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OCTOBER TERM 2012 PREVIEW

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A LOOK AHEAD AT OCTOBER TERM 2012

This report previews the Supreme Court's docket for October Term 2012. Section I discusses some especially noteworthy cases. Section II organizes the 2012 Term cases into subject-matter categories and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

It is hard to imagine another Term that will duplicate the significance of last year's Term. The Affordable Care Act case and the Arizona immigration case alone made last Term the most important in recent memory. But should the Court grant the pending petitions on the constitutionality of the Defense of Marriage Act, California Proposition 8, and Section 5 of the Voting Rights Act, this Term will rival, if not exceed, the importance of last Term. Without those cases, the Term is likely to be a relatively quiet one. Still, of the 33 cases that the Court has already granted, there is one potential blockbuster, and several others that are noteworthy.

Fisher v. University of Texas

The most significant granted case on the Court's docket is *Fisher v. University of Texas*. In *Grutter v. Bollinger*, the Court held that universities could use race as a factor in their admissions in order to increase diversity. The admissions plan at issue in *Fisher* is modeled on the plan upheld in *Grutter* with one important difference. The University achieves a measure of racial diversity under a state law that guarantees admission to all Texas high school graduates in the top 10% of their class, and seeks to use race as a factor in filling the remaining seats to increase the level of diversity. It is possible that this case will turn on whether the Justices conclude that the state's Top 10% law eliminates the justification for the explicit use of race in University admissions. The case has the potential, however, to be far more significant. *Grutter* is a decision that pre-dates the Roberts Court, and Justice Kennedy did not join the majority. In his opinion for the plurality of the Court in the Seattle School District case, Chief Justice Roberts expressed a deep hostility to the use of race in admissions, summed up in his statement that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." While Justice Kennedy distanced himself from that statement, his concurring opinion expressed a strong preference for race-neutral means to further racial diversity over the overt use of race upheld in *Grutter*. It remains to be seen whether five Justices will be prepared to gut the decision in *Grutter*, or whether *Gutter* is reaffirmed in a decision that resolves whether the Texas plan survives under that decision.

Kiobel v. Royal Dutch Petroleum

The Court heard argument in *Kiobel v. Royal Dutch Petroleum* last term on the question whether corporations could be sued for human rights violations under the Alien Tort Statute (ATS). At argument, it became clear that the Court was far more interested in the question whether the ATS can be applied extraterritorially to challenge human rights violations that occur in foreign countries. The Court has now ordered reargument on that question. When Congress creates a cause of action, there is a strong presumption that Congress does not intend for the cause of action to apply extraterritorially. If the Court applies that same kind of presumption to the federal common law cause of action under the ATS, it would effectively spell the end of ATS litigation. Virtually every case brought under the ATS seeks to hold corporations liable in damages for aiding and abetting human rights violations committed by foreign governments

against their own citizens. While a majority of the Court is likely to be skeptical that U.S. courts are appropriate forums for resolving extraterritorial human rights claims, it remains to be seen whether a majority is prepared to shut down virtually all human rights litigation.

Amgen v. Connecticut Retirement Plans and Comcast v. Behrend

Class actions allow meritorious claims to be brought that would not be worthwhile to bring individually. At the same time, once a class is certified, it puts enormous pressure on defendants to settle even when the merits of the claim are weak. In *Wal-Mart Stores, Inc. v. Dukes*, the Court responded to the latter concern by requiring plaintiffs to prove their claim of systemic employment discrimination on the merits before obtaining class certification. This Term, the Court will return to that same subject in two cases. It is probably no accident that one is a securities fraud case and the other is an antitrust case because these are the two areas in which class actions continue to thrive. In *Amgen v. Connecticut Retirement Plans and Trust Funds*, the Court will decide whether a plaintiff who relies on a fraud-on-the-market theory must prove the materiality of the fraud before a class is certified. And in *Comcast v. Behrend*, the Court will decide whether an antitrust plaintiff must produce admissible evidence establishing a basis for classwide damages before a class is certified. In both cases, the courts of appeals offered distinctions between the issues they decided and those resolved in *Wal-Mart*, and the question is whether those distinctions are sufficient to give the Court comfort that class actions will be certified only when there is real substance to the class claims.

Clapper v. Amnesty International USA

An amendment to the Foreign Intelligence Surveillance Act authorizes the federal government to conduct warrantless electronic surveillance that targets non-United States citizens located outside the United States. Any such surveillance will also allow the government to monitor the conversations of lawyers, journalists, and human rights activists who communicate with the targets. The amendments may raise substantial Fourth Amendment issues. But if the Government has its way, that Fourth Amendment claim will not be litigated because no one knows whether he is actually being monitored, and an allegation that there is a reasonable likelihood that such monitoring will occur in the future is insufficient to establish Article III standing. The Court is closely divided on issues of standing, with Justice Kennedy usually casting the deciding vote. This could be another such case.

Florida v. Jardines and Florida v. Harris

On the criminal law docket, the most intriguing cases are the two Fourth Amendment dog sniff cases. *Florida v. Jardines* presents the question whether a dog sniff at the front door of house is a search requiring probable cause, and *Florida v. Harris* asks whether an alert by a well-trained narcotics detection dog is sufficient to establish probable cause. Precedent appears to be on the government's side. But that was true last term in *United States v. Jones*, where the Court unanimously rejected the government's argument that GPS monitoring of public movements can never be a search. At argument in *Jones*, the Chief Justice asked the government whether its theory would mean that it could install a GPS device on every Justice's car in order to monitor their public movements. Some Court observers cite the Chief Justice's question and the result in *Jones* as evidence that the success of a Fourth Amendment claim often depends on the extent to

which Justices perceive their privacy at risk from the government practice at issue. It is unlikely that dog sniffs pose the same threat to the privacy of Justices as GPS monitoring. Still, if the government's view of the law is right, absent even a suspicion of wrongdoing, a parade of government agents could walk up to a Justice's front door with a trained dog by their side. Then, if the dog alerts because a furniture delivery man or a college-age visitor recently handled drugs and left residual odor on the door knob, the government could get a warrant to search the Justice's house. Whether that is sufficient to trigger the Court's concern is hard to know.

SECTION II: CASE SUMMARIES

Page

Business Law

- Alien Tort Statute
Kiobel v. Royal Dutch Petroleum 8
- Antitrust
FTC v. Phoebe Putney Health System 9
- Collective Actions
Amgen v. Connecticut Retirement Plans and Trust Funds 10
Comcast Corp. v. Behrend 11
Genesis HealthCare Corp. v. Symczyk 12
The Standard Fire Insurance Co. v. Knowles 13
- Copyright
Kirtsaeng v. John Wiley & Sons 14
- Employee Retirement Income Security Act
U.S. Airways v. McCutchen 15
- Title VII – Employment Discrimination
Vance v. Ball State University 16
- Trademark – Article III Mootness
Already v. Nike 17

Constitutional Law

- Fifth Amendment – Takings
Arkansas Game & Fish Commission v. United States 18
- Fourteenth Amendment – Equal Protection
Fisher v. University of Texas at Austin 19

Criminal Law

- Armed Career Criminal Act
Descamps v. United States 20
- Conspiracy
Smith v. United States 21
- Fifth Amendment – Double Jeopardy
Evans v. Michigan 22
- Fourth Amendment – Search and Seizure
Bailey v. United States 23
Florida v. Harris 24
Florida v. Jardines 25
- Habeas Corpus – Anti-Terrorism and Effective Death Penalty Act
Johnson v. Williams 26
Ryan v. Gonzales 27
Tibbals v. Carter 28
- Plain Error Review
Henderson v. United States 29
- Sixth Amendment – Ineffective Assistance of Counsel
Chaidez v. United States 30

Environmental Law

- Clean Water Act
Decker v. Northwest Environmental Defense Center 31
Georgia-Pacific West v. Northwest Environmental Defense Center 31
Los Angeles County Flood Control District v. Natural Resources Defense Council .32

Federal Practice and Procedure

- Civil Service Reform Act
Kloeckner v. Solis 33
- Foreign Intelligence Surveillance Act – Article III Standing
Clapper v. Amnesty International USA 34
- Litigation Costs
Marx v. General Revenue Corp. 35

Other Public Law

- Fair Credit Reporting Act
United States v. Bormes 36
- Hague Convention on Civil Aspects of International Child Abduction
Chafin v. Chafin 37
- Immigration
Moncrieffe v. Holder 38
- Medicare Reimbursement
Sebelius v. Auburn Regional Medical Center 39
- Maritime
Lozman v. Riviera Beach 40

<i>Alphabetical Case Index</i>	<i>Page</i>
<i>Already v. Nike</i>	17
<i>Amgen v. Connecticut Retirement Plans and Trust Funds</i>	10
<i>Arkansas Game & Fish Commission v. United States</i>	18
<i>Bailey v. United States</i>	23
<i>Chafin v. Chafin</i>	37
<i>Chaidez v. United States</i>	30
<i>Clapper v. Amnesty International USA</i>	34
<i>Comcast Corp. v. Behrend</i>	11
<i>Decker v. Northwest Environmental Defense Center</i>	31
<i>Evans v. Michigan</i>	22
<i>Federal Trade Commission v. Phoebe Putney Health System</i>	9
<i>Fisher v. University of Texas at Austin</i>	19
<i>Florida v. Harris</i>	24
<i>Florida v. Jardines</i>	24
<i>Genesis HealthCare Corp. v. Symczyk</i>	12
<i>Georgia-Pacific West v. Northwest Environmental Defense Center</i>	31
<i>Henderson v. United States</i>	29
<i>Johnson v. Williams</i>	26
<i>Kiobel v. Royal Dutch Petroleum</i>	8
<i>Kirtsaeng v. John Wiley & Sons</i>	14
<i>Kloeckner v. Solis</i>	33
<i>Los Angeles County Flood Control District v. Natural Resources Defense Council</i>	32

<i>Lozman v. Riviera Beach</i>	40
<i>Marx v. General Revenue Corp.</i>	35
<i>Moncrieffe v. Holder</i>	38
<i>Ryan v. Gonzales</i>	27
<i>Sebelius v. Auburn Regional Medical Center</i>	39
<i>Smith v. United States</i>	21
<i>The Standard Fire Insurance Co. v. Knowles</i>	13
<i>Tibbals v. Carter</i>	28
<i>United States v. Bormes</i>	36
<i>U.S. Airways v. McCutchen</i>	15
<i>Vance v. Ball State University</i>	16

Business Law

Alien Tort Statute

Kiobel v. Royal Dutch Petroleum (10-1491)

Questions Presented:

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.
2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.
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.

Summary:

The Alien Tort Statute (ATS) 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.” In *Sosa v. Alvarez-Machain*, the Court held that ATS liability does not extend to violations of international norms “with less definite content and acceptance among civilized nations than the [historical] paradigms familiar when [ATS] was enacted.” The Court also noted that a “related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual.” The questions presented in this case are whether the liability of a corporation is a question of subject matter jurisdiction; whether corporations are subject to liability under the ATS for human rights violations; and whether the ATS allows suits for extraterritorial conduct.

