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GIBSON DUNN Supreme Court Round-Up

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

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1. ***Hollingsworth v. Perry*, No. 12-144 (9th Cir., 671 F.3d 1052; cert. granted Dec. 7, 2012; SG as amicus, supporting respondents; argued on Mar. 26, 2013). The Questions Presented are: (1) Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman; and (2) whether petitioners have standing under Article III, § 2 of the Constitution in this case.**

Decided June 26, 2013 (570 U.S. ____). Ninth Circuit/Vacated and Remanded. Chief Justice Roberts for a 5-4 Court (Kennedy, J., dissenting; joined by Thomas, Alito, Sotomayor, JJ.). In a case challenging the constitutionality of Proposition 8—a state ballot initiative that amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California”—the Court held that the initiative’s official proponents lacked standing to defend the law on appeal. The state officials named as defendants had refused to defend the law before the district court, and decided not to appeal from that court’s order declaring Proposition 8 unconstitutional and enjoining its enforcement. Only the initiative’s official proponents, whom the district court had permitted to intervene, sought to appeal. The Court held they lacked standing to do so. The proponents “had no ‘direct stake’ in the outcome of their appeal,” the Court concluded, because “the District Court had not ordered them to do or refrain from doing anything.” Instead, “[t]heir only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law,” and “such a ‘generalized grievance,’ no matter how sincere, is insufficient to confer standing.” The Court concluded that while the proponents played a “‘unique,’ ‘special,’ and ‘distinctive’ role” in “the process of enacting the law,” they “have no role—special or otherwise—in the enforcement of Proposition 8” and thus had “no ‘personal stake’ in defending its enforcement that is distinguishable from the interest of every citizen of California.” Unable to assert “a judicially cognizable interest of their own,” the proponents also lacked standing



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under the Court's precedents to assert the State of California's interests in appealing from the district court's order. The Court explained that the California Supreme Court's determination that the proponents were "authorized under California law to appear and assert the state's interest" in Proposition 8's validity means only "that, so far as California is concerned, [the proponents] may argue in defense of Proposition 8," not that they "become de facto public officials." And the Court rejected the proponents' argument that they were authorized to act as California's agents. Neither the California Supreme Court nor the Ninth Circuit had described them as such, the Court noted, and "[w]hen the proponents sought to intervene in this case," they purported not "to be agents of California" but to represent "their [own] interests as official proponents." Moreover, the Court concluded, "the most basic features of an agency relationship are missing here": the proponents "answer to no one," owe no "fiduciary obligation . . . to the people of California," and apparently have no right to indemnity from the state for legal expenses associated with defending the law. In any event, "standing in federal court is a question of federal law, not state law"; and because the proponents lacked constitutional standing to appeal, the Ninth Circuit lacked jurisdiction to consider the appeal.

2. ***United States v. Windsor*, No. 12-307 (2d Cir., 699 F.3d 169; cert. granted Dec. 7, 2012; argued on Mar. 27, 2013). The Questions Presented are: (1) Whether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State; (2) whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and (3) whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.**

Decided June 26, 2013 (570 U.S. ____). Second Circuit/Affirmed. Justice Kennedy for a 5-4 Court (Roberts, C.J., dissenting; Scalia, J., dissenting, joined in full by Thomas, J., and by Roberts, C.J., as to Part I; Alito, J., dissenting, joined by Thomas, J., as to Parts II and III). The Court held that Section 3 of the federal Defense of Marriage Act ("DOMA") violates the Fifth Amendment's guarantee of equal protection. Section 3 of DOMA, enacted in 1996, defines "marriage" and "spouse" in such a way as to exclude same-sex partners from being recognized in federal statutes. As a result, Edith Windsor was denied the benefit of the marital exemption from the federal estate tax after the death of her lawful spouse, Thea Spyer. Windsor brought suit seeking a tax refund, and the United States Department of Justice declined to defend the constitutionality of DOMA's Section 3. The Bipartisan Legal Advisory Group ("BLAG") of the House of Representatives intervened in the suit to defend DOMA's constitutionality. The Court found first that it had Article III jurisdiction to hear the case, despite the apparent lack of a legal disagreement between the parties, because the United States retained a sufficient interest in avoiding the concrete financial harm threatened in the event the U.S. Treasury should be required to issue Windsor's tax refund. Moreover, BLAG's "sharp adversarial presentation" in favor of DOMA's constitutionality further assuaged the Court's prudential concerns regarding the

need for a controversy. On the merits of the case, the Court concluded that the regulation of marriage is traditionally the province of the States, and that the federal government’s intrusion into that realm, via DOMA, constitutes an “injury and indignity” that has “no legitimate purpose.” By ensuring the federal non-recognition of same-sex spouses legally married under state law, DOMA deprived such spouses of “[t]he liberty protected by the Fifth Amendment’s Due Process Clause,” which guarantees for all persons “the equal protection of the laws.”

3. ***Sekhar v. United States*, No. 12-357 (2d Cir., 683 F.3d 436; cert. granted Jan. 11, 2013; argued on Apr. 23, 2013). Whether the “recommendation” of an attorney, who is a salaried employee of a governmental agency, in a single instance, is intangible property that can be the subject of an extortion attempt under 18 U.S.C. § 1951(a) (the Hobbs Act) and 18 U.S.C. § 875(d).**

Decided June 26, 2013 (570 U.S. ____). Second Circuit/Reversed. Justice Scalia for a 9–0 Court (Alito, J., concurring, joined by Kennedy and Sotomayor, JJ.). The Court held that a person’s attempt to compel a recommendation of a monetary investment does not constitute “extortion” under the Hobbs Act, 18 U.S.C. § 1951(a). Here, the New York State Comptroller Office’s general counsel made a written recommendation to the Comptroller that the State’s Common Retirement Fund not invest in a fund managed by, amongst others, the petitioner, Giridhar Sekhar. After the general counsel informed the fund of this recommendation, he received a series of anonymous emails threatening to expose his alleged extramarital affair unless he recommended investing in the fund. The emails were traced to Sekhar. Sekhar thereafter was indicted for, and convicted by jury of, attempted extortion in violation of the Hobbs Act. That act defines “extortion” as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. § 1951(b). The Court concluded that according to common law, the Hobbs Act’s text and origin, and previous Court precedent, Sekhar’s conduct—attempting to compel the general counsel’s investment recommendation—was not attempted extortion, or “the obtaining of property,” as defined by the Hobbs Act, because property must be transferrable. “[T]he obtaining of property” under the Hobbs Act requires “not only the deprivation but also the acquisition of property.” *Scheidler v. National Organization of Women*, 537 U.S. 393, 404 (2003). Thus because the general counsel’s recommendation was not property that could be transferred, it could not constitute “property” under the Hobbs Act. Additionally, the Court distinguished between coercion and extortion. The New York statute under which the Hobbs Act was modeled contained separate provisions criminalizing each act. A person was guilty of coercion under the New York statute by making threats to compel one to act or to abstain from acting. The Hobbs Act included nearly verbatim the New York statute’s extortion provision, but it omitted its coercion provision. Thus, in omitting this provision, Congress deliberately distinguished extortion from coercion; extortion under the Hobbs Act could not be read to include coercion.

4. ***Adoptive Couple v. Baby Girl*, No. 12-399 (S.C., 731 S.E.2d 550; cert. granted Jan. 4, 2012; SG as amicus, supporting affirmance; argued on Apr. 16, 2013).**

The Questions Presented are: (1) Whether a non-custodial parent can invoke the Indian Child Welfare Act (ICWA), which applies to state custody proceedings involving an Indian child, to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law. (2) Whether ICWA defines “parent” in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

Decided June 25, 2013 (570 U.S.____). Supreme Court of South Carolina/Reversed. Justice Alito for a 5–4 Court (Thomas, J., concurring; Breyer, J., concurring; Scalia, J., dissenting; Sotomayor, J., dissenting, joined by Ginsburg and Kagan, JJ, and Scalia, J., in part). Biological Father was a member of the Cherokee Nation who renounced his parental rights before Baby Girl, his biological daughter, was born and did not attempt to contact her until she was four months old. Nevertheless, he sought to block her adoption by Adoptive Couple by invoking the IWCA. The Court held that neither of the two ICWA provisions at issue required Biological Father to be awarded custody of Baby Girl. The first of those provisions, 25 U.S.C. § 1912(f), provides that an Indian parent’s parental rights may not be terminated unless the court determines that “the continued custody of the child by the [Indian parent] is likely to result in serious emotional or physical damage to the child.” Section 1912(f) did not control, the Court explained, because by its terms it applies only to *continued* custody—i.e., custody that a parent already has or had. The Court concluded the statute is inapplicable “where the Indian parent *never* had custody of the Indian child.” The Court grounded this reading of the statute in its purpose, its legislative history, and nonbinding guidelines issued by the Bureau of Indian Affairs shortly after the ICWA’s enactment. At no point prior to the adoption proceeding did Biological Father have custody of Baby Girl; accordingly, the Court concluded that § 1912(f) did not bar termination of his parental rights. For similar reasons, the Court held that 25 U.S.C. § 1912(d) did not apply. Section 1912(d) requires any party seeking to terminate parental rights to an Indian child to determine that “active efforts have been made to . . . prevent the breakup of the Indian family.” The Court reasoned that where “an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent’s legal or physical custody,” the “breakup of the Indian family’ has long since occurred, and § 1912(d) is inapplicable.” The Court cited the ICWA’s purpose, its statutory structure, and policy considerations as confirming this conclusion. Finally, the Court concluded that 25 U.S.C. § 1915(a)—which requires preference to be given to Indian families in adoption proceedings concerning Indian children—was inapplicable to the proceedings below, since no Indian families had sought to adopt Baby Girl.

5. ***Koontz v. St. Johns River Water Management*, No. 11-1447 (Fl., 77 So. 3d 1220; cert. granted Oct. 5, 2012; SG as amicus, supporting respondent; argued on Jan. 15, 2013). The Questions Presented are: (1) Whether the Government can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987),**

and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (2) Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

Decided June 25, 2013 (570 U.S. ____). Florida Supreme Court/Reversed and remanded. Justice Alito for a 5-4 Court (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.). Under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), governments may not place conditions on land-use permits if those conditions—that would otherwise constitute a taking of property without just compensation—lack a “nexus” or “rough proportionality” to the proposed use. The owner of a 14.9 acre tract of wetlands sought to develop 3.7 acres of that land and applied for a permit to that end, volunteering to grant the State a conservation easement over the remaining 11 acres. The local water management district rejected this proposal, and indicated that it would grant the landowner’s permit if he (1) paid money to hire contractors to make improvements to district-owned wetlands several miles away; or (2) reduced the development to one acre and granted conservation easements over the remaining tract. The land owner did not agree and sued the district under state law, contending that the permitting requirement was an unreasonable exercise of its police powers without just compensation. After lower courts dismissed the case on state procedural grounds, the Florida Supreme Court rejected the claims on the merits, finding that *Nollan* and *Dolan* did not apply because the district did not accept the permit and then require satisfaction of the condition but rather rejected the permit (*i.e.*, nothing was taken), and that a monetary condition (as opposed to action involving real property) could not give rise to such claims. The Supreme Court disagreed. At the outset, the court explained that *Nollan* and *Dolan* do not hinge on whether conditions require action prior or subsequent to granting permits, and that the one acre option should not be considered as a viable alternative condition in the *Nollan/Dolan* analysis because that option was not a “condition” of granting the permit, but rather was a counterproposal for an entirely different land-use permit. Turning to the merits, the Court found that the monetary condition here implicated *Nollan* and *Dolan* because of the “direct link between the government’s demand and a specific parcel of property” was tied to the landowner’s use of his property, akin to a lien on that property, which unquestionably implicates takings concerns. In response to contentions that its ruling would impact local governments’ power to tax property, the Court explained that its precedents have “long recognized that ‘the power of taxation should not be confused with the power of eminent domain,’” and the Court has “had little trouble distinguishing between the two.” The Court did not express any view as to whether the conditions complied with *Nollan* and *Dolan*, but instead remanded the case to the Florida courts for further proceedings.

6. ***Shelby County v. Holder*, No. 12-96 (D.C. Cir., 679 F.3d 848; cert. granted Nov. 9, 2012; argued on Feb. 27, 2013). Whether Congress’s decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its**

authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

Decided June 25, 2013 (568 U.S. ___). D.C. Circuit/Reversed. Chief Justice Roberts for a 5-4 Court (Thomas, J., concurring; Ginsburg, J., dissenting). Section 5 of the Voting Rights Act of 1965 requires specified States or political subdivisions to obtain federal preclearance before enacting any law related to voting, and Section 4 of the Act contains the formula by which jurisdictions are singled out for inclusion in this preclearance regime. Although originally intended to be temporary, Congress reauthorized Sections 4 and 5 several times, most recently in 2006 for an additional 25 years, but has not updated Section 4’s coverage formula since 1975. In 2010, Shelby County, Alabama, a covered jurisdiction, sought a declaratory judgment that Sections 4 and 5 are facially unconstitutional, as well as a permanent injunction against their enforcement. The D.C. District Court rejected this challenge, concluding that a sufficient record existed by which Congress could conclude that Section 5’s preclearance remedy was still necessary and to justify the Section 4 coverage formula’s disparate treatment among the States. The D.C. Circuit affirmed. The Court reversed, concluding that although voting discrimination undoubtedly still exists, “the Act’s extraordinary measures, including its disparate treatment of States,” does not satisfy constitutional muster because “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.” The Court explained that the Act’s preclearance remedy “sharply departs” from basic principles of federalism, including the “fundamental principle of *equal* sovereignty among the States.” This doctrine requires a showing that the Act’s disparate geographic coverage is sufficiently related to the problem of racial discrimination in voting that it targets. This standard was met when the Act was initially passed given the pervasiveness of racial discrimination in voting and an original coverage formula that targeted the areas where Congress found evidence of persistent and insidious discrimination. Yet “[n]early 50 years later, things have changed dramatically,” with the racial gap in voter registration and turnout almost the same in covered as in non-covered jurisdictions. In light of this significant progress, the Court concluded that the coverage formula, “based on decades-old data and eradicated practices,” is no longer sufficiently related to the problem it targets. The Court thus held that Section 4’s coverage formula is no longer constitutional because Congress failed to craft a formula to single out jurisdictions for the “extraordinary and unprecedented” preclearance remedy “on a basis that made sense in light of current conditions.” The Court emphasized that its decision invalidating Section 4 did not affect the “permanent, nationwide ban on racial discrimination” in Section 2 of the Act, nor did it speak to the constitutionality of the Section 5 preclearance remedy itself.

7. ***Mutual Pharmaceutical Co. v. Bartlett*, No. 12-142 (1st Cir., 678 F.3d 30; cert. granted Nov. 30, 2012; SG as amicus, supporting petitioner; argued on Mar. 19, 2013). Whether the First Circuit erred when it created a circuit split and held—in clear conflict with the Court’s decision in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); and *Cipolline v. Liggett Group, Inc.*, 505 U.S. 504 (1992)—that federal law**

does not preempt state law design-defect claims targeting generic pharmaceutical products because the conceded conflict between such claims and the federal laws governing generic pharmaceutical design allegedly can be avoided if the makers of generic pharmaceuticals simply stop making their products.

Decided June 24, 2013 (570 U.S. ___). First Circuit/Reversed. Justice Alito for a 5-4 Court (Breyer, J. dissenting, joined by Kagan, J.; Sotomayor, J. dissenting, joined by Ginsburg, J). The Court held that federal law preempts certain state design defect claims. Respondent was prescribed an FDA-approved generic drug called sulindac that caused toxic epidermal necrolysis and ultimately left her severely disfigured and nearly blind. At the time Respondent was prescribed sulindac, the label did not specifically identify toxic epidermal necrolysis as a potential side effect. Respondent sued the drug manufacturer under New Hampshire law, alleging strict product liability. The jury found that sulindac was unreasonably dangerous, and awarded Respondent \$21 million in damages. The manufacturer challenged the award, arguing that it was impossible for it to simultaneously avoid liability under New Hampshire law and comply with the FDA's design and labeling requirements under the Federal Food, Drug, and Cosmetic Act. The First Circuit reversed, holding that the manufacturer could have complied with both sets of law simply by not selling sulindac in New Hampshire, or by paying the small number of patients who suffered the adverse side effects. The Supreme Court reversed, holding that the New Hampshire design defect law was preempted by federal law because it imposed a duty on the drug manufacturer to either alter the drug's composition or alter its label to make it safer, both of which were in "direct conflict with federal law." The Court specifically rejected the First Circuit's "stop-selling" rationale as "incompatible with our pre-emption jurisprudence," and specifically with the decision in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), in which the Court found preemption even though the manufacturer there could also have stopped selling the relevant drug.

8. ***Vance v. Ball State University*, No. 11-556 (7th Cir., 646 F.3d 461; cert. granted June 25, 2012; SG as amicus, supporting neither party; argued on Nov. 26, 2012). Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.**

Decided Jun. 24, 2013 (570 U.S. ___). Seventh Circuit/Affirmed. Justice Alito for a 5-4 Court (Thomas, J., concurring; Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.). Deciding a question left open in *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 (1998), and *Faragher v. Boca Raton*, 524 U. S. 775 (1998), the Court held that an employee is a "supervisor" for purposes of the employer's vicarious liability under Title VII of the Civil Rights Act of 1964 only if he or she is empowered by the employer to take tangible

employment actions against the victim—i.e., the power to “hire, fire, demote, promote, transfer, or discipline.” Under *Ellerth* and *Faragher*, one standard applies if the harassing employee is a “supervisor” of the victim (i.e., the employer is strictly liable for harassment resulting in a supervisor’s adverse employment action, but may be able to raise an affirmative defense when no adverse employment action has been taken), while another applies if the harasser is merely a co-worker of the victim (i.e., the employer is liable only if it was negligent in controlling working conditions). Lower courts interpreting those decisions disagreed over how to define the term “supervisor.” Though that question was not presented in *Ellerth* or *Faragher*, the Court observed that its answer is implicit in the framework those cases established, which contemplates a clearly defined, unitary category of supervisors and strongly suggests that the category’s defining characteristic is the authority to take tangible employment actions. The Court reasoned that distinguishing supervisors from co-workers on this basis provides an easily workable test under which an employee’s status as a supervisor can be readily determined, generally by reference to written documentation, such that the issue can be resolved without much difficulty either on summary judgment or at trial. By contrast, the nebulous definition suggested in Enforcement Guidance from the Equal Employment Opportunity Commission and adopted in some Courts of Appeals, which ties supervisor status to the ability to exercise significant direction over another’s daily work, would require case-specific evaluation of a number of factors that would preclude early resolution of the issue, unduly burden trial courts, and confuse juries. The Court explicitly rejected this definition. The Court’s clearer and narrower approach, it suggested, will not leave employees unprotected against harassment by co-workers who have the ability to inflict significant psychological injury on victims, but who do not possess the requisite authority to be deemed supervisors: in such cases, victims will prevail who are able to show that their employers were negligent in allowing the harassment to occur.

9. ***United States v. Kebodeaux*, No. 12-418 (5th Cir. 687 F.3d 232; cert. granted Jan. 11, 2013; argued on Apr. 17, 2013). The Questions Presented are: (1) Whether the court of appeals erred in conducting its constitutional analysis on the premises that respondent was not under a federal registration obligation until the Sex Offender Registration and Notification Act (SORNA) was enacted, when pre-SORNA federal law obligated him to register as a sex offender. (2) Whether the court of appeals erred in holding that Congress lacks the Article I authority to provide for criminal penalties under 18 U.S.C. § 2250(a)(2)(A) for failing to register as a sex offender, as applied to a person who was convicted of a sex offense under federal law and completed his criminal sentence before SORNA was enacted.**

Decided June 24, 2013 (570 U.S. ____). Fifth Circuit/Reversed. Justice Breyer for a 7-2 Court (Roberts, C.J., concurring in the judgment; Alito, J., concurring in the judgment; Scalia, J., dissenting; Thomas, J., dissenting, joined by Scalia, J., in part.). The Court held that it was within Congress’s Article I power to enact SORNA, as applied to the respondent. In 1999, a court-martial convicted respondent Kebodeaux, then in the military, of a sex offense. At the time, the

Wetterling Act imposed registration requirements on people convicted of such offenses. In 2006, years after Kebodeaux's release, Congress enacted SORNA, which modified the Wetterling Act's requirements, in part by increasing the maximum sentence for violations. The Court held it within Congress's power to impose registration requirements on military personnel: Article I allows Congress to "make Rules for the . . . Regulation of the land and naval Forces" and to "to "make all Laws which shall be necessary and proper for carrying into Execution" that power. Art. I, § 8, cls. 14, 18. Congress reasonably concluded that registration requirements were necessary to its regulation of the military. Congress also reasonably concluded that SORNA's modifications were necessary, as was their application to people who had been convicted of sex offenses before SORNA was enacted. The Court of Appeals had erred in concluding that Kebodeaux was not subject to any federal requirements from the time of his release from custody until Congress passed SORNA; in fact, the Wetterling Act's requirements applied to Kebodeaux at all times following his conviction. The Court held that the small changes in those requirements at issue fell within Congress's Article I power.

10. ***University of Texas Southwestern Medical Center v. Nassar*, No. 12-484 (5th Cir., 674 F.3d 448; cert. granted Jan. 18, 2013; SG as amicus, supporting respondent; argued on Apr. 24, 2013). Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (i.e., that an improper motive was one of multiple reasons for the employment action).**

Decided June 24, 2013 (570 U.S. ___). Fifth Circuit/Vacated and remanded. Kennedy, J., for a 5-4 Court (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.). The Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in 42 U.S.C. § 2000e-2(m). Title VII's retaliation provision—42 U.S.C. § 2000e-3(a)—prohibits employer retaliation "because [an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge." In defining the proper causation standard for this provision, the Court reasoned, it is presumed that Congress incorporated tort law's but-for causation standard absent an indication to the contrary in the statute itself. The Court determined that Title VII's retaliation provision, § 2000e-3(a), contains no such indication. The retaliation provision of Title VII's "because of" language differs from the status-based discrimination provision, 42 U.S.C. § 2000e-2(m), which requires that a complaining employee establish that his or her status "was a motivating factor for any employment practice." The retaliation provision's "because of" language mimics the language in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a)(1), which the Court interpreted in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), to require but-for causation. Based on the statute's text and structure, and on judicial economy considerations, the Court concluded that the appropriate standard for Title VII retaliation claims requires proof that the unlawful retaliation would not



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have occurred in the absence of the alleged wrongful action or actions of the employer.

