based frivolity but not for non-merits based frivolity. Thus, a defendant may "prevail" under Title VII "even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason."

6. ***Betterman v. Montana*, No. 14-1457 (Mont., 342 P.3d 971; cert. granted Dec. 4, 2015; SG as amicus, supporting respondent; argued on Mar. 28, 2016). Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in the final disposition of his case.**

**Decided May 19, 2016** (578 U.S. __). Mont./Affirmed. Justice Ginsburg for a unanimous Court (Thomas, J., concurring, joined by Alito, J.; Sotomayor, J., concurring). The Court held that the Sixth Amendment's right to a speedy trial does not apply after a criminal defendant has been convicted or pleaded guilty. Petitioner Betterman pleaded guilty to bail jumping and was jailed for more than fourteen months while awaiting sentencing. The Montana Supreme Court rejected his claim that the delay violated the Sixth Amendment, reasoning that the right to a speedy trial does not apply to sentencing. The Supreme Court agreed, explaining that the text of the Sixth Amendment uses the terms "accused" and "trial," indicating that the speedy trial right applies only before conviction. Further, the right is designed to protect the presumption of innocence by eliminating "long enduring unresolved criminal charges," and that presumption ends after a defendant is found guilty. Moreover, the only remedy available for a violation of the speedy trial right is dismissal of charges, which would be an extreme remedy for a delay in sentencing. This interpretation of the Sixth Amendment finds support in federal and state statutes implementing the speedy trial guarantee by imposing time limits for charging and trial without saying anything about sentencing.

7. ***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; SG as amicus, supporting respondent; argued on Nov. 2, 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.**

**Decided May 16, 2016** (578 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Alito for a 6-2 Court (Thomas, J., concurring; Ginsburg, J., dissenting, joined by Sotomayor, J.). The Court held that violation of a statutory right does not necessarily satisfy the injury-in-fact requirement of Article III standing. The plaintiff contended that Spokeo, Inc., had violated the Fair Credit Reporting Act by failing to follow "reasonable procedures to assure maximum possible accuracy" of consumer reports. 15 U.S.C. § 1681e(b). The Ninth Circuit concluded that the plaintiff had satisfied the injury-in-fact requirement because he alleged that Spokeo had mishandled his personal information in violation of the


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statute. The Court disagreed, explaining that "violation of a procedural right" does not automatically establish injury-in-fact, which requires a showing of "concrete and particularized" harm. Although the alleged statutory violation satisfied the particularized prong, it did not necessarily satisfy the concreteness prong. The Ninth Circuit's standing analysis was therefore incomplete, and the Court remanded for consideration of whether the plaintiff had adequately alleged that he suffered a concrete injury.

8. ***Merrill Lynch v. Manning*, No. 14-1132 (3d Cir., 772 F.3d 158; cert. granted June 30, 2015; argued on Dec. 1, 2015). Whether Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa(a), provides federal jurisdiction over state law claims seeking to establish liability based on violations of the Act or its regulations, or seeking to enforce duties created by the Act or its regulations.**

   **Decided May 16, 2016** (578 U.S. __). Third Circuit/Affirmed. Justice Kagan for a unanimous Court (Thomas, J., concurring in the judgment, joined by Sotomayor, J.). The Court held that the test for exclusive federal jurisdiction in Section 27 of the Securities Exchange Act of 1934 ("Exchange Act") is coterminous with the test for federal question jurisdiction in 28 U.S.C. § 1331. Under Section 27, federal courts have exclusive jurisdiction over actions that are "brought to enforce any liability or duty" created by the Exchange Act. Merrill Lynch sought to remove a state-court suit that alleged only state-law claims but that suggested Merrill Lynch had violated a federal regulation. The Court held that removal was unavailable because the "brought to enforce" test for jurisdiction in Section 27 is the same as the "arising under" test for jurisdiction in § 1331, and the claims at issue did not "arise under" the Exchange Act because that statute did not create the state-law claims in question, and those claims did not "necessarily raise a federal issue." In equating the "brought to enforce" language with the "arising under" language, the Court aimed to satisfy the "twin goals" of "respecting state courts and providing administrable standards."

9. ***Zubik v. Burwell*, No. 14-1418 (3d Cir., 778 F.3d 422; cert. granted Nov. 6, 2015; argued on Mar. 23, 2016; supplemental briefing ordered on Mar. 29, 2016; consolidated with *Priests for Life v. Dep't of Health & Human Servs.*, No. 14-1453; *Roman Catholic Archbishop v. Burwell*, No. 14-1505; *E. Texas Baptist Univ. v. Burwell*, No. 15-35; *Little Sisters v. Burwell*, No. 15-105; *S. Nazarene Univ. v. Burwell*, No. 15-119; *Geneva College v. Burwell*, No. 15-191). Whether the HHS contraceptive-coverage mandated and its accommodation violates the Religious Freedom Restoration Act by forcing religious nonprofits to act in violation of their sincerely-held religious beliefs.**

   **Decided May 16, 2016** (578 U.S. __). Third, Fifth, Tenth, and D.C. Circuits/Vacated and remanded. Per Curiam (Sotomayor, J., concurring, joined by Ginsburg, J.). The Court did not decide whether regulations requiring petitioners—various religious non-profits, schools, and colleges—to submit a form opting out of providing contraceptive coverage as a part of their healthcare plans violates the Religious Freedom Restoration Act. Instead, the Court remanded the cases to the courts of appeals, recommending (but not requiring) that the parties agree on an approach that would allow petitioners' insurance

companies to provide contraceptive coverage to petitioners' employees without any "opt out" or other notice from petitioners. The remand resulted from post-argument supplemental briefing in which petitioners confirmed that it would not violate their religious beliefs to contract with an insurance plan that does not provide contraceptive coverage, and the Government confirmed that cost-free contraceptive coverage could be provided to petitioners' employees from the same insurance company without requiring any form of notice from petitioners.

10. ***Husky Int'l Elecs. v. Ritz*, No. 15-145 (5th Cir., 787 F.3d 312; cert. granted Nov. 6, 2015; SG as amicus, supporting petitioner; argued on Mar. 1, 2016). Whether the "actual fraud" bar to discharge under Section 523(a)(2)(A) of the Bankruptcy Code applies only when the debtor has made a false representation, or whether the bar also applies when the debtor has deliberately obtained money through a fraudulent-transfer scheme that was actually intended to cheat a creditor.**

    **Decided May 16, 2016** (578 U.S. __). Fifth Circuit/Reversed and remanded. Justice Sotomayor for a 7-1 Court (Thomas, J., dissenting). The Court held that the phrase "actual fraud" in Section 523(a)(2)(A) of the Bankruptcy Code encompasses fraudulent conveyances regardless of whether they involve a false misrepresentation. When the petitioner sought to recover a debt from a company, it learned that one of the company's directors and part owners, the respondent, had drained the company of assets by transferring money to other companies that he controlled. The respondent later filed for Chapter 7 bankruptcy. The petitioner then filed a complaint requesting payment of the debt, arguing that the debt was not dischargeable because the respondent had engaged in "actual fraud" under Section 523(a)(2)(A) by transferring the money to the other companies, notwithstanding that he had done so without making any false representation. The Court agreed with the petitioner, noting that when Congress enacted the "actual fraud" discharge exception, the Bankruptcy Code already had an exemption for debts obtained by a "false representation," which indicates that Congress did not intend "actual fraud" to mean the same thing as "false representation." Moreover, since "the beginning of English bankruptcy practice," courts and legislators have used the phrase "actual fraud" to mean "done with wrongful intent," regardless of any false misrepresentation.

11. ***Sheriff v. Gillie*, No. 15-338 (6th Cir., 785 F.3d 1091; cert. granted Dec. 11, 2015; argued on Mar. 29, 2016; SG as amicus, supporting respondents). The Questions Presented are: (1) Whether special counsel—lawyers appointed by a state attorney general to undertake his duty to collect debts owed to the State—are state "officers" within the meaning of 15 U.S.C. § 1692a(6)(C). (2) Whether it is materially misleading under 15 U.S.C. § 1692e for special counsel to use attorney general letterhead to convey that they are collecting debts owed to the State on behalf of the attorney general.**

    **Decided May 16, 2016** (578 U.S. __). Sixth Circuit/Reversed and remanded. Justice Ginsburg for a unanimous Court. On the first question presented, the Court assumed without deciding that private attorneys hired by Ohio to collect debts owed to the State are not state "officers" exempt from the Fair Debt Collection Practices Act ("FDCPA"). On the second question presented, the

Court held that the private attorneys did not send a false or misleading communication in violation of the FDCPA when they used the Ohio Attorney General's letterhead to communicate with debtors. The collection letters were not false or misleading because the letterhead accurately identified the principal (the Ohio Attorney General), the signature block accurately identified the agent (the private attorneys), and the Ohio Attorney General had authorized the private attorneys to use his letterhead when sending debt-collection communications.

12. ***Ocasio v. United States*, No. 14-361 (4th Cir., 750 F.3d 399; cert. granted Mar. 2, 2015; argued on Oct. 6, 2015). Whether a conspiracy to commit extortion requires that the conspirators agree to obtain property from someone outside the conspiracy.**

    **Decided May 2, 2016** (578 U.S. ___). Fourth Circuit/Affirmed. Justice Alito for a 5-3 Court (Breyer, J., concurring; Thomas, J., dissenting; Sotomayor, J., dissenting, joined by Roberts, C.J.). The Court held that a defendant may be convicted for conspiring to commit extortion under the Hobbs Act, which prohibits obtaining property "from another . . . under color of official right," even when the owner of the property in question is a co-conspirator. At issue was an agreement among some police officers and the owners of an auto body shop. The officers agreed to direct the owners of damaged cars to the body shop, and in exchange the owners of the body shop agreed to provide kickbacks to the officers. Appellant, one of the officers, argued that he could not possibly have conspired to violate the Hobbs Act because that statute makes it unlawful to obtain property "from another," and the property at issue—the kickbacks—belonged to the owners of the body shop, who were co-conspirators. The Court rejected that argument, citing the "age-old" principle that a conspirator need not be capable of committing the underlying offense so long as he has the "specific intent that the underlying crime *be committed*" by someone in the conspiracy. Thus, if two parties—one a public official and the other a private citizen—agree that the public official will obtain a bribe from the private citizen "under color of official right," the parties are guilty of conspiring to violate the Hobbs Act even though the private citizen could not have bribed himself. The Court was not concerned that its holding would transform every extortion case under the Hobbs Act into a conspiracy case, explaining that conspiracy requires proof of specific intent, not merely proof that the person being extorted has consented to their property being taken.

