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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.

October 2013 Term

Decided Cases

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

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

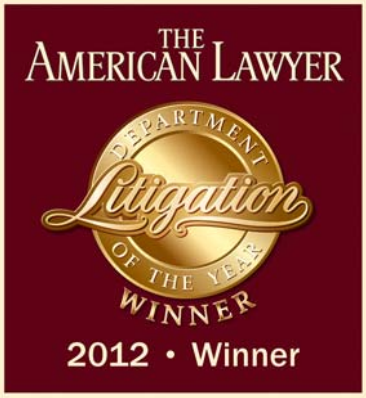
2. ***Cline v. OK Coalition for Reproductive Justice*, No. 12-1094 (Sup. Ct. Ok., 292 P.3d 27; cert. granted June 27, 2013). Oklahoma law requires that abortion-inducing drugs be administered according to the protocol described on the drugs' FDA-approved labels. The Question Presented is whether the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

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

Theodore B. Olson
202.955.8500
tolson@gibsondunn.com

Amir C. Tayrani
202.887.3692
atayrani@gibsondunn.com

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



Gibson Dunn was named the 2012 Litigation Department of the Year by *The American Lawyer* for an unprecedented second time. Appellate Group co-chair Ted Olson was named a finalist in the inaugural "Litigator of the Year" competition.

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

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

Cases To Be Argued

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

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

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

defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.

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

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

Gibson Dunn
Counsel for
Daimler AG

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

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

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

9. ***Kansas v. Cheever*, No. 12-609 (Kan., 284 P.3d 1007; cert. granted Feb. 25, 2013; limited to Question 1; SG as amicus, supporting petitioner; argued on Oct. 16, 2013). When a criminal defendant affirmatively introduces expert**

Gibson Dunn
Counsel for Amicus Curiae Federal Law Enforcement Officers Association

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?

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

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

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

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

questions involving the scope of and continuing validity of the Court's decision in *Missouri v. Holland*?

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

15. ***Medtronic Inc. v. Boston Scientific Corp.*, No. 12-1128 (Fed. Cir., 695 F.3d 1266; cert. granted May 20, 2013; SG as amicus, supporting petitioner; argument scheduled for Nov. 5, 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.**

Gibson Dunn
Counsel for
Town of
Greece

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

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

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

19. ***Burrage v. United States*, No. 12-7515 (8th Cir., 687 F.3d 1015; cert. granted Apr. 29, 2013; argument scheduled for Nov. 12, 2013). The Questions Presented are: (1) Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement. (2) Whether a person can be convicted for**

Gibson Dunn
Counsel for
FMR, LLC

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.

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

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

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

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

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

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

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

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

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

29. ***Air Wisconsin Airlines Corp. v. Hoeper*, No. 12-315 (Sup. Ct. Colo., 2012 CO 19; CVSG Jan. 7, 2013; cert. supported May 17, 2013; cert. granted June 17, 2013; SG as amicus, supporting petitioner; argument scheduled for Dec. 9, 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; argument scheduled for Dec. 9, 2013). Whether a district court's decision on the merits that leaves unresolved a request for contractual attorney's fees is a "final decision" under 28 U.S.C. § 1291, which provides that courts of appeals have jurisdiction of appeals from final decisions of the district court.**

31. ***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***

Gibson Dunn
Counsel for Amicus Curiae Current and Former Members of Congress

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

32. ***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; argument scheduled for Dec. 10, 2013). Limited to the Questions Presented in No. 12-1182.**

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

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

35. ***White v. Woodall*, No. 12-794 (6th Cir., 685 F.3d 574; cert. granted June 27, 2013; argument scheduled for Dec. 11, 2013). The Questions Presented are: (1) Whether the Sixth Circuit violated 28 U.S.C. § 2254(d)(1) by granting habeas relief on the trial court's failure to provide a no-adverse-inference**

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

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

37. ***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.**

38. ***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. (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).**

39. ***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. (3) Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.**

40. ***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.

41. ***Harris v. Quinn*, No. 11-681 (7th Cir., 656 F.3d 692; CVSG June 28, 2012; cert. opposed May 10, 2013; cert. granted Oct. 1, 2013). 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.**

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

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

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

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

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

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

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

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

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

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

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

Cases Determined Without Argument

1. ***Stanton v. Sims*, No. 11-1184 (9th Cir., 706 F.3d 954; Reversed and remanded Nov. 4, 2013).** Per Curiam. The Ninth Circuit had reversed a grant of qualified immunity in a 42 U.S.C. § 1983 case after concluding that it was clearly established law that an officer with probable cause to arrest a suspect for a misdemeanor may not enter a home without a warrant while in hot pursuit of that suspect. The Court reversed the Ninth Circuit on the ground that the law was not

clearly established. Regarding the state of the law at the time the officer made his warrantless entry, the Court observed: "Two opinions of this Court [*Welsh v. Wisconsin*, 466 U.S. 740 (1984) and *United States v. Santana*, 427 U.S. 38 (1976)] were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided."

Pending Cases Calling For The Views Of The Solicitor General

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

2. ***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. (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.**

3. ***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*.**

Gibson Dunn
Counsel for
NML
Capital, Ltd.

4. ***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.**

5. ***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).**

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

7. ***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.**

Gibson Dunn
Counsel for
UPS

8. ***Young v. United Parcel Service, Inc.*, No. 12-226 (4th Cir.. 707 F.3d 437; CVSG Oct. 7, 2013). Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to nonpregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work."**

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

series of duplicative claims so long as no prior claim is pending at the time of filing.

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

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

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

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

CVSG Cases In Which The Solicitor General Supported Certiorari

1. **N/A**

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Sony Computer Entertainment v. 1st Media, LLC*, No. 12-1086 (Fed. Cir., 694 F.3d 1367; CVSG May 13, 2013; cert. opposed Sept. 5, 2013; cert denied Oct. 15, 2013). Whether the Court of Appeals for the Federal Circuit erred in**

restricting district courts' equitable discretion in evaluating patent unenforceability, contrary to this Court's precedent in *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933), *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), and *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945), by applying a rigid test that (a) forecloses district courts from considering the entire circumstantial record; and (b) precludes district courts from granting equitable remedies where a patent applicant has violated the Patent and Trademark Office's duty of candor.

Supreme Court Statistics:

Gibson Dunn has a strong and high-profile presence before the Supreme Court of the United States, appearing numerous times in the past decade in a variety of cases on behalf of the nation's leading corporations, U.S. states, presidential candidates, and others. Gibson Dunn has had more than 100 Supreme Court arguments among the firm's active lawyers. Moreover, while the grant rate for certiorari petitions is below 1%, Gibson Dunn's certiorari petitions have captured the Court's attention: Gibson Dunn has persuaded the Court to grant its certiorari petitions more than thirty percent of the time since 2005.

Appellate and Constitutional Law Group Co-Chairs:

Theodore B. Olson - Washington, D.C. (202.955.8500, tolson@gibsondunn.com)
Theodore J. Boutrous, Jr. - Los Angeles (213.229.7000, tboutrous@gibsondunn.com)
Daniel M. Kolkey - San Francisco (415.393.8200, dkolkey@gibsondunn.com)
Thomas G. Hungar - Washington, D.C. (202.955.8500, thungar@gibsondunn.com)
Miguel A. Estrada - Washington, D.C. (202.955.8500, mestrada@gibsondunn.com)