11. ***Fisher v. University of Texas at Austin*, No. 11-345 (5th Cir., 631 F.3d 213; cert. granted Feb. 21, 2012; SG as amicus, supporting respondents; argued on Oct. 10, 2012). Whether this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that University of Michigan’s narrowly tailored use of race as a factor in student admissions did not violate the Equal Protection Clause), permit the University of Texas at Austin’s use of race in undergraduate admissions decisions.**

Decided June 24, 2013 (570 U.S. ____). Fifth Circuit/Vacated and remanded. Justice Kennedy for a 7-1 Court (Scalia, J., concurring; Thomas, J., concurring; Ginsburg, J., dissenting). The University of Texas at Austin considers race as one of various factors in its undergraduate admission process and is committed to increasing racial minority on campus. To ensure a “critical mass” of minority students, the school considers race as a meaningful factor when evaluating a student’s application, but the school does not assign a race an explicit numerical value. This admissions process is coupled with a measure known as the Top Ten Percent Law, which grants automatic admission to any public state college (including the University of Texas at Austin) to all students in the top 10% of their class at high schools in Texas. After her application was rejected, Abigail Fisher, a Caucasian, sued the University on the grounds that the University’s use of race in admissions violates the Equal Protection Clause of the Fourteenth Amendment. The Court held that strict scrutiny must be applied to any admissions program using racial categories or classifications. A university must prove that a means chosen by it to attain diversity is narrowly tailored to achieve that goal. While a court may take account of the university’s expertise, it remains the judiciary’s obligation to determine whether the admission process “ensure[s] that each application is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” *Grutter*, 539 U.S. at 337. The reviewing court must be satisfied that no workable race-neutral alternatives suffice. Rather than performing the searching strict-scrutiny examination required, however, the Court of Appeals reviewed only whether the University’s decision to use race as a factor in admission was made in good faith, concluding that the narrow-tailoring inquiry was conducted with a degree of deference to the University. For this reason, the Court vacated the judgment and remanded the case for consideration under the correct standard.

12. ***Descamps v. United States*, No. 11-9540 (9th Cir., 466 Fed. App’x 563; cert. granted Aug. 31, 2012; argued on Jan. 7, 2013). Whether the Ninth Circuit’s ruling in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), that a state conviction for burglary where the statute is missing an element of the generic crime, may be subject to the “modified categorical approach” wherein judges are permitted to use the record of conviction to determine whether a state law offense is identical to a federal offense that**

triggers an increased sentence under the Armed Career Criminal Act (ACCA), even though most other Circuit Courts of Appeal would not allow it.

Decided June 20, 2013 (570 U.S. ____). Ninth Circuit/Reversed. Justice Kagan for an 8-1 Court (Kennedy, J., concurring; Thomas, J., concurring in the judgment; Alito, J., dissenting). The Court held that the modified categorical approach of determining whether a state law offense is sufficiently identical to trigger an increased sentence under the ACCA does not apply to “indivisible statutes” that contain a single set of elements, but only to “divisible statutes”—*i.e.*, a statute that sets out one or more of the elements in the alternative. The ACCA increases the sentences of certain federal defendants who have three prior convictions for “violent felonies,” including “burglary, arson, or extortion.” 18 U.S.C. § 924(e)(2)(B)(ii). To determine whether a past conviction is for one of these crimes, courts use the “categorical approach” of comparing the elements of the statute of conviction to the elements of the “generic” crime—*i.e.* the offense as it is commonly understood. If the statute of conviction has the same or narrower elements, then the prior conviction qualifies as an ACCA predicate. The Court has previously held that a modified categorical approach, in which the sentencing courts consult the record of conviction, was appropriate to determine which alternative form of a divisible statute was the basis for conviction. *Taylor v. United States*, 495 U.S. 575 (1990); *Shepherd v. United States*, 544 U.S. 13 (2005). The Court explained that prior cases and policy make clear that, for purposes the ACCA, the key to comparing statutes of conviction to generic offenses is “elements, not facts.” Applying the modified categorical approach to the “narrow range of cases” involving divisible statutes only requires looking at which version of statute the prosecution charged so that the court can compare it to the generic offense. In this way, the modified categorical approach is merely a tool used to help effectuate the categorical analysis, and it therefore maintains the “focus on elements, rather than facts of a crime.” In contrast, applying the modified categorical approach to indivisible statutes would inappropriately require an “evidence-based” inquiry. Because the elements of an indivisible statute are clear, the question the modified categorical approach seeks to answer is whether, despite the overly broad statute, the judge or jury actually found facts in satisfaction of the generic offense. The Court concluded that answering such a question would contravene the elements-based approach which comports with the ACCA’s text, avoids Sixth Amendment concerns that arise from sentencing courts making factual findings that properly belong to juries, and averts practical difficulties and inequities.

13. ***American Express Co. v. Italian Colors Restaurant*, No. 12-133 (2d Cir., 667 F.3d 204; cert. granted Nov. 9, 2012; SG as amicus, supporting respondents; argued on Feb. 27, 2013). Whether the Federal Arbitration Act permits courts, invoking the “federal substantive law of arbitrability,” to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.**

Decided June 20, 2013 (570 U.S. ____). Second Circuit/Reversed. Justice Scalia for a 5-3 Court (Thomas, J., concurring; Kagan, J., dissenting, joined by Ginsburg

and Breyer, J.J.). The Court held that the Federal Arbitration Act (FAA) does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. Merchants who accept American Express credit cards had contractually agreed to resolve disputes by arbitration, and had explicitly waived the right to arbitrate on a class action basis. They nonetheless filed a class action lawsuit against American Express, alleging violations of Section 1 of the Sherman Act. American Express moved to compel individual arbitration under the FAA, but the merchants countered that the cost of expert analysis necessary to prove the antitrust claims would greatly exceed the maximum recovery for an individual plaintiff, and therefore that the class-action waiver was unenforceable. The Supreme Court rejected the merchant's argument, concluding that they failed to overcome the overarching principle underlying the FAA: that "arbitration is a matter of contract," and thus "courts must rigorously enforce arbitration agreements according to their terms." The Court reasoned that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Nor does Rule 23 afford litigants a right to vindicate claims through the class action mechanism, which was designed as an exception to the usual rule of individual litigation. Instead, Rule 23 imposes stringent requirements that preclude class action litigation for most claims. The Court also rejected the argument that the "effective vindication" exception to the FAA resulted in the invalidation of the arbitration agreement. That exception, which originated in dictum, comes from a desire to prevent "prospective waiver of a party's right to pursue statutory remedies," but the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the *right to* pursue that remedy.

14. ***Agency for International Development v. Alliance for Open Society International, Inc.*, No. 12-10 (2d Cir., 651 F.3d 218; cert. granted Jan. 11, 2013; argued on Apr. 22, 2013). Whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7632(f), which requires an organization to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.**

Decided June 20, 2013 (570 U.S. ____). Second Circuit/Affirmed. Chief Justice Roberts for a 6-2 Court (Scalia, J., dissenting; joined by Thomas, J.; Kagan, J. did not participate). The Court held that the provision in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act) requiring that nongovernmental organizations receiving funds under the Act adopt a policy explicitly opposing prostitution violates the First Amendment. In passing the Leadership Act, 22 U.S.C. § 7601 *et seq.*, Congress authorized billions of dollars in appropriation to fund efforts by nongovernmental organizations to combat the spread of HIV/AIDS. An organization may not use funds received under the Act "to promote or advocate the legalization or practice of prostitution [and] sex trafficking." In addition, no organization may receive funds unless it has "a policy explicitly opposing prostitution and sex trafficking"; this second requirement is referred to as the "Policy Requirement." Respondents sought a

declaratory judgment that the Policy Requirement violated their First Amendment rights, and sought a preliminary injunction against its enforcement. The district court granted the injunction, and the Second Circuit affirmed. The Supreme Court affirmed, holding that “conditions that define the limits of [a] government spending program—those that specify the activities Congress wants to subsidize” are permissible under the Spending Clause of the Constitution, while “conditions that seek to leverage funding to regulate speech outside the contours of the program itself” violate the First Amendment. So while Congress can prohibit an organization from using federal funds to engage in a particular First Amendment activity, Congress cannot prohibit an organization that receives federal funds from engaging in that activity “through programs that are separate and independent from the project that receives” those funds. By itself, the condition that Leadership Act funds may not be used “to promote or advocate” prostitution ensures that federal funds will not be used for the prohibited purposes. But by also requiring that organizations receiving funds adopt a policy opposing prostitution, the Policy Requirement prohibited organizations from exercising their First Amendment rights outside of the scope of the federal program—that is, through programs independent from those funded by the Leadership Act. Thus, because the Policy Requirement “compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program,” it violates the First Amendment.

15. ***Salinas v. Texas*, No. 12-246 (Tex. Crim. App., 369 S.W.3d 176; cert. granted Jan. 11, 2013; SG as amicus, supporting respondent; argued on Apr. 17, 2013). Whether or under what circumstances the Fifth Amendment’s Self-Incrimination Clause protects a defendant’s refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.**

Decided June 17, 2013 (570 U.S. ____). Texas Court of Criminal Appeals/Affirmed. Justice Alito for a 5-4 Court (Roberts, C.J., and Kennedy, J., joined; Thomas, J., concurring in the judgment, joined by Scalia, J.; Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). Without being placed in custody or receiving *Miranda* warnings, Genovevo Salinas voluntarily answered the questions of a police officer who was investigating a murder. Salinas fell silent when asked whether ballistics testing would match his shotgun to shell casings found at the murder scene. At Salinas’s murder trial in Texas state court, the prosecution used his failure to answer the question as evidence of guilt. Salinas appealed, claiming that the prosecution’s use of his silence in its case in chief violated the Fifth Amendment. The Supreme Court granted certiorari and affirmed, although no single opinion garnered five votes. Justice Alito announced the judgment of the Court and delivered an opinion in which Chief Justice Roberts and Justice Kennedy joined. To prevent the privilege against self-incrimination from shielding information not properly within its scope, a witness must invoke the privilege at the time he relies on it. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984). A defendant does not normally invoke the privilege by remaining silent. *Roberts v. United States*, 445 U.S. 552, 560 (1980). This express invocation requirement applies even when an official has reason to suspect the question

would incriminate the witness. *Murphy*, 465 U.S. at 427-48. Justice Alito, therefore, declined to create an exception to the express invocation principle for cases where a witness chooses to stand mute rather than give an answer that officials suspect would be incriminating. He also rejected Salinas's argument that such an exception should be created because reliance on the Fifth Amendment privilege is the most likely explanation for silence in a case such as this one, noting that such silence is "insolubly ambiguous." Justice Thomas, writing for himself and Justice Scalia, affirmed on different grounds. Justice Thomas stated that *Griffin v. California*, 380 U.S. 609 (1965), in which the Court held that the Fifth Amendment prohibits a prosecutor or judge from commenting on a defendant's failure to testify, should not be extended to a defendant's silence during a voluntary precustodial interview because that case "lacks foundation in the Constitution's text, history, or logic." Because the prosecutor's comments did not compel Salinas to give self-incriminating testimony, his claims would have failed even if he had invoked the privilege.

16. ***Federal Trade Commission v. Actavis*, No. 12-416 (11th Cir., 677 F.3d 1298; cert. granted Dec. 7, 2012; argued on Mar. 25, 2013). Whether reverse-payment agreements are per se lawful unless the underlying patent litigation was a sham or the patent was obtained by fraud (as the court below held), or instead are presumptively anticompetitive and unlawful (as the Third Circuit has held).**

Decided June 17, 2013 (570 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Breyer for a 5-3 Court (Roberts, C.J., dissenting, joined by Scalia, J. and Thomas, J.; Alito, J., did not participate). The Court held that reverse payment settlement agreements—which arise primarily in pharmaceutical-related patent infringement suits and are agreements in which a patent holder pays a would-be competitor who makes a generic substitute to keep the generic substitute out of the market—are subject to antitrust scrutiny. The Court specifically declined to hold that reverse payment settlement agreements are presumptively unlawful. Instead, lower courts should apply a full "rule of reason" analysis in evaluating the competitive effects of such settlements. Here, the Eleventh Circuit affirmed the district court's dismissal of the FTC's complaint (alleging that a reverse payment settlement agreement violated Section 5 of the Federal Trade Commission Act) because the court concluded that so long as the settlement fell within the scope of a patent's exclusionary potential, it was immune from antitrust attack. The Supreme Court disagreed. Patent-related settlements can violate the antitrust laws, and the pro-competitive policy rationale behind the Hatch-Waxman Act indicates Congress's desire to facilitate the entry of generic drugs into the market. Moreover, the reverse payment system has the potential for genuine adverse effects on competition, as it keeps competition out of the market, and such harm is likely in practice. At least some of the time, if the patent infringement lawsuit had proceeded, it would have proved meritless, and therefore this type of competitive restraint would be unjustified. The Court noted that lower courts need not determine the validity of a patent before addressing the antitrust issues, and dismissed the concern that this holding would discourage settlement in patent cases, because other settlement structures are available.

17. *Alleyne v. United States*, No. 11-9335 (4th Cir., 457 F. App'x 348; cert. granted Oct. 5, 2012; argued on Jan. 14, 2013). Whether the Court should overrule its decision in *Harris v. United States*, 536 U.S. 545 (2002), in which it held that the Constitution does not require facts which increase a mandatory minimum sentence to be determined by a jury.

Decided June 17, 2013 (570 U.S. ____). Fourth Circuit/Vacated and remanded. Justice Thomas for a 5-4 Court (Sotomayor, J., concurring, joined by Ginsburg and Kagan, JJ.; Breyer, J., concurring in part and concurring in the judgment; Roberts, C.J., dissenting, joined by Scalia and Kennedy, JJ.; Alito, J., dissenting). The Court overruled *Harris v. United States* and held that any fact that increases the mandatory minimum sentence for a crime must be submitted to the jury. The Sixth Amendment right to trial by jury requires each element of a crime to be proved to a jury beyond a reasonable doubt. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that an “element” of a crime is any fact that increases the punishment for the crime above what is otherwise legally prescribed and, consequently, that any fact that increases the mandatory maximum penalty is an element of a crime. In *Harris*, the Court had declined to extend *Apprendi* to cover facts that increase the mandatory minimum penalty. The Court concluded that *Harris* was wrongly decided because it cannot be reconciled with *Apprendi*. The Court reasoned that *Apprendi*'s definition of “elements” necessarily includes not only facts that increase a punishment's ceiling, but also those that increase its floor. The Court emphasized the consistency between this definition of “elements” and common-law and early American practice. Further, the Court explained, a fact triggering a mandatory minimum indisputably alters the prescribed range of sentences to which a criminal defendant is exposed, and under federal law the legally prescribed sentencing range *is* the penalty affixed to the crime. The Court went on to explain that because a fact increasing the legally prescribed floor aggravates the penalty, the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury. The Court concluded that there is no basis in principle or logic to distinguish facts that raise the maximum from those that raise the minimum and accordingly overruled *Harris* as inconsistent with *Apprendi*. The Court cautioned, however, that its holding does not mean that any fact that influences judicial sentencing discretion must be found by a jury—judges remain free to find facts that merely determine which sentence should be imposed within the range authorized by law (as opposed to those facts that determine what range the law authorizes).

18. *Maracich v. Spears*, No. 12-25 (4th Cir., 675 F.3d 281; cert. granted Sept. 25, 2012; argued on Jan. 9, 2013). The Questions Presented are: (1) Whether the Fourth Circuit erred in holding, contrary to every other court heretofore to have considered the issue, that lawyers who obtain, disclose, or use personal information solely to find clients to represent in an incipient lawsuit—as opposed to evidence for use in existing or potential litigation—may seek solace under the litigation exception of the Driver's Privacy Protection Act of 1994 (“DPPA”), 18 U.S.C. §§ 2721-2725. (2) Whether the Fourth Circuit erred in reaching the conclusion (in conflict with prior precedent) that a

lawyer who files an action that effectively amounts to a “place holder” lawsuit may thereafter use DPPA-protected personal information to solicit plaintiffs for that action through a direct mail advertising campaign on the grounds that such use is “inextricably intertwined” with “use in litigation.”

Decided June 17, 2013 (570 U.S. ____). Fourth Circuit/Vacated and remanded. Justice Kennedy for a 5-4 Court (Ginsburg, J., dissenting, joined by Scalia, Sotomayor, and Kagan, JJ.). The Court held that an attorney’s sending of communications for the predominant purpose of soliciting clients is not a use of information excepted from the Driver’s Privacy Protection Act (“DPPA”) under the statute’s “litigation exception.” This exception permits disclosure of personal information in state motor vehicle department records for use “in connection with” civil, criminal, administrative, or arbitral proceedings, including “investigation in anticipation of litigation.” The Court concluded that the “in connection with” language does not extend to commercial solicitation by an attorney; rather, the specific examples of uses of “in connection with” in litigation listed in the exception, such as service of process, “suggest . . . a limited scope to permit the use of highly restricted personal information when it serves an integral purpose in a particular legal proceeding.” Similarly, the Court concluded that “investigation in anticipation of litigation” is “best understood to allow background research to determine whether there is a supportable theory for a complaint, a theory sufficient to avoid sanctions for filing a frivolous lawsuit, or to locate witnesses for deposition or trial testimony,” rather than to allow commercial solicitation. This interpretation “respects the statutory design of the DPPA,” which contains a separate exception allowing solicitation of those who have expressly consented to having their names and addresses disclosed. The Court was not persuaded by Respondents’ attempt to distinguish between “mere trolling for clients,” on the one hand, and “solicitation tied to a specific legal dispute,” on the other, because it found “no principled way to classify some solicitations as acceptable and others as unacceptable for the purpose of [the litigation exception].” Recognizing that “[c]lose cases may arise,” the Court determined that “[w]here a reasonable observer could discern that the predominant purpose of obtaining, using, or disclosing protected personal information was to initiate or propose a business transaction with a prospective client, [the litigation exception] does not exempt the solicitation.”

19. ***Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71 (9th Cir., 667 F.3d 383; cert. granted Oct. 15, 2012; SG as amicus, supporting respondents; argued on Mar. 18, 2013).** Whether the court of appeals erred in (1) creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution that is contrary to this Court’s authority and conflicts with other circuit court decisions, and (2) holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote.

Decided June 17, 2013 (569 U.S. ____). Ninth Circuit/Affirmed. Justice Scalia for a 7-2 Court (Kennedy, J., concurring in part and concurring in the judgment; Thomas, J., dissenting; Alito, J., dissenting). The Court held that the National

Voter Registration Act (“NVRA”) precludes Arizona from requiring voter-registration applicants who submit a uniform federal registration form to submit additional proof of U.S. citizenship. The NVRA mandates that States “accept and use” a uniform form developed by the Election Assistance Commission (the “Federal Form”) to register voters for federal elections. The Federal Form requires applicants to aver that they are citizens, but does not require documentary evidence; Arizona law, by contrast, requires State voter-registration officials to reject all applications that do not contain “satisfactory,” or concrete, evidence of U.S. citizenship. Plaintiffs sought to enjoin the enforcement of this Arizona law, but the Ninth Circuit, sitting en banc, held that Arizona’s documentary evidence requirement conflicted with the NVRA’s text, structure, and purpose, and was thus preempted by federal law. The Court affirmed, concluding that the Arizona provision conflicted with the NVRA’s “accept and use” mandate. Although, “in isolation,” the “accept and use” mandate might mean either that a State must accept the Federal Form as a sufficient registration application or that it must merely receive the form and use it as part of its own registration process, the mandate’s context makes clear that the first reading is the fairest interpretation. The Court also reasoned that the presumption against pre-emption is inapplicable in cases like this in which Congress legislates pursuant to its Elections Clause powers. Thus, “a state-imposed requirement of evidence of citizenship not required by the Federal Form is ‘inconsistent with’ the NVRA’s mandate that States ‘accept and use’ the Federal Form.” The Court explained that its holding does not conflict with Arizona’s constitutional authority to establish voting qualifications because an alternate statutory means remains open for Arizona to obtain the citizenship information it requires to enforce its qualification rules—namely, an administrative process by which States can request the Election Assistance Commission to “alter the Federal Form to include information the State deems necessary to determine eligibility.”

20. ***American Trucking Association, Inc. v. Los Angeles*, No. 11-798 (9th Cir., 660 F.3d 384; CVSG Mar. 26, 2012; cert. opposed Nov. 30, 2012; cert. granted Jan. 11, 2013 limited to Questions 1 and 3; SG as amicus, supporting reversal; argued on Apr. 16, 2013). The Questions Presented are: (1) Whether 49 U.S.C. § 14501(c)(1), which provides that “a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property,” contains an unexpressed “market participant” exception and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services. (3) Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers’ federal registration, in violation of *Castle v. Hayes Freight Lines Inc.*, 348 U.S. 61 (1954).**

Decided June 13, 2013 (569 U.S. ____). Ninth Circuit/Reversed in part and remanded. Justice Kagan for a 9-0 Court (Thomas, J., concurring). The Court

held that the Federal Aviation Administration Authorization Act (“FAAAA”) expressly preempts two provisions of the mandatory concession agreements imposed by the Port of Los Angeles on short-haul trucking providers. Federally licensed short-haul “drayage” trucks are responsible for bringing cargo into and out of the Port. In 2007, in response to community concerns regarding traffic, safety, and the environment, the Port implemented a “Clean Truck Program” subjecting drayage companies to a number of conditions of operation, including providing off-street parking plans for their vehicles, and displaying placards on their trucks with a telephone number for reporting environmental or safety concerns. The FAAAA preempts any state “law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U. S. C. §14501(c)(1). The FAAAA does not preempt a state from undertaking purely contractual arrangements while acting as a market participant rather than a regulator. But the Court held that the concession agreements at stake here constitute an exercise of “classic regulatory authority,” and the parking and placard requirements imposed by the Port have “the force and effect of law,” because drayage companies are subject to criminal penalties for violating the terms of the concession agreement. The FAAAA therefore preempted the concession agreements. The Court declined to consider a separate question on which it had also granted certiorari, regarding whether the penalty provisions of the concession agreement are barred by *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954).