13. ***Heffernan v. City of Paterson, N.J.*, No. 14-1280 (3d Cir., 777 F.3d 147; cert. granted Oct. 1, 2015; SG as amicus, supporting petitioner; argued on Jan. 19, 2016). Whether the First Amendment bars the Government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate.**

    **Decided April 26, 2016** (578 U.S. __). Third Circuit/Reversed and remanded. Justice Breyer for a 6-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that when a government employer punishes an employee based on the belief that the employee had engaged in certain political activity that the First Amendment protects, the employee may seek relief under 42 U.S.C. § 1983 even if the employee had not in fact engaged in protected political activity. The case

involved a police department that demoted an officer for campaigning against the incumbent mayor, but the officer was not actually involved in the campaign. The lower courts rejected the officer's § 1983 claim, reasoning that he had not been deprived of a First Amendment right because he had not actually engaged in any protected activity. The Court reversed, explaining that the First Amendment focuses on "the activity of the Government," and the Government here had "acted upon a constitutionally harmful policy." Moreover, the constitutional harm caused by the Government's action—discouraging the officer and his colleagues from engaging in protected activities—is the same regardless of whether the Government acted on a factual mistake.

14. ***Harris v. Arizona Indep. Redistricting Comm'n*, No. 14-232 (D. Ariz., 993 F. Supp. 2d 1042; probable jurisdiction noted June 30, 2015; SG as amicus, supporting appellee; argued on Dec. 8, 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).**

**Decided Apr. 20, 2016** (578 U.S. __). D. Ariz./Affirmed. Justice Breyer for a unanimous Court. The Court held that Arizona's redistricting commission did not violate the Fourteenth Amendment's Equal Protection Clause when the commission redrew the state's legislative districts. The new districts had a population deviation of 8.8%, which is below the presumptively permissible 10%. For that reason, the plaintiffs challenging the new districts had to show that it was "more probable than not" that the deviation resulted from illegitimate considerations rather than a legitimate attempt to comply with the Voting Rights Act. Plaintiffs did not meet that burden. To satisfy the Voting Rights Act's "non-retrogression" requirement, a new redistricting plan may not diminish the number of districts in which minority groups can "elect their preferred candidates of choice," and both the commission's old and new plans had the same number of these "ability-to-elect districts." Moreover, although one district had changed to become more politically competitive for the Democratic Party, the commission made that change only after a statistician expressed concern that the Justice Department might not agree with the plan without the change. That record shows that Arizona's redistricting commission was trying in good faith to comply with the Voting Rights Act, not to expand the number of Democratic-leaning districts, as plaintiff had alleged.

15. ***Bank Markazi v. Peterson*, No. 14-770 (2d Cir., 758 F.3d 185; CVSG Apr. 6, 2015; cert. opposed Aug. 19, 2015; cert. granted Oct. 1, 2015; argued on Jan. 13, 2016). Whether 22 U.S.C. § 8772—a statute that effectively directs a particular result in a single pending case—violates the separation of powers.**

**Decided Apr. 20, 2016** (578 U.S. __). Second Circuit/Affirmed. Justice Ginsburg for a 6-2 Court (Thomas, J., joining in all but Part II-C; Roberts, C.J., dissenting, joined by Sotomayor, J.). The Court held that 22 U.S.C. § 8772, which makes U.S.-based assets of the Central Bank of Iran available for post-judgment execution in a specific set of cases, does not violate the separation of powers. In accordance with the "terrorism exception" to the Foreign Sovereign Immunities Act, more than 1,000 plaintiffs won money judgments in federal court against the Republic of Iran in connection with Iran-sponsored acts of terrorism, including the 1983 bombing of the Marine barracks in Beirut. To ensure that those plaintiffs could execute their judgments, Congress passed § 8772, which identified the enforcement proceedings by caption and docket number and made certain Iranian assets held in a New York bank account available for satisfaction of the judgments. The Court rejected the Central Bank's argument that the statute offended the separation of powers by legislatively directing a particular result in an ongoing judicial proceeding. Congress has the power to change the legal standards governing pending matters, even when the change is outcome-determinative and applies to only a narrow class of cases. Moreover, the statute was on particularly steady ground because it was an exercise of the political branches' traditional control over foreign affairs. The statute therefore did not usurp a judicial function.

16. ***Molina-Martinez v. United States*, No. 14-8913 (5th Cir., 588 F. App'x 333; cert. granted Oct. 1, 2015; argued on Jan. 12, 2016). Where an error in the application of the United States Sentencing Guidelines results in the application of the wrong guideline range to a criminal defendant, should an appellate court presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights?**

    **Decided Apr. 20, 2016** (578 U.S. __). Fifth Circuit/Reversed and remanded. Justice Kennedy for a unanimous Court (Alito, J., concurring in part and concurring in the judgment, joined by Thomas, J.). The Court held that the Fifth Circuit had erred in ruling that, when a district court applies an incorrect sentencing range but ultimately sentences a defendant within the correct range, the defendant challenging his sentence must identify "additional evidence" to establish that the error affected his substantial rights. The sentencing range in the defendant's presentence report was 77-96 months, and the district court sentenced him to 77 months. On appeal, the defendant argued for the first time that the correct guidelines range was actually 70-87 months. The Fifth Circuit agreed that the district court had applied the wrong sentencing range, yet affirmed the 77-month sentence because the defendant had failed to identify "additional evidence" showing that use of the incorrect guidelines range affected his "substantial rights" under Federal Rule of Criminal Procedure 52(b), which controls when appellate courts may remedy sentencing errors that went unnoticed in the district court. The Court rejected this "additional evidence" requirement, holding that application of an erroneously high guidelines range will ordinarily establish a probability that the district court would have imposed a different sentence, thereby satisfying Rule 52(b)'s requirement that the error affect a defendant's substantial rights. The Court declined to adopt a categorical presumption of

prejudice for sentences imposed under incorrect guidelines ranges, but explained that the application of an incorrect range will usually suffice to establish prejudice absent unusual circumstances.

17. ***Hughes v. Talen Energy Marketing*, No. 14-614 (4th Cir., 753 F.3d 467; cert. granted Oct. 19, 2015; consolidated with *CPV Maryland v. PPL EnergyPlus*, No. 14-623; argued on Feb. 24, 2016). The Questions Presented are: (1) When a seller offers to build generation and sell wholesale power on a fixed-rate contract basis, does the Federal Power Act field-preempt a state order directing retail utilities to enter into the contract? (2) Does the Federal Energy Regulatory Commission's acceptance of an annual regional capacity auction preempt 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?**

    **Decided Apr. 19, 2016** (578 U.S. __). Fourth Circuit/Affirmed. Justice Ginsburg for a unanimous Court (Sotomayor, J., concurring; Thomas, J., concurring in part and concurring in the judgment). The Court held that a Maryland regulatory program using guaranteed income to incentivize new in-state power generation is preempted because it encroaches on the exclusive authority of the Federal Energy Regulatory Commission ("FERC") to regulate interstate wholesale rates for electricity. The Federal Power Act empowers FERC to regulate interstate wholesale markets for electricity, but leaves for the states the power to regulate retail electricity sales and electricity generation. In keeping with its delegated authority, FERC extensively regulates interstate "capacity auctions" in which power producers sell capacity. Concerned that the auctions were not encouraging enough in-state power generation, Maryland enacted a regulatory program to subsidize a new in-state power generator, and "condition[ed] receipt of those subsidies on the new generator selling capacity into a FERC-regulated wholesale auction." According to the Court, that subsidy scheme altered the competitiveness of the interstate capacity auctions by guaranteeing Maryland's new in-state power generator a different rate than the whole auction price, thereby invading "FERC's regulatory turf." It was irrelevant that Maryland was pursuing the noble goal of encouraging in-state power generation. "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale markets, as Maryland has done here."

18. ***Franchise Tax Bd. of California v. Hyatt*, No. 14-1175 (Nev., 335 P.3d 125; cert. granted June 30, 2015; argued on Dec. 7, 2015). The Questions Presented are: (1) Whether Nevada may refuse to extend to sister states haled into Nevada courts the same immunities Nevada enjoys in those courts. (2) Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign state to be haled into the courts of another state without its consent, should be overruled.**

    **Decided April 19, 2016** (578 U.S. __). Nev./Vacated and remanded. Justice Breyer for a 6-2 Court (Alito, J., concurring in the judgment; Roberts, C.J., dissenting, joined by Alito, J.). The Court was equally divided on whether to overrule *Nevada v. Hall*, 440 U.S. 410 (1979), which allows a private citizen of one state to sue another state without the other state's consent, and thus affirmed

the Nevada courts' exercise of jurisdiction over a California agency. On the merits, the Court held that the Full Faith and Credit Clause of Article IV, § 1 of the Constitution, prohibits Nevada courts from awarding damages against California that are greater than Nevada law would allow against the state's own agencies in a similar lawsuit. At issue was a $1 million damages award that the Nevada courts imposed against California's Franchise Tax Board. A Nevada statute, however, caps the damages that would be available in a similar lawsuit against Nevada agencies at $50,000, and a California statute would have immunized the Board from suit entirely. By refusing to apply either statute in this case, the Nevada courts adopted a "special and discriminatory rule[]" that is "hostile" to its sister state, undermining California's sovereign status and violating the Full Faith and Credit Clause.

**Gibson Dunn**
Appointed as
*Amicus Curiae*
Supporting
the Judgment
Below

19. ***Welch v. United States*, No. 15-6418 (11th Cir., 683 F.3d 1304; cert. granted Jan. 8, 2016; argued on Mar. 30, 2016). The Questions Presented are: (1) Whether a conviction under Florida state law for "sudden snatching" qualifies for Armed Career Criminal Act enhancement pursuant to 18 U.S.C. § 924(e). (2) Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review.**

**Decided Apr. 18, 2016** (578 U.S. ___). Eleventh Circuit/Vacated and remanded. Justice Kennedy for a 7-1 Court (Thomas, J., dissenting). The Court held that *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act ("ACCA") is unconstitutionally vague, announced a new substantive rule that applies retroactively on collateral review of criminal convictions that have become final. The ACCA increases the sentence for certain firearm-possession offenses from a maximum of ten years to a mandatory minimum of fifteen years if a defendant has three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). The statutory definition of "violent felony" includes a so-called "residual clause," which *Johnson* invalidated under the void-for-vagueness doctrine. Here, the Court reasoned that *Johnson* announced a new substantive rule that applies retroactively—as opposed to a procedural rule that would not apply retroactively—because *Johnson* "changed the substantive reach" of the ACCA, altering the class of persons the statute punishes. The "function" of a new rule, not its underlying constitutional source, is determinative. Thus, even though the rule articulated in *Johnson* turned on the Due Process Clause, the rule was nonetheless substantive (and therefore retroactive) because it affected "the reach of the underlying statute rather than the judicial procedures by which the statute is applied."