Petitioners Esther Kiobel and eleven other Nigerians living in the U.S., sued respondents Royal Dutch Petroleum and other foreign corporations under the ATS for respondents’ alleged support of the Nigerian government’s violent suppression of protesters. Kiobel specifically alleged that respondents aided the Nigerian government in committing the international law violations of torture, extrajudicial killings, and genocide. The district court dismissed some claims and refused to dismiss other claims, and certified its order for interlocutory appeal.

The Second Circuit ordered the dismissal of all claims. It held that whether ATS liability extends to a corporation is a question of subject matter jurisdiction that must be resolved before analyzing the merits of the claim. The court then held that the ATS does not extend liability to corporations because international law has rejected corporate liability for international human rights crimes. The Supreme Court granted certiorari and heard argument on those rulings last Term. Following oral argument, the Court ordered supplemental briefing on the extent to which the ATS permits federal courts to entertain a suit against foreign entities for violations occurring on foreign soil, and set the case for reargument.

On the original issues, Kiobel argues that the scope of liability is a merits question, not a question of subject matter jurisdiction. Kiobel also argues that corporations are subject to ATS liability because the text of the ATS does not exclude corporate actors, federal common law has

always provided for corporate tort liability, and corporate liability is a general principle of law that is accepted by all nations.

On the question of extraterritoriality, petitioners contend that the text of the ATS has no territorial limit; paradigmatic violations of law of nations, including piracy, occur extraterritorially; the contemporaneous transitory tort doctrine afforded a remedy for extraterritorial torts; and the presumption against extraterritoriality does not apply because the ATS it is a jurisdictional statute. Respondent maintains that the presumption against extraterritoriality applies because U.S. law supplies the cause of action for an ATS claim; the text of the law does not clearly embrace extraterritorial violations; paradigmatic violations occur either within the forum nation or on the high seas; and the transitory tort doctrine applies foreign law and therefore does not inform the reach of the ATS.

Decision Below:

621 F.3d 111 (2d Cir. 2010)

Petitioners' Counsel of Record:

Paul L. Hoffman, Schonbrun DeSimone Seplow Harris & Hoffman LLP

Respondent's Counsel of Record:

Kathleen M. Sullivan, Quinn Emanuel Urquhart & Sullivan, LLP

Antitrust

FTC v. Phoebe Putney Health System, Inc. (11-1160)

Questions Presented:

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" 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.

Summary:

Under the "state action doctrine," federal antitrust laws do not apply to an entity's anticompetitive conduct if the conduct is authorized by a clearly expressed state legislative policy to displace competition. The question in this case is whether a state legislature's conferral on a local government of power to acquire property is sufficient to trigger the state action doctrine and insulate from the antitrust laws a hospital's acquisition of its only rival. This case also presents the question whether the state action doctrine applies when the local government entity plays no role in negotiating the terms of the acquisition, and has no means to oversee the hospital's operations.

The Hospital Authority of Albany-Dougherty County (Authority) was created by Georgia law and given the power to acquire and lease property. Using that power, the Authority acquired the Phoebe Putney Memorial Hospital (Memorial). The Authority then created two private corporations, Phoebe Putney Health Systems, Inc. (PPHS) and Phoebe Putney Memorial Hospital (PPMH), and leased Memorial to PPMH. The Authority, PPHS, and PPMH then arranged to acquire the Palmyra Medical Center (Palmyra), the only other hospital in Albany, Georgia. The FTC issued an administrative complaint against respondents charging that their proposed transaction would violate the federal antitrust laws. The FTC and the State of Georgia

then filed suit against respondents in district court, seeking to enjoin the transaction pending the FTC's administrative proceedings. The district court denied injunctive relief and dismissed the complaint.

The Eleventh Circuit affirmed, holding that the transaction was exempt from antitrust scrutiny under the state action doctrine. It reasoned that the state action doctrine insulates anticompetitive effects that are a foreseeable result of state legislation, and that the legislature must have foreseen that its grant of power to the Authority to acquire and lease property would produce anticompetitive effects.

The FTC argues that a state's grant of general corporate powers to a local governmental entity is not sufficient to trigger the state action doctrine. The FTC argues that the conferral of such powers does not express a clear state policy in favor of displacing competition but instead reflects a neutral state policy of subjecting the government entity to the same legal restrictions imposed on private companies in the same line of business. The FTC additionally argues that the state action doctrine is inapplicable because the Authority itself neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operations.

Decision Below:

663 F.3d 1369 (11th Cir. 2011)

Petitioner's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondent's Counsel of Record:

Kevin James Arquit, Simpson Thacher & Bartlett, LLP

Seth Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Collective Actions

***Amgen v. Connecticut Retirement Plans and Trust Funds* (11-1085)**

Questions Presented:

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.

Summary:

To obtain class certification in a 10b-5 securities fraud case, the plaintiff is required by Federal Rule of Civil Procedure 23(b)(3) to prove that the element of reliance is common to the class. In *Basic Inc. v. Levinson*, the Supreme Court held that a plaintiff can do so by invoking the "fraud-on-the-market" presumption – the principle that the market price of a security traded in an efficient market reflects all public information and therefore a buyer of the security is presumed to have relied on the truthfulness of that information in purchasing the security. This presumption may be rebutted at the merits stage with a showing that the market was already aware of the truth behind the defendant's supposed falsehoods, and thus that those falsehoods did not affect the market price. The questions in this case are whether, at the class certification stage, a plaintiff seeking to certify a class based on the fraud-on-the-market theory must prove the materiality of the misrepresentations and whether a defendant may offer evidence of non-materiality.

Connecticut Retirement Plans and Trust Funds (Connecticut Retirement) brought a securities fraud action against Amgen alleging that it misstated safety information about Amgen products, causing its stock price to rise until corrections caused it to fall, in violation of sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Connecticut Retirement moved to certify a class of all purchasers of Amgen stock between the date of the misstatements and the date of the correction. The district court certified the class.

The Ninth Circuit affirmed. The court of appeals held that, at the class certification stage, a plaintiff must prove that the security in question was traded in an efficient market and that the alleged misrepresentations were public, but that a plaintiff need not establish materiality. Instead, a plaintiff need only plausibly allege materiality. The court reasoned that because materiality is a necessary element of a claim on the merits, the claims of the plaintiff and the class stand or fall together. By contrast, because an efficient market and public disclosure are not elements, a failure to prove them would still leave a claim for individual reliance that is unsuitable for class treatment. For the same reason, the court of appeals held that rebuttal evidence on the issue of materiality is not relevant at the class certification stage.

Petitioner argues that to obtain class certification on a fraud-on-the-market theory, a plaintiff must prove materiality, and a defendant must be afforded an opportunity to present rebuttal evidence of non-materiality. Relying on *Basic*, petitioner argues that proof of materiality is just as essential to proceeding on a fraud-on-the-market theory as proof of an efficient market and public disclosure. Petitioner also relies on the holding in *Wal-Mart Stores, Inc. v. Dukes* that merits issues must be examined at the class certification stage to the extent that they overlap with class certification issues. Finally, petitioner argues that there is no relevant distinction between materiality and the other two showings the court of appeals required, because all three are elements of a fraud-on-the-market claim that must be proven at the merits stage.

Decision Below:

660 F.3d 1170 (9th Cir. 2011)

Petitioner's Counsel of Record:

Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Respondent's Counsel of Record:

David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans, and Figel, P.L.L.C.

Comcast v. Behrend (11-1059)

Question Presented:

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.

Summary:

In *Wal-Mart Stores, Inc. v. Dukes*, the Court expressed doubt that a district court could rely on expert testimony at the class certification stage without finding that it is admissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which establishes the standards for admissibility of expert testimony. It did not, however, definitively resolve that issue. This case presents that question. As formulated by the Court, the question is whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence to show that the case is susceptible to awarding damages on a class-wide basis.

Plaintiffs brought suit on behalf of a class of more than two million present and former Comcast cable subscribers in the Philadelphia area, alleging that Comcast engaged in

anticompetitive behavior that resulted in above-market cable prices in violation of sections 1 and 2 of the Sherman Act. One essential element of a Sherman Act claim is damages. In order to show that this element raised an issue common to the class, plaintiffs relied on a multiple regression analysis performed by their expert. The district court found that the model was sufficient to establish commonality on the issue of damages and certified the proposed class under Rule 23(b)(3).

The Third Circuit affirmed. The Third Circuit stated that because petitioner did not raise the question whether *Daubert* applies at the class certification stage, the issue was not properly before it. The court went on to conclude, however, that a district court may rely on expert testimony at the class certification stage as long as it could evolve to become admissible. The court added that the sole question at the class certification stage is whether a model presents a theory of proof that is plausible. Applying that approach, the Third Circuit determined that the model of plaintiffs' expert was plausible, and that petitioner's attacks on the model were merits arguments that were inappropriate to consider at the class certification stage.

Judge Jordan dissented. He concluded that a court may not rely on expert testimony to certify a class unless that testimony is admissible. He further concluded that the testimony of plaintiffs' expert was inadmissible both because it is irrelevant and because it fails to satisfy *Daubert*.

In its petition, petitioner presented a question that focused on the Third Circuit's failure to consider its merits-based attack on plaintiffs' model. That failure, petitioner argued, was inconsistent with the holding in *Wal-Mart* that merits arguments that defeat commonality must be considered at the class certification stage. The Supreme Court, however, reformulated the question presented to track more closely the question raised by Judge Jordan's dissenting opinion relating to whether a plaintiff is required to establish commonality through admissible evidence.

Decision Below:

655 F.3d 182 (3d Cir. 2011)

Petitioner's Counsel of Record:

Miguel A. Estrada, Gibson, Dunn & Crutcher LLP

Respondent's Counsel of Record:

Barry C. Barnett, Susman Godfrey, L.L.P.

***Genesis HealthCare Corporation v. Symczyk* (11-1059)**

Question Presented:

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.

Summary:

Under the Fair Labor Standards Act (FLSA), an employee may bring a "collective" action on behalf of himself and other employees similarly situated, subject to the requirement that no employee shall be a party plaintiff to the action unless he consents to become such a party. The question in this case is whether a collective action becomes moot when, prior to conditional certification of the case as a collective action, the lone plaintiff receives a Rule 68 offer from the defendants that satisfies all of plaintiff's claims.

Symczyk, a former employee of petitioners, initiated a collective action on behalf of herself and all others similarly situated, alleging that petitioners violated the FLSA when they failed to pay employees who performed compensable work during meal breaks. Before Symczyk moved for "conditional certification" of the collective action, petitioners extended an offer of complete relief to plaintiff for all her damages and costs, under Fed.R.Civ.P. 68. The

district court then dismissed the case, holding that petitioner's offer made the case moot.

The Third Circuit reversed. It held that while an offer of complete relief ordinarily moots a case, that general rule does not apply to collective actions. The court relied on decisions holding that an offer of complete relief to the named plaintiff does not moot a class action filed under Fed.R.Civ.P. 23. The court viewed that class action exception as an equitable doctrine to account for calculated attempts by defendants to pick off plaintiffs in order to forestall class relief. The court concluded that the same equitable rationale applies to collective actions.