21. ***Tarrant Regional Water District v. Herrmann*, No. 11-889 (10th Cir., 656 F.3d 1222; CVSG Apr. 2, 2012; cert. supported Nov. 30, 2012; cert. granted Jan. 4, 2013; SG as amicus, supporting vacatur and remand; argued on Apr. 23, 2013). The Questions Presented are: (1) Whether Congress’s approval of an interstate water compact that grants the contracting states “equal rights” to certain surface water and – using language present in almost all such compacts – provides that the compact shall not “be deemed . . . to interfere” with each state’s “appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact,” manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water. (2) Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.**

Decided June 13, 2013 (569 U.S. ____). Tenth Circuit/Affirmed. Justice Sotomayor for a unanimous Court. The Court held that federal law did not preempt several Oklahoma statutes that restrict out-of-state diversions of water, and that Oklahoma’s laws did not impose unconstitutional restrictions on interstate commerce. In 1978, the States of Texas, Oklahoma, Arkansas, and Louisiana entered into the Red River Compact, which was subsequently made federal law by an act of Congress. This Compact allocated to each signatory-State the right to use a certain amount of water in the Red River basin. Facing water shortages, a Texas state agency filed an application with Oklahoma, seeking to obtain Texas’s allocation of water under the Compact by diverting water located within

Oklahoma's geographic boundaries. Oklahoma's water statutes, however, effectively denied the ability of out-of-state entities to apply for such diversions. The Court held that the Compact did not preempt Oklahoma's statutes, because it did not grant signatories the right to obtain water from inside the sovereign boundaries of other signatories. The allocations provided by the Compact were intended to set limits on the amount of water a State could retain and use within its own borders; they did not authorize States to invade the sovereign territory of other signatories to the Compact to obtain their allocation. In addition, Oklahoma's water laws did not discriminate against out-of-state residents with respect to "unallocated waters," because the Compact expressly allows signatories to use "whatever amount of water they can put to beneficial use," subject to the requirement that they honor other state's minimum allocation. Thus, because there is no "unallocated waters," Oklahoma cannot discriminate against interstate commerce with respect to those waters.

22. ***United States v. Davila*, No. 12-167 (11th Cir., 664 F.3d 1355; cert. granted Jan. 4, 2013; argued on Apr. 15, 2013). Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant.**

Decided June 13, 2013 (569 U.S. ____). Eleventh Circuit/Vacated and remanded. Justice Ginsburg for a 7-2 Court (Scalia, J., concurring in part and concurring in the judgment, joined by Thomas, J.). The Court held that under Rule 11(h) of the Federal Rules of Criminal Procedure, a federal judge's participation in plea negotiations in violation of Rule 11(c)(1) does not warrant automatic vacatur of the defendant's guilty plea. Rule 11(c)(1) of the Federal Rules of Criminal Procedure prohibits judicial participation in plea negotiations. Rule 11(h) provides that "a variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights." Respondent Davila entered a guilty plea to conspiracy to defraud the United States by filing false income tax returns. Three months before Davila entered his plea, a U.S. Magistrate Judge told him during a pre-plea *in camera* hearing that his best course, given the strength of the government's case against him, was to plead guilty. The government stipulated, and the Court agreed, that the Magistrate Judge thereby violated Rule 11(c)(1). The Eleventh Circuit held that the Rule 11(c)(1) violation required automatic vacatur of Davila's guilty plea. The Supreme Court reversed. The Court explained that Rule 11(h) was designed and enacted to make clear that Rule 11 violations are not excepted from the general rule—provided in Federal Rule of Civil Procedure 52(a)—that any trial court error that does not affect substantial rights must be disregarded as harmless. The Court further elaborated that violations of Rule 11(c)(1) do not rank within the "very limited class of errors" in criminal proceedings deemed "structural" that trigger automatic reversal, because the Rule is not "impelled by" the Due Process Clause or any other constitutional requirement. As a result, the Court held that if a judge violates Rule 11(c)(1), a court must vacate the plea only if the error was not harmless (or, absent prompt objection by the defendant, if the violation constituted plain error). A reviewing court thus must consider whether it was reasonably



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probable that, but for the judicial participation in plea negotiations, the defendant would have exercised his right to go to trial. And the court should consider “all that transpired in the trial court in order to assess the impact of the error.”

23. *Association for Molecular Pathology v. Myriad Genetics, Inc.*, No. 12-398 (Fed. Cir., 689 F.3d 1303; cert. granted Nov. 30, 2012; SG as amicus, supporting neither party; argued on Apr. 15, 2013). **The Questions Presented are: (1) Are human genes patentable; (2) Did the Federal Circuit err in upholding a method claim by Myriad that is irreconcilable with this Court’s ruling in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012); and (3) Did the Federal Circuit err in adopting a new and inflexible rule, contrary to normal standing rules, and the Supreme Court’s decision in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), that petitioners who have been indisputably deterred by Myriad’s “active enforcement” of its patent rights nonetheless lack standing to challenge those patents absent evidence that they have been personally threatened with an infringement action?**

Decided June 13, 2013 (569 U.S. ____). Federal Circuit/Affirmed in part and reversed in part. Justice Thomas for a 9-0 Court (Scalia, J., joined in part; Scalia, J., concurring in part and concurring in the judgment). The Court held “that a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated, but that cDNA”—synthetically created complementary DNA—“is patent eligible because it is not naturally occurring.” At issue were composition claims from three patents filed by Myriad after it “discovered the precise location and sequence” of two particular genes—BRCA1 and BRCA2—and developed medical tests “to detect[] mutations” in those genes “and thereby assess[] whether the patient has an increased risk of [breast or ovarian] cancer.” If valid, Myriad’s patents would give it the exclusive right to manipulate BRCA DNA in two ways: “to isolate an individual’s BRCA1 and BRCA2 genes (or any strand of 15 or more nucleotides within the genes) by breaking the covalent bonds that connect the DNA to the rest of the individual’s genome,” and “to synthetically create BRCA cDNA.” The Court held that the BRCA1 and BRCA2 genes are not patentable. Beginning from the longstanding rule that “[l]aws of nature, natural phenomena, and abstract ideas are not patentable,” the Court explained that although Myriad “found an important and useful gene, . . . separating that gene from its surrounding genetic material is not an act of invention” or “creat[ion].” And while “Myriad found the location of the BRCA1 and BRCA2 genes,” the Court explained, “that discovery, by itself, does not render the BRCA genes ‘new . . . composition[s] of matter’ . . . that are patent eligible” under 35 U.S.C. § 101. The Court continued that “[e]xtensive effort alone is insufficient to satisfy the demands of § 101,” and rejected Myriad’s arguments that “patents depend[] on/upon the creation of a unique molecule,” and that the Patent & Trademark Office’s “past practice of awarding gene patents is entitled to deference.” cDNA, in contrast, “is not a ‘product of nature’ and is patent eligible under § 101,” the Court held, “except insofar as very short series of DNA may have no intervening introns to remove when creating cDNA.” The Court also underscored that its opinion did not implicate “method claims,”

“patents on new *applications* of knowledge about the BRCA1 and BRCA2 genes,” or “the patentability of DNA in which the order of the naturally occurring nucleotides has been altered.”

24. ***Oxford Health Plans, LLC v. Sutter*, No. 12-135 (3d Cir., 675 F.3d 215; cert. granted Dec. 7, 2012; argued on Mar. 25, 2013). Whether an arbitrator acts within his powers under the Federal Arbitration Act (as the Second and Third Circuits have held) or exceeds those powers (as the Fifth Circuit has held) by determining that parties affirmatively “agreed to authorize class arbitration,” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010), based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.**

Decided June 10, 2013 (569 U.S. ___). Third Circuit/Affirmed. Justice Kagan for a 9-0 Court (Alito, J., joined by Thomas, J., concurring). The Court held that an arbitrator does not exceed his powers under § 10(a)(4) of the Federal Arbitration Act by concluding that an arbitration clause authorizes class arbitration, even if that conclusion is probably wrong. The Court began by emphasizing the narrow scope of judicial review under § 10(a)(4), which requires a reviewing court to uphold an arbitral award so long as it even arguably interprets the contract on which the award is based. Here, the arbitrator had determined that the arbitration provision in the parties’ contract authorized class arbitration. Because he based that determination on the provision’s text, the Court concluded, he was interpreting the contract and therefore had not exceeded his powers. The Court distinguished its prior decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010)—which held that a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so—on the ground that in *Stolt-Nielsen* the parties had stipulated that they had not agreed to class arbitration. This stipulation meant the arbitrators “lacked any contractual basis for ordering class procedures,” the Court explained, while in the present case the parties had agreed that the arbitrator should determine whether their arbitration provision authorized class arbitration (the Court suggested in a footnote that the case might have come out differently had the Petitioner argued that the availability of class arbitration is a question of arbitrability to be decided by a court). The Court hinted that it believed the arbitrator’s decision was wrong but emphasized that this belief was irrelevant: “So long as the arbitrator was ‘arguably construing’ the contract—which this one was—a court may not correct his mistakes under § 10(a)(4).”

25. ***Peugh v. United States*, No. 12-62 (7th Cir., 675 F.3d 736; cert. granted Nov. 9, 2012; argued on Feb. 26, 2013). Whether a sentencing court violates the Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense, if the newer Guidelines create a significant risk that the defendant will receive a longer sentence.**

Decided June 10, 2013 (569 U.S. ____). Seventh Circuit/Reversed and remanded. Justice Sotomayor for a 5-4 Court (Kennedy, J., joined as to all but Part III-C; Thomas, J., dissenting, joined by Roberts, C.J., and Scalia and Alito, JJ., as to Parts I and II-C; Alito, J., dissenting, joined by Scalia, J.). Marvin Peugh was convicted of five counts of bank fraud for conduct that occurred in 1999 and 2000. Under the 2009 version of the Federal Sentencing Guidelines in effect at the time of sentencing, the low end of Peugh’s sentencing range was 70 to 87 months. Under the 1998 version of the Federal Sentencing Guidelines in effect at the time of his offenses, Peugh’s sentencing range was 30 to 37 months. A district court is to apply the Guidelines “in effect on the date that the defendant is sentenced.” 18 U.S.C. § 3553(a)(4)(A)(ii). At sentencing, Peugh argued that the *Ex Post Facto* Clause of the U.S. Constitution required that he be sentenced under the 1998 Guidelines, but the District Court rejected his claim and sentenced him to 70 months’ imprisonment. The Seventh Circuit affirmed, and the Supreme Court granted *certiorari*. The Supreme Court held that the *Ex Post Facto* Clause is violated when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version imposes a higher sentencing range than the Guidelines in place at the time of the offense. The Constitution forbids the passage of laws that “change[] the punishment, and inflict[] greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 Dall. 386, 390 (1798). The Government argued that there was no *ex post facto* problem because the more punitive Guidelines applied at Peugh’s sentencing were merely advisory. The Court, however, disagreed. The controlling question in the Court’s inquiry is whether the change in law presents a “sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Garner v. Jones*, 529 U.S. 397 (1937). *Miller v. Florida*, 482 U.S. 423 (1987) establishes that applying amended sentencing guidelines that increase a defendant’s recommended sentence can violate the Constitution—regardless of the fact that sentencing courts possess the ability to deviate from the recommendation. Because the post-*Booker* sentencing scheme contains measures intended to ensure that sentences are anchored to the Guidelines, such as the requirement that the district court make a correct Guidelines calculation at the outset, an increase in the applicable guidelines range creates a significant risk of a higher sentence and constitutes an *ex post facto* violation.

26. ***Horne v. Department of Agriculture*, No. 12-123 (9th Cir., 673 F.3d 1071; cert. granted Nov. 20, 2012; argued on Mar. 20, 2013). Under federal regulations, a “handler” of raisins must turn over a percentage of his raisin crop to a federal entity in order to sell the remainder on the open market—often in exchange for no payment or payment below the cost of raisin production. The Questions Presented are: (1) Whether the Ninth Circuit erred in holding, contrary to the decisions of five other circuit courts, that a party may not raise the Takings Clause as a defense to a “direct transfer of funds mandated by the Government,” *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (plurality), but instead must pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims; and (2) Whether the Ninth Circuit erred in holding,**

contrary to a decision of the Federal Circuit, that it lacked jurisdiction over petitioners’ takings defense, even though petitioners, as “handlers” of raisins under the Raisin Marketing Order, are statutorily required under 7 U.S.C. § 608c(15) to exhaust all claims and defenses in administrative proceedings before the United States Department of Agriculture, with exclusive jurisdiction for review in federal district court.

Decided June 10, 2013 (569 U.S. ____). Ninth Circuit/Reversed and remanded. Justice Thomas for a unanimous Court. The Agricultural Marketing Agreement Act of 1937 (AMAA), which was enacted to stabilize prices for agricultural commodities, requires “handlers” of covered agricultural commodities to follow marketing orders promulgated by the Secretary of the Agriculture, or else face civil and criminal penalties. *See* 7 U.S.C. § 608a(5), (6), and (14). One order—the California Raisin Marketing Order—established a Raisin Administrative Committee (RAC), which promulgated rules requiring raisin “handlers” to retain a certain amount of raisins in reserve and pay assessments to the RAC. Petitioners, California raisin growers, refused to surrender the requisite portions of raisins to the reserve, and, as a result, the United States Department of Agriculture (USDA) initiated administrative proceedings against the growers. The raisin growers raised an affirmative defense that the Marketing Order violated the Fifth Amendment’s prohibition against taking property without just compensation. The Ninth Circuit concluded that it lacked jurisdiction to resolve the takings claim because it should have been raised as a separate action in the Court of Federal Claims. The Supreme Court, however, held that the raisin growers could bring their takings claim as a defense to the AMAA assessment, rather than in the Court of Federal Claims. The provision’s text does not bar handlers from raising constitutional defenses to the USDA’s enforcement action. Further, the Court reasoned, allowing handlers to do so would not diminish the incentive to file direct challenges to marketing orders under the statute, because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if the constitutional challenge fails. And it would make little sense to force a party to pay a fine in one proceeding and then turn around and sue for recovery of that same fine in a separate proceeding.

27. ***Hillman v. Maretta*, No. 11-1221 (Va., 722 S.E.2d 32; CVSG June 18, 2012; cert. supported Dec. 14, 2012; cert. granted Jan. 11, 2013; SG as amicus, supporting respondent; argued on Apr. 22, 2013). Whether 5 U.S.C. § 8705(a), any other provision of the Federal Employees Group Life Insurance Act of 1954 (“FEGLIA”), or any regulation promulgated thereunder preempts a state domestic relations equitable remedy which creates a cause of action against the recipient of FEGLIA insurance proceeds after they have been distributed.**

Decided June 3, 2013 (569 U.S. ____). Virginia Supreme Court/Affirmed. Justice Sotomayor for a 9-0 Court (Scalia, J., joined as to all but footnote 4; Thomas, J., concurring; Alito, J., concurring). The Court held that Section 8705(a) of the Federal Employees Group Life Insurance Act (“FEGLIA”), 5 U.S.C. § 8705(a), which establishes a life insurance program for federal employees and allows each



employee to designate a beneficiary to receive the proceeds of the policy when the employee dies, preempts a Virginia statute that allows the family of a deceased employee to sue the designated beneficiary for the proceeds if the beneficiary happens to be the employee's former spouse. Section 8705(a) of FEGLIA permits an employee to name a beneficiary of life insurance proceeds and specifies an "order of precedence" providing that an employee's death benefits accrue first to that beneficiary ahead of other potential recipients. The objective of FEGLIA is to honor an employee's choice of beneficiary—it gives highest priority to an insured's designated beneficiary, and underscores that the employee's "right" of designation "cannot be waived or restricted." The Virginia statute conflicts with that objective, the Court concluded, because it directs that the proceeds actually belong to someone other than the named beneficiary by creating a cause of action for their recovery by a third party. Further, the Court reasoned that FEGLIA is "strikingly similar" to the National Service Life Insurance Act of 1940 ("NSLIA"), 54 Stat. 1008, and the Servicemen's Group Life Insurance Act of 1965 ("SGLIA"), Pub. L. 89-214, 79 Stat. 880, two statutes that the Court had previously held as preempting state laws similar to the Virginia statute at issue here. *See Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Wissner v. Wissner*, 530 U.S. 655 (1950).

28. ***Maryland v. King*, No. 12-207 (Md., 425 Md. 550; cert. granted Nov. 9, 2012; SG as amicus, supporting petitioner; argued on Feb. 26, 2013). Whether the Fourth Amendment allows the states to collect and analyze DNA from people arrested and charged with serious crimes.**

Decided June 3, 2013 (569 U.S. ____). Court of Appeals of Maryland/Affirmed. Justice Kennedy for a 5-4 Court (Scalia, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.). The Court held that the taking and analyzing of an arrestee's DNA via a cheek swab sample is a legitimate police booking procedure that is reasonable under the Fourth Amendment when police officers make an arrest supported by probable cause for a serious offense and bring the suspect to the station to be detained. The Court determined that a swab of the inner tissues of an arrestee's cheek to obtain DNA samples is a search under the Fourth Amendment, and falls within the category of searches analyzed by reference to reasonableness. The reasonableness inquiry requires weighing "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). Here, the Court accorded "great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest." The Court concluded that the individual's privacy interests did not outweigh the government interest inasmuch as the intrusion caused by a cheek swab is minimal, a person's expectation of privacy is diminished when in police custody, and the processing of the DNA would not reveal information beyond identification.

29. ***Trevino v. Thaler*, No. 11-10189 (5th Cir., 449 F. App'x 415; cert. granted Oct. 29, 2012, limited to Question One; argued on Feb. 25, 2013). In federal habeas proceedings, undersigned counsel raised for the first time a claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), that trial counsel were ineffective**

for failing to investigate the extraordinary mitigating evidence in Mr. Trevino's life. The federal proceeding was stayed to allow exhaustion, but the Texas Court of Criminal Appeals dismissed Mr. Trevino's *Wiggins* claim under state abuse of the writ rules. Thereafter, the federal district court dismissed the claim as procedurally barred, finding no cause for the default. On appeal, Mr. Trevino argued that the Court of Appeals should stay further proceedings until this Court resolved the question then-pending in several cases whether ineffective assistance of state habeas counsel in failing to raise a meritorious claim of ineffective assistance of trial counsel established cause for the default in state habeas proceedings. The Court of Appeals refused to stay Mr. Trevino's appeal for this purpose. Four months later, this Court decided in *Martinez v. Ryan*, 132 S. Ct. 1309 (March 20, 2012), that ineffective assistance of state habeas counsel in the very circumstance presented by Mr. Trevino's case could establish cause for the default of a claim of ineffective assistance of trial counsel. The Question Presented is whether the Court should grant certiorari, vacate the Court of Appeals opinion, and remand to the Court of Appeals for consideration of Mr. Trevino's argument under *Martinez v. Ryan*.

Decided May 28, 2013 (569 U.S. ____). Fifth Circuit/Vacated and remanded. Justice Breyer for a 5-4 Court (Roberts, C.J., dissenting, joined by Alito, J.; Scalia, J., dissenting, joined by Thomas, J.). The Court held that where a state's criminal procedural framework fails to provide defendants with a meaningful opportunity to present, on direct appeal, a claim of ineffective assistance of trial counsel, a procedural default on that issue will not prevent a federal habeas court from hearing the ineffective assistance claim. Under *Coleman v. Thompson*, 501 U.S. 722 (1991), a state prisoner who fails to exhaust state remedies, or to meet state procedural requirements for presenting his federal claims, is not entitled to federal habeas relief, unless he can show "cause" for such default. Last Term, the Court held in *Martinez v. Ryan*, 566 U.S. 1 (2012), that there is a narrow exception to the *Coleman* rule, in cases where the criminal defendant's failure to present an ineffective assistance of counsel claim at the direct appeal stage is the result of a state law that does not permit him to do so. In *Trevino*, the Court found that the *Martinez* exception applies equally to cases where the defendant's failure to present the ineffective assistance claim is the result of a state law that "in theory grants permission" to raise it on direct appeal, but in practice "precludes as a matter of course" such an opportunity.

30. ***McQuiggin v. Perkins*, No. 12-126 (6th Cir., 670 F.3d 665; cert. granted Oct. 29, 2012; argued on Feb. 25, 2013). Whether, under the Antiterrorism and Effective Death Penalty Act of 1996, there is an actual-innocence exception to the requirement that a petitioner show an extraordinary circumstance that "prevented timely filing" of a habeas petition, and if so, whether there is an additional actual-innocence exception to the requirement that a petitioner demonstrate that "he has been pursuing his rights diligently."**

Decided May 28, 2013 (569 U.S. ____). Sixth Circuit/Vacated and remanded. Justice Ginsburg for a 5-4 Court (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas, J., and joined in part by Alito, J.). The Court held that a petitioner who presents a convincing showing of actual innocence may overcome the one-year statute of limitations on federal habeas petitions prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). The Court repeatedly cautioned that this “miscarriage of justice exception . . . applies to a severely confined category: cases in which new evidence shows ‘it is more likely than not that no reasonable juror would have convicted [the petitioner].’” And the Court “clarifie[d] that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner’s part . . . as a factor in determining whether actual innocence has been reliably shown,” even though untimeliness itself is not an insuperable or absolute bar. Accordingly, the Court “[held] that the Sixth Circuit erred to the extent that it eliminated timing as a factor relevant in evaluating the reliability of a petitioner’s proof of innocence,” and emphasized that “[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing.”

31. ***Sebelius v. Cloer*, No. 12-236 (Fed. Cir., 675 F.3d 1358; cert. granted Nov. 20, 2012; argued on Mar. 19, 2013). Whether a person whose petition under the National Vaccine Injury Compensation Program is dismissed as untimely may recover from the United States an award of attorneys’ fees and costs.**

Decided May 20, 2013 (569 U.S. ____). Federal Circuit/Affirmed. Justice Sotomayor for a 9-0 Court (Scalia and Thomas, JJ., joined as to all but Part II-B). The Court held that attorneys’ fees and costs as provided under section 300aa-15(e)(1) of the National Childhood Vaccine Injury Act of 1986 (the Act) may be awarded for a petition filed under the Act that is ultimately dismissed as untimely. Section 300aa-15(e)(1) authorizes courts to award attorney’s fees and costs for an unsuccessful petition filed under the Act if that petition “was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.” Respondent filed a claim for compensation under the Act, alleging that Hepatitis-B immunizations she received caused or exacerbated her multiple sclerosis. Sitting en banc, the Federal Circuit held that respondent’s claim was correctly dismissed as filed outside the statutory limitations period, but, nevertheless, that the petition was eligible for attorneys’ fees and costs provided that the statute’s good faith and reasonable basis requirements were met. The Court affirmed, concluding that the statutory text “ties eligibility for attorney’s fees broadly to ‘any proceeding [filed under the Act],’” including those later dismissed as untimely. The Act’s fees provision does not cross-reference its limitations provision, contrasted to provisions elsewhere in the Act that do expressly require compliance with the limitations period. Nothing in the fees and limitations provisions “suggests that the reason for the subsequent dismissal of a petition, such as its untimeliness, nullifies the initial filing of that petition.” Neither the canons of construction nor the alleged burdens the Government raised to support an alternate reading justify departing from the Act’s clear text.