20. ***Evenwel v. Abbott*, No. 14-940 (W.D. Tex., 2014 WL 5780507; probable jurisdiction noted May 26, 2015; SG as amicus, supporting appellees; argued on Dec. 8, 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.**

**Decided Apr. 4, 2016** (578 U.S. __). W.D. Tex./Affirmed. Justice Ginsburg for a unanimous Court (Thomas, J., concurring in the judgment; Alito, J., concurring

in the judgment, joined by Thomas, J., except as to Part III-B). The Court held that states may draw legislative districts based on total population. In 2013, Texas adopted a State Senate districting map that had a maximum total-population deviation of 8.04%, which is below the presumptively permissible 10% threshold. The districts, however, had a voter-population deviation of more than 40%. For that reason, petitioners argued that the districts violated the "one-person, one-vote" principle of the Equal Protection Clause. The Court disagreed, reasoning that "history, precedent, and practice" all confirm that states may draw legislative districts based on total population. The Framers endorsed a total-population approach when debating what would become the Fourteenth Amendment, specifically rejecting proposals to allocate House seats based on voter population. Moreover, the Court's prior cases all have looked to total-population figures when evaluating districting maps, and requiring voter-eligible apportionment would upset the "well-functioning" approach to districting that all fifty states have followed for decades. Thus, total-population apportionment "complies with the requirements of the one-person, one-vote principle." The Court did not resolve whether states also may draft districts using voter-population or other methods.

21. ***Nichols v. United States*, No. 15-5238 (10th Cir., 775 F.3d 1225; cert. granted Nov. 6, 2015; argued on Mar. 1, 2016). Whether 42 U.S.C. § 16912(a) requires a sex offender who resides in a foreign country to update his registration in the jurisdiction where he formerly resided.**

    **Decided Apr. 4, 2016** (578 U.S. ___). Tenth Circuit/Reversed. Justice Alito for a unanimous Court. The Court held that the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901 *et seq.*, does not require sex offenders who move outside of the United States to deregister with the state from which they departed. Under SORNA, sex offenders who change residences must inform in person at least one of the "jurisdiction[s] involved" with the change. The "jurisdiction[s] involved" are those "where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). According to the Court, the present tense of the statute is critical: once an offender moves abroad, the offender no longer resides, works, or studies in a jurisdiction subject to SORNA, and therefore has no obligation to appear in person to register. If Congress had intended sex offenders to *deregister* in their *departed* jurisdiction, it could have said so in the statute. SORNA, however, speaks only in the present tense. The Court dismissed concerns that its holding would create a loophole in SORNA's registration scheme, explaining that Congress recently passed a new law requiring sex offenders to provide SORNA-related information whenever they travel abroad.

22. ***Luis v. United States*, No. 14-419 (11th Cir., 564 F. App'x 493; cert. granted June 8, 2015; argued on Nov. 10, 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.**

    **Decided March 30, 2016** (578 U.S. __). Eleventh Circuit/Vacated and remanded. Justice Breyer for a 5-3 Court (Thomas, J., concurring in the

judgment; Kennedy, J., dissenting, joined by Alito, J.; Kagan, J., dissenting). Justice Breyer's plurality opinion concluded that restraining before trial a criminal defendant's untainted assets violates the Sixth Amendment right to counsel of choice. At issue was a pretrial order freezing the defendant's untainted assets, so they would be available for restitution and other criminal penalties. Although the Court recognized that the Government might be able to freeze *tainted* property before trial, the property at issue was not traceable to any crime—and "that distinction makes a difference." The Government's reliance on *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1983), was therefore misplaced because those cases involved restraint of tainted property. Three other considerations also supported the plurality's conclusion that the pretrial restraint at issue violated the Sixth Amendment. First, the "fundamental" right to counsel is closer to "the heart of a fair, effective criminal justice system" than the Government's interest in punishment and restitution. Second, the common law offered no support for preconviction asset forfeiture. Third, allowing pretrial seizure of untainted property could create more indigent defendants who would rely on already "overworked and underpaid public defenders," thereby creating a systemic risk of weakened Sixth Amendment rights.

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23. ***Friedrichs v. California Teachers Ass'n*, No. 14-915 (9th Cir., Order; cert. granted, June 30, 2015; SG as amicus, supporting respondents; argued on Jan. 11, 2016). The Questions Presented are: (1) Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements—which compel public employees to pay dues to fund union activities—are invalid under the First Amendment. (2) Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.**

    **Decided Mar. 29, 2016** (578 U.S. __). Ninth Circuit/Affirmed. Per Curiam. The Court's opinion states that the judgment was affirmed by an equally divided Court.

24. ***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; argued on Oct. 5, 2015). 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.**

    **Decided Mar. 22, 2016** (577 U.S. __). Eighth Circuit/Affirmed. Per Curiam. The Court's opinion states that the judgment was affirmed by an equally divided Court.



25. ***Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (8th Cir., 765 F.3d 791; cert. granted June 8, 2015; SG as amicus, supporting respondents; argued on Nov. 10, 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.**

    **Decided March 22, 2016** (577 U.S. __). Eighth Circuit/Affirmed and remanded. Justice Kennedy for a 6-2 Court (Roberts, C.J., concurring, joined by Alito, J., as to Part II; Thomas, J., dissenting, joined by Alito, J.). The Court held that the district court did not err in certifying a class of factory workers seeking unpaid overtime wages under the Fair Labor Standards Act ("FLSA"), even though the workers had relied on statistical averaging to establish similarities among class members. The class sought compensation for overtime spent putting on and taking off protective gear before and after shifts. Because the defendant did not track this time, the class introduced a statistical study that calculated the average time it takes to put on and remove the gear. According to the Court, the statistical evidence was proper because each class member could have relied on the same evidence "had each brought an individual action." Allowing the evidence was particularly appropriate because the defendant had violated its legal duty to document employee overtime, and under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), FLSA plaintiffs can use reasonable inferences to fill evidentiary gaps created by their employer's recordkeeping failures. However, the fairness and utility of using statistical methods outside the FLSA context "will depend on facts and circumstances particular to those cases." The Court did not adopt a categorical rule governing the use of statistical evidence in class actions. Nor did it address the defendant's argument that allowing the statistical evidence for purposes of awarding damages would compensate uninjured class members, stating that the issue was premature because no damages had been awarded.

26. ***Sturgeon v. Frost*, No. 14-1209 (9th Cir., 768 F.3d 1066; cert. granted Oct. 1, 2015; argued on Jan. 20, 2016). Whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.**

    **Decided March 22, 2016** (577 U.S. __). Ninth Circuit/Reversed. Chief Justice Roberts for a unanimous Court. The Court held that the Ninth Circuit wrongly construed Section 103(c) of the Alaska National Lands Conservation Act, which prohibits the National Park Service from exercising regulatory control over certain land within the boundaries of the National Park System, but the Court did not offer its own reading of the statute. The plaintiff, John Sturgeon, wanted to

hunt moose in Alaska using a hovercraft. To access his favorite hunting grounds, Sturgeon must traverse part of the Nation River, which flows through a wildlife preserve managed by the Park Service. Alaska law allows the use of hovercraft, but a Park Service regulation bans hovercraft on all waters in the National Park System. Sturgeon argued that Section 103(c) deprives the Park Service of authority to regulate "non-public lands," and that the Nation River is "non-public land" because the Alaska Statehood Act gave Alaska ownership of all land beneath the state's navigable waters. The Park Service responded that the federal government retained a property interest in the navigable waters under the "reserved water rights doctrine," and hence the disputed portion of the Nation River was "public land" subject to Park Service's anti-hovercraft regulation. The Ninth Circuit adopted a third approach. It reasoned that Section 103(c) allows the Park Service to enforce its nationally applicable regulations on "non-public land" in Alaska, but the Park Service could not enforce its Alaska-specific regulations on such "non-public land." Thus, according to the Ninth Circuit, the Park Service's authority in Alaska is broader for regulations that apply nationwide than for regulations that apply in Alaska only. The Supreme Court rejected that "topsy-turvy" interpretation because it "would prevent the Park Service from recognizing Alaska's unique conditions," and federal law "repeatedly recognizes that Alaska is different." The Court vacated the Ninth Circuit's judgment and remanded for further proceedings, but it declined to address whether the Park Service has authority under Section 103(c) to regulate non-public land in Alaska, reasoning that construing the statute raises "vital issues of state sovereignty" and "federal authority" that "should be addressed by the lower courts in the first instance."

27. ***Nebraska v. Parker*, No. 14-1406 (8th Cir., 774 F.3d 1166; cert. granted Oct. 1, 2015; argued on Jan. 20, 2016). The Questions Presented are: (1) Whether ambiguous evidence concerning the first two factors in the test from *Solem v. Bartlett*, 465 U.S. 463 (1984)—the statutory language used to open the Indian lands, and events surrounding the passage of a surplus land Act—necessarily forecloses any possibility that diminishment of a federal Indian reservation could be found on a de facto basis. (2) Whether the original boundaries of the Omaha Indian Reservation were diminished following passage of the Act of August 7, 1882.**

**Decided Mar. 22, 2016** (577 U.S. __). Eighth Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held that an 1882 federal statute allowing western settlers to purchase land on an Omaha Tribe reservation neither "diminished" the reservation nor deprived the Tribe of jurisdiction over the purchased land. A portion of the land sold to settlers under the statute became the village of Pender, Nebraska. When the Tribe tried to subject retailers in Pender to a liquor-license ordinance, Pender and its retailers sued, arguing that they were not within the reservation's boundaries and therefore not subject to the Tribe's jurisdiction. The Supreme Court disagreed, holding that the 1882 Act did not "diminish" the size of the Omaha reservation and, therefore, Pender remained part of the reservation and subject to the Tribe's jurisdiction. Only Congress may diminish an Indian reservation, "and its intent to do so must be clear." Because the 1882 statute said nothing about diminution or cessation of reservation land,

the statute did not shrink the reservation's boundaries even though the Tribe had almost no involvement in the disputed territory since 1882. To be sure, the Tribe's historic lack of involvement might support equitable defenses to the ordinance such as laches and acquiescence, but that does not alter the meaning of the 1882 statute or the fact that the land was still a part of the reservation.

28. ***Americold Logistics, LLC v. ConAgra Foods, Inc.*, No. 14-1382 (10th Cir., 776 F.3d 1175; cert. granted Oct. 1, 2015; argued on Jan. 19, 2016). Whether the citizenship of a trust for purposes of diversity jurisdiction is based on the citizenship of the controlling trustees, the trust beneficiaries, or some combination of both.**

**Decided March 7, 2016** (577 U.S. __). Tenth Circuit/Affirmed. Justice Sotomayor for a unanimous Court. The Court held that, for purposes of diversity jurisdiction, the citizenship of a trust is based on the citizenship of its members. At issue was a "real estate investment trust" ("REIT") organized under Maryland law. A Maryland statute provides that a REIT is an "unincorporated business trust or association," like a limited partnership, joint-stock company, and other types of unincorporated associations. Another Maryland statute provides that the members of an unincorporated association are its shareholders. Thus, the REIT at issue was a citizen of all states in which its shareholders reside.

29. ***Gobeille v. Liberty Mut. Ins. Co.*, No. 14-181 (2d Cir., 746 F.3d 497; CVSG Dec. 15, 2014; cert. opposed May 19, 2015; SG as amicus, supporting petitioner; cert. granted June 29, 2015; argued on Dec. 2, 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.**

**Decided March 1, 2016** (577 U.S. __). Second Circuit/Affirmed. Justice Kennedy for a 6-2 Court (Thomas and Breyer, J.J., concurring; Ginsburg, J., dissenting, joined by Sotomayor, J.). The Court held that ERISA preempts a Vermont statute requiring health insurers to report to the State certain information about health-care claims and procedures. ERISA, which expressly preempts state laws that "relate to" ERISA plans, preempted the Vermont statute because other states might follow Vermont's lead and adopt their own reporting requirements, thus exposing ERISA plans to "[d]iffering, or even parallel, regulations from multiple jurisdictions" and "creat[ing] wasteful administrative costs." That risk of waste was sufficient to trigger preemption even though the Vermont statute itself did not economically burden any ERISA plan.