Petitioners argue that an FLSA collective action becomes moot when a defendant extends a Rule 68 offer of complete relief to the lone plaintiff because such a plaintiff then lacks any personal stake in the outcome of the litigation. Petitioners further argue that the class action cases relied on by the court of appeals are inapposite because they rest on the ground that a class representative can bind class members to a judgment. In contrast, petitioners argue, a judgment in a collective action cannot bind employees who have not themselves joined the litigation.

Decision Below:

656 F.3d 189 (3d Cir. 2011)

Petitioner's Counsel of Record:

Ronald J. Mann, Columbia University Law School

Respondent's Counsel of Record:

Gary F. Lynch, Carlson Lynch LTD

***The Standard Fire Insurance Co. v. Knowles* (11-1450)**

Question Presented:

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?

Summary:

The Class Action Fairness Act (CAFA) authorizes a defendant to remove a class action from state court to federal court where any class member is from a different state than any defendant, and the aggregated claims of all class members exceed \$5 million. At issue in this case is whether a name plaintiff can defeat removal by stipulating that he will not seek total damages in excess of \$5 million on behalf of himself and absent class members.

Respondent Greg Knowles sought reimbursement for home repair costs from petitioner The Standard Fire Insurance Company, and petitioner refused to pay. Knowles then filed a class action complaint in Arkansas state court, and stipulated that he would not seek damages in excess of \$5 million in the aggregate. Petitioner removed the case to federal court under CAFA, but the district court remanded the case to state court. The court found that petitioner demonstrated that the actual amount in controversy exceeds the \$5 million threshold, but held that Knowles' stipulation barred removal. Consistent with Eighth Circuit precedent holding that such a stipulation is valid and effective, the Eighth Circuit denied petitioner's request for permission to appeal under CAFA.

Petitioner contends that Knowles cannot cap the damages of proposed class members he has not yet been certified to represent. Petitioner argues that allowing a plaintiff to cap damages for a class that has not yet been certified is inconsistent with the Supreme Court's holding in *Smith v. Bayer Corp.* that a plaintiff cannot bind class members until the class is certified.

Petitioner further asserts that allowing Knowles to limit aggregate damages, without providing absent class members notice and an opportunity to be heard, violates due process. Finally, petitioner argues that allowing plaintiffs to avoid removal to federal court by stipulating to limited damages defeats Congress's goal in CAFA to curb class action abuses in state courts.

Decision Below:

Unpublished Order in No. 11-15355-CC (11th Cir. Feb. 6, 2012)

Petitioner's Counsel of Record:

Michael Manely, The Manely Firm, P.C., Marietta, Georgia

Respondent's Counsel of Record:

Stephen J. Cullen, Miles & Stockbridge P.C.

Copyright

Kirtsaeng v. John Wiley & Sons, Inc. (11-697)

Question Presented:

[H]ow [do sections 602(a)(1) and 109(a) of the Copyright Act] apply to a copy that was made and legally acquired abroad and then imported into the United States?

Summary:

Section 602(a)(1) of the Copyright Act prohibits the importation of a work without the authority of the copyright's owner. The first-sale doctrine codified in section 109(a) creates an exception to section 602(a)(1) that allows the purchaser of a copy "lawfully made under this Title" to distribute it without the copyright owner's permission. In *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, the Court held that the first-sale doctrine applies to products manufactured in the United States, allowing someone who purchases a U.S.-manufactured copy abroad to import it back into the United States without violating section 602(a)(1). The question in this case is whether the first-sale doctrine also applies to copies manufactured abroad, allowing someone who purchases a foreign-manufactured copy to import it into the United States. The Court previously granted certiorari on that question in another case, but it divided 4-4, with Justice Kagan recusing, leaving the issue unresolved.

John Wiley & Sons (Wiley), a textbook publisher, owns a subsidiary, Wiley-Asia, that manufactures books in foreign countries. Those books are intended for foreign sale. Wiley manufactures books in this country that are intended for sale here. Kirtsaeng, a graduate student, purchased textbooks manufactured by Wiley-Asia abroad, imported them into the United States, and resold them on commercial websites, such as ebay.com. Wiley filed an action against Kirtsaeng for copyright infringement. The district court rejected Kirtsaeng's first-sale defense, holding that the first-sale doctrine does not apply to copies manufactured abroad. The jury found Kirtsaeng liable and awarded statutory damages to Wiley.

The Second Circuit affirmed, agreeing with the district court that that the first-sale doctrine applies only to copies manufactured in the United States. The court concluded that the phrase "lawfully made under this Title" could either mean manufactured in the United States or it could have a broader meaning that covers goods lawfully manufactured abroad. It adopted the former interpretation because the latter would render the importation ban in section 602(a)(1) ineffective in the vast majority of cases. The court also read dicta in *Quality King* to suggest that works "lawfully made under the law of some other country" are not "lawfully made under the United States Copyright Act."

Petitioner argues that "lawfully made under this Title" limits the applicability of the first-sale doctrine to any copy of a work made by the copyright owner or someone authorized by the

copyright owner to make it. Under that interpretation, because Wiley authorized Wiley-Asia to manufacture the copies, the first-sale doctrine protects Kirtsaeng's importation of the copies into the United States. Petitioner argues that this interpretation is the most natural reading of the phrase "lawfully made under this Title"; Congress's use of the words "made under this title" and "manufactured in the United States" in the same sentence elsewhere in the Copyright Act demonstrates that Congress did not intend to give these two phrases the same meaning; and the Second Circuit's interpretation would give copyright owners a perverse incentive to relocate production of their goods overseas. Petitioner finally argues that the *Quality King* dicta indicate only that the first-sale doctrine does not protect an overseas licensee whose license extends only to foreign distribution.

Decision Below:

654 F.3d 210 (2d Cir. 2011)

Petitioner's Counsel of Record:

E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP

Respondent's Counsel of Record:

Theodore B. Olson, Gibson, Dunn & Crutcher LLP

Employee Retirement Income Security Act

U.S. Airways, Inc. v. McCutchen (11-1285)

Question Presented:

Whether the Third Circuit correctly held – in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits – that ERISA Section 502(a)(3) 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.

Summary:

Under section 502(a)(3) of the Employee Retirement Income Security Act (ERISA), the administrator of an employee benefits plan seeking to enforce the plan's terms against a beneficiary may file a civil action to pursue an injunction or other "appropriate equitable relief." In *Serboff v. Mid Atlantic Medical Services*, the Court left open the question whether the term "appropriate" makes equitable defenses and limitations applicable to an administrator's section 502(a)(3) claim. This case presents that question.

Respondent James McCutchen suffered a serious automobile accident. After the accident, a benefit plan administered by McCutchen's employer, U.S. Airways, paid McCutchen \$66,866 for his medical expenses. McCutchen subsequently recovered \$110,000 from third parties. After payment of his attorneys' fees and costs, however, McCutchen was left with less than \$66,866. U.S. Airways nonetheless filed suit against McCutchen for the full \$66,866 it had paid McCutchen. Relying on a provision in the benefit plan that gave U.S. Airways the right to "any monies recovered," the district court ruled for U.S. Airways.

The Third Circuit reversed. It held that reimbursement claims under section 502(a)(3) of ERISA are subject to equitable defenses, such as unjust enrichment. The court reasoned that the word "appropriate" incorporates traditional equitable defenses, and that unjust enrichment is one such traditional defense. Applying that understanding of section 502(a)(3), the court concluded that an award of full reimbursement to U.S. Airways would not be appropriate because it would leave McCutchen with less than full payment for his medical bills and would amount to a windfall to U.S. Airways.

Petitioner argues that, under ERISA, a court must enforce the terms of a plan as they are

written, and may not rely on traditional equitable defenses to override those terms. Petitioner argues that the term “appropriate” means that the relief must be directed towards the goal of enforcing the terms of a benefit plan, not that a court may depart from those terms. Petitioner further argues that deviating from the plan’s terms will increase plan costs and premiums. Finally, petitioner argues that full reimbursement would not constitute a windfall because it returns to U.S. Airways exactly the amount of money it paid to McCutchen and that McCutchen contractually agreed to reimburse.

Decision Below:

663 F.3d 671 (3d Cir. 2011)

Petitioner’s Counsel of Record:

Neal Kumar Katyal, Hogan Lovells US LLP

Respondent’s Counsel of Record:

Matthew W.H. Wessler, Public Justice

Title VII – Employment Discrimination

Vance v. Ball State University (11-770)

Question Presented:

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.

Summary:

In *Faragher v. City of Boca Raton*, and *Burlington Industries, Inc. v. Ellerth*, the Court held that an employer is vicariously liable under Title VII when a supervisor discriminatorily harasses an employee. If the harasser was a non-supervisory coworker, however, the employer is not liable absent proof that the employer itself was negligent. At issue in this case is whether a harasser’s authority to direct an employee’s daily work, without the power to make formal employment decisions (*i.e.*, hire, fire, demote, promote, transfer, or discipline), is sufficient to make that person a supervisor for purposes of vicarious liability.

Petitioner Maetta Vance, an employee of Ball State University, was allegedly subjected to racial epithets and veiled threats by Sandra Davis, the person who assigned Vance work. Vance sued Ball State under Title VII, claiming that Davis’s harassment created a racially hostile work environment for which Ball State was vicariously liable. The district court granted summary judgment in favor of Ball State, and the Seventh Circuit affirmed. The court of appeals held that for purposes of vicarious employer liability, a supervisor is someone who has authority to make formal employment decisions. Because Davis lacked such authority, and Vance could not establish that Ball State was negligent, the court found no basis for employer liability.

Petitioner contends that an employer is vicariously liable for the harassment of any supervisor who has authority to direct an employee’s daily work activities, regardless of whether that person can make formal employment decisions. Petitioner argues that treating such persons as supervisors for purposes of vicarious liability is consistent with the holding of in *Faragher* and *Ellerth*, that an employer is vicariously liable for a hostile work environment created by a supervisor with immediate or successively higher authority over the employee. Petitioner further contends that the Court’s twin rationales for supervisory liability -- that a supervisor can

command the victim's presence and threaten retaliation – are fully applicable to persons who direct an employee's daily work, regardless of whether such persons also have authority to make formal employment decisions.

Decision Below:

646 F.3d 461 (7th Cir. 2011)

Petitioner's Counsel of Record:

Daniel R. Ortiz, University of Virginia School of Law

Respondent's Counsel of Record:

Gregory G. Garre, Latham & Watkins, LLP

Trademark – Article III Mootness

Already, LLC v. Nike, Inc. (11-982)

Question Presented:

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.

Summary:

Article III of the U.S. Constitution requires a “case or controversy” before a court may exercise jurisdiction over a dispute. The question in this case is whether a promise not to assert a registered trademark against an accused infringer divests the district court of Article III jurisdiction to hear that party's claim challenging the validity of the asserted mark.