32. ***Metrish v. Lancaster*, No. 12-547 (6th Cir., 683 F.3d 740; cert. granted Jan. 18, 2013; argued on Apr. 24, 2013).** The Questions Presented are: (1) Whether the Michigan Supreme Court’s recognition that a state statute that abolished the long-maligned diminished-capacity defense was an “unexpected and indefensible” change in a common-law doctrine of criminal law under this Court’s retroactivity habeas jurisprudence. (2) Whether the Michigan Court of Appeals’ retroactive application of the Michigan Supreme Court’s decision was “so lacking in justification” that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement so as to justify habeas relief under *Harrington v. Richter*, 131 S. Ct. 770 (2011).

Decided May 20, 2013 (569 U.S. ____). Sixth Circuit/Reversed. Justice Ginsburg for a unanimous Court. The Court held that the Michigan Court of Appeals did not unreasonably apply clearly established Supreme Court precedent, so the petitioner was not entitled to habeas relief. After Lancaster’s offense, but prior to his trial, the Michigan Supreme Court overruled decisions of the Michigan Court of Appeals and held, on its initial consideration of the issue, that Michigan does not recognize a diminished-capacity defense that would negate the mens rea of a crime. Lancaster argued that to apply that decision to him retroactively would violate due process. The Supreme Court has previously recognized in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Rogers v. Tennessee*, 532 U.S. 451 (2001), that the Due Process Clause prohibits the retroactive application of a judicial decision that is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” *Rogers*, 532 U.S. at 462. But here, the Court held that the Michigan courts reasonably concluded that Lancaster’s due-process rights had not been violated. In *Bouie*, the state court unexpectedly *expanded* narrow and precise statutory language that, as written, did not reach the defendant’s conduct. Here, the state supreme court addressed a particular issue (the diminished capacity defense) for the first time and rejected a line of lower court decisions, based on a reasonable interpretation of a controlling statute. Fair-minded jurists could conclude that the Michigan Supreme Court’s decision was not “unexpected and indefensible by reference to [existing] law.” *Rogers*, 532 U.S. at 462. As a result, Lancaster cannot meet the difficult standard for relief under AEDPA.

33. ***PPL Corp. v. Commissioner of Internal Revenue*, No. 12-43 (3d Cir., 665 F.3d 60; cert. granted Oct. 29, 2012; argued on Feb. 20, 2013).** Whether, in determining the creditability of a foreign tax, courts should employ a formalistic approach that looks solely at the form of the foreign tax statute and ignores how the tax actually operates, or should employ a substance-based approach that considers factors such as the practical operation and intended effect of the foreign tax.

Decided May 20, 2013 (569 U.S. ____). Third Circuit/Reversed. Justice Thomas for a 9-0 Court (Sotomayor, J., concurring). The Court held that a one-time “windfall tax” imposed by the United Kingdom (U.K.) on 32 U.K. companies privatized between 1984 and 1996 is creditable for U.S. tax purposes. In 1997, the

U.K. imposed a tax on certain recently privatized companies, which were required to continue providing services at the same rates they had offered under government control for a fixed period. This tax was structured to capture what the U.K. government considered to be excess profits earned by those companies during that period. Internal Revenue Code § 901(b)(1) provides that any “income, war profits, and excess profits taxes” paid overseas are creditable against U.S. income taxes. As a result, Petitioner PPL Corporation, one of the companies subject to the tax, claimed a corresponding credit on its federal tax return under § 901. The Commissioner of Internal Revenue rejected the claim, but the Tax Court held that the tax was creditable. The Third Circuit reversed the Tax Court. Reversing the Third Circuit, the Court explained that under Treasury Regulation § 1.901-2(a)(1), the test under § 901 is whether the “predominant character” of a foreign tax is “that of an income tax in the U.S. sense.” In addition, the foreign government’s characterization of the tax is not dispositive. The “crucial inquiry,” according to the Court, is the tax’s economic effect. The Court therefore rejected the Third Circuit’s reliance on the U.K. government’s characterization of the windfall tax as capturing a portion of the difference between the price at which each privatized company was sold and the price at which the government believed each company should have been sold. Instead, after examining the tax’s economic effect, the Court concluded that the windfall tax is “economically equivalent to the difference between the profits each company *actually* earned and the amount the [U.K.] government believed it *should* have earned given its flotation value.” (emphasis in original). In other words, the windfall tax is a “tax on realized net income disguised as a tax on the difference between two values, one of which is completely fictitious.” Thus, the predominant character of the tax is “nothing more than a tax on actual profits above a threshold,” or an excess profits tax, a category of income tax in the U.S. sense, and so the tax is creditable under § 901.

34. ***Arlington, Texas v. FCC*, No. 11-1545; *Cable, Telecommunications & Tech. v. FCC*, No. 11-1547 (5th Cir., 668 F.3d 229; cert. granted Oct. 5, 2012 limited to Question One and cases consolidated; argued on Jan. 16, 2013). Whether a court should apply *Chevron* deference to review an agency’s determination of its own statutory jurisdiction.**

Decided May 20, 2013 (569 U.S. ___). Fifth Circuit/Affirmed. Justice Scalia for a 6-3 Court (Breyer, J., concurring in part and concurring in the judgment; Roberts, C.J. dissenting, joined by Kennedy and Alito, JJ.). The Court held that courts must apply the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority (that is, its jurisdiction). The Communications Act of 1934 empowers the Federal Communications Commission (“FCC”) to “prescribe such rules and regulations as may be necessary in the public interests to carry out [its] provisions.” 47 U.S.C. § 201(b). Another provision of the Act requires that state or local governments act on any application to select a proposed site for a wireless communications tower “within a reasonable period of time.” *Id.* § 332(c)(7)(B)(ii). Relying on its “broad statutory authority in implement the provisions” of the Act, the FCC issued a declaratory ruling setting specific time limits as presumptively reasonable. The

Court rejected Petitioner’s argument that this ruling should not be afforded deference under *Chevron* because it was a decision as to the FCC’s “jurisdiction.” The Court reasoned that in every case involving an agency’s interpretation of a statute that it administers, the question is always “whether the agency has stayed within the bounds of its statutory authority.” Thus, the Court rejected the “false dichotomy” between “jurisdictional” and “non-jurisdictional” agency interpretations. In either case, *Chevron* deference applies.

35. ***Bowman v. Monsanto Co.*, No. 11-796 (Fed. Cir., 657 F.3d 1341; cert. granted Oct. 5, 2012; SG as amicus, supporting respondents; argued on Feb. 19, 2013). Patent exhaustion delimits rights of patent holders by eliminating the right to control or prohibit use of the invention after an authorized sale. In this case, the Federal Circuit refused to find exhaustion where a farmer used seeds purchased in an authorized sale for their natural and foreseeable purpose—namely, for planting. The Question Presented is: Whether the Federal Circuit erred by (1) refusing to find patent exhaustion in patented seeds even after an authorized sale and by (2) creating an exception to the doctrine of patent exhaustion for self-replicating technologies.**

Decided May 13, 2013 (569 U.S. ___). Federal Circuit/Affirmed. Justice Kagan for a unanimous Court. The Court held that the doctrine of patent exhaustion does not permit a farmer who buys patented seeds to reproduce them through planting and harvesting without the patent holder’s permission. Although the doctrine of patent exhaustion provides that “the initial authorized sale of a patented item terminates all patent rights to that item,” *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 625 (2008), the doctrine restricts the patentee’s rights only as to the “particular article” sold, and thus “leaves untouched the patentee’s ability to prevent a buyer from making new copies of the patented item.” The doctrine of patent exhaustion therefore did not enable petitioner to make additional patented soybeans through planting and harvesting. The Court underscored that, “[w]ere the matter otherwise, Monsanto’s patent would provide scant benefit,” particularly as a “grower could multiply his initial purchase, and then multiply that new creation, *ad infinitum*—each time profiting from the patented seed without compensating the inventor.” The Court was not persuaded by petitioner’s arguments that the exhaustion doctrine should apply because seeds are meant to be planted and that interfering with this use creates an impermissible exception to the doctrine for patented seeds.

36. ***Bullock v. BankChampaign, N.A.*, No. 11-1518 (11th Cir., 670 F.3d 1160; cert. granted Oct. 29, 2012; SG as amicus, supporting respondent; argued on Mar. 18, 2013). What degree of misconduct by a trustee constitutes “defalcation” under § 523(a)(4) of the Bankruptcy Code that disqualifies the errant trustee’s resulting debt from a bankruptcy discharge—and does it include actions that result in no loss of trust property.**

Decided May 13, 2013 (569 U.S. ___). Eleventh Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. The Bankruptcy Code, specifically 11 U.S.C. § 523(a)(4), provides that an individual cannot obtain a discharge in

bankruptcy of a debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” The Court held that the term “defalcation” includes a culpable state of mind requirement, and that a finding of “defalcation” requires immoral conduct, intentional wrong, or gross recklessness with regards to the improper nature of the fiduciary behavior complained of. The Court detailed five considerations which led it to interpret the term in this way: (1) Statutory context (and the *noscitur a sociis* canon) favors this interpretation; (2) the interpretation does not render the word surplusage; (3) exceptions to discharge should be plainly expressed; (4) several circuit courts have interpreted the statute in this manner without difficulty; and (5) the Court was not presented with a compelling alternative. The Court also cited approvingly *Neal v. Clark*, 94 U.S. 704 (1878), in which it interpreted the term “fraud” in the Bankruptcy Code to contain a similar *scienter* requirement.

37. ***Dan’s City Used Cars, Inc. v. Pelkey*, No. 12-52 (N.H., 163 N.H. 483; cert. granted Dec. 7, 2012; SG as amicus, supporting respondent; argued on Mar. 20, 2013). Whether state statutory, common law negligence, and consumer protection act enforcement actions against a tow-motor carrier based on state law regulating the sale and disposal of a towed vehicle are related to a transportation service provided by the carrier and are thus preempted by 49 U.S.C. § 14501-c-1.**

Decided May 13, 2013 (569 U.S. ___). Sup. Ct. N.H./Affirmed. Justice Ginsburg for a unanimous Court. The Court held that the Federal Aviation Administration Authorization Act of 1994, which preempts all state laws “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property,” 49 U.S.C. § 14501(c)(1), does not preempt state-law claims stemming from the storage and disposal of a towed vehicle. Petitioner, a towing company, towed respondent’s car, stored the car for several months, and then disposed of the car at a public auction in a manner respondent alleged was prohibited by the New Hampshire Consumer Protection Act and New Hampshire tort law. Respondent brought suit, and petitioner contended the respondent’s claims were preempted by § 14501(c)(1). The Court disagreed and held that state-law claims stemming from the storage and disposal of a car, once towing has ended, are not sufficiently connected to a motor carrier’s “service . . . with respect to the transportation of property” to warrant preemption under § 14501(c)(1). The Court so held for two reasons. First, respondent’s claims did not concern “the transportation of property.” They concerned the storage and disposal of property (his vehicle) after transportation had ended. Second, the claims were unrelated to the “service” of a “motor carrier.” The only service petitioner rendered was its towing of respondent’s car. That service ended months before the occurrence of the conduct on which respondent’s claims were based (petitioner’s disposal of his car). The Court emphasized that Congress’s purpose in enacting § 14501(c)(1) was to ensure that state regulations did not impede the free transportation of interstate commerce and concluded that allowing respondent’s claims to go forward was fully consonant with that purpose.

38. ***Boyer v. Louisiana*, No. 11-9953 (La. Ct. App., 56 So.3d 1119; cert. granted Oct. 5, 2012 limited to Question One; argued on Jan. 14, 2013). Whether a state’s failure to fund counsel for an indigent defendant for five years, particularly where failure was the direct result of the prosecution’s choice to seek the death penalty, should be weighed against the state for speedy trial purposes.**

Decided April 29, 2013 (569 U.S. ___). The writ of certiorari was dismissed as improvidently granted.

39. ***McBurney v. Young*, No. 12-17 (4th Cir., 667 F.3d 454; cert. granted Oct. 5, 2012; argued on Feb. 20, 2013). Under the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution, whether a state may preclude citizens of other states from enjoying the same right of access to public records that the state affords its own citizens.**

Decided Apr. 29, 2013 (569 U.S. ___). Fourth Circuit/Affirmed. Justice Alito for a 9-0 Court (Thomas, J., concurring). The Court held that Virginia’s Freedom of Information Act (“FOIA”) does not violate the Privileges and Immunities Clause of the U.S. Constitution because the Commonwealth made available by other means most of the information petitioners sought, and refusal to release the remaining information did not abridge any of petitioners’ fundamental privileges and immunities. The Court also held that the Virginia FOIA does not violate the dormant Commerce Clause because it does not prohibit or unduly regulate any interstate market. Virginia’s FOIA provides that “all public records shall be open to inspection and copying by any citizens of the Commonwealth,” but does not grant the same right to non-citizens. § 2.2-3704(A). Petitioners, non-Virginia citizens, sought declaratory and injunctive relief under 42 U.S.C. § 1983 for violations of the Privileges and Immunities Clause and the dormant Commerce Clause. Noting that the Privileges and Immunities Clause protects only “fundamental” privileges and immunities, the Court held that the Clause does not include the “broad right” of “access to public information on equal terms with citizens of the Commonwealth.” Although petitioners’ remaining arguments—the ability to earn a living in one’s chosen profession, the right to own and transfer property, and the right to resort to a state’s courts on equal terms with state citizens—did come within the ambit of the Clause, the Court rejected these arguments because Virginia’s FOIA was not enacted with a protectionism aim, and most of the information petitioners sought was available through alternate means. Finally, the Court explained that the Dormant Commerce Clause is not violated in this case because Virginia’s FOIA does not “interfere[] with an interstate market through prohibition or burdensome regulations,” but “merely provides a service to local citizens that would not otherwise be available at all.”

40. ***Moncrieffe v. Holder*, No. 11-702 (5th Cir., 662 F.3d 387; cert. granted Apr. 2, 2012; argued on Oct. 10, 2012). Whether a conviction under a provision of state law that encompasses, but is not limited to, the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony,**



notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal felony.

Decided Apr. 23, 2013 (569 U.S. ___). Fifth Circuit/Reversed and remanded. Justice Sotomayor for a 7-2 Court (Alito, J., dissenting; Thomas, J., dissenting). The Court held that if a noncitizen’s conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony under the Immigration and Nationality Act (“INA”). Under the INA, a noncitizen convicted of an “aggravated felony” is not only deportable, 8 U. S. C. § 1227(a)(2)(A)(iii), but also ineligible for discretionary relief. The INA lists as an “aggravated felony” “illicit trafficking in a controlled substance,” § 1101(a)(43)(B), which – though undefined – includes conviction of an offense that the Controlled Substances Act (CSA) makes punishable by more than one year’s imprisonment, *see* 18 U.S.C. §§ 924(c)(2), 3559(a)(5). For purposes of the INA, a conviction under state law “constitutes a ‘felony punishable under the [CSA]’ only if it proscribes conduct punishable as a felony under that federal law.” *Lopez v. Gonzales*, 549 U. S. 47, 60 (2006). Here, the defendant pleaded guilty under Georgia law to possession of marijuana with intent to distribute. The government sought to deport him on the ground that his conviction was an aggravated felony under the CSA, punishable by up to five years’ imprisonment. 21 U.S.C. § 841(b)(1)(D). After the defendant was ordered deported in administrative proceedings, and the Fifth Circuit denied his petition for review, the Court granted certiorari. The Court began by observing that it was required to apply the “categorical approach” to determine whether the defendant’s state law conviction qualified as a felony for purposes of the INA. Under the “categorical approach,” courts look “not to the facts of the particular prior case,” but instead to whether “the state statute defining the crime of conviction” categorically fits within the “generic” federal definition (meaning the offense when viewed in the abstract) of a corresponding aggravated felony. *Gonzales v. Duenas-Alvarez*, 549 U. S. 183, 186 (2007) (citing *Taylor v. United States*, 495 U. S. 575, 599–600 (1990)). Though federal law generally treats marijuana possession as a felony, it is characterized as a misdemeanor if the conviction involves a small amount of the drug and no money changed hands. Because the Georgia statute under which the defendant was convicted for possession with intent to distribute did not reveal whether either remuneration or more than a small amount of marijuana was involved, the defendant’s conviction could correspond to either the CSA felony or the CSA misdemeanor. Accordingly, the defendant was not convicted of an aggravated felony and could not be subject to deportation under the INA. In reaching this conclusion, the Court observed that it would consider both the elements of a crime and sentencing factors in applying the categorical approach; that is, the state offense conviction must meet both the elements of the generic federal offense defined by the INA, and the CSA must punish that offense as a felony.

41. ***Missouri v. McNeely*, No. 11-1425 (Supreme Court of Missouri, 358 S.W.3d 65; cert. granted Sept. 25, 2012; SG as amicus, supporting petitioner; argued on Jan. 9, 2013). Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the**

exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

Decided Apr. 17, 2013 (569 U.S. ___). Sup. Ct. of Mo./Affirmed. Justice Sotomayor for a 5-4 Court (Kennedy, J., concurring in part; Roberts, C.J., concurring and dissenting in part, joined by Breyer and Alito, JJ.; Thomas, J., dissenting). The Court held that in drunk-driving investigations, the natural metabolization of alcohol in the bloodstream does not constitute a *per se* exigency sufficient to justify an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. Here, the defendant was stopped for driving under the influence and subjected to a non-consensual blood test. At trial for drunk driving, he sought to suppress the admission of the blood test on the ground that it was conducted in violation of the Fourth Amendment. The trial and appellate courts agreed, and the Court granted certiorari to resolve a split in authority on the question of whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations. The Court began its analysis by observing that the general principle that a warrantless search of a person is reasonable only if it falls within a recognized exception applied in this case. The State claimed that the search was *per se* permissible under the exigency exception, which provides for a warrantless search when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. ___, ___ (2011) (slip op., at 6) (internal quotation marks and brackets omitted). The Court disagreed, holding that, consistent with general Fourth Amendment principles, the exigency must be determined case by case based on the totality of the circumstances. The Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), in which the Court upheld the warrantless blood test of an individual arrested for driving under the influence, was not to the contrary because, there, the Court made clear that its judgment that the exigency exception applied based "on the facts of the present record." *Id.* at 772.

42. ***Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (2d Cir., 621 F.3d 111; cert. granted Oct. 17, 2011, argued in tandem with *Mohamad v. Rajoub*, No. 11-88; SG as amicus, supporting petitioners; argued on Feb. 28, 2012; restored to calendar on Mar. 5, 2012; SG supplemental brief as amicus, supporting petitioners; argued on Oct. 1, 2012). The Questions Presented are: (1) Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question or an issue of subject matter jurisdiction. (2) Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or whether they may be sued in the same manner as any other private party defendant under the ATS. (3) Whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.**

Decided Apr. 17, 2013 (569 U.S. ___). Second Circuit/Affirmed. Chief Justice Roberts for a 9-0 Court (Kennedy, J., concurring; Alito, J., concurring, joined by Thomas, J.; Breyer, J., concurring, joined by Ginsburg, Sotomayor, and Kagan, JJ.). The Court held that the presumption against the extraterritorial application of U.S. law applies to claims under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, and nothing in the text, history, or purposes of the statute rebuts that presumption. Petitioners were Nigerian nationals residing in the United States who filed suit under the ATS, alleging that certain Dutch, British, and Nigerian corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The ATS, which is a jurisdictional statute, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. § 1350. The Court has previously construed the ATS to permit federal courts to “recognize private claims [for a modest number of international law violations] under federal common law.” *Sosa v. Alvarez-Machain*, 542 U. S. 692, 732 (2004). This case presented the separate question whether the ATS could be invoked to reach conduct occurring in the territory of a foreign sovereign. In conducting this inquiry, the Court determined that the ATS must be understood within the context of the presumption against extraterritoriality, which “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 248 (1991). Though the presumption is typically applied to determine whether an Act of Congress regulating conduct applies abroad, the Court determined that its underlying principles similarly constrain courts when considering causes of action that may be brought under the ATS, particularly as the ATS’s extraterritorial application raises the prospect of unwarranted judicial interference in the conduct of foreign policy. Moreover, the presumption was not rebutted by the text, history, or purpose of the ATS. The text of the ATS failed to evince a clear indication of extraterritoriality. That the statutory text referred to violations of “the law of nations” did not mean that it was intended to apply extraterritorially because such violations could happen within or outside the United States. Likewise, the history of the ATS’s enactment failed to rebut the presumption against extraterritoriality because when the ATS was passed, the only recognized violations of the law of nations were violation of safe conducts, infringements of the rights of ambassadors, and piracy, none of which provided support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad. Finally, there was no indication that the ATS was passed to “make the United States a uniquely hospitable forum for the enforcement of international norms.”

43. ***US Airways, Inc. v. McCutchen*, No. 11-1285 (3d Cir., 663 F.3d 671; cert. granted June 25, 2012; SG as amicus, supporting neither party; argued on Nov. 27, 2012). Whether the Third Circuit correctly held—in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits—that Section 502(a)(3) of the Employee Retirement Income Security Act authorizes courts to use equitable principles to rewrite contractual language and refuse to order**

participants to reimburse their plan for benefits paid, even where the plan’s terms give it an absolute right to full reimbursement.