30. ***Lockhart v. United States*, No. 14-8358 (2d Cir., 749 F.3d 148; cert. granted May 26, 2015; argued on Nov. 3, 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," an issue that divides the federal courts of appeals.**

**Decided March 1, 2016** (577 U.S. __). Second Circuit/Affirmed. Justice Sotomayor for a 6-2 Court (Kagan, J., dissenting, joined by Breyer, J.). The

Court held that a state conviction for first degree sexual abuse involving the defendant's adult girlfriend triggered the ten-year mandatory minimum sentence of 18 U.S.C. § 2252(b)(2), which applies to prior state convictions for crimes "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." The Court applied the "rule of the last antecedent" to hold that the phrase "involving a minor or ward" in § 2252(b)(2) modifies *only* the last crime listed in the statute ("abusive sexual conduct"). The defendant's prior conviction for sexual abuse therefore did not need to involve "a minor or ward" to trigger the ten-year mandatory minimum. The structure of § 2252(b)(2) confirms this reading: the statute applies to prior state sex-offense convictions and to prior federal sex-offense convictions listed in Chapter 109A, and Chapter 109A covers sex-abuse offenses involving adults *and* minors. Thus, construing § 2252(b)(2) to encompass only those state convictions involving minors would mean that defendants with prior federal convictions receive harsher sentences than defendants with nearly identical prior state convictions. There is no evidence that Congress intended such a disparate result. Finally, the rule of lenity did not apply because the Court "will not apply the rule of lenity to override a sensible grammatical principle buttressed by the statute's text and structure."

31. ***Montgomery v. Louisiana*, No. 14-280 (La., 141 So. 3d 264; cert. granted Mar. 23, 2015; argued on Oct. 13, 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).**

**Decided Jan. 25, 2016** (577 U.S. __). La./Reversed and remanded. Justice Kennedy for a 6-3 Court (Scalia, J., dissenting, joined by Thomas and Alito, J.J.; Thomas, J., dissenting). The Court held that it had jurisdiction to decide whether a state supreme court correctly refused to give retroactive effect to the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. __ (2012), which prohibited mandatory life sentences without the possibility of parole for juveniles, and that *Miller* had, in fact, announced a new substantive rule that is retroactive in cases on state collateral review. As to the jurisdictional question, the Court observed that the principle that courts must give retroactive effect to new substantive rules in federal habeas proceedings—articulated in Justice O'Connor's plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989)—"is best understood as resting upon constitutional premises." Like all federal law, the Court reasoned, that constitutional command is binding on state courts, and it follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is unlawful. Accordingly, a court has no authority to leave that conviction or sentence in place regardless of whether the conviction or sentence became final before the rule was announced, and the Supreme Court has jurisdiction to review any such determination. As to the question about *Miller*'s effect, the Court concluded that *Miller*'s prohibition on mandatory life without parole for juvenile offenders did, in fact, announce a new substantive rule that must be retroactively applied. Because *Miller* determined that sentencing a child

to life without parole is excessive for all but the rare juvenile offender whose crime reflects "irreparable corruption," it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect "the transient immaturity of youth." As a result, the Court concluded, *Miller* announced a substantive rule of constitutional law and, like other substantive rules, is retroactive because it necessarily carries a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him or her.

32. ***Menominee Indian Tribe of Wisconsin v. United States*, No. 14-510 (D.C. Cir., 764 F.3d 51; cert. granted June 30, 2015; argued on Dec. 1, 2015). Whether the D.C. Circuit misapplied *Holland v. Florida*, 560 U.S. 631, 649 (2010), when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act.**

    **Decided Jan. 25, 2016** (577 U.S. __). D.C. Circuit/Affirmed. Justice Alito for a unanimous Court. The Court held that equitable tolling is not available to preserve contract claims that were not timely presented to a federal contracting officer because there were no extraordinary circumstances beyond the plaintiff's control. The Court explained that, to be entitled to equitable tolling of a statute of limitations, a litigant must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010). The Court rejected the claim by the Menominee Indian Tribe ("Tribe") that diligence and extraordinary circumstances should be considered together as factors in a unitary test, and instead made clear that these two components are required "elements," each of which must be established and not merely factors to be weighed. The Court also reaffirmed that the "extraordinary circumstances" prong is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control. Accordingly, because the Tribe had unilateral authority to present its claims in a timely manner, and its claimed obstacles—namely, a mistaken reliance on a putative class action and a belief that presentment was futile—were not outside the Tribe's control, the Tribe did not satisfy the "extraordinary circumstances" prong. The Tribe's mistake, the Court explained, was "fundamentally no different from a garden variety claim of excusable neglect" that falls short of satisfying the requirements for equitable tolling.

33. ***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; argued on Oct. 14, 2015). The Questions Presented are: (1) Whether the Federal Energy Regulatory Commission ("FERC") reasonably concluded that it has authority under the Federal Power Act ("FPA"), 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 FERC is arbitrary and capricious.**

**Decided Jan. 25, 2016** (577 U.S. __). D.C. Circuit/Reversed and remanded. Justice Kagan for a 6-2 Court (Scalia, J., dissenting, joined by Thomas, J.; Justice Alito did not participate). The Court held that FERC's 2011 "demand response" rule, FERC Order No. 745 (the "Rule")—which broadened a program to pay utility users for reductions in electricity consumption of power at peak rates in order to lower electricity rates and avoid power blackouts—was within the agency's authority under the Federal Power Act ("FPA"). The Court reasoned as follows: First, the Court explained that the practices at issue directly affect wholesale electricity rates. The Court adopted the D.C. Circuit's construction limiting FERC's "affecting" jurisdiction to rules or practices that "directly affect" the wholesale rate. Because wholesale demand response is about reducing wholesale rates, the rules and practices that determine how those programs operate also affect wholesale rates, particularly here, where the formula for compensating demand response necessarily lowers wholesale electricity prices by displacing higher-priced generation bids. Second, the Court held that the Rule did not regulate retail electricity sales in violation of 18 U.S.C. § 824(b). A FERC regulation does not run afoul of the statutory provision's proscription simply because it affects the quantity or terms of retail sales. Thus, the fact that transactions occurring on the wholesale market—and FERC's regulation of those transactions—have natural consequences at the retail level is of no legal consequence. Regardless of the effect on retail rates, FERC's regulation here is exclusively of the wholesale market, as part of its charge to improve how that market runs, and thus 18 U.S.C. § 824(b) imposes no bar. Third, the Court reasoned that the challenger's position would subvert the FPA, because it would leave the entire practice of wholesale demand response outside the jurisdiction of any entity, because neither FERC nor the states would possess the authority to regulate that market. This outcome, the Court concluded, would undermine the FPA's core purpose of protecting "against excessive prices" and ensuring effective transmission of electric power. The Court also reversed the D.C. Circuit's holding that the Rule's compensation formula was arbitrary and capricious. The Court noted that under the narrow scope of review in *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), the Court's important but limited role is to ensure that FERC engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that decision. Here, the Court concluded, FERC's detailed explanation of the compensation formula, which contained lengthy responses to contrary views, reflected a serious and careful discussion of the issue, thus satisfying the arbitrary and capricious standard.

34. ***Musacchio v. United States*, No. 14-1095 (5th Cir., 590 F. App'x 359; cert. granted June 29, 2015; argued on Nov. 30, 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.**

**Decided Jan. 25, 2016** (577 U.S. __). Fifth Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held that when a jury instruction adds an element to the charged crime and the Government fails to object, a challenge to the sufficiency of the evidence should be assessed against the elements of the charged crime, rather than the elements set forth in the erroneous jury instruction. The Court described a court's role in reviewing the sufficiency of the evidence as "limited" to considering only the "legal" question "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Thus, the Court reasoned, a reviewing court's determination does not rest on how the jury was instructed. For this reason, the Government's failure to introduce evidence of an additional element contained only in the jury instructions, and its failure to object to those jury instructions did not affect sufficiency-of-the-evidence review. Although the Court affirmed the Fifth Circuit's decision, the Court rejected the Fifth Circuit's reliance on "law of the case," because although legal rulings by a district court bind that court, a district court's opinions have no binding power on appellate review. The Court further held that a defendant cannot successfully raise 29 U.S.C. § 3282(a)'s statute-of-limitations bar for the first time on appeal. A time bar is jurisdictional only if Congress has "clearly state[d]" that it is. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. ___, ___ (2013). Here, the Court reasoned, the text, context, and relevant historical treatment of the statute of limitations contained in 29 U.S.C. § 3282(a) confirm that it imposes a non-jurisdictional defense that becomes part of a case only if a defendant raises it in the district court. Because the provision does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms, the Court reasoned, it stands in marked contrast to 29 U.S.C. § 3231, which speaks squarely to federal courts' general criminal subject-matter "jurisdiction" and does not condition its jurisdictional grant on compliance with § 3282(a)'s statute of limitations. Moreover, because the statute does not impose a jurisdictional limit, the failure to raise the defense at or before trial is reviewable on appeal—if at all—only for plain error. Here, the district court's failure to enforce an unraised limitations defense under 29 U.S.C. § 3282(a) cannot be a plain error, the Court concluded, because if a defendant fails to press the defense, it does not become part of the case and, thus, there is no error for an appellate court to correct.

35. ***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; argued on Oct. 7, 2015). 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.**

**Decided Jan. 20, 2016** (577 U.S. __). Kan./Reversed and remanded. Justice Scalia for an 8-1 Court (Sotomayor, J., dissenting). As to the first question presented, the Court held that the Eighth Amendment does not require courts in capital sentencing cases to instruct the jury that mitigating circumstances must be proved beyond a reasonable doubt. Indeed, the Court doubted whether it is even possible to apply a standard of proof to the mitigating-factor determination because whether mitigation exists is largely a judgment call. In reaching its determination, the Court noted that in *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998), it upheld a death sentence even though the trial court "failed to provide the jury with express guidance on the concept of mitigation," and in *Weeks v. Angelone*, 528 U.S. 225, 232-33 (2000), the Court reaffirmed that it has "never held that the State must structure in a particular way the manner in which juries consider mitigating evidence" and rejected the contention that it was constitutionally deficient to instruct jurors to "'consider a mitigating circumstance if you find there is evidence to support it.'" The Court also rejected petitioners' contention that an instruction was necessary in this case, noting that ambiguity in capital-sentencing instructions gives rise to constitutional error only if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." The alleged confusion stemming from the jury instructions used at the defendants' sentencings did not clear that bar. As to the second question presented, the Court held that the Eighth Amendment did not require that joint sentencing proceedings be severed where the defendants' claim is, at bottom, that the jury considered evidence that would not have been admitted in a severed proceeding, and that the joint trial clouded the jury's consideration of mitigating evidence like "mercy." Instead, consistent with the Court's prior decision in *Romano v. Oklahoma*, 512 U.S. 1 (1994), the evidence must have so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process. Here, the trial court instructed the jury that it "must give separate consideration to each defendant," that each was "entitled to have his sentence decided on the evidence and law which is applicable to him," and that any evidence in the penalty phase "limited to only one defendant should not be considered by you as to the other defendant." The jury was presumed to have followed those instructions.