Nike filed a complaint against petitioner *Already, LLC*, alleging infringement and dilution of its trademark for its Air Force 1 shoes. *Already* counterclaimed, seeking a declaratory judgment that Nike's mark was not a “trademark” under federal law and cancellation of its registration. Nike then delivered a “covenant not to sue” to petitioner, in which it promised to refrain from asserting its trademark registration against petitioner's products. Nike then moved to dismiss its own complaint against petitioner as well as petitioner's counterclaim for lack of a case or controversy. The district court dismissed both parties' claims.

The Second Circuit affirmed, holding that Nike's covenant not to sue eliminated the case or controversy between Nike and *Already*. The court reasoned that Nike's covenant rendered any threat of further litigation against *Already* for marketing its shoes remote or nonexistent. The court of appeals then held that the Lanham Act did not create an independent basis for federal jurisdiction because it applies only when there is an otherwise jurisdictionally supportable action involving a registered mark.

Petitioner argues that Nike's covenant does not eliminate the case or controversy between Nike and petitioner over whether Nike's trademark should be canceled. Petitioner relies on the principle that a dismissal of a plaintiff's claims does not affect a court's jurisdiction over counterclaims. Petitioner further argues that whether a post-suit covenant not to sue eliminates a case or controversy is governed by the mootness doctrine. Under that doctrine, petitioner argues, this case is not moot because Nike failed to show that it is “absolutely clear” that it will not reassert its trademark against petitioner.

Decision Below:

663 F.3d 89 (2d Cir. 2011)

Petitioner's Counsel of Record:

James W. Dabney, Fried, Frank, Harris, Shriver & Jacobson, LLP

Respondent's Counsel of Record:

Thomas C. Goldstein, Goldstein & Russell, P.C.

Constitutional Law**Fifth Amendment – Takings**

Arkansas Game & Fish Commission v. United States (11-597)

Question Presented:

Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.

Summary:

In *Sanguinetti v. United States*, the Supreme Court held that flooding must be permanent to be considered a taking. Subsequently, in other contexts, the Court has recognized the concept of temporary takings. The question in this case is whether government actions that impose recurring flood invasions must continue permanently to constitute a taking.

The Army Corps of Engineers (Corps) manages the Clearwater Dam. The Corps' Water Control Manual provides for normal water releases from the dam and also allows for deviations. Between 1993 and 2000, the Corps approved several temporary deviations. These temporary deviations caused flooding in the Dave Donaldson Black River Wildlife Management Area, which in turn caused excessive timber mortality. Petitioner Arkansas Game & Fishing Commission, which owns the Management Area, filed suit against the United States, alleging that the flooding constituted a physical taking of its property without just compensation. The Court of Federal Claims found the United States liable for a temporary taking and awarded petitioner approximately \$5.8 million in damages.

The Federal Circuit reversed. It held that flooding that is inherently temporary cannot constitute a taking. Because the Corps approved each of the deviations as a temporary measure, the court concluded, the flooding of the Management Area could not constitute a taking. The court distinguished Supreme Court precedent recognizing temporary takings claims on the ground that those cases did not involve flood claims.

Petitioner contends that flooding is not exempt from a takings claim merely because it is temporary. Instead, petitioner argues, whether temporary flooding constitutes a taking depends on all the circumstances, including the foreseeability of the flooding and the extent of the damage. If permanence were a requirement, petitioner argues, government agencies would be free to approve temporary flood plans each year that foreseeably cause serious damage.

Decision Below:

637 F.3d 1366 (Fed. Cir. 2011)

Petitioner's Counsel of Record:

James F. Goodhart, General Counsel, Arkansas Game & Fish Commission

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Fourteenth Amendment – Equal Protection

Fisher v. University of Texas at Austin (11-345)

Question Presented:

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions. (Kagan, J., recused)

Summary:

The Supreme Court in *Grutter v. Bollinger* held that a university may use race as a factor in admissions when narrowly tailored to achieve the educational benefits of a diverse student body. Texas law guarantees admission to state universities to Texas high school graduates in the top 10% of their class. In addition, the University of Texas at Austin (UT), considers race as a factor in admissions to the remaining seats. At issue in this case is whether that consideration of race violates the equal protection clause, as interpreted in *Grutter* and other Supreme Court decisions.

Following a Fifth Circuit decision barring the use of race in admissions, Texas enacted the Top 10% Law. That law significantly increased the percentage of minority students admitted to UT. After *Grutter* was decided, UT determined that the Top 10% Law was insufficient to achieve a critical mass of underrepresented minority students. Consequently, it decided to use race as one factor, among others, in filling the remaining seats. Abigail Fisher, a white Texas high school graduate outside the top 10%, was subsequently denied admission to UT. Fisher sued, claiming that UT's use of race in admissions violated the Equal Protection Clause.

The district court upheld UT's admissions policy under *Grutter*. The court of appeals affirmed. The court deferred to UT's judgment that the school had not yet achieved the critical mass of underrepresented minority students necessary to achieve the educational benefits of a diverse student body. The court concluded that UT appropriately considered the racial demographics of the state's population and lack of classroom diversity in deciding that the Top 10% Law was insufficient to achieve the necessary critical mass.

Petitioner contends that UT's use of race in admissions violates the equal protection clause. Petitioner first argues that UT's use of state demographic data shows it is pursuing the constitutionally impermissible goal of racial balancing. Petitioner next argues that UT's pursuit of a critical mass of minority students at the classroom level goes beyond the compelling interest in a diverse student body recognized in *Grutter*, and is not itself a permissible basis for considering race in admissions. Petitioner next argues that because the Top 10% Law achieves substantial racial diversity, and UT's use of race adds only minimally to that diversity, UT's consideration of race is neither supported by a strong basis in evidence nor narrowly tailored. Finally, petitioner argues that, to the extent *Grutter* is read to justify deferential review of a university's use of race in admissions, it should be clarified or overruled.

Decision Below:

631 F.3d 213 (5th Cir. 2011)

Petitioner's Counsel of Record:

Bert W. Rein, Wiley Rein LLP

Respondent's Counsel of Record:

Gregory G. Garre, Latham & Watkins, LLP

Criminal Law

Armed Career Criminal Act

Descamps v. United States (11-9540)

Question Presented:

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, even though most other Circuit Courts of Appeal would not allow it.

Summary:

The Armed Career Criminal Act (ACCA) provides a sentence enhancement for a felon in possession of a firearm who has three prior convictions for violent felonies. Burglary is a violent felony when it has as its elements an unprivileged entry into a building with the intent to commit a felony. It is not a violent felony when the entry is privileged or the entry is into something that is not a building, like a car. When a state statute is divisible, *i.e.*, it sets out different ways to commit a burglary, some of which contain all the elements of the violent felony, and some of which do not, courts apply a modified categorical approach to determine whether the defendant committed a violent felony. Under this approach, when certain judicial records, such as a guilty plea, make clear that the defendant was convicted of a violent felony, the defendant's conviction counts as a violent felony. At issue in this case is whether that same record-based modified categorical approach may be applied when the state statute is not divisible, *i.e.*, it does not set out an alternative that contains all the elements of the violent felony.

Petitioner Matthew Robert Descamps was found guilty of being a felon in possession of a firearm. At sentencing, the district court determined that Descamps had three prior convictions for violent felonies, one of which was a conviction for burglary. It therefore imposed an enhanced sentence under ACCA.

The Ninth Circuit affirmed, holding that Descamps' conviction of burglary qualified as a violent felony. Applying the modified categorical approach, the court examined Descamps' plea colloquy and determined that Descamps' crime was the unprivileged entry into a grocery store with the intent to commit a felony. The court applied the modified categorical approach even though the state statute under which Descamps was convicted did not set out any alternative way of committing the crime that included all essential elements of the violent felony.

Petitioner contends that the modified categorical approach may only be applied when a statute burglary statute is divisible. Because California's burglary statute is not divisible, petitioner argues, his state burglary conviction cannot establish that he was convicted of a violent felony.

Decision Below:

466 Fed. Appx. 563 (9th Cir. 2012)

Petitioner's Counsel of Record:

Dan B. Johnson, Law Office of Dan B. Johnson, P.S., Spokane, Washington

Respondent's Counsel of Record:

Donald B. Verrilli, Solicitor General of the United States

Conspiracy

Smith v. United States (11-8976)

Question Presented:

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 – a fundamental due process question that is the subject of a well-developed circuit split.

Summary:

The Due Process Clause requires the government to prove beyond a reasonable doubt all elements of an offense. The question in this case is whether, once a defendant produces evidence that he withdrew from a conspiracy before the relevant limitations period, the government must prove his lack of withdrawal beyond a reasonable doubt.

Petitioner was charged with participating in a drug conspiracy and a RICO conspiracy. At trial, he offered evidence that he withdrew from the conspiracy prior to the statute of limitations period. After deliberating for nearly 12 days, the jury asked the court: “If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?” Over petitioner’s objections, the district court instructed the jury that once the government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from the conspiracy by a preponderance of the evidence. Petitioner was subsequently convicted and sentenced to life imprisonment.

The D.C. Circuit affirmed in relevant part. It held that the government can prove the element of a defendant’s participation in a conspiracy by showing that he participated at some point in the conspiracy, and that withdrawal from the conspiracy is an affirmative defense as to which the defendant bears the burden of proof.

Petitioner argues that once a defendant produces evidence that he withdrew from a conspiracy outside the limitations period, due process requires the government to prove his lack of withdrawal beyond a reasonable doubt. Petitioner reasons that due process requires the government to prove every element of an offense beyond a reasonable doubt, a defendant’s participation in the conspiracy during the relevant limitations period is an element of a conspiracy offense, and evidence of withdrawal negates that element of the offense.

Decision Below:

651 F.3d 30 (D.C. Cir. 2011)

Petitioner’s Counsel of Record:

A. J. Kramer, Federal Public Defender, Washington, D.C.

Respondent’s Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Fifth Amendment – Double Jeopardy

Evans v. Michigan (11-1327)

Question Presented:

Does the Double Jeopardy Clause bar retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a midtrial directed verdict of acquittal because the prosecution failed to prove that fact?

Summary:

The Double Jeopardy Clause protects an individual from being prosecuted a second time for the same offense after an acquittal. In *United States v. Martin Linen Supply Co.*, the Supreme Court defined an acquittal as a “ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” The question in this case is whether a trial court’s directed verdict on the ground that the prosecution failed to prove an erroneously included element is an acquittal for the purposes of the Double Jeopardy Clause.

Petitioner burned a vacant house and was charged with “burning other real property.” The district court directed a verdict of acquittal, holding that the prosecution was required to prove that the property burned was not a dwelling, and that it failed to do so. Finding it undisputed that that the trial court had erred in requiring the prosecutor to prove that the property was not a dwelling, the Michigan Court of Appeals reversed and remanded for a new trial. The court rejected petitioner’s claim that retrial would violate the Double Jeopardy Clause.