Decided Apr. 16, 2013 (569 U.S. ___). Third Circuit/Vacated and remanded. Justice Kagan for a 5-4 Court (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas and Alito, JJ.). The Court held that the express terms of the plan govern in an action brought under Section 502(a)(3) of the Employee Retirement Income Security Act (“ERISA”), which authorizes a civil action “to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the” ERISA plan, based on an equitable lien by agreement. The Court observed that neither general unjust enrichment principles nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules—can override the express terms of the contract. (Under the common-fund rule, a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.) Though the respondent cited a slew of cases in which courts applied equitable doctrines, none did so to override a clear contract that provided otherwise. The Court reasoned that this result comports with ERISA’s focus on what a plan provides: § 502(a)(3) does not “authorize ‘appropriate equitable relief’ at large,” *Mertens v. Hewitt Associates*, 508 U. S. 248, 253 (1993), but countenances only such relief as will enforce “the terms of the plan” or the statute. When there are gaps in the relevant ERISA plan, however, equitable doctrines may be used to properly construe it. Because the plan at issue was silent on the allocation of attorney’s fees, the common fund doctrine could be used to fill the gap. The Court reasoned that ordinary contract interpretation principles supported this conclusion because courts construe ERISA plans, as they do other contracts, by “looking to the terms of the plan” as well as to “other manifestations of the parties’ intent.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U. S. 101, 113. Where the terms of a plan leave gaps, courts must “look outside the plan’s written language” to decide the agreement’s meaning, *CIGNA Corp. v. Amara*, 563 U. S. ___, ___, and should properly take account of the doctrines that typically or traditionally have governed a given situation when no agreement states otherwise.

44. ***Genesis Healthcare Corp. v. Symczyk*, No. 11-1059 (3d Cir., 656 F.3d 189; cert. granted June 25, 2012; SG as amicus, supporting affirmance; argued on Dec. 3, 2012). Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff’s claims.**

Decided Apr. 16, 2013 (569 U.S. ___). Third Circuit/Reversed. Justice Thomas for a 5-4 Court (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.). The Court held that an action under the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. § 216(b), brought by a single plaintiff on behalf of herself and “other similarly situated” employees, was no longer justiciable when the lone plaintiff’s individual claim became moot. The respondent brought the FLSA claim on behalf of herself and others who were similarly situated, but after she ignored an offer of judgment under Federal Rule of Civil Procedure 68 that would have fully satisfied her claim, and no other individuals had joined her suit, the district

court concluded that her suit was moot. The Third Circuit reversed, holding that her individual claim was moot but that her collective action was not. The Supreme Court agreed with the district court, holding that “[a] straightforward application of well-settled mootness principles” compelled the conclusion that because the respondent had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness, her suit was appropriately dismissed for lack of subject-matter jurisdiction. “[T]he mere presence of collective-action allegations in the complaint cannot save [a] suit from mootness once the individual claim has been satisfied.”

45. ***Millbrook v. United States*, No. 11-10362 (3d Cir., 2012 WL 1384918; cert. granted Sept. 25, 2012; argued on Feb. 19, 2013). Whether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to “execute searches, to seize evidence, or to make arrests for violations of federal law.”**

Decided Mar. 27, 2013 (568 U.S. __). Third Circuit/Reversed and remanded. Justice Thomas for a unanimous Court. Section 2680(h) of the Federal Tort Claims Act (“FTCA”) is known as the “law enforcement proviso” and extends the FTCA’s waiver of sovereign immunity to claims for six intentional torts that are based on the “acts or omissions” of an “investigative or law enforcement officer.” 28 U.S.C. § 2680(h). The Court held that Section 2680(h)’s waiver of immunity for the six intentional torts applies to all of the activities of law enforcement officers within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest. Petitioner Millbrook, a federal prisoner, sued the United States under the FTCA, alleging, *inter alia*, assault and battery by correctional officers. The district court and the Third Circuit granted summary judgment to the Government, holding that the “law enforcement proviso” applies only to tortious conduct that occurs during the course of executing a search, seizing evidence, or making an arrest. The Supreme Court disagreed. Relying on Section 2680(h)’s plain language and its cross-reference to Section 1346(b) of the FTCA, the Court observed that the law enforcement proviso waived immunity for six intentional torts resulting from the “acts or omissions” of an “investigative or law enforcement officer” that occur while the officer is “acting within the scope of his employment.” Nothing in Section 2680(h)’s text, the Court reasoned, supported limiting the proviso to conduct arising out of searches, seizures of evidence, or arrests. Indeed, the FTCA’s only reference to those terms was in Section 2680(h)’s definition of “investigative or law enforcement officer,” which the Court understood to refer to the *status* of persons whose conduct might be actionable, not the types of activities that may give rise to the claim.



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46. ***Comcast Corp. v. Behrend*, No. 11-864 (3d Cir., 655 F.3d 182; cert. granted June 25, 2012; argued on Nov. 5, 2012).** Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

Decided Mar. 27, 2013 (568 U.S. __). Third Circuit/Reversed. Justice Scalia for a 5-4 Court (Ginsburg and Breyer, JJ., dissenting, joined by Sotomayor and Kagan, JJ.). The Court held that a class of Comcast subscribers was improperly certified under Federal Rule of Civil Procedure 23(b)(3) because the class's damages model failed to establish that damages could be calculated on a class-wide basis. A putative class of Comcast cable television subscribers sued Comcast and its subsidiaries, alleging that the practice of "clustering" operations violates federal antitrust laws. "Clustering" is a strategy of concentrating operations in a region by swapping systems outside the region for competitor systems inside the region. The class claimed that it was harmed by Comcast's "clustering" strategy because it lessened competition and created supra-competitive prices. The class sought certification under Federal Rule of Civil Procedure 23(b)(3), which permits certification only if "the court finds that the questions of law or fact predominate over any questions affecting only individual members." The district court required the class to show that (1) the "antitrust impact" of the violation could be proved at trial through evidence common to the class, and (2) the damages were measurable on a class-wide basis through a "common methodology." The district court accepted only one of the class's four proposed theories of antitrust impact: that Comcast's actions lessened competition from "overbuilders," *i.e.*, companies that build competing networks in areas where an incumbent cable company already operates. It then certified the class, finding that the damages from overbuilder deterrence could be calculated on a class-wide basis. The Third Circuit affirmed. The Supreme Court reversed, holding that the Third Circuit erred "[b]y refusing to entertain arguments against the [class's] damages model that bore on the propriety of class certification under Rule 23, simply because those arguments would also be pertinent to the merits determination." Specifically, the Third Circuit failed to evaluate the damages model to determine whether the damages it projected were tied to the single theory of liability approved by the district court. Because the model failed to measure damages resulting from the particular antitrust injury on which Comcast's liability was premised, it failed to demonstrate that damages could be calculated on a national basis. Accordingly, the class was improperly certified.

47. ***Florida v. Jardines*, No. 11-564 (Fl., 73 So. 3d 34; cert. granted Jan. 6, 2012, limited to Question 1; SG as amicus, supporting petitioner; argued on Oct. 31, 2012).** Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

Decided Mar. 26, 2013 (568 U.S. __). Florida Supreme Court/Affirmed. Justice Scalia for a 5-4 Court (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.; Alito, J., dissenting, joined by Roberts, C.J. and Kennedy and Breyer, JJ.).

The Court held that the use of a drug-sniffing dog to investigate a home and its surroundings is a “search” within the meaning of the Fourth Amendment. In 2006, police took a drug-sniffing dog to Joelis Jardines’s front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers sought and obtained a search warrant, which revealed marijuana plants. At Jardines’s trial for trafficking in cannabis, the trial court suppressed the marijuana plant evidence on the ground that the canine investigation was an unreasonable search in violation of the Fourth Amendment. The Supreme Court of Florida affirmed, and the Supreme Court agreed. The Court observed that a “search” within the meaning of the Fourth Amendment occurs when the Government obtains information by physically intruding on persons, houses, papers, or effects. The Court further noted that when it comes to the Fourth Amendment, “the home is first among equals” and that the “home” includes “curtilage,” or the area immediately surrounding and associated with the home. Because Jardines had not expressly or implicitly invited the police to engage in a canine forensic investigation on his front porch, the police had no license to conduct their investigation and violated the Fourth Amendment. Because the Court found that the search violated the Fourth Amendment, it declined to reach the question whether the officers’ investigation of Jardines’s home violated his expectation of privacy under *Katz v. United States*, 389 U.S. 347 (1967).

48. ***Wos v. E.M.A.*, No. 12-98 (4th Cir., 674 F.3d 290; cert. granted Sept. 25, 2012; SG as amicus, supporting respondents; argued on Jan. 8, 2013). The Question Presented is whether N.C. Gen. Stat. § 108A-57 is preempted by the Medicaid Act’s anti-lien provision as it was construed in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), an issue on which the North Carolina Supreme Court and the United States Court of Appeals for the Fourth Circuit are in conflict.**

Decided Mar. 20, 2013 (568 U.S. __). Fourth Circuit/Affirmed. Justice Kennedy for a 6-3 Court (Breyer, J., concurring; Roberts, C.J., dissenting, joined by Scalia and Thomas, JJ.). Fourth Circuit/Affirmed. Justice Kennedy for a 6-3 Court (Breyer, J., concurring; Roberts, C.J., dissenting, joined by Scalia and Thomas, JJ.). The Court held that the anti-lien provision of the federal Medicaid Act preempts a North Carolina law requiring that up to one-third of any damages recovered for tortious injury be paid to the State to reimburse it for the medical treatment payments it made on behalf of the injured party. When a State makes payments for medical treatment of an injured party, the federal Medicaid Act requires that the State seek reimbursement of those payments out of any tort recovery by the injured party. But an anti-lien provision in the Medicaid Act also prohibits the State from taking any portion of those damages that are not “designated as payments for medical care.” North Carolina’s law—as construed by the North Carolina Supreme Court—creates an irrebuttable presumption that if the State’s medical payments exceed one-third of the injured party’s tort recovery, one-third of that recovery is designated as payments for medical care, even if the settlement or a jury verdict attributes less than one-third of the recovery to medical care. Thus, North Carolina argued, because the law designates that portion as attributable to medical care, the State does not violate the anti-lien provision by

claiming one-third of the recovery. Respondent E.M.A. recovered a tort settlement for medical malpractice, and the State attempted to claim one-third of the settlement under the law. The tort settlement did not allocate damages between medical and nonmedical claims. E.M.A. then claimed that the State's reimbursement scheme violated the federal anti-lien provision, and the Court agreed. Because the North Carolina law would permit, in some cases, the State to take portions of tort recoveries that were not actually attributable to medical expenses, the Court held that the law violates the anti-lien provision and is therefore preempted. Rather than providing a process for determining what portion of a tort recovery is actually attributable to medical expenses, the North Carolina law effectively applied an across-the-board presumption that one-third of the recovery represents medical expenses. The Court explained that this "irrebuttable, one-size-fits-all statutory presumption is incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses." Thus, a judicial finding or approval of an allocation between medical and nonmedical damages is binding as to the State's recovery. And in cases where, as here, the recovery does not allocate money among the medical and nonmedical claims, trial judges and trial lawyers "can find objective benchmarks to make projections of the damages" likely attributable to medical expenses, which the State may recover.

49. ***Decker v. Northwest Envtl. Defense Ctr.*, No. 11-338, *Georgia-Pacific West v. Northwest Envtl. Defense Ctr.*, No. 11-347 (9th Cir., 640 F.3d 1063; cert. granted June 25, 2012, cases consolidated; SG as amicus, supporting petitioners; argued on Dec. 3, 2012). The Questions Presented are: (1) Whether the Ninth Circuit erred when, in conflict with other circuits, it held that a citizen may bypass judicial review of a National Pollutant Discharge Elimination System ("NPDES") permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the Clean Water Act ("CWA"). (2) Whether the Ninth Circuit erred when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater.**

Decided Mar. 20, 2013 (568 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for a 7-1 Court (Roberts, C.J., concurring in part, joined by Alito, J.; Scalia, J., dissenting in part and concurring in part). The Court held that the Environmental Protection Agency's interpretation of its Industrial Stormwater Rule—a regulation implementing the Clean Water Act that EPA has since amended—was reasonable and must be accorded deference under *Auer v. Robbins*, 519 U.S. 452 (1997). At issue was whether the EPA had reasonably determined that, under its rule, a permit is not required "before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States." Reiterating the "well established" rule "that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail," the Court held that the EPA's interpretation of the Industrial Stormwater Rule was a permissible one, both because the regulation's language "leave[s] open



the rational interpretation” reached by the EPA, and because “there is no indication that [EPA’s] current view is a change from prior practice or a post hoc justification adopted in response to litigation.” Additionally, the Court concluded that even though the EPA had since amended its Rule, the case nonetheless presented “a live controversy . . . regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule.” And the Court determined that because the case was a “citizen suit” designed “not to challenge [a regulation] but to enforce it under a proper interpretation,” the suit did not fall under the “exclusive jurisdiction mandate” of 33 U.S.C. § 1369(b), which requires that an application for review be lodged in the court of appeals within 120 days of the EPA administrator’s action.

50. *Standard Fire Insurance Company v. Knowles*, No. 11-1450 (8th Cir., No. 11-8030, unreported; cert. granted Aug. 31, 2012; argued on Jan. 7, 2013). **Whether, after *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), when a named plaintiff attempts to defeat a defendant’s right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a “stipulation” that attempts to limit the damages he “seeks” for the absent putative class members to less than the \$5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, *absent* the “stipulation,” exceeds \$5 million, is the “stipulation” binding on absent class members so as to destroy federal jurisdiction?**

Decided Mar. 19, 2013 (568 U.S. __). Eighth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. Greg Knowles filed a putative class action in Arkansas state court against the Standard Fire Insurance Company. Knowles sought to certify a class of Arkansas policyholders and attached an affidavit to the complaint stipulating that he would “not at any time during this case . . . seek damages for the class . . . in excess of \$5,000,000 in the aggregate.” Standard Fire removed the case to federal district court under the Class Action Fairness Act of 2005 (“CAFA”), arguing that the amount in controversy exceeded CAFA’s \$5 million amount-in-controversy requirement. Although the district court found that the amount in controversy would have been above the \$5 million threshold absent the stipulation, it remanded the case to state court in light of the stipulation. The Court held that Knowles’ stipulation cannot defeat federal jurisdiction under CAFA. It explained that “stipulations must be binding,” and a plaintiff “who files a proposed class action cannot legally bind members of the proposed class before the class is certified.” Because the stipulation did not bind anyone other than Knowles, he had not reduced the value of the putative class members’ claims. The Court further stated that, by its plain terms, CAFA provides that “the claims of the individual class members shall be aggregated” to determine whether jurisdiction exists. 28 U.S.C. § 1332(d)(6). Thus, the statute commands the district court “to determine whether it has jurisdiction by adding up the value of the claim of each person who falls within the definition of [a] proposed class and determine whether the resulting sum exceeds \$5 million.” If the sum exceeds \$5 million, the district court has jurisdiction under CAFA.



51. *Supap Kirtsaeng, dba Bluechristine99 v. John Wiley & Sons, Inc.*, No. 11-697 (2d Cir., 654 F.3d 210; cert. granted Apr. 16, 2012; SG as amicus, supporting respondent; argued on Oct. 29, 2012). **How do Section 602(a)(1) of the Copyright Act, which makes it impermissible to import a work “without the authority of the owner” of the copyright, and Section 109(a), which allows the owner of a copy “lawfully made under this title” to sell or otherwise dispose of the copy without the copyright owner’s permission, apply to a copy that was made and legally acquired abroad and then imported into the United States? Can such a foreign-made product never be resold in the United States without the copyright owner’s permission; sometimes be resold within the United States without permission, but only after the owner approves an earlier sale in the United States; or always be resold without permission within the United States, so long as the copyright owner authorized the first sale abroad?**

Decided Mar. 19, 2013 (568 U.S. __). Second Circuit/Reversed and remanded. Justice Breyer for a 6-3 Court (Kagan, J., concurring, joined by Alito, J.; Ginsburg, J., dissenting, joined by Kennedy, J. and joined in part by Scalia, J.). The Court held that the “first sale” doctrine applies to copies of copyrighted work legally produced and sold outside of the United States. The Copyright Act grants copyright owners the “exclusive right” to distribute their copyrighted work, subject to certain limitations. One such limitation is the “first sale” doctrine, which allows the owner of a particular copy of copyrighted work—“lawfully made under this title”—to resell the copy as he wishes. At the same time, the Copyright Act provides that the importation of copyrighted work into the United States without the copyright owner’s permission violates the copyright owner’s exclusive right of distribution. The Court determined that the “first sale” doctrine’s application to copies “lawfully made under this title” includes all copies that are made in compliance with the Copyright Act, even if those copies are made outside of the United States. Therefore, the Act’s importation provision does not prohibit a buyer from legally purchasing a copy in another country and then reselling it in the United States without the copyright owner’s provision. The Court concluded that this interpretation of the Copyright Act was supported by the text, history, and context of the “first sale” doctrine provision, and by the “first sale” doctrine’s common-law history.

52. *Levin v. United States*, No. 11-1351 (9th Cir., 663 F.3d 1059; cert. granted Sept. 25, 2012; argued on Jan. 15, 2013). **Whether suit may be brought against the United States for battery committed to a civilian by military medical personnel acting within the scope of their employment.**

Decided Mar. 4, 2013 (568 U.S. __). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Scalia, J., declining to join footnotes 6 and 7). The Court held that 10 U.S.C. § 1089(e) establishes a right to bring a medical battery claim against the United States under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-2680, for injuries suffered at the hands of armed forces medical personnel, notwithstanding the intentional tort exception to the FTCA in § 2680(h). Section 1089(e) of the FTCA provides: “For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any

cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions.” The Government suggested that this language existed only to support another provision in the FTCA that immunizes federal officials against medical malpractice suits. *See* 28 U.S.C. § 1089(a). But the Court held that the Government’s proposed reading was “unnatural,” and the plainest reading of § 1089(e) is to remove the immunity that otherwise exists for intentional tort suits against the United States. In fact, the Government previously offered precisely this construction of § 1089(e) to the Court in *United States v. Smith*, 499 U.S. 160 (1991), and the Court accepted it. The Government’s attempts in this case to disavow that reading and inject ambiguity into the statute were unavailing.

53. *Amgen, Inc. v. Connecticut Retirement Plan*, No. 11-1085 (9th Cir., 660 F.3d 1170; cert. granted June 11, 2012; argued on Nov. 5, 2012; SG as amicus, supporting respondent). The Questions Presented are: (1) Whether, in a misrepresentation case under SEC Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory. (2) Whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.

Decided Feb. 27, 2013 (568 U.S. ____). Ninth Circuit/Affirmed. Justice Ginsburg for a 6-3 Court (Scalia, J., dissenting and Thomas, J. dissenting; joined by Kennedy, J. and Scalia, J. except for Part 1-B). The Court held that, in securities class actions challenging false or misleading statements, the plaintiff need not prove that the alleged misstatements were material in order to obtain class certification using the so-called fraud-on-the-market presumption of reliance. In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Court recognized that “the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class.” However, the *Basic* Court held that “if a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities,” thereby preventing the element of reliance from becoming an insuperable barrier to class certification. Connecticut Retirement sought to invoke this presumption, and Amgen argued that Connecticut Retirement could not obtain class certification unless it proved the materiality of the challenged statements. The district court disagreed and certified a class action under Federal Rule of Civil Procedure 23(b)(3). The Ninth Circuit affirmed, and the Supreme Court agreed, holding that “[w]hile [the plaintiff] certainly must prove materiality to prevail on the merits, . . . such proof is not a prerequisite to class certification.” The Supreme Court gave two reasons for its decision. First, “[b]ecause materiality is judged according to an objective standard, the materiality of . . . alleged misrepresentations and omissions is a question common to all members of [a proposed] class.” Second, “the plaintiff class’s inability to prove materiality would not result in individual questions predominating. Instead, a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members’ securities-fraud claims.”

In short, the class was “entirely cohesive” on the issue of materiality. Because “Amgen’s rebuttal evidence aimed to prove that the misrepresentations and omissions alleged in Connecticut Retirement’s complaint were immaterial,” the Court also rejected the argument that the district court erred by refusing to consider this evidence at the certification stage for the same reasons.

54. ***Gabelli v. SEC*, No. 11-1274 (2d Cir., 653 F.3d 49; cert. granted Sept. 25, 2012; argued on Jan. 8, 2013). Whether for purposes of applying the five-year limitations period under 28 U.S.C. § 2462—which provides that “except as otherwise provided by Act of Congress” any penalty action brought by the Government must be “commenced within five years from the date when the claims first accrued”—the Government’s claim first accrues when the Government can first bring an action for a penalty, where Congress has not enacted a separate controlling provision.**

Decided Feb. 27, 2013 (568 U.S. ____). Second Circuit/Reversed and remanded. Chief Justice Roberts for a unanimous Court. The Court held the statute of limitations applicable to the Investment Advisers Act and many other penalty provisions of the U.S. Code, 28 U.S.C. § 2462, begins to run when the alleged fraud occurs, not when it is discovered. The Court noted that the “standard rule” is that a claim accrues “when the plaintiff has a complete and present cause of action.” This rule advances the purposes of the statutes of limitation—which are repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities. The Court held that the discovery rule exception to statutes of limitation, which was created to protect individuals who had been unknowingly defrauded, does not apply to the Government when it brings an enforcement action for penalties. The Court noted several reasons the discovery rule did not apply. First, the Government is more equipped than private plaintiffs to root out and discover fraud. Second, the Court reasoned that the Government seeks different remedies than a private plaintiff. And finally, the Court noted that it would be quite difficult for lower courts to determine when the “[G]overnment” knew or reasonably should have known of fraud.

55. ***Clapper v. Amnesty Int’l USA*, No. 11-1025 (2d Cir., 638 F.3d 118; cert. granted May 21, 2012; argued on Oct. 29, 2012). Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance under Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a (Supp. II 2008), and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.**

Decided Feb. 26, 2013 (568 U.S. ____). Second Circuit/Reversed and remanded. Justice Alito for a 5-4 Court (Breyer, J., dissenting; joined by Ginsburg, Sotomayor, and Kagan, JJ.). Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U. S. C. § 1881a, which was enacted as part of the FISA Amendments Act, allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the

surveillance of individuals who are not “United States persons” and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court’s approval. Respondents were United States persons whose work, they alleged, requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under § 1881a. Respondents sought a declaration that § 1881a is unconstitutional under the Fourth and First Amendments, Article III, and separation of powers principles, as well as a permanent injunction against surveillance authorized under § 1881a. Respondents proffered two theories of standing: (1) there was an objectively reasonable likelihood that their communications would be acquired under § 1881a at some point in the future; and (2) the risk of surveillance under § 1881a was so substantial that they had been forced to take costly and burdensome measures to protect the confidentiality of their international communications. The Court rejected both theories, holding that respondents lacked Article III standing to pursue their challenge to 50 U.S.C. § 1881a. The Court reasoned that respondents’ lawsuit was based on a “chain of contingencies” that would have to occur before their communications might be at risk of eavesdropping. Because respondents had failed to show that harms to them were “certainly impending,” as required in the Court’s precedent, *Whitmore v. Arkansas*, 495 U. S. 149, 158 (1990), or “fairly traceable” to § 1881a, they could not satisfy Article III’s standing requirements. Moreover, respondents could not “manufacture standing by choosing to make expenditures based on hypothetical future harm.”