36. ***Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, No. 14-723 (11th Cir., 593 F. App'x 903; cert. granted Mar. 30, 2015; SG as amicus, supporting petitioners; argued on Nov. 9, 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.**

**Decided Jan. 20, 2016** (577 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Thomas for an 8-1 Court (Alito, J., joining the opinion except Part III-C; Ginsburg, J., dissenting). The Court held that when an ERISA-plan participant wholly dissipates a third-party settlement on non-traceable items, the plan

administrator may not bring suit to attach the participant's separate assets under Section 502(a)(3) of ERISA, which authorizes plan administrators to file suit "to obtain . . . appropriate equitable relief," because the plan is not seeking equitable relief. As a general matter, employee benefit plans subject to ERISA contain subrogation clauses requiring a plan participant to reimburse the plan for medical expenses if the participant later recovers money from a third party for his or her injuries. Here, the petitioner was injured by a drunk driver, and his ERISA plan paid $120,000 for his medical expenses. The petitioner later sued the drunk driver and obtained a $500,000 settlement. Pursuant to the plan's subrogation clause and Section 502(a)(3) of ERISA, the plan administrator sought reimbursement from the settlement via an equitable lien on any settlement funds or property in petitioner's possession and an order enjoining petitioner from dissipating any such funds. In determining whether the suit could be brought under Section 502(a)(3), the Court observed that whether the relief requested "is legal or equitable depends on [1] the basis for [the plaintiff's] claim and [2] the nature of the underlying remedies sought." *Sereboff v. Mid Atl. Med. Servs., Inc*., 547 U.S. 356, 363 (2006). Under the Court's precedents, the basis for the plan administrator's claim—the enforcement of a lien created by an agreement to convey a particular fund to another party—was equitable, and the nature of the plan administrator's underlying remedy—enforcement of a lien against specifically identifiable funds that were within petitioner's possession and control—would have been equitable had the plan administrator immediately sued to enforce the lien against the fund. The Court concluded, however, that an ERISA plan is not seeking equitable relief when the defendant has dissipated all of a separate settlement fund, and the plan then seeks to recover out of the defendant's general assets. In premerger equity courts, a plaintiff could ordinarily enforce an equitable lien, including, as here, an equitable lien by agreement, only against specifically identified funds that remained in the defendant's possession or against traceable items that the defendant purchased with the funds. If a defendant dissipated the entire fund on nontraceable items, the lien was eliminated, and the plaintiff could not attach the defendant's general assets. Because it was not clear whether the petitioner kept his settlement fund separate from his general assets and whether he dissipated the entire fund on nontraceable assets, the case was remanded to the district court for it to make a determination in the first instance.

37. ***Campbell-Ewald Co. v. Gomez*, No. 14-857 (9th Cir., 768 F.3d 871; cert. granted May 18, 2015; SG as amicus, supporting respondent; argued on Oct. 14, 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.**

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**Decided Jan. 20, 2016** (577 U.S. __). Ninth Circuit/Affirmed and remanded. Justice Ginsburg for a 6-3 Court (Thomas, J., concurring; Roberts, C.J., dissenting, joined by Scalia and Alito, J.J.; Alito, J., dissenting). As to the first and second questions presented, the Court held that an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, and the district court therefore retains jurisdiction to adjudicate the plaintiff's complaint. The Court reasoned that a case does not become moot as long as the parties have a concrete interest, however small, in the litigation's outcome and that respondent's complaint was not effaced by petitioner's unaccepted offer to satisfy his individual claim under basic principles of contract law. Specifically, the settlement offer, once rejected, had no continuing efficacy, so the parties remained adverse and retained the same stake in the litigation they had at the outset. As to the third question presented, the Court held that a federal contractor is not entitled to immunity from suit for its violation of the Telephone Consumer Protection Act when it violated both federal law and the Government's explicit instructions. The Court observed that unlike the United States and its agencies, federal contractors do not enjoy absolute immunity. While a federal contractor who simply performs as directed by the Government may be shielded from liability for injuries caused by its conduct, no "derivative immunity" exists when the contractor has exceeded its authority or its authority was not validly conferred. Here, the defendant violated the Government's explicit instructions when it sent text messages to individuals who had not "opted in" to receive solicitations, and thus it was not immune.

38. ***Duncan v. Owens*, No. 14-1516 (7th Cir., 782 F.3d 360; cert. granted Oct. 1, 2015; argued on Jan. 12, 2016). Whether, under clearly established Supreme Court precedent, as required to grant habeas relief under 28 U.S.C. § 2254, a trial court violates a criminal defendant's right to have his guilt adjudicated solely on the evidence introduced at trial by inferring a defendant's motive when the motive is not an element of the offense and is not directly established by the evidence at trial.**

    **Decided Jan. 20, 2016** (577 U.S. __). The writ of certiorari was dismissed as improvidently granted.

39. ***Bruce v. Samuels*, No. 14-844 (D.C. Cir., 761 F.3d 1; cert. granted June 15, 2015; argued on Nov. 4, 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?**

    **Decided Jan. 12, 2016** (577 U.S. __). D.C. Circuit/Affirmed. Justice Ginsburg for a unanimous Court. The Court held that a provision of the Prison Litigation Reform Act of 1995, which requires prisoners who commence a civil action *in forma pauperis* "to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account," applies on a per-case basis. 28 U.S.C. § 1915(b). Thus, a prisoner must make a payment equal to 20% of the income of his prisoner account for each lawsuit the prisoner files, not simply a single payment of 20% of his income regardless of the number of lawsuits he has

filed. Looking at the text of the statute, the Court reasoned that "the subsection as a whole is written from the perspective of a single case," not all cases filed by a single prisoner. The Court also rejected petitioner's "extratextual" argument that applying the payments on a per-case basis could be administratively burdensome or leave prisoners without access to the courts. Several states have been able to operate efficiently while applying a per-case approach, and the courts are statutorily required to permit prisoners to file civil actions even if they have "no assets and no means by which to pay" filing fees. 28 U.S.C. § 1915(b)(4).

40. ***Hurst v. Florida*, No. 14-7505 (Fla., 147 So. 3d 435; cert. granted Mar. 9, 2015; argued on Oct. 13, 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).**

**Decided Jan. 12, 2016** (577 U.S. __). Fla./Reversed and remanded. Justice Sotomayor for an 8-1 Court (Breyer, J., concurring in the judgment; Alito, J. dissenting). The Court held that Florida's capital sentencing scheme violates the Sixth Amendment because it permits a judge to increase the maximum punishment a capital felon may receive based on facts that were not resolved by jury determination. After a defendant is convicted of a capital offense, Florida employs a "hybrid" proceeding to determine whether the capital felon is to be sentenced to death. Under this process, the sentencing judge conducts an evidentiary hearing before a jury. The jury then renders an "advisory sentence" of life imprisonment or death, without specifying the factual basis of its recommendation. Notwithstanding the jury's recommendation, the court must independently weigh the aggravating and mitigating circumstances and enters the sentence itself. Although the judge must give the jury's recommendation "great weight," the sentencing order must reflect the judge's independent judgment. The Court concluded that this scheme is unconstitutional because it permits a judge to find the facts necessary to sentence a defendant to death. The Court reasoned that this result was compelled by its prior decision in *Ring v. Arizona*, 436 U.S. 584 (2002), which held that an Arizona capital sentencing scheme that permitted a judge to find the facts necessary to sentence a defendant to death was unconstitutional. The only relevant difference between Florida's sentencing scheme and the scheme ruled unconstitutional in *Ring* was that "Florida incorporates an advisory jury verdict that Arizona lacked." The Court concluded that this distinction is immaterial because, under the Florida scheme, the jury's recommendation does not include "specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." The Court remanded the case for the Florida courts to consider whether the constitutional error was harmless.

41. ***DIRECTV, Inc. v. Imburgia*, No. 14-462 (Cal. Ct. App., 170 Cal. Rptr. 3d 190; cert. granted Mar. 23, 2015; argued on Oct. 6, 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.**

**Decided Dec. 14, 2015** (577 U.S. __). Cal. Ct. App./Reversed and remanded. Justice Breyer for a 6-3 Court (Thomas, J., dissenting; Ginsburg, J., dissenting, joined by Sotomayor, J.). The Court held that an arbitration provision stating that it was governed by the Federal Arbitration Act but was unenforceable if the "law of your state" made class-arbitration waivers unenforceable had to be enforced because it was preempted by the Federal Arbitration Act. In *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the California Supreme Court held that a waiver of class procedures in arbitration contracts was unenforceable under state law. But in 2011, the U.S. Supreme Court held that this rule was preempted by the Federal Arbitration Act. The arbitration agreement at issue here stated that if "the law of your state" makes class-arbitration waivers unenforceable, then the entire arbitration provision is unenforceable. The California Court of Appeal concluded that this language required application of state law even if it had been preempted by federal law. The Court held that this conclusion was itself preempted by the Federal Arbitration Act because the rule would not be a basis "for the revocation of any contract" other than an arbitration provision. 9 U.S.C. § 2. The Court reasoned that "law of your state" is not ambiguous and takes the ordinary meaning: valid state law. California courts have never applied a similar rule in other contexts, thus leading the Court to conclude that this was a rule that would apply only in the arbitration context. The Court also reasoned that the canon that contracts should be construed against the drafter would not lead California courts to reach a similar conclusion in cases not involving arbitration because of the lack of any similar case interpreting similar language to include invalid laws.

42. ***Shapiro v. McManus*, No. 14-990 (4th Cir., 584 F. App'x 140; cert. granted June 8, 2015; argued on Nov. 4, 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).**

**Decided Dec. 8, 2015** (577 U.S. __). Fourth Circuit/Reversed and remanded. Justice Scalia for a unanimous Court. Under 28 U.S.C. § 2284(a), a "district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." When a district court judge is presented with a request for a three-judge court, § 2284(b)(1) states that the judge "shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges" to serve. The Court held that these statutory commands do not permit a single judge to dismiss the action for failure to state a claim for relief. The statutory language could not be clearer in mandating that a three-judge court be convened when the action challenges the constitutionality of the apportionment of congressional districts. No party disputed that the present suit is such an action, and it therefore follows that the district judge was required to refer the case to such a court. The provision of § 2284(b)(1) that permits the judge to "determine[] that three judges are not required" does not grant discretion to the district judge to ignore § 2284(a). It merely clarifies that a district judge need not initiate a three-

judge court upon request without first examining the allegations in the complaint. It does not permit a single judge to determine that the complaint fails to state a claim. The Court also held that petitioners' constitutional claim was not so insubstantial as to deprive the district court of jurisdiction, a ruling that could be made by a single judge.

