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GIBSON DUNN
Supreme Court Round-Up

Overview

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

October Term 2013

Decided Cases

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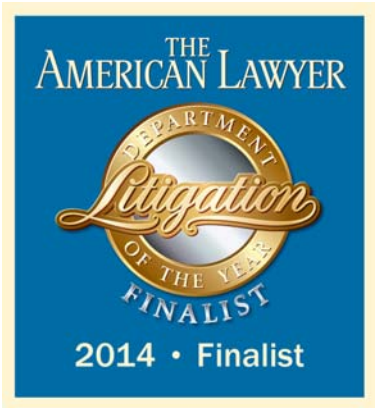
1. ***Air Wisconsin Airlines Corp. v. Hoeper,* No. 12-315 (Sup. Ct. Colo., 2012 CO 19; CVSG Jan. 7, 2013; cert. supported May 17, 2013; cert. granted June 17, 2013; SG as amicus, supporting petitioner; argued on Dec. 9, 2013). Whether immunity under the Aviation and Transportation Security Act ("ATSA"),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

   Decided Jan. 27, 2014. (571 U.S. ___). Colorado Supreme Court/Reversed. Justice Sotomayor for a 6-3 Court (Scalia, J., joined by Kagan, J., Thomas, J., concurring in part and dissenting in part). The ATSA requires airlines and their employees to report to the Transportation Security Administration ("TSA") any and all potential security threats to the Nation's air transportation system. To encourage such reports, the ATSA provides a broad grant of immunity from suit, shielding airlines and their employees from all liability, including liability for state-law defamation. See 49 U.S.C. § 44941. The Court held that, under the ATSA, an airline or its employee may not be denied immunity for reporting suspicious behavior to the TSA absent a finding that the report was materially false. Congress patterned the exception to ATSA immunity after the actual malice standard of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and that standard has long required a finding of material falsity. The Court presumed that Congress meant to incorporate this settled understanding. The Court also held that, in this context, material falsity means the falsehood had a natural tendency to influence a reasonable TSA officer's determination of an appropriate response. Air Wisconsin's statements to the TSA—that Respondent was a Federal Flight Deck Officer (FFDO) "who may be armed," that the airline was "concerned about his mental stability and the whereabouts of his firearm," and that an "[u]nstable pilot in [the] FFDO program was terminated today"—were, as a matter of law, not



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

Practice co-chair Miguel Estrada was named a 2014 Litigator of the Year winner by *The American Lawyer*. Practice co-chair Ted Olson was named a finalist in the publication's inaugural 2012 Litigator of the Year competition.

The National Law Journal named Gibson Dunn to its 2013 Appellate Hot List, which recognized law firms "doing killer appellate work" in the country's appellate courts.

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

materially false. Any minor inaccuracies in those statements would not have affected a reasonable TSA officer's determination of an appropriate response. The court below erred by finely parsing the language of the airline's statements to TSA.

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

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

3. ***Sandifer v. United States Steel Corp.*, No. 12-417 (7th Cir., 678 F.3d 590; cert. granted Feb. 19, 2013; limited to Question 1; SG as amicus, supporting respondent; argued on Nov. 4, 2013). Under the Fair Labor Standards Act, the period of time during which a covered employee must be paid begins when the worker engages in a principal activity. Under 29 U.S.C. § 203(o) of the Act, however, an employer need not compensate worker for time spent "changing clothes" if that time is expressly excluded from compensable time under a bona fide collective bargaining agreement applicable to that worker. Does donning and doffing safety gear constitute "changing clothes" within the meaning of § 203(o)?**

   Decided Jan. 27, 2014. (571 U.S. ___). Seventh Circuit/Affirmed. Justice Scalia for a unanimous Court (Sotomayor, J., joining except as to footnote 7). The Court held that the time petitioner steel workers spend donning and doffing protective