The Michigan Supreme Court affirmed the ruling of the court of appeals. The court held that a directed verdict grant is not an acquittal if it is based on the prosecution’s failure to prove an erroneously added element. The court reasoned that such a directed verdict is not an acquittal under *Martin Linen* because it does not resolve the factual elements of the offense, but instead resolves a factual issue that is not an element of the offense. The court distinguished Supreme Court cases treating legally erroneous acquittals as acquittals for Double Jeopardy purposes on the ground that those cases involved errors in what was required to prove an element of the offense, not the addition of an erroneous element.

Petitioner argues that a defendant has been acquitted for purposes of the Double Jeopardy Clause if a judge finds that the prosecution has failed to prove an element of the offense, even if dismissal is based on an erroneously added element. Petitioner relies on *Smith v. Massachusetts* for the “well-established rule that the bar [against retrial] will attach” even “to a preverdict acquittal that is patently wrong in law.” Petitioner further argues that, for Double Jeopardy purposes, there is no substantive or administrable difference between a misconstruction of the governing law and the addition of an element to the governing law.

Decision Below:

491 Mich. 1 (2012)

Petitioner’s Counsel of Record:

David A. Moran, University of Michigan Law School

Respondent’s Counsel of Record:

Timothy A. Baughman, Wayne County Prosecutor's Office

Fourth Amendment – Search and Seizure

Bailey v. United States (11-770)

Question Presented:

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.

Summary:

In *Michigan v. Summers*, the Supreme Court held that police may automatically detain the occupant of a residence incident to the execution of a search warrant. Such a detention is *per se* reasonable under the Fourth Amendment. The question in this case is whether the *Summers* rule extends to the detention of an individual who has left the immediate vicinity of the premises before the warrant is executed.

While conducting surveillance of an apartment for which a search warrant had been obtained, police officers saw petitioner and another man leave the apartment and enter a car. Both men generally matched an informant's description of the apartment's occupant. The officers pulled the car over approximately one mile from the apartment. A pat down search of petitioner revealed a key to the apartment, and petitioner also made statements connecting him to the residence. Petitioner was then transported back to the apartment, where he was arrested after officers found a firearm and drugs there. Petitioner subsequently moved to suppress the key and statements tying him to the residence on the ground that they were fruit of an illegal detention. The district court denied the motion, holding that the detention was lawful under *Summers*. Petitioner was convicted and sentenced to 30 years of imprisonment.

The Second Circuit affirmed. The court of appeals held that the petitioner's detention during the search of the apartment was justified under *Summers* because petitioner was (i) an occupant of the premises subject to a search warrant, (ii) seen leaving during the execution of the warrant, and (iii) detained as soon as reasonably practicable thereafter. The court reasoned that the concerns underlying *Summers* apply in those circumstances because the intrusion on the individual remains minimal and the interests in officer safety and preservation of evidence remain strong.

Petitioner argues that the *Summers* rule should not extend to the detention of individuals who have left the immediate vicinity of the premises to be searched because the concerns underlying *Summers* do not apply with the same force. In particular, petitioner argues that detention away from the home is more intrusive than one at home because it produces the indignity of public arrest. Petitioner further argues that concerns for flight and officer safety are far weaker because a person who has left the premises is unaware of the officer's presence and not in a position to interfere with the search.

Decision Below:

652 F.3d 197 (2d Cir. 2011)

Petitioner's Counsel of Record:

Kannon K. Shanmugam, Williams & Connolly LLP

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Florida v. Harris (11-817)**Question Presented:**

Whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that 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?

Summary:

A search of a car is reasonable under the Fourth Amendment when it is based on probable cause. At issue in this case is whether the alert of a trained and certified drug detection dog establishes probable cause for a car search, absent further evidence demonstrating the dog's reliability.

A patrol officer stopped petitioner Clayton Harris for driving a truck with expired tags. During the traffic stop, a drug detection dog alerted to the door handle on the driver's side. The officer interpreted the alert as indicative of residual odor on the door handle from someone who touched drugs. The officer then searched the truck and found over 200 pseudophedrine pills, something the dog was not trained to detect. Harris subsequently confessed to purchasing the pills. The State charged Harris with possession of pseudophedrine with intent to manufacture methamphetamine. The trial court found probable cause to search Harris's truck and denied his motion to suppress. Harris pleaded no contest, reserving his right to appeal the suppression ruling. The intermediate appellate court affirmed.

The Florida Supreme Court reversed. The court held that a showing that a dog is trained and certified to detect drugs is insufficient to establish probable cause because there are no uniform standards of training and certification. The court further held that in order to establish probable cause, the State must introduce evidence of training methods and certification criteria, field performance records, including alerts where contraband was not found, and the dog handler's experience and training. Because the State did not present evidence of that kind, the court concluded that it failed to establish probable cause. The court also emphasized that the State failed to explain how detection of residual odor on the door handle established probable cause to search the interior of the truck.

The State contends that the alert of a trained and certified drug detection dog is sufficient to establish probable cause for a search. The State further contends that in judging a dog's reliability, it is inappropriate to give predominant weight to a dog's success rate in the field, because it is impossible to tell whether an alert that fails to uncover drugs results from residual odor or some other cause. Finally, the State argues that the possibility that a dog is detecting residual odor does not detract from the conclusion that an alert establishes probable cause because probable cause requires only a fair probability, not a certainty, that contraband will be found.

Decision Below:

71 So.3d 756 (Fla. 2011)

Petitioner's Counsel of Record:

Gregory G. Garre, Latham & Watkins, LLP

Respondent's Counsel of Record:

Glen P. Gifford, Assistant Public Defender, Tallahassee, Florida

Florida v. Jardines (11-564)**Question Presented:**

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.

Summary:

The Supreme Court has held in a series of decisions that a dog “sniff” of a vehicle or luggage to detect illegal narcotics is not a “search” within the meaning of the Fourth Amendment. The rationale of those decisions is that a dog sniff detects only contraband, and an individual has no legitimate expectation of privacy in contraband. At issue in this case is whether a dog sniff outside a home is a search.

Miami-Dade police received a tip that marijuana was being grown inside the home of petitioner Joelis Jardines. A month later, a detective went to Jardines’ house, joined by a drug detection dog and his handler. The dog handler approached the front door, where the dog alerted to the scent of contraband. Based on the alert, the detective obtained a warrant to search Jardines’ house. The police discovered marijuana plants during the search, and Jardines was charged with drug trafficking.

The trial court suppressed the evidence seized at Jardines’ house as the fruit of an unlawful search. The intermediate appellate court reversed, finding that a dog sniff is not a search. The Florida Supreme Court reversed the intermediate appellate court, holding that a dog sniff outside a house is a search under the Fourth Amendment. In reaching that conclusion, the court relied on the special Fourth Amendment status of a house recognized in *Kyllo v. U.S.*, where the Court held that a thermal image scan outside a house to detect excess heat in a house is a search. The court also deemed it significant that a dog sniff outside a house exposes its residents to public embarrassment and creates a risk of arbitrary enforcement. The court distinguished the Supreme Court’s dog sniff cases on the ground that they did not involve a house, the risk of public embarrassment, or the danger of arbitrary enforcement.

The State argues that a dog sniff outside a house is not a Fourth Amendment search. The State contends that the Court’s prior dog sniff cases are controlling on this issue, because a dog sniff outside a house, like a dog sniff anywhere else, detects only the presence of contraband. *Kyllo* does not apply, the State argues, because the imaging device in that case revealed intimate information about residents’ lawful activity, rather than only the presence of contraband. The State further argues that, unlike the advanced technology in *Kyllo*, dog sniffs have been used in crime detection for centuries, and therefore do not risk shrinking the privacy traditionally protected by the Fourth Amendment.

Decision Below:

73 So.3d 34 (Fla. 2011)

Petitioner’s Counsel of Record:

Carolyn M. Snurkowski, Office of the Attorney General, Tallahassee, Florida

Respondent’s Counsel of Record:

Howard K. Blumberg, Assistant Public Defender, Miami, Florida

Habeas Corpus – Antiterrorism and Effective Death Penalty Act

Johnson v. Williams (11-465)

Question Presented:

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.

Summary:

The Antiterrorism and Effective Death Penalty Act (AEDPA) bars federal habeas relief for "any claim that was adjudicated on the merits in State court proceedings," unless the state court decision conflicts with or unreasonably applied federal law clearly established by the Supreme Court. The Supreme Court has held that when a state court summarily denies relief without explanation, adjudication on the merits is presumed, and AEDPA's deferential standard of review applies. At issue in this case is whether adjudication on the merits is also presumed when a state court decision explains its rejection of a claim on state law grounds, without discussing the asserted violation of federal law.

Respondent Tara Williams drove the getaway car for a liquor store robbery in which an accomplice shot and killed the store's owner. During jury deliberations in her murder trial, the foreman reported that Juror No. 6 had expressed concern over the severity of the charge and an intention to disregard the law. The trial court found that Juror No. 6 was "biased" against the prosecution, discharged him for cause based on state law, and replaced him with another juror. The jury then convicted Williams of first-degree murder, and she was sentenced to life without parole. The California appellate courts affirmed, explaining that the district court did not err under state law in removing Juror No. 6 for cause. The court did not expressly address Williams' claim that the removal violated her Sixth Amendment right to trial by a jury.

Williams filed a federal habeas petition, reasserting her claim that the removal violated her Sixth Amendment rights. The district court applied AEDPA's deferential standard and denied relief. The Ninth Circuit reversed. The Ninth Circuit held that the state court's rejection of Williams' claim on state-law grounds, without any mention of her Sixth Amendment claim, overcame the presumption that the claim was adjudicated on the merits, and entitled Williams to de novo review. The court of appeals then held that the removal of Juror No. 6 violated Williams' Sixth Amendment rights.

The State contends that a state court should be presumed to adjudicate a federal law claim on the merits when it discusses the substance of the claimed error (such as improper removal of a juror), without regard to whether a federal-law basis for the claim is specifically discussed. Only a plain statement to the contrary, the State maintains, is sufficient to overcome that presumption. The State argues that this rule is consistent with the presumption that state courts fulfill their duty to decide constitutional issues, with the general rule of appellate practice that the failure to address arguments constitutes an implicit rejection of them, and with the Court's decisions that treat a state court decision as an adjudication on the merits when that is the most reasonable explanation for the decision.

Decision Below:

646 F.3d 626 (9th Cir. 2011)

Petitioner's Counsel of Record:

Stephanie Brenan, California Department of Justice

Respondent's Counsel of Record:

Kurt David Hermansen, San Diego, California

Ryan v. Gonzales (10-930)**Question Presented:**

Did the Ninth Circuit err when it held that 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" – impliedly entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel?

Summary:

18 U.S.C. § 3599(a)(2) grants any indigent capital defendant who seeks to vacate or set aside a death sentence the right "to the appointment of one or more attorneys." The question in this case is whether that provision implicitly guarantees death row inmates who are not competent to assist counsel a right to a stay of post-conviction proceedings. The related question whether capital prisoners have a right to competence in federal habeas proceedings under 18 U.S.C. § 4241 and *Rees v Peyton*, is presented in *Tibbals v. Carter*, No. 11-218.