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43. ***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; argued on Oct. 5, 2015). The Questions Presented are: (1) Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), the express definition of "agency" in the FSIA; the factors set forth in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); or common law principles of agency control. (2) Whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for travel entirely outside of the United States.**

**Decided Dec. 1, 2015** (577 U.S. __). Ninth Circuit/Reversed. Chief Justice Roberts for a unanimous Court. The Court held that a tort suit for personal injuries suffered while boarding a train in Austria is not a case "based upon a commercial activity carried on in the United States." The Foreign Sovereign Immunities Act generally shields foreign states and their agencies from suit in United States courts unless the suit falls within one of the Act's exceptions. One exception withdraws sovereign immunity in any case "in which the action is based upon a commercial activity carried on in the United States by [a] foreign state." 28 U.S.C. § 1605(a)(2). The Ninth Circuit had held that an action satisfies this requirement if a single element of the asserted claim "consists in conduct that occurred in commercial activity carried on in the United States." Rejecting this approach, the Court instead held that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." Here, the claims all turned "on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria." Thus, the claims were "based upon" conduct occurring outside of the United States and did not fall within the commercial activity exception. Because of this determination, the Court did not address whether the conduct of a ticket seller in the United States should be attributed to the foreign agency.

## Cases To Be Decided

1. ***Dollar Gen. 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; SG as amicus, supporting respondents; argued on Dec. 7, 2015). Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the**

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**conduct of nonmembers who enter into consensual relationships with a tribe or its members.**

2. ***Fisher v. Univ. of Texas*, No. 14-981 (5th Cir., 758 F.3d 633; cert. granted June 29, 2015; SG as amicus, supporting respondents; argued on Dec. 9, 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).**

3. ***Puerto Rico v. Sanchez Valle*, No. 15-108 (P.R., 2015 WL 1317010; cert. granted Oct. 1, 2015; argued on Jan. 13, 2016). Whether the Commonwealth of Puerto Rico and the federal government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.**

4. ***Kingdomware Technologies, Inc. v. United States*, No. 14-916 (Fed. Cir., 754 F.3d 923; cert. granted June 22, 2015; argued on Feb. 22, 2016). The Questions Presented are: (1) 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. (2) Whether the Department of Veterans Affairs procurements at issue in this case have been fully performed, and if so, whether the case is moot.**

5. ***Utah v. Strieff*, No. 14-1373 (Utah, 2015 WL 223953; cert. granted Oct. 1, 2015; SG as amicus, supporting petitioner; argued on Feb. 22, 2016). Whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful.**

6. ***Taylor v. United States*, No. 14-6166 (4th Cir., 754 F.3d 217; cert. granted Oct. 1, 2015; argued on Feb. 23, 2016). Whether, in a federal criminal prosecution under the Hobbs Act, 18 U.S.C. § 1951, the Government must prove beyond a reasonable doubt that the crime at issue affects interstate commerce.**

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7. ***Halo Elecs., Inc. v. Pulse Elecs., Inc.*, No. 14-1513 (Fed. Cir., 769 F.3d 1371; cert. granted Oct. 19, 2015; consolidated with *Stryker Corp. v. Zimmer, Inc.*, No. 14-1520; SG as amicus, supporting petitioner; argued on Feb. 23, 2016). Whether the Federal Circuit erred by applying a rigid, two-part test for enhancing patent infringement damages under 35 U.S.C. § 284, that is the same as the rigid, two-part test this Court rejected last term in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), for imposing attorney fees under the similarly-worded 35 U.S.C. § 285.**

8. ***Voisine v. United States*, No. 14-10154 (1st Cir., 778 F.3d 176; cert. granted Oct. 30, 2015; argued on Feb. 29, 2016). Whether a misdemeanor crime with the *mens rea* of recklessness qualifies as a "misdemeanor crime of domestic violence," as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9).**

9. ***Williams v. Pennsylvania*, No. 15-5040 (Pa., 105 A.3d 1234; cert. granted Oct. 1, 2015; argued on Feb. 29, 2016). The Questions Presented are: (1) Whether the Eighth and Fourteenth Amendments are violated where the presiding Chief Justice of a State Supreme Court declines to recuse himself in a capital case where (a) he had personally approved the decision to pursue capital punishment against petitioner in his prior capacity as elected district attorney and continued to head the district attorney's office that defended the death verdict on appeal, (b) expressed strong support for capital punishment in his State Supreme Court election, and (c) in his position as Chief Justice of the State Supreme Court, reviewed a ruling by the state post-conviction court that his office committed prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), when it prosecuted and sought the death penalty against petitioner. (2) Whether the Eighth and Fourteenth Amendments are violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether the jurist's vote is ultimately decisive.**

10. ***Whole Woman's Health v. Cole*, No. 15-274 (5th Cir., 790 F.3d 563; cert. granted Nov. 13, 2015; SG as amicus, supporting petitioner; argued on Mar. 2, 2016). The Questions Presented are: (1) Whether, when applying the "undue burden" standard of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a court errs by refusing to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve a State's interest in promoting health. (2) Whether the Fifth Circuit erred in concluding that this standard permits Texas to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services, while failing to advance the State's interest in promoting health or any other valid interest.**

11. ***RJR Nabisco, Inc. v. European Cmty.*, No. 15-138 (2d Cir., 764 F.3d 129; cert. granted Oct. 1, 2015; SG as amicus, supporting petitioner; argued on Mar. 21, 2016). Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act applies extraterritorially.**

12. ***Simmons v. Himmelreich*, No. 15-109 (6th Cir., 766 F.3d 576; cert. granted Nov. 6, 2015; argued on Mar. 22, 2016). Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the Federal Tort Claims Act's ("FTCA") exceptions to liability, 28 U.S.C. § 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.**

13. ***Puerto Rico v. Franklin California Tax-Free Trust*, No. 15-233 (1st Cir., 2015 WL 4079422; cert. granted Dec. 4, 2015; argued on Mar. 22, 2016; consolidated with *Acosta-Febo v. Franklin California Tax-Free Trust*, No. 15-255). Whether Chapter 9 of the United States Bankruptcy Code, which does not apply to Puerto Rico, nonetheless preempts a Puerto Rico statute creating a mechanism for the Commonwealth's public utilities to restructure their debts.**

14. ***Ross v. Blake*, No. 15-339 (4th Cir., 787 F.3d 693; cert. granted Dec. 11, 2015; SG as amicus, supporting petitioner; argued on Mar. 29, 2016). Whether there is a common law "special circumstances" exception to the Prison Litigation Reform Act that relieves an inmate of his mandatory obligation to exhaust administrative remedies when the inmate erroneously believes that he satisfied exhaustion by participating in an internal investigation.**

15. ***U.S. Army Corps of Eng'rs v. Hawkes Co.*, No. 15-290 (8th Cir., 782 F.3d 994; cert. granted Dec. 11, 2015; argued on Mar. 30, 2016). Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act constitutes "final agency action for which there is no other adequate remedy in a court" and is therefore subject to judicial review under the Administrative Procedure Act.**

16. ***United States v. Texas*, No. 15-674 (5th Cir., 2015 WL 6873190; cert. granted Jan. 19, 2016; argued on April 18, 2016). Whether the Secretary of Homeland Security's guidance directing his subordinates to establish a process for considering deferred action for certain aliens who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents violates the Take Care Clause of the Constitution, Article II, section 3.**

17. ***United States v. Bryant*, No. 15-420 (9th Cir., 769 F.3d 671; cert. granted Dec. 14, 2015; argued on April 19, 2016). Whether reliance on valid uncounseled tribal-court misdemeanor convictions, in order to prove U.S.C. § 117(a)'s predicate-offense element, violates the Constitution.**



18. ***Universal Health Servs., Inc. v. United States ex rel. Escobar*, No. 15-7 (1st Cir., 780 F.3d 504; cert. granted Dec. 4, 2015; SG as amicus, supporting respondents; argued on April 19, 2016). The Questions Presented are: (1) Whether the "implied certification" theory of legal falsity under the False Claims Act is viable. (2) If the "implied certification" theory is viable, whether a government contractor's reimbursement claim can be legally "false" under that theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment.**

19. ***Birchfield v. North Dakota*, No. 14-1468 (N.D., 858 N.W.2d 302; cert. granted Dec. 11, 2015; SG as amicus, supporting respondents; argued on April 20, 2016; consolidated with *Bernard v. Minnesota*, No. 14-1470, and *Beylund v. Levi*, No. 14-1507). Whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.**

20. ***Encino Motorcars, LLC v. Navarro*, No. 15-415 (9th Cir., 780 F.3d 1267; cert. granted Jan. 15, 2016; argued on April 20, 2016). Whether "service advisors" at car dealerships are exempt under 29 U.S.C. § 213(b)(10)(A)—which covers "any salesman, partsman, or mechanic primarily engaged in**

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**selling or servicing automobiles"—from the Fair Labor Standards Act's overtime-pay requirements.**

21. ***Kirtsaeng v. John Wiley & Sons, Inc.*, No. 15-375 (2d Cir., 605 F. App'x 48; cert. granted Jan. 15, 2016; argued on April 25, 2016). What constitutes the appropriate standard for awarding attorneys' fees to a prevailing party under section 505 of the Copyright Act?**

22. ***Cuozzo Speed Technologies, LLC v. Lee*, No. 15-446 (Fed. Cir., 793 F.3d 1268; cert. granted Jan. 15, 2016; argued on April 25, 2016). The Questions Presented are: (1) Whether the court of appeals erred in holding that, in *inter partes* review ("IPR") proceedings, the Patent Trial and Appeal Board may construe claims in an issued patent according to their broadest reasonable interpretation rather than their plain and ordinary meaning. (2) Whether the Court of Appeals erred in holding that, even if the Board exceeds its statutory authority in instituting an IPR proceeding, the Board's decision whether to institute an IPR proceeding is judicially unreviewable.**

23. ***Mathis v. United States*, No. 15-6092 (8th Cir., 786 F.3d 1068; cert. granted Jan. 19, 2016; argued on April 26, 2016). Whether a predicate prior conviction under the Armed Career Criminal Act must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory definitional provisions that merely establish the means by which referenced elements may be satisfied rather than stating alternative elements or versions of the offense.**

24. ***Dietz v. Bouldin*, No. 14-458 (9th Cir., 794 F.3d 1093; cert. granted Jan. 19, 2016; SG as amicus, supporting respondent; argued on April 26, 2016). Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.**

25. ***McDonnell v. United States*, No. 15-474 (4th Cir., 792 F.3d 478; cert. granted Jan. 15, 2016; argued on April 27, 2016). Whether "official action" under the controlling fraud statutes is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.**

## October Term 2016

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. ***Manuel v. City of Joliet*, No. 14-9496 (7th Cir., 590 F. App'x 641; cert. granted Jan. 15, 2016; SG as amicus, supporting petitioner). Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.**