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

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

   Decided Jan. 22, 2014. (571 U.S. ___). Federal Circuit/Reversed and remanded. Justice Breyer for a unanimous Court. The Court held that, where a licensee brings a declaratory judgment action seeking a declaration of non-infringement, the patentee retains the burden of proving infringement. At the outset, responding to an argument by amici, the Court found that it had subject matter jurisdiction, as the defendant patentee could bring a federal suit for infringement if the plaintiff licensee did not pay royalties. Then, turning to the merits, the Court explained that it was following established case law holding that the burden of persuasion in patent infringement cases rests with the patentee. The Court observed that the Declaratory Judgment Act is "procedural," whereas the burden of proof is a substantive aspect of a claim that does not change simply because the lawsuit is framed as a suit for declaratory judgment. The Court noted several practical considerations supporting its decision. First, shifting the burden would create uncertainty, particularly in situations where the evidence was inconclusive, and might lead either to continued infringement or to further litigation by the patentee to fully establish its rights. Second, shifting the burden could make it difficult for a licensee to determine the theory on which a patentee's infringement claim rests, as the patentee is in the best position to clarify where, how, and why a product infringes. Finally, shifting the burden could undermine the purpose of the

Declaratory Judgment Act by creating a significant obstacle to the use of the mechanism by licensees to clarify their legal rights.

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

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

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

   Decided Jan. 14, 2014 (571 U.S. __). Ninth Circuit/Reversed. Justice Ginsburg for a unanimous Court (Sotomayor, J., concurring in the judgment). The Court held that, under the Fourteenth Amendment's Due Process Clause, a court may exercise general personal jurisdiction over a foreign corporation only when that corporation's contacts with the forum State are so "constant and pervasive" as to render it "at home" there. Generally, a corporation's "home" is its "place of incorporation and principal place of business." The Court therefore reversed the Ninth Circuit, which had held that a court in California could exercise general personal jurisdiction over petitioner, a German corporation, in a case involving

only foreign plaintiffs and conduct occurring entirely abroad, based solely on the forum contacts of the petitioner's American subsidiary. As the Court explained, even if petitioner's subsidiary both qualified as its agent and was at "home" in California, petitioner itself was neither incorporated in California nor had its principal place of business there. The Ninth Circuit consequently erred in concluding that petitioner could be subject to "claims by foreign plaintiffs having nothing to do with anything that had occurred or had its principal impact in California."

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

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

8. ***Heimeshoff v. Hartford Life Insurance*, No. 12-729 (2d Cir., 496 F. App'x 129; cert. granted Apr. 15, 2013; SG as amicus, supporting petitioner; argued on Oct. 15, 2013). The Question Presented is when a statute of limitations should accrue for judicial review of a disability adverse benefit determination under**

the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002, et seq.

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

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

Decided Dec. 11, 2013 (571 U.S. __). Kansas Supreme Court/Vacated and remanded. Justice Sotomayor for a unanimous Court. The Court reaffirmed the "settled rule" of Buchanan v. Kentucky, 483 U.S. 402 (1987), that where a defense expert examines a criminal defendant and testifies that the defendant lacked the requisite mental state to commit the crime charged, the Fifth Amendment does not prohibit the government from introducing in rebuttal evidence from a court-ordered psychological evaluation of the defendant. This rule is consistent with the

principle that a criminal defendant who chooses to testify to facts favorable to himself may not then invoke the Fifth Amendment to shield himself from cross-examination on those facts. The Court explained that the Kansas Supreme Court misconstrued Buchanan insofar as it read its holding as limited to cases in which a defense is premised on a "mental disease or defect"—a category that would not include the defense of voluntary intoxication by ingesting methamphetamine raised by Respondent Cheever below. Rather, Buchanan upheld admission of psychological expert evidence to rebut defenses based on "mental status," a broader term than "mental disease or defect." The Court also found it irrelevant that Cheever's voluntary intoxication was "temporary"; the defense at issue in Buchanan (extreme emotional disturbance) involved a temporary condition as well. The Court declined to address in the first instance whether the testimony of the State's rebuttal expert exceeded the "limited rebuttal purpose" permitted by the Fifth Amendment or by the State's evidentiary rules (which, the Court noted, could impose requirements more stringent than the constitutional "ceiling") and remanded the case for further proceedings.

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

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

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

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

12. ***Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas,*** **No. 12-929 (5th Cir., 701 F.3d 736; cert. granted Apr. 1, 2013; argued on Oct. 9, 2013). Whether the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), changed the standard for**

enforcement of forum-selection clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a), and (2) If so, whether district courts should allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause.