Gonzales was convicted of first-degree murder and sentenced to death. Gonzales subsequently filed a petition for federal habeas corpus relief. Pursuant to section 3599(a)(2), the district court appointed counsel to represent Gonzales, and counsel moved to stay the proceedings pending a competency determination. The district court denied Gonzales's motion, concluding that his claims did not require his assistance because they were record-based and/or resolvable as a matter of law.

Relying on its prior decision in *Rohan v. Woodford*, the Ninth Circuit ordered a stay of proceedings pending a competency determination. In *Rohan*, the Ninth Circuit held that section 3599(a)(2) implicitly grants an incompetent death row inmate a right to a stay of proceedings pending restoration of his competence. The Ninth Circuit in *Rohan* recognized that section 3599(a)(2) does not expressly grant a death row inmate a right to competence. Relying on the common law tradition of requiring competency in criminal proceedings, and its practical importance to counsel's effectiveness, however, the court implied a right to competence to assist counsel from section 3599(a)(2)'s guarantee of a right to counsel. Applying *Rohan*, the Ninth Circuit ruled that Gonzales's proceedings should be stayed because his judicial-bias claim could potentially benefit from rational communication between Gonzales and his counsel.

Petitioner contends that 18 U.S.C. § 3599(a)(2) does not guarantee a right to competence in post-conviction proceedings. Petitioner relies on the text of section 3599(a), which affords a right to counsel, but does not afford a right of competency to assist counsel. Petitioner further contends that (i) there is no common law tradition requiring competent assistance in post-conviction proceedings, (ii) competent assistance is not needed for Gonzales's record-based claims, (iii) recognizing a right to competent assistance is incompatible with the Court's holding that habeas petitions may be filed by a "next-friend," and (iv) recognizing such a right would undermine the holding in *Ford v. Wainwright* that only unawareness of the punishment or the reason for it, and not mere inability to assist, precludes execution of a death sentence.

Decision Below:

623 F.3d 1242 (9th Cir. 2010)

Petitioner's Counsel of Record:

John Pressley Todd, Assistant Attorney General, Arizona

Respondent's Counsel of Record:

Leticia Marquez, Office of the Federal Public Defender for District of Arizona

Tibbals v. Carter (11-218)

Questions Presented:

1. Do capital prisoners possess a “right to competence” in federal habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966)?

2. Can a federal district court order an indefinite stay of a federal habeas proceeding under *Rees*?

Summary:

18 U.S.C. § 4241 authorizes district courts to hold competency hearings to determine if a criminal defendant is unable to understand the nature and consequences of the proceedings against him or to assist in his defense. Section 4241 also authorizes district courts to stay proceedings until a defendant is deemed competent. In *Rees v. Peyton*, the Supreme Court directed the district court to determine the competency of a petitioner who wished to terminate his habeas proceeding. The question in this case is whether capital prisoners have a “right to competence” in federal habeas proceedings under section 4241 and *Rees*, and whether a federal district court can order an indefinite stay of a federal habeas proceeding if a petitioner is not competent to assist counsel. The related question whether a death row inmate’s right to counsel in post-conviction proceedings implies a right to competence and a stay of proceedings is presented in *Ryan v. Gonzales*, No. 10-930.

Carter was convicted of aggravated murder and sentenced to death. Carter eventually filed a federal habeas petition. When Carter refused to meet with his attorneys, they filed a motion for a competency determination and a stay of the proceedings. After finding Carter incompetent, the district court dismissed his petition without prejudice and equitably tolled the statute of limitations on his habeas claims.

The Sixth Circuit amended the district court’s judgment. The court held that *Rees* affords capital prisoners a right under section 4241 to a determination of competency whenever a habeas petitioner seeks to forego his petition, whether by action or inaction. That standard was satisfied here, the court concluded, because Carter’s failure to meet with his attorneys created a risk that the statute of limitations would run on his habeas claims. The court held, however, that the district court should not have dismissed the petition and tolled the statute of limitations. Instead, citing a court’s inherent authority to manage its docket and section 4241, the court of appeals ruled that Carter’s petition should be stayed with respect to any claim that requires his assistance.

Petitioner argues that section 4241 does not apply to post-conviction proceedings because the text of the law limits its application to a defendant’s trial and post-release proceedings. Petitioner further argues that *Rees* is inapposite because it suggests that competency is a prerequisite to withdrawal of a petition, not to the litigation of one, and because it did not base its ruling on section 4241, but merely suggested that its procedures should be used in the withdrawal context. Petitioner also contends that because AEDPA restricts Carter’s habeas proceeding to the state-court record, the district court lacked discretion to stay Carter’s case based on the possibility that Carter might have new evidence bearing on his claims. Finally, petitioner argues that any indefinite stay of a habeas proceeding is incompatible with AEDPA’s purpose of expediting the execution of criminal sentences.

Decision Below:

644 F.3d 329 (6th Cir. 2011)

Petitioner’s Counsel of Record:

Alexandra T. Schimmer, Solicitor General of Ohio

Respondent’s Counsel of Record:

Scott Michelman, Public Citizen Litigation Group

Plain Error Review

Henderson v. United States (11-9307)

Question Presented:

When the governing law is unsettled at the time of trial but settled in the defendant's favor by the time of appeal, should an appellate court reviewing for "plain error" apply *Johnson*'s time-of-appeal standard, as the First, Second, Sixth, Tenth, and Eleventh Circuits do, or should the appellate court apply the Ninth Circuit's time-of-trial standard, which the D.C. Circuit and the panel below have adopted?

Summary:

While a defendant generally forfeits the right to obtain correction of a trial court's error by failing to make a timely assertion of the right at trial, Rule 52(b) of the Federal Rules of Criminal Procedure permits an appellate court to correct a trial court's "plain error" despite the lack of a timely objection. In *Johnson v. United States*, the Supreme Court held that, when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration." The question in this case is whether, when the law is *unsettled* at the time of trial but settled in the defendant's favor by the time of appeal, Rule 52(b) requires the error to be plain at the time of the trial or merely at the time of appeal.

Petitioner pleaded guilty to being a felon in possession of a firearm. The trial court sentenced petitioner to a longer prison term than the Sentencing Guidelines recommended so that he could qualify for a drug treatment program. Petitioner did not object to the lengthened sentence at trial. While the petitioner's appeal was pending, the Supreme Court held in *Tapia v. United States* that it is error for a court to lengthen a prison sentence to enable an offender to qualify for a treatment program.

The Fifth Circuit affirmed. Because petitioner did not preserve the error by making a timely objection, the court reviewed for plain error. The court recognized that that the district court's sentence constituted an error under *Tapia*. It refused to reverse the district court's sentence, however, because the law was unsettled at the time of trial.

Petitioner contends that an error's plainness should be determined at the time of appeal regardless of the law's clarity at the time of trial. Petitioner argues that this rule is consistent with the Court's general practice of applying new law to all cases not yet final, treats similarly situated defendants similarly, and avoids an elusive and time-consuming inquiry into whether the law was "settled" or "unsettled" at the time of trial. Petitioner further argues that because an error will never be plain when the law is unsettled, the court of appeals' time-of-trial standard is the same as no plain error review at all.

Decision Below:

646 F.3d 223 (5th Cir. 2011)

Petitioner’s Counsel of Record:

Patricia A. Gilley, Gilley & Gilley, Shreveport, Louisiana

Respondent’s Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Sixth Amendment – Ineffective Assistance of Counsel

Chaidez v. United States (11-820)

Question Presented:

Whether [the holding in *Padilla v. Kentucky* that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise that pleading guilty to an offense will subject them to deportation] applies to persons whose convictions became final before its announcement.

Summary:

Under *Teague v. Lane*, a case creates a new rule that is not retroactively applicable if it was not dictated by existing precedent at the time the defendant's conviction became final. In *Padilla v. Kentucky*, the Supreme Court held that criminal defendants receive ineffective assistance of counsel under the general test of ineffectiveness set forth in *Strickland v. Washington* when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. The question in this case is whether *Padilla* announced a new constitutional rule and is therefore non-retroactive.

Chaidez, a permanent resident alien, was involved in an insurance scheme in which she falsely claimed to have been a car passenger in a collision. She pleaded guilty to two counts of mail fraud, an aggravated felony that subjected her to deportation. After her conviction became final, deportation proceedings were initiated against her. Chaidez then filed a petition seeking to overturn her conviction on the ground that her trial counsel had not informed her that removal was a potential consequence of her conviction. While that petition was pending, the Supreme Court decided *Padilla*. The district court granted Chaidez's petition based on *Padilla*.

The Seventh Circuit reversed, holding that *Padilla* announced a new, non-retroactive rule. The court of appeals reasoned that prior to *Padilla*, it was unsettled whether the Sixth Amendment applied to advice regarding the collateral consequences of a guilty plea. In support of that conclusion, the Seventh Circuit cited the views of four Justices in *Padilla* that the Sixth Amendment does not apply to advice on collateral consequences. The court also cited several pre-*Padilla* lower court decisions that took the same position.

Petitioner argues that the holding in *Padilla* is retroactively applicable to her conviction because *Padilla* is merely a fact-specific application of *Strickland*. In particular, petitioner contends that *Strickland* tied effective assistance of counsel to prevailing professional norms, and professional norms required advising defendants on the immigration consequences of their pleas long before petitioner's conviction became final. Petitioner further argues that the view of the *Padilla* dissenters and some pre-*Padilla* lower courts that *Strickland* does not apply to advice concerning collateral consequences does not show that *Padilla* was new because the Court's decisions never suggested such a limitation on *Strickland*.

Decision Below:

655 F.3d 684 (7th Cir. 2011)

Petitioner's Counsel of Record:

Jeffrey L. Fisher, Stanford Law School, Supreme Court Litigation Clinic

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Environmental Law

Clean Water Act

Decker v. Northwest Environmental Defense Center (11-338)

Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center (11-347)

Questions Presented:

(11-338)

1. Did the Ninth Circuit err when, in conflict with [multiple] circuits, it held that a citizen may bypass judicial review of [a National Pollutant Discharge Elimination System] 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]?

2. Did the Ninth Circuit err when it held that stormwater from logging roads is industrial stormwater under the [Clean Water Act] and EPA's rules, even though EPA has determined that it is not industrial stormwater?

(11-347)

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 [the National Pollutant Discharge Elimination System].

Summary:

The Clean Water Act (CWA) requires a permit for stormwater discharges associated with industrial activities from any silvicultural point source into the navigable waters of the United States. The EPA's silvicultural regulation excludes from the "silvicultural point sources" definition "surface drainage, or road construction and maintenance from which there is natural runoff." The EPA has interpreted "natural runoff" to include stormwater runoff from forest roads, even when the runoff is channeled. One question presented in this case is whether the Ninth Circuit erred in failing to defer to that interpretation. EPA regulations define "industrial activities" to include "logging," and EPA has interpreted "logging" to exclude logging roads. Another question presented in this case is whether the Ninth Circuit erred in failing to defer to that interpretation. Citizens dissatisfied with an EPA regulation generally must seek judicial review in a court of appeals within 120 days, and may not challenge the validity of a regulation in a citizen suit enforcement action. The final question presented in this case is whether the Ninth Circuit improperly permitted a challenge to EPA's silvicultural and stormwater regulations in this citizen suit enforcement action.