3. ***Murr v. Wisconsin*, No. 15-214 (Wis. Ct. App., 359 Wis. 2d 675; cert. granted Jan. 15, 2016). Whether, in a regulatory taking case, the "parcel as a whole" concept as described in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.**

4. ***Microsoft Corp. v. Baker*, No. 15-457 (9th Cir., 797 F.3d 607; cert. granted Jan. 15, 2016). Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.**

5. ***Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (8th Cir., 788 F.3d 779; cert. granted Jan. 15, 2016). Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.**

6. ***Salman v. United States*, No. 15-628 (9th Cir., 792 F.3d 1087; cert. granted Jan. 19, 2016). Whether the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), requires proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit has held, or whether it is enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held below.**

7. ***Samsung Elecs. Co. v. Apple Inc.*, No. 15-777 (Fed. Cir., 786 F.3d 983; cert. granted Mar. 21, 2016). Where a design patent is applied to only a component of a product, should an award of infringer's profits be limited to those profits attributable to the component?**

8. ***Bravo-Fernandez v. United States*, No. 15-537 (1st Cir., 790 F.3d 41; cert. granted Mar. 28, 2016). Whether, under *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.**

9. ***Pena-Rodriquez v. Colorado*, No. 15-606 (Colo., 350 P.3d 287; cert. granted Apr. 4, 2016). Whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.**

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10. ***Shaw v. United States*, No. 15-5991 (9th Cir., 781 F.3d 1130; cert. granted Apr. 25, 2016). Whether, for purposes of subsection (1) of the bank-fraud statute, 18 U.S.C. § 1344, a "scheme to defraud a financial institution" requires proof of a specific intent not only to deceive, but also to cheat, a bank, as the majority of circuits—nine of twelve—have held and as petitioner Lawrence Shaw argued before the Ninth Circuit, which instead joined the minority view in affirming his convictions for a scheme directed at a non-bank third-party.**

11. ***Manrique v. United States*, No. 15-7250 (11th Cir., 618 F. App'x 579; cert. granted Apr. 25, 2016). Whether the Court should resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court's decision in *Dolan v. United States*, 560 U.S. 605, 618 (2010).**

12. ***Star Athletica, L.L.C. v. Varsity Brands, Inc.*, No. 15-866 (6th Cir., 799 F.3d 468; cert. granted May 2, 2016). What is the appropriate test to determine when a feature of a useful article is protectable under § 101 of the Copyright Act?**

13. ***SCA Hygiene Products v. First Quality Baby Products*, No. 15-927 (Fed. Cir., 807 F.3d 1311; cert. granted May 2, 2016). Whether and to what extent the defense of laches may bar a claim for patent infringement brought within the Patent Act's six-year statutory limitations period, 35 U.S.C. § 286.**

## Cases Determined Without Argument

1. ***Maryland v. Kulbicki*, No. 14-848 (Md. Ct. App.; Reversed Oct. 5, 2015).** Per Curiam. The Court held that the Maryland Court of Appeals erred in conducting a post-hoc assessment of trial counsel's performance, and finding it constitutionally deficient, based on scientific advances not available at the time of trial. Respondent was convicted of first-degree murder, in part because of the testimony of an expert who opined that based on "Comparative Bullet Lead Analysis" ("CBLA"), bullet fragments removed from the victim "likely came from the same package" of ammunition as a bullet later taken from respondent's gun. Eleven years after respondent's conviction, the Court of Appeals of Maryland held in a separate case that CBLA evidence was not generally accepted by the scientific community and was therefore inadmissible. Applying that rule to respondent's conviction, the Court of Appeals held that respondent's defense attorneys were constitutionally deficient for failing to identify an early report authored by the expert witness that "presaged the flaws in CBLA evidence" but concluded that CBLA was a valid technique. The Supreme Court reversed, holding that there was no reason to believe that a diligent search would have discovered the report, or that an efficient counsel would necessarily have brought the report to the attention of the jury.

2. ***Mullenix v. Luna*, No. 14-1143 (5th Cir.; Reversed Nov. 9, 2015).** Per Curiam (Scalia, J., concurring in the judgment; Sotomayor, J., dissenting). The Court

held that a police officer was entitled to qualified immunity for his conduct in fatally shooting a suspect during a high-speed chase. During the chase, which lasted eighteen minutes and reached speeds between 85 and 110 miles per hour, the suspect twice called the police dispatcher claiming to have a gun and threatening to shoot police officers if they did not abandon their pursuit. In response, the police set up a tire spike strip under an overpass. Petitioner drove to the same overpass and—despite his superior's order to wait—fired his rifle at the car intending to hit the engine block to disable the vehicle before it reached the spike strip. Instead, the bullets hit the suspect, who was killed. The Court held that petitioner was entitled to qualified immunity because it was not clearly established that the Fourth Amendment makes the use of deadly force inappropriate in similar circumstances. At most, the cases addressing excessive force claims involving car chases reveal a "hazy legal backdrop" against which police officers must act. In reaching the opposite conclusion, the Fifth Circuit held that it is clearly established that a police officer may not use deadly force against a fleeing felon that does not pose a sufficient threat of harm to the officer or others. The Court rejected this formulation as being at too high a level of generality. Instead, courts must analyze the specific factual situation the officer confronts in analyzing the question of qualified immunity.

3. ***White v. Wheeler*, No. 14-1372 (6th Cir.; Reversed and remanded Dec. 14, 2015).** Per Curiam. The Court held that a trial judge's decision to strike a juror for cause because of his equivocal and inconsistent answers when questioned about whether he could consider voting to impose the death penalty was not "an unreasonable application of[] clearly established Federal law" under the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. § 2254(d)(1). The Sixth Amendment's guarantee of an impartial jury confers on capital defendants the right to a jury not uncommonly willing to condemn a man to die, but also acknowledges the State's strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Thus, a juror may be struck for cause only when he is substantially impaired in his ability to impose the death penalty under the state-law framework. In granting *habeas* relief, the Sixth Circuit here concluded that the trial court had misconstrued the juror's answers as stating that he knew he could not impose a sentence of death when in fact he merely stated that he was uncertain. The Court concluded, however, that the juror's answers provided a reasonable basis for the trial judge to conclude that the juror was unable to give that penalty fair consideration.

4. ***James v. Boise*, No. 15-493 (Idaho; Reversed and remanded Jan. 25, 2016).** Per Curiam. The Court held that the Idaho Supreme Court, like any other state or federal court, is bound by the Supreme Court's interpretation of federal law, and the state court had erred in concluding otherwise. Specifically, the Idaho Supreme Court had ignored the Court's prior decision in *Hughes v. Rowe*, 449 U.S. 5 (1980) (per curiam), which interpreted 42 U.S.C. § 1988 to permit a prevailing defendant to recover attorney's fees only if "the plaintiff's action was frivolous, unreasonable, or without foundation." The Idaho Supreme Court insisted that it was not bound by the interpretation articulated in *Hughes* because Section 1988 does not expressly contain the limitation. It then proceeded to award damages to a defendant without first determining that "the plaintiff's action

was frivolous, unreasonable, or without foundation." The Court held that the Idaho Supreme Court's decision was error. Because the Idaho Supreme Court was construing a federal statute, it was required to defer to the Supreme Court's interpretation of that statute.

5. ***Amgen Inc. v. Harris*, No. 15-278 (9th Cir.; Reversed and remanded Jan. 25, 2016).** Per Curiam. The Court held that the Ninth Circuit had failed to comply with the Court's prior decision in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. ___ (2014), which rejected a presumption of prudence for ERISA fiduciaries who administer employee stock-ownership plans and specified pleading standards to help courts distinguish plausible and meritless claims for breach of the duty of prudence on the basis of inside information. Specifically, the Court in *Fifth Third Bancorp* said that a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. The plaintiffs had failed to do so in their class action complaint alleging that the ERISA plan managers had breached their fiduciary duties, and thus the complaint should have been dismissed.

6. ***V.L. v. E.L.*, No. 15-648 (Ala.; Reversed and remanded Mar. 7, 2016).** Per Curiam. The Court held that the Alabama Supreme Court had erred in refusing to enforce a Georgia judgment of adoption making the petitioner a legal parent of her former lesbian partner's three children. The Alabama Supreme Court's refusal to honor that judgment violated the Full Faith and Credit Clause of Article IV, § 1, which requires a court to recognize "valid judgments rendered by the courts of its sister States," even if the court "disagrees with the reasoning of the underlying judgment or deems it to be wrong on the merits." There is a limited exception to that requirement for when the issuing court lacked jurisdiction to render the judgement, but that exception did not apply because a Georgia statute expressly authorized the Georgia court to resolve the adoption petition at issue. The Alabama Supreme Court attempted to manufacture a jurisdictional problem by treating as jurisdictional a Georgia statute that controlled the *merits* of the adoption petition, but that statute had nothing to do with whether the Georgia court had authority to resolve the petition. Thus, because the adoption judgment "appears on its face to have been issued by a court with jurisdiction," the Alabama Supreme Court erred in not giving it full faith and credit.

7. ***Wearry v. Cain*, No. 14-10008 (La. Dist. Ct.; Reversed and remanded Mar. 7, 2016).** Per Curiam (Alito, J., dissenting, joined by Thomas, J.). The Court held that the Louisiana courts had erred in denying Wearry post-conviction relief because the State had withheld material exculpatory evidence in violation of due process under *Brady v. Maryland*, 373 U.S. 83 (1963). Wearry was convicted of capital murder and sentenced to death. After his conviction became final, he learned that the prosecution had failed to disclose police records undermining the credibility of the State's star witness, as well as other records showing that, contrary to the prosecution's assertions at trial, another State witness had requested a reduced sentence in exchange for testifying against Wearry. The

withheld evidence unconstitutionally undermined confidence in Wearry's conviction because the prosecution's case rested almost entirely on the jury crediting the State's witnesses rather than Wearry's alibi.

8. ***Caetano v. Massachusetts*, No. 14-10078 (Mass.; Vacated and remanded Mar. 21, 2016).** Per Curiam (Alito, J., concurring, joined by Thomas, J.). The Court held that the Massachusetts Supreme Judicial Court had erred in upholding a state law prohibiting the possession of stun guns. The Massachusetts court offered three explanations to support its holding that the Second Amendment does not extend to stun guns, but *District of Columbia v. Heller*, 554 U.S. 570 (2008), foreclosed all three. First, the lower court reasoned that stun guns were not commonly used when the Second Amendment was enacted, but *Heller* made clear that the Second Amendment "extends . . . to . . . arms . . . that were not in existence at the time of the founding." Second, the lower court invoked the "common law" prohibition of "unusual" weapons, but just because stun guns are a modern invention does not mean they are "unusual." Finally, the lower court reasoned that stun guns are not "readily adaptable to use in the military," but *Heller* rejected the principle "that only those weapons useful in warfare are protected."