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

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

Decided Nov. 5, 2013 (571 U.S. __). Sixth Circuit/Reversed. Justice Alito for a 9-0 Court (Sotomayor and Ginsburg, JJ., concurring in the judgment). The Court reaffirmed that "[w]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, . . . the federal court [must] use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt" under the Antiterrorism

and Effective Death Penalty Act of 1996 (AEDPA) and Strickland v. Washington, 466 U.S. 668 (1984). The Court explained that "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court," requires that federal habeas courts be "highly deferential" to state courts' factual and legal determinations, and "recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." Here, the Court concluded that the record "readily support[ed]" both the state court's factual findings regarding the plea bargain at issue and the state court's legal conclusion that counsel was not ineffective. The state court record contained ample evidence that the prisoner maintained his claim of innocence and had second thoughts about confessing in open court: for example, he passed a polygraph test denying that he was in the room when the victim was killed, and discussed the case with a prison guard who advised against pleading guilty if he was innocent. The Sixth Circuit's failure to credit the state court's reasonable factual finding resulted in a failure to apply the doubly-deferential standard of review required by AEDPA. The Court further concluded that the record contained no evidence that counsel gave inadequate advice on whether to withdraw the plea, and thus the silent record was insufficient to overcome Strickland's "strong[] presum[ption]" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Pending Cases

1. ***Chadbourne & Parke LLP v. Troice*, No. 12-79; *Willis of Colorado Inc. v. Troice*, No. 12-86; *Proskauer Rose LLP v. Troice*, No. 12-88 (5th Cir., 675 F.3d 503; CVSG Oct. 1, 2012; cert. opposed Dec. 14, 2012; cert. granted Jan. 18, 2013; SG as amicus, supporting petitioners; argued on Oct. 7, 2013). The Questions Presented are: (1) Whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1), prohibits private class actions based on state law only where the alleged purchase or sale of a covered security is "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud. (2) Whether the SLUSA precludes a class action in which the defendant is sued for aiding and abetting fraud, but a non-party, rather than the defendant, made the only alleged misrepresentation in connection with a covered securities transaction.**

2. ***McCutcheon v. Federal Election Commission*, No. 12-536 (D.D.C., 2012 WL 4466482; cert. granted Feb. 19, 2013; argued on Oct. 8, 2013). Federal law imposes two types of limits on individual political contributions: Base limits restrict the amount an individual may contribute to a candidate committee ($2,500 per election), a national-party committee ($30,800 per calendar year), a state, local, and district party committee (combined $10,000 per calendar year), and a political-action committee ($5,000 per calendar year). 2 U.S.C. § 441a(a)(1). Biennial limits restrict the aggregate amount an individual may contribute biennially to candidate committees ($46,200) and all other committees ($70,800). 2 U.S.C. § 441a(a)(3). The Questions Presented are:**

(1) Whether the biennial limit on contributions to non-candidate committees is unconstitutional for lacking a constitutionally cognizable interest as applied to contributions to national-party committees. (2) Whether the biennial limits on contributions to non-candidate committees are facially unconstitutional for lacking a constitutionally cognizable interest. (3) Whether the biennial limits on contributions to non-candidate committees are unconstitutionally too low, as applied and facially. (4) Whether the biennial limit on contributions to candidate committees is unconstitutional for lacking a constitutionally cognizable interest. (5) Whether the biennial limit on contributions to candidate committees is unconstitutionally too low.

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

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

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

6. ***Bond v. United States*, No. 12-158 (3d Cir., 681 F.3d 149; cert. granted Jan. 18, 2013; argued on Nov. 5, 2013). The Questions Presented are: (1) Whether the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state prerogatives, and is concededly unnecessary to satisfy the Government's treaty obligations? (2) Can the provisions of the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, be interpreted not to reach ordinary poisoning cases, which have been handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing validity of the Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920)?**

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

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

9. ***Lawson v. FMR, LLC*, No. 12-3 (1st Cir., 670 F.3d 61; CVSG Oct. 9, 2012; cert. opposed Apr. 9, 2013; cert. granted May 20, 2013; SG as amicus, supporting petitioners; argued on Nov. 12, 2013). Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.**

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

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

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

arbitrator determines whether a precondition to arbitration has been satisfied.