Petitioners are state forestry officials and private timber companies who operate logging roads in Oregon. These roads channel stormwater runoff into rivers. The Northwest Environmental Defense Center brought a citizen suit against petitioners, alleging that petitioners violated the CWA by engaging in this activity without a permit. The district court dismissed the claim.

The Ninth Circuit reversed. The court held that petitioners had engaged in stormwater discharges associated with industrial activity from a silvicultural point source without a permit, in violation of the CWA. The court first concluded that the CWA definition of "point source" encompasses stormwater runoff that is channeled from logging roads, and that the EPA's regulation was consistent with that conclusion. The court rejected the EPA's position that its regulation treats channeled runoff as a non-point source on the ground that it would make the

regulation inconsistent with the statute. The court next concluded that the discharges at issue were “associated with industrial activities.” The court rejected EPA’s position that logging roads are not industrial activities based on the court’s view that EPA’s regulatory coverage of “logging” and “immediate access roads” necessarily encompasses logging roads. Finally, the court held that it was not improperly permitting a challenge to EPA’s silvicultural regulation in a citizen suit enforcement action because the regulation was subject to two different interpretations, and EPA first adopted its interpretation in this case.

Petitioners collectively make two basic arguments. First, they argue that the court improperly permitted a challenge to EPA regulations in this citizen suit enforcement action. They argue that even if EPA delayed in interpreting the silvacultural regulation, that delay affects only the time for appealing under the exclusive review provision; it does not permit a challenge in a citizen suit enforcement action. Second, petitioners argue that channeled forest road runoff is not subject to the CWA’s permit requirement both because the EPA reasonably concluded that logging roads are non-industrial and because EPA reasonably concluded that they are not a point source.

Decision Below:

640 F.3d 1063 (9th Cir. 2011)

Petitioner’s Counsel of Record:

Anna M. Joyce, Solicitor General, Oregon Department of Justice (11-338)

Timothy S. Bishop, Mayer Brown LLP (11-347)

Respondent’s Counsel of Record:

Jeffrey L. Fisher, Stanford Law School, Supreme Court Litigation Clinic

Los Angeles County Flood Control District v. Natural Resources Defense Council (11-460)

Question Presented:

When water flows from one portion of a river that is navigable water of the United States, 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, into a lower portion of the same river, can there be a “discharge” from an “outfall” under the Clean Water Act[?]

Summary:

The Clean Water Act (CWA) prohibits the “discharge” of pollutants into navigable waters from a “point source” unless the discharge complies with a National Pollution Discharge Elimination System (NPDES) permit. The definition of point source includes the outfall from a municipal separate storm sewer system (MS4). The question in this case is whether there can be a “discharge” from an “outfall” when water flows from one portion of a river, through a channel containing an MS4 monitoring station, and into a lower portion of the same river.

Petitioner owns and operates a MS4 that collects stormwater runoff from across Los Angeles County and channels it into the region’s rivers, including the Los Angeles and San Gabriel Rivers. Environmental organizations commenced an action under the CWA’s citizen suit provision, alleging that petitioner had violated its stormwater permit by improperly discharging stormwater that exceeded water quality standards into the Los Angeles and San Gabriel Rivers. The district court rejected that claim on the ground that plaintiffs showed only that pollutants exceeded permit standards at monitoring stations downstream from the outflows and not that they exceeded permit standards when they passed through MS4 outflows.

The Ninth Circuit reversed in relevant part, holding that there was sufficient evidence of a discharge of pollutants from MS4 outfalls into the Los Angeles and San Gabriel Rivers. The court reasoned that pollutants exceeding permit standards were detected in a section of the MS4

owned and operated by petitioner, that the MS4 is distinct from the two rivers because it is man-made, and that a discharge from a point source therefore occurred when the polluted stormwater flowed out of the concrete channels, through an outfall, and into navigable waterways.

Petitioner argues that man-made improvements to a water body do not alter its status as a navigable water of the United States. Petitioner further argues that, under the Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, a transfer of water between two portions of a single river cannot constitute a discharge of pollutants.

Decision Below:

673 F.3d 880 (9th Cir. 2011)

Petitioner's Counsel of Record:

Timothy T. Coates, Greines, Martin, Stein & Richland LLP

Respondent's Counsel of Record:

Aaron Colangelo, Natural Resources Defense Council

Federal Practice and Procedure

Civil Service Reform Act

Kloeckner v. Solis (11-184)

Question Presented:

If the [Merit Systems Protection Board] decides a mixed case without determining the merits of the discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?

Summary:

The Civil Service Reform Act (CSRA) provides that federal employees may appeal certain employment actions, including dismissals, to the Merit Systems Protection Board (MSPB). While the CSRA generally provides for review of MSPB decisions in the Federal Circuit, there is an exception for “[c]ases of discrimination,” which are reviewable in federal district court. Such cases are referred to as “mixed cases” because they involve both an action that may be appealed to the MSPB and an allegation that the basis for the action was discrimination in violation of federal law. An MSPB decision resolving a mixed case on the merits is indisputably subject to review in federal district court. At issue in this case is whether an MSPB decision resolving a mixed case on procedural grounds is also subject to review in federal district court or is instead subject to review in the Federal Circuit.

Carolyn Kloeckner filed an internal equal employment opportunity (EEO) complaint with the Department of Labor (DOL), claiming that the DOL subjected her to a hostile work environment because of sex and age. The DOL eventually fired Kloeckner, and she appealed her dismissal to the MSPB, alleging that it was in retaliation for her EEO complaint. Kloeckner also added a retaliatory discharge claim to her EEO complaint. To avoid unnecessary duplication, the MSPB dismissed Kloeckner's discharge complaint without prejudice to her refiling it within four months. The DOL subsequently rejected Kloeckner's EEO claims, and Kloeckner appealed to the MSPB. Because the appeal was filed long after the four-month refiling period had expired, the MSPB dismissed the appeal as untimely. Kloeckner then sued the DOL in federal district court, claiming discrimination and retaliation.

The district court dismissed Kloeckner's claim for lack of jurisdiction. The Eighth

Circuit affirmed. The court of appeals held that the Federal Circuit has exclusive jurisdiction to review an MSPB decision dismissing a mixed case on procedural grounds. The court interpreted a provision that requires the MSPB to resolve the “issue of discrimination and the applicable action” within a specified period to imply that Congress limited district court review to decisions on the merits of the discrimination claim.

Kloeckner contends that federal district courts have jurisdiction over MSPB decisions in all mixed cases regardless of whether the MSPB resolves the case on procedural grounds or the merits. Kloeckner relies on the text of the CSRA, which refers to “cases of discrimination” as cases in which an employee “alleges” that a basis for the action reviewable by the MSPB was discrimination in violation of federal law. Kloeckner argues that this language makes clear that the defining feature of a “case of discrimination” subject to federal district court review is an allegation of discrimination, not whether the MSPB resolves that allegation of discrimination on the merits.

Decision Below:

639 F.3d 834 (8th Cir. 2011)

Petitioner’s Counsel of Record:

Eric Schnapper, School of Law, University of Washington

Respondent’s Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Foreign Intelligence Surveillance Act – Article III Standing

Clapper v. Amnesty International USA (11-1025)

Question Presented:

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 and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.

Summary:

Section 1881a of the Foreign Intelligence Surveillance Amendments Act authorizes the federal government to conduct electronic surveillance targeting non-United States persons located outside the United States to acquire foreign intelligence. The question in this case concerns what showing persons who communicate with possible targets of section 1881a-authorized surveillance must make in order to establish Article III standing to challenge the constitutionality of that provision.

Respondents are lawyers, journalists, and human rights groups. They filed suit, alleging that section 1881a is unconstitutional and seeking declaratory and injunctive relief against the Government’s use of it as authority to conduct surveillance. To support their claim of Article III standing, respondents alleged that their jobs require them to communicate with individuals who are likely to be targets of surveillance under section 1881a. Respondents further alleged that section 1881a imposes significant burdens and costs on them, such as foregoing certain conversations and incurring the costs of travel to meet face-to-face. The district court held that respondents failed to establish Article III standing and dismissed their suit.

The Second Circuit reversed. The court of appeals held that respondents have standing on two grounds. First, it held that respondents suffer prospective injury because there is a reasonable likelihood that their conversations will be monitored. The court reasoned that

respondents communicate with the very kind of persons who are likely to be targeted under section 1881a. Second, the court held that respondents suffer present injury because they incur significant burdens and costs to avert interception of their conversations.

The government argues that neither of the Second Circuit's standing theories satisfies Article III. The government argues that in order to satisfy Article III, it is not enough to show that an injury may be reasonably likely to occur at some point in the future. Instead, the government argues, Article III requires a showing that a future injury is "imminent" and "certainly impending," a showing respondents failed to make. The government further argues that the costs respondents incur to avert interception of their conversations constitute a "self-inflicted" injury, and self-inflicted injuries are insufficient to satisfy Article III.

Decision Below:

638 F.3d 118 (2d Cir. 2011)

Petitioner's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondent's Counsel of Record:

Jameel Jaffer, American Civil Liberties Union Foundation

Litigation Costs

Marx v. General Revenue Corp. (11-1175)

Question Presented:

Whether a prevailing defendant in [a Fair Debt Collection Practices Act] case may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment."

Summary:

Under Rule 54(d) of the Federal Rules of Civil Procedure, a prevailing party is ordinarily allowed to recover the costs of litigation (other than attorney's fees), unless a federal statute provides otherwise. The Fair Debt Collection Practices Act (FDCPA), a consumer protection statute, provides that "on a finding by the court that an action . . . 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." At issue in this case is whether, absent a finding of bad faith or harassment, a court may award costs under Rule 54(d) to a defendant who wins a FDCPA suit.

Respondent General Revenue Corp. (GRC), a debt collection service, was hired to collect payments due when petitioner Olivea Marx defaulted on her student loan. Marx sued GRC, alleging abusive collection practices in violation of the FDCPA. The district court found against Marx, and awarded costs to GRC pursuant to Rule 54(d). The court did not find that Marx sued in bad faith and for the purpose of harassment.

The court of appeals affirmed the costs award. The court held Rule 54(d) embodies a longstanding presumption that a prevailing party is entitled to costs and that nothing in the FDCPA prevents Rule 54(d)'s normal operation. In the court's view, the FDCPA merely recognizes that the prevailing party is entitled to receive the costs of suit as a matter of course, and only an award of attorney's fees to a prevailing defendant is linked to a finding that the action was brought in bad faith.

Marx argues that the text of Rule 54 makes its presumption in favor of an award of costs inapplicable when a statute provides otherwise, and that, by expressly requiring bad faith as a

predicate for an award of costs to the defendant, the FDCPA provides otherwise. Petitioner argues that the Tenth Circuit’s view that the term “costs” in the FDCPA simply restates Rule 54’s presumption in favor of costs would make that term superfluous and that disconnecting it from the bad faith limitation would not make grammatical sense. Finally, Marx argues that the bad faith limitation on costs is necessary to avoid deterring persons who are already in debt from bringing suit.