56. *Marx v. General Revenue Corp.*, No. 11-1175 (10th Cir., 668 F.3d 1174; cert. granted May 29, 2012; SG as amicus, supporting petitioner; argued on Nov. 7, 2012). Whether a prevailing defendant in a case under the Fair Debt Collection Practices Act may be awarded costs where the lawsuit was not “brought in bad faith and for the purpose of harassment” under 15 U.S.C. § 1692k(a)(3).

Decided Feb. 26, 2013 (568 U.S. ____). Tenth Circuit/Affirmed. Justice Thomas for a 7-2 Court (Sotomayor, J., dissenting; joined by Kagan, J.). The Court held that under Federal Rule of Civil Procedure 54(d)(1), a prevailing defendant in a Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692, suit may be awarded costs where the lawsuit was not brought in bad faith and for the purpose of harassment. Section 1692k(a)(3) of the FDCPA provides that “[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney’s fees reasonable in relation to the work expended and costs.” Federal Rule of Civil Procedure 54(d)(1) gives district courts discretion to award costs to prevailing defendants “[u]nless a federal statute . . . provides otherwise.” Here, the petitioner had defaulted on a student loan and brought suit against the debt collector, General Revenue Corp., claiming that it used illegal debt collection practices in violation of the FDCPA. The district court ruled for General Revenue Corp., finding that petitioner had failed to provide evidence of any FDCPA violation. General Revenue Corp. moved for remuneration for costs, and the district court awarded

them under Federal Rule of Civil Procedure 54(d)(1). The Tenth Circuit affirmed, and the Supreme Court agreed, holding that Section 1629k(a)(3) did not displace Federal Rule of Civil Procedure 54(d)(1) and “the venerable presumption that prevailing parties are entitled to costs,” and therefore the district court had discretion to award costs to a prevailing defendant in an FDCPA case without finding that the plaintiff brought the case in bad faith and for the purpose of harassment.

57. *Chaidez v. United States*, No. 11-820 (7th Cir., 655 F.3d 684; cert. granted Apr. 30, 2012; argued on Nov. 1, 2012). Whether *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in which the Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation, applies to persons whose convictions became final before its announcement.

Decided Feb. 20, 2013 (568 U.S. ____). Seventh Circuit/Affirmed. Justice Kagan for a 7-2 Court (Thomas, J., concurring in the judgment. Sotomayor, J., dissenting; joined by Ginsburg, J.). The Court held that *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that the Sixth Amendment requires criminal defense attorneys to inform their clients of the deportation implications of guilty pleas, does not apply retroactively to cases already final on direct review. At the time *Padilla* was announced, petitioner Chaidez—a lawful permanent resident of the United States seeking to avoid deportation—had already petitioned a federal district court to vacate her 2004 conviction for mail fraud. Applying *Teague v. Lane*, 489 U.S. 288 (1989), in which the Supreme Court held that when a federal court announces a new rule of criminal procedure, it cannot be applied retroactively in cases on collateral review, the district court vacated Chaidez’s conviction. The district court reasoned that *Padilla* was not a “new rule” under *Teague*, but rather a new application of the well-established rule that attorneys in criminal cases must provide reasonably effective assistance. On appeal, a divided panel of the Seventh Circuit reversed, holding instead that *Padilla* announced a new rule that could not be applied retroactively to Chaidez’s challenge. The Court agreed with the Seventh Circuit, finding that *Padilla* did more than straightforwardly apply the test from *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether failure to inform a criminal defendant of the potential immigration implications of a guilty plea constituted ineffective assistance of counsel. Instead, *Padilla* crafted a new rule by resolving the threshold question of whether immigration implications constituted only a “collateral consequence” of a criminal conviction. In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Supreme Court explicitly left open the question of whether advice concerning such collateral consequences is subject to Sixth Amendment requirements. Therefore, when the Court in *Padilla* held that advice about the immigration implications of guilty pleas falls within the ambit of the Sixth Amendment, it crafted a “new rule” under *Teague*. Accordingly, “defendants whose convictions became final prior to *Padilla*”—including petitioner Chaidez—“cannot benefit from its holding.”

58. ***Evans v. Michigan*, No. 11-1327 (Mich. Sup. Ct., 491 Mich. 1; cert. granted June 11, 2012; SG as amicus, supporting respondent; argued on Nov. 6, 2012). Whether the Double Jeopardy Clause of the U.S. Constitution bars retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a mistrial-directed verdict of acquittal because the prosecution failed to prove that fact.**

Decided Feb. 20, 2013 (568 U.S. ____). Supreme Court of Michigan/Reversed. Justice Sotomayor for an 8-1 Court (Alito, J., dissenting). The Court held that the Double Jeopardy Clause bars retrial following a court-directed acquittal, even if the acquittal is erroneous. The petitioner set fire to an unoccupied house and was charged with burning “other real property” in violation of Michigan state law. Juxtaposing his charged offense with Michigan’s common-law arson offense, which requires that the burned structure be a dwelling, petitioner argued that the State failed to prove an element of the charged offense because the State did not introduce evidence that the building was *not* a dwelling house. The trial court agreed, granting an acquittal on grounds that the prosecution failed to provide evidence of an element that it was not, in fact, required to prove. The Michigan Court of Appeals reversed and remanded, holding that the State was not required to prove that the building was *not* a dwelling house because burning “other real property” is a lesser included offense of Michigan’s common-law arson offense and thus that the Double Jeopardy Clause did not bar Evans’s retrial. The Supreme Court of Michigan affirmed. Relying on decades of well-settled double jeopardy precedent, the Supreme Court reversed. The Court first recognized that for the purposes of the Double Jeopardy Clause, “[a] mistaken acquittal is an acquittal nonetheless,” even if its foundation is “egregiously erroneous.” *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam). The Court read *Fong Foo* and its progeny to define an acquittal as encompassing any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense. Stressing the line between procedural dismissals unrelated to factual guilt or innocence and substantive rulings that go to the defendant’s lack of criminal culpability, the Court held that the trial court’s ruling in this case related to the ultimate question of petitioner’s guilt or innocence. Because the judgment of acquittal—however erroneous—resolved the question of petitioner’s guilt or innocence on the basis of the sufficiency of the evidence, rather than on unrelated procedural grounds, the trial court’s ruling concluded the proceedings absolutely. The Court dismissed respondent’s proposed distinction between a trial court erroneously adding an extraneous “element” and a trial court “misinterpret[ing]” or “misconstru[ing]” a statute as “far too fine a distinction to be meaningful.” The antecedent legal error here affected only the accuracy of the determination to acquit, not its essential character—that of acquittal. The Court also declined to revisit the line of cases flowing from *Fong Foo*, which purported to distinguish substantive and procedural rulings for purposes of the Double Jeopardy Clause.

59. ***Johnson v. Williams*, No. 11-465 (9th Cir., 646 F.3d 636; cert. granted Jan. 13, 2012, limited to Question 1; argued on Oct. 3, 2012). Whether a habeas petitioner’s claim has been “adjudicated on the merits” for purposes of**

28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.

Decided Feb. 20, 2013 (568 U.S. ____). Ninth Circuit/Reversed and remanded. Justice Alito for a 9-0 Court (Scalia, J., concurring in the judgment). The Court held that, for purposes of 28 U.S.C. § 2254(d), a federal habeas court must presume, subject to rebuttal, that a federal claim was “adjudicated on the merits in State court” when a state court rules against a defendant in an opinion that addresses some issues but does not expressly address the federal claim. The Court reasoned that this conclusion followed from its earlier decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), in which it held that a federal habeas court must likewise presume that a claim has been adjudicated on the merits when a state court issues an order summarily rejecting all claims raised by a defendant, including a federal claim that the defendant later raises in a federal habeas proceeding. The Court suggested that the presumption can be rebutted—either by the habeas petitioner (to show that the federal claim should be reviewed de novo) or by the state (to show that the federal claim is procedurally defaulted)—where a state standard is less protective than the applicable federal standard or where the federal precedent is mentioned in passing. With respect to the federal claim at issue in this case (a Sixth Amendment jury trial claim), the Court found that the presumption was not adequately rebutted.

60. ***Henderson v. United States*, No. 11-9307 (5th Cir., 646 F.3d 223; cert. granted June 25, 2012; argued on Nov. 28, 2012).** Whether, when the governing law is unsettled at the time of trial but settled in the defendant’s favor by the time of appeal, an appellate court reviewing for “plain error” should apply the time-of-appeal standard in *Johnson v. United States*, 520 U.S. 461 (1997), as the First, Second, Sixth, Tenth, and Eleventh Circuits do, or should apply the Ninth Circuit’s time-of-trial standard, which the D.C. Circuit and Fifth Circuit have adopted.

Decided Feb. 20, 2013 (568 U.S. ____). Fifth Circuit/Reversed and remanded. Justice Breyer for a 6-3 Court (Scalia, J., dissenting, joined by Thomas and Alito, JJ.). The Court held that as long as an error is “plain” under Rule 52(b) *at the time of appellate review*, the appellate court may consider the error even though it was not brought to the trial court’s attention. In *Johnson v. United States*, 520 U.S. 461 (1997), the Court held that an appellate court may review an error that was clearly correct under circuit precedent when made, but that has since become plainly erroneous due to an intervening authoritative legal decision. *Johnson* thus forecloses the government’s position here—that whether an error was plain should always be determined based on the law at the time the error was made. In light of Rule 52’s general concern for fairness, and *Johnson*’s holding that plain error review applies to errors that were clearly correct when the lower court ruled, there is no reason why plain error review should not also apply to errors that were merely unsettled when the lower court ruled. To hold otherwise would bring about unjustifiably different treatment among similarly situated defendants. Moreover, there is no reason to think defense counsel will deliberately refrain from presenting

claims of error to the trial court on the chance that those issues will be resolved in their favor prior to the appeal.

61. ***Gunn v. Minton*, No. 11-1118 (Tex., 355 S.W.3d 634; cert. granted Oct. 5, 2012; argued on Jan. 16, 2013). Did the Federal Circuit depart from the standard this Court articulated in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), for “arising under” jurisdiction of the federal courts under 28 U.S.C. § 1338, when it held that state law legal malpractice claims against trial lawyers for their handling of underlying patent matters come within the exclusive jurisdiction of the federal courts? Because the Federal Circuit has exclusive jurisdiction over appeals involving patents, are state courts and federal courts strictly following the Federal Circuit’s mistaken standard, thereby magnifying its jurisdictional error and sweeping broad swaths of state law claims—which involve no actual patents and have no impact on actual patent rights—into the federal courts?**

Decided Feb. 20, 2013 (568 U.S. ___). Texas Supreme Court/Reversed and remanded. Chief Justice Roberts for a unanimous Court. The Court held that 28 U.S.C. § 1338(a), which vests jurisdiction over cases “arising under” federal patent law exclusively in the Federal Circuit, does not deprive state courts of subject matter jurisdiction over a legal malpractice claim that relates to a question of patent law. Under *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005), a state-law cause of action arises under federal law when it presents a federal issue that is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disturbing the federal-state balance that Congress created. Here, the first two requirements were met: the plaintiff could prevail on his malpractice claim only by showing that his attorney failed to make a patent law argument that would have changed the outcome of his underlying patent suit. But the patent issue was not “substantial” under *Grable*, which focuses on the importance of the issue to the federal system as a whole, not whether the issue is important in the case before the court. Because this plaintiff brought a malpractice case, the patent issue arose only in a hypothetical sense by imagining a world in which the plaintiff’s attorney argued the patent case differently. Accordingly, allowing a state court to hear the plaintiff’s malpractice claim would not undermine the development of a uniform body of patent law and would not deprive the Federal Circuit of its authority to resolve novel patent issues itself. The case also failed to satisfy *Grable*’s fourth requirement, the Court reasoned, because states have a special interest in maintaining standards of practice for attorneys, and there was no reason to suppose Congress intended to require that malpractice cases be heard in federal court simply because they involve a tangential question of patent law.

62. ***Florida v. Harris*, No. 11-817 (Supreme Court of Florida, 71 So. 3d 756; cert. granted Mar. 26, 2012; SG as amicus, supporting petitioner; argued on Oct. 31, 2012). Whether an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle.**

Decided Feb. 19, 2013 (568 U.S. ____). Supreme Court of Florida/Reversed. Justice Kagan for a unanimous Court. The Court held that the State’s introduction into evidence of an exhaustive set of records, including a log of the narcotics detection dog’s prior performance in the field, is not required to establish that an alert by the dog established probable cause to search a vehicle. The Court concluded that such a requirement would be inconsistent with the practical, common-sense, totality-of-the-circumstances test the Court’s precedents have consistently used to ascertain the existence of probable cause. The decision below, the Court explained, “flouted this established approach to determining probable cause” by creating “a strict evidentiary checklist, whose every item the State must tick off.” The Court rejected the premise that records of a dog’s prior field performance are “the gold standard” of reliability, concluding instead that the better measure of a dog’s reliability “comes away from the field, in controlled testing environments.” The Court emphasized that the decisive question at a probable-cause hearing is not whether law enforcement has complied with an “inflexible set of evidentiary requirements.” Rather, the question “is whether all the facts surrounding a dog’s alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.”

63. ***FTC v. Phoebe Putney Health*, No. 11-1160 (11th Cir., 663 F.3d 1369; cert. granted June 25, 2012; argued on Nov. 26, 2012).** The Questions Presented are: (1) Whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has “clearly articulated and affirmatively expressed” a “state policy to displace competition” under the “state action doctrine” in the market for hospital services. (2) Whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital’s operation.

Decided Feb. 19, 2013 (568 U.S. ____). Eleventh Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that the state-action immunity doctrine, which exempts certain acts of local governmental entities from federal antitrust scrutiny, does not apply to special-purpose “hospital authorities” created by state law and granted general corporate powers. Under the state-action immunity doctrine, the activities of local governmental entities are immune from federal antitrust laws if they are undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition. *Cnty. Commc’ns Co. v. Boulder*, 455 U.S. 40, 52 (1982). This test is satisfied if the anticompetitive effect of the local entity’s action was the “foreseeable result” of that which the state authorized. The Court held that a Georgia law that created public hospital authorities to serve the state’s indigent population, and then granted those authorities general corporate powers such as the ability to acquire hospitals, was not sufficient to pass the clear articulation test. Nothing about Georgia’s grant of general corporate powers, the Court reasoned, indicated that the state had foreseen and implicitly endorsed any anticompetitive effects that might result from the

activities of the hospital authorities. Therefore, the Court held that the hospital authorities were not immune from federal antitrust review.

64. ***Bailey v. United States*, No. 11-770 (2d Cir., 652 F.2d 197; cert. granted June 4, 2012; argued on Nov. 1, 2012). Whether, pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.**

Decided Feb. 19, 2013 (568 U.S. ____). Second Circuit/Reversed and remanded. Justice Kennedy for a 6-3 Court. (Scalia, J., concurring; joined by Ginsburg and Kagan, JJ. Breyer, J., dissenting; joined by Thomas and Alito, JJ.) After observing him depart his apartment home, police detained Chunon Bailey pursuant to a warrant to search the premises. Bailey was seized approximately one mile away from his apartment home. Bailey moved to suppress evidence derived from his seizure. The United States District Court for the Eastern District of New York denied the motion to suppress, and the Second Circuit Court of Appeals affirmed that ruling. The Court of Appeals interpreted the Supreme Court’s opinion in *Michigan v. Summers*, 452 U.S. 692 (1981), “to authorize[e] law enforcement to detain an occupant of premises subject to a valid search warrant *when the person is seen leaving those premises and the detention is effected as soon as reasonably possible.*” 652 F.3d 197, 208 (2011) (emphasis added). The Supreme Court reversed the Court of Appeals, holding that *Summers* only justifies the detention of occupants within the immediate vicinity of the premises to be searched. The Court reasoned that none of the three law enforcement interests identified as justifying the detention in *Summers*—officer safety, facilitating the completion of the search, and preventing flight—“applies with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched.” The Court also noted that detention away from the premises more closely “resemble[s] a full-fledged arrest” than detention of a current occupant incidental to a search of the premises, which the Court has described as “only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant.”

65. ***Chafin v. Chafin*, No. 11-1347 (11th Cir., 2012 WL 231213; cert. granted Aug. 13, 2012; SG as amicus, supporting petitioner; argued on Dec. 5, 2012). Whether an appeal of a District Court’s ruling on a Petition for Return of Children pursuant to the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction becomes moot after the child at issue returns to his or her country of habitual residence, as in the Eleventh Circuit’s *Bekier v. Bekier*, 248 F.3d 1051 (2001), leaving the United States Court system lacking any power or jurisdiction to affect any further issue in the matter or should the United States Courts retain power over their own appellate process, as in the Fourth Circuit’s *Fawcett v. McRoberts*, 326 F.3d 491 (2003), and maintain jurisdiction throughout the appellate process giving the concerned party an opportunity for proper redress.**

Decided Feb. 19, 2013 (568 U.S. ___). 11th Circuit/Vacated and remanded. Chief Justice Roberts for a 9-0 Court (Ginsburg, J., concurring; joined by Scalia and Breyer, JJ.). In 1988, the United States ratified the Hague Convention on the Civil Aspects of International Child Abduction and passed ICARA as implementing legislation. ICARA directs U.S. courts to order the prompt return of any children removed from their country of habitual residence in violation of a custody determination of that foreign country. In general, ICARA also provides that courts ordering a child's return must require defendants to pay the plaintiffs' legal fees and the child's transportation costs. After petitioner filed for a divorce and child custody in Alabama state court, respondent initiated this case in the District Court for the Northern District of Alabama, seeking an order under ICARA for the return of their minor daughter, E.C., to Scotland. The district court ruled in favor of respondent, who then returned to Scotland with E.C. The Eleventh Circuit dismissed petitioner's appeal of the district court order, reasoning that appeal of a return order is moot after the child has been removed from the United States pursuant to that order. The Supreme Court disagreed, holding that such a case is not moot and that U.S. courts retain jurisdiction to hear an appeal of a return order even after the child has been returned to his or her country of habitual residence. The Court explained that petitioner's dispute was still alive because he continued to contest key issues in the case and because the relief he sought—reversal of the district court's removal order and vacatur of the court's expense orders—was typical appellate relief. Although enforcement of any order in petitioner's favor may be uncertain given respondent's and E.C.'s current residence overseas, "such uncertainty does not typically render cases moot" because there is still "a possibility of effectual relief for the prevailing parent."

66. ***Sebelius v. Auburn Regional Medical Center*, No. 11-1231 (D.C. Cir., 642 F.3d 1145; cert. granted June 25, 2012; argued on Dec. 4, 2012). Whether the 180-day statutory time limit under 42 U.S.C. § 1395oo(a)(3), for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary is subject to equitable tolling.**

Decided Jan. 22, 2013 (568 U.S. ___). D.C. Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Sotomayor, J., concurring). The Court held that (1) Section 1395oo(a)(3)'s 180-day statutory time limit for filing an appeal of Medicare reimbursements with the Provider Reimbursement Review Board (PRRB) is not jurisdictional, (2) the HHS Secretary's regulation extending Section 1395oo(a)(3)'s 180-day window to three years after notice of the reimbursement amount upon a showing of "good cause" is a permissible interpretation of Section 1395oo(a)(3), and (3) the Secretary's regulatory requirement is not subject to equitable tolling. In 2006, respondent hospitals learned that there had been a systematic undercalculation of their Medicare reimbursements from 1987 through 1994. Within 180-days of learning about the miscalculation, the hospitals filed an appeal with the PRRB, seeking remuneration for the underpayment. The Secretary of Health and Human Services had adopted a regulation permitting hospitals to file appeals for up to three years from the time they received word of their reimbursement rate from the financial contractor, if they could show "good cause"

for failing to meet the usual 180-day deadline set by Section 1395oo(a)(3). Because the hospitals had filed more than ten years after expiration of the statutory deadline, the PRRB dismissed the appeals on grounds that it lacked jurisdiction and had no equitable powers to extend the window beyond the Secretary's three year outer limit. The D.C. Circuit reversed, finding that equitable tolling was available to the hospitals as a matter of fairness. The Supreme Court disagreed, holding that Section 1395oo(a)(3) did not limit PRRB's jurisdiction to hear the hospital's appeals because Congress did not clearly state that Section 1395oo(a)(3) was jurisdictional and that the Secretary's regulation was both reasonable and not subject to equitable tolling. The Court noted that it had never applied the presumption of equitable tolling to an agency's internal appeal deadline, and explained that the imposition of tolling would "essentially gut the Secretary's [time] requirement." Because the Secretary's administrative regime survived *Chevron* review, it was entitled to deference, and the respondents' complaint was lawfully time-barred.

67. ***Lozman v. Riviera Beach*, No. 11-626 (11th Cir., 649 F.3d 1259; cert. granted Feb. 21, 2012; SG as amicus, supporting petitioner; supplemental briefing on mootness ordered Aug. 14, 2012; argued on Oct. 1, 2012). Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.**

Decided Jan. 15, 2013 (568 U.S. ___). Eleventh Circuit/Reversed. Justice Breyer for a 7-2 Court. Sotomayor, J., dissenting; joined by Kennedy, J.). Petitioner Lozman's floating home was a house-like plywood structure with empty bilge space underneath the main floor to keep it afloat. He had it towed several times before deciding on a marina owned by the City of Riviera Beach. After various disputes with Lozman and unsuccessful efforts to evict him from the marina, the City brought a federal admiralty lawsuit in rem against the floating home, seeking a lien for dockage fees and damages for trespass. Lozman moved to dismiss the suit for lack of admiralty jurisdiction. The Supreme Court held that Lozman's floating home was not a "vessel" for purposes of 1 U.S.C. § 3, and therefore federal maritime jurisdiction was not triggered. The Court reasoned that, except for the fact that the structure floated, nothing about the floating home suggested that it was intended to transport people or cargo over water. The Court also observed that its interpretation of the statute was consistent with the statute's language and purpose, which "revealed little reason to classify floating homes as vessels" because owners of floating homes cannot easily escape liability by sailing away from their homes; faced no special sea dangers; and did not significantly engage in port-related commerce. Finally, the Court noted that its interpretation was consistent with state law in States in which owners of floating homes had congregated in communities, as those laws treat structures that meet the "floating home" definition like ordinary land-based homes rather than like "vessels."