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

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

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

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

17. ***American Lung Ass'n v. EME Homer City*, No. 12-1183 (D.C. Cir., 696 F.3d 7; cert. granted June 24, 2013; consolidated with *EPA v. EME Homer City*,**

No. 12-1182; argued on Dec. 10, 2013). Limited to the Questions Presented in No. 12-1182.

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18. ***Mayorkas v. Cuellar de Osorio*, No. 12-930 (9th Cir., 695 F.3d 1003; cert. granted June 24, 2013; argued on Dec. 10, 2013). The Questions Presented are: (1) Whether Section 1153(h)(3) of the Immigration and Nationality Act ("INA")—which provides rules for determining whether particular aliens qualify as "children" so that they can obtain visas or adjustments of their immigration status as derivative beneficiaries of sponsored family member immigrants (also known as "primary beneficiaries")—unambiguously grants relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes available to the primary beneficiary. (2) Whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3) of the INA.**

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

20. ***White v. Woodall*, No. 12-794 (6th Cir., 685 F.3d 574; cert. granted June 27, 2013; argued on Dec. 11, 2013). The Questions Presented are: (1) Whether the Sixth Circuit violated 28 U.S.C. § 2254(d)(1) by granting habeas relief on the trial court's failure to provide a no-adverse-inference instruction even though the Supreme Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances. (2) Whether the Sixth Circuit violated the harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in ruling that the absence of a no-adverse-inference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty pleas to the crimes and aggravators.**

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McConnell, at al.

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

power may be exercised when the Senate is convening every three days in *pro forma* sessions.

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

23. ***Exec. Benefits Ins. Agency v. Arkison*, No. 12-1200 (9th Cir., 702 F.3d 553; cert. granted June 24, 2013; SG as amicus, supporting respondent; argued on Jan. 14, 2014). The Questions Presented are: (1) Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III. (2) Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. § 157(b).**

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

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

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

27. ***United States v. Castleman*, No. 12-1371 (6th Cir., 695 F.3d 582; cert. granted Oct. 1, 2013; argued on Jan. 15, 2014). Whether the respondent's Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9).**

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Counsel for
Respondents

28. ***Harris v. Quinn*, No. 11-681 (7th Cir., 656 F.3d 692; CVSG June 28, 2012; cert. opposed May 10, 2013; cert. granted Oct. 1, 2013; SG as amicus, supporting respondents; argued on Jan. 21, 2014). The Questions Presented are: (1) Whether a state may, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the state for greater reimbursements from its Medicaid programs. (2) Whether the lower court erred in holding that the claims of providers in the Home Based Support Services Program are not ripe for judicial review.**

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

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

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

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

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

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

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

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

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

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

final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

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

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

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

42. ***Conestoga Wood Specialties v. Sebelius*, No. 13-356 (3d Cir., 724 F.3d 377; cert. granted Nov. 26, 2013; consolidated with *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354; argument scheduled for Mar. 25, 2014). Whether the religious owners of a family business, or their closely held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage mandate of the Affordable Care Act.**

43. ***Wood v. Moss*, No. 13-115 (9th Cir., 711 F.3d 941; cert. granted Nov. 26, 2013; argument scheduled for Mar. 26, 2014). The Questions Presented are: (1) Whether the court of appeals erred in denying qualified immunity to Secret Service agents protecting the President by evaluating a claim of viewpoint discrimination by anti-Bush demonstrators at a high level of generality and concluding that pro-and anti-Bush demonstrators needed to be positioned an equal distance from the President while he was dining on an**

outdoor patio, and while he was travelling by motorcade. (2) Whether a group of anti-Bush demonstrators have adequately pleaded viewpoint discrimination in violation of the First Amendment when no factual allegations support their claim of discriminatory motive, and there was an obvious security-based rationale for moving the nearby anti-Bush group and not the farther-away pro-Bush group.