9. ***Woods v. Etherton*, No. 15-723 (6th Cir.; Reversed Apr. 4, 2016).** Per Curiam. The Court held that the Sixth Circuit applied the wrong standard of review under the Antiterrorism and Effective Death Penalty Act ("AEDPA") when it concluded that Etherton's appellate counsel had been constitutionally ineffective by failing to raise a Confrontation Clause claim. Under AEDPA, federal habeas relief was available to Etherton, a state prisoner, only if the 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." 28 U.S.C. § 2254(d)(1). A state court's determination that a habeas claim fails to meet that standard "precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Moreover, AEDPA review of an ineffective assistance claim is "doubly deferential . . . because counsel is strongly presumed to have rendered adequate assistance." Here, a fairminded jurist could conclude that Etherton's appellate counsel made a reasoned judgment not to raise a Confrontation Clause challenge to an anonymous tip admitted at trial because, among other reasons, the facts in the tip were both uncontested and consistent with Etherton's defense. The Sixth Circuit thus erred in failing to afford appellate counsel and the state court the benefit of the doubt when it award Etherton habeas relief.

10. ***Montana v. Wyoming*, No. 137O (Original jurisdiction; Judgment for Wyoming and remanded Mar. 21, 2016).** Per Curiam. The Court held that Wyoming is liable to Montana for reducing the volume of water available in the Tongue River in the years 2004 and 2006, but is not liable to Montana for any other year at issue. The Court remanded the case to the Special Master for a determination of damages and other relief.

11. ***Kernan v. Hinojosa*, No. 15-833 (9th Cir.; Reversed May 16, 2016).** Per Curiam (Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that the Ninth Circuit erred in refusing to apply deferential review under the

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). When a state court order denies a habeas petition without explanation, federal courts presume that the order agrees with the "last reasoned state-court opinion" unless there is strong evidence" to the contrary. *Ylst v. Nunnemaker*, 501 U.S. 797, 804-05 (1991). Here, a California Superior Court denied a habeas petition for improper venue, and the California Supreme Court affirmed without explanation. Applying *Ylst*, the Court held that there *was* strong evidence to rebut the presumption that the California Supreme Court denied the petition for "improper venue," explaining that there is only one California Supreme Court and, therefore, the California Supreme Court could not possibly have denied the habeas petition on the basis of improper venue. Thus, the California Supreme Court's denial of the habeas petition was on the merits and the Ninth Circuit erred in not applying AEDPA deference, which is required whenever a state court resolves a prisoner's federal claim on the merits.

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

1. ***Lightfoot v. Cendant Mortg. Corp.*, No. 14-1055 (9th Cir., 769 F.3d 681; CVSG Oct. 5, 2015). The Questions Presented are: (1) Whether the phrase "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal" in Fannie Mae's charter confers original jurisdiction over every case brought by or against Fannie Mae to the federal courts. (2) Whether the majority's decision in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), should be reversed.**

2. ***Tibbs v. Bunnell*, No. 14-1140 (Ky., 448 S.W.3d 796; CVSG Oct. 5, 2015). Whether state law may nullify the federal "patient safety work product" privilege, or whether, instead, the Kentucky Supreme Court erred by interpreting it not to protect information "normally contained in" documents subject to state reporting or recordkeeping requirements.**

3. ***Odhiambo v. Kenya*, No. 14-1206 (D.C. Cir., 764 F.3d 31; CVSG Oct. 5, 2015). Whether a Kenyan national who now lives in the United States may sue his former government in a U.S. court, to try to collect payments that he contends he is owed for acting as a whistleblower to identify people who had evaded Kenyan taxes.**

4. ***Fry v. Napoleon Cmty. Sch.*, No. 15-497 (6th Cir., 788 F.3d 622; CVSG Jan. 19, 2016). Whether the Handicapped Children's Protection Act of 1986 commands exhaustion in a suit brought under the Americans with Disabilities Act and the Rehabilitation Act that seeks damages—a remedy that is not available under the Individuals with Disabilities Education Act.**

5. ***Venezuela v. Helmerich & Payne Int'l*, No. 15-423 (D.C. Cir., 784 F.3d 804; CVSG Feb. 29, 2016; consolidated with *Helmerich & Payne Int'l v. Venezuela*, No. 15-698). The Questions Presented are: (1) Whether, for purposes of determining if a plaintiff has pleaded that a foreign state has taken property "in violation of international law," the Foreign Sovereign Immunities Act**

**("FSIA") recognizes a discrimination exception to the domestic-takings rule, which holds that a foreign sovereign's taking of the property of its own national is not a violation of international law. (2) Whether, for purposes of determining if a plaintiff has pleaded that "rights in property taken in violation of international law are in issue," the FSIA allows a shareholder to claim property rights in the assets of a still-existing corporation. (3) Whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.**

6. ***Ivy v. Morath*, No. 15-486 (5th Cir., 781 F.3d 250; CVSG Feb. 29, 2016). Whether the relationship between public and private actors invokes dual obligations to accommodate disabilities in any context other than an express contractual relationship between a public entity and its private vendor.**

7. ***Czyzewski v. Jevic*, No. 15-649 (3d Cir., 787 F.3d 173; CVSG Feb. 29, 2016). Whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme.**

8. ***Midland Funding v. Madden*, No. 15-610 (2d Cir., 786 F.3d 246; CVSG Mar. 21, 2016). Whether the National Bank Act, which preempts state usury laws regulating the interest a national bank may charge on a loan, continues to have preemptive effect after the national bank has sold or otherwise assigned the loan to another entity.**

9. ***Belize v. Belize Social Dev. Ltd.*, No. 15-830 (D.C. Cir., 794 F.3d 99; CVSG Mar. 28, 2016). The Questions Presented are: (1) Under the doctrine of *forum non conveniens*, as applied to the New York Convention by Article III, is a foreign forum per se inadequate because specific assets in the United States cannot be attached by a foreign court, as the D.C. Circuit has held; or is it adequate if it has jurisdiction and some attachable assets, as the Second Circuit held? (2) Under Article V(2)(b) of the New York Convention, does the public policy in favor of arbitration yield where confirmation of an arbitral award would be contrary to countervailing public policies, such as those grounded in constitutional separation of powers principles, combating government corruption and/or international comity?**

10. ***Howell v. Howell*, No. 15-1031 (Ariz., 361 P.3d 936; CVSG Apr. 18, 2016). Whether the Uniformed Services Former Spouses' Protection Act preempts a state court's order directing a veteran to indemnify a former spouse for a reduction in the former spouse's portion of the veteran's military retirement pay, where that reduction results from the veteran's post-divorce waiver of retirement pay in order to receive compensation for a service-connected disability.**

11. ***Pa. Higher Educ. Assistance Agency v. Pele*, No. 15-1044 (4th Cir., 628 F. App'x 870, CVSG May 16, 2016); *Pa. Higher Educ. Assistance Agency v. United States ex rel. Oberg*, No. 15-1045 (4th Cir., 804 F.3d 646; CVSG May 16, 2016). Whether the Pennsylvania Higher Education Assistance**

**Agency, a statewide agency located in the capital and unambiguously treated as an arm of the state by Pennsylvania, is an arm of Pennsylvania for purposes of federal law, or is instead an "independent political subdivision" as determined by the Fourth Circuit and its multifactor balancing test.**

## 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.**

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

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 Aetna Life Insurance 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.**

4. ***Life Technologies Corp. v. Promega Corp.*, No. 14-1538 (Fed. Cir., 773 F.3d 1338; CVSG Oct. 5, 2015; cert. supported in part, limited to second Question Presented, May 11, 2016). The Questions Presented are: (1) Whether a single entity can "actively induce" itself to infringe a patent under 35 U.S.C. § 271(f)(1). (2) Whether supplying a single, commodity component of a multi-component invention from the United States is an infringing act under 35 U.S.C. § 271(f)(1), exposing the manufacturer to liability for all worldwide sales.**

## CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Fed. Nat'l Mortg. 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 Sys., 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 Sys., 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 Servs., 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 Servs., 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 Pharm. v. Sup. Ct. 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. ***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.**

7. ***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.**

8. ***Ridley Sch. Dist. 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.**

9. ***Mississippi v. Tennessee*, No. 22O143, Orig. (Original Jurisdiction; CVSG Oct. 20, 2014; leave to file bill of complaint opposed May 12, 2015; motion for leave to file bill of complaint granted June 29, 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.**

10. ***Corr v. Metro. Wash. Airports*, No. 13-1559 (4th Cir., 740 F.3d 295; CVSG Jan. 12, 2015; cert. opposed May 22, 2015; cert. denied Oct. 5, 2015). The Questions Presented are: (1) Whether the Metropolitan Washington Airports Authority ("MWAA") exercises sufficient federal power to mandate separation-of-powers scrutiny for purposes of a suit seeking injunctive relief and invoking the Little Tucker Act to seek monetary relief. (2) Whether the Metropolitan Washington Airports Act of 1986, 49 U.S.C. §§ 49101 *et seq*., which transferred to MWAA all of the Government's "rights, liabilities, and obligations" concerning, *inter alia*, Dulles Airport and its "access highways and other related facilities," violates the separation of powers, including the Executive Vesting, Appointments, and Take Care Clauses of Article II, by depriving the president of control over MWAA, an entity exercising executive branch functions pursuant to federal law.**

11. ***Google, Inc. v. Oracle Am., 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.**

12. ***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.**

13. ***RJR Pension Inv. 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.**

14. ***Nebraska & Oklahoma v. Colorado*, No. 22O144, Orig. (Original Jurisdiction; CVSG May 4, 2015; motion for leave to file bill of complaint opposed Dec. 16, 2015; motion for leave to file bill of complaint denied Mar. 21, 2016). 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.**

15. ***Smith v. Aegon Cos. Pension Plan*, No. 14-1168 (6th Cir., 2013 WL 321632; CVSG June 1, 2015; cert. opposed Nov. 25, 2015; cert. denied Jan. 11, 2016). 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.**

16. ***Hernandez v. Mesa*, No. 15-118 (5th Cir., 785 F.3d 117; CVSG Nov. 30, 2015; cert. opposed Feb. 29, 2016). The Questions Presented are: (1) Whether a formalist or functionalist analysis governs the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States. (2) Whether qualified immunity may be granted or denied based on facts—such as the victim's legal status—unknown to the officer at the time of the incident.**

17. ***State Farm Fire & Cas. Co. v. United States, ex. rel. Rigsby*, No. 15-513 (5th Cir., 794 F.3d 457; CVSG Jan. 11, 2016; cert. opposed Apr. 15, 2016). The Questions Presented are: (1) What standard governs the decision whether to dismiss a relator's claim for violation of the False Claims Act's seal**

**requirement? (2) Whether and under what standard a corporation or other organization may be deemed to have "knowingly" presented a false claim, or used or made a false record, in violation of Section 3729(a) of the False Claims Act based on the purported collective knowledge or imputed ill intent of employees other than the employee who made the decision to present the claim or record found to be false, where (i) the employee submitting the claim or record independently made the decision to present the claim or record in good faith after reviewing the available information, and (ii) there was no causal nexus between the submission of the false claim or record and the purported collective knowledge or imputed ill intent of those other employees.**

## 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 four most recent Terms, nine different Gibson Dunn partners have presented oral argument in 16 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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