68. ***Smith v. United States*, No. 11-8976 (D.C. Cir., 651 F.3d 30; cert. granted June 21, 2012; limited to Question 2; argued on Nov. 6, 2012). Whether**

withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, the burden of persuasion rests with the Government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period.

Decided Jan. 9, 2013 (568 U.S. __). D.C. Circuit/Affirmed. Justice Scalia for a unanimous Court. Petitioner was convicted of, among other things, criminal conspiracy to distribute illegal narcotics, and argued that the district court erred in instructing the jury that he must prove beyond a reasonable doubt that he did not withdraw from the conspiracy outside the applicable statute of limitations. The Court of Appeals affirmed his conviction, and the Supreme Court affirmed. The Court reasoned that requiring a defendant to prove withdrawal does not violate the Due Process Clause because “[w]ithdrawal does not negate an element of the conspiracy crimes,” and “although union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability, it does not place upon the prosecution a constitutional responsibility to prove that he did not withdraw.” Instead, as with other affirmative defenses, the burden is properly placed on the defendant. Moreover, although Congress could have reassigned the burden to the prosecution, it did not do so here—a “practical and fair” approach because “[o]n the matter of withdrawal, the informational asymmetry heavily favors the defendant.”

69. ***Already, LLC v. Nike, Inc.*, No. 11-982 (2d Cir., 663 F.3d 89; cert. granted June 25, 2012; SG as amicus, supporting vacatur and remand; argued on Nov. 7, 2012). Whether a federal district court is divested of Article III jurisdiction over a party’s challenge to the validity of a federally registered trademark if the registrant promises not to assert its mark against the party’s then-existing commercial activities.**

Decided Jan. 9, 2013 (568 U.S. __). Second Circuit/Affirmed. Chief Justice Roberts for a 9-0 Court (Kennedy, J., concurring; joined by Thomas, Alito, and Sotomayor, JJ.). Nike filed suit, alleging that two of Already’s athletic shoes violated Nike’s Air Force 1 trademark. Already denied the allegations and filed a counterclaim challenging the validity of Nike’s Air Force 1 trademark. While the suit was pending, Nike issued a “Covenant Not to Sue,” promising not to raise any trademark or unfair competition claims against Already or any affiliated entity based on Already’s existing footwear designs, or any future Already designs that constituted a “colorable imitation” of Already’s current products. Nike then moved to dismiss its claims with prejudice, and to dismiss Already’s counterclaim without prejudice on the ground that the covenant had extinguished the case or controversy. Already opposed dismissal of its counterclaim, contending that Nike had not established that its covenant had mooted the case. The Supreme Court applied the voluntary cessation doctrine and held that Nike’s unconditional and irrevocable covenant not to enforce its trademark against a competitor’s existing products and any future “colorable imitations” mooted Already’s action to have the trademark declared invalid. The breadth of Nike’s covenant was sufficient to satisfy the voluntary cessation doctrine because it was unconditional and

irrevocable and covered not just current or previous designs, but also colorable imitations. Once Nike demonstrated that the covenant encompassed all of Already's allegedly unlawful conduct, it was incumbent on Already to indicate that it engages in or has sufficiently concrete plans to engage in activities that would arguably infringe Nike's trademark yet not be covered by the covenant. Because Already failed to do so, the case was moot.

70. *Los Angeles County Flood Control v. Natural Resources*, No. 11-460 (9th Cir., 673 F.3d 880; cert. granted June 25, 2012; limited to Question 2; SG as amicus, supporting neither party; argued on Dec. 4, 2012). In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), the Supreme Court held that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Clean Water Act. The question presented is whether when water flows from one portion of a river that is navigable water of the United States into a lower portion of the same river, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, there can be a "discharge" from an "outfall" under the Clean Water Act.

Decided Jan. 8, 2013 (568 U.S. __). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Alito, J., concurring in the judgment only). The Court held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the Clean Water Act. The district court found that the record was insufficient to warrant a finding that petitioner's "municipal separate storm sewer systems," concrete channels within the Los Angeles and San Gabriel Rivers, had discharged pollutants into the rivers. The Ninth Circuit reversed, holding that a discharge had occurred when polluted water detected in the improved portion of the waterways flowed downstream into the unimproved portions of the same waterways. In keeping with the Court's holding in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 109-112 (2004), where it held that the transfer of polluted water between "two parts of the same water body" is not a discharge, the Court reversed. Because of its prior holding in *Miccosukee*, the Court noted that it was "hardly surprising" that both parties and the United States as *amicus curiae* agreed that the flow of polluted water from one portion of a river, through a concrete channel, and then into a lower portion of the same river does not constitute a "discharge." In *Miccosukee*, polluted water was removed from and then returned to the same water body; here, the Court reasoned, polluted water simply flowed "from one portion of the water body to another." Unless the transfer of polluted water is between "meaningfully distinct water bodies," as the Court explained in *Miccosukee*, it does not qualify as a "discharge" under the Clean Water Act.

71. *Tibbals v. Carter*, No. 11-218 (6th Cir., 644 F.3d 329; cert. granted Mar. 19, 2012; argued on Oct. 9, 2012). (1) Whether capital prisoners have a right to competence in habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966), which involved an incompetent death row inmate's attempt to withdraw his

certiorari petition. (2) Whether a court can order an indefinite stay of habeas proceedings under *Rees*.

Decided Jan. 8, 2013 (568 U.S. ___). Sixth Circuit/Reversed. Justice Thomas for a unanimous Court. Decided with *Ryan v. Gonzales*, No. 10-103. The Court held that state prisoners adjudged incompetent have no statutory right to a stay of their federal habeas corpus proceedings. The Ninth Circuit and the Sixth Circuit, citing different federal statutes, had both concluded that death row inmates are entitled to a suspension of their federal habeas proceedings when found incompetent. The Supreme Court reversed both courts. Specifically, the Court held that its prior decision in *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam), did not recognize a statutory right to competence in federal habeas proceedings. The Court also held that 18 U.S.C. § 3599, which guarantees a right to federally funded counsel, does not provide a state prisoner with the right to suspend his federal habeas proceedings when he is adjudged incompetent. The Court reasoned that the assertion of such a right lacked any basis in the provision's text and would be difficult to square with the Court's constitutional precedents. The Court went on to note that given the backward-looking, record-based nature of habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence. After rejecting 18 U.S.C. § 3599 as a statutory basis for the right to competence in habeas proceedings, the Court also held that 18 U.S.C. § 4241 does not include a right to competence in habeas proceedings because it is inapplicable to habeas proceedings on its face, applying only to federal defendants and to trial proceedings prior to sentencing and at any time after the commencement of probation or supervised release. Finally, the Court held that where competence is questioned and the prisoner's claims could potentially benefit from his or her assistance, a district court should "take into account the likelihood that the petitioner will regain competence in the foreseeable future" and should not issue an indefinite stay that would "merely frustrate[] the State's attempts to defend its presumptively valid judgment."

72. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011; cert. opposed Feb. 9, 2012; cert. granted Mar. 19, 2012; SG as amicus, supporting petitioners; argued on Oct. 9, 2012). Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys," entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel.**

Decided Jan. 8, 2013 (568 U.S. ___). Ninth Circuit/Reversed. Justice Thomas for a unanimous Court. Decided with *Tibbals v. Carter*, No. 11-218. A summary of that opinion appears above.

73. ***Kloekner v. Solis*, No. 11-184 (8th Cir., 639 F.3d 834; cert. granted Jan. 13, 2012; argued on Oct. 2, 2012). The Merit Systems Protection Board is authorized to hear appeals by federal employees regarding certain adverse actions, such as dismissals. If in such an appeal the employee asserts that the challenged action was the result of unlawful discrimination, that claim is**

referred to as a “mixed case.” **The Question Presented is: If the Board decides a “mixed case” without determining the merits of the discrimination claim, whether the Court of Appeals for the Federal Circuit or a district court has jurisdiction over that claim.**

Decided Dec. 10, 2012 (568 U.S. ____). Eighth Circuit/Reversed. Justice Kagan for a unanimous Court. The Court held that when the Merit Systems Protection Board (“MSPB”) dismisses an employee’s claim on procedural grounds, the employee must seek judicial review in federal district court, not the Federal Circuit. The Civil Service Reform Act (“CSRA”) permits a federal employee to seek judicial review of MSPB decisions regarding federal personnel actions. The statute provides that judicial review of the MSPB’s decision should be sought in the Federal Circuit, or, if the action is a “mixed case” involving claims of discrimination under federal antidiscrimination statutes, in federal district court. 5 U.S.C. § 7703(b)(1)–(2). The court below interpreted the statute to require that mixed cases dismissed on procedural grounds be reviewed in the Federal Circuit. The Court, resolving a circuit split, found the statute straightforward: “cases of discrimination subject to [§ 7702]” shall be filed in district court, and “cases of discrimination subject to [§ 7702]” are mixed cases alleging discrimination. Therefore, the Court held, mixed cases shall be filed in district court, regardless of whether the MSPB’s decision was procedural or on the merits. The Court rejected the Government’s contrary argument that a procedural ruling is not a “judicially reviewable action” subject to review in the district court. The Government’s reading of the statute would have stretched the meaning of “judicially reviewable action” beyond normal legal parlance, causing a strange result: under the Government’s view, “to say that an agency action is not ‘judicially reviewable’ is to say that it is subject to judicial review in the Federal Circuit (even though not in district court).”

74. ***Arkansas Game & Fish Commission v. United States*, No. 11-597 (Fed. Cir., 637 F.3d 1366; cert. granted Apr. 2, 2012; argued on Oct. 3, 2012). Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause of the Fifth Amendment.**

Decided Dec. 4, 2012 (568 U.S. ____). Federal Circuit/Reversed and remanded. Justice Ginsburg for an 8-0 Court (Kagan, J. did not participate). The Court held that the Government’s recurrent flooding of an owner’s land may constitute a taking under the Fifth Amendment, even where the flooding is temporary. In prior decisions, the Court had separately held that flooding can constitute a taking, and that a taking need not be permanent to be compensable. The Government argued here, however, that floodings are compensable only where they are permanent, relying on a line from *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924) (“it is, at least, necessary that the overflow . . . constitute an actual, permanent invasion of the land”). The Court disagreed. It held that this dicta from *Sanguinetti* was meant to summarize the Court’s flooding cases to that point, all of which had involved permanent flooding, rather than to set forth a fixed rule of Takings jurisprudence. The Court dismissed the Government’s concern that every passing

flood, no matter how brief, would create liability; the Court's cases establish that Takings cases must be decided by weighing the relevant factors in each case. Those relevant factors include the length of the intrusion, its degree, the character of the land at issue, and the owner's reasonable, investment-backed expectations for the land's use. The Court declined to address the Government's other justification for the Federal Circuit's judgment, because that argument was not raised to the court below.

75. ***United States v. Bormes*, No. 11-192 (Fed. Cir., 626 F.3d 574; cert. granted Jan. 13, 2012; argued on Oct. 2, 2012). Whether the Little Tucker Act, 28 U.S.C. § 1346(a)(2), waives the sovereign immunity of the United States with respect to damages actions for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.**

Decided Nov. 13, 2012 (568 U.S. ____). Federal Circuit/Vacated and remanded. Justice Scalia for a unanimous Court. The plaintiff, James Bormes, paid a fee to the United States over the Internet and then brought suit against the U.S. for damages under the Fair Credit Reporting Act on grounds that the fee receipt displayed too much information about his credit card. The Government countered that it was immune from lawsuits seeking money damages. The Supreme Court agreed, holding that the Little Tucker Act, 28 U.S.C. § 1346(a)(2), does not waive the Government's sovereign immunity with respect to Fair Credit Reporting Act damages actions. The Court observed that the Little Tucker Act provides the Government's consent to suit for certain damages claims premised on other laws, unless the other laws include their own judicial remedies. The Fair Credit Reporting Act, the Court reasoned, provides a detailed remedial scheme, including monetary relief in certain circumstances. Thus, the Little Tucker Act does not waive sovereign immunity with respect to Fair Credit Reporting Act claims.

October 2013 Term

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). 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. ***Bond v. United States*, No. 12-158 (3d Cir., 681 F.3d 149; cert. granted Jan. 18, 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*?

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). 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)?
4. *McCutcheon v. Federal Election Commission*, No. 12-536 (D.D.C., 2012 WL 4466482; cert. granted Feb. 19, 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.
5. *Burt v. Titlow*, No. 12-414 (6th Cir., 680 F.3d 577; cert. granted Feb. 25, 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 resentencing 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.

6. *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). 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?
7. *Walden v. Fiore*, No. 12-574 (9th Cir., 688 F.3d 558; cert. granted Mar. 4, 2013; SG as amicus, supporting petitioner). 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.
8. *Kaley v. United States*, No. 12-463 (11th Cir., 677 F.3d 1316; cert. granted Mar. 18, 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?
9. *U.S. Forest Service v. Pacific Rivers Council*, No. 12-623 (9th Cir., 689 F.3d 1012; cert. granted Mar. 18, 2013). The Questions Presented are: (1) Whether respondent Pacific Rivers Council (PRC) has Article III standing to challenge the Forest Service’s 2004 programmatic amendments to the forest plans governing management of 11 Sierra Nevada Forests when PRC failed to establish that any of its members was imminently threatened with cognizable harm because he or she would come into contact with any parcel of forest affected by the amendments. (2) Whether PRC’s challenge to the Forest Service’s programmatic amendments is ripe when PRC failed to identify any site-specific project authorized under the amended plan provisions to which PRC objects. (3) Whether the National Environmental Policy Act required the Forest Service, when adopting the programmatic amendments, to analyze every type of environmental effect that any project



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ultimately authorized under the amendments throughout the 11 affected forests might have if it was reasonably possible to do so when the programmatic amendments were adopted, even though any future site-specific project would require its own appropriate environmental analysis before going forward.

10. *Madigan v. Levin*, No. 12-872 (7th Cir., 692 F.3d 607; cert. granted Mar. 18, 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.
11. *United States v. Woods*, No. 12-562 (5th Cir., 471 F. App'x 320; cert. granted Mar. 25, 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; and (2) Whether the district court had jurisdiction in this case under 26 U.S.C. § 6226 to consider the substantial valuation misstatement penalty.
12. *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682 (6th Cir. 652 F.3d 607; cert. granted Mar. 25, 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.
13. *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). 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.
14. *Heimeshoff v. Hartford Life Insurance*, No. 12-729 (2d Cir., 496 F. App'x 129; cert. granted Apr. 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.*



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15. *Sprint Communications Co. v. Jacobs*, No. 12-815 (8th Cir., 690 F.3d 864; cert. granted Apr. 15, 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.”
16. *DaimlerChrysler AG v. Bauman*, No. 11-965 (9th Cir., 644 F.3d 909; cert. granted Apr. 22, 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.
17. *Burrage v. United States*, No. 12-7515 (8th Cir., 687 F.3d 1015; cert. granted Apr. 29, 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; and (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.
18. *Burnside v. Walters*, No. 12-7892 (6th Cir., Nos. 10-5790/6368 (unpublished)); cert. granted May 13, 2013. Whether the Sixth Circuit erred in holding—in conflict with all eleven other federal circuit courts of appeals—that the *in forma pauperis* statute, 28 U.S.C. § 1915(e)(2), prohibits indigent plaintiffs from amending their complaints.
19. *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). 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.
20. *Northwest, Inc. v. Ginsberg*, No. 12-462 (9th Cir., 695 F.3d 873; cert. granted May 20, 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.
21. *Greece, New York v. Galloway*, No. 12-696 (2d Cir., 681 F.3d 20; cert. granted May 20, 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.

22. *Medtronic Inc. v. Boston Scientific Corp.*, No. 12-1128 (Fed. Cir., 695 F.3d 1266; cert. granted May 20, 2013). Whether, in a declaratory judgment action brought by a licensee under *MedImmune, Inc. v. Genentech, Inc.*, 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.
23. *Rosemond v. United States*, No. 12-895 (10th Cir., 695 F.3d 1151; cert. granted May 28, 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.
24. *Mississippi ex rel. Hood v. AU Optronics Corp.*, No. 12-1036 (5th Cir., 701 F.3d 796; cert. granted May 28, 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.
25. *Lexmark International, Inc. v. Static Control Components, Inc.*, No. 12-873 (6th Cir., 697 F.3d 387; cert. granted June 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.
26. *United States v. Apel*, No. 12-1038 (9th Cir., 676 F.3d 1202; cert. granted June 3, 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.
27. *BG Group PLC v. Argentina*, No. 12-138 (D.C. Cir., 665 F.3d 1363; CVSG Nov. 5, 2012; cert. granted June 10, 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.

28. *Mount Holly, N.J. v. Mt. Holly Gardens Citizens*, No. 11-1507 (3d Cir., 658 F.3d 375; CVSG Oct. 29, 2012; cert. granted June 17, 2013). Whether disparate impact claims are cognizable under the Fair Housing Act, 42 U.S.C. § 3604(a).
29. *Air Wisconsin Airlines Corp. v. Hoeper*, No. 12-315 (Sup. Ct. Colo., 2012 CO 19; CVSG Jan. 7, 2013; cert. granted June 17, 2013). Whether immunity under the Aviation and Transportation Security Act may be denied without a determination that the air carrier's disclosure was materially false.
30. *Ray Haluch Gravel Co. v. Central Pension Fund*, No. 12-992 (1st Cir., 695 F.3d 1; cert. granted June 17, 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.
31. *Law v. Siegel*, No. 12-5196 (9th Cir., 435 Fed. App'x 697; CVSG Dec. 3, 2012; cert. granted June 17, 2013). Whether the Ninth Circuit erred in allowing the bankruptcy trustee to surcharge the debtor's constitutionally protected homestead property.
32. *Unite Here Local 355 v. Mulhall*, No. 12-99 (11th Cir., 667 F.3d 1211; CVSG Jan. 14, 2013; cert. granted June 24, 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.
33. *Michigan v. Bay Mills Indian Community*, No. 12-515 (6th Cir., 695 F.3d 406; CVSG Jan. 7, 2013; cert. granted June 24, 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.
34. *Lozano v. Alvarez*, No. 12-820 (2d Cir., 697 F.3d 41; CVSG Mar. 18, 2013; cert. granted June 24, 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.

35. *Mayorkas v. Cuellar de Osorio*, No. 12-930 (9th Cir., 695 F.3d 1003; cert. granted June 24, 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; and (2) whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3) of the INA.
36. *McCullen v. Coakley*, No. 12-1168 (1st Cir., 708 F.3d 1; cert. granted June 24, 2013). 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.
37. *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). 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; and (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.
38. *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). Limited to the Questions Presented in No. 12-1182.
39. *Exec. Benefits Ins. Agency v. Arkison*, No. 12-1200 (9th Cir., 702 F.3d 553; cert. granted June 24, 2013). 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; and (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).

40. *UBS Financial Services v. Union de Empleados de Muelles de Puerto Rico*, No. 12-1208 (1st Cir., 704 F.3d 155; cert. granted June 24, 2013). Whether, consistent with the standard of review employed by other Circuit Courts of Appeals, but in direct conflict with the decision below, the First Circuit should have reviewed the district court’s determination that particularized facts alleged in a shareholder derivative complaint were insufficient to excuse a pre-suit demand on the corporation’s board of directors under an abuse of discretion standard, pursuant to Rule 23.1.
41. *NLRB v. Noel Canning*, No. 12-1281 (D.C. Cir., 705 F.3d 490; cert. granted June 24, 2013). 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, and (3) whether the President’s recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.
42. *White v. Woodall*, No. 12-794 (6th Cir., 685 F.3d 574; cert. granted June 27, 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; and (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 interference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty pleas to the crimes and aggravators.
43. *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



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

44. *Paroline v. United States*, No. 12-8561 (5th Cir., 701 F.3d 749; cert. granted June 27, 2013). 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.

Cases Determined Without Argument

1. *Tennant v. Jefferson County Commission*, No. 11-1184 (S.D. W.Va.; reversed and remanded Sept. 25, 2012). Per Curiam. On direct appeal from a three-judge district court, the Court held that West Virginia's 2011 congressional redistricting plan does not violate the "one person, one vote" principle embodied in Article I, § 2 of the United States Constitution. Because West Virginia conceded that it could have adopted a redistricting plan with lower population variations between congressional districts, the only question for the Court was whether West Virginia can demonstrate that the "population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The Court held that West Virginia carried its burden. Unlike other proposed plans, the chosen redistricting plan avoided creating contests between incumbents, did not split political subdivisions, and minimized population shifts between districts. Accordingly, the Court reversed the district court's decision that West Virginia had not carried its burden.
2. *Lefemine v. Wideman*, No. 12-168 (4th Cir.; vacated and remanded Nov. 5, 2012). Per curiam. In a lawsuit alleging that the conduct of government officials violates the U.S. Constitution, a plaintiff who obtains a permanent injunction but no money damages is a "prevailing party" for purposes of attorneys' fees under 42 U.S.C. § 1988. The permanent injunction ordered the officials to change their behavior in a manner that directly benefited the plaintiff. Accordingly, the plaintiff was entitled to receive his attorneys' fees unless special circumstances would render an award unjust.
3. *Nitro-Lift Technologies, LLC v. Howard*, No. 11-1377 (Okla.; vacated and remanded Nov. 26, 2012). Per curiam. The Court held that the Oklahoma Supreme Court erred in preventing arbitration of a dispute over the scope of non-

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. Further proceedings in this case were reserved pending receipt of a response from the Supreme Court of Oklahoma.

competition agreements in employment contracts. The employment contract at issue contained a valid arbitration clause requiring arbitration for “[a]ny dispute, difference or unresolved question between Nitro-Lift and the Employee.”

Nonetheless, the Oklahoma Supreme Court ruled that the arbitration clause and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, did not inhibit its review of the underlying contract’s validity, and the noncompetition clauses were void and unenforceable as against Oklahoma’s public policy. The Supreme Court vacated the Oklahoma Supreme Court’s decision, holding that it was bound by the FAA, which is “the supreme Law of the Land,” and by the prior opinions of the U.S. Supreme Court interpreting the FAA as foreclosing “judicial hostility towards arbitration.” Slip Op. at 5 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, __ (2011)).