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

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

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

47. ***Pom Wonderful LLC v. The Coca-Cola Co.*, No. 12-761 (9th Cir., 679 F.3d 1170; CVSG Mar. 25, 2013; cert. opposed Nov. 27, 2013; cert. granted Jan. 10, 2014). Whether the court of appeals erred in holding that a private party cannot bring a Lanham Act claim, 15 U.S.C. §§ 1051 *et seq*., challenging a product label regulated under the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq*.**

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

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49. ***Argentina v. NML Capital, Ltd.*, No. 12-842 (2d Cir., 695 F.3d 201; CVSG Apr. 15, 2013; cert. supported Dec. 4, 2013; cert. granted Jan. 10, 2014). Whether post-judgment discovery in aid of enforcing a judgment against a foreign state can be ordered with respect to all assets of a foreign state**

regardless of their location or use, as held by the Second Circuit, or is limited to assets located in the United States that are potentially subject to execution under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq*., as held by the Seventh, Fifth, and Ninth Circuits.

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

51. ***United States v. Clarke*, No. 13-301 (11th Cir., 517 F. App'x 689; cert. granted Jan. 10, 2014). Whether an unsupported allegation that the Internal Revenue Service ("IRS") issued a summons for an improper purpose entitles an opponent of the summons to an evidentiary hearing to question IRS officials about their reasons for issuing the summons.**

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

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

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claiming. (2) Whether the presumption of validity dilutes the requirement of particular and distinct patent claiming.

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

55. ***Riley v. California*, No. 13-132 (Cal. App., 2013 WL 475242; cert. granted Jan. 17, 2014). Whether evidence at petitioner's trial was obtained in a search of petitioner's cell phone that violated petitioner's Fourth Amendment rights.**

56. ***United States v. Wurie*, No. 13-212 (1st Cir., 728 F.3d 1; cert. granted Jan. 17, 2014). Whether the Fourth Amendment permits the police, without obtaining a warrant, to review the call log of a cellphone found on a person who has been lawfully arrested.**

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

Cases Determined Without Argument

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

2. ***Ford Motor Co. v. United States*, No. 13-113 (6th Cir., 508 Fed. App'x 506; Reversed and remanded Dec. 2, 2013).** Per curiam. When a taxpayer overpays his taxes, he is generally entitled to interest from the Government for the period between the payment and the ultimate refund pursuant to 26 U.S.C. § 6611(a). The interest runs "from the date of overpayment." *Id.* §§ 6611(b)(1), (b)(2). Ford Motor Company had overpaid its federal taxes but disagreed with the Government

on the meaning of "the date of overpayment." Ford sued the Government, asserting jurisdiction under 28 U.S.C. § 1346(a)(1). The Government did not contest jurisdiction, and the district court and Sixth Circuit held that the Government's construction of "the date of overpayment" in Section 6611 was correct. Ford sought certiorari, arguing that the Sixth Circuit erred in strictly construing Section 6611 because it was Section 1346 that waived the Government's immunity from the suit, and Section 6611 is a substantive provision that should not be strictly construed. In its response to Ford's petition for certiorari, the Government introduced a new argument – namely, that 28 U.S.C. § 1346 was not the basis for jurisdiction in the district court and that the only basis for jurisdiction is the Tucker Act, 28 U.S.C. § 1491(a), which would have required that the case be brought in the Court of Federal Claims. Because the Sixth Circuit had not passed on the Government's argument, the Court vacated and remanded for further proceedings.

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

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

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

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

5. ***Cline v. OK Coalition for Reproductive Justice,*** **No. 12-1094 (Sup. Ct. Ok., 292 P.3d 27; cert. granted June 27, 2013). Oklahoma law requires that abortion-inducing drugs be administered according to the protocol described on the drugs' FDA-approved labels. The Question Presented is whether the**

Oklahoma Supreme Court erred in holding that this Oklahoma law is facially unconstitutional under *Planned Parenthood v. Casey*.[1]

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

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

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

Pending Cases Calling For The Views Of The Solicitor General

1. ***Madison County v. Oneida Indian Nation of New York*, No. 12-604 (2d Cir., 665 F.3d 408; CVSG Feb. 19, 2013). Whether the 300,000-acre Oneida reservation in New York still exists, neither disestablished nor diminished, despite (1) the federal government's actions taken in furtherance of disestablishment, including the 1838 Treaty of Buffalo Creek, which covered land sales of tribal reservations under the U.S. Indian Removal program); (2) the Court's holding in *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005), that the Oneida Indian Nation of New York cannot exercise sovereignty over lands it purchases in the ancient reservation area; and (3) the Court's finding in that case that land in the ancient reservation area has not been treated as an Indian reservation by the federal, state, or local governments for nearly two centuries.**