Decision Below:

668 F.3d 1174 (10th Cir. 2011)

Petitioner’s Counsel of Record:

Allison M. Zieve, Public Citizen Litigation Group

Respondent’s Counsel of Record:

Lisa S. Blatt, Arnold & Porter LLP

Other Public Law

Fair Credit Reporting Act

United States v. Bormes (11-192)

Question Presented:

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.*

Summary:

The Fair Credit Reporting Act (FCRA) prohibits the disclosure of a consumer’s credit information, makes “any person” committing a willful violation liable for damages, and defines a “person” to include “any government.” The Little Tucker Act waives the United States’ sovereign immunity with respect to suits seeking less than \$10,000 for breaching a statute that creates a right to recover damages from the United States. At issue in this case is whether the Little Tucker Act waives the federal government’s sovereign immunity from a consumer’s claim for damages under the FCRA.

Respondent James Bormes, an attorney, filed a federal lawsuit on a client’s behalf and used his own credit card to pay the \$350 filing fee. Bormes paid the fee on pay.gov, a system operated by the federal government. The government sent Bormes a webpage and email message confirming receipt of payment, both of which contained the expiration date on Bormes’ credit card. Bormes sued the United States for willfully violating the FCRA, which prohibits printing a credit card expiration date. Bormes sought to represent a class of similarly situated consumers, and sought damages for the class.

The district court dismissed the action on the ground that the United States was immune from suit. The court of appeals reversed, holding that the Little Tucker Act waives the federal government’s immunity from a consumer’s claim to recover less than \$10,000 in damages for violating the FCRA. The court reasoned that the Little Tucker Act waives immunity when there is a “fair inference” that the underlying source of substantive law is money mandating, and that the FCRA’s definition of “person” to include “any . . . government” raises a fair inference that the FCRA mandates a monetary recovery against the United States.

The United States contends the Little Tucker Act does not waive the United States’ immunity from suits for money damages under the FCRA. First, it argues that the Little Tucker Act does not apply to statutes, like the FCRA, that have their own remedial schemes. Second, it

argues that even if the Little Tucker Act could apply to some statutes with their own remedial schemes, it could not apply to the FCRA because the Tucker Act conflicts in a number of ways with the FCRA. And third, it argues that the definition of “person” to include “any government” does not raise a fair inference that the FCRA mandates a monetary recovery against the United States.

Decision Below:

626 F.3d 574 (Fed. Cir. 2010)

Petitioner’s Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondent’s Counsel of Record:

John G. Jacobs, Jacobs Kolton, Chartered, Chicago, Ill.

Hague Convention on Civil Aspects of International Child Abduction

Chafin v. Chafin (11-1347)

Question Presented:

Whether an appeal of a District Court’s ruling on a Petition for Return of Children pursuant to 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* case, 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* case, and maintain jurisdiction throughout the appellate process giving the concerned party an opportunity for proper redress.

Summary:

Under the Hague Convention on the Civil Aspects of International Child Abduction and its implementing statute, the International Child Abduction Remedies Act (ICARA), a district court is authorized to order a minor child returned to the child’s country of habitual residence if it finds that the child was wrongfully removed to or retained in the United States, in breach of custody rights. At issue in this case is whether one parent’s appeal of an order granting the other parent’s petition to return their child to the country of habitual residence becomes moot once the child has returned to that country.

Petitioner Jeffrey Lee Chafin, an American, is married to respondent Lynne Hales Chafin, a Scottish national. Respondent and the child moved to Scotland. Respondent later traveled with the child to the United States to attempt a marital reconciliation. After those efforts failed, respondent was deported to Scotland. She then filed a petition in district court in Alabama to return the child to Scotland. The district court granted the petition, and denied petitioner’s motion for a stay pending appeal. The child then returned to Scotland.

The court of appeals remanded with instructions to the district court to vacate its return order and dismiss the case as moot. The court reasoned that the case became moot once the child returned to Scotland.

Petitioner contends that compliance with an order to return a child to her country of habitual residence does not moot an appeal challenging the order. Petitioner asserts that an appellate court has the authority to reverse the order and direct that the child be returned to the United States. The possibility of awarding relief that can undo the effects of compliance with the order, petitioner maintains, preserves a live controversy.

Decision Below:

Unpublished Order, No. 11-15355-CC (11th Cir. Feb. 6, 2012)

Petitioner's Counsel of Record:

Michael E. Manely, The Manely Firm, P.C., Marietta, Georgia

Respondent's Counsel of Record:

Stephen J. Cullen, Miles & Stockbridge P.C.

Immigration***Moncrieffe v. Holder* (11-702)****Question Presented:**

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.

Summary:

Federal immigration law provides that an alien convicted of an aggravated felony, including a state offense that is equivalent to a felony punishable under the Controlled Substances Act (CSA), is deportable. Under the CSA, possession with intent to distribute less than 50 kilograms of marijuana is felony, but if the defendant can show that he distributed a small amount of marijuana for no remuneration, it is a misdemeanor. At issue in this case is whether an alien is deportable based on his state conviction of possession with intent to distribute marijuana where neither the fact nor the record of his conviction demonstrates that he did not distribute a small amount of marijuana for no remuneration.

Petitioner Adrian Moncrieffe, a lawful permanent resident of the United States, pleaded guilty to possession with intent to distribute marijuana under Georgia law. The United States sought to deport Moncrieffe as an aggravated felon. The Immigration Judge ruled that Moncrieffe was deportable because his state conviction was analogous to the CSA felony of possession with intent to distribute marijuana, and the Board of Immigration Appeals affirmed.

The Fifth Circuit denied Moncrieffe's petition for review. The court held that when a state conviction for possession with intent to distribute does not reveal the quantity of marijuana or whether it was for remuneration, the default analogous federal offense is the felony of possession with intent to distribute, subjecting an alien to deportation. Under that approach, an alien can avoid deportation only by showing through the record of conviction that he was convicted only of distributing a small quantity of marijuana for no remuneration.

Moncrieffe contends that a state law conviction for possession of marijuana with intent to distribute must be presumed to be for the non-deportable federal law misdemeanor of distributing a small amount of marijuana for no remuneration, unless the government can establish otherwise through the record of conviction. Moncrieffe argues that this approach is consistent with the Supreme Court's categorical approach under which a state law that covers conduct that is both a misdemeanor and a felony under federal law is presumed to be the misdemeanor, unless the government can demonstrate otherwise through the record of conviction.

Decision Below:

662 F.3d 387 (5th Cir. 2011)

Petitioner's Counsel of Record:

Thomas C. Goldstein, Goldstein & Russell, P.C.

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Medicare Reimbursement

Sebelius v. Auburn Regional Medical Center (11-1231)

Question Presented:

Whether the 180-day statutory time limit for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary, 42 U.S.C. 1395oo(a)(3), is subject to equitable tolling.

Summary:

Medicare's Prospective Payment System reimburses hospitals for their inpatient operating costs. If a provider is dissatisfied with its payment, it may file an appeal with the Provider Reimbursement Review Board (PRRB) within 180 days after receiving notice of the payment. Federal regulations authorize the PRRB to extend this time period if good cause is shown and a request for extension is filed within three years. The question in this case is whether the 180-day statutory time limit for filing an appeal is also subject to equitable tolling.

Respondent hospitals filed requests for hearings with the PRRB more than a decade after the statutory appeal deadlines had expired but within 180 days of the PRRB's discovery in an unrelated case that the hospitals had been underpaid in fiscal years 1993-1996. The PRRB dismissed respondents' appeals, holding that it could not grant equitable tolling. Respondents then filed suit in district court. The district court dismissed the suit on the ground that the statute did not allow equitable tolling.

The D.C. Circuit reversed. It held that the 180-day period for requesting a hearing is subject to equitable tolling and remanded for further factual development to determine whether equitable tolling was appropriate in this case. The court reasoned that there is a presumption in favor of equitable tolling, and that nothing in the statute suggested that there should not be equitable tolling. The court concluded that the "good cause" exception was immaterial to the equitable tolling inquiry because it was contained in regulations, not the statute.

The government contends that the 180-day statutory time limit for filing a PRRB appeal is not subject to equitable tolling. The government argues that the presumption in favor of equitable tolling does not apply to the adjudication of claims before an administrative review. In that context, the government argues, the agency has authority to determine what exceptions, if any, there will be to the statutory review period. The government also argues that a presumption in favor of equitable tolling is inapplicable because administrative review of reimbursement claims is not analogous to any action against a private party, there is no tradition of equitable tolling for such claims, and the statute was drafted before the Court announced a presumption in favor of equitable tolling. Finally, the government argues that any presumption in favor of equitable tolling is rebutted, because allowing equitable tolling would impose a substantial and unpredictable administrative and financial burden on the Medicare program.

Decision Below:

642 F.3d 1145 (D.C. Cir. 2011)

Petitioner's Counsel of Record:

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Respondent's Counsel of Record:

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Court-Appointed Amicus Curiae:

John F. Manning, Harvard Law School

Maritime Law

Lozman v. City of Riviera Beach, Florida (11-626)

Question Presented:

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.

Summary:

Maritime jurisdiction extends to any "vessel," and 1 U.S.C. § 3 defines a "vessel" to include "every description of watercraft or other artificial contrivance used as a means of transportation in water." In *Stewart v. Dutra Construction Company*, the Supreme Court held that a "vessel" under 1 U.S.C. § 3 encompasses any watercraft practically capable of maritime transportation, regardless of its primary purpose. The question in this case is whether an indefinitely moored floating residence is a vessel under section 3.

Petitioner Lozman purchased a floating structure that has no motor power or steering of its own for use as his home. Lozman had the structure towed to a marina in the City of Riviera Beach, Florida, where it was moored to a dock by cables and received power from land. After Lozman failed to comply with the City's new docking rules, the City brought an *in rem* action in federal district court, seeking to enforce a maritime lien. The City also sought damages for trespass. Both forms of relief are available only if petitioner's floating structure is a vessel for purposes of maritime jurisdiction. The district court held that the structure was a vessel for purposes of maritime jurisdiction and entered judgment for the City.

The Eleventh Circuit affirmed, holding that if a structure is capable of being transported under tow, it is a vessel for the purposes of maritime jurisdiction. Because petitioner's floating residence was towed several times over long distances, the court concluded that it was a maritime vessel. Relying on *Stewart*, the court concluded that petitioner's intent to use the structure as a home and not for maritime purposes did not alter its status as a vessel.

Petitioner contends that a structure is a vessel for purposes of maritime jurisdiction only if it is intended to be used for maritime transportation or commerce. Because floating homes that are indefinitely moored are not intended to be used for maritime purposes, petitioner argues, they are not maritime vessels. Petitioner argues that *Stewart* supports that conclusion, because it made clear that structures moored to the shore indefinitely are not maritime vessels.

Decision Below:

649 F.3d 1259 (11th Cir. 2011)

Petitioner's Counsel of Record:

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