4. ***Marshall v. Rodgers*, No. 12-382 (9th Cir.; reversed and remanded Apr. 1, 2013).** Per curiam. The Question Presented was whether *Faretta v. California*, 422 U.S. 806, 807 (1975), which held that a defendant has a Sixth Amendment right to “proceed *without* counsel when he voluntarily and intelligently elects to do so, “clearly establish[es],” for purposes of habeas corpus review of state-court judgments under 28 U.S.C. § 2254(d), that a defendant retains a constitutional right to revoke his prior waiver of counsel at trial and require reappointment of counsel to file a new trial motion. The Court held that *Faretta* did not clearly establish that the right to counsel is retained following a waiver and that the Ninth Circuit erred when it held that a criminal defendant’s Sixth Amendment right to effective assistance of counsel was violated where the California state courts declined to appoint an attorney to assist in filing a motion for a new trial following the defendant’s three prior waivers of the right to counseled representation. The Court reasoned that the defendant’s right to counsel in these circumstances was not clearly established by “Federal law, as determined by the Supreme Court of the United States,” in light of his three prior waivers of his right to counsel. Slip Op. at 3-4 (citing 28 U.S.C. § 2254(d)(1)).

Pending Cases Calling For The Views Of The Solicitor General

1. ***Harris v. Quinn*, No. 11-681 (7th Cir., 656 F.3d 692; CVSG June 28, 2012).** 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.
2. ***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.

3. *Fifth Third Bancorp v. Dudenhoeffer*, No. 12-751 (6th Cir., 692 F.3d 410; CVSG Mar. 25, 2013). The Questions Presented are: (1) 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; and (2) whether the Sixth Circuit erred by refusing to follow precedent of this Court (and the holdings of every other circuit to address the issue) by holding that filings with the Securities and Exchange Commission become actionable ERISA fiduciary communications merely by virtue of their incorporation by reference into plan documents.
4. *Pom Wonderful LLC v. The Coca-Cola Co.*, No. 12-761 (9th Cir., 679 F.3d 1170; CVSG Mar. 25, 2013). 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.*
5. *Argentina v. NML Capital, Ltd.*, No. 12-842 (2d Cir., 695 F.3d 201; CVSG Apr. 15, 2013). 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.
6. *Sony Computer Entertainment v. 1st Media, LLC*, No. 12-1086 (Fed. Cir., 694 F.3d 1367; CVSG May 13, 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



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courts from granting equitable remedies where a patent applicant has violated the Patent and Trademark Office's duty of candor.

7. *Limelight Networks, Inc., v. Akamai Technologies*, No. 12-786 (Fed. Cir., 692 F.3d 1301; CVSG June 24, 2013) (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 under § 271(a).
8. *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, No. 12-960 (Fed. Cir., 692 F.3d 1301; CVSG June 24, 2014) (linked with *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, No. 12-786). Whether a party may be liable for infringement under either section of the patent infringement statute, 35 U.S.C. § 271(a) or § 271(b), where two or more entities join together to perform all of the steps of a process claim.
9. *Samantar v. Yousuf*, No. 12-1078 (4th Cir., 699 F.3d 763; CVSG June 24, 2013). 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 Supported Certiorari

1. *Tarrant Regional Water District v. Herrmann*, No. 11-889 (10th Cir., 656 F.3d 1222; CVSG Apr. 2, 2012; cert. supported Nov. 30, 2012; cert. granted Jan. 4, 2013; SG as amicus, supporting vacatur and remand; argued on Apr. 23, 2013). The Questions Presented are: (1) Whether Congress's approval of an interstate water compact that grants the contracting states "equal rights" to certain surface water and – using language present in almost all such compacts – provides that the compact shall not "be deemed . . . to interfere" with each state's "appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact," manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water. (2) Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.

Decided June 13, 2013 (569 U.S. ____). Tenth Circuit/Affirmed. Justice Sotomayor for a unanimous Court. The Court held that federal law did not preempt several Oklahoma statutes that restrict out-of-state diversions of water, and that Oklahoma's laws did not impose unconstitutional restrictions on interstate commerce. In 1978, the States of Texas, Oklahoma, Arkansas, and Louisiana entered into the Red River Compact, which was subsequently made federal law by an act of Congress. This Compact allocated to each signatory-State the right to use

a certain amount of water in the Red River basin. Facing water shortages, a Texas state agency filed an application with Oklahoma, seeking to obtain Texas's allocation of water under the Compact by diverting water located within Oklahoma's geographic boundaries. Oklahoma's water statutes, however, effectively denied the ability of out-of-state entities to apply for such diversions. The Court held that the Compact did not preempt Oklahoma's statutes, because it did not grant signatories the right to obtain water from inside the sovereign boundaries of other signatories. The allocations provided by the Compact were intended to set limits on the amount of water a State could retain and use within its own borders; they did not authorize States to invade the sovereign territory of other signatories to the Compact to obtain their allocation. In addition, Oklahoma's water laws did not discriminate against out-of-state residents with respect to "unallocated waters," because the Compact expressly allows signatories to use "whatever amount of water they can put to beneficial use," subject to the requirement that they honor other state's minimum allocation. Thus, because there is no "unallocated waters," Oklahoma cannot discriminate against interstate commerce with respect to those waters.

2. ***Hillman v. Maretta*, No. 11-1221 (Va., 722 S.E.2d 32; CVSG June 18, 2012; cert. supported Dec. 14, 2012; cert. granted Jan. 11, 2013; argued on Apr. 22, 2013). Whether 5 U.S.C. § 8705(a), any other provision of the Federal Employees Group Life Insurance Act of 1954 ("FEGLIA"), or any regulation promulgated thereunder preempts a state domestic relations equitable remedy which creates a cause of action against the recipient of FEGLI insurance proceeds after they have been distributed.**

Decided June 3, 2013 (569 U.S.____). Virginia Supreme Court/Affirmed. Justice Sotomayor for a 9-0 Court (Scalia, J., joined as to all but footnote 4; Thomas, J., concurring; Alito, J., concurring). The Court held that Section 8705(a) of the Federal Employees Group Life Insurance Act ("FEGLIA"), 5 U.S.C. § 8705(a), which establishes a life insurance program for federal employees and allows each employee to designate a beneficiary to receive the proceeds of the policy when the employee dies, preempts a Virginia statute that allows the family of a deceased employee to sue the designated beneficiary for the proceeds if the beneficiary happens to be the employee's former spouse. Section 8705(a) of FEGLIA permits an employee to name a beneficiary of life insurance proceeds and specifies an "order of precedence" providing that an employee's death benefits accrue first to that beneficiary ahead of other potential recipients. The objective of FEGLIA is to honor an employee's choice of beneficiary—it gives highest priority to an insured's designated beneficiary, and underscores that the employee's "right" of designation "cannot be waived or restricted." The Virginia statute conflicts with that objective, the Court concluded, because it directs that the proceeds actually belong to someone other than the named beneficiary by creating a cause of action for their recovery by a third party. Further, the Court reasoned that FEGLIA is "strikingly similar" to the National Service Life Insurance Act of 1940 ("NSLIA"), 54 Stat. 1008, and the Servicemen's Group Life Insurance Act of 1965 ("SGLIA"),

Pub. L. 89-214, 79 Stat. 880, two statutes that the Court had previously held as preempting state laws similar to the Virginia statute at issue here. *See Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Wissner v. Wissner*, 530 U.S. 655 (1950).

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011; cert. opposed Feb. 9, 2012; cert. granted Mar. 19, 2012; SG as amicus, supporting petitioners; argued on Oct. 9, 2012). Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital state inmate pursuing federal habeas relief “shall be entitled to the appointment of one or more attorneys,” entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel.**

Decided Jan. 8, 2013 (568 U.S. ___). Ninth Circuit/Reversed. Justice Thomas for a unanimous Court. Decided with *Tibbals v. Carter*, No. 11-218. The Court held that state prisoners adjudged incompetent have no statutory right to a stay of their federal habeas corpus proceedings. The Ninth Circuit and the Sixth Circuit, citing different federal statutes, had both concluded that death row inmates are entitled to a suspension of their federal habeas proceedings when found incompetent. The Supreme Court reversed both courts. Specifically, the Court held that its prior decision in *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam), did not recognize a statutory right to competence in federal habeas proceedings. The Court also held that 18 U.S.C. § 3599, which guarantees a right to federally funded counsel, does not provide a state prisoner with the right to suspend his federal habeas proceedings when he is adjudged incompetent. The Court reasoned that the assertion of such a right lacked any basis in the provision’s text and would be difficult to square with the Court’s constitutional precedents. The Court went on to note that given the backward-looking, record-based nature of habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner’s competence. After rejecting 18 U.S.C. § 3599 as a statutory basis for the right to competence in habeas proceedings, the Court also held that 18 U.S.C. § 4241 does not include a right to competence in habeas proceedings because it is inapplicable to habeas proceedings on its face, applying only to federal defendants and to trial proceedings prior to sentencing and at any time after the commencement of probation or supervised release. Finally, the Court held that where competence is questioned and the prisoner’s claims could potentially benefit from his or her assistance, a district court should “take into account the likelihood that the petitioner will regain competence in the foreseeable future” and should not issue an indefinite stay that would “merely frustrate[] the State’s attempts to defend its presumptively valid judgment.”

2. ***Los Angeles County Flood Control v. Natural Resources*, No. 11-460 (9th Cir., 673 F.3d 880; cert. granted June 25, 2012; limited to Question 2; SG as amicus, supporting neither party; argued on Dec. 4, 2012). In *South Florida***

***Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), the Supreme Court held that transfer of water within a single body of water cannot constitute a “discharge” for purposes of the Clean Water Act. The question presented is whether when water flows from one portion of a river that is navigable water of the United States into a lower portion of the same river, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, there can be a “discharge” from an “outfall” under the Clean Water Act.**

Decided Jan. 8, 2013 (568 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Alito, J., concurring in the judgment only). The Court held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a “discharge of a pollutant” under the Clean Water Act. The district court found that the record was insufficient to warrant a finding that petitioner’s “municipal separate storm sewer systems,” concrete channels within the Los Angeles and San Gabriel Rivers, had discharged pollutants into the rivers. The Ninth Circuit reversed, holding that a discharge had occurred when polluted water detected in the improved portion of the waterways flowed downstream into the unimproved portions of the same waterways. In keeping with the Court’s holding in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 109-112 (2004), where it held that the transfer of polluted water between “two parts of the same water body” is not a discharge, the Court reversed. Because of its prior holding in *Miccosukee*, the Court noted that it was “hardly surprising” that both parties and the United States as *amicus curiae* agreed that the flow of polluted water from one portion of a river, through a concrete channel, and then into a lower portion of the same river does not constitute a “discharge.” In *Miccosukee*, polluted water was removed from and then returned to the same water body; here, the Court reasoned, polluted water simply flowed “from one portion of the water body to another.” Unless the transfer of polluted water is between “meaningfully distinct water bodies,” as the Court explained in *Miccosukee*, it does not qualify as a “discharge” under the Clean Water Act.

3. ***Decker v. Northwest Env'tl. Defense Ctr.*, No. 11-338 (9th Cir., 640 F.3d 1063; cert. granted June 25, 2012, case consolidated with *Georgia-Pacific West v. Northwest Env'tl. Defense Ctr.*, No. 11-347; SG as amicus, supporting petitioners; argued on Dec. 3, 2012). The Questions Presented are: (1) Whether the Ninth Circuit erred when, in conflict with other circuits, it held that a citizen may bypass judicial review of a National Pollutant Discharge Elimination System (“NPDES”) permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the Clean Water Act (“CWA”). (2) Whether the Ninth Circuit erred when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA’s rules, even though EPA has determined that it is not industrial stormwater.**

Decided Mar. 20, 2013 (568 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for a 7-1 Court (Roberts, C.J., concurring in part, joined by Alito, J.; Scalia, J., dissenting and concurring in part). The Court held that the Environmental Protection Agency’s interpretation of its Industrial Stormwater Rule—a regulation implementing the Clean Water Act that EPA has since amended—was reasonable and must be accorded deference under *Auer v. Robbins*, 519 U.S. 452 (1997). At issue was whether the EPA had reasonably determined that, under its rule, a permit is not required “before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States.” Reiterating the “well established” rule “that an agency’s interpretation need not be the only possible reading of a regulation—or even the best one—to prevail,” the Court held that the EPA’s interpretation of the Industrial Stormwater Rule was a permissible one, both because the regulation’s language “leave[s] open the rational interpretation” reached by the EPA, and because “there is no indication that [EPA’s] current view is a change from prior practice or a post hoc justification adopted in response to litigation.” Additionally, the Court concluded that even though the EPA had since amended its Rule, the case nonetheless presented “a live controversy ... regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule.” And the Court determined that because the case was a “citizen suit” designed “not to challenge [a regulation] but to enforce it under a proper interpretation,” the suit did not fall under the “exclusive jurisdiction mandate” of 33 U.S.C. § 1369(b), which requires that an application for review be lodged in the court of appeals within 120 days of the EPA administrator’s action.

4. ***Georgia-Pacific West v. Northwest Environmental Defense Center*, No. 11-347 (9th Cir., 640 F.3d 1063; CVSG Dec. 12, 2011; cert. opposed May 24, 2012; cert. granted June 25, 2012, consolidated with No. 11-338; argued on Dec. 3, 2012). Since passage of the Clean Water Act, the Environmental Protection Agency has considered runoff of rain from forest roads—whether channeled or not—to fall outside the scope of its National Pollutant Discharge Elimination System (“NPDES”) and thus not to require a permit as a point source discharge of pollutants. Under a rule first promulgated in 1976, EPA consistently has defined as nonpoint source activities forest road construction and maintenance from which natural runoff results. And in regulating stormwater discharges under 1987 amendments to the Act, EPA again expressly excluded runoff from forest roads. In consequence, forest road runoff long has been regulated as a nonpoint source using best management practices, like those imposed by the State of Oregon on the roads at issue here. EPA’s consistent interpretation of more than 35 years has survived proposed regulatory revision and legal challenge, and repeatedly has been endorsed by the United States in briefs and agency publications. The Ninth Circuit—in conflict with other circuits, contrary to the position of the United States as amicus, and with no deference to EPA—rejected EPA’s longstanding interpretation. Instead, it directed EPA to regulate channeled forest road runoff under a statutory category of stormwater discharges “associated with industrial activity,” for which a permit is required. The**

Question Presented is: Whether the Ninth Circuit should have deferred to EPA’s longstanding position that channeled runoff from forest roads does not require a permit, and erred when it mandated that EPA regulate such runoff as industrial stormwater subject to NPDES.

Decided Mar. 20, 2013 (568 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for an 8-0 Court (Roberts, C.J., concurring in part, joined by Alito, J.; Scalia, J., dissenting and concurring in part). Decided with *Decker v. Northwest Envtl. Defense Ctr.*, No. 11-338. The Court held that the Environmental Protection Agency’s interpretation of its Industrial Stormwater Rule—a regulation implementing the Clean Water Act that EPA has since amended—was reasonable and must be accorded deference under *Auer v. Robbins*, 519 U.S. 452 (1997). At issue was whether the EPA had reasonably determined that, under its rule, a permit is not required “before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States.” Reiterating the “well established” rule “that an agency’s interpretation need not be the only possible reading of a regulation—or even the best one—to prevail,” the Court held that the EPA’s interpretation of the Industrial Stormwater Rule was a permissible one, both because the regulation’s language “leave[s] open the rational interpretation” reached by the EPA, and because “there is no indication that [EPA’s] current view is a change from prior practice or a post hoc justification adopted in response to litigation.” Additionally, the Court concluded that even though the EPA had since amended its Rule, the case nonetheless presented “a live controversy ... regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule.” And the Court determined that because the case was a “citizen suit” designed “not to challenge [a regulation] but to enforce it under a proper interpretation,” the suit did not fall under the “exclusive jurisdiction mandate” of 33 U.S.C. § 1369(b), which requires that an application for review be lodged in the court of appeals within 120 days of the EPA administrator’s action.

5. ***Vance v. Ball State University*, No. 11-556 (7th Cir., 646 F.3d 461; CVSG Feb. 21, 2012; cert. opposed May 24, 2012; cert. granted June 25, 2012; SG as amicus, supporting neither party; argued on Nov. 26, 2012). In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim’s co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a “supervisor” and who had the authority to direct and oversee the victim’s daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The Question Presented is whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* “supervisor” liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim’s daily work, or, as the First,**

Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to “hire, fire, demote, promote, transfer, or discipline” their victim.

Decided Jun. 24, 2013 (___ U.S. ___). Seventh Circuit/Affirmed. Justice Alito for a 5-4 Court (Thomas, J., concurring; Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.). Deciding a question left open in *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 (1998), and *Faragher v. Boca Raton*, 524 U. S. 775 (1998), the Court held that an employee is a “supervisor” for purposes of the employer’s vicarious liability under Title VII of the Civil Rights Act of 1964 only if he or she is empowered by the employer to take tangible employment actions against the victim—i.e., the power to “hire, fire, demote, promote, transfer, or discipline.” Under *Ellerth* and *Faragher*, one standard applies if the harassing employee is a “supervisor” of the victim (i.e., the employer is strictly liable for harassment resulting in a supervisor’s adverse employment action, but may be able to raise an affirmative defense when no adverse employment action has been taken), while another applies if the harasser is merely a co-worker of the victim (i.e., the employer is liable only if it was negligent in controlling working conditions). Lower courts interpreting those decisions disagreed over how to define the term “supervisor.” Though that question was not presented in *Ellerth* or *Faragher*, the Court observed that its answer is implicit in the framework those cases established, which contemplates a clearly defined, unitary category of supervisors and strongly suggests that the category’s defining characteristic is the authority to take tangible employment actions. The Court reasoned that distinguishing supervisors from co-workers on this basis provides an easily workable test under which an employee’s status as a supervisor can be readily determined, generally by reference to written documentation, such that the issue can be resolved without much difficulty either on summary judgment or at trial. By contrast, the nebulous definition suggested in Enforcement Guidance from the Equal Employment Opportunity Commission and adopted in some Courts of Appeals, which ties supervisor status to the ability to exercise significant direction over another’s daily work, would require case-specific evaluation of a number of factors that would preclude early resolution of the issue, unduly burden trial courts, and confuse juries. The Court explicitly rejected this definition. The Court’s clearer and narrower approach, it suggested, will not leave employees unprotected against harassment by co-workers who have the ability to inflict significant psychological injury on victims, but who do not possess the requisite authority to be deemed supervisors: in such cases, victims will prevail who are able to show that their employers were negligent in allowing the harassment to occur.

6. ***American Trucking Association, Inc. v. Los Angeles*, No. 11-798 (9th Cir., 660 F.3d 384; CVSG Mar. 26, 2012; cert. opposed Nov. 30, 2012; cert. granted Jan. 11, 2013 limited to Questions 1 and 3; argued on Apr. 16, 2013). The Questions Presented are: (1) Whether 49 U.S.C. § 14501(c)(1), which provides that “a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related**

to a price, route, or service of any motor carrier . . . with respect to the transportation of property,” contains an unexpressed “market participant” exception and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services. (3) Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers’ federal registration, in violation of *Castle v. Hayes Freight Lines Inc.*, 348 U.S. 61 (1954).

Decided June 13, 2013 (569 U.S. ____). Ninth Circuit/Reversed in part and remanded. Justice Kagan for a 9-0 Court (Thomas, J., concurring). The Court held that the Federal Aviation Administration Authorization Act (“FAAAA”) expressly preempts two provisions of the mandatory concession agreements imposed by the Port of Los Angeles on short-haul trucking providers. Federally licensed short-haul “drayage” trucks are responsible for bringing cargo into and out of the Port. In 2007, in response to community concerns regarding traffic, safety, and the environment, the Port implemented a “Clean Truck Program” subjecting drayage companies to a number of conditions of operation, including providing off-street parking plans for their vehicles, and displaying placards on their trucks with a telephone number for reporting environmental or safety concerns. The FAAAA preempts any state “law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U. S. C. §14501(c)(1). The FAAAA does not preempt a state from undertaking purely contractual arrangements while acting as a market participant rather than a regulator. But the Court held that the concession agreements at stake here constitute an exercise of “classic regulatory authority,” and the parking and placard requirements imposed by the Port have “the force and effect of law,” because drayage companies are subject to criminal penalties for violating the terms of the concession agreement. The FAAAA therefore preempted the concession agreements. The Court declined to consider a separate question on which it had also granted certiorari, regarding whether the penalty provisions of the concession agreement are barred by *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954).

7. ***Blue Cross and Blue Shield v. Fossen*, No. 11-1155 (9th Cir., 660 F.3d 1102; CVSG June 18, 2012; cert. opposed Dec. 21, 2012; cert. denied Jan. 22, 2013). Whether a substantive state-law insurance standard saved from preemption under the insurance saving clause of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1144(b)(2)(A), can be enforced through state-law remedies or instead is enforceable exclusively through ERISA’s enforcement scheme, 29 U.S.C. § 1132.**
8. ***GlaxoSmithKline v. Classen Immunotherapies, Inc.*, No. 11-1078 (Fed. Cir., 659 F.3d 1057; CVSG June 25, 2012; cert. opposed Dec. 13, 2012; cert. denied Jan. 14, 2013). Whether the Federal Circuit’s interpretation of 35 U.S.C.**



§ 271(e)(1)'s safe harbor from patent infringement liability for drugs – an interpretation which arbitrarily restricts the safe harbor to pre-marketing approval of generic counterparts – is faithful to statutory text that contains no such limitation and decisions of this Court rejecting similar efforts to impose extra-textual limitations on the statute.

9. *Retractable Technologies v. Becton, Dickinson & Co.*, No. 11-1154 (Fed. Cir., 653 F.3d 1296; CVSG June 29, 2012; cert. opposed Nov. 28, 2012; cert. denied Jan. 7, 2013). The Questions Presented are: (1) Whether a court may depart from the plain and ordinary meaning of a term in a patent claim based on language in the patent specification, where the patentee has neither expressly disavowed the plain meaning of the claim term nor expressly defined the term in a way that differs from its plain meaning. (2) Whether claim construction, including underlying factual issues that are integral to claim construction, is a purely legal question subject to de novo review on appeal.
10. *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). 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.
11. *Lawson v. FMR, LLC*, No. 12-3 (1st Cir., 670 F.3d 61; CVSG Oct. 9, 2012; cert. opposed Apr. 9, 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.



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