2. ***Young v. United Parcel Service, Inc.*, No. 12-1226 (4th Cir., 707 F.3d 437; CVSG Oct. 7, 2013). Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to nonpregnant employees with work limitations to**

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

provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

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

4. ***Maersk Drilling USA v. Transocean Offshore Deepwater*, No. 13-43 (Fed. Cir., 699 F.3d 1340; CVSG Oct. 7, 2013). Whether offering, negotiating, and entering into a contract in Scandinavia to provide services using a potentially patented device constitutes an "offer to sell" or "sale" of an actually patented device "within the United States," under 35 U.S.C. § 271(a).**

5. ***Thurber v. Aetna Life Ins. Co.*, No. 13-130 (2d Cir., 712 F.3d 654; CVSG Oct. 7, 2013). The Questions Presented are: (1) Whether an ERISA Plan may enforce an equitable lien by agreement under Section 502(a)(3) of ERISA where it has not identified a particular fund that is in the defendant's possession and control at the time the Plan asserts its equitable lien. (2) Whether a discretionary clause in an ERISA plan mandating that an abuse-of-discretion standard of judicial review be applied to a Section 502(a)(1)(B) denial-of-benefits claim is enforceable when the clause was never disclosed to the participant in any plan document, as the Second Circuit held here, or whether the Plan must give participants and beneficiaries clear notice of such a clause, as the Seventh Circuit has required.**

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

7. ***Medtronic, Inc. v. Stengel*, No. 12-1351 (9th Cir., 704 F.3d 1224; CVSG Oct. 7, 2013). Whether the Medical Device Amendments to the federal Food, Drug**

and Cosmetic Act preempt a state-law claim alleging that a medical device manufacturer violated a duty under federal law to report adverse-event information to the Food and Drug Administration.

8. ***Oneok, Inc. v. Learjet, Inc.*, No. 13-271 (9th Cir., 715 F.3d 716; CVSG Dec. 2, 2013). Whether the Natural Gas Act, which occupies the field as to matters within its scope, preempts state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions.**

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

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

11. ***Picard v. JPMorgan Chase & Co.*, No. 13-448 (2d Cir., 721 F.3d 54; CVSG Jan. 13, 2014). The Questions Presented are: (1) Whether, in conflict with decisions of the Third and Sixth Circuits, the Securities Investor Protection Corporation's right to subrogation is limited to customers' Securities Investor Protection Act ("SIPA") claims against a failed brokerage's estate and therefore does not reach claims against third parties that share responsibility for the brokerage's collapse and customers' losses. (2) Whether, in conflict with decisions of the Fourth and Eighth Circuits, federal statutory silence overrides any right to contribution under state law for liabilities arising under the federal statute regardless of whether Congress intended to preempt the state law. (3) Whether, in conflict with decisions of the First and Seventh Circuits, a trustee lacks standing under SIPA or the Bankruptcy Code to assert claims against parties that hastened or deepened the bankruptcy and are therefore general to all of an estate's customers or creditors.**

12. ***Comptroller of Treasury of MD v. Wynne*, No. 13-485 (Md., 431 Md. 147; CVSG Jan. 13, 2014). Whether the United States Constitution prohibits a**

state from taxing all the income of its residents—wherever earned—by mandating a credit for taxes paid on income earned in other states.

13. ***AL Dep't of Revenue v. CSX Transp., Inc.*, No. 13-553 (11th Cir., 720 F.3d 863; CVSG Jan. 27, 2014). Whether a state "discriminates against a rail carrier" in violation of 49 U.S.C. § 11501(b)(4) when the state generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to railroads' competitors.**

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Samantar v. Yousuf*, No. 12-1078 (4th Cir., 699 F.3d 763; CVSG June 24, 2013; cert. supported Dec. 10, 2013; cert. denied Jan. 13, 2014). Whether a foreign official's common-law immunity for acts performed on behalf of a foreign state is abrogated by plaintiffs' allegations that those official acts violate jus cogens norms of international law.**

CVSG Cases In Which The Solicitor General Opposed Certiorari

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